

**RESPOND**

## **Working Papers**

### **Global Migration: Consequences and Responses**

Paper 2018/13, June 2018

## **Migration Governance**

### **Legal & Policy Framework**

### **Collection of Country Reports**

University of Florence

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Horizon 2020  
RESPOND: Multilevel Governance  
of Mass Migration in Europe and  
Beyond (770564)



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Each report underwent a double review process: the review by a national expert appointed by national teams, and the review by the WP leader. We are grateful to all national experts that collaborated enhancing the quality of RESPOND research. Finally, we are indebted to Dr Silvia D'Amato, Dr Paola Pannia and Dr Andrea Terlizzi, post-doc fellows at the University of Florence. Without their learned support the overall task of preparing this delivery would have been much heavier.



## About the project

RESPOND: Multilevel Governance of Mass Migration in Europe and Beyond is a comprehensive study of responses to the 2015 Refugee Crisis. One of the most visible impacts of the refugee crisis is the polarization of politics in EU Member States and intra-Member State policy incoherence in responding to the crisis. Incoherence stems from diverse constitutional structures, legal provisions, economic conditions, public policies and cultural norms, and more research is needed to determine how to mitigate conflicting needs and objectives. With the goal of enhancing the governance capacity and policy coherence of the European Union (EU), its Member States and neighbours, RESPOND brings together fourteen partners from eleven countries and several different disciplines. In particular, the project aims to:

- provide an in-depth understanding of the governance of recent mass migration at macro, meso and micro levels through cross-country comparative research;
- critically analyse governance practices with the aim of enhancing the migration governance capacity and policy coherence of the EU, its member states and third countries.

The countries selected for the study are Austria, Germany, Greece, Hungary, Iraq, Italy, Lebanon, Poland, Sweden, Turkey and the United Kingdom. By focusing on these countries, RESPOND studies migration governance along five thematic fields: (1) Border management and security, (2) Refugee protection regimes, (3) Reception policies, (4) Integration policies, and (5) Conflicting Europeanization. These fields literally represent refugees' journeys across borders, from their confrontations with protection policies, to their travels through reception centers, and in some cases, ending with their integration into new societies.

To explore all of these dimensions, RESPOND employs a truly interdisciplinary approach, using legal and political analysis, comparative historical analysis, political claims analysis, socio-economic and cultural analysis, longitudinal survey analysis, interview based analysis, and photo voice techniques (some of these methods are implemented later in the project). The research is innovatively designed as multi-level research on migration governance now operates beyond macro level actors, such as states or the EU. Migration management engages meso and micro level actors as well. Local governments, NGOs, associations and refugees are not merely the passive recipients of policies, but are shaping policies from the ground-up.

The project also focuses on learning from refugees. RESPOND defines a new subject position for refugees, as people who have been forced to find creative solutions to life threatening situations and as people who can generate new forms of knowledge and information as a result.

## Introduction

Work package 1 “Legal and policy framework: sustainability and interaction” aims at gathering background information about the socio-economic, political, legal and institutional context of migration governance in Austria, Germany, Greece, Hungary, Iraq, Italy, Lebanon, Poland, Sweden, Turkey and the UK and at the level of the European Union. WP1 main objectives, are structured in three principal streams: (1) gathering and critically analysing information on the political, legal and institutional context of migration governance, and illustrating national cases through country reports; (2) comparing the national case-studies and discussing the outcome in a comparative report; and (3) retrieving and systematizing a number of indicators available in the most relevant databases in order to create an ad hoc dataset on socio-economic, cultural, political and legal indicators on migration governance covering all RESPOND countries.

Deliverable D1.2 is the product of the first stream of activities. In compliance with the Grant Agreement, the University of Florence team (UNIFI) drafted the WP1 report guidelines, which were discussed in the kick-off meeting in Uppsala (1-3 December 2017), then reviewed by UNIFI and circulated among all partners involved in WP1, and finally submitted to the European Commission as Deliverable D1.1. Once national chapter drafted, they underwent a double peer review process, in line with RESPOND Quality Assurance Plan (D11.1): first by a national expert selected by national teams, and second by UNIFI.

In order to offer a comprehensive understanding of the legal and policy framework of migration governance in different countries, all country reports presented in this volume follow the same structure: (1) an overview and discussion of national (and European) data and statistics on migration (the research project covers the period 2011-2017); (2) the discussion of the national socio-economic, political and cultural hosting societies, with special attention devoted to the migration history of the country; (3) the analysis of the constitutional organization of the state (in particular of the federal/regional/decentralised structure of the system of government that defines the tier of government responsible for the different dimensions of migration governance, and of the role of the judiciary, that may be relevant for the effective definition and entrenchment of fundamental rights) and of the eventual principles on immigration and asylum (with special attention to landmark constitutional case-law in the field of asylum); (4) the analysis of the legislative and institutional framework in the fields of immigration and asylum; (5) the critical discussion of foreigners’ legal status, with a focus on the acquisition of the status and of the connected rights and duties; (6) the illustration of eventual refugee crisis driven legislation and measures, and, finally, (7) a critical assessment of the compliance with the standards developed and crystallized at the supranational level.

Data for this research was collected through a combination of desk research of various sources (e.g. policy and legal documents, national and EU case law, research reports and scientific literature), information requests to relevant institutions, and semi-structured interviews with legal and policy experts and academics held during January and March 2018. The multidisciplinary approach of WP1 emerges from the structure, the content and the findings presented in the national reports: building on the analysis of the constitutional and legal framework, the research has enlarged the spectrum of the analysis and integrated the social sciences perspective with the discussion of data, societies’ cultural and social traits, and with the scrutiny of public policies and institutions. The findings of the present collection of national reports will be used in the development of a comparative report on the same topic and will contribute to unveiling the legal, political and socio-economic context of migration governance under Work package 1.

Each involved national team was responsible for its own domestic case, except the University of Florence, that covered also the European Union report, and Glasgow Caledonian University team that worked on the case of Hungary given the team's expertise on the country. GCU was able to funnel external resources (in addition to the resources allocation established in the Grant Agreement) to work on this report.

# **RESPOND**

## **European Union**

### **Legal & Policy Framework of Migration Governance**

**D1.2 Report – May 2018**

**Chiara Favilli – University of Florence**

Horizon 2020  
RESPOND: Multilevel Governance  
of Mass Migration in Europe and  
Beyond (770564)



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## 1. Statistics and data overview

On 1 January 2017, the estimated total population in the European Union (EU) amounted to approximately 512 million people. As Table 1 shows, between 2011 and 2017 the EU population increased by almost 9 million people (+1.70%).

**Table 1. Population change in the EU, 2011-2017 (million persons)**

	Population
2011	502,964,837
2012	504,047,964
2013	505,163,008
2014	507,011,330
2015	508,540,103
2016	510,277,177
2017	511,522,671
<b>Change (2011-2017)</b>	<b>8,557,834</b>

Source: Eurostat

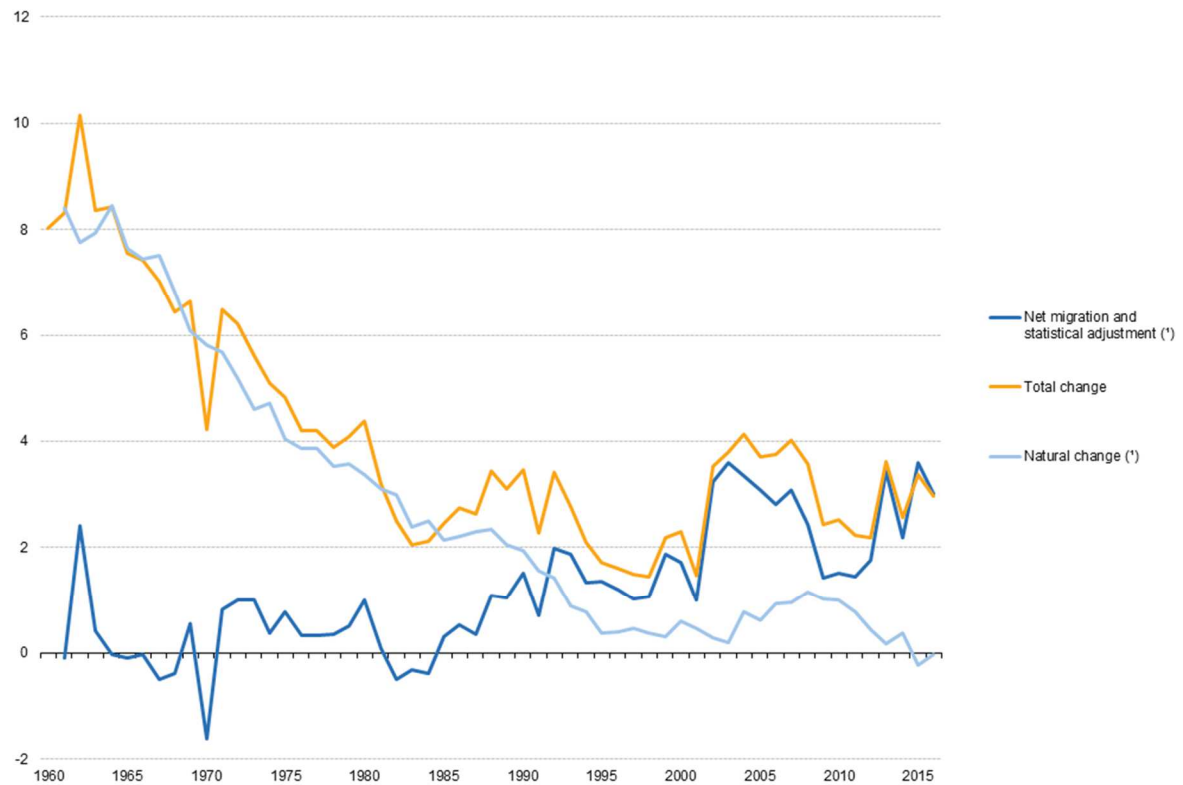
The two components that determine population change are the natural population change – namely the difference between the number of live births and deaths during a given year – and the net migration – namely the difference between the number of immigrants and the number of emigrants. As shown by Table 2, in 2015 there has been a natural decrease – namely deaths have outnumbered live births. This means that the positive population change that occurred between 2015 and 2016 (+1,737,074) (see Table 1) can be attributed to net migration (plus statistical adjustment). Migration is thus a fundamental factor affecting population change in the EU. In particular, as reported by Figure 1, since the mid-1980s net migration has increased and from the beginning of the 1990s onwards the value of net migration and statistical adjustment has always been higher than that of natural change. Therefore, during the past three decades net migration has constituted the main driver of population growth. This trend is likely to persist in the future. Indeed, since the baby-boom generation continues to age, the number of deaths is expected to increase. Thus, it is likely that population change will increasingly be affected by net migration (Eurostat 2015).



**Table 2. Population change in the EU, 2011-2016 (natural population change and net migration plus statistical adjustment)**

	Natural population change	Net migration plus statistical adjustment
2011	395,113	713,631
2012	220,255	894,789
2013	87,468	1,760,854
2014	195,700	1,101,159
2015	-117,371	1,854,445
2016	19,626	1,222,979

Source: Eurostat

**Figure 1. Population change by component (annual crude rates) in the EU, 1960-2016 (per 1000 persons)**

Note: Excluding French overseas departments up to and including 1997. Breaks in series: 1991, 2000-01, 2008, 2010-12 and 2014-16.  
 (\*) 1960: not available.  
 Source: Eurostat (online data code: demo\_gind)

Source: Eurostat

If immigration flows both from outside the EU and between EU countries are considered, in 2016 a total of around 4.3 million people immigrated to one of the EU Member States, with Germany reporting the largest amount (1,029,852), followed by the United Kingdom (588,993), Spain (414,746), France (378,115), Italy (300,823) and Poland (208,302) (Table 3).

**Table 3. Total number of immigrants in the EU, 2011-2016 (thousands)**

	2011	2012	2013	2014	2015	2016
Belgium	147,377	129,477	120,078	123,158	146,626	123,702
Bulgaria	.	14,103	18,570	26,615	25,223	21,241
Czech Republic	27,114	34,337	30,124	29,897	29,602	64,083
Denmark	52,833	54,409	60,312	68,388	78,492	74,383
Germany	489,422	592,175	692,713	884,893	1,543,848	1,029,852
Estonia	3,709	2,639	4,109	3,904	15,413	14,822
Ireland	57,292	61,324	65,539	73,519	80,792	85,185
Greece	60,089	58,200	57,946	59,013	64,446	116,867
Spain	371,331	304,053	280,772	305,454	342,114	414,746
France	319,816	327,431	338,752	340,383	364,221	378,115
Croatia	8,534	8,959	10,378	10,638	11,706	13,985
Italy	385,793	350,772	307,454	277,631	280,078	300,823
Cyprus	23,037	17,476	13,149	9,212	15,183	17,391
Latvia	10,234	13,303	8,299	10,365	9,479	8,345
Lithuania	15,685	19,843	22,011	24,294	22,130	20,162
Luxembourg	20,268	20,478	21,098	22,332	23,803	22,888
Hungary	28,018	33,702	38,968	54,581	58,344	53,618
Malta	5,465	8,256	10,897	14,454	16,936	17,051
Netherlands	130,118	124,566	129,428	145,323	166,872	189,232
Austria	82,230	91,557	101,866	116,262	166,323	129,509
Poland	157,059	217,546	220,311	222,275	218,147	208,302
Portugal	19,667	14,606	17,554	19,516	29,896	29,925
Romania	147,685	167,266	153,646	136,035	132,795	137,455
Slovenia	14,083	15,022	13,871	13,846	15,420	16,623
Slovakia	4,829	5,419	5,149	5,357	6,997	7,686
Finland	29,481	31,278	31,941	31,507	28,746	34,905
Sweden	96,467	103,059	115,845	126,966	134,240	163,005
United Kingdom	566,044	498,040	526,046	631,991	631,452	588,993
<b>EU</b>	<b>3,273,680</b>	<b>3,319,296</b>	<b>3,416,826</b>	<b>3,787,809</b>	<b>4,659,324</b>	<b>4,282,894</b>

Source: Eurostat

As for emigration, a total of almost 3 million people have left an EU country in 2016. As with immigration flows, these data include emigration flows both from the EU and between EU countries. Germany reported the highest number of emigrants (533,762), followed by the United Kingdom (340,440), Spain (327,325), France (309,805), Poland (236,441) and Romania (207,578) (Table 4).

**Table 4. Total number of emigrants in the EU, 2011-2016 (thousands)**

	2011	2012	2013	2014	2015	2016
Belgium	84,148	93,600	102,657	94,573	89,794	92,471
Bulgaria	.	16,615	19,678	28,727	29,470	30,570
Czech Republic	55,910	46,106	25,894	28,468	25,684	38,864
Denmark	41,593	43,663	43,310	44,426	44,625	52,654
Germany	249,045	240,001	259,328	324,221	347,162	533,762
Estonia	6,214	6,321	6,740	4,637	13,003	13,792
Ireland	83,049	81,797	76,560	71,107	67,160	62,056
Greece	92,404	124,694	117,094	106,804	109,351	106,535
Spain	409,034	446,606	532,303	400,430	343,875	327,325
France	291,594	255,922	239,813	308,775	295,911	309,805
Croatia	12,699	12,877	15,262	20,858	29,651	36,436
Italy	82,461	106,216	125,735	136,328	146,955	157,065
Cyprus	4,895	18,105	25,227	24,038	17,183	14,892
Latvia	30,311	25,163	22,561	19,017	20,119	20,574
Lithuania	53,863	41,100	38,818	36,621	44,533	50,333
Luxembourg	9,264	10,442	10,750	11,283	12,644	13,442
Hungary	15,100	22,880	34,691	42,213	43,225	39,889
Malta	3,806	4,005	4,778	5,108	7,095	8,303
Netherlands	104,201	110,431	112,625	112,900	112,330	111,477
Austria	51,197	51,812	54,071	53,491	56,689	64,428
Poland	265,798	275,603	276,446	268,299	258,837	236,441
Portugal	43,998	51,958	53,786	49,572	40,377	38,273
Romania	195,551	170,186	161,755	172,871	194,718	207,578
Slovenia	12,024	14,378	13,384	14,336	14,913	15,572
Slovakia	1,863	2,003	2,770	3,644	3,870	3,801
Finland	12,660	13,845	13,893	15,486	16,305	18,082
Sweden	51,179	51,747	50,715	51,237	55,830	45,878
United Kingdom	350,703	321,217	316,934	319,086	299,183	340,440
<b>EU</b>	<b>2,614,564</b>	<b>2,659,293</b>	<b>2,757,578</b>	<b>2,768,556</b>	<b>2,740,492</b>	<b>2,990,738</b>

Source: Eurostat

Among the 4.3 million immigrants in the EU, in 2016 almost 2 million people (352,597 less than in 2015) were from a non-EU country. Again, Germany reported the largest number of non-EU immigrants (507,034), followed by the United Kingdom (265,390), Spain (235,632) and Italy (200,217) (Table 5). Overall, almost 22 million non-EU nationals are currently living in the EU (4.2 % of total EU population), 2 million more than in 2014. The largest share is recorded in Germany (5,223,701), followed by Italy (3,509,089), France (3,050,884), Spain (2,485,761) and the United Kingdom (2,444,555) (Table 6).

**Table 5. Number of non-EU immigrants in the EU, 2013-2016 (thousands)**

	2013	2014	2015	2016
Belgium	41,443	41,626	65,808	46,502
Bulgaria	11,984	15,268	12,850	10,610
Czech Republic	10,780	9,386	10,619	29,902
Denmark	19,624	24,482	32,256	28,559
Germany	252,122	372,408	967,539	507,034
Estonia	1,490	1,155	3,656	4,182
Ireland	18,344	20,263	22,524	27,161
Greece	16,313	13,539	17,492	69,497
Spain	157,823	164,369	183,675	235,632
France	127,360	130,394	148,686	158,156
Croatia	3,440	3,470	3,024	4,035
Italy	201,536	180,271	186,522	200,217
Cyprus	4,842	4,022	5,922	6,480
Latvia	2,604	3,511	3,795	2,910
Lithuania	2,357	4,086	2,919	5,175
Luxembourg	4,234	4,447	6,132	5,573
Hungary	10,802	15,451	15,221	13,261
Malta	4,957	6,655	7,530	6,700
Netherlands	40,837	47,785	61,369	76,680
Austria	32,241	39,425	86,469	54,472
Poland	59,035	67,005	103,883	80,054
Portugal	3,737	5,914	8,595	7,845
Romania	13,656	10,880	8,994	12,263
Slovenia	8,342	8,046	9,903	10,371
Slovakia	507	444	665	621
Finland	13,183	13,568	13,108	19,638
Sweden	64,186	70,734	78,158	104,384
United Kingdom	248,464	287,136	278,587	265,390
<b>EU</b>	<b>1,376,243</b>	<b>1,565,740</b>	<b>2,345,901</b>	<b>1,993,304</b>

Source: Eurostat

**Table 6. Number of non-EU nationals living in the EU, 2014-2017 (thousands)**

	2014	2015	2016	2017
Belgium	410,127	419,822	450,827	455,108
Bulgaria	40,614	51,246	58,807	64,074
Czech Republic	261,302	272,993	280,907	302,579
Denmark	233,023	244,380	267,192	274,990
Germany	3,826,401	4,055,321	4,840,650	5,223,701
Estonia	187,087	183,276	182,266	179,888
Ireland	121,149	117,015	124,709	138,315
Greece	662,335	623,246	591,693	604,813
Spain	2,685,348	2,505,196	2,482,814	2,485,761
France	2,750,594	2,870,846	2,877,568	3,050,884
Croatia	21,126	24,218	26,678	30,086
Italy	3,479,566	3,521,825	3,508,429	3,509,089
Cyprus	48,465	38,242	30,479	29,738
Latvia	298,616	291,440	282,792	273,333
Lithuania	16,039	16,573	12,311	13,313
Luxembourg	34,482	36,429	39,618	40,795
Hungary	59,335	64,821	71,062	71,414
Malta	13,810	18,894	23,177	24,073
Netherlands	330,382	338,773	367,744	413,401
Austria	539,292	566,370	639,645	673,207
Poland	71,543	76,595	123,926	180,334
Portugal	300,711	294,778	283,500	279,562
Romania	52,529	54,687	58,858	60,600
Slovenia	80,290	84,367	90,169	95,718
Slovakia	12,476	13,064	13,901	14,687
Finland	121,882	127,792	133,136	143,757
Sweden	384,947	416,246	447,664	505,332
United Kingdom	2,425,012	2,434,209	2,436,046	2,444,555
<b>EU-28</b>	<b>19,468,483</b>	<b>19,762,664</b>	<b>20,746,568</b>	<b>21,583,107</b>

Source: Eurostat

As far as data on the acquisition of citizenship are concerned, in 2016 citizenship was granted to 994,800 people, 208,800 more than in 2011 (Table 7). Of these citizenship acquisitions, 863,341 (87% of the total) were granted to non-EU nationals. The highest number of citizenships were granted by Italy (184,626), followed by Spain (147,306), United Kingdom (131,796) and France (108,219) (Table 8).

**Table 7. Number of acquisitions of citizenship in the EU, 2011-2016 (thousand)**

	2011	2012	2013	2014	2015	2016
EU-28	786,000	822,100	981,000	889,100	841,200	994,800

Source: Eurostat

**Table 8. Number of acquisitions of citizenship in the EU granted to non-EU nationals, 2013-2016 (thousand)**

	2013	2014	2015	2016
Belgium	26,310	13,118	19,842	23,057
Bulgaria	756	888	1,261	1,585
Czech Republic	1,820	4,033	2,216	3,559
Denmark	1,466	4,347	10,505	13,419
Germany	86,499	82,408	81,463	79,621
Estonia	1,328	1,610	897	1,769
Ireland	22,494	18,162	10,418	6,711
Greece	28,462	20,248	13,315	32,329
Spain	222,312	201,798	111,857	147,306
France	85,607	94,819	102,650	108,219
Croatia	866	622	1,072	3,703
Italy	93,538	120,455	158,885	184,626
Cyprus	877	1,526	2,697	3,399
Latvia	3,041	2,076	1,838	1,662
Lithuania	106	125	126	136
Luxembourg	479	579	649	653
Hungary	1,845	2,035	1,122	1,044
Malta	227	146	522	1,239
Netherlands	22,891	28,808	25,978	25,807
Austria	6,258	6,335	7,011	7,173
Poland	3,374	3,816	3,697	3,460
Portugal	23,413	20,168	19,647	24,181
Romania	2,768	2,388	2,598	4,514
Slovenia	1,154	1,002	1,185	1,230
Slovakia	151	178	202	278
Finland	7,799	7,143	6,728	7,941
Sweden	37,770	30,528	34,034	42,924
United Kingdom	189,668	115,392	104,792	131,796
<b>EU</b>	<b>873,279</b>	<b>784,753</b>	<b>727,207</b>	<b>863,341</b>

Source: Eurostat

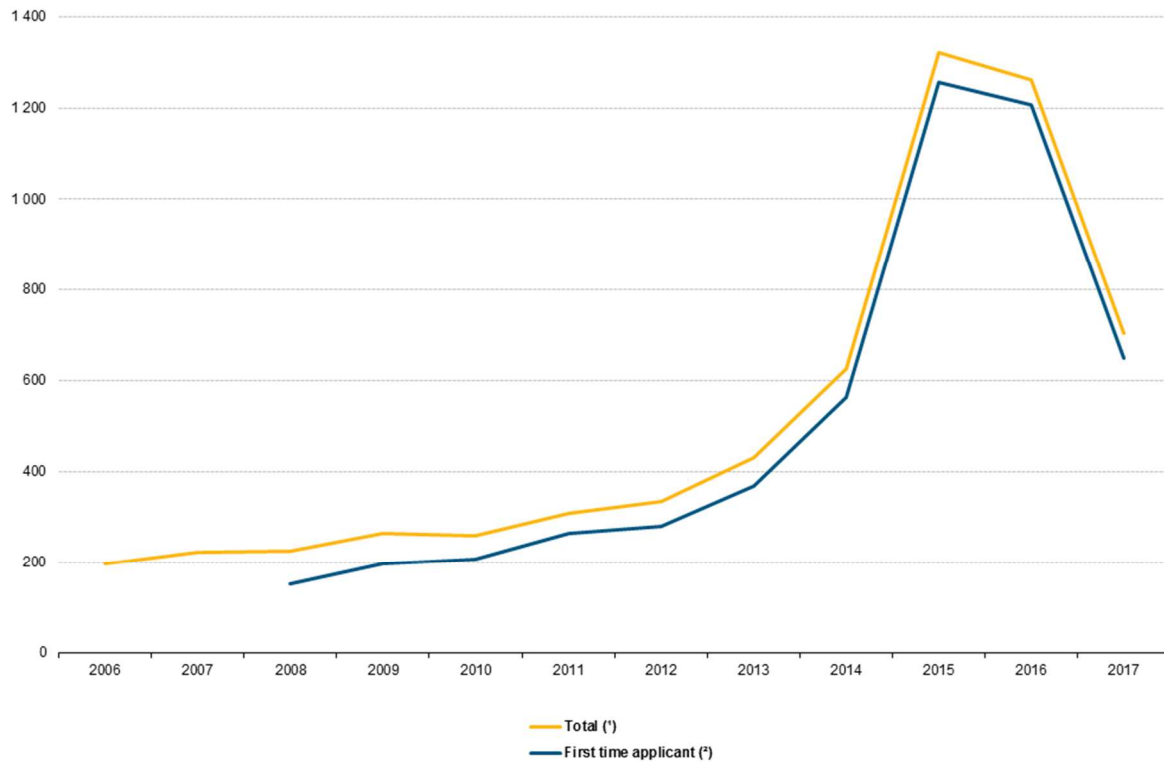
Statistics on asylum and managed migration are also crucial to analyse. In 2017, the total number of asylum applications from non-EU nationals amounted to 705,705, namely to approximately half the number registered in 2015 and 2016, when applications amounted to 1,322,825 and 1,260,910 respectively (Table 9). Therefore, as also Figure 2 clearly displays, asylum applications reached their peaks in 2015 and 2016, when the EU has witnessed an unprecedented influx of refugees and migrants, most of them fleeing from war Syria.

Numbers are similar if we consider data on first time asylum applicants only (Table 9). Indeed, after having peaked in 2015 and 2016 (approximately 1.2 million applications per year), the number of first time asylum applicants fell to 650 in 2017. Since a first-time applicant is a person who applied for asylum for the first time in a given country, this category excludes those people who have already applied once and therefore more accurately reflects the number of newly arrived asylum seekers.

**Table 9. Number of asylum applicants (non-EU) in the EU, 2011-2017**

	Asylum applicants	First time asylum applicants
2011	309,040	263,160
2012	335,290	278,280
2013	431,090	367,825
2014	626,960	562,680
2015	1,322,825	1,257,030
2016	1,260,910	1,206,120
2017	705,705	650,970

Source: Eurostat

**Figure 2. Asylum applications (non-EU) in the EU, 2006–2017 (thousands)**

(\*) 2006 and 2007: EU-27 and extra-EU-27.

(\*) 2006 and 2007: not available.

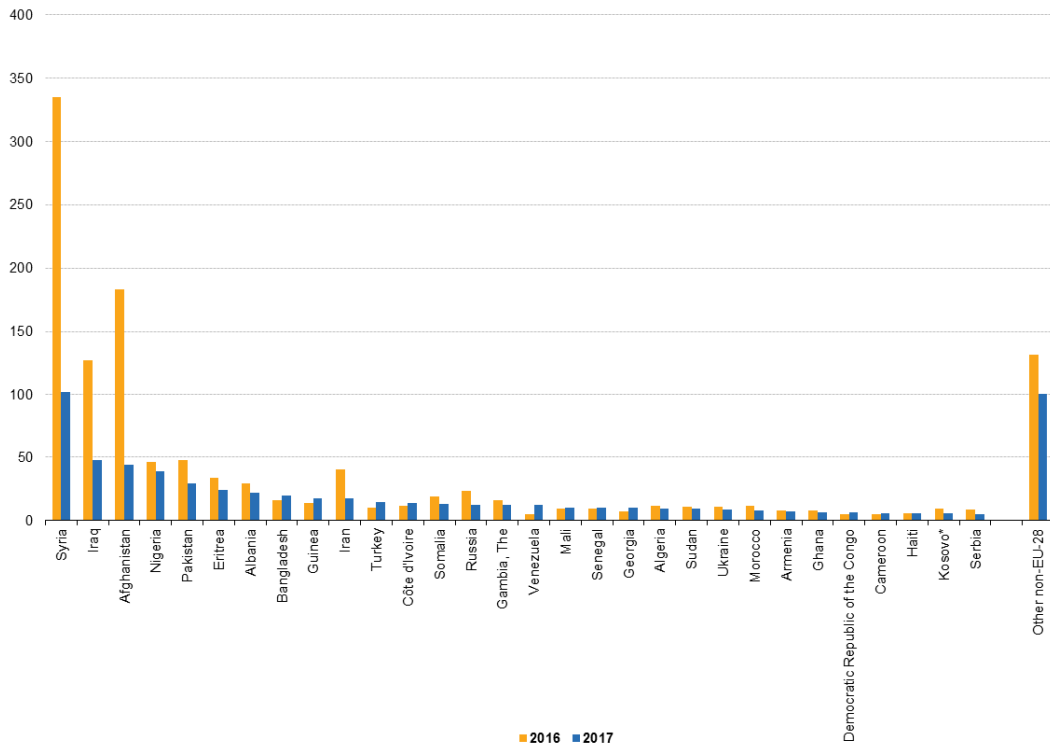
Source: Eurostat (online data codes: migr\_asyctz and migr\_asyappctza)

Source: Eurostat

As for the country of origin of first time asylum seekers, as shown by Figure 3, in 2016 most of them were from Syria, Afghanistan and Iraq. As Table 10 displays, Syria has been the main country of origin of first time asylum seekers in the EU since 2013, though the number of Syrian first-time applicants fell from 362,730 in 2015 to 102,415 in 2017.



**Figure 3. Countries of citizenship of (non-EU) asylum seekers in the EU, 2016 and 2017 (thousands of first time applicants)**



(\*) This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo Declaration of Independence

Source: Eurostat (online data code: migr\_asyappctza)

Source: Eurostat

**Table 10. Number of first time asylum applicants from Afghanistan, Iraq and Syria, 2011-2017 (thousand)**

	Afghanistan	Iraq	Syria
2011	22,270	12,785	6,455
2012	21,080	11,360	20,805
2013	20,715	8,110	45,820
2014	37,855	14,845	119,000
2015	178,305	121,590	362,730
2016	182,970	127,095	334,865
2017	43,760	47,560	102,415

Source: Eurostat

As for the distribution by sex of first time asylum applicants, Table 11 displays that males have always constituted the majority during the time period under consideration. In 2017, the share of males amounted to 434,945, while the female share to 215,770. Moreover, amongst the total number of asylum applications, 31,395 were from unaccompanied minors, namely from persons less than 18 years old who entered the EU territory not accompanied by an adult or left unaccompanied after

having entered the territory. Again, even with unaccompanied minors, applications peaked in 2015 and 2016 (95,205 and 63,245 respectively) (Table 12).

**Table 11. Share of males and females (non-EU) first time asylum applicants, 2011-2017 (thousands)**

	<b>Males</b>	<b>Females</b>
2011	179,115	83,340
2012	180,085	96,125
2013	234,600	119,580
2014	398,350	164,155
2015	911,465	344,315
2016	815,025	389,165
2017	434,945	215,770

Source: Eurostat

**Table 12. Asylum applicants considered to be unaccompanied minors, 2011-2017 (thousands)**

	<b>Unaccompanied minors</b>
2011	11,690
2012	12,540
2013	12,725
2014	23,150
2015	95,205
2016	63,245
2017	31,395

Source: Eurostat

Data on first instance decisions on applications show that the highest number of decisions was issued in 2016 (1,106,405) (Table 13). Out of the total number of decisions issued, 672,900 (61%) had a positive outcome. Moreover, 366,485 (54%) positive decisions resulted in grants of refugee status, 48,505 (7%) granted an authorisation to stay for humanitarian reasons, and 257,915 (38%) granted subsidiary protection. It is important to note that, while refugee status and subsidiary protection status are defined by EU law, humanitarian status is specific to national legislations. As for 2017, the total number of first instance decisions dropped to 973,415. Out of these decisions, 442,925 (46%) were positive, of which 222,105 (50%) granted refugee status.

**Table 13. First instance decisions on (non-EU) asylum applications, 2011-2017 (thousands)**

	Refugee status	Humanitarian status	Subsidiary protection status	Total positive	Rejected	Total
2011	29,035	10,525	19,975	59,535	177,860	237,390
2012	37,985	21,630	31,395	91,010	197,495	288,505
2013	49,670	12,505	45,435	107,610	206,625	314,235
2014	95,380	15,710	56,295	167,385	199,470	366,850
2015	229,460	22,225	55,890	307,575	289,005	596,580
2016	366,485	48,505	257,915	672,900	433,505	1,106,405
2017	222,105	62,950	157,870	442,925	530,490	973,415

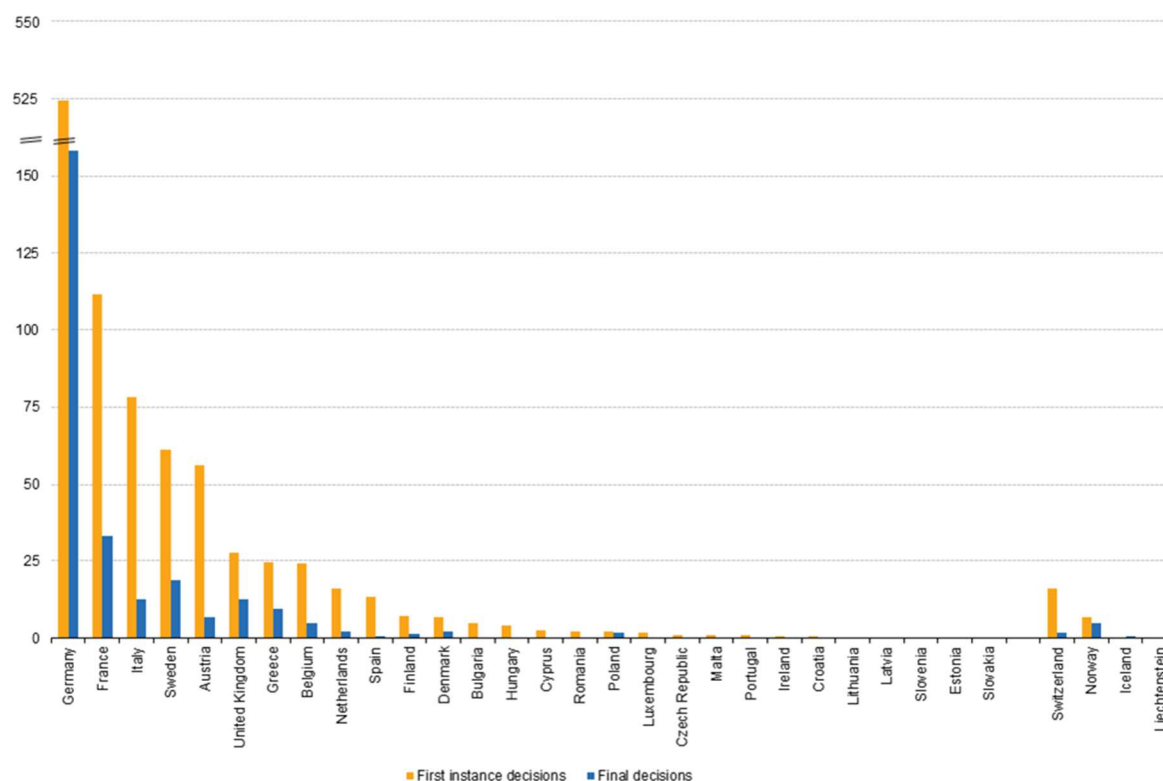
Source: Eurostat

If only final decisions – namely those decisions taken by administrative or judicial bodies in appeal or in review and which are no longer subject to remedy – are considered, in 2017 267,040 decisions were issued, of which 95,310 (36%) were positive (Table 14). In particular, 49,590 (52%) granted refugee status, 14,580 (15%) granted humanitarian status, and 31,140 (33%) resulted in grants of subsidiary protection. As displayed by Figure 4, the largest amount of both first instance and final decisions was issued by Germany.

**Table 14. Final decisions on (non-EU) asylum applications, 2011-2017 (thousands)**

	Refugee status	Humanitarian status	Subsidiary protection status	Total positive	Rejected	Total
2011	13,790	5,870	5,035	24,690	103,850	128,540
2012	13,510	6,255	5,455	25,220	106,885	132,105
2013	14,845	4,480	5,350	24,675	109,965	134,640
2014	15,990	4,795	5,415	26,195	109,835	136,030
2015	18,110	3,650	4,640	26,400	152,900	179,300
2016	23,660	10,700	8,275	42,630	188,355	230,985
2017	49,590	14,580	31,140	95,310	171,730	267,040

Source: Eurostat

**Figure 4. Number of first instance and final decisions on (non-EU) asylum applications, 2017 (thousands)**

Source: Eurostat

With regards to resident permits – namely those authorisations issued by a country’s authorities allowing non-EU nationals to legally stay on its territory –, data are available by reason for issuing the permits (Table 15). In 2016, almost 3.4 million permits were released. The majority of them were issued for other reasons (1,031,128; 31%) – that encompass stays without the right to work or international protection –, followed by employment reasons (854,715; 25%), family reasons (780,429; 23%) and education-related reasons (694,287; 21%).

**Table 15. First residence permits issued by reason, 2011-2016 (thousands)**

	Family	Education	Employment	Other	Total
2011	719,365	492,938	523,862	440,679	2,176,844
2012	671,055	454,299	480,958	490,311	2,096,623
2013	671,572	463,943	534,214	686,722	2,356,451
2014	680,388	476,845	573,321	595,423	2,325,977
2015	760,231	525,858	707,632	628,301	2,622,022
2016	780,429	694,287	854,715	1,031,128	3,360,559

Source: Eurostat

Finally, statistics on the enforcement of immigration legislation are also available (Table 16). These data refers to non-EU citizens (or third country nationals) who were refused entry at the EU external borders, third country nationals found to be illegally present on the territory of an EU country,

third country nationals who were ordered to leave the territory of an EU country, and third country nationals who were returned to their country of origin outside the EU. The highest number of non-EU citizens found to be illegally present on the territory of an EU country was recorded in 2015 (2,154,675). The number of non-EU citizens who were refused entry into the EU reached its peak in 2017 (439,505). As for those non-EU nationals who were ordered to leave the territory of one of the EU Member States, the highest number was registered in 2015 (533,395). In the same year, 196,190 third country nationals were returned to their country of origin outside the EU. In 2016, this number increased and 228,625 non-EU citizens were returned to their country.

**Table 16. Non-EU citizens subject to the enforcement of immigration legislation, 2011-2017 (thousands)**

	Refused entry	Illegally present	Ordered to leave	Returned to a non-EU country
2011	344,440	474,690	491,310	167,150
2012	317,170	439,420	483,650	178,500
2013	326,320	452,270	430,450	184,765
2014	286,805	672,215	470,080	170,415
2015	297,860	2,154,675	533,395	196,190
2016	388,280	983,860	493,785	228,625
2017	439,505	618,780	516,115	188,905

Source: Eurostat

## 2. The socio-economic, political and cultural context

Up until the end of the Sixties migration policy was very liberal, with incentives to attract migrant workers and tolerance towards irregular entries. The flows came mainly from North Africa and Turkey. In Germany, the model of so-called “guest workers” prevailed, although over time it became evident that migrants tended not to return to their own country but to settle in the host state. In the Seventies, the free movement of workers from EU member States steadily increased, while migration of non-EU nationals fluctuated depending on the upturn or downturn in national economies. It is since the Eighties, and particularly the Nineties, that increased flows from non-EU countries have become an established trend, alongside a rise in the number of asylum seekers. These years saw the beginnings of cooperation between member States (MS) on migration, prior to the actual conferral of competence to the then European Community which happened 'only' in 1999 when the Treaty of Amsterdam came into force. It is worth mentioning that from 1991, with the outbreak of the conflict in the Balkans, EU countries became a refuge for over a million people who were displaced or fleeing persecution. In the first ten years of the new millennium the EU saw an expansion to the East with the inclusion, between 2004 and 2007, of twelve new MS and Croatia in 2013. At the same time, the EU began to frame its policy on migration and asylum, first with the incorporation into EU law of the international conventions of Schengen and Dublin, and then with the adoption of secondary acts, especially directives.

The rise of geopolitical instability across the world and the progressive reduction of regular entry channels into the EU resulted in an increase in irregular migration, both from Eastern Europe and Asia, and from Africa, largely via central and eastern Mediterranean routes.

### 3. The EU Competence on Migration and Asylum

Since 1 December 2009, the competence on migration is provided for in the Treaty on the Functioning of the European Union, and in particular in Title V, named “Area of Freedom, Security and Justice” (articles 67 to 89 of the TFEU), Chapter 2 of which covers “Policies on border checks, asylum and migration”.<sup>1</sup> This concluded the process of transfer of competence that began with the so-called third pillar of the European Union in 1992, then followed by the transitional period lasting five years after the entry into force of the Amsterdam Treaty and which in part has shaped and conditioned the development of this policy.

The EU competence is very broad, encompassing measures ensuring the free movement of people, primarily the crossing of internal borders, measures on the crossing of external borders, on the conditions of migration, stay and removal, and on the granting of refugee *status*.

On the basis of article 67(2) TFEU, the EU developed a common policy on borders, visas, migration and asylum. The status of “common policy” allows the EU to adopt legislative acts, including harmonization, in accordance with the principles of proportionality and subsidiarity, since it is of shared competence. Nevertheless, article 70 of the TFEU expressly states that the provisions of Title V of the TFEU shall not preclude exercising the responsibilities incumbent upon MS for the maintenance of public order and the safeguarding of internal security. This could allow the States to adopt acts even where there are EU regulations. The latter could, therefore, be derogated by the States, notwithstanding the fact that the notions of public order and internal security must be understood as notions of European Union law and, therefore, interpreted according to what the Court has stated on limits to the movement of people and goods where there are analogous limits to the application of the freedoms enshrined in the Treaty.

Article 67(2) TFEU also describes the policy as being based on solidarity among MS and as fair towards third-country nationals. Solidarity means at least that all MS are required to share the costs of managing the common policies in this sector which, as is known, risk overburdening the states at the southern and eastern external border.

At the procedural level ordinary legislative procedure applies, which was extended after the entry into force of the Lisbon Treaty to all matters of the area of freedom, security and justice and characterized by the intervention of the European Parliament as co-decision maker together with the Council and the adoption of resolutions by the latter with a qualified majority (articles 289 and 294 of the TFEU).

There is no limitation to the jurisdiction of the Court of Justice which will allow the Court to fully play the role of guarantor of the uniform interpretation and application of EU law. The only exception was for acts already adopted on the basis of the third pillar which, until 30 November 2014, retained the characteristics in force at the time of their adoption, including the limited role of the Court of Justice.

Article 68 of the TFEU expressly provides that the European Council defines the general strategic guidelines for legislative and operational planning within the area of freedom, security and justice. The law specifies the general competence of the Council to define general policy guidelines

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<sup>1</sup> L. Azoulai, K. de Vries (eds.), *EU Migration Law, Legal Complexities and Political Rationales*, Collected Courses of the Academy of European Law, Oxford University Press, Oxford, 2014; S. Peers, *EU Justice and Home Affairs Law*, Oxford, 2013; Millet-Devalle (ed.), *L'Union européenne et la protection des migrants et des réfugiés*, Pédone Paris, 2010.

in this sector and to establish the subsequent regulatory developments on the basis of a five-year schedule.

There remains a comprehensive flexibility in the subjective application of the rules: the United Kingdom, Ireland and Denmark qualify for different treatment in accordance with special protocols annexed to the treaties. Protocol no. 21 on the position of the United Kingdom and Ireland with respect to the area of freedom, security and justice excludes them from the application of all the provisions of Title V of the TFEU. Therefore, they are not bound in any way unless they decide to opt in to a single measure adopted, by giving notice within three months from the time the proposal is submitted or at any time after the adoption of the act. Both States decide independently and without mutual constraints notwithstanding the indirect constraints deriving from the existence of the area of free movement between their territories.

Slightly different is the discipline contained in Protocol no. 22 on the position of Denmark, which is entirely excluded from participating in the measures adopted within the area of freedom, security and justice, with the exception of the determination of those states whose nationals must possess visas when crossing external borders and of measures constituting a development of the Schengen acquis. In fact, unlike the United Kingdom and Ireland, Denmark is part of the Schengen Agreement on the gradual abolition of internal borders controls and its related Convention, the content of which was incorporated within the Treaty on European Union by the 1997 Treaty of Amsterdam by Protocol no. 19. The coordination between the exclusion from applying the EU's policy on visas, asylum and migration, and adhering to the Schengen Convention is obtained by giving Denmark the right to participate in the measures adopted within the framework of the European Union that constitute a development of the Schengen acquis, stating, nevertheless, that Denmark will be bound under international law. It is a position analogous to that of those states which are not part of the European Union but are part of the Schengen Convention, such as Norway, Iceland, Switzerland and Liechtenstein. However, the same Protocol (part IV) stipulates that at any time Denmark may, in accordance with its constitutional requirements, notify not to make use any longer of its differentiated regime, by surrendering it entirely or opting for a similar regime to that of the United Kingdom and Ireland, namely, the ability to choose whether or not to adhere to an act adopted by the European Union. It is expressly stipulated that, if this were to happen, already existing constraints, as well as by implication any subsequent ones, will be binding upon Denmark insofar as they are EU law.

On the other hand, as regards those states that joined the European Union in 2004 and 2007, no derogations was allowed from free movement or the area of freedom, security and justice, but a gradual application of the rules on the elimination of internal border controls, conditioned by the positive result of the periodic assessments provided for in the Schengen system.



## **4. The relevant legislative and institutional framework in the fields of migration and asylum**

### **4.1 The European policy on migration and asylum**

The essential features of the EU's migration policy have been outlined on the basis of the policy guidelines of the European Council. Ever since the Tampere European Council of 15 and 16 December 1999, the first after the entry into force of the Amsterdam Treaty, heads of state and government have defined the objectives and the supporting elements of this EU policy. In particular, it stated that "This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and migration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organize it and commit related international crimes. These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union. The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union".

In following European Councils, the Tampere Council's emphasis on the values of freedom and respect for human rights and solidarity shifted towards the need for security and control within the European area. The conclusions of the European Council were affected, in fact, both by the political affiliation of the majority of the leaders of the member countries and the unfolding of events. So, after September 11, 2001, and even more so after the Madrid attacks of 11 March 2004, the agenda of work agreed at Tampere has been radically altered, making the fight against terrorism and international crime a priority, and considering all the remaining measures mainly as functional to this. In the Hague programme, as in that of Stockholm, the prominence given to the various dimensions of the area has been re-balanced, without ever returning, however, to that opening of perspectives typical of the early days that earmarked the Tampere European Council.

Since 1999 a number of proposals of legislative acts have been submitted, and documents and studies have been published, designed to offer tools of analysis and to outline the best strategies to pursue. From the various documents presented up to now, it is evident that one of the guiding principles of the EU's migration policy, reiterated many times, is that it is necessary in order to manage a phenomenon that is destined to continue in time, both due to the economic conditions of the countries of origin and the needs of the European Union itself, characterized by a demographic decline that has to be filled to achieve the objectives agreed in the Development Agenda, known as Lisbon 2020. Migration is, therefore, considered to be a constant and ongoing phenomenon that cannot be countered, but that, on the contrary, should be properly regulated.

The European Commission has articulated the EU's migration policy in four areas for which it builds specific development strategies even within a framework of general guidelines. These sectors consist of the policies on legal migration and integration, the policies on borders, visas and cooperation with countries of origin, the combatting of irregular migration.

Under national law, legislation on migration consists of a comprehensive body of law, at times completed by specific provisions or implementation. The institutions of the European Union, on the other hand, have opted for sectoral provisions aimed, then, at regulating individual segments of what is the overall regulation of the legal status of foreign nationals.

Parallel to the adoption of legislative acts, the EU has promoted the so-called administrative cooperation between the competent services of the MS, as provided for by article 74 of the TFEU. In this context, the Council's decision was adopted that introduces a mutual information procedure on the measures of the MS in the areas of asylum and migration. This measure was designed to facilitate the exchange of information between the MS, considering that, in spite of the competence attributed to the EU, they continue to play a strong role by constantly adopting new national measures intended to influence the other MS and the European Union. This must be seen in the wider context of the mechanisms and structures of cooperation and information between the MS and the Commission, which aims to unify and simplify the existing systems, structures and networks at European Union level in order to reduce the administrative burden for the benefit of the MS.

## 5. The legal status of foreigners

### 5.1 Accessing asylum: The Dublin regulation

The need to determine the competent state for examining international protection applications emerged among European Union states already in 1990, even before the attribution to the EU of a competence in relation to migration and asylum. The result was the then 12 MS signing the Dublin Convention, an international treaty having the main objective of reducing the phenomenon of refugees “in orbit”, moving between one state and another, without there being any certainty about who will be the competent state.<sup>2</sup> Subsequently, after the attribution of a broad competence to the European Union in relation to visas, asylum and migration, the Dublin Convention was redrawn in an EU act, which in turn was replaced by regulation 604/2013, known as Dublin Regulation III, that is still in force today.<sup>3</sup> Despite periodic revisions, the main rules of Dublin Regulation III has remained substantially unchanged, although the aim of the regulation is different today: no longer that of ensuring that there is at least one competent State to examine applications for protection, but that there is just one. The main objective has, in fact, become to reduce, if not to clear, the possibility of applicants for international protection choosing the state where the application is to be submitted and, thus, their movement, the so-called secondary movements, within the European Union.

The limitation of secondary movements is precisely the main objective of EU rules on asylum which, even where they redraw existing legal constraints, tend to specify them and to dictate criteria for their application in order to reduce the divergent systems among MS. Operational cooperation between national administrations also helps to achieve this aim and the European Asylum Support Office was established for this purpose.

However, the divergent national asylum systems and the creation of a large area of free movement have instead encouraged secondary movements of asylum seekers who arrived in any EU state and emphasized the phenomenon of the choice of where to seek asylum, so-called asylum shopping, which has resulted in a structural crisis of the Dublin system. This practice has clearly shown that the realization of the area of free movement of persons goes against the rules established by the Dublin Regulation: on the one hand, a genuine area of free movement of persons has been

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<sup>2</sup> Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, 15 June 1990, OJ. 19 August 1997 C 254.

<sup>3</sup> The Dublin Convention is an international treaty that was converted into EU Law by EU regulation no. 343/2003, so said «Dublin Regulation II», OJ 25 February 2003 L 50, p. 1 ff. Another regulation followed, the Regulation no. 604/2013, so said «Dublin III», still in force at the time of writing this paper: *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, OJ 29 June 2013 L 180, p. 31-59. Hailbronner, Kay, Thiery, Claus, *Schengen II and Dublin: Responsibility for Asylum Applications in Europe*, *Common Market Law Review*, 1998, p. 1047 ss; Ippolito, Francesca, Velluti, Samantha, *The Recast Process of the EU Asylum System: A Balancing Act Between Efficiency and Fairness*, *Refugee Survey Quarterly*, 2011, p. 24 ss. Strictly connected is *Regulation no. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice*, OJ 29 June 2013 L 180, p. 1-30.

achieved, but, on the other, some of these people, asylum seekers, refugees, but also the majority of citizens of third countries, are obliged to stay in one MS. In the EU, in fact, asylum seekers do not have the right to choose where they may apply for protection, nor do the beneficiaries of protection have the right to reside in another EU state. The Dublin Regulation, in fact, not only determines the competent member state for examining an application for international protection, but also the state in which the person is meant to stay for a long, and sometimes very long period, even in the case where international protection is recognized; in fact, no right of residence in a state other than the state responsible for the international protection is recognized under European Union law.

The central part of the system, i.e. the criteria for the determination of the competent state, have not changed substantially since 1990. Those criteria are the following: the State where family members of the applicant are already present, the one that issued the visa or residence permit, or the country where the request is submitted in the case of unaccompanied minors, who are considered a vulnerable category. A residual criterion is that of the State of first entry into the EU which is, in practice, the most widely applied. This criterion is severely criticized by external border states, including Italy, because it causes an imbalance in the responsibility of EU MS and overburdens those States that are subjected to the twofold responsibility of controlling borders in the interest of all MS and also receiving asylum seekers. Although data provide a complex picture, with numerous requests for international protection also submitted in EU internal States, the rigidity of the criteria and their practical application have contributed over the years to the creation of strong tensions between MS.

The application of the Dublin Regulation has led to the creation of responsible units in each MS which have to interact with each other to effectively identify the competent state and to proceed subsequently to the return of persons and their related taking in charge or taking back. A complex system that proved very slow and highly inefficient. What cannot be denied is the data on the actual number of returns of asylum-seekers and beneficiaries of international protection across MS, in accordance with the policies and procedures set out therein: only about 8% of accepted transfer requests are actually fulfilled.

Among the various reasons behind the low efficiency of the Dublin system, what stands out is absconding and the difficulties of practical cooperation between the administrations of the various MS. The lack of cooperation between the states not only relates to requests for taking charge coming from other MS, but also involves the identification of asylum seekers, one of the prerequisites for the main application policy, that of the state of first arrival, to actually be applied. Identification is an obligation related to the Dublin Regulation, set out in the Eurodac regulation which allows fingerprints to be compared to check whether the applicant has previously applied for asylum in another EU country, or has transited through that state and, therefore, attributing competence to it with certainty and rapidity. The increase in arrivals into Italy and Greece has irrefutably shown that identification is regularly missed, as was the case at the time of the Arab Spring. Consider that, in Italy in 2014, out of the approximately 160,000 new arrivals only about 90,000 people were identified, with a parallel increase in flows to Northern European countries. To encourage backward referrals or the taking back of applicants for protection for which Italy is competent, the European Commission has developed the so-called hotspot approach, which has been implemented by Italy and Greece. In Italy, since this approach has been adopted, the number of identifications has increased significantly, reaching almost one hundred percent of the people landed.

On the other hand, it is the asylum seekers themselves who tend to avoid the application of the criteria set out in the regulation. Although there is a common European asylum system, the aim of equivalent and homogenous national asylum systems is far from being realized and there is significant divergence in the rates of acceptance of asylum applications as well as in the reception

systems. In addition to the divergent asylum systems, there is divergence in what we can simply call the “country-system”, in relation to social welfare systems, to the prospects of employment and integration in general. It is this divergence, above all, that influences asylum seekers when choosing in which European country to apply for protection.<sup>4</sup>

In addition, the Dublin system crisis was further exacerbated by certain judgments of the European Court of Human Rights (ECtHR) which condemned those MS which, in implementing the Dublin Regulation, proceeded with transfers to Greece and Italy without excluding the risk of a violation of the rights protected in the Convention, especially in article 3. In fact, recital 3 of the Dublin Regulation states that '[...] MS, all respecting the principle of non-refoulement, are considered safe for citizens of third countries.' This is how the so-called presumption of safety of all MS is postulated which is an expression of the principle of mutual trust in national asylum systems, the necessary condition for achieving rapid transfers of people from one state to another, without, in practice, having to verify the risk of the violation of human rights, particularly the Geneva Convention on refugees and the ECHR. The ECtHR has not, however, fully harnessed this presumption of security and has reiterated its constant position on this matter which is based on the principle that transfers from one state to another should not expose people to a real risk of suffering a violation of the rights guaranteed in the Convention, especially the right not to suffer torture or inhuman and degrading punishment and treatment set out in article 3. There is no exception to this principle if the transfer is done to execute an obligation arising from the European Union and in application of the Dublin Regulation, despite the fact that the ECtHR duly takes into consideration the existence of special links between EU MS. In fact, for several years, the European Court has been referred to with claims that the Convention has been violated by MS when applying the Dublin regulation, all of which have been rejected or deemed inadmissible. Only since the *M.S.S.* ruling, condemning Belgium for transfers to Greece, has the European Court reiterated the full responsibility of EU MS with regard to the rights enshrined in the European Convention, even when transfers of third-country nationals are made to another EU member state. This was the first condemn issued by the ECtHR of what became known as “Dublin cases” which was followed by others in which the Court further reiterated that, despite a presumption between EU MS of the security of their asylum systems, the responsibility to protect the rights enshrined in the European Convention cannot be excluded.<sup>5</sup>

In short, to ensure compliance with the Convention, MS should adopt procedures to ensure that, for each person subject to transfer to another state, there is no risk of violating the rights set out in the Convention; MS can assume the presumption of safety of a country that is part of the Dublin

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<sup>4</sup> Brekke, Jean-Paule, Brochmann, Grete, *Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences, and the Dublin Regulation*, *Journal of Refugee Studies*, 2014, pp. 1-18. EASO, *Annual Report on the Situation of Asylum in the European Union 2014*, [www.easo.europa.eu](http://www.easo.europa.eu).

<sup>5</sup> ECtHR, Judgement of 21 January 2011, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09; 21 October 2014, *Sharifi and Others v. Italy and Greece*, Appl. no. 16643/09; 4 November 2014, *Tarakhel v. Switzerland*, Appl. no. 29217/12. See the report: *Doctors for Human Rights, Unsafe Harbour. The Readmission to Greece from Italian Ports and the Violation of the Migrants Basic Human Rights*, Summary, November 2013; Lenart, Joanna, «Fortress Europe»: *Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms*, *Utrecht Journal of Int. and European Law*, 2012, p. 4 ss.; Mallia, Patricia, *Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation*, *Refugee Survey Quarterly*, 2011, p. 107 ff.; GRAGL, *The Shortcomings of Dublin II: Strasbourg's M.S.S. Judgement and its Implications for the European Union's Legal Order*, *European Yearbook of Human Rights*, 2012, p. 123 ff. Saccucci, Andrea, *Diritto di asilo e Convenzione europea dei diritti umani: il ruolo della Corte di Strasburgo nella protezione dello straniero da misure di allontanamento verso Paesi «a rischio»*, in Favilli, Chiara, ed, *Procedure e garanzie del diritto d'asilo*, Padova: Cedam, 2011, p. 145 ff.

system, but will have to be particularly cautious in the case of persons belonging to vulnerable groups and, of course, where there is a risk of a lack of fundamental rights in the destination country. In any event, since the presumption of safety must be understood to be relative and not absolute, each person must be able to dispute the risk of a violation of their rights through an effective means of recourse, as required by article 13 of the Convention.

There is no doubt that the need to fully guarantee respect for fundamental rights can only have a negative impact on the speed and on the certainty of the system, as expressly pointed out by the Court of Justice. It understood, in the narrowest sense, the principle expressed by the ECtHR, with a formula substantially transposed into the current article 2 of the Dublin III Regulation aimed at excluding transfers to the competent member state when there are "systemic weaknesses in the asylum procedure and the reception conditions of applicants in that member state which entail the risk of inhuman or degrading treatment under article 4 of the European Union Charter of Fundamental Rights". On this aspect there is still a divergence between the text of the Dublin Regulation and the approach taken by the Court of Justice, on the one hand, and the approach of the ECtHR on the other. Except that it was echoed also in its opinion on the agreement on EU accession to the ECHR which the Court of Justice deemed not to comply with EU treaties as it was not enough to guarantee the peculiarities of European Union law, which also include those regulatory instruments, such as the Dublin Regulation, that are based on mutual trust between MS and that, in order to work, must involve the existence of absolute presumptions of security of their respective legal systems.

## 5.2 The European Common Asylum System

The EU has developed a common asylum policy based on two phases aimed at the creation of the Common European Asylum System.<sup>6</sup> In particular, the agreed strategy developed across two successive phases characterized by a different level of harmonization of national legislation governing all relevant aspects of the protection system: the reception, procedures, qualifications and decision of the competent state. To facilitate the correct application of the European asylum system at national level, the European Asylum Support Office was also created, which is currently being transformed into the European Asylum Agency.

Central to this is the notion of international protection, on the basis of which an appropriate status is offered to any citizen of a third country, not only to those fleeing from individual persecution, but also

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<sup>6</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 10 July 2001 L 187, p. 45; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 29 June 2013 L 180, p. 60-95; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ 29 June 2013 L 180, pp. 96-116; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 20 December 2011 L 337, p. 9 s. See also *Communication from the Commission to the European Parliament And The Council 5th Annual Report on Immigration and Asylum (2013)*, COM(2014)288 of 22 May 2014. Adinolfi, Adelina, *Riconoscimento dello status di rifugiato e della protezione sussidiaria: verso un sistema comune europeo?*, *Rivista di diritto internazionale*, 2009, p. 669 ff.; Teitgen-Colly, Catherine, *The European Union and Asylum: an Illusion of Protection*, *Common Market Law Review*, 2006, p. 1503 ff.; MORGESE, *La riforma del sistema europeo comune di asilo e i suoi principali riflessi nell'ordinamento italiano*, *Diritto, immigrazione cittadinanza*, 2013, p. 15-35; Zwaan, Karin, *UNHCR and European Asylum Law*, Nijmegen, 2005.



to those who, for whatever reason, cannot be rejected or returned their country of origin and require subsidiary or temporary protection (article 78 TFEU).

### 5.3 Temporary protection

Directive 2001/55/EC on temporary protection in the event of a mass influx of displaced persons was one of the first legal acts adopted by the European Union on asylum. Unlike other acts, the adoption of this directive did not raise any particular difficulties on the part of the MS which already provided legal measures designed to regulate the stay of displaced persons who cannot return to their own country under safe conditions. This legislation applies to mass influxes of people, in the case of both spontaneous arrivals and those due to evacuation plans. The cause triggering the exodus process from one's own land can be of various kinds, although article 2, section 1 c) considers in particular those fleeing areas of armed conflict or endemic violence, or persons who are at grave risk of systematic or generalized human rights violations. Although there is no precise indication in this respect, the notion of displaced persons under article 2 of directive 2001/55/EC would also include those fleeing from their own country because of environmental disasters. These are, in fact, situations in which a large number of people need to be accepted temporarily. However, in more recent situations of reception generated by a natural disaster, the mechanism of temporary protection was not used. The practice is, therefore, homogeneous as it removes the right to international protection from so-called environmentally displaced persons.

Temporary protection measures are justified as it is believed that the right to asylum is not enough to ensure adequate protection precisely because of the high number of people involved which would not allow for a careful individual assessment. The security granted by temporary protection is, therefore, collective in nature and does not require the individual to prove they are in personal danger. This different kind of protection gives rise to another type of individual legal situation: in the case of asylum, this involves a real individual right which arises the moment the person is in the situation governed by article 1 of the Geneva Convention, while in the case of temporary protection, there is an expectation of care that may grant a right only the moment it is attributed with a legal act to a group of people.

Temporary protection is granted with a qualified majority decision of the Council following a proposal by the Commission and has an initial duration of one year. If circumstances so require, it can be extended by six months after six months, and up to a total of three years, but may also be prematurely revoked if the situation in the country of origin improves. The limited duration of protection corresponds to the presumed limited duration of the situation that renders the country of origin insecure, after which the displaced persons must be repatriated. If, at the end of the maximum duration of temporary protection "a safe and stable repatriation" of displaced persons is not yet possible, the MS will have to find other protection solutions through the Council, probably by resorting to subsidiary protection under directive 2011/95/EU.

### 5.4 Refugee status

The hard core of international protection concerns those who have refugee status under the 1951 Geneva Convention, as expressly reiterated in the text of the Treaty on the Functioning of the European Union and defined in a directive as "the cornerstone of the international legal framework on the protection of refugees". Directive 2011/95/EU, in defining the concept of refugee, reformulates article 1 of the Convention according to which a refugee is one who flees from their own country or who does not want to return there for fear of persecution for reasons of race, religion, nationality,

membership of a particular social group or political opinion. Asylum seekers and refugees enjoy a special status as defined by the Convention. Over the years, the UNHCR has contributed decisively to ensuring the application of the Convention in different historical and geographical contexts from those in which it was drafted.

A new aspect is that of agents of persecution. In particular, some MS considered protection against persecution perpetrated by state bodies as admissible, while, according to others, it was enough that the State was unable to ensure protection, regardless of the source, public or private, of the persecution. Article 6 clearly states that the perpetrators of the persecution (or serious harm for the purposes of subsidiary protection) may be, in addition to the State, "political parties or organizations controlling the state or a substantial part of its territory", as well as non-state entities if it can be demonstrated that the state or other entities who control the territory, including international organizations, are unable or unwilling to provide adequate protection.

As for the entities that may offer protection, article 7 includes the State, political parties or international organizations. This list should be seen as exhaustive so that other entities may not be deemed suitable to provide protection. As noted by the Commission in its proposal to amend the qualification directive, some states have interpreted the regulation in its broadest sense to the point of risking to undermine the notion of adequate protection provided by the Geneva Convention. The Commission stipulates, therefore, that the list of entities suitable to provide protection is absolute and that all the conditions laid down therein must be satisfied; not just, therefore, being suitable to provide protection, but also to have the will to do it.

The directive has expressly codified in article 5 the right to so-called *sur place* protection when the need for protection arises outside the country of origin, since the events that cause the need for protection occurred after departure from the country of origin. However, article 5, section 3, grants states the right to refuse refugee status to those at risk of persecution on the basis of the specific circumstances created by the applicant themselves since leaving their country of origin.

One provision that has sparked criticism from the UNHCR is article 8, which provides for the possibility of denying international protection when there are internal areas within the country of origin where the person "does not have a well-founded fear of being persecuted or runs no real risk of suffering serious harm" despite there being technical barriers preventing their return. This provision goes against what the ECtHR stated in the *Salah Sheekh* case when it clearly reiterated that for internal areas to be considered secure they must ensure that the person runs no risk of being subjected to treatment prohibited by article 3 of the ECHR. The proposal to amend the directive radically alters article 8 making it conform to the ECtHR's statement and thereby providing that for the internal area to be safe it must ensure international protection by the entities described in article 7, and excluding the application of the measure when there are technical barriers to return, as well as providing for an obligation that the authorities obtain accurate and up-to-date information on the general situation in the country.

In identifying acts of persecution and reasons for persecution, the directive has substantially reproduced the provisions of the Geneva Convention with some slight variations and "timid" additional provisions. Over the years some states, spurred on by the UNHCR guidelines, have interpreted these provisions in their broadest sense to ensure protection against persecution on the grounds of gender, sexual orientation and age, in particular through the broad interpretation of the concept of "social group". So, article 9 qualifies as persecution "acts specifically directed against one gender or against children". In addition, article 10 expressly provides that "social group" could mean a group founded on the common characteristic of sexual orientation, except when criminally relevant facts come to light inside MS. It also states that gender related aspects might be considered,



"although they do not constitute in themselves a presumption of the applicability of this article". This statement was probably inserted for fear that international protection might be granted to all women in certain countries. This side issue was duly removed from the directive proposal that also made it an obligation to take account of gender considerations when evaluating the existence of a social group, which at the moment is seen as the responsibility of the states.

## 5.5 Subsidiary protection

One of the major innovations of the European asylum system is the codification of the establishment of subsidiary protection by directive 2011/95/EU. This form of protection, which is subsidiary to asylum, identifies those cases where, although not qualifying for refugee status, there is nevertheless a "real risk of suffering serious harm in the country of origin or of habitual residence". The term "serious harm" also includes those situations in which a person has the right to receive protection to prevent the denial of a right recognised in international conventions on refugees other than that of Geneva. Chief among these, as we know, is the European Convention on Human Rights and in particular article 2 on the right to life and article 3 which guarantees the right not to be subjected to torture or inhuman or degrading treatment. Article 3, in particular, has been interpreted by the European Court of Human Rights as a limit on the removal of foreign nationals whenever the return or delivery to the state of origin or to the requesting state exposes them to a serious risk of suffering such treatment or torture. This is, therefore, a different situation from that contemplated by the Geneva Convention, in which it is the existence of persecution of an individual that determines the right to refugee status. In addition, in the ECHR system the right enshrined in article 3 is absolute given that article 15 of the Convention does not allow any derogations, even in a state of war or other danger to the state. The Geneva Convention, on the other hand, provides that the right of asylum is denied in the presence of any of the reasons for exclusion provided by article 1 and expressly restated in the directive.

Article 3 of the ECHR and the interpretive jurisprudence of the European Court were carefully considered when directive 2004/83/EC was adopted. Despite the fact that MS are all bound by both the Geneva Convention and the ECHR, in the absence of procedural and applicative regulations, the way it is implemented is widely diverse. EU directives have, therefore, codified the system of international protection within the MS, systematising the various rights and defining their respective scope of application, as well as their resulting status. It is a well-known fact that, in relation to the rights guaranteed to beneficiaries of international protection, including refugees under the Geneva Convention, there is a huge divergence between MS. Internal legislation tends to differ considerably also with regard to aspects that are sometimes central to the treatment of foreign nationals. This is even more evident in those forms of protection that are based on the protection of the rights enshrined in human rights conventions that impose limits on the removal of a person. The case of article 3 of the ECHR is paradigmatic from this point of view, but we could also include the analogous regulation in article 13 of the Covenant on Civil and Political Rights. These regulations do not provide for a positive obligation to recognise a certain status, but "only" an obligation not to remove persons who are likely to be denied their rights. The directives not only codify the prerequisites for the recognition of protection (i.e. the denial of the rights of the protected person), but also specify its characteristics and the rights associated with it.

Despite being inspired by the ECHR, the codified language in directive 2011/95/EU is entirely original, given that the expression "serious harm" does not appear either in the text of the Convention or in the jurisprudence of the European Court. Article 15 of the directive specifies what is meant by "serious harm", distinguishing three cases: a) the death penalty or execution; b) torture or other

forms of inhuman and degrading treatment; c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. Cases a) and b) are clearly also inspired literally by articles 2 and 3 of the ECHR, as well as articles 2 and 19 of the Charter of Fundamental Rights. What is new is article 15 (c) as is clear from the preparatory works of the directive. Recognising a right to protection in cases of risk arising from situations of indiscriminate violence, the directive greatly expands the possibilities of protection of asylum seekers; one of the most complex points in the examination of asylum applications is that of evaluating the existence of an individual risk in relation to which the applicant must provide as much proof as possible, which could also be presumptive, but nevertheless conclusive. The question is, in fact, crucial in the light of the divergence between the MS who have understood, in a more or less narrow sense, what the ECtHR stated on the matter. The European Court has effectively tended to exclude the application of article 3 of the ECHR in cases where the applicant had not proven individual risk of ill-treatment or torture; even though the Court has taken into consideration the general situation of the country, it has, at least up to 2008, considered the condition of the individual person to be decisive. More recently, the Court has for the first time stated that, even in the absence of evidence of individual risk, the situation of generalised disorder and violence in the destination country, especially when the person belongs to a vulnerable group, may be such as to risk violating article 3 of the ECHR.

The directive codifies and clarifies, therefore, a highly relevant aspect of the protection of people at risk of having their human rights violated in the destination country. The Court of Justice, when called upon to interpret article 15, stated what should be the correct interpretation of the three different cases of serious harm referred to therein. Doubts about interpretation could have arisen due to the apparent contradiction with article 15 (c) of recital no. 26 of the same directive. According to it: "The risks to which the population or a section of the population of a country are generally exposed do not normally constitute an individual threat to be defined as serious harm". The Court expressed its opinion on this point with the *Elgafaji* judgment. This involved an appeal by an Iraqi married couple against the denial of a temporary residence permit by the Netherlands; the permit had been requested due to the risks to which the couple would have been exposed if returned to Iraq. The Dutch authorities had rejected the request, maintaining that the couple had not demonstrated individual risk, in other words, they had not proved they ran an individual risk of death, torture or inhuman and degrading treatment.

The Court set out a number of criteria for interpreting what is meant by individual risk. According to the Court, the key to correctly interpreting article 15 is the identification of a separate and distinct application for each of the three cases provided for therein. So a) and b) correspond to the cases included in articles 2 and 3 of the ECHR, as traditionally interpreted by the ECtHR. In particular, cases (a) and (b) refer to the specific exposure to a risk of a particular type of harm (death, execution, torture, punishment or ill-treatment). Case c), on the other hand, consists in the serious and individual threat to the life or the person of the applicant and, therefore, is concerned with the risk of a more general kind of harm, by reason of a situation of armed conflict and indiscriminate violence. In a situation of this type, the person returned to their country of origin is exposed to a real risk of a serious threat regardless of their specific personal situation. The Court overcomes the apparent contradiction with recital no. 26 by emphasizing the presence in the sentence of the adverb "normally". In the opinion of the Court this means that there may be exceptional situations characterised by "a degree of risk so high that there would be reasonable grounds to believe that the person would be exposed individually to the risk in question". In particular, the more individualisation can be demonstrated, the less a high degree of indiscriminate violence will be required. The Court stated that if there is individual risk, there is no need to have recourse to demonstrating the gravity of the general situation of the country; whereas, if there is no individual

risk or if it is difficult to prove, then proof of indiscriminate violence could be decisive. In addition, according to the Court, account must be taken of the geographical extent of the situation of indiscriminate violence and of certain indications, such as those mentioned in article 4, section 4 of the directive, i.e. the fact that the applicant has already been subject to persecution, serious harm or direct threats. In the drafting of the proposed amendment to the directive in force, the European Commission, having been asked to clarify article 15 (c), stated that "taking into account the interpretive guidance provided by the aforesaid judgment and the fact that the relevant provisions were deemed compatible with the ECHR, it was not considered necessary to amend article 15 (c)".

## 5.6 Regular migrant

Despite the fact that controlling the entry of foreign nationals for economic reasons might be seen as the fulcrum of any migration policy, there is no significant European legislation in this regard. The main reason was the reluctance of the member states to give the EU the role of regulator of this segment, maintaining that it was strictly the domain of the member states.

A concrete attempt was made by the European Commission a few months after the entry into force of the Amsterdam Treaty, with the publication of a communication laying down the general lines of development of future immigration policy and, then, of a proposal on entry for work reasons in 2001. This proposal provides a common procedure for the request of an entry permit and a combined residence and work permit. The proposal also provides for the setting of common prerequisites for the acceptance of immigrants for economic reasons; the availability of rapid action instruments on the part of the states in relation to changes in economic and demographic circumstances. A residence permit for work reasons should be issued for a maximum period of three years and should be renewed for a further maximum of three years.

Left in a dead end, the proposal was finally withdrawn in 2005, in the light of the clear opposition of Governments and the change in priorities seen since the end of 2001. The new course was then marked by the presentation of the Green Paper on immigration for economic reasons, resulting in the adoption of an action plan on legal migration which was substantially confirmed by the Stockholm Programme, approved in December 2009.

A sign of the states' position on immigration for economic reasons is also found in the provisions of the Treaty on the Functioning of the European Union where it is expressly stated that the jurisdiction of the EU shall not affect the right of states to determine the number of entries of citizens from third countries for the purpose of looking for employed or self-employed work (article 79, section 5 of the TFEU). The narrow interpretation of the law, aimed at recognizing the jurisdiction of the state solely with regard to entry to look for employed or self-employed work found no response, either in theory or in practice. Indeed, the European Pact on Immigration and Asylum states that "it is up to each member state to decide the conditions of admission into its territory of legal migrants and, if required, fix the number". According to this document, which was solemnly agreed by EU heads of state and government, it is the competence of the states to also define the prerequisites for entry, an aspect which, however, may be governed by EU regulations if and when a common control might be required.

Having abandoned any prospect of realizing a genuine European policy on immigration for economic reasons, the Commission, following the guidelines of the European Council and the Council, adopted only certain regulations, the only ones on which the governments of the member states were willing to agree common rules.

This led to the approval of directive 2009/50/EC on the conditions of entry and residence of third-country nationals who intend to perform highly skilled jobs, and the establishment of the European Blue Card. The scope of the directive was to increase the EU's capacity to attract third-country nationals who intend to perform highly skilled jobs, by facilitating entry and improving the legal status of those residing in the EU. To be admitted, the directive requires, among other things, that applicants possess a contract of employment or an offer of highly qualified employment lasting at least a year. The directive is without prejudice to national legislation on entry quotas which are decided independently by the individual member states. The authorization for entry and residence is certified by the so-called "Blue Card", which is usually valid from one to four years. After eighteen months of legal residence in a country, the worker gains the right to move to another member state to perform highly qualified work, subject, however, to the limits fixed by the authorities of that state with regard to the number of citizens who can be admitted.

Not only is there no control over the entry and residence of third-country nationals for economic reasons, but there is also no control over the conditions under which legally resident third-country nationals can move to another member state and work there. Indeed, according to the directive on long-term residents, citizens who obtain this status can reside in another member state only if they meet the requirements and conditions established by the member states, that is to say in accordance with the rules on entry and residence of third-country nationals. States may provide for a privileged path of entry for "long-term residents" already residing in a member state, but entirely at their discretion, without any obligation under EU law.

Among the legal acts adopted following complex and long negotiations what stands out in particular is directive 2003/86/EC on the right to family reunification; the original proposal had been submitted for the first time in 1999 and finally approved in 2003, with a text widely different from the original. After four years of negotiations, two amended proposals and numerous modifications to the original text, this act is the paradigmatic example of the effects that the procedure under article 67 of the EC Treaty can produce on the content of a legal act. It belongs to the category of provisions aimed at introducing minimum standards and not harmonization. Once again, however, these rules are so minimal as to introduce restrictions that are too limited for the national legislator. With respect to the Italian legal system, the directive is not strict enough when it comes to the notion of family, the condition of children over 12 years of age and the nature of the residence permit for family reasons, the relative activities required and the dependence on the permit of the family member making the reunification. During the difficult job of composing national interests in the Council, which lasted about four years, the Commission's original proposal was extensively amended, both by transforming into powers many of the obligations originally provided for and by introducing provisions to the main purpose of allowing the maintenance of specific national measures which would otherwise have had to be repealed once the directive was implemented. The latter ends up having mainly the function of identifying the lowest common denominator, making it a cornerstone of community legislation, while refusing, however, to introduce new elements that would force the states to modify or repeal national law, unless on individual aspects of it. The most innovative provisions were formulated as so-called "may provisions", according to which states may regulate aspects of the right to family reunification under the directive; just as in the other cases national provisions, which would otherwise not be compatible with the directive, may still be applied. The final result was, therefore, a directive that was not harmonizing and allowed the states to maintain their national legislation substantially unchanged. However, since in the last twenty years the European states with a high level of immigration have adopted regulations aimed at reducing the possibility of legal entry, including family reunification, the adoption of the directive at least sets a minimum level of protection which cannot be reduced further and is independent of the states. Furthermore, it widens the "scope of European Union law" which defines the area within which states must act in

respect of all community law, including general principles and fundamental rights, as protected by the Court of Justice.

The Court of justice ruled on the legality of the directive after an action for annulment brought by the European Parliament in relation to articles 4, no. 1 and no. 6, and 8. The Parliament argued that the directive's provisions authorizing derogations from the right to family reunification (integration conditions, the minimum number of years before applying for family reunification), went against fundamental rights, in particular, the right to family life and the principle of non-discrimination. The Court, although considering the directive to be legal, stipulated that, in applying the provisions of implementation, the states must always take into account the respect of fundamental rights, including the right to family life, as protected by the European Convention on Human Rights, and the best interests of the child.

According to the article 79, point 4, of the TFEU, the EU can take measures to encourage and support the action of the member states in order to facilitate the integration of third-country nationals legally residing in their territory. Therefore, the adoption of any measure of harmonization of the member states' legislation is excluded, which entirely precludes the formation of a common policy on integration. However, what is not excluded is that the coordination of national policies can lead to significant results, also in terms of the harmonization of national policies, even if only in the medium and long term, and always without any constraint imposed on the states (article 2, section 5 of the TFEU).

The principles of integration have been expressed by the European Commission in its Communication COM(2005)38 of 1 September 2005 on a common agenda for integration, then renewed up to 2017. Supplementary to this is the Handbook on Integration that contains examples of best practices related to the integration of migrants that have been tried in various EU countries.

The binding measures which can be understood as a means to foster integration include regulation no. 859/2003 of 14 May 2003 on the extension of the provisions of regulation no. 1408/71 to third-country nationals who legally reside in the Community to whom these provisions are not already applicable solely on the grounds of nationality, and directive 2003/109/EC on the status of third-country nationals who are long-term residents. The purpose of this latter directive is to align the treatment of European Union citizens and third-country nationals as the key element for the promotion of economic and social cohesion, a fundamental objective of the European Union. The directive provides that, after five years of legal residence in a member state, the foreign national acquires the right to be granted the status of long-term resident. Once acquired, the status is permanent, except in cases of revocation, even though the permit must be renewed after five years. One of the characteristic aspects of this status, in addition to reducing cases of removal and equivalence with European Union citizens with regard to accessing certain services, is the right to move and reside in another member state for a period longer than three months. This right is also functional to the full realization of the free movement of workers governed by the Treaty and recognized up to now only to citizens of member countries. This freedom, however, in respect of third-country nationals does not constitute a fundamental right. One of its most obvious limitations is the fixing of state quotas by the member states for the access of third-country nationals according to the legislation in force, that may also relate to long-term residents from other member states. These may also be refused the preference clause of EU citizens. One should consider, however, that a quota system of a member state, which systematically blocks the access of long-term residents from other member states, is not compatible with the directive.

The European Council also requires the creation of equal opportunities for a better integration and full participation in society. The obstacles to integration must be actively removed; common

fundamental principles underlying a coherent European framework on immigration must not be established. The European Handbook on the Integration of Migrants, published by the Commission on 10 November 2004, and the Conclusions of the Council of 11 November 2004, which identify common principles for the integration policies on immigrants, are texts giving a useful insight into this topic.

## 5.7 Undocumented migrants

The final piece of the EU's migration policy consists of the actions to combat irregular migration, human trafficking and people smuggling. The European institutions have based action in this sector on the assumption that an effective policy to combat irregular migration is an essential condition to ensure the credibility of migration policy, as well as to reduce the exploitation conditions in which irregular migrants find themselves and which, after all, is damaging to the economy of the European Union. The MS were also particularly diligent in adopting the measures proposed by the European Commission or state initiatives.

The same cooperative spirit was shown in the adoption of the measures on the removal of third-country nationals in an irregular situation, aimed at defining a regulatory framework on the removal operations implemented by the national authorities of the individual MS.

More complex, however, was the adoption of directive 2008/115/EC on the repatriation of third-country nationals in an irregular situation following a proposal of the European Commission. The approval of the directive was accompanied by harsh criticism on the part of many non-governmental organizations at European level which defined it as the “directive of shame”, especially in view of the long detention times while awaiting expulsion, which, under certain conditions, can be up to eighteen months. In reality, the directive introduced a complex system in which the primary objective of removal is balanced with the respect for human rights and the dignity of the foreign national, stressing the need to respect the proportionality of the measures employed for the purposes pursued.

The directive repealed two articles of the Schengen Convention, contributing to the process of replacing Schengen regulations with EU acts that began with the incorporation of the Convention into the European Union. The return directive does not harmonize and does not diversify the prerequisites for expulsion, but simply removes persons in an irregular position according to common rules and procedures. The first new aspect of EU law is the obligation to remove foreign nationals residing irregularly, with the exception of the humanitarian cases expressly provided for by article 6 of the directive.

The directive requires states to provide a plurality of ways to perform removal that are characterized by a gradual increase in the use of coercive measures, ranging from voluntary departure to compulsory accompaniment, with a preference for voluntary departure whenever there is no reason to believe that this could jeopardize the purpose of the return procedure (recital 10). In particular, states are called upon to assess whether there is a risk of absconding, which, if slight, can determine the safeguards during the period granted for voluntary departure (article 7, section 3); otherwise it may result in the issuance of a removal order, possibly accompanied by coercive measures, in accordance with the principle of proportionality and on the basis of a reasonable use of force (article 8, section 4).

Under article 11 of the directive, every return decision is accompanied by a re-entry ban when the period for voluntary departure has not been granted or, once granted, the foreign national has not complied with the return order; this ban may be applied to other cases. In any case, the duration is a maximum of five years, which can only be increased if there is a “danger to public order, public

security or national security". In the system of the directive the re-entry ban is a kind of sanction against the foreign national who has not complied with the repatriation order and is intended to be an incentive to adhere to this instrument of removal that does not preclude subsequent re-entries, even after short period of time, if the required conditions are met.

As to detention, while providing a maximum term of 18 months (article 15), it is expressly stated that it should be for as short a period as possible and should last only for the time necessary to carry out the repatriation. To this end, there is a system of periodic control of the conditions surrounding the decision to deprive a person of their personal freedom and it is established that the detention should end when there are no more reasonable grounds for removal, both of a legal or other nature. Furthermore, recital no. 16 specifies the rationale and principles of detention, which "should be limited and subject to the principle of proportionality with regard to the means employed and the objectives pursued" and justified only if other less coercive measures are not sufficient.

Finally, under article 13 of the directive, those being removed have the right to an effective remedy, the concept of which has been developed by the Court of Justice and the European Court of Human Rights. The right to an effective remedy is also established by article 47 of the Charter of Fundamental Rights of the European Union, which is, in turn, based on article 13 of the European Convention. The European Court of Human Rights has developed an interesting jurisprudence on the right to an effective remedy, including in relation to appeals against the expulsion of foreign nationals, especially when they claim article 3 of the European Convention has been violated. In particular, the Court has stated that, for the action to be effective, it must be able to suspend the execution of the expulsion. Because the rights enshrined in the Charter that correspond to the rights recognized in the European Convention must have the same meaning and the same scope as those conferred by the Convention, the Court of Justice could decide to strengthen the protection of the fundamental rights of foreign nationals, helping to ensure the effective application of the rights enshrined in the European Convention.

If the general system of the directive is clear (administrative sanctions, the preference for voluntary repatriation, proportionality and reasonableness of the measures used), each provision has clauses that give the states a degree of flexibility, making the directive's harmonizing effect extremely tenuous. Article 7, which provides for voluntary departure, allows states to establish that this period be granted upon request of the foreign nationals concerned; furthermore, the directive does not codify the notion of "risk of absconding", the declination of which is left to the discretion of the states and the judgement of the administrative and judicial authorities. Since this concept is crucial, as it is the basis on which the form of executing the expulsion is decided (voluntary departure or immediate execution with possible detention), its non-codification greatly undermines the uniform application of the directive, at least until an official interpretation by the Court of Justice. Lastly, the directive fails entirely to regulate the status of third-country nationals who have not been removed despite still being irregular. The directive contains only a vague reference in recital no. 12 on the basis of which MS should define the basic conditions for the existence of such persons, but does not contain any regulatory provision in this regard. The only certain fact is that these people cannot be detained beyond the eighteen months deemed to be the maximum period of detention for the execution of the expulsion.

Among the more recent legal acts adopted within the framework of combatting irregular migration is directive 2009/52/EC, which introduced minimum standards on sanctions and measures against employers who employ third-country nationals residing irregularly. This is a measure that has a significant impact also in the area of employment. In fact the directive tends to impact one of the many factors that feed the irregular flows of entry and residence of third-country nationals. As we know, the chances of finding a job in the informal market, with wages still higher than those in

the country of origin, is one of the reasons that encourage emigration, even if irregular. The thorny issue of the informal economy is addressed by the EU in the context of competency on employment, the exercise of which has furnished a number of studies and has started a process of coordination and comparison of the policies of the states on the matter.

The directive prohibits the employment of third-country nationals residing irregularly and establishes common minimum standards on sanctions and measures applicable in MS against employers who violate this prohibition. It applies to third-country nationals residing irregularly in an EU member state, whether they have entered regularly and overstayed or have entered irregularly. However, it does not consider the employment of those who, although legally residing, have no right to work or have a limited right to work. In fact, in the Treaty these situations have a different legal basis and, therefore, these guidelines could not be regulated here.

This, and all the acts adopted up to this point, were now beginning to be implemented and/or applied by the MS who are ultimately responsible for ensuring the effectiveness of the EU's measures, on the basis of the principles of loyal cooperation and uniform interpretation. The difficulties seen in this phase that is so crucial to the effectiveness of EU law and to the achievement of the objectives pursued by the adoption of the acts, are an indication of a certain reluctance that still characterizes many of the MS who are unwilling to afford the European Union the role of legislator in this matter.



## 6. Refugee crisis driven reforms

The crisis of migrants and asylum-seekers, which has become a crisis of the European area of free movement, has revived the never-dormant debate on the effective application of the principle of solidarity among MS enshrined in article 80 of the TFEU. Institutions and governments have understood this principle only in terms of technical and financial assistance to the countries most involved in the reception of asylum seekers.<sup>7</sup>

There has been no room for the application of the provisions of the directive on temporary protection which was approved in 2001 when the memory of the crisis caused by the migration of more than a million people fleeing from the conflict in the former Yugoslavia was still fresh. Temporary protection, in fact, provides for the distribution of people into a member country when a massive influx of migrants could affect the functioning of the asylum system. Although the instrument is already in force and fully suitable to be applied in the present case, its application has never been adequately proposed, so much so that the European Commission has even thought of repealing it.

Also excluded is the promotion of mutual recognition and a flexible management of the transfer of beneficiaries of international protection, although present in numerous Commission documents and proposed by the Italian Presidency of the Council in the second half of 2014.

Instead, the choice was issuing a new instrument, relocation, “fixing” the Dublin regulation and investing considerable resources in cooperating with third countries to stem the flow towards the European Union.

During weeks of heated debate, with repeated summits of the Heads of State and Government now directly involved in examining the detail of the solutions to be adopted, two decisions were approved on the temporary relocation of people in obvious need of international protection who had arrived in Italy and Greece up to September 2018. Based on article 78, section 3 of the TFEU, these decisions provided for a temporary mechanism to transfer a total of 160,000 people, out of which 54,000 Syrian citizens to be admitted into EU countries was then subtracted following the agreement with Turkey which will be discussed shortly.<sup>8</sup>

The most innovative aspect of the decisions was the setting of mandatory quotas on the basis of which to distribute international protection applicants between MS, with the exception of the United Kingdom, Ireland and Denmark. For the first time objective criteria were established to identify the number of people that each member state can potentially accept, depending on the country's population, the number of applicants already present, the gross domestic product and the unemployment rate. The setting of mandatory quotas according to objective parameters was the most innovative aspect of these decisions and was the most difficult one to be accepted by the MS, with some strongly opposed to it, to the point that the second decision, that of 22 September, was adopted with a qualified majority, with Romania, the Czech Republic, Slovakia and Hungary voting against it. The latter two states have also raised an action for annulment before the Court of Justice,

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<sup>7</sup> European parliament, *The Implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States in the field of border checks, asylum and immigration* (edited by Vanheule, van Selm, Boswell); German Bar Association, AWO Workers' Welfare Association, Diakonia Germany, Pro Asyl, National Working Group for Refugees, The Paritätische Welfare Association, Neue Richtervereinigung, Jesuit Refugee Service, *Memorandum, Allocation of refugees in the European Union: for an equitable, solidarity-based system of sharing responsibility*, March 2013; ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, March 2008.

<sup>8</sup> Council decision 2015/1523 of 14 September 2015 *establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, OJ L 239, p. 146; decision 2015/1601 of 22 September 2015 *establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, in OJ L 248, p. 80.

based largely on procedural grounds, but also on the violation of the principle of proportionality and article 78, section 3 of the TFEU, as a legal basis suitable for adopting an act of this kind. The Court, with a comprehensive and robust judgment, dismissed all the grounds of appeal raised and also reiterated the centrality of the principle of solidarity referred to in article 80 of the TFEU, from which a rule of burden-sharing between the MS derives in principle, according to the discretionary choices made by the EU institutions.<sup>9</sup>

However, conceiving relocation as an expression of the principle of European solidarity raises several concerns. First of all, its practical application proved to be largely unsatisfactory. If it is true, as pointed out by the President of the European Council, that 93% of people who were in need of international protection have been relocated, it is equally true that the absolute figure is around 30,000 as opposed to the 120,000 envisaged by the decisions. The reason is that the decisions identified as eligible subjects only people belonging to those nationalities who obtain a status in at least 75% of cases based on data provided by the MS and processed by the EASO (such as Syrians, Afghans or Eritreans). For Italy, it was evident that the decisions could not have led to an effective lightening of the burden, since these nationalities make up a small minority of the total number of applicants for international protection.

Moreover, along with redistribution, the decisions provided for a strengthening of the existing identification obligation under the Eurodac regulation, with operational support measures for Italy and Greece aimed at improving identification procedures and the start of procedures for granting international protection with the dispatch of experts coordinated by the EASO and other relevant agencies where appropriate. At the same time, the European Commission agreed with Italy and Greece a roadmap for the creation of reception and first care facilities managed according to the hotspots approach, in other words closed centres to ensure the effective implementation of identification, registration and fingerprinting procedures. For Italy this meant a dramatic increase in identifications and, therefore, of the people for whom it was responsible in terms of the protection application under the Dublin regulation, in the face of a redistribution of barely 10,000 people. Other governments and institutions have basically achieved compliance with the obligations which Italy breached for years, by stemming the relocation facilitated by the lack of identifications in exchange for an “official” relocation of a tiny minority of the people that arrive in Italy.

It is not surprising, therefore, that after the expiry of the term of their application, given the divisions between the states and the limited success in terms of their intended purpose, the Commission has abandoned this tool and has withdrawn a proposed amendment to the Dublin Regulation which would have introduced some kind of permanent relocation system. Instead, a proposal to amend the Dublin regulation was presented following the publication on 6 April 2016 of a communication in which two reform options were envisaged: one of minimum reform and one that was rather more robust and based on the distribution of all applicants for international protection between MS through a procedure managed directly by the new European Asylum Agency. Needless to say, the proposal presented was based on the first option, a sort of Dublin plus that left the current system unchanged, particularly with respect to the policy of the state of first arrival. Except for some extension to the application of the criterion of the presence of family members in other MS (not just spouses and minor children, but also brothers and sisters, and the express consideration of family ties that arose after leaving the country of origin), the proposal was presented as a general tightening of the criteria and rules already laid down, particularly in order to prevent secondary movement; in

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<sup>9</sup> Court of Justice, 6 September 2017, C-643/15, *Slovak Republic and Hungary v Council of the European Union*.

fact, it clearly set out the obligations of applicants for international protection and the consequent penalties for non-compliance, including possible exclusion from the reception system.

A new aspect was the introduction of the corrective mechanism of distribution of asylum seekers when a member state has a disproportionate influx of applicants for international protection and resettled people, namely greater than 150% of the national quota defined for each state through a reference key based on two criteria: the number of inhabitants and the gross domestic product. States are allowed not to participate in the redistribution mechanism by declaring their opposition and paying the sum of € 250,000 for each person not accepted. As we know, on 16 November 2017 the European Parliament in its first reading examination adopted by a large majority several amendments on the basis of which the criterion of the country of first arrival was exceeded with the introduction of an automatic transfer system using a method of fixed distribution, not conditional on exceeding 150% of the quota considered sustainable for each state. In addition, the choice of the country of transfer should be based on the exploitation of existing social ties between applicants and the destination country: family ties (extended to dependent adult children, brothers and sisters), having taken a course of study in the country or even just having lived there should be taken into consideration when choosing the country where to transfer the applicant for international protection.

Transfers of people, even in the case of extradition or expulsion, tend to always be very difficult to achieve, even more so when they cover tens of thousands of people. For this reason, the voluntary participation of applicants for international protection is essential, and the Parliament's proposal to introduce additional criteria enhancing the links with the competent state is going in the right direction, the only viable one remaining within the logic of the Dublin system.

Agreement between the Parliament and the Council imposed by ordinary legislative procedure seems impossible to reach given the stellar distance between the positions of the two institutions, to which also that of the Commission can be added. The Council, which represents EU governments, locked in a traditional approach aimed at tightening and eliminating all the derogations in the Regulation to ensure that the criteria are finally applied in a rigorous way, threatens severe sanctions for applicants for international protection. The Parliament, on the other hand, which represents the people of the EU, proposes to abandon the traditional system and, while still within the framework of the system of Dublin, innovates it profoundly.

## **6.1 Cooperation with third countries: stemming of flows of migrants and asylum seekers**

While waiting for the second reform of the European asylum system to be approved, cooperation on stemming the flows of migrants and asylum seekers with third countries of origin and transit is constantly advancing. This has strengthened the external dimension of asylum and migration policies, which has been increasingly present since the Seville European Council held in June 2003. At the time, the governments asked the European Commission to introduce into its external relations with third countries systematic mechanisms of control of the activities to combat irregular migration. During the same summit, the UK government drew up a proposal for the construction of reception centres for asylum seekers in third countries, so as to admit only those whose application was deemed admissible. A proposal that was initially rejected, it has at times re-emerged in the agendas of the institutions or in informal meetings between ministers. For several years it has been defined in its mildest form of encouraging countries in the areas of origin and transit to make every effort to ensure adequate protection for asylum seekers, first of all by ratifying the Geneva Convention, and then developing protection programs with the regions concerned in cooperation with the United Nations High Commissioner for Refugees (UNHCR).

With the crisis of migrants and asylum seekers, this proposal was reintroduced in the context of the renewed framework of cooperation with third countries which have been given a systematic framework with the communication of 6 June 2016.<sup>10</sup> Thus, a new phase opened aimed at intensifying relations with third countries on the basis of the principle of “more progress and more aid”. The underlying belief is that third countries need to be persuaded to cooperate with the EU to combat the smuggling of migrants, repatriate irregular migrants and receive asylum seekers, with any economic incentive at the disposal of the EU and the states: the more cooperation, the more funding and support from the EU. One of the many reasons which led the EU institutions and governments to opt for this mode of cooperation is represented by the difficulties so far encountered in formal readmission agreements and the lack of effectiveness of those already into force. With the new partnership framework for cooperation with third countries, on the one hand the EU acts in parallel and at the same time as the states, on the other economic incentives are boosted to the maximum through the use of trade, investment and development cooperation to obtain the cooperation of countries of origin and transit.

The “model” of this new strategy was cooperation with Turkey, which has become the key country for stemming the flow of Syrian citizens to the Greek islands. After several preliminary meetings, the “declaration” of 18 March 2016 announced that various interconnected measures had been agreed on. Turkey is committed to guaranteeing reception and protection to approximately three million Syrian citizens in exchange for massive funding from the EU and the MS (a total of six billion euros are estimated) and of the unblocking of negotiations on the agreement for visa liberalisation for Turkish citizens. For the first time the return of asylum seekers was also regulated by declaring Turkey a safe country and a country of first asylum for Syrian citizens.

Even with all of the uncertainty about the maintenance of the agreement in the long term, the significant reduction of arrivals in the Greek islands has made it a model of relations with countries of origin and transit along the central Mediterranean route, in particular with Niger and Libya. Bilateral cooperation is also a feature on this exciting front, which sees Italy involved first and foremost. After the signing of the Memorandum of Understanding with Libya on 2 February 2017, a partnership began that was promoted directly by the Ministry of the Interior with local Libyan municipalities in order to obtain the cooperation of those who actually control parts of the territory at local level. In addition, huge efforts have been made to operationalize the Libyan coast guard, so as to reduce the presence of European ships in the Mediterranean and thus avoid being directly involved in the activities of search and rescue at sea. This obviously allows European ships not to intervene thereby avoiding having to take rescued migrants to a safe port, usually a port in Italy, in compliance with the obligations of international law of the sea and the principle of non-refoulement.

The cooperation to stop arrivals along the central Mediterranean route also extends to the Southern border of Libya and to all of states of origin and transit and involves existing military missions which have been included in the large external dimension of migration and asylum policies. Within the framework of a broader mandate, they also relate to supporting the control and management of migration flows and to combatting human trafficking and people smuggling. Cooperation with Niger is of particular importance, as it is one of the main transit states to Libya and has become the destination country for the few who are taken from Libyan detention centers and returned there, and who should return to their countries of origin in the absence of alternative destinations. The EUCAP Sahel Niger mission has been operational since 2012 and the Italian government has deployed a military mission.

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<sup>10</sup> *Partnership Framework with third countries under the European Agenda on Migration*, COM (2017) 350 final of 13.6.2017.

A cooperation that has rid itself of the traditional form typical of readmission agreements and has developed informally and flexibly. Just as cooperation with Turkey was sealed not with a formal agreement but with a "declaration", this is also true of other ongoing collaborations that can take on different names, such as deals or dialogues, but do not assume the form of a true international agreement.

A similar tendency is also seen in Italy, with the widespread practice not only of agreements in simplified form, but of informal policy agreements or arrangements. Indeed, there are readmission agreements which are signed directly by the heads of administrations, without the intervention of ministers or governments. This obviously allows much faster changes in duties and also less attention to be paid to constitutional constraints or treaties. At procedural level, then, all the steps required for the signing of formal or simplified agreements are removed, always precluding the intervention of parliaments, but also publication in the Official Journal.

Also interesting is the interplay between EU action and that of the states. Cooperation with Turkey was achieved through direct action by Heads of State and Government and financed with resources coming from a mix of national budgets and the EU budget. In this context, controlling the activities performed by national parliaments becomes the only way to avoid circumventing democratic safeguards; avoiding, in other words, that through the EU governments are even freer on the international scene than they would be if they were acting outside the EU. However, such control is very difficult, both due to the mix of EU and national measures and the non-adoption of formal acts, subject to political and/or legal control. The cooperation between the EU and Turkey, for example, lacked any EU agreement, so much so that the European Parliament decided not to contest the violation of its own requirements and did not raise an appeal for annulment before the European Court of justice. But there appears to be not a single agreement of the MS, because if there were, the internal procedures on the competence to be stipulated would have to be followed, something that does not seem to have happened in this case.

Elsewhere it has been shown, however, that the cooperation between the EU and Turkey should have been concluded with an international agreement which, since it would have impacted on EU rules, would have had to have been signed by the European Union. The limits of sovereignty accepted by the states in favour of the EU are justified if EU treaties are respected along with all of the rules related to competencies, procedures and requirements of the institutions.

## 7. Conclusion

The EU, therefore, attributes competence on asylum based on a body of regulations and jurisprudence of various origin, which are not directly binding on the EU but are binding on the MS and, therefore, indirectly also relevant for the European institutions. The obligation to comply with the constraints already arising from international law derives expressly from article 78 of the TFEU, under which the EU must develop a “common European asylum system” in accordance with the Geneva Convention (1951 convention and 1967 protocol), the principle of non-refoulement and other relevant treaties; the first is an international agreement to which all MS are party, but not directly the EU and the second is a rule of general international law.

Despite the fact that the Geneva Convention is a treaty binding all MS, having been broadly interpreted by the UNHCR that for decades has supported the states in the implementation of the convention, the divergences in practice are many. The same can be said of the obligations arising from the European Convention on Human Rights or the conventions against torture, all relevant to the subject of the treatment of foreign nationals, particularly in relation to the limits on removal.

EU law has, therefore, been grafted onto this body of rules, international jurisprudence and practice, becoming a leading player of the right to asylum both on the continent of Europe and the international arena.

The common European asylum system has the merit of having put together the various protections arising from international law on international protection through what we can term as “codification”. At the same time, it also represents a “progressive development”, both for the codification of the interpretations of how the Geneva Convention should evolve and the express inclusion in the European system of those cases other than the right of asylum which have not yet been independently and fully regulated at international level nor, often, at national level. We refer in particular to the limits to removal arising from the European Convention of Human Rights which are now largely “covered” by the notion of subsidiary protection, changing merely negative obligations into actual positive obligations of protection and recognition of a specific status.

If EU law tends to be textually compliant with international law and the ECHR, there is one aspect where there is a discrepancy. This concerns those cases where the causes of the termination or exclusion of protection apply. In these cases, the person will have to be repatriated using the expulsion procedures in force in each individual country. Similarly, this happens when the person is a beneficiary of international protection but the government decides to remove them for reasons of national security or public order. Even the Geneva Convention acknowledges that protection may be rescinded and that the contracting states can expel a refugee residing regularly in their territory. However, in accordance with article 3 of the ECHR, as interpreted by the European Court of Human Rights, the protection offered by it is absolute and not subject to any exclusion, withdrawal or termination unless there is a change in circumstances such as to eliminate the risk of being subjected to a treatment prohibited by the regulation. In other words, having ascertained the existence of the prerequisites provided for by article 3 of the ECHR there can be no limitation of the guaranteed right, even when there may be a risk to public order or the security of the state. It is surprising, then, that in the text of the directive there is no reference to the absolute nature that subsidiary protection can assume, at least in the case in which the right being protected is the same as that deriving from article 3 of the ECHR. It is evident that the states should continue to apply the principles established by the European Court and, therefore, not proceed with the assessment of the exclusion of protection in cases where same legal position that is protected by article 3 of the ECHR exists.

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## ANNEX I: Overview of the legal framework on migration, asylum and reception conditions

Legislation title (original and English) and number	Date	Type of law (i.e. legislative act, regulation, etc...)	Object	Link/PDF
Dublin Convention	Signed on 15/06/1990  Entered into force on 1/09/1997 and 1/10/1997	Treaty	Determining the State responsible for examining applications for asylum lodged in one of the Member States	<a href="https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A41997A0819%2801%29">https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A41997A0819%2801%29</a>
Directive 2001/55/EC	20/07/2001	Council Directive	Minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States	<a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001L0055">https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001L0055</a>
Regulation No 859/2003	14/05/2003	Council Regulation	Extension of the provisions of regulation no. 1408/71 to third- country nationals who legally reside in the Community to whom these provisions are not already applicable solely on the grounds of nationality	<a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003R0859">https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003R0859</a>

Directive 2003/86/EC	22/09/2003	Council Directive	Right to family reunification	<a href="https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32003L0086">https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32003L0086</a>
Directive 2003/109/EC	25/11/2003	Council Directive	Status of third-country nationals who are long-term residents	<a href="https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003L0109">https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003L0109</a>
Directive 2004/83/EC	29/04/2004	Council Directive	Minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection	<a href="https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32004L0083">https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32004L0083</a>
European Pact on Immigration and Asylum	24/09/2008		Legal immigration: control of irregular immigration; border management; asylum	<a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:ji0038">https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:ji0038</a>
Directive 2008/115/EC	16/12/2008	Directive of the European Parliament and of the Council	Common standards and procedures in Member States for returning illegally staying third-country nationals	<a href="https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0115">https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0115</a>
Directive 2009/50/EC	25/05/2009	Council Directive	Conditions of entry and residence of third-country nationals for the purposes of highly qualified employment	<a href="https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0050">https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0050</a>

Directive 2009/52/EC	18/06/2009	Directive of the European Parliament and of the Council	Minimum standards on sanctions and measures against employers of illegally staying third-country nationals	<a href="https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0052">https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0052</a>
Treaty on the Functioning of the European Union (Title V, articles 67 to 89 )	Since 1/12/2009	Treaty	Freedom, security and justice  Border checks, asylum and migration	<a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT">https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT</a>
The Stockholm Programme	12/2009		Framework for EU action on the issues of citizenship, justice, security, asylum, immigration and visa policy for the period 2010–2014.	<a href="https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52010XG0504(01)">https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52010XG0504(01)</a>
Directive 2011/95/EU	13/12/2011	Directive of the European Parliament and of the Council	Standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection	<a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011L0095">https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011L0095</a>
Dublin III Regulation (No 604/2013)	26/06/2013	Regulation of the European Parliament	Determining the Member State responsible for examining an application for	<a href="https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R0604">https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R0604</a>

		and of the Council	international protection lodged in one of the Member States by a third-country national or a stateless person	
Eurodac Regulation (No 603/2013)	26/06/2013	Regulation of the European Parliament and of the Council	Comparison of fingerprints for the effective application of Regulation No 604/2013 (Dublin III Regulation)	<a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0603">https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0603</a>

## ANNEX II: List of authorities involved in the migration governance

Authority (English and original name)	Type of organisation	Area of competence in the fields of migration and asylum	Link
Court of Justice	EU institution	Guarantor of the uniform interpretation and application of EU law	<a href="https://curia.europa.eu/jcms/jcms/Jo2_7024/en/">https://curia.europa.eu/jcms/jcms/Jo2_7024/en/</a>
European Council	EU institution	Defines the general strategic guidelines for legislative and operational planning within the area of freedom, security and justice	<a href="http://www.consilium.europa.eu/en/european-council/">http://www.consilium.europa.eu/en/european-council/</a>
European Asylum Support Office	EU agency	Contributes to the development of the Common European Asylum System by facilitating, coordinating and strengthening practical cooperation among Member States; it helps Member States fulfil their European and international obligations	<a href="https://www.easo.europa.eu/">https://www.easo.europa.eu/</a>

# **RESPOND**

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## **Austria**

### **Country Report**

**D1.2 – April 2018**

**Ivan Josipovic and Ursula Reeger**

**Institute for Urban and Regional Research**

**Austrian Academy of Sciences**

Horizon 2020  
RESPOND: Multilevel Governance  
of Mass Migration in Europe and  
Beyond (770564)



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# 1 Migration to Austria: Statistics and data overview

## 1.1 Migrants in Austria: Short history and current developments<sup>1</sup>

In the past decades, Austria has clearly turned into a country of immigration. Looking back briefly at the migration history after the Second World War, two groups of migrants have been of particular importance until the mid-1990s: 1) refugees from communist countries – until the end of the 1980s – and 2) labour migrants and their families. Due to the country's neutrality during the Cold War period, Austria received three major waves of refugees, namely from Hungary in 1956, from Czechoslovakia in 1968 and from Poland in 1981. However, for many of these refugees Austria was only a transit country on their way to other destinations. At the beginning of the 1960s, Austria saw a growing need for additional labour and actively started to recruit workers in Turkey (1964) and the Socialist Federal Republic of Yugoslavia (1966). Contrary to what had originally been planned (namely the rotation model of 'guest workers'), many of the workers stayed and brought their families to Austria.

Since Austria's EU accession in 1995 and the accessions of mostly Eastern European countries in 2004 and 2007, intra-EU mobility has been gaining importance, most of all from the neighbouring countries of Germany, Slovakia and Hungary but also from Poland, Romania and Bulgaria. 46 per cent of the foreign-born population have immigrated from another EU/EEA<sup>2</sup> member state. Many of them came after the accessions but quite a few arrived

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<sup>1</sup> The general data situation on migration in Austria displays both positive and negative features. Statistics Austria (a federal institution under public law responsible for providing services in the area of federal statistics) collects data on the population via the Population Register, which is based on the obligatory registration of every person changing his/her main residence or entering/leaving Austria with the respective municipality. The data collected at registration include place of birth, sex, age and citizenship. This makes it possible to continuously check the stocks and flow of the population on all spatial levels. The Austrian Population Register follows the UN definitions for short-term and long-term migrants. One problem arises from the fact that migrants are more likely not to deregister when they leave Austria, which leads to the assumption that the statistical migration balance is probably higher than the actual migration balance (compare Reeger 2009: 116). Furthermore, these data do not include any information on the legal status of migrants. Data overviews on the structure of the population are published on the website of Statistics Austria. For an in-depth analysis access to data is fee-based. Statistics specifically on asylum are collected by the Federal Ministry of the Interior (BM.I) and published in monthly and annual reports on the ministry's webpage but only on the national level and not spatially disaggregated. This data collection includes asylum applications by sex and countries of origin as well as information on unaccompanied minors and statistics on negative and positive decisions by type of title. Regarding third country nationals in general, the BM.I also publishes 'Aliens, Settlement and Residence Statistics' on a monthly and yearly basis. These statistics include information on existing valid residence titles and newly granted residence titles by citizenship. All of these data sources are going to be used in the following outline on migrants in Austria, stocks and flows as well as the basic structural features of migration.

<sup>2</sup> Definition and clarification: Persons from the EEA and Switzerland enjoy freedom of movement and do not face barriers when accessing Austria. The EEA consists of all EU member states, Iceland, Liechtenstein and Norway. Persons from any other country are so-called 'third country nationals' and need a residence title if they intend to stay in Austria for more than six months.

already before these points in time. Either way, intra-EU mobility is not the focus of the present report and the numbers are just shown in order to provide an overall picture of immigration to Austria and the current structure of the population (see Table 1).

Zooming in on third country nationals, migrants from former Yugoslavia and from Turkey, who arrived as ‘guest workers’ in the 1960s, and their descendants still form an important and growing foreign-born group in Austria, as the comparison between 2011 and 2017 shows.<sup>3</sup> In total, more than half a million persons (almost one third of the foreign-born population and 58 per cent of those born in third countries) came from Turkey, Bosnia and Herzegovina, Serbia, Kosovo and Macedonia. Furthermore, this migration flow continued when more than 100,000 refugees from these regions fled to Austria during the Balkan War in the 1990s.

**Table 1: Austrian population by country of birth, 2011 and 2017**

	2011 Abs.	2011 In %		2017 Abs.	2017 In %		Change 2011- 2017 in %
<b>Total population</b>	8,375,164	100.0		8,772,865	100.0		4.7
<b>Austria</b>	7,080,458	84.5		7,116,599	81.1		0.5
<b>Abroad</b>	1,294,706	15.5		1,656,266	18.9		27.9
<b>EU and EFTA countries</b>	<b>585,276</b>	<b>7.0</b>		<b>755,824</b>	<b>8.6</b>		<b>29.1</b>
<b>Third countries</b>	<b>709,430</b>	<b>8.5</b>	<b>100.0</b>	<b>900,442</b>	<b>10.3</b>	<b>100.0</b>	<b>26.9</b>
<b>Europe, among these:</b>	<b>528,856</b>	<b>6.3</b>	<b>74.5</b>	<b>577,595</b>	<b>6.6</b>	<b>64.1</b>	<b>9.2</b>
Bosnia and Herzegovina	149,679	1.8	21.1	164,291	1.9	18.2	9.8
Kosovo	27,135	0.3	3.8	31,809	0.4	3.5	17.2
Macedonia	21,134	0.3	3.0	25,117	0.3	2.8	18.8
Russian Federation	26,432	0.3	3.7	33,851	0.4	3.8	28.1
Serbia	130,931	1.6	18.5	139,137	1.6	15.5	6.3
Turkey	158,535	1.9	22.3	160,371	1.8	17.8	1.2
<b>Africa</b>	<b>40,090</b>	<b>0.5</b>	<b>5.7</b>	<b>53,961</b>	<b>0.6</b>	<b>6.0</b>	<b>34.6</b>
<b>Asia, among these:</b>	<b>107,684</b>	<b>1.3</b>	<b>15.2</b>	<b>222,297</b>	<b>2.5</b>	<b>24.7</b>	<b>106.4</b>
Afghanistan	8,428	0.1	1.2	44,684	0.5	5.0	430.2
Iraq	4,870	0.1	0.7	16,197	0.2	1.8	232.6
Syria	3,046	0.0	0.4	41,588	0.5	4.6	1265.3
<b>America</b>	<b>29,783</b>	<b>0.4</b>	<b>4.2</b>	<b>36,233</b>	<b>0.4</b>	<b>4.0</b>	<b>21.7</b>
<b>other, unknown</b>	<b>3,017</b>	<b>0.0</b>	<b>0.4</b>	<b>10,356</b>	<b>0.1</b>	<b>1.2</b>	<b>243.3</b>

Source: Statistics Austria, Population Register; own calculation.

The development between 2011 and 2017 has been positive for all groups under consideration, some only slightly (Austria +0.5%), some more pronounced. In terms of dynamics, the immigration of refugees from Afghanistan, Syria and Iraq is of crucial importance. While only 16,344 persons from these three countries resided in Austria in 2011, their number grew to 102,469 persons at the beginning of 2017.

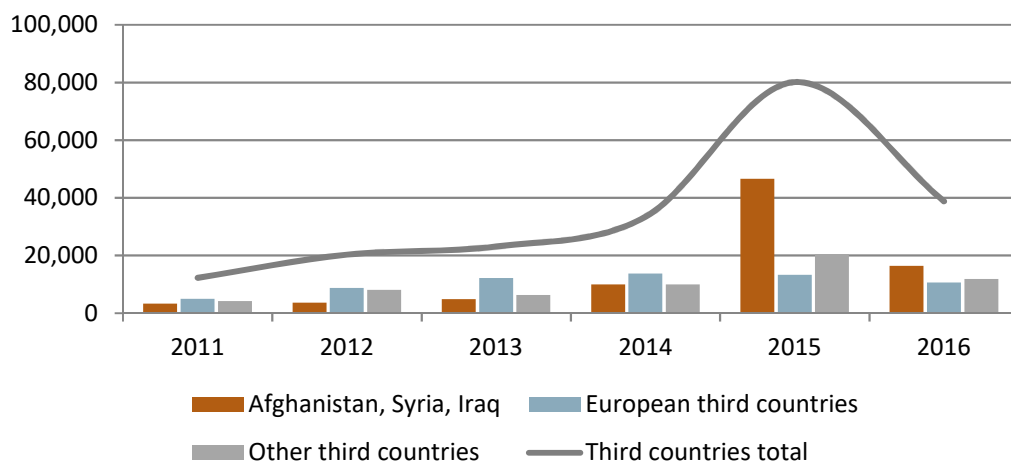
<sup>3</sup> Note: Countries under consideration in this group are the successor states of former Yugoslavia and Turkey. The following have been included: Bosnia and Herzegovina, Kosovo, Macedonia and Serbia. Croatia and Slovenia are now EU member states and are thus not counted in this group.

**Table 2: Current residence titles of third country nationals in Austria, 2016**

	Men	Women	Total	In %	Women in %
Permanent Residence EU	131,303	125,547	256,850	56.5	48.9
Red-White-Red Card Plus	47,434	48,705	96,139	21.1	50.7
Family Members	16,100	22,898	38,998	8.6	58.9
Residence Permit	12,875	14,111	26,986	5.9	52.3
Permanent Residence Family Member	7,957	9,224	17,181	3.8	53.7
Former Settlement Certificate	5,141	4,694	9,835	2.2	47.7
Settlement Permit	2,608	4,226	6,834	1.5	61.8
Red-White-Red Card	1,151	522	1,673	0.4	31.2
EU Blue Card	196	96	292	0.1	32.3
<b>Total</b>	<b>224,765</b>	<b>230,023</b>	<b>454,788</b>	<b>100.0</b>	<b>50.6</b>

Source: Statistics by the BM.I; own calculation.

Basically, third country nationals (in this definition excluding asylum applicants and refugees, mainly those who come for work or education purposes or in order to reunite with their family) need a residence title, if they want to stay in Austria for a longer period of time or permanently. There is an abundance of different titles regarding, i. a., the length and purpose of stay (see Chapter 5.1 for a more detailed description). In 2016, there were almost 450,000 active residence titles. The most important category refers to 'permanent residence EU' (256,850 cases, 57% of all active titles) with an almost equal share of men and women (see Table 2). This title allows for an unlimited stay and access to the labour market and is available after five years of permanent residence in Austria. The Red-White-Red Card and Red-White-Red Card Plus, which were designed and implemented to attract skilled workers, made up 21.5% of the residence titles, and again there is an equal share of men and women in the quantitatively more important Red-White-Red Card Plus scheme. Other residence titles include those for family members and more temporary forms of permits.

**Figure 1: Net migration for selected groups born in third countries, 2011-2016**

Source: Statistics Austria, Population Register; own calculation.

Moving from stocks to flows, Figure 1 shows that the net migration from various regions outside of the EEA has been quite stable and consistently positive from 2011 until 2014, with

European third countries dominating the scene. The year 2015 clearly was an exception, as we already mentioned above. Like other Western European countries, Austria witnessed a substantial inflow of refugees from Afghanistan, Syria and Iraq.

## 1.2 Refugees in Austria

In the next step, we will zoom in on the group of recent refugees. Contrary to the data from the Population Register displayed in Table 1 and Figure 1 that only contain the place of birth but not the legal status of immigrants, Table 3 reflects the developments as of 2011 from the perspective of Asylum Statistics. Again, the dynamics are striking. From 2011 until 2016 (the numbers for 2017 are not available yet), 208,021 persons from 142 countries applied for asylum in Austria. The three most important countries of origin are Afghanistan (around one quarter of all applications), Syria and Iraq. These three countries make up 56 per cent of all asylum applicants in this time period (see Table 3). Like many other EU countries, Austria has witnessed a peak inflow of refugees in 2015 with 88,340 applications compared to 14,416 applications in 2011.

**Table 3: Asylum applications by country of citizenship, 2011-2016**

	2011	2012	2013	2014	2015	2016	<b>Total</b>	In %
Afghanistan	3,609	4,005	2,589	5,076	25,563	11,794	<b>52,636</b>	25.3
Syria	422	915	1,991	7,730	24,547	8,773	<b>44,378</b>	21.3
Iraq	484	491	468	1,105	13,633	2,862	<b>19,043</b>	9.1
Other	9,901	12,002	12,455	14,153	24,597	18,856	<b>91,964</b>	44.2
<b>Total</b>	<b>14,416</b>	<b>17,413</b>	<b>17,503</b>	<b>28,064</b>	<b>88,340</b>	<b>42,285</b>	<b>208,021</b>	<b>100.0</b>

Source: Statistics Austria based on Asylum Statistics by the BM.I.

From a comparative perspective across the EU, Austria ranked second regarding the share of asylum applications in the total population in 2016. Germany ranked first, and Greece and Malta only displayed slightly lower shares than Austria. In absolute numbers, there were 1,259,995 asylum applications in the EU in 2016, a little less than in 2015 (1,322,825). About 3% of those were filed in Austria (source: EUROSTAT database).

In sociodemographic terms, the share of young persons among the refugees is rather high. Among the 208,021 asylum applicants who came between 2011 and 2016, 8.6% (17,847 persons) were unaccompanied minors between the ages of 14 and 18. Around 8% of the unaccompanied minors were younger than 14 (1,442 persons). Regarding gender, there is a clear, albeit slightly vanishing dominance of males. While 26% of the asylum applicants in 2011 were women, this share grew to 33% in 2016. There are many reasons for why these shares are still relatively low. According to the UNHCR, the risks for women who flee is often assessed as being too high in the countries of origin. Married men, therefore, are to some extent the pioneers on the dangerous journey to Europe and try to get their families to join them once they are recognized as refugees. Furthermore, women often lack the financial resources to flee to Europe on their own.

**Table 4: Final decisions on asylum, 2011-2016**

	2011	2012	2013	2014	2015	2016	Total
Positive	3,572	3,680	4,133	8,734	14,413	22,307	<b>56,839</b>
Negative	11,553	10,745	10,379	9,068	13,152	13,124	<b>68,021</b>
Other (1)	2,100	1,878	2,163	1,032	8,009	11,313	<b>26,495</b>
Total	17,225	16,303	16,675	18,834	35,574	46,744	<b>151,355</b>
Positive %	20.7	22.6	24.8	46.4	40.5	47.7	<b>37.6</b>
Positive from:							
Afghanistan	822	969	1,259	2,540	2,083	1,756	<b>9,429</b>
Iraq	202	161	121	211	637	1,328	<b>2,660</b>
Syria	360	542	838	3,604	8,114	15,528	<b>28,986</b>

Note (1): the category 'Other' includes, for example, non-appearance of asylum applicants, return and withdrawal of the application. Source: Statistics Austria based on Asylum Statistics by the BM.I.

Since 2013, the number of final decisions on asylum has been growing according to the number of applications with a peak in 2016 reflecting the logical time lag between the arrival of refugees and the decisions made on their future in Austria. The share of positive decisions (for asylum including subsidiary and humanitarian protection) has also grown significantly from 20.7% in 2011 to 47.7% in 2016. Furthermore, there is a pronounced shift from asylum to the more temporary forms of subsidiary and humanitarian protection. Asylum applicants from Syria have by far the highest chances to be recognized as refugees.

There is also a visible growth trend for the time period under consideration regarding the forced and voluntary return of asylum applicants. According to the BM.I and the Federal Office for Immigration and Asylum (BFA), 10,677 asylum applicants left Austria in the year 2016, 5,797 left voluntarily and 4,880 were forced to leave the country. The number of returns is significantly higher than it was in 2011, when 4,377 persons were forced to leave or did so on a voluntary basis (3,382).

### 1.3 Regional distribution of migrants

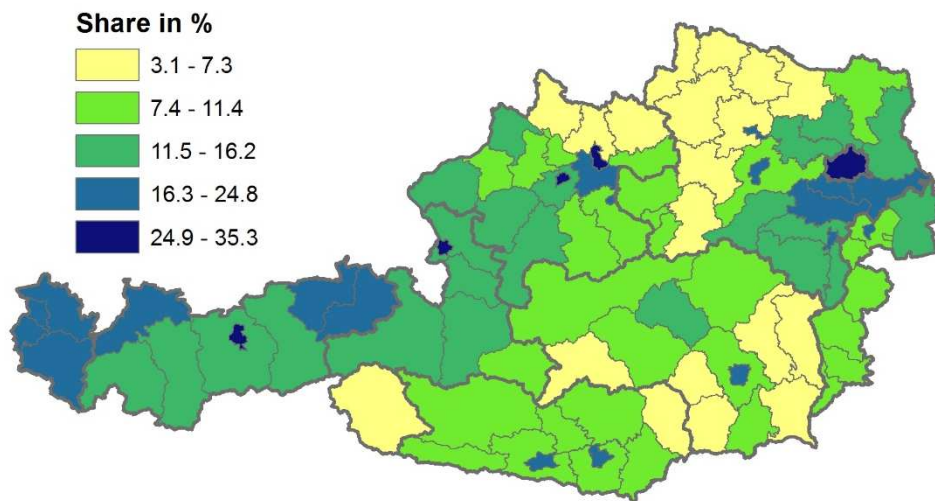
As shown above, almost one fifth of the Austrian population was born abroad. Regarding their spatial distribution, one can clearly argue that migration to Austria is first and foremost an urban (Viennese) phenomenon. Vienna – the only large metropolis in Austria, its capital as well as its economic, cultural and political center – attracts people from other Austrian provinces and from abroad. The city is home to 40 per cent of the foreign-born population in Austria, compared to only 17 per cent of the Austrian-born population. For migrants from Syria and Iraq, the share of those living in Vienna is even higher (see Table 5).

**Table 5: Regional distribution of persons born abroad, 2017**

	Austria	Vienna	Vienna in %
Total population	8,772,865	1,867,582	21.3
Born in Austria	7,116,599	1,207,833	17.0
Foreign-born	1,656,266	659,749	39.8
Born in			
Afghanistan	44,684	15,880	35.5
Syria	41,588	18,597	44.7
Iraq	16,147	6,521	40.4

Source: Statistics Austria, Population Register; own calculation.

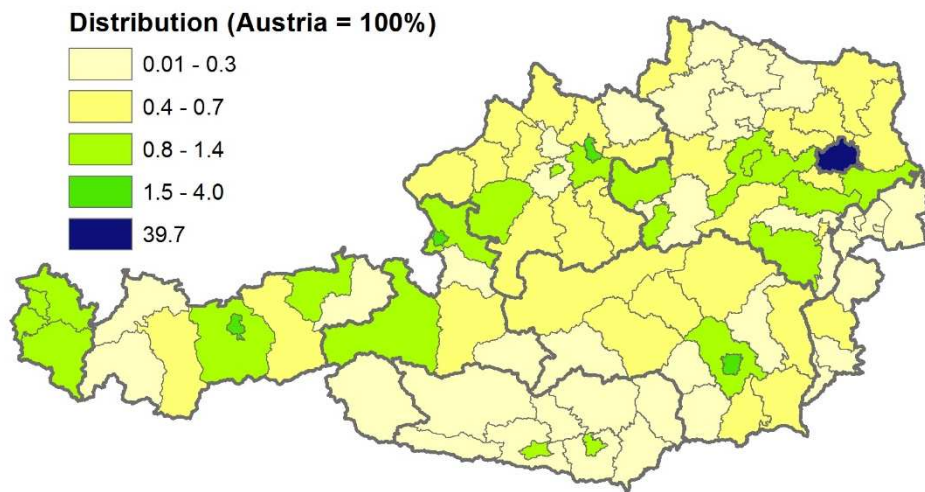
Map 1 shows pronounced regional disparities in the share of migrants in the total population on the level of political districts. While on the national level the share of foreign-born persons is 18.9%, Vienna takes the lead with a share of 35.3%, followed by other – albeit much smaller – cities like Salzburg (30.4%), Wels (29.7%) and Innsbruck (29.6%). On the other end of the scale, we find very low shares in more rural political districts, mostly in the provinces of Lower Austria and Styria, like Zwettl (3.1%) or Waidhofen an der Thaya (4.4%). The reasons for this distribution are obvious and can be briefly explained as follows: Migrants are most of all attracted to job opportunities in urban labour markets or to education opportunities at universities. They also have better chances through migrant networks in urban areas, a factor which perpetuates migration to cities.

**Map 1: Share of foreign-born persons in the total population on the level of political districts, 2017**

Source: Population Register, Statistics Austria; cartography: ArcMap 10.3; own design.



**Map 2: Regional distribution of migrants born in Syria, Afghanistan and Iraq on the level of political districts, 2017**



Source: Population Register, Statistics Austria; cartography: ArcMap 10.3; own design.

At the beginning of 2017, the number of persons born in Syria, Afghanistan and Iraq and residing in Austria was a little more than 100,000 persons, most of whom had arrived around the year 2015 as asylum applicants. Almost 40% of them are currently living in Vienna, while the respective shares in all other political districts never exceed 4% (see Map 2). Once again, capitals of other provinces (like Innsbruck, Salzburg, Linz or Graz) play a certain role but Vienna is still the hotspot for refugees. One has to keep in mind that asylum applicants are only allowed to register for a place of residence within the province that provides them with welfare support. They cannot choose where they want to live, contrary to recognized refugees.

## 2 The socio-economic, political and cultural context

Austria is located in the south-eastern central part of Europe and shares a border with Slovenia and Italy in the South, Switzerland, Liechtenstein and Germany in the west, the Czech Republic in the north and Slovakia and Hungary in the east. During the Cold War period, Austria was located at the periphery of Western Europe with the Iron Curtain forming its eastern border. In the past 30 years, Central and Eastern Europe have undergone enormous political changes that also went hand in hand with a gradual removal of migration-related barriers. Starting with the fall of the Iron Curtain in 1989, the region witnessed Austria's EU accession in 1995 and the accession of ten mostly Eastern European countries in 2004 as well as the accession of Romania and Bulgaria in 2007.

Austria consists of nine federal provinces including Vienna, the capital. Vienna thus holds a double function within the Austrian constitutional and administrative framework as a city with its own statute and as a federal province. Furthermore, Vienna is the only large metropolis in Austria with 1.87 million inhabitants, accounting for more than one fifth of the Austrian population. Ranking second is the capital of the federal province of Styria, Graz, with 284,000 inhabitants, and ranking third is Linz, the capital of Upper Austria, with a little more than 200,000 inhabitants.

In comparison to other European countries, Austria is rather small both in terms of area and population. In demographic terms, Austria currently is home to 8.74 million persons and has been experiencing a population growth since the turn of the millennium (2001: 8.03 million persons, 2011: 8.37 million persons). This growth is entirely caused by immigration. Furthermore, the demographic composition of the population has changed drastically in the past decades. A rise in life expectancy combined with dropping fertility rates have led to the ongoing ageing of the population. In the past 40 years, the average mean age has grown by about 6 years to 42.2 years (source: Statistics Austria database).

Results from the Human Development Report (UNDP, 2017: 2) indicate that Austria displays a 'very high human development category' (with a score of 0.893), ranking it at 24<sup>th</sup> place out of 188 countries. The Austrian HDI (Human Development Index) is above average for all countries in the 'very high development group' and also above the average of OECD countries (ibid.: 4). Made up of basically three dimensions (a long and healthy life, access to knowledge and a decent standard of living), the UNDP report shows that Austria's life expectancy at birth grew by 6.1 years between 1990 and 2015, mean years of schooling increased by 2.7 years and the GNI (Gross National Income) per capita increased by about 40%.

According to Statistics Austria (based on the Labour Force Survey), unemployment rates are currently dropping. In 2017, the workforce consisted of 4.261 million employed persons and 247,900 unemployed persons. This results in an unemployment rate of 5.5% in 2017, compared to 6.0% the previous year. In the same time period, the number of gainfully employed persons grew by 49,700 persons. From the gender perspective, dropping unemployment rates refer to both men and women (-0.6% for both genders in comparison to 2016).

Regarding the structure of the population in terms of religion, the only available official data source is the Census 2001, which contained a question about the individual religious denomination. Back then, 74% of the Austrian population were Roman Catholic, 5%

Protestant, 4% Muslim and 12% of the population stated that they did not belong to any religious denomination. According to a study that took the data of the Census 2001 as a basis for projections (Goujon, Jurasszovich and Potancoková, 2017), this distribution has changed in the past 15 years. The group that has grown the most is the one with no religious denomination from 12% to 17%. The share of Roman Catholics has shrunk from 74% to 64%, while the share of Muslims has doubled from 4% to 8%.

The official language in Austria is German. Nevertheless, there are several languages that are officially recognized as minority languages next to German on the municipal level, namely Hungarian and Burgenland Croatian (in some municipalities in Austria's most eastern federal province Burgenland) and Slovenian (in some municipalities of Carinthia). These regulations are based on the protection of minority rights and go back to the Austrian State Treaty of 1955. Most languages spoken by more recent immigrants and pertinent to much larger groups like Turkish are not subject to the protection of minority rights.

Since 1945, Austria has been a federal, representative democratic republic. Its federal character derives from a division of legislative, executive and judicial powers between the federal level, called *Bund*, and the nine provinces that are called *Länder*. Since Austria's accession to the EU in 1995, certain competences have been delegated to the supranational level. The system of government is characterized by a mix of presidential and parliamentary elements, whereby the former is rather weakly pronounced, which leads to it being classified as semi-presidentialism. The parliament has two chambers, the National Council with 183 seats and the Federal Council that assembles delegates from the provinces. The formation of the federal government has historically been rather atypical for a parliamentary system, as Austria displays a longstanding tradition of grand coalitions between the social democrats (Sozialdemokratische Partei Österreichs – SPÖ) and the conservatives (Österreichische Volkspartei – ÖVP) (Pelinka & Rosenberger, 2007). A reason for this is the political culture characteristic of consociational democracies. In the case of Austria, the broad involvement of (non-winning) political minorities strongly evolved around the conflictual experiences of the First Republic (1918-1934) and the aim of conciliation of the class cleavage between capital and labour. It is also in this context that Austrian Corporatism emerged with a continuously high degree of coordination between business and labour stakeholders as well as institutionalized bargaining practices (Pernicka & Helfer, 2015).

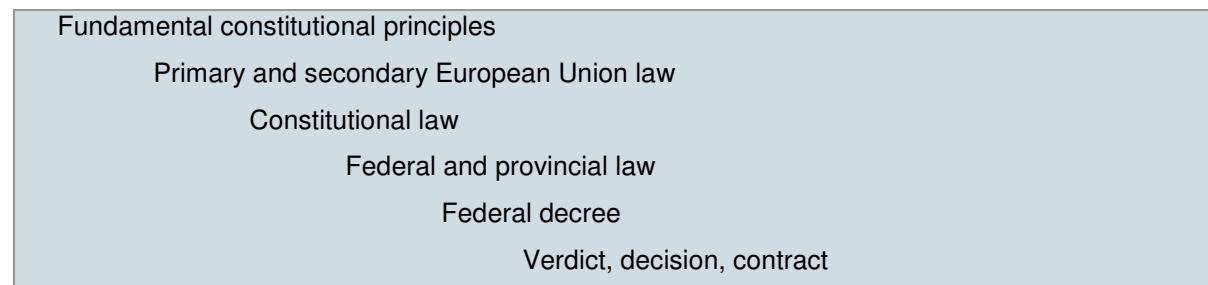
Since December 2017, the government consists of a coalition between the conservative ÖVP and the right-wing Freedom Party of Austria (FPÖ). This political constellation is quite the exception and supports arguments for an erosion of consociational democratic patterns that were initially raised during the first ÖVP-FPÖ coalition in 2000. With the fading of the class cleavage, new political issues have moved to the top of the political agenda, most notably matters of immigration and internal security. This has been accompanied by a political culture of conflict and a retreat from grand coalitions. Surveys relating to the latest national elections (SORA/ISA, 2017) suggest a very high political salience of the topics of immigration and asylum and their positive effect on parties on the conservative to right-wing political spectrum. Political parties currently represented in the National Council are the conservative Austrian People's Party (ÖVP) with 62 seats, the Social Democratic Party of Austria (SPÖ) with 52 seats, the right-wing Freedom Party of Austria (FPÖ) with 51 seats, the liberal New Austria and Liberal Forum (NEOS) with 10 seats, and the left-wing List Peter Pilz (PILZ) with 8 seats.

### 3 The constitutional organization of the state and constitutional principles on immigration and asylum

#### 3.1 The constitutional framework and the principle of asylum

The legal system of Austria has five fundamental principles enshrined in its constitutional framework<sup>4</sup>: the democratic, republican, federal, constitutional and liberal principle. The first three principles are explicitly stated within respective articles of the Austrian Federal Constitutional Law, whereas the latter two are the results of interpretation of the entirety of constitutional laws. While constitutional laws can be amended by a two-third majority in the National Council of the parliament, the abolishment or modification of laws reflecting the fundamental principles requires an additional national referendum. They are largely considered to be placed even above EU law in the Austrian legal hierarchy.

**Figure 2: The hierarchical structure of legal order in Austria**



Source: own design.

According to these principles, Austria is a parliamentary democracy (democratic principle) where the political will of the people is mainly formulated through representation and the rare use of instruments of direct democracy. The national government is tied to majorities in the parliament that are decisive for the president's decision of appointing a chancellor after national elections.

In accordance to the constitutional principle, the Republic is founded on a clear separation of powers. This means that legislative, executive and judicial powers provide the means for a general rule of law and equality before the law. The equality clause stated in the Basic Law of the State allows for objectively justifiable unequal treatment between unequal persons, meaning between citizens and non-citizens. However, the liberal principle constrains political will in the legislative branch at the level of fundamental and human rights. Those rights were first established under the Geneva Convention, which has been in effect since 1955, as well as under the protocols relating to the status of refugees that came into force in 1973. The second legal source of human rights is the European Convention on Human Rights (ECHR) provided by the Council of Europe since 1958. Since 1964, the ECHR is ranked as a '[...]

<sup>4</sup> The Austrian constitution does not consist of a single constitutional charter, but of a range of constitutional laws. Two of the historically most central laws are the Federal Constitutional Law (B-VG) that was re-adopted in 1945 in its version of 1929, and the Basic Law of the State on the General Rights of Citizens of 1867 that was ranked as a constitutional law by means of Art. 149, Section 1, B-VG. There is a series of other laws that were adopted as constitutional laws through two-third majority in the National Council.

directly applicable federal constitutional law in Austria and is therefore formally fully equivalent to the original catalogue of fundamental rights in the Austrian Federal Constitution, the Basic Law of the State on the General Rights of Citizens taken from the 1867 monarchical constitution' (Öhlinger, 1990: 286). Accordingly, although the right to asylum is not explicitly stated in the centrepiece of the Austrian constitutional framework, namely the Federal Constitutional Law, the ECHR as its legal source is in fact ranked as a constitutional law. A third source of fundamental rights is the Charter of Fundamental Human Rights of the European Union. Since it became applicable in 2009, it has not only been coequal to EU primary law but has also been ruled by the Austrian Constitutional Court in 2012 as part of the criteria norms for assessing the constitutional conformity of Austrian law (VfGH-Pressinformation, 2012a).

Finally, in the realm of politics, it is particularly the president who upholds norms and values enshrined in the constitution. He is directly elected as the head of state (republican principle) with extensive competences but also with a tradition of restraint in every-day politics. Also, while he (or she) does generally not have any competences explicitly relating to asylum or immigration, the president is a high moral figure representing the state and can become especially relevant for topics related to human rights.

### **3.2 Decentralization: Tiers of government and their competences**

In accordance with the federal principle, legislative, executive and judicial powers are shared between the federal level and the provincial level. The Austrian provinces (*Länder*) of Burgenland, Carinthia, Lower Austria, Salzburg, Styria, Tyrol, Upper Austria, Vienna, and Vorarlberg participate in the legislative branch in two ways: On the one hand they represent the second and rather weak chamber of the parliament, namely the Federal Council; on the other hand they act in terms of a provincial government that is formed through provincial parliamentary elections. A third tier of government consists of the municipalities, which are called *Gemeinden*. The characterization of Austria as a federal state with a high level of centralization becomes particularly evident when considering the division of competences in the realms of immigration and asylum (see Table 6).

**Table 6: Division of important competences in sectors relevant to immigration and asylum**

	<b>Federation</b>	<b>Provinces</b>	<b>Municipalities</b>
<b>Legal status</b> <b>Entrance</b> <b>Residence</b> <b>Return</b>	Status of foreigners (L/EX) <sup>(1)</sup>		
	Control of entry, residence and withdrawal of aliens from national territory (L/EX)	Naturalisation procedure (EX)	-
	Asylum procedure and decision (L/EX)		
	Naturalisation law (L)		
<b>Accommodation</b> <b>Reception</b>	Accommodation as a condition for entrance and residence (L)	Regional planning and building laws (L)	Execution of building laws (EX)
	Accommodation in Initial Reception Centres or Distribution Centres during admissibility procedure in asylum system (L/EX)	Accommodation under Basic Welfare Support during substantive asylum procedure (quota for each province according to number of inhabitants) (EX)	Non-discrimination of foreigners in the provision of humane accommodation (EX)
<b>Social insurance</b> <b>Social aid</b>	Pension, health and unemployment insurance depending on legal status and employment (L/partly EX)	Parts of the health sector (EX), social housing sector, small child care, social aid: Needs-Based Minimum Benefit (L/partly EX)	Execution of provincial legislation via municipality or district authorities (EX)
	Universal services: family support, child care allowances		
<b>Employment</b>	Authorization for employment and as a condition for entrance and stay (L)		-
	Setting of quotas for aliens and execution via Public Employment Service (AMS) (EX)	Only consultative function on quotas for provinces (L)	

Source: Based on Bußjäger, 2007; Sozialministerium, 2016. Note (1): L = Legislation, EX = Execution.

Whereas the federal level is (almost) exclusively responsible for matters of legal status and the related issues of entrance, withdrawal and return, the first two tiers of government share competences in the realm of reception within the asylum system. The federal level is only responsible for accommodation and social aid during the admissibility procedure. The provinces, on the other hand, provide Basic Welfare Support<sup>5</sup> for official asylum applicants during the substantive procedure (see Chapter 5). They are also responsible for social aid services such as the Needs-Based Minimum Benefit, a service for persons without reasonable subsistence that becomes relevant upon the acquisition of a title.

The 2,098 municipalities have no formal competences in migration-related areas. However, they hold competences regarding the execution of building and space planning,

<sup>5</sup> Basic Welfare Support is a social aid system for aliens in need of help and protection (most notably asylum applicants) which covers accommodation, food and clothing, health insurance, and partly spending money.

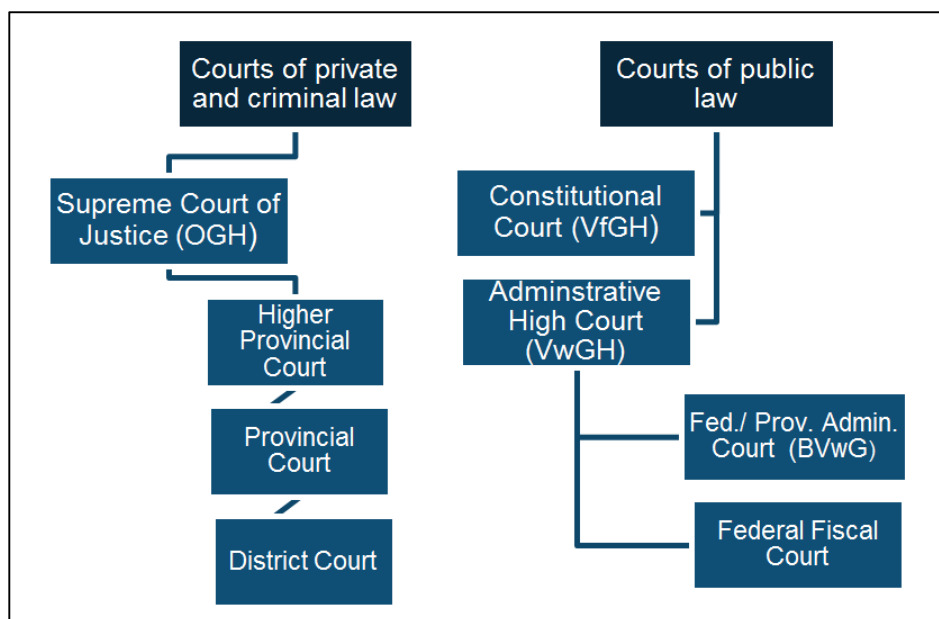
which allow them to have a de facto impact on the urban distribution of migrants and the accommodation of asylum applicants (Rosenberger & Haselbacher, 2016: 402).

### 3.3 Judiciary and constitutional case-law on asylum

The Austrian judiciary is commonly divided into the subsystems of public, private and criminal law. While the Supreme Court of Justice (OGH) presents the highest national body in criminal and private proceedings, the Constitutional Court (VfGH) is the final instance of the public and constitutional law (see Figure 3). The Federal Administrative Court (BVwG) is of particular relevance for matters of immigration and asylum and functions as an appellate body in administrative procedures such as those concerning international protection. The BVwG was created in 2012 and has since replaced the Asylum Court and other specialized administrative entities. Revisions can be enacted by the VfGH but also by the Administrative High Court (VwGH) against the decisions of the BVwG in light of contradicting or missing decisions from higher instances or open legal questions.

Aside from its function as an appellate body, the VfGH also has the power to set up judicial reviews on the constitutionality of legislative acts. Historically speaking, its activities in the political realms of immigration and asylum have grown since the early 1990s, when questions of the temporality of residences became relevant, migration matters institutionally switched from the social to the interior ministry and the gates of the asylum system gained importance (Bauböck & Perchinig, 2006: 732p.) In the following decades, the political will of rendering access more restrictive and asylum procedures more efficient (see Chapter 4) has accordingly clashed with human rights provisions embedded in the constitution.

**Figure 3: Overview of Austrian judiciary**



Source: own design.



Regarding the acceleration of asylum procedures, the VfGH has repeatedly ruled in favour of effective legal remedies and longer appeal periods. As early as 1995, it stated 'that the de facto possibility of return cannot substitute effective legal protection' (translated from German; VfSlg 17.340/2004; cited in Ludwig-Boltzmann-Institut, 2016: 6), after provisions on a general omission of suspensory effects of appeals had been introduced. However, it argued that a shortened suspensory period is constitutional in the case of second-time applicants because in this case the asylum law held provisions for an examination of refoulement protection prior to cutting guarantees.

Similarly, in October 2017, the VfGH found itself for the third time in two years faced with provisions on the appeal period for decisions concerning international protection at first instance that are associated with residence terminating measures. It annulled the federal government's two-week provision and stressed the relevance of legal remedy that stood in contrast to the BVwG, which had arguably been inefficient with its proceedings. Accordingly, the BFA Procedures Act had to be repaired after the VfGH had already invalidated a general two-week appeal provision in 2016 (VfGH-Presseinformation, 2017a).

The most comprehensive legal intervention of the VfGH occurred in 2004, after the first conservative/right-wing coalition government had introduced restrictions for appeal to administrative decisions, immediate expulsion of asylum applicants and increased possibilities for detention (Kotschy, 2006: 689). The VfGH invalidated a major part of the new provisions as they violated a number of fundamental rights such as the right to an effective remedy (new facts and evidence were not allowed in the second instance), physical and mental integrity (immediate enforceability of decisions), liberty (detention upon missing interviews and follow-up applications), family life and property (confiscation of clothing and personal belongings) (Kotschy, 2006). According to Kotschy (2006: 693) the central rationale behind the judgment was balancing the interests of asylum applicants as a vulnerable group of applicants on the one hand and the state and its security concerns on the other.

Since 2011, the VfGH has largely ruled in favour of individual rights. This concerns, for example, family reunification in asylum procedures, where it decided that the notion of family members in terms of the ECHR does not have to be congruent with that of the Settlement and Residence Act. Also, it ruled in 2014 and 2015 that the right to respect for private and family life needs to be considered during the family asylum procedure (Lukits, 2016b: 59).

With regard to procedural guarantees, the VfGH (G 151/2014) annulled increasingly restrictive provisions on appeal during detention due to a lack of clarity as to where legal remedy has to be lodged (VfGH-Presseinformation, 2015). In 2016, it found that a legal differentiation between mere consultative work of legal counsellors during appeals on the one hand and representation during appeals to return decisions or decisions terminating residence on the other hand discriminates between aliens and is objectively unfounded (VfGH 9.3.2016 G447-449/2015). Legal counsellors may thus represent their clients upon demand at any appeal (Kriwanek & Tuma, 2016).

Finally, concerning the entry and withdrawal from territory the VfGH invalidated minimum sanctions (1,000 EUR) for unlawful entry to territory (VfGH 9.3.2011 G 53/2010) as not sufficiently differentiated and also annulled the termination of procedures for settlement permits of persons who had to leave the country as it was violating the constitutional principle (VfGH 20.2.2011 G 201/2010) (VfGH-Presseinformation, 2011). Likewise, in 2012, a provision of the Aliens Police Act that had blocked authorities to reverse entry bans upon the termination



of relevant grounds was declared unconstitutional (VfGH 3.12.2012 G74/2012) (VfGH-  
Presseinformation, 2012b).

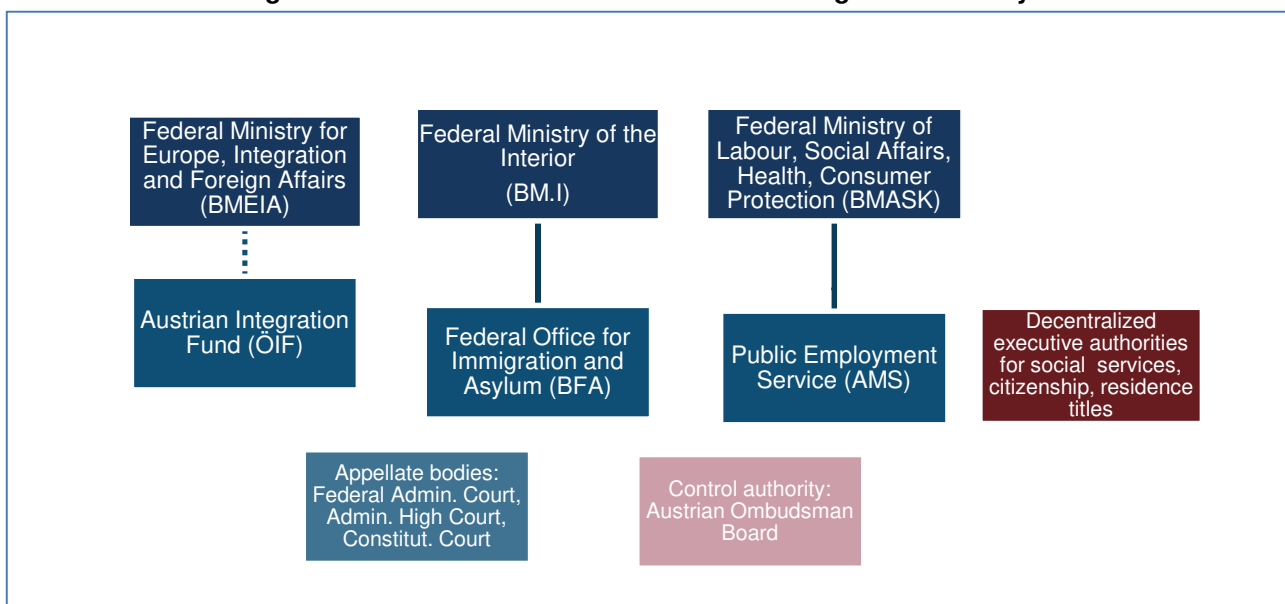
## 4 The relevant legislative and institutional framework in the fields of migration and asylum

### 4.1 State actors

At the highest institutional level, matters of asylum, immigration and integration are subject to the portfolios of three major ministries (see Figure 4.):

- The Federal Ministry of the Interior (BM.I): It covers matters related to federal borders, immigration and emigration, return, citizenship as well as asylum. The BFA works as a subordinated agency that carries out first instance procedures on asylum and issues residence titles as well as return decisions (EMN, 2015: 85).
- The Federal Ministry for Europe, Integration and Foreign Affairs (BMEIA): It is responsible for visa issuance, which is linked to the diplomatic authorities abroad, as well as (development) cooperation with third states and the UNHCR. Since 2014, the BMEIA is officially responsible for the integration agenda. It largely finances the ÖIF (Austrian Integration Fund) as an organization that manages integration projects and regularly produces evaluation papers (EMN, 2015: 85).
- The Federal Ministry of Labour, Social Affairs, Health and Consumer Protection (BMASK): It determines criteria and quotas for work permits. The AMS as a subordinated administrative body for labour market matters executes the permissions, performs consultative work and provides qualification courses (EMN, 2015: 85).

**Figure 4: National institutions involved in immigration and asylum**



Source: Figure based on institutional chart by EMN, 2015: 85.

Major institutional rearrangements have been in place since 2011, when a State Secretariat for Integration was created. This brought about a shift of this policy field from the interior ministry to the exterior ministry, where it was fully incorporated in 2014. Like immigration and asylum matters as a whole, this matter remained in the hands of the ÖVP, which for almost two decades has dominated the interior and the exterior ministry, whereas the SPÖ was entrusted with social affairs. This has changed only recently, when the ÖVP entered into a coalition with the political competitor FPÖ, which had a strong political

ownership of these topics during its time in the opposition and during elections. Since December 2017, an independent candidate recruited by the FPÖ constitutes the exterior minister, while two long-serving FPÖ politicians are interior and social ministers.

Apart from political personnel, it is important to, firstly, highlight the Austrian Ombudsman Board as a control authority for public administration including an expert commission on the protection and promotion of human rights (Volksanwaltschaft, 2017). Secondly, academic expertise was institutionalized in recent years with the creation of the Independent Expert Council for Integration in 2010 within the BMEIA and the Migration Council for Austria created within the BM.I in 2014. These two councils were recruited by the respective institutional authorities and are assigned to produce annual reports evaluating the status quo and giving advice for future actions.

Furthermore, in 2015, the Austrian government installed two Refugee Coordinators as part of an ad hoc crisis management. An immediate jump in the number of people seeking asylum or travelling through Austria exceeded the reception capacities and urged authorities to create these posts (Profil, 2016). Up until late 2016, they were responsible for organizing accommodation for refugees through a coordination network of diverse actors such as federal, provincial and municipal authorities, economic actors and NGOs. Especially the latter play a crucial role within the fields of asylum and immigration, which is why we will briefly zoom in on their activities in the Austrian asylum system.

## **4.2 Non-governmental and civil society actors**

NGOs are engaged both as legally associated partners of state authorities but also as independent actors who work in favour of refugees' and immigrants' rights beyond legal provisions. Historically speaking, they have emerged from a Christian social environment (for example: Caritas, Diakonie) on the one hand and social democratic organizations as well as new social movements on the other (for example: Volkshilfe, Asyl in Not, SOS Menschenrechte) (Langthaler & Trauner, 2009: 456). Their engagement has not only been tied to institutional needs since the 1990s, but is also linked to the rise of broad civil society concerns, which peaked in 1999 with the deportation death case of Marcus Omofuma, the Refugee Protest Camp Vienna in 2012 as well as diverse initiatives during the summer of 2015.

Today, NGOs engage in numerous fields of activity such as consultative work within asylum procedures, the provision of certain basic welfare services for applicants as well as integration and voluntary return programmes (Langthaler & Trauner, 2009: 452).

Regarding the recruitment of legal advisory staff for applicants to international protection, two NGOs are of particular relevance as they are assigned by the federal government for counselling: Verein Menschenrechte Österreich (VMÖ) and Diakonie Flüchtlingsdienst (together with Volkshilfe Oberösterreich).

Concerning care services, NGOs have experienced a profound institutional involvement in the provision of accommodation and social workers. This has particularly been performed by certain divisions of Caritas and Diakonie-Flüchtlingsdienst. In this context, NGOs act as 'operative partners of the provinces for the performance of care tasks' (Langthaler & Trauner, 2009: 460). They cooperate by means of service contracts with the provinces and are accordingly tied to legal provisions regarding the scope of activities covered by public finance.

Public financing is generally provided for the accommodation of asylum applicants, whereas for counselling tasks, care services and integration programmes they receive funding from the European Refugee Fund and are only co-financed by the interior ministry (Langthaler & Trauner, 2009: 457).

However, in some areas Langthaler and Trauner (2009: 464) have noted a loss of importance of charitable NGOs to the benefit of private social service contractors such as European Home Care and VMÖ. Recent announcements of the federal government, on the other hand, have expressed the wish to push back NGOs in order to benefit centralized state agencies (Profil, 2018).

### **4.3 National immigration and asylum law: pillars, principles and evolution**

The first pillar of Austrian immigration and asylum law encompasses the realm of regular migration. The Settlement and Residence Act (NAG) (100/2005) as a general national law governs legal residence permits and accordingly provides for an active management of certain types of immigration. Aside from the documentation of EU internal mobility, the NAG formulates the conditions of permission, rejection and withdrawal of residence titles, arguably matters of a stay longer than six months. Whereas the term ‘residence’ refers to the aim of finding a residency for more than six months, relocating the centre of life interests or taking on a long-term job, ‘settlement’ addresses a form of immigration that can solidify and allows for family reunification (Feik, 2016: 173). This distinction is characteristic of Austrian immigration law (EMN, 2015).

The second pillar governs the entrance to federal territory, the grounds for rejection as well as the issuance of residence terminating measures, return, toleration and the issuance of documents for foreigners (Feik, 2016: 156). The most important laws are the Aliens Police Act (FPG) (100/2005) and the Border Control Act (GrekoG) (435/1996), which is informed by the Schengen provisions.

The third pillar covers the realm of asylum. Next to national law, this area consists of a complex layering of primary law in terms of the EU Charter of Fundamental Rights, EU secondary law as well as further national law. The Asylum Act (AsylG) (100/2005) governs obligations stipulated in the Geneva Convention and under European Union law. It holds provisions for asylum applicants and beneficiaries of international protection with regard to entry, identification and qualification while the BFA Proceeding-Act (BFA-VG) covers procedural aspects (Rössl & Frühwirth, 2016).

Immigration- and asylum-related legislation has experienced a particular boost in quantity since the early 1990s. This also led to a constant transformation in the structure of laws. For example, the Aliens Act was created in 1992 as a follow-up to the former Aliens Police Act and merged together with the Residence Act in 1997 – only to be separated again into the Foreign Police Act (FPG) and Settlement and Residence Act (NAG), which form the legal basis of current provisions since 2005. In addition to that, laws often entail only formal structures and procedures, whereas national regulations from the respective ministries provide details for the implementation (EMN, 2015: 21).

During the 1990s and early 2000s, the paradigm of Austrian asylum and immigration policies was restricting access through the asylum system while disengaging from a proactive

migration management after decades of ‘guest worker’ politics (Bauböck & Perchinig, 2006). Regarding asylum, the goal was to increase efficiency, such as with safe third country provisions and the abolishment of in-country applications to visas in 1992, the introduction of accelerated asylum procedures for ‘evidently unfounded’ applications in 2005 or a shortening of appeal periods in 2009. On the other hand, liberalizations concern, for example, the solidification of residence with increasing time spent in Austria. This principle is embedded in the Aliens Act of 1997 and aimed at integrating the prevalent foreign population (Bauböck & Perchinig, 2006: 734). Also, following a ruling of the VfGH (G 246, 247/07), an instrument for the regularization of persons with an irregular or precarious status was created in 2009<sup>6</sup>. The humanitarian right to stay allows persons that can de facto not be returned to apply for a residence permit (Chapter 5) (Demokratiezentrum-Wien, 2015). Regarding labour migration, the introduction of seasonal work permits through the Aliens Act (FrG) (75/1997) was the only major innovation next to general restrictions to the mere immigration of key labour forces such as academics.

2011 marked a turning point in national labour migration management. Following the EU directive 2009/50/EC, Austria transposed provisions on the immigration of highly qualified labour through a new quota system and criteria catalogue for the so-called ‘Red-White-Red Card’. This provision was further extended in 2013 by the possibility to apply for the card abroad under a point-based criteria system.

Regarding the realm of asylum and its procedural dimension, Austrian lawmakers particularly increased security concerns over the internal dealing with asylum applicants since 2011. While the 2009 reform contained obligations for applicants to international protection to reside within the district of their Initial Reception Centres during the admissibility procedure (Rössel & Frühwirth, 2016), according provisions were extended to persons with return decisions. The 2017 Aliens Law Amendment Act (145/2017) further expanded this logic to asylum applicants in the substantive procedure who are currently obliged to reside within the province of their Basic Welfare Support system (Knapp, 2017). This was mainly implemented in order to avoid secondary movements from rural to urban areas and from one social aid system to another. Since 2017, persons in the admissibility procedure can furthermore be ordered to remain not only within their municipality but within a given accommodation facility. This applies, for example, to persons arriving from safe third countries and to second-time applicants (Biffl, 2017: 7).

Following the 2015 Aliens Law Amendment Act (70/2015), the admissibility procedure was locally shifted from the initial reception centre to the Federal Office for Immigration and Asylum (BFA) and fast track procedures with a maximum decision period of 5 months were legally anchored for certain groups of applicants (Rössel & Frühwirth, 2016). The same aliens law amendment contained provisions for the creation of annual country reports (for the top 5 countries of origin by holders of international protection), which form the basis for reviewing asylum cases.

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<sup>6</sup> Prior to the amendment act of 2009, the granting of a residence title on humanitarian grounds only existed in terms of a non-binding right based on clemency. In 2008, the VfGH (G 246, 247/07) found that old provisions were illicit. Persons whose residence could not be terminated due to Art. 8 ECHR had been living as illegalized immigrants in a legal black hole. Consequently the federal government was urged to create residence permits that could be claimed on humanitarian grounds, namely if a person displays strong private and family ties within the federal territory.

Liberalizations in this area were introduced, for example, following the EU directive on return 2008/115/EC, when free legal consultation was extended in asylum and return proceedings in 2011 as well as with the expansion of legal advice before the VwGH in 2015 (EMN, 2015: 23pp). In 2013, a new institutional structure of asylum was created. The establishment of the BFA and the incorporation of the Asylum Court into the newly founded BVwG re-opened the legal channels to the VwGH (Rössel & Frühwirth, 2016).

With regard to the material dimension of asylum, the most important change occurred with the 2016 Amendment Act (24/2016) modifying the AsylG, the FPG and BFA-VG as a direct legislative response to the perceived crisis. The protection and thus residence period for beneficiaries of asylum was limited to three years, downgrading the status to the minimum limit stipulated in the EU Qualification Directive 2011/95/EU. In addition, time limits were introduced for family reunification, within which beneficiaries of subsidiary protection can bring their family members into the country after three years and recognized refugees within the first three months upon acquiring a title (ÖIF, 2016). Eventually, legal provisions were created that allow for a governing via an emergency decree, when the annual upper limit of asylum applicants is exhausted (Hilpold, 2017)<sup>7</sup>. It allows authorities to suspend the processing of further applications. However, this mechanism has not entered into force as of early 2018.

By 2017, political discourse on immigration and asylum in Austria was tightly associated with matters of internal security and identity (Rheindorf & Wodak, 2017). This is mirrored by the legal reform package on integration and anti-face-covering (IntG, AGesVG, IJG), which stipulates compulsory civic integration programs for beneficiaries of international protection as well as a ban of face veiling clothes in public. The Aliens Law Amendment Act 2017, furthermore, tightened provisions on detention (as had already been done in 2011 and 2015) with detention periods for adults of up to 18 months.

#### **4.4 Sub-national legislation in conflict with national legislation**

In recent years, the reception and accommodation of asylum applicants within the federal Austrian territory has been a central site of political contestation. The conflict between federal and provincial actors peaked in 2015, when application numbers rose sharply. Following the 2004 agreement on Basic Welfare Support, provinces are required to take on asylum applicants according to a quota (in relation to the size of population). However, some provinces and municipalities were not willing to provide accommodation facilities or encountered public resistance. Following disputes with the federal government, the latter

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<sup>7</sup> The 2016 Amendment Act (24/2016) introduced changes to the AsylG (Section 5 §36 and §41), thereby attaching the admission of newly arriving persons into the asylum procedure to the warranty of public order. The evaluation of the public order is conducted with regard to the number of foreigners applying for international protection, and the public systems that might be curtailed in their functioning. Therefore, the federal government publishes a yearly annual upper limit figure (37,500 applicants in 2016). Upon the exhaustion of this limit, the federal government after consultation of the main committee of the National Council may govern via an ordinance for up to 18 months. This mechanism has not been activated as of April 2018, given the fact that application figures remained under the stipulated limits. However, the provision has been subject to heavy criticism of legal experts who doubt the legitimacy of a security based argument against obligations deriving from the Geneva Convention (Hilpold, 2017: 76-77). Representatives of the federal government have pointed out a possible implementation via the installation of waiting zones (ORF, 2016).

adopted a constitutional law, namely the Federal Constitutional Act for the Accommodation and Distribution of Foreigners in Need of Help and Protection (120/2015). It allows the federal government to run its own accommodation facilities in federal public buildings, even against the will of provincial and municipal authorities (Müller & Rosenberger, 2017: 119p.).

The matter of a social aid service, namely the Needs-Based Minimum Benefit as a provincial competence, has also been subject to several political and jurisdictional conflicts between the federal or constitutional level and the respective provinces. Between 2010 and 2016, an agreement of the federal government and the provinces on common standards in central areas of social aid provided a stronger harmonization regarding minimum allowances and personal asset limits, to name a few. However, since the beginning of 2017, the provinces are able to freely act upon their own legislation, as previous negotiations on a new agreement failed. Political tensions emerged particularly between the SPÖ-led social ministry on the federal level and ÖVP-led provinces that aimed for more restrictive provisions (Salzburger Nachrichten, 2016). The most restrictive provisions were introduced in Upper Austria, Lower Austria and in Burgenland, where allowances were cut and upper household limits and the provision of aid were determined by the duration of residence. In Lower Austria, beneficiaries of subsidiary protection were excluded from the full service of Needs-Based Minimum Benefit. Following a complaint of a person based in this province, the VfGH (E 3297/2016) ruled in 2017 that this discrimination is lawful by pointing out the temporary character of the title in comparison to asylum (VfGH-Presseinformation, 2017b). However, in a 2018 ruling, the VfGH (G 136/2017) annulled provisions that stipulated upper household limits and generally attached services to the length of residence (VfGH-Presseinformation, 2018)<sup>8</sup>. Furthermore, the western provinces of Tyrol and Vorarlberg cut allowances and introduced special provisions for persons who share flats. The remaining provinces introduced only moderate changes that mainly tied allowances to the completion of integration courses (Wiener-Zeitung, 2017).

A third site of conflict concerns civic integration programmes and the question of whether asylum applicants should be allowed to engage. Diverging objectives are particularly evident in the case of the province of Vienna. Against the federal point of view (of the BMEIA) that integration measures should generally only be considered for beneficiaries of international protection, Viennese authorities (FSW and MA17) installed an operative system of integration courses for persons with an ongoing procedure. These encompass German courses, workshops and information classes on different topics (Start Wien) and cooperation with the Public Employment Service.

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<sup>8</sup> With regard to the VfGH ruling E 3287/2016 relating to the case of an Iraqi national, the judges found that differences in the legal status of holders of subsidiary protection and beneficiaries of asylum are in fact sufficient to justify an objective discrimination when it comes to social services. Yet, the judges pointed out the necessity of complying with Art. 3 of the ECHR in assessing the level of services (VfGH-Presseinformation, 2017b). Regarding the VfGH ruling G 136/2017, the decision is argued as follows: 'The system [Deckelung, Anm.] that has been created with § 11b NÖ MSG does not conduct an averaging, but rather prevents considerations of a concrete need of persons living in a household. Therefore the system of Needs-Based Minimum Income fails to fulfil its purpose, namely the prevention and countering of social hardship of persons in need of help' (own translation from German; VfGH 7.3.2018 G 136/2017; cited in: VfGH-Presseinformation, 2018).

## 4.5 Policy plans and roadmaps

Recent policy plans on the federal level have been put forth in a ‘50-Points-Integration Plan’ that was developed by the BMEIA and the Expert Commission in an immediate response to the summer of 2015. Some of the proposed measures in the realms of education and language, intercultural dialogue, regional living environment and labour skills (BMEIA, 2015) have already found consideration in the aforementioned 2017 legislation.

Another, more recent roadmap on immigration, asylum and integration was laid down in December 2017 in the last government program (2018 – 2022) by the coalition partners of the ÖVP and the FPÖ (Bundeskanzleramt, 2017). In the chapter on ‘order and security’ (pp. 32-33), it defines goals such as a recodification of immigration and asylum law or the promotion of ideas during the Austrian EU Council Presidency in the second half of 2018. Central issues are the protection of EU external borders described as a condition for returning to Schengen provisions, making asylum procedures more efficient by screening communication devices in order to investigate travel routes and cutting legal remedies before the VwGH in certain cases. Under ‘social matters’ (p. 118) the program stipulates a reduction of financial transfers for persons granted asylum or subsidiary protection to a monthly 365 EUR plus a 155 EUR integration bonus upon the engagement in integration courses (but also sanctions upon disregard), despite this being a provincial competence.

Finally, the program refers to the ‘migration crisis of 2015’ and argues for the creation of a legal framework that allows for specific arrangement competences and information obligations between tiers of government in the context of future crisis management (Bundeskanzleramt, 2017: 35).



## 5 The legal status of foreigners

### 5.1 Regular migration

Legal entrance into the federal territory of Austria generally requires a valid passport and visa. Groups that are exempted from visa obligations are stipulated in the Foreign Police Act (FPG) (100/2005) and encompass EEA citizens, third country nationals with a settlement in the Schengen Area, citizens of third countries holding bilateral agreements with Austria and beneficiaries of international protection (EMN, 2015: 29).

The first two types of visa are governed by the EU Visa Code Regulation (2009/810/EC) and the Schengen Borders Code (2006/562/EC). Visa A grants holders airport transit and Visa C permits for short stays of up to three months. The third type, Visa D, is a national long-stay visa allowing for a stay of up to six months. As laid down in the FPG, it can be issued for the purpose of a stay beyond three months, in exceptional humanitarian cases, for job-seeking, the attribution of residence permits or the purpose of family reunification under asylum law. Unless attached to the asylum system, applying for Visa D requires health insurance that covers at least 30,000 EUR, proof of financial resources and in case of no application for residence in Austria proof of employment and residence in the country of origin (EMN, 2015: 29p). Since the 2017 Aliens Law Amendment Act (145/2017), special provisions are in place allowing for a stay of up to 12 months with Visa D, primarily in cases of attending courses in Austria or for bridging periods until a residence permit is granted which was applied for prior to entry (§ 2 Section 2 NAG 2005). Seasonal workers may also receive a Visa D for a period of nine months and even extend it from within Austria in particular cases.

Applications to any kind of residence permit generally need to be lodged outside of Austria at a responsible embassy or consulate, only renewals of already received titles can be conducted in Austria. Likewise, the approval of an application does not allow for immediate entry, but first requires a granting of a Visa D.

#### Types of residence permits

Aliens who want to reside or settle in Austria beyond periods and matters provided under the aforementioned visa system need to apply for a residence permit. Different types of permits are issued for different purposes, whereby a general distinction is made between applicants who intend to relocate their centre of main life interests and aim at permanently settling in Austria and those who want to temporarily reside in the country for a specific occupation (category 'Temporary Residence Permit' in Table 7) (EMN, 2015: 32).

**Table 7: Residence titles of third country nationals in Austria**

<b>Residence permit type</b>	<b>Entitlements</b>
Red-White-Red Card	temporary settlement with restricted access to the labour market, for one year
Red-White-Red Card Plus	temporary settlement with unrestricted access to the labour market, for three years
EU Blue Card	temporary settlement with restricted access to the labour market, for two years
Settlement Permit	temporary settlement with restricted access to the labour market, for a maximum of three years
Settlement Permit without Employment	temporary settlement without employment possibilities, for a maximum of three years
Settlement Permit Dependant	temporary settlement without access to the labour market, for a maximum of three years
Permanent Residence EU	permanent settlement with unrestricted access to the labour market, for five years
Family Member <sup>9</sup>	family members of Austrian nationals, for a maximum of three years, with the possibility of subsequently obtaining the residence title Permanent Residence EU
Temporary Residence Permit	temporary residence for a specific purpose; several subcategories, issued for one year, this includes the Residence Permit Plus and Residence Permit for Individual Protection, which can be issued based on humanitarian grounds

Source: own compilation, based on EMN (2015, p.32, Table 4).

### Conditions for granting a residence permit

General conditions for any type of residence title are stipulated under §11-13 of the Settlement and Residence Act (NAG) (100/2005) and encompass the necessity to find adequate accommodation in advance, have health insurance that covers all major risks and provide evidence for sufficient financial resources (in order to be independent from social aid services), to name a few. Persons aiming at long-term settlement also have to show proof of German language skills at the level of A1. General grounds for refusal are entry bans, return decisions within an EEA member state as well as convictions on previous illegal entry (EMN, 2015: 35).

Austrian legislators have also been pursuing the establishment of a quota system since the early 1990s as an additional condition for entry. While quotas were abolished for highly qualified third country nationals in 2011, the federal government continues to set up annual

<sup>9</sup> Family members in terms of the NAG are defined as marital partners who are at least 21 years old and their underage children. The definition of family according to the AsylG does not require a certain age, but merely that the partners were married prior to entry.

quotas for certain types of family reunification, holders of a Settlement Permit Dependant applying for a Red-White-Red Card Plus and mid-to-low qualified persons who apply for a Permanent Residence EU in order to pursue employment (EMN, 2015: 35). The federal quota for 2018 encompasses 6,120 open slots, 4,000 of which are reserved for seasonal workers (Kurier.at, 2018).

The NAG stipulates legal remedies against negative decisions on applications or the renewal of applications before the High Administrative Court (EMN, 2015: 40).

### **Rights and duties upon granting a status**

Persons who are granted a residence or settlement title can legally reside within the entire federal territory for the time of validity of their status. A renewal can be undertaken at internal authorities at the earliest three months prior to expiry. Immigrants with a long-term stay are required to fulfil the so-called Integration Agreement within their first two years in Austria. Stipulated in the NAG, the agreement obliges immigrants to participate in language and civic integration courses upon the acquisition of a residence permit. The first module encompasses language courses at the level of A2, while the second module covers the level of B1.

Third country nationals are generally entitled to family reunification within the scope of the nuclear family, which is defined in terms of spouses, registered partners and unmarried underage children. The status of those family members is tied to the holder of the Austrian legal status and its validity (EMN, 2015: 36).

In general, access to the labour market is strongly regulated in Austria. Accordingly, the Federal Act Governing the Employment of Foreigners (AuslBG) (218/1975) differentiates between types of residence that entail automatic access, conditioned access and a third category of persons who are fully excluded from the labour market. The first group are for example holders of the Red-White-Red Card Plus, the Permanent Residence-EU, or Residence Permit Plus. Persons with a conditioned access need to apply for a work permit at the Austrian Public Employment Service (AMS). Those can be persons aiming to conduct seasonal work, students, holders of a toleration card, or asylum applicants three months after admission to the asylum procedure. This group undergoes a labour market test, wherein their immigration situation and the labour market needs are tested, permitting only for work if no Austrian nationals are available and only in sectors of labour shortage (EMN, 2015: 43).

## **5.2 Immigration via the asylum system**

Upon the arrival of persons who want to seek asylum within the Austrian territory, an application needs to be lodged at any police authority. As a member of the Schengen Area with no external borders, Austria generally only has border posts installed at international airports. However, since September 2015 systematic border controls are being conducted along certain frontier checkpoints in accordance with Schengen exemption clauses. The first police authorities that are addressed upon arrival are responsible for immediate registration (which includes taking fingerprints) while third country nationals are generally de facto protected from forced return (EMN, 2015: 45). After a first inquiry with an interpreter is recorded within a maximum of 48 hours in police custody, the documents including a report of the inquiry are submitted to the Federal Office for Immigration and Asylum (BFA). It is important to note that only the following prognosis decision about the likeliness of Austrian responsibility for the respective case marks the formal starting point of any asylum procedure

(HELPGv, 2018a; BFA, 2018a). Consequently, persons are transferred to a Distribution Centre or invited to present themselves at one of the two Initial Reception Centres.

### **Reception conditions during the admissibility procedure**

The first phase of the twofold asylum procedure is the admissibility procedure during which the BFA checks whether Austria is responsible for an asylum case. During the period of this pending decision (20 days), applying persons carry a green identification card and are obliged to cooperate at any time. They have no legal residence as such and are merely tolerated within the territory of their Distribution or Reception Centre's district. The violation of these borders is considered an administrative offence that can lead to detention in the most extreme case (Rössl & Frühwirth, 2016). During their stay at the reception centre, the persons receive a medical examination, are provided legal support by an NGO and are protected from a forced return. This protection generally is not effective for subsequent applications. Those applicants are not considered for a substantive procedure unless the state of evidence regarding a person's persecution has changed.

Unaccompanied minors are accommodated in special facilities or living communities where they receive 24-hour supervision and social care; in case of doubt they need to undergo an age test by means of a wristbone x-ray. During the admissibility procedure they are represented by their legal adviser.

### **The first interview and the Dublin procedure**

The BFA makes its decision based on an interview (with interpreters) about the person's personal circumstances, his/her journey to Austria and the reasons for his/her flight. Since 2017, every false testimony in this interview is considered a legal offence. Applications are only considered admissible if a person was unable to find protection in another safe third country or if no other EU member state is responsible for the examination (EMN, 2015: 46).

If during the admissibility procedure the BFA finds that any of the criteria or provisions of the Dublin III Regulation apply or if biometric data corresponds to that in the EURODAC database, Austrian authorities enter into a consultative procedure with institutions in the respective member state (BFA, 2018b). In this procedure, time limits for return requests become effective: 3 months upon a negative decision of the BFA, 2 months upon a EURODAC hit and reversely 2 months to reply in regular cases. The person applying for international protection, on the other hand, has an appeal period of 7 days. He/She can turn to the Federal Administrative Court (BVwG), which needs to decide within 7 days upon accepting the case. If the person does not cooperate on his/her return to his/her respective member state, Basic Welfare Support is reduced by withdrawing, for example, spending money and schooling and clothing allowances. Once Austrian authorities have received a positive reply from a Dublin state, the authorities have 6 months to conduct the return. The applicant, on the other hand, cannot be granted a suspension despite an ongoing appeal. In case of an accepted appeal, the person can return to Austria with a white card for temporary residence but may not automatically be accepted for a substantive examination, if there was a mere procedural error (Knapp, 2016b: 3).

Since 2015, the lawmaker also provides details on legal cases of accelerated procedures that are referred to as 'fast track procedures'. In general, these are enforced when a person's application is 'evidently unfounded', meaning the applicant has arrived from or crossed

through a safe third country,<sup>10</sup> has tried to hide their identity or does not state reasons of persecution. These cases need to be ruled upon within a maximum of five months, though negative decisions do not have a suspensory effect (EMN, 2015: 25).

### **Asylum applicants: Reception conditions and the substantive procedure**

In case of a positive outcome in the admissibility procedure, a person is formally recognized as an asylum applicant with a corresponding white temporary residence card that is valid during the entire substantive procedure. It grants persons legal residence within the entire federal territory (EMN, 2015: 52). However, applicants are only allowed to register for a place of residence within the province that provides their Basic Welfare Support.

Basic Welfare Support is a social aid system for aliens in need of help and protection which can be provided through cash or in-kind allowances. This means that, aside from asylum applicants, beneficiaries of international protection are also entitled to this service during the first four months upon approval. Furthermore, persons with legally binding residence terminating decisions and persons that can de facto not be returned have a claim to this type of support until their effective departure. Persons who have private earnings or support are generally excluded from this service. Basic Welfare Support represents the central pillar of the asylum reception system and encompasses (according to Koppenberg, 2014: 44-45):

- accommodation which can be provided by NGOs or provincial bodies or through cash support (120 EUR/month) for individual private rent (special facilities are provided for unaccompanied minors and care-dependent persons, who receive 2,480 EUR/month),
- clothing and food (three meals per day in organized accommodations or a maximum of 215 EUR/month for individually accommodated persons),
- health insurance,
- social consultation,
- spending money (40 EUR/month) in the provinces of Vienna, Tyrol, Vorarlberg.
- For children, school attendance is compulsory, regardless of their status.

This list of important basic welfare provisions is based on the legal framework of the 2004 Basic Welfare Support Agreement of the federal government, which finances services that are implemented on the provincial level. The 60 percent of the budget that are generally derived from the federal level amounted to a total of 473 Mio. EUR in 2017 and have been complemented by respective provincial budgets. As of November 2017, 63.356 persons received Basic Welfare Support (DerStandard, 2017).

Apart from means of reception, recent provisions stipulate the possibility for asylum applicants with a 'high probability of approval' to participate in modular integration programs. However, the lawmaker does not offer a comprehensive definition for assessing related 'probabilities'. Such integration programs entail German and value courses provided by the ÖIF as well as skill checks and training by the AMS for labour market participation. Currently, most civic integration programs for asylum applicants are only conducted in the province of Vienna. While asylum applicants generally do not have access to the labour market, they can engage in supporting activities in their Basic Welfare Support accommodation or charitable

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<sup>10</sup> The list of safe countries of origin has been expanded in 2018 to include Ukraine, Armenia and Benin. These were added to such states as Morocco, Algeria, Tunisia, Georgia, Ghana, Mongolia, Albania, Serbia and Kosovo.

public tasks without a work permit. With a permit from the AMS they can also conduct seasonal work or start an apprenticeship in an area of labour shortage if they are under 25 years of age (AMS-OÖ, 2015). Furthermore, since 2017, they are allowed to conduct simple kinds of work in private households (Biffl, 2017: 7). Unaccompanied underage asylum applicants receive additional support. They are usually accommodated within special facilities with fewer people and increased permanent social staff. There is no general provision for asylum applicants concerning family reunification.

While the status of asylum applicants is associated with a series of rights, this group has been increasingly confronted with new duties in recent years. The latest of such obligations presents the duty to register for a place of residence within the province (*Wohnsitzbeschränkung*) that is responsible for their Basic Welfare Support during the entire asylum procedure (Knapp, 2017: 29). While this, of course, does not apply to those who are self-financed, the necessity to seek permission to move to another province has been criticised for its inconformity with EU law (Ludwig-Boltzmann-Institut, 2017: 4). 'Due to reasons of public interest, the public order or for a quick processing of the application' (translated from German; Knapp, 2017: 28), authorities are also entitled to delegate an asylum applicant to a specific Basic Welfare Support accommodation. This can be the case if a person was delinquent, if he or she comes from a 'safe third country' or if it is the second time that the person applies for asylum in Austria.

### **The second interview**

While Austrian law is only familiar with a single category of application for international protection, there are at least three different statuses that might derive from a respective procedure. During the substantive or regular procedure, applicants are interviewed for the second time providing reasons for why they are seeking asylum in Austria. BFA authorities are inclined to examine, whether there is an entitlement to asylum, subsidiary protection or humanitarian protection. There is an ex officio duty for investigating all possible relevant information and pieces of evidence (Limberger, 2017: 173). The co-presence of a legal representative is possible and means of evidence can be submitted. Up until May 2018, the BFA is authorised to a decision period of 15 months, which will then be revised to the initial provision of six months (Knapp, 2017).

With regard to qualification criteria, authorities first examine whether persecution in terms of Art. 1 of the Geneva Convention applies in a case. While political opinions represent the most common reason for persecution, other aspects have been jurisdictionally more contested. Belonging to a religious minority or changing inner convictions (conversion) that cannot be freely exercised might present a well-founded reason, if the chances are high that it leads to persecution. Yet, although it has proven difficult to assess inner convictions, current procedures foresee the questioning of knowledge on the 'new' religion (Limberger, 2017: 176). With regard to belonging to a social group, an ECJ ruling of 2013 (C-199/12 to C-201/12) has pointed out, for example, that persons cannot be expected to hide their homosexuality in the country of origin (Limberger, 2017: 177). Another social group might be that of women with a 'western orientation'. Concerning this aspect, the VwGH has ruled that such a claim might be justified even after adopting said orientation in the host country (Limberger, 2017: 179). In this sense, subjective post-flight reasons for asylum in general (but also objective ones) are acknowledged. On the other hand, applications where inner state flight alternatives had been an option are rejected (Limberger, 2017: 182).



As long as a person's residence in Austria is based on entrance and reception provisions under the Asylum Act, he/she is not allowed to lodge an application for residence under the NAG (EMN, 2015: 52p.).

A special asylum procedure is foreseen for families. If several family members lodge an application for international protection, their cases are commonly examined, although each family member receives a separate written decision. Granting protection to one family member automatically leads to protection being granted to the remaining family members. However, the legal term of family in this context is very narrow. It only covers the relationship between underage unmarried children and their parents, marital or registered partners as well as legal representatives of underage children (all three statuses need to be acquired prior to arrival) (HELPgv, 2018b).

Likewise, there are again special provisions for unaccompanied minors with regard to the substantive procedure. These persons are legally represented by legal staff of the respective provincial children and youth aid authorities (*Kinder- und Jugendhilfe*). Like all other applicant groups they have an appeal period of four weeks following unfavourable decisions after the substantive procedure.

### **Beneficiaries of international protection: rights and duties**

Upon the granting of asylum, recognized refugees receive a Convention Passport which entitles them to residence and entry for three years. Furthermore, persons receive a blue identification card for the duration of their initially temporary residence (HELPgv, 2018a). If asylum is not granted, applicants can also receive the status of subsidiary protection, meaning that a return to the country of origin would present a threat to the applicant's life and integrity due to prevalent violence of war or conflict (Art 2. ECHR, Art. 3. ECHR) (Limberger, 2017: 182). Holders of subsidiary protection are entitled to a temporary residence of one year and are issued a grey Card for Persons Eligible for Subsidiary Protection (EMN, 2015: 52).

A third category of international protection titles are beneficiaries of humanitarian protection. The issuance of temporary residence permits can be based on humanitarian considerations that generally apply to persons who cannot be returned long term due to a number of reasons. Most often, this concerns the preservation of family units or so-called hardship cases (*Härtefälle*) that display a high level of integration (BFA, 2014). It can, however, also be granted under consideration of a need for 'particular protection', meaning that a person is either a victim of or witness to human trafficking, has been a victim of violence in his/her family or that his/her forced return has been de facto suspended for more than one year (Unternehmensservice-Portal, 2018). In these cases, an ordinary residence permit, a Residence Permit for Individual Protection or a Residence Permit Plus is issued (each for the duration of one year). While the first two titles require an authorization as stipulated under the Federal Act on the Employment of Foreigners, the latter as such entitles persons to pursue employment.

Upon granting asylum or subsidiary protection family reunification can be conducted under certain conditions. Regarding both beneficiaries of asylum and subsidiary protection, family members can address an Austrian consular authority abroad in order to apply for a visa. This option is not only conditioned by time limits (the family member needs to apply within the first three months of asylum or after three years of subsidiary protection) but entails further criteria that apply to beneficiaries of subsidiary protection in general and to persons granted asylum

whose family member lodged the application after the three-month deadline. In these cases, the beneficiaries of protection titles need to account for an 'adequate accommodation', health insurance as well as sufficient income (HELPgv, 2018b).

A positive outcome of the asylum procedure means that persons drop out of Basic Welfare Support and are transferred to the general social aid system. At its core is a Needs-Based Minimum Benefit that falls entirely into the competences of the provinces. It is provided for persons who have personal savings of no more than 4,189 EUR (2016), enjoy legal residence in Austria and are available for employment. Until 2016, services were standardized with an average of 844 EUR, yet since the expiration of a harmonizing agreement between the federal government and provinces, standards have diverged increasingly (Table 8).



**Table 8: General provisions for beneficiaries of asylum and subsidiary protection on Needs-Based Minimum Benefit: single households and single parents**

	Basic allowance	Conditions and limitations
Burgenland	584 EUR	- 1.500 EUR household limit (annulled by VfGH on 7.3. 2018) - cuts of 30% upon violation of integration obligations - cuts of 50 % upon violation of AMS obligations
Lower Austria	572 EUR	- 1.500 EUR household limit (annulled by VfGH on 7.3. 2018) - obligation to participate in integration courses - AMS related obligations (incl. obligation to take on non-profit work)
Vienna	844 EUR	- obligation to participate in integration courses - AMS related obligations (cuts between 25-50 % for one month upon violation)
Upper Austria	520 EUR	- 1.500 EUR household limit (annulled by VfGH on 7.3.2018) - 155 EUR basic allowance amount is determined by fulfilment of integration obligations
Styria	863 EUR	- 628 EUR are provided in cash, the rest are in-kind allowances - obligation to participate in integration courses - AMS related obligations (cuts of up to 25 % upon violation)
Carinthia	844 EUR	- obligation to participate in integration courses
Tyrol	647 EUR	- obligation to participate in integration courses (cuts of up to 66% upon violation) - 485 EUR for persons living in a shared flat
Salzburg	844 EUR	- obligation to participate in integration courses
Vorarlberg	645 EUR	- obligation to participate in integration courses - 482 EUR for persons living in a shared flat

Sources: ORF Wien, 2017; Wiener Zeitung, 2017; Sozialministerium, 2018; Salzburg24, 2017.

In 2017, the Needs-Based Minimum Benefit was also tied to the participation in integration programmes in most provinces. Since late 2017, persons granted asylum or subsidiary protection after 21<sup>st</sup> of December 2014 and above the age of 15 are obliged to participate in institutionally embedded integration measures. Those are mainly covered by the recent Integration Act (IntG) and Integration Year Act (IJG). As was mentioned in the subchapter 'Regular migration', the IntG stipulates a duty to integration that includes a compulsory attendance to language courses and 'value and orientation' courses upon the acquisition of a title. German classes are provided by the BMEIA up to a level of A1 and implemented by the ÖIF, while level A2 classes are offered by the BMASK and implemented by the AMS. Value and orientation courses are also provided by the BMEIA and the ÖIF, targeting the communication of constitutional and democratic principles, rules of peaceful public life and

values such as self-determination and equality. In the long run, the goal of these measures is the acquisition of the Austrian citizenship (§ 2, IntG).

The IJG defines more narrowly the provisions on the first year of beneficiaries of asylum and subsidiary protection but it also considers asylum applicants. The purpose is to rapidly assess relevant professional skills and facilitate inclusion into the labour market for those who could not find a job. The mentioned courses are structured as modules and the progress has to be protocolled within an integration booklet. Asylum applicants may only participate if they belong to a group '[...] where the granting of international protection is very likely under consideration of prevalent data [...]' (translated from German: § 1, IJG).

Furthermore, persons are entitled to child care and family subsidies. Health insurance is provided for gainful workers whose wage is above the monthly limit of 438 EUR (in 2018). In addition, persons receiving Needs-Based Minimum Benefit are entitled to be insured within their respective province.

Regarding housing, beneficiaries of international protection are allowed to take residency at any province and have open access to the housing market. As many persons rely on social aid, which varies across provinces but remains comparably low compared to rental prices, they can apply for housing aid. Generally, these persons are equal to citizens in this regard; however, conditions are generally in favour of the latter. In Vienna, for example, persons must have had an earned income for at least one year and beneficiaries of asylum are only entitled to aid after five years. Tyrol and Upper Austria also hold provisions for a minimum of five years of residence; Vorarlberg requires full-time employment (Aslywohnung.at, 2018).

## **Renewal and naturalisation**

Cases of asylum are reviewed after three years. Unless provisions for residence terminating measures or a withdrawal of status apply, the persons are eligible for unlimited settlement by means of a Permanent Residence – EU title after a total five year of residence in Austria and the fulfilment of the integration criteria. Holders of subsidiary protection who initially have a residence permit of one year might receive a two-year extension, which can also lead to an entitlement to permanent residence under the same conditions (HELPgv, 2018c). Persons who have received a residence permit of one year resulting from humanitarian considerations can only renew their title if they are holders of a Residence Permit for Individual Protection (EMN, 2015: 54). Like the other two groups, these persons can also solidify their legal residence after five years legally spent in Austria. Persons with a regular residence permit and those with a Residence Permit Plus can validate their entire time while those with a Residence Permit for Individual Protection can only validate half of their annual terms (HELPgv, 2018c).

The pathway to citizenship<sup>11</sup> for recognized refugees is shorter than the general provision of ten years of legal residence. Accordingly, beneficiaries of asylum may apply for citizenship after six years of continuous residence and only if no withdrawal procedure has been initiated

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<sup>11</sup> The Citizenship Law (311/1985) stipulates the jus sanguinis principle and does not allow dual citizenship, unless an Austrian born person has parents with different citizenship. After ten years of residence, persons are generally eligible for citizenship, however they need to fulfill conditions such as the acquisition of German (level B1), knowledge about the history of Austria and no criminal record. Beneficiaries of asylum have a legal claim to citizenship after six years of residence, yet the same conditions apply here as well.

(EMN, 2015: 56). Holders of subsidiary protection and those with a humanitarian title do not benefit from these special regulations; they fall under general provisions, stipulating a minimum of ten years of legal residence of which five years need to be spent under settlement (MSNO, 2015).

**Table 9: Overview of important rights and duties for applicants of international protection and upon a positive outcome**

	Status	Rights/ Guarantees	Duties
<b>Stage I: Admissibility procedure</b>	Tolerated (Green Procedure Card)	- Protection from forced return	- Cooperation - Stay within municipality
<b>Stage II: Substantive procedure</b>	Asylum applicant (White Card for Temporary Residence)	- Basic Welfare Support - Health insurance - Access to housing market - Only charitable work or apprenticeship	- Cooperation - Place of residence within the province of Basic Welfare Support
<b>Stage III: Positive decision</b>	Beneficiary of Asylum (Convention passport)	- 3 years of legal residence - Social Insurance (including Needs-Based Minimum Benefit and health insurance) - Access to labour market	- Civic integration programs
	Subsidiary Protection (Grey Card for Persons Eligible for Subsidiary Protection)	- 1 year of legal residence - Social Insurance (including Needs-Based Minimum Benefit and health insurance) - Access to labour market	- Civic integration programs
	Humanitarian title (for example, Residence Permit Plus)	- 1 year of legal residence - Social Insurance (including Needs-Based Minimum Benefit and health insurance) - Access to labour market	- Civic integration programs

Source: own compilation.

### 5.3 Losing the right to reside in the country: negative decision, cessation, withdrawal

In the immediate context of international protection, the termination of a legal residence or a tolerated stay in Austria can generally be initiated following a negative decision in the admissibility procedure as it is mentioned in the Dublin procedure. Secondly, it may accompany a negative decision in the substantive procedure or upon reviewing a case.

If a person is denied a title to international protection or if a title expires and reasons for granting asylum or subsidiary protection are no longer given, the decision of the BFA is usually accompanied by a return decision. Persons are subsequently obliged to cooperate on their return, which usually receives a time limit of 14 days (a suspension of the time limit might be acquired on request). Voluntary return implies that the persons returning can apply to have their costs for transportation and the delivery of documents covered (BFA, 2018b). This amounts to a maximum of 1,000 EUR for the first 1,000 applicants based on an initiative of

2016/2017 (BFA, 2018c). Since late 2017, persons with a final negative decision are required to move to a specific Basic Welfare Support accommodation, where they are prepared for their return (Knapp, 2017).

In some cases, legal return consultation through the VMÖ can be compulsory even prior to a decision, namely if a negative decision is considered in advance (§ 52a Section 2 BFA-VG; cited in: Lukits, 2016, p.18). Likewise, restrictions to stay within a municipality or even within a given facility (HELPGv, 2017) can be imposed on persons who reside within a Basic Welfare Support accommodation provided by the federal government and who do not cooperate. If a person does not voluntarily return to the country of origin or if an immediate expulsion is necessary, authorities may enact a forced return. This requires a passport or a return certificate from the respective embassy. Following diplomatic difficulties regarding the issuance of according papers, the 2017 Aliens Law Amendment Act (145/2017) created a provision that allows BFA authorities to mandate persons for a self-instructed application (§ 46 Section 2 FPG 2005). Upon the acquisition of these documents, a forced return is carried out separately or with charter machines, often under Frontex Joint Return Operations. Since 2017, authorities are no longer obligated to communicate the date of the expulsion (Knapp, 2017: 31). Persons are allowed to receive Basic Welfare Support until the completion of a return, though services are partly curtailed if persons do not cooperate.

A third instance that generally leads to a termination of residence and a return order is when the status for beneficiaries of international protection is withdrawn. A withdrawal procedure can be initiated following the move of a person's main place of residence outside of Austria or when a person returns to the country of origin (EMN, 2015: 53). Additionally, § 6 of the AsylG 2005 stipulates a withdrawal when a person constitutes a threat to public order and safety or when a person commits a crime.<sup>12</sup> If such an aggravated crime occurs, criminal prosecution and the withdrawal procedure are initiated separately. While in previous years the latter could only be started following a legal conviction, the 2017 Aliens Law Amendment Act (145/2017) now allows for a withdrawal procedure right after a legal charge (§ 27 Section 2 AsylG 2005). Upon a conviction, the prison sentence is served in Austria and a forced return is carried out afterwards (DerStandard, 2016). However, in all cases of return decisions authorities might be confronted with a legal or factual impossibility of deportation, which usually leads to a toleration status.

Between 2011 and 2014, return decisions automatically resulted in an entry ban of 18 months. However, following an appeal before the VwGH (2012/18/0029), provisions in the FPG were changed in 2013 in order to conform to the EU Return Directive. As a consequence, entry bans of 5 years are now possible depending on a person's previous behaviour regarding public order and safety. A maximum entry ban of 10 years can be ordered upon a serious threat to public order and safety, and it can also be made unlimited. The latter case applies, for example, to persons who have been convicted to more than 5 years of prison or who have joined a criminal or terrorist group (Rutz, 2014: 20).

Stipulated under § 53 of the FPG 2005, entry bans are inherently tied to return decisions and consecutive residence terminating measures under Austrian law (Rutz, 2014: 9).

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<sup>12</sup> This usually applies to sentences of 3 years or more (DiePresse, 2016). Such crimes do not, for example, cover theft but they encompass robbery or rape, arguably delicts that are tied to physical assault or murder.

Following this condition, authorities are bound to consider the private and family life of aliens prior to their decision as well as all provisions associated with the residence terminating measures for the purpose of forcibly returning the person to the country of origin. This means that entry bans cannot be ordered if family, health or social reasons prevent a return. While any third country national can receive a return decision upon very serious offences, persons with no legal residence or a negative decision on international protection qualify as such for a return decision and they also qualify for an entry ban, if they violate the provisions on voluntary return. However, entry bans cannot be ordered in cases where persons are merely returned to another EU member state. A decision of the BFA can be appealed before the BVwG, usually within only two weeks, and persons are not allowed to bring forward new evidence (Rutz, 2014: 38p.).

## Detention

Aliens can furthermore be held in detention for a number of reasons that are strongly linked to their presence on Austrian territory. Arguably, this form of imprisonment is not conceptualized as punishment but as a measure of safeguarding administrative acts that are mainly related to the termination of legal stay and to guaranteeing a forced return. Aside from the EU Return and Reception Conditions Directive as well as the Dublin Regulation, provisions on detention are stipulated in the FPG. The grounds for detaining asylum applicants are therein firstly formulated as discretionary options that are conditioned by prior return decisions of the applicant, by Austria's (non-)responsibility for the case under the terms of the Dublin Regulation or by an enforceable but not final return decision. Secondly, a directory provision concerns safeguarding procedures, for example, upon violating the duty to report, not cooperating in measures for terminating residence or leaving the Initial Reception Centre without permission (EMN, 2014: 10pp.). Minors can only be held in detention from the age of 14 or higher. Authorities are generally required to check how far a measure can be considered appropriate and consequently seek more moderate solutions. This might be the ordinance to remain in an accommodation, to regularly notify a police station or to lodge a financial deposit at a police authority (EMN, 2014: 17). Considering a certain level of discretion, the Constitutional Court ruled in 2007 that the related statement of facts has to strike a balance in each individual case between considerations of public interest in safeguarding a procedure (safety and public order) and the personal freedom of the party concerned (VfSlg 18.145/2007; cited in: Feik, 2016: 168).

Following the administrative decision, the detention needs to be carried out within 14 days, during which time the detained person can address the BVwG as the appeal body. Likewise, detained persons are entitled to a free legal consultation, usually carried out by the VMÖ. The duration of detention is set to a maximum of three months for minors between 14 and 18 and six months for adults. In 2017, the provisions were further expanded to include grounds upon which detention can be prolonged to a maximum of 18 months stipulated by the EU Return Directive. Reasons for this length of detention can be a refusal to offer identification for the delivery of travel documents, the lack of approval documents for the journey, obstructing the police authorities in the course of doing their duty or intentionally setting technical obstacles for the return. Austrian detention infrastructure consists of a total of eight long-term facilities and seven small facilities (including the Vienna Airport transit zone) that can detain persons for up to 40 days (Global-Detention-Project, 2018).

## Suspended return and toleration

A return decision often does not automatically result in its execution as legal, technical or policy-related obstacles can intervene. Aside from the lack of relevant travel documents and the aforementioned legal obstacles concerning family units and personal integrity, health problems of the person to be deported or technical defaults in the transfer can also occur.

Non-removed (or tolerated) persons can accordingly receive a toleration card in order to verify their identity and to bind them to legal obligations, which, in turn, is argued to reduce the risk of abscondence. Arguably, despite or, in fact, precisely because of attempts to avoid a high politicization of this group, non-removed persons possess rights which are often overlooked by the officials<sup>13</sup> (Rosenberger & Küffner, 2016: 147). They continue to be entitled to basic welfare provisions if there is no personal negligence of return and can remain in the employment position if they have previously acquired a work permit. Children are allowed to continue going to school; however, persons are no longer entitled to participate in integration programmes (Lukits, 2016a: 29). After one year of toleration it is possible to lodge an application for residence due to 'particular protection', which is valid for 12 months and allows for unlimited access to the labour market. Furthermore, provisions allow for a consecutive application for a Red-White-Red Card Plus, which is granted under conditions that take into account the length of stay, the integration level as well as participation in the labour market (BFA, 2014).

## 5.4 Undocumented migrants

The first category of undocumented migrants<sup>14</sup> are persons who are entitled to legal entry and stay but do not register at any responsible authority. These can be tourists staying in non-commercial accommodations or EU citizens who do not register their place of residence. Unless they are registered, persons residing in Austria for an extended time period cannot apply for social aid services or child care or open a bank account, to name a few (Fassmann, 2015).

The second group of undocumented migrants are third country nationals whose presence within Austrian territory is irregular, meaning that they are not in possession of legal documents allowing for entry or stay. These can be third country nationals entering without a residence permit or a visa, persons overstaying their visa or persons who have entered the country via the asylum system. It has to be noted that applying for asylum in Austria (apart from family reunification) is inevitably tied to a legal limbo time period within the federal territory, as applications can generally not be lodged at diplomatic outposts. According to a standard form stipulated in the Schengen Borders Code entry can be refused through a decision that states the concise reasons. Since Austria generally only holds permanent border control posts at international airports and since legal or practical obstacles to an immediate

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<sup>13</sup> Official statistics on the number of people receiving a toleration card show great discrepancies compared to the gap between persons with a return order and the number of persons actually transferred.

<sup>14</sup> These statistics that are based on criminal records and assume an equal share of irregular migrants among criminal suspects and the entire residential population estimated between 65,000 and 183,000 undocumented migrants in Austria in 2014 (Fassmann, 2015).

return upon irregular entry are possible, it is important to consider that the authorities are allowed to order persons to remain in certain places (Kratzmann & Adel-Naim, 2012: 28-29).

Austrian law does not have any explicit rights concerning undocumented migrants but since human rights provisions apply to all persons within a territory independent of their legal status those migrants have access to medical care in case of an emergency and children are allowed to enter the formal education system. However, they cannot access the formal labour or housing market.

Apart from return, there are two major regularization pathways in Austria. The first one leads to a residence title such as the Settlement Permit or the Red-White-Red Card Plus, providing the person has established his/her private or family life in Austria according to Art. 8 ECHR or has, in addition to that, fulfilled the first module of the Integration Agreement (Kratzmann & Adel-Naim, 2012: 32). The second pathway can depart from the status of toleration due to obstacles to return or a residence permit issued on humanitarian grounds following an asylum procedure and can lead to a Residence Permit Plus. This permit is valid for one year and makes it possible, for example, to register for a place of residence and to access the labour market. A system of residence solidification, referred to as *Aufenthaltsverfestigung*, which is inherent to the entirety of provisions under the NAG 2005 increases the protection from removal parallel to the duration of stay, acquisition of the German language or the development of private and family ties (EMN, 2005). General amnesties for irregular migrants have been very rare in Austrian history due to a high scepticism regarding potential pull effects (Kratzmann & Adel-Naim, 2012: 57).



## 6 Refugee crisis driven reforms since 2015

The perception of a refugee crisis in Austria grew since the beginning of summer 2015, when increasingly large numbers of refugees arrived in clustered groups. An estimated 600,000 persons crossed Austria as a transit country in that year and 88,340 persons lodged an application for international protection (MSNO, 2016). At first, the increasingly congested Initial Reception Centre in Traiskirchen, the train stations and later the border crossing points were supported by a strong engagement of the civil society. Later referred to as ‘welcome culture’, socioeconomic, cultural and political initiatives for refugees emerged in the light of insufficient action of institutional and political actors. While this engagement quickly professionalized into emerging NGOs<sup>15</sup>, broader societal support declined and in part even turned into rejection over time (Müller & Rosenberger, 2017: 118). By September 2015, the federal government, led by an SPÖ chancellor and an ÖVP interior minister, had reintroduced systematic border controls and installed two Refugee Coordinators, who were responsible for organizing permanent accommodation facilities. Border management on the one hand and the distribution of persons and reception responsibilities on the other remained two central political concerns in the following months.

Concerning borders, the federal government successfully negotiated prolongations of a Schengen suspension with the Commission. It was then able to terminate the initial passing-through strategy as well as erect a border fence with Slovenia by early 2016. Although left empty, the attached facility system with tents and provisional sanitary devices continues to be sustained to this day. Aside from unilateral measures, the issue of border management was also tackled at the international level. In February 2016, Austrian officials seized the Western Balkans Summit for administrative and financial cooperation on policing prominent migratory routes between Greece and central European states.<sup>16</sup>

With regard to the distribution of asylum applicants on the national level, the federal government introduced the Federal Constitutional Act for the Accommodation and Distribution of Foreigners in Need of Help and Protection (120/2015) that enables it to enforce accommodation space in municipalities if the provinces do not fulfil the quotas. Concerning the relocation of refugees from the Hotspots in Greece and Italy, federal authorities displayed great resistance despite an Austrian approval in the Council. The Austrian chancellor tried to avoid the admission of 1,952 asylum applicants through a letter to the EU Commission stating how Austria had already admitted a disproportional amount of refugees.<sup>17</sup>

By the end of 2015, the federal government initiated a series of legal reforms that were adopted in May 2016. The 2016 Amendment Act (24/2016) introduced modifications to the

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<sup>15</sup> Newly emerging NGOs and initiatives like ‘Train of Hope’, ‘Happy.Thankyou.Moreplease!!’ or ‘Fremde werden Freunde’ compensated for state deficits in the realm of reception, coordination, and integration according to Simsa et al. (2016). They did not only contribute to a so-called ‘welcome culture’, but also provided important mediating structures. Yet, early scholarly policy recommendations such as the one by Simsa et al. (2016) urging for a proper public funding and institutional cooperation with these initiatives have largely been disregarded as of 2018.

<sup>16</sup> The non-invitation of Greek authorities led to temporary diplomatic tensions between Greece and Austria (DerStandard, 2016b).

<sup>17</sup> By January 2018, the government ended up admitting 43 persons from Italy (DiePresse, 2017a; DiePresse, 2018).



AsylG 2005, the FPG 2005 and the BFA-VG 2012. According to Knapp (2016a) the most important legal changes encompass:

- the possibility to act upon an emergency decree if the number of asylum applicants reaches a level that threatens public order and security, allowing authorities to temporarily suspend the processing of further applications (Section 5 §36 and §41 AsylG),
- a general confinement of the entitlement to asylum for three years upon which each case is reviewed (§3 AsylG),
- extended decision periods for BFA authorities from 6 to 15 months for the duration of 2 years (§22 AsylG),
- time limits for family reunification: in the first three weeks upon a family member's acquisition of an asylum status or after three years for beneficiaries of subsidiary protection (§35 AsylG),
- identification cards for asylum beneficiaries (§51a AsylG),
- obligatory contact with the ÖIF for beneficiaries of asylum and subsidiary protection (§67a AsylG).

Furthermore, an amendment of the FPG allowed for extended detention periods of 14 days (previously 120 hours) for the purpose of preparing a return (§39 FPG) as well as the use of video conferences for translation tasks during the admissibility procedure (amendment of the BFA Proceedings Act).

By the end of 2017, a second series of amendments was implemented. Legal reforms under the 2017 Aliens Law Amendment Act (145/2017) involved changes in the NAG 2005, the FPG 2005, the AsylG 2005, the BFA-VG 2012, the GVG-B 2005 and the GrekoG 1996, some of which include (according to Knapp, 2016b):

- the possibility of ordering house detention in the Basic Welfare Support facility for delinquent asylum applicants or persons coming from safe third countries,
- a confinement of the registered place of residence for asylum applicants to the province they were assigned to within their Basic Welfare Support and sanctions of 100 to 1,000 EUR upon violation,
- the possibility to order persons with a residence terminating decision to stay in an accommodation of the federal government and sanctions of 100 to 1,000 EUR upon violation,
- increased detention periods from previously 10 months to a new maximum of 18 months,
- extended decision periods for the BVwG from 6 to 12 months until May 2018.

Aside from these provisions on the asylum procedure, the integration of aliens and the public threat they potentially posed became highly debated political topics. The Integration Act (IntG) (68/2017) introduced an obligation for aliens to actively cooperate in the integration process. Persons granted asylum or subsidiary protection now need to sign an integration declaration that obligates them to take value and orientation courses as well as German classes. This is a considerable step, as these groups had previously been excluded from language and civic integration obligations stipulated for migrants under the NAG (EMN, 2015: 53). Non-participation can lead to sanctions on social aid provisions in most of the provinces. The Integration Year Act (IJG), furthermore, entails provisions on asylum applicants 'with a high probability of approval' and focuses on the integration of these groups into the labour market as a gateway to societal inclusion. It stipulates an integration program of at least one

year which evaluates competences and provides a number of courses. In doing so, it is tightly associated with the Approval and Assessment Act (AuBG) (55/2016) that sets up a framework for the assessment and approval criteria of professional qualifications.

The same legal package also includes the Anti-Face-Covering Act (68/2017), which prohibits the wearing of clothes or other objects that might hide or conceal facial features in public places or buildings. This measure has been openly declared as a symbolic act for an 'open society' (BMEIA, 2018).

Against the background of an increasingly polarized public opinion on the topics of immigration and asylum, new dynamics in party politics have evolved. Debates within the parties and tensions between the partners of the grand coalition have led to a reorganization of the federal government staff as an immediate response to the public discontent over how this perceived crisis is being dealt with. Upon the accession of a new SPÖ chancellor and ÖVP interior minister, the government continued to pursue a restrictive course, and yet support for the right-wing FPÖ was growing. With the FPÖ benefiting from a decades-long issue ownership and the ÖVP presenting the former foreign minister as the lead candidate with increasing anti-immigration positions at the 2017 national elections, these two parties maximized their share of votes successfully. While the FPÖ entered the government, the party with the most liberal stances on immigration and asylum, namely the Green Party, experienced a negative impact of these topics on their result. Together with internal conflicts and a party split, this led to the party dropping out of the National Council after 31 years.

## 7 Conclusion

Austria has a long tradition of being a destination country for migrants and refugees, a country that for decades promoted labour migration and admitted refugees during the communist era of Eastern Europe as well as during the time of the Balkan Wars. The notion of the latest advent of mass migration to Austria relates to the increasing number of asylum applications since 2013 and in particular in 2015. In that year alone, application numbers reached a six-decade high of 88,340 persons, while thousands of others crossed federal territory for their onward journey. Besides the quantity and frequency of immigration, this latest phase also displays novelties concerning the composition of the newcomers in terms of countries of origin. Arguably, the three largest groups of asylum applicants in 2015, namely Syrians, Afghans and Iraqis, are relatively new to Austria, with their numbers increasing by 1,265 per cent, 430 per cent, and 232 per cent respectively between 2011 and 2017.

Lawmakers reacted to these latest developments by introducing a series of legislative reforms that are shaping the consecutive and future developments of asylum and migration. While Austria displays a comparatively high level of standards concerning international protection, it is difficult to assess the impact of the latest fast-paced reforms. On the one hand, reception facilities were expanded, creating new capacities and co-ordination structures that improved the previously highly critical overcrowding of the Initial Reception Centre Traiskirchen (Volksanwaltschaft, 2015). Likewise, additional civic integration measures were created for beneficiaries of international protection which were supplemented by broad local civil society and NGO involvement. The federal overall policy goal however, aimed at reducing the number of newcomers in the long run. In 2016, the entitlement to asylum was accordingly limited initially to three years and family reunification was restrained through application time limits. The federal government also introduced a unilateral annual quota for asylum applications that allows for acting upon an emergency decree and suspending further processing of applications upon exhaustion. While application figures have not reached the according limits by 2018, legal experts (Obwexer, 2016) have been highly critical, pointing out how preventing of persons from lodging an application to international protection would violate human rights, EU and constitutional laws. Thus, a *de facto* implementation of the annual quota provision has to be awaited. In addition, Austria has been conducting systematic border controls along certain checkpoints, thereby repeatedly extending Schengen exemption provisions. In 2017, further reforms particularly aimed at tightening duties for asylum applicants and persons with final negative decisions, as well as setting up integration duties that also work as means to obtain social services in their full extent.

Apart from state internal conflicts, border management and the distribution of refugees from Hotspots became highly contested issues in Austria's relationship to other EU member states. The notion of porous external borders, Austria's geopolitical position in the middle of the Schengen Area and its high admission rate in 2015 led to a resistant stance on the EU-wide distribution despite the political approval and the search for non-EU state alliances in the transnational policing of borders along the Western Balkan Route.

While the principle of asylum is deeply embedded in the Austrian constitution and European Union law, the governance of immigration and asylum has in recent years been repeatedly impeded by the Constitutional Court (VfGH), which intervened in both federal and provincial laws that aimed at restricting refugee's rights and entitlements. First and foremost, this relates to the federal government's attempts of rendering asylum procedures more efficient while decreasing the effectiveness of legal remedies. The VfGH annulled provisions

that tightened appeal periods and urged the reparation of appeal regulations for persons in detention. Likewise, it repeatedly ruled in favour of private and family life needs during family asylum procedures. The VfGH did thereby not only address violations of fundamental rights along a procedural dimension, but also touched upon material asylum law. For example, it ruled that women with a western-oriented lifestyle could validate this as a ground for international protection, even if the lifestyle had been adopted in the host country.

Aside from federal legislation, the Court has also addressed increasingly restrictive social welfare provisions by the provinces of Upper Austria and Lower Austria. Accordingly, attempts of a general attachment of the Needs-Based Minimum Benefit to the length of residence and size of households were annulled. Austrian provinces have not only chosen diverging paths in the realm of social aid services, but also displayed discrepancies regarding reception quotas for asylum applicants. This turned into a major site of conflict during the crisis. The fulfilment of admission quotas and the provision of allowances and accommodation facilities was debated alongside matters of financial resources, social aid deservingness and cultural or identity-based issues, and it resulted in the creation of a federal constitutional law allowing the federal instalment of reception facilities, even against the will of the provinces and municipalities.

Finally, it was not only the state and its institutions that affected the life of immigrants and refugees, the so-called ‘refugee crisis’ has doubtlessly also had an impact on the Austrian political landscape. It was a top priority topic on the political agenda paired with strong public opinions. Accordingly, in the wake of the crisis, the federal government underwent a reconfiguration with party internal exchanges of prominent figures such as the interior minister and the chancellor in early 2016. During the national elections of 2017, asylum and migration remained highly salient topics. The major winning parties were the right-wing FPÖ, which had had a strong ownership of the issue for decades, and the conservative ÖVP, whose lead candidate had previously been foreign minister and had particularly pushed an agenda for order and security.

## Appendices

### Glossary and list of abbreviations

Abbreviation	German	English
AGesVG	Anti-Gesichtsverhüllungsgesetz	Anti-Face-Covering Act
AMS	Arbeitsmarktservice	Public Employment Service
AsylG	Asylgesetz	Asylum Act
AuBG	Anerkennungs- und Bewertungsgesetz	Approval and Assessment Act
BFA	Bundesamt für Fremdenwesen und Asyl	Federal Office for Immigration and Asylum
BFA-VG	BFA-Verfahrensgesetz	BFA-Proceedings Act
BMASK	Bundesministerium für Arbeit, Soziales, Gesundheit und Konsumentenschutz	Federal Ministry for Labour, Social Affairs and Consumer Protection
BMEIA	Bundesministerium für Europa, Integration und Äußeres	Federal Ministry for Europe, Integration and Foreign Affairs
BM.I	Bundesministerium für Inneres	Federal Ministry of Internal Affairs
BVwG	Bundesverwaltungsgericht	Federal Administrative Court
EAST	Erstaufnahmestelle	Initial Reception Centre
FPG	Fremdenpolizeigesetz	Aliens Police Act
GrekoG	Grenzkontrollgesetz	Border Control Act
IJG	Integrationsjahrgesetz	Integration Year Act
IntG	Integrationsgesetz	Integration Act
NAG	Niederlassungs- und Aufenthaltsgesetz	Settlement and Residence Act
OGH	Oberster Gerichtshof	Supreme Court of Justice
ÖIF	Österreichischer Integrationsfonds	Austrian Integration Fund
VA	Volksanwaltschaft	Austrian Ombudsman Board
VMÖ	Verein Menschenrechte Österreich	Human Rights Group Austria
VfGH	Verfassungsgerichtshof	Constitutional Court
VwGH	Verwaltungsgerichtshof	Administrative High Court

## Annex I: Overview of the legal framework on migration, asylum and reception conditions

Legislation title (original and English) and number	Date	Type of law	Object	Link/ PDF
<b>Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich (Niederlassungs- und Aufenthaltsgesetz – NAG)</b> Federal Act concerning the Settlement and Residence in Austria (NAG)	StF: BGBl. I Nr. 100/2005	Law	Permission and withdrawal of legal residence and settlement permits	<a href="#">RIS</a>
<b>Bundesgesetz über die Gewährung von Asyl (AsylG)</b> Federal Act concerning the Granting of Asylum	StF: BGBl. I Nr. 100/2005	Law	Asylum applicants and beneficiaries of international protection: criteria on entry, identification, qualification, asylum procedure and return	<a href="#">RIS</a>
<b>Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetiteln (FPG)</b> Federal Act on the Exercise of Aliens' Police, the Issue of Documents for Aliens and the Granting of Entry Permits	Stf: BGBl. I NR. 100/2005	Law	Aliens' entrance to federal territory, grounds for rejection, residence terminating measures, return, toleration and the issuance of documents for foreigners	<a href="#">RIS</a>
<b>Bundesgesetz, mit dem die allgemeinen Bestimmungen über das Verfahren vor dem Bundesamt für Fremdenwesen und Asyl zur Gewährung von internationalem Schutz, Erteilung von Aufenthaltstiteln aus berücksichtigungswürdigen Gründen, Abschiebung, Duldung und zur Erlassung von aufenthaltsbeendenden Maßnahmen sowie zur Ausstellung von österreichischen Dokumenten für Fremde geregelt werden (BFA-Verfahrensgesetz – BFA-VG)</b> Federal Act on the general rules for procedures at the federal office for immigration and asylum for the granting of international protection, the issuing of residence permits due to extenuating circumstances, deportation, tolerated stay and issuing of stay terminating measures,	StF: BGBl. I Nr. 87/2012	Law	Procedures for application to international protection, return, toleration and residence terminating measures	<a href="#">RIS</a>

furthermore the issuing of documents for aliens. BFA Proceedings Act (BFA-VG)				
<b>Bundesgesetz über die Einrichtung und Organisation des Bundesamtes für Fremdenwesen und Asyl (BFA-Einrichtungsgesetz – BFA-G)</b> Federal Act on the implementation and organization of the federal immigration and asylum office	StF: BGBl. I Nr. 87/ 2012	Law	Institutional framework concerning organization and functioning of the BFA	<a href="#">RIS</a>
<b>Vereinbarung zwischen dem Bund und den Ländern gemäß Art. 15a B-VG über gemeinsame Maßnahmen zur vorübergehenden Grundversorgung für hilfs- und schutzbedürftige Fremde (Asylwerber, Asylberechtigte, Vertriebene und andere aus rechtlichen oder faktischen Gründen nicht abschiebbare Menschen) in Österreich</b> Agreement of 15 July 2004 between the federal state and the provinces under Article 15a of the Federal Constitution concerning joint action for the temporary Basic Welfare Support of aliens in need of help and protection in Austria	StF: BGBl. I Nr. 80/ 2004	Agreement based on constitutional law	Division of competences of Basic Welfare Support during substantive procedure and distribution of asylum applicants across provinces	<a href="#">RIS</a>
<b>Bundesgesetz, mit dem die Grundversorgung von Asylwerbern im Zulassungsverfahren und bestimmten anderen Fremden geregelt wird (GVG-B)</b> Federal Act to regulate the Basic Welfare Support of asylum applicants in the admission procedure and of certain other foreigners (GVG-B)	StF: BGBl. I Nr. 405/ 1991	Law	Basic Welfare Support during admissibility procedure	<a href="#">RIS</a>
<b>Vereinbarung zwischen dem Bund und den Ländern gemäß Artikel 15a B-VG über die Erhöhung ausgewählter Kostenhöchstsätze des Artikel 9 der Grundversorgungsvereinbarung</b> Agreement between the federal state and states under Article 15a of the Basic Care Act concerning the raise of selected maximum cost rates of Article 9 Basic Welfare Support Agreement <b>Amended by:</b>	StF: BGBl. I 46/ 2013	Agreement based on constitutional law	Increase of maximum expenses on Basic Welfare Support	<a href="#">RIS</a>

Agreement between the federal state and states under Article 15a concerning the raise of selected maximum cost rates of Article 9 Basic Welfare Support Agreement	StF: BGBl 48/2016			
<b>Bundesverfassungsgesetz für die Unterbringung und Aufteilung von hilfs- und schutzbedürftigen Fremden</b> Federal Constitutional Act for the accommodation and distribution of foreigners in need of help and protection	StF: BGBl 120/2015	Constitutional law	Availability of accommodation for the purpose of Basic Welfare Support within municipalities (according to a quota) and the right of the federal government to enforce accommodation space within its own properties	<a href="#">RIS</a>
<b>Bundesgesetz über die Durchführung von Personenkontrollen aus Anlass des Grenzübertritts (GrekoG)</b> Federal Act concerning the implementation of identity checks at the instance of border crossings (GrekoG)	StF: BGBl 435/1996	Law	Border facilities and border controls	<a href="#">RIS</a>
<b>Bundesgesetz, mit dem ein Integrationsgesetz (IntG) und ein Anti-Gesichtsverhüllungsgesetz (AGesVG) erlassen sowie das Niederlassungs- und Aufenthaltsgesetz, das Asylgesetz 2005, das Fremdenpolizeigesetz 2005, das Staatsbürgerschaftsgesetz 1985 und die Straßenverkehrsordnung 1960 geändert werden.</b> Federal Act on the enactment of an integration law and anti-face-covering law (IntG, AGesVG)	StF: BGBl 68/2017	Law	Obligation to participation in civic integration courses and ban on public wearing of face-covering clothes	<a href="#">BGBl</a>
<b>Bundesgesetz zur Arbeitsmarktintegration von arbeitsfähigen Asylberechtigten und subsidiär Schutzberechtigten sowie AsylwerberInnen, bei denen die Zuerkennung des internationalen Schutzes wahrscheinlich ist, im Rahmen eines Integrationsjahres (Integrationsjahrgesetz – IJG)</b> Federal Act on labour market integration of beneficiaries of asylum and subsidiary	StF: BGBl. I Nr. 75/2017	Law	Labour market integration of beneficiaries of asylum and subsidiary protection, as well as specific asylum applicants	<a href="#">RIS</a>



protection, as well as asylum applicants, who are likely to receive international protection as part of an integration year (IJG)				
<b>Bundesgesetz über die Vereinfachung der Verfahren zur Anerkennung und Bewertung ausländischer Bildungsabschlüsse und Berufsqualifikationen (Anerkennungs- und Bewertungsgesetz – AuBG)</b> Federal Act on the simplification of procedures for the accreditation and evaluation of foreign education and qualification certificates (AuBG)	Stf: BGBl. I Nr. 55/ 2016	Law	Education and qualification certificates for integration into the labour market and education system	<a href="#">RIS</a>
<b>Bundesgesetz über die österreichische Staatsbürgerschaft</b> Federal Act on Citizenship	StF: BGBl 311/ 1985	Law	Criteria for naturalisation	<a href="#">RIS</a>
<b>Verordnung der Bundesministerin für Inneres über den Beirat für die Führung der Staatendokumentation</b> Ordinance of the federal minister of internal affairs concerning the advisory board on the operation of Country of Origin Information	StF: BGBl. II Nr. 413 /2005	Decree		<a href="#">RIS</a>
<b>Verordnung der Bundesregierung, mit der Staaten als sichere Herkunftsstaaten festgelegt werden</b> Ordinance of the federal government, concerning the determination of countries as safe countries of origin	StF: BGBl. II Nr. 177/ 2009	Decree		<a href="#">RIS</a>
<b>Verordnung der Bundesministerin für Inneres zur Durchführung des Asylgesetzes 2005 (AsylG-DV)</b> Ordinance of the federal minister of internal affairs, for the implementation of the Asylum Law 2005 (AsylG-DV)	StF: BGBl II Nr. 448/ 2005	Decree		<a href="#">RIS</a>
<b>Verordnung der Bundesministerin für Inneres, mit der das unbefugte Betreten und der unbefugte Aufenthalt in den Betreuungseinrichtungen des Bundes verboten wird 2005</b> Ordinance of the federal minister of internal affairs, concerning the prohibition of	StF: BGBl. II Nr. 2/ 2005	Decree		<a href="#">RIS</a>

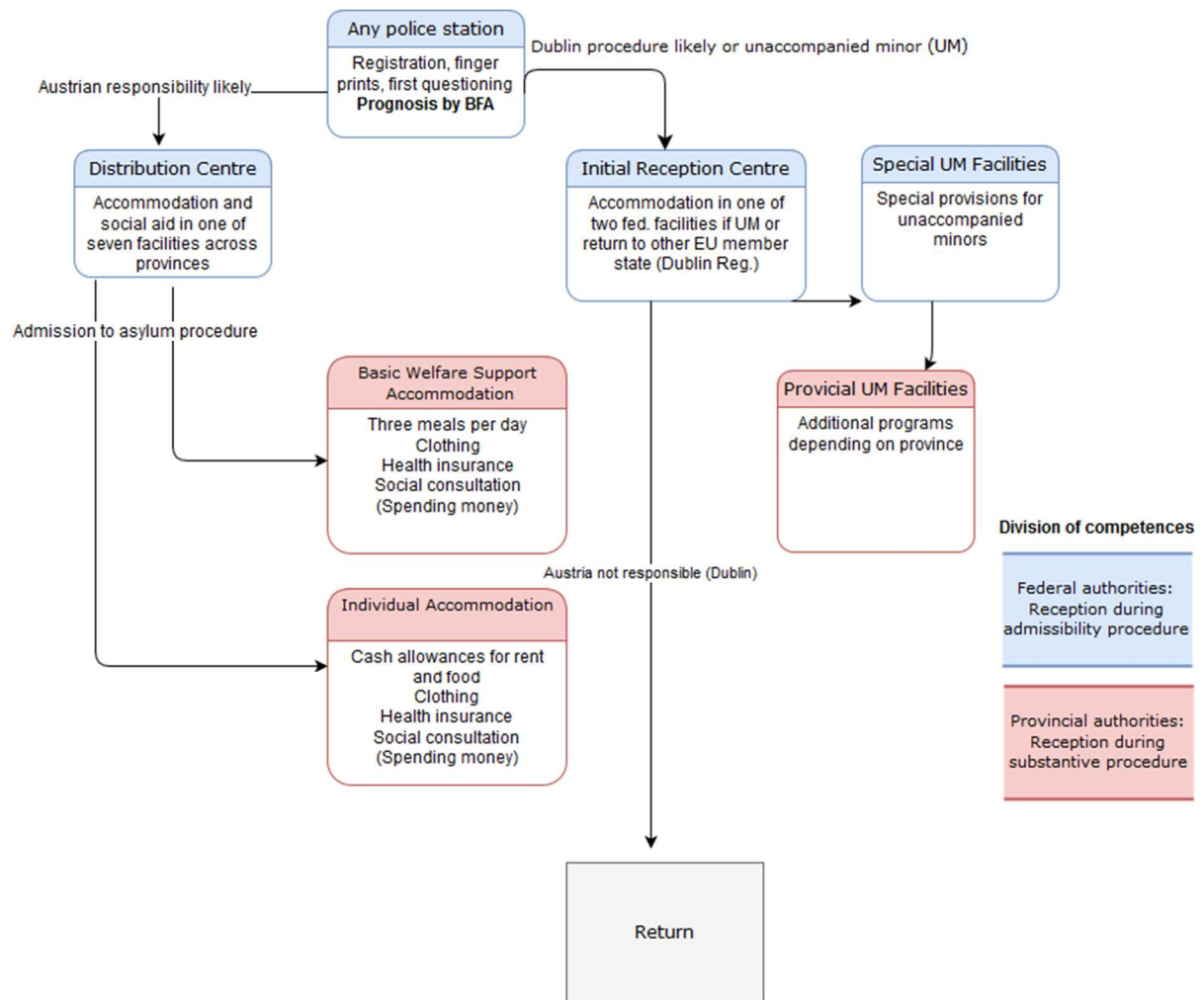
unauthorised entry and stay in federal care facilities				
<b>Verordnung der Bundesministerin für Inneres über die Anhaltung von Menschen durch die Sicherheitsbehörden und Organe des öffentlichen Sicherheitsdienstes</b> Ordinance of the federal minister of internal affairs, concerning the arrest of persons by the security authorities and institutions of the public security service	StF: BGBl. II Nr. 128/1999	Decree		<a href="#">RIS</a>

**Annex II: List of authorities involved in migration governance**

<b>Authority</b> (English and original name)	<b>Tier of government</b> (national, regional, local)	<b>Type of organization</b>	<b>Area of competence in the fields of migration and asylum</b>	<b>Link</b>
<b>Bundesministerium für Europa, Integration und Äußeres (BMEIA)</b> Federal Ministry for Europe, Integration and Foreign Affairs	Federal	Ministry	Borders, immigration, emigration, return, citizenship, asylum	<a href="#">Link</a>
<b>Bundesministerium für Arbeit, Soziales, Gesundheit und Konsumentenschutz (BMAK)</b> Federal Ministry of Labour, Social Affairs, Health and Consumer Protection	Federal	Ministry	Access to labour market, integration	<a href="#">Link</a>
<b>Bundesministerium für Inneres (BM.I)</b> Federal Ministry of the Interior	Federal	Ministry	Visa, diplomatic services, integration	<a href="#">Link</a>
<b>Bundesamt für Fremdenwesen und Asyl (BFA)</b> Federal Office for Immigration and Asylum	Federal	Executive body	Protection	<a href="#">Link</a>
<b>Österreichischer Integrationsfonds (ÖIF)</b> Austrian Integration Fund	Federal	Executive body	Integration	<a href="#">Link</a>
<b>Arbeitsmarktservice (AMS)</b> Public Employment Service	Federal	Executive body	Labour market	<a href="#">Link</a>
<b>Verfassungsgerichtshof (VfGH)</b> Constitutional Court	Federal	Judiciary	Protection	<a href="#">Link</a>
<b>Verwaltungsgerichtshof (VwGH)</b> Administrative High Court	Federal	Judiciary	Protection	<a href="#">Link</a>
<b>Bundesverwaltungsgericht (BVwG)</b> Federal Administrative Court	Federal	Judiciary	Protection	<a href="#">Link</a>

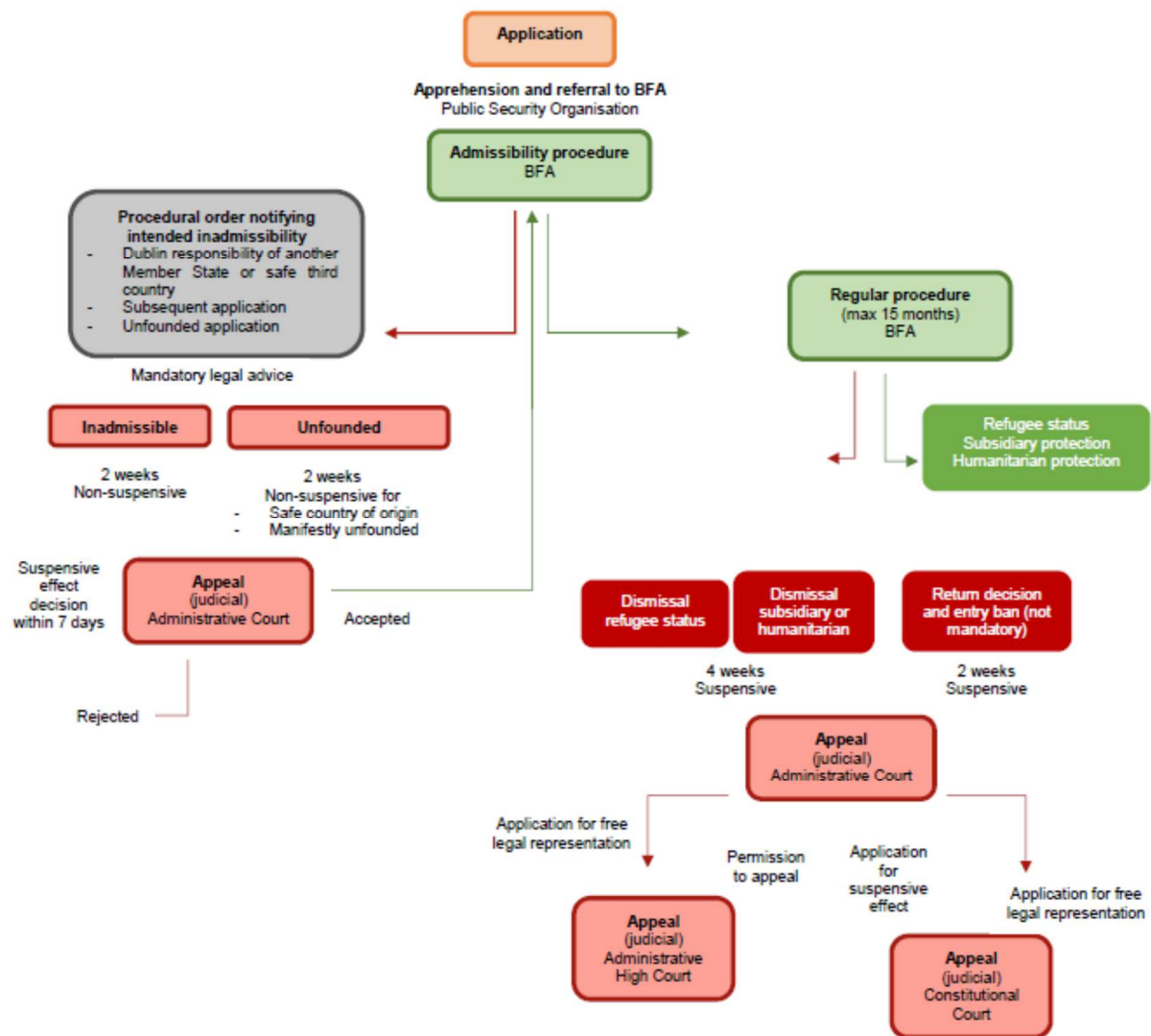
<b>Fonds Soziales Wien</b> Vienna Social Fund	Provincial	Executive body	Reception/ Integration	
<b>Koordinationsstelle für Ausländerfragen Niederösterreich</b> Coordination Office for Aliens Affairs Lower Austria	Provincial	Executive body	Reception/ Integration	
<b>Referat Grundversorgung für Fremde Burgenland</b> Department of Basic Welfare Support for Alien Burgenland	Provincial	Executive body	Reception/ Integration	
<b>Referat für Flüchtlingsangelegenheit Steiermark</b> Department of Refugee Affairs Styria	Provincial	Executive body	Reception/ Integration	
<b>Referat für Flüchtlingswesen und Integration Kärnten</b> Department of Refugee and Integration Affairs Carinthia	Provincial	Executive body	Reception/ Integration	
<b>Referat Grundversorgung für Fremde Oberösterreich</b> Department of Basic Welfare for Aliens Upper Austria	Provincial	Executive body	Reception/ Integration	
<b>Referat Soziale Absicherung und Eingliederung Salzburg</b> Department of Social Coverage and Integration Salzburg	Provincial	Executive body	Reception/ Integration	
<b>Flüchtlingskoordination Tirol, Tiroler Sozialer Dienst</b> Refugee Coordination Tyrol, Social Services Tyrol	Provincial	Executive body	Reception/ Integration	
<b>Abteilung Gesellschaft, Soziales und Integration Vorarlberg</b> Department for Society, Social Affairs and Integration Vorarlberg, Caritas Vorarlberg	Provincial	Executive body	Reception/ Integration	

### Annex III: Flow chart of the national reception system



Source: Own design.

## Annex IV: Flow chart of the Austrian asylum procedure



Source: AIDA, Asylum Information Database, Country Report Austria 2016 (update 2017), p. 15, available at <http://www.asylumineurope.org/reports/country/austria>

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# **RESPOND**

## **Germany**

### **Country Report**

**D1.2 – May 2018**

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of Mass Migration in Europe and  
Beyond (770564)



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## Disclaimer

This national report presents macro level information about the socio-economic, cultural, political, legal, institutional and policy context of migration governance in Germany between 2011 and 2017. The quantitative and qualitative data for this report has been compiled from various data sources (see citations). The authors relied on information freely available online, from official government-funded (European and German) institutions and organizations. For Europe, we utilized Eurostat (European Commission Statistical Office - <http://ec.europa.eu>) whilst for Germany we utilized various sources, the most official (centralizing) of which is the Federal Statistical Office of Germany (*Statistisches Bundesamt* – [www.destatis.de](http://www.destatis.de)). The office collects data on a systematic and coherent manner and makes most of the data available on open access (most documents are easily accessible online via the office's website). For case-law, we relied on EDAL (European Database of Asylum Law - [www.asylumlawdatabase.eu](http://www.asylumlawdatabase.eu)), for population and asylum we sourced data from the Deutsche Bundestag, BMI (*Bundesministerium des Innern* - [www.bmi.bund.de](http://www.bmi.bund.de)), BAMF (*Bundesamt für Migration und Flüchtlinge* – [www.bamf.de](http://www.bamf.de)), and BMJV (*Bundesministerium der Justiz und für Verbraucherschutz* - <http://www.bmjbv.de>). We also utilized various other data banks accessible online such as AIDA (Asylum Information Database – [www.asylumineurope.org](http://www.asylumineurope.org)) a database managed by the European Council on Refugees and Exiles – ECRE: [www.ecre.org](http://www.ecre.org)) and PROASYL (a human rights-based network organization concerned with refugee protection - [www.proasyl.de](http://www.proasyl.de)). We also relied on public and university library catalogues. All sources are appropriately referenced.

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**Table 1. Basic terminology regarding asylum laws and procedures in Germany<sup>1</sup>**

Arrival centre ( <i>Ankunftszentrum</i> )	Centre where various processes such as registration, identity checks, interview and decision-making are streamlined in the same facility. Around 26 branch facilities of the BAMF operate as arrival centres.
Arrival certificate ( <i>Ankunftsnachweis</i> )	Certificate received upon arrival in the arrival centre. This replaced the BÜMA in 2016.
Formal decision	Cases which are closed without an examination of the asylum claim's substance, e.g. because it is found that Germany is not responsible for the procedure or because an asylum seeker withdraws the application.
Geographical restriction ( <i>Residenzpflicht</i> )	Also known as "residence obligation", this refers to the obligation on asylum seekers to stay in the district of the Federal State where they have been assigned for a maximum period of 6 months, pursuant to Section 56 Asylum Act. Derogations apply for applicants who are obliged to stay in initial reception centres for the entire asylum procedure or up to 24 months.
Initial reception centre ( <i>Aufnahmeeinrichtung</i> )	Reception centre where the BAMF branch office is located and where asylum seekers are assigned to reside.
Residence rule ( <i>Wohnsitzregelung</i> )	Obligation on beneficiaries of international protection to reside in the Federal State where their asylum procedure was conducted, pursuant to Section 12a Residence Act. This is different from the geographical restriction imposed on asylum seekers.
Revision	Appeal on points of law before the Federal Administrative Court.
Secondary application	Under Section 71a Asylum Act, this is a subsequent application submitted in Germany after the person has had an application rejected in a safe third country or a Dublin Member State.
Special officer ( <i>Sonderbeauftragter</i> )	Specially trained BAMF officer dealing with vulnerable asylum seekers.
Special reception centre ( <i>Besondere Aufnahmeeinrichtung</i> )	Reception centre where accelerated procedures are carried out in accordance with Section 30a Asylum Act. Two such centres exist in Bavaria at the moment (Bamberg, Manching/Ingolstadt). Special reception centres are distinct from initial reception centres.
Transit centre ( <i>Transitzentrum</i> )	Initial reception centre hosting asylum seekers for a period of up to 24 months, in application of Section 47(1b) Asylum Act. Three such centres exist in Bavaria at the moment (Manching/Ingolstadt, Regensburg and Deggendorf).

Source: AIDA

<sup>1</sup>Compiled and adapted from AIDA Country Report (Germany). Available at: [http://www.asylumineurope.org/sites/default/files/report-download/aida\\_de\\_2017update.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_de_2017update.pdf). Retrieved 13/04/2018

**Table 2. Abbreviations often used in asylum laws and procedures in Germany<sup>2</sup>**

ARE	Arrival and Return Centre   Ankunfts- und Rückführungseinrichtung
BAMF	Federal Office for Migration and Refugees   Bundesamt für Migration und Flüchtlinge
BÜMA	Confirmation of Reporting as Asylum Seeker   Bescheinigung über die Meldung als Asylsuchender
BVerfG	Federal Constitutional Court   Bundesverfassungsgericht
CEFR	Common European Framework of Reference for Languages
CJEU	Court of Justice of the European Union
CPT	European Committee for the Prevention of Torture
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GGUA	Gemeinnützige Gesellschaft zur Unterstützung Asylsuchender
ILGA	International Lesbian and Gay Association
OVG	Higher Administrative Court   Oberverwaltungsgericht
VG	Administrative Court   Verwaltungsgericht

Source: AIDA

<sup>2</sup>Compiled and adapted from AIDA Country Report (Germany). Available at: [http://www.asylumineurope.org/sites/default/files/report-download/aida\\_de\\_2017update.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_de_2017update.pdf). Retrieved 13/04/2018

## Summary

- **An Immigration Model Based on Restrictions**

- **Guest Workers:** Post-1945 immigration to (West-) Germany is characterized by the “**guest worker**” system (*Gastarbeiter*) for the period between 1955 to 1973.
- **Lack of Long Term Migration Policy:** The assumption of the eventual return of the *Gastarbeiter* to their countries of origin prevented the development of socio-political or infrastructural concepts to account for longer-term residence or societal integration of immigrants in Germany. <
- **Transition to an asylum regime.** In 1973, the recruitment ban (*Anwerbestopp*), marked the official end of the era of foreign labor recruitment to West Germany. What followed was a slow transition to an asylum regime with the worldwide rising numbers of asylum seekers. In 1980, for the first time, more than 100,000 asylum applications were registered. The political debate around migration in the 1980s focussed strongly on the proclaimed necessity to restrict the access to asylum. A growing “repressive consensus” resulted in the 1992-93 reform of asylum laws.
- **The Post Cold War Migration/Balkan Wars - “asylum compromise”:** Through a prolonged campaign from the conservative party that was accompanied by racist violence all over the recently unified Germany, the social-democratic party in 1992 gave in and accepted a reform of article 16 of the German **Basic Law**, in which the right to political asylum was enshrined. The so-called “asylum compromise”, passed in 1993, introduced the notions of Safe Third Countries, Safe Countries of Origin, accelerated asylum procedures at international airports, reinforcement of border controls, and a separate social welfare regime for asylum seekers which saw benefits reduced by 30 % and mandated a preference of in-kind transfers.
- **Paradigm shift – the new Act on Migration.** In the context of a new red-green coalition government the consensus grew that Germany is a country of immigration that needs to be governed. The **Act on Migration** was eventually formulated that replaced the **Act on Foreigners** and which simplified the available residence statuses, EU directives of the CEAS as well as the **Blue Card Directive** were transposed into national law, and for the first time in the post-war history a national integration policy was set up.
- **EU Accession as biggest legalisation scheme:** the two rounds of EU accession of Eastern European countries in the 2000s, automatically legalised the presence of up to a million persons in Germany that was highly scandalized as irregular before.
- **Post 2011 Migration:** Since 2011 the numbers of asylum seeking migrants has steadily risen, however the events of summer 2015 took Germany by a surprise. After some months of an open door policy (with a suspension of the Dublin regulation) several regulations were set up to restrict the access and accelerate the procedures whereas for those refugees that were defined as having a “perspective to stay” new integration measures were being put in place. Today, the presence of asylum seekers in the German territory is rigidly controlled by a multilevel system of laws and regulations from the EU level down to the federal level, the federal state level, and the municipal level (see Aumüller, Daphi, & Biesenkamp, 2015; Schammann&Kühn, 2016; Wendel, 2014 cited in El-Kayed and Hamann 2018: 138). From

housing to healthcare, from employment to education, this multilevel legislative mesh regulates the lives of asylum seekers and refugees as a specific category of migrants set apart from others; limiting their movement, constraining their life choices, asserting geographical limitations and in essence creating borders within borders.

### **Numbers and Data Issues: Overview of Quantitative Analysis**

- Immigrants in Germany: Around 20% of Germans today (out of an 80 million population), has a migration background.<sup>3</sup> Most of this migration background is from Turkey, followed by people from Poland, Russia and Italy. Latest data on net migration (2016) shows a positive balance of 497,964.
- Steep Rise in asylum claims: Since 2011, there has been an increase in the number of people with a migration background. Asylum Applications is one major reason for this. In 2011 Germany registered 53.347 asylum applications. In 2016 Germany registered 745.545 asylum applications
- **Religion:** Most asylum seekers arriving in Germany after 2011 have come from Muslim-majority countries (Syria, Afghanistan, Iraq, Eritrea, Sudan).
- **Gender Issues:** The data shows that most asylum seekers are male and young (average of 30 yrs). This has been widely problematized in German public debate whereas in 2015 and 2016 the number of women and children was steadily rising up to 40% (depending on the age group even more). The specific situation of female asylum seeking migrants and their heightened risk of being a victim of (gender based) violence was taken up by welfare organizations and some Länder leading to the set-up of “Violence prevention programs” (Ministry of family affairs, youth and women).
- **Restrictions:** Through a series of restrictive measures (including the EU-Turkey Statement) Germany was able to cap the numbers of asylum applications and resettlement plans. In 2017 we see the number of applications reduced to 207,157.
- **Ambiguity and Lack of Transparency:** Government generated statistics on asylum in Germany can be rather ambiguous and it is often highly politicized. The data is also not always transparent and contradictions can be found even on data produced for the same purposes by the same governmental institutions (i.e. BAMF).

### **Political Organization and Asylum and Immigration in German Law**

- In Germany, **administrative responsibilities in the area of migration and asylum are strongly intertwined and distributed among the federal, state and municipal levels** (cf. section 2.3). The right of asylum recognizes the definition of “refugee” **as established in the 1951 Refugee Convention in the form of the 1967 protocol.** Furthermore the term “refugee” must be interpreted in the sense of **the 2011/95/EU directive.** Generally, these protection is a part of the asylum procedure itself and are verified by the **Federal Office For**

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<sup>3</sup> In Germany, the definition “migratory background” refers to people who have been born as non-German citizen or whose mother and/or father have not been German citizen at the time of their birth. This definition differs from other European countries such as Austria, where both parents have been born abroad or Switzerland, where “migratory background” is defined independently from the citizenship status.



**Migration and Refugees (*Bundesamt für Migration und Flüchtlinge* - BAMF)** without any further application.

- **Current Asylum Law, Application Procedures and Overall Legal Status of Foreigners**
  - The German Asylum regime is based on three main acts:
    - **The Asylum Act (*Asylgesetz* - AsylG)**
    - **The Residence Act (*Aufenthaltsgesetz* - AufenthG)**
    - **The Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz* – AsylbG)**
  - The **Asylum Act** is, however, the central to the German asylum system. According to the **Asylum Act (*Asylgesetz*)** an asylum seeker coming to Germany may be granted one of the following four forms of protection after his/her case is assessed. It is only when none of the above forms of protection can be considered is the application then rejected.
    - **Art 16a of the Basic Law**
    - **Award of Refugee Protection (Section 3 of the Asylum Act)**
    - **Award of Subsidiary Protection (Section 3 of the Asylum Act)**
    - **Imposition of a Ban of Deportation (Section 60V+ VII of the Residence Act)**
- **Constitutional entrenchment of the principle of asylum**
- **The right of asylum for persons persecuted on political grounds is a basic right stipulated in Art. 16a GG.** Apart from integration, labour market and health policies, migration policy is increasingly intertwined with development policy, e.g. in the area of assisted return. But also other areas such as security policy and anti-discrimination policy are not to be neglected in that respect.
- **Länder, German Federation, EU and UN: Multi-Level Continuities and Discontinuities in Asylum Legislation/ Procedures**
  - The administrative court procedure is three tiered: **Administrative Courts (*Verwaltungsgerichte*)** on the local level - **Higher Administrative Courts (*Oberverwaltungsgerichte* or *Verwaltungsgerichtshöfe*)** on the *Länder* level - **Federal Administrative Court (*Bundesverwaltungsgericht*)**. As sole competent court it shall rule at first and last instance on regarding disputes against expulsion orders in accordance with **§ 58a of the Residence Act** and their implementation. **§ 58a** stated that the supreme **Land authority** may issue a deportation order for a foreigner without a prior expulsion order based on the assessment of facts, in order to avert a special danger to the security of the Federal Republic of Germany or a terrorist threat.

### **Refugee Crisis Driven Reforms: Amendments to Current Laws and New Legislation**

- Several amendments to current laws have been adopted in recent years due to the refugee crisis. The major amendments and their most important implications have entered into force:

- October 24, 2015, the ‘**Asylum Package I**’ or **Act on the Acceleration of Asylum Procedures** (*Asylverfahrenbeschleunigungsgesetz*).
- August 1, 2015, the **Act to Redefine the Right to Stay and the Termination of Residence**.
- November 1, 2015, the **Act to improve the Housing, Care, and Treatment of Foreign Minors and Adolescents**
- February 5, 2016, the **Data Sharing Improvement Act**
- March 17, 2016, the “**Asylum Package II**”
- March 17, 2016 the **Act to Facilitate Deportation of Foreign Criminal Offenders**
- August 6, 2016 the **Integration Act**
- July 20, 2017 the **Act to Enforce the Obligation to Leave the Country**
- There are also many more reforms proposed such as **Substitution of Benefits in Kind for Cash Benefits** and the **Reduction of the Financial Burden of German States and Municipalities**.

## Abstract

The aim of this national report is to gather information about the **legal, institutional and policy context of migration governance** in Germany in respect of asylum. As such, it offers a short (non exhaustive) overview of the asylum regime in Germany within the context of the so-called “Refugee Crisis” of 2015/2016. For this end, our focus is on macro level aspects of the legal and policy framework of the German asylum regime. This report is part of a comparative exercise between the partner countries involved in RESPOND.

The time frame comprehends the **period between 2011 and 2017**. The logic behind this is that it encompasses the beginning of the Syrian civil war and its aftermath. Within this period, Europe has received millions of asylum seekers not only from Syria but also from the wider Eastern Mediterranean and Middle Eastern regions, Central Africa and Eastern Europe whilst Germany in particular has become the most sought-after destinations in Europe for those seeking asylum.

## Introduction

According to the United Nations High Commissioner for Refugees (UNHCR) “Global Trends Report on Forced Migration”, a record high 65.3 million people, or one in 11 persons, were displaced by conflict and persecution between 2015 and 2016 (UNHCR, 2015), a majority of which are women and children (International Rescue Committee [IRC], 2014; Sherwood, 2014). According to the same report, Syria is the largest source country for refugees, with a total refugee population of 4.9 million (and 7.6 million who are internally displaced persons (IDPs) at the end of 2015, while Afghanistan was the second-largest source country with 2.7 million refugees. Unfortunately, the signs indicate that these numbers will continue to increase, especially because of the long and bloody conflict in Syria and the lack of a foreseeable diplomatic resolution. According to the International Displacement Monitoring Centre (IDMC) GRID – Global Report on Internal Displacement – the total number of conflict-related IDPs throughout the world as of December 2015 is 40.8 million (2016). Furthermore, another 22 million people in Asia are currently displaced as a direct consequence of natural disasters. The estimated total figure of IDPs around the world is 55 million, of which a significant number will never return home. For those who do return, the average time of displacement is 17.5 years. According to the International Red Cross and Red Crescent Federation, approximately 73 million people in the world are, or have recently been, forced to migrate (2015). If correct, these numbers indicate that one in one hundred individuals in the world today is either an IDP or an international refugee or asylum seeker. However, overall, data on refugees is not unambiguous and often it is highly politicized (see Crisp 1999). Europe has been reluctantly slow to respond to the challenges offered by such large human displacement occurring elsewhere in the globe. Germany is among some of few European countries that have accommodated significant numbers of asylum seekers within its territory recently. However, Germany itself is a country with a migration history based on restrictions. Refugees are more often than not seen as a “burden” to society. This view is visible in the very language of policy reports, for instance “burden-sharing” (see Thielemann 2006).

This report takes an in-depth look at the asylum legislation of Germany and explores how the legislators has reacted to the raise in asylum application in the country since 2011. Given the restrictions in terms of space and time, and the complexity of the issue at hand, we cannot offer an all-encompassing analysis, nor can we address every theme pertinent to the issue of asylum, borders, or the social, cultural and political context of Germany vis-à-vis the development of migration governance (including asylum laws). Rather, what is possible to achieve is a brief descriptive and, more importantly, **critical account** of particularly important events, quantitative outlines and descriptive contours of the most recent asylum-related changes to the German legal framework.

This report, as the entirety of **RESPOND** is an interdisciplinary effort that is inherently complex given the multiplicity of disciplinary streams it contains. For this report alone, we have counted on the expertise of anthropologists, sociologists and legal scholars. Although collaboration of this kind can be rather problematic, the benefits of interdisciplinary work overshadows the technical and theoretical shortcomings. This situation is not unique to our endeavour alone but shared with other research teams. For instance, a study looking at “solidarity” in the EU found that “the bias due to the discrepancy between the “law in the books” and “law in action” that can so often affect pure legal analysis [...] has been strongly mitigated by a “social science” approach to legal studies, definitely more prone to making reference to legal realism, i.e. to ask how laws affect people in real life” (Federico et al 2017: 9).

Besides a brief historical overview, we offer some quantitative analysis of current asylum flows. The data we display gives us a basic idea of the outline of contemporary migration into Germany. According to the Basic Law, social law is subject to the concurrent legislation principle. This means that the federal states have the power to legislate social matters “so long as and to the extent that the Federation has not exercised its legislative power by enacting a law” (**Art. 72 para 1 Basic Law**).

**Underlying the overall contribution of this report is the relationship between federal asylum law and the application of legislation amongst the German *Länder*.** Germany’s federalism also structures the field of migration and asylum to a large degree (see El-Kayed and Hamann 2018, Laubenthal, 2016). In that sense, the *Länder*, differently shape the living conditions, social situations and integration opportunities of refugees (ibid).

**Typically, federal laws are executed by the 16 federal states in their own right (Art. 83 Basic Law).** Execution of federal laws by the central Federal Government is restricted to exceptional cases defined by the **Basic Law**<sup>4</sup> (adopted by the Parliamentary Council on 8 May 1949, was ratified in the week of 16 to 22 May 1949). Moreover, the execution of federal law by the single federal states implies that they establish the necessary administrative bodies and regulate all related administrative procedures (**Art. 84 para 1 Basic Law**). “The executive competences of the federal states constitute an important pillar of their autonomy because they enable them to shape policies and to exercise influence” (Stoy 2015: 85 - see also Zschache 2017: 86). Consequently, there is a variety of administrative procedures that reflect the preferences of the different regional governments to some extent. This complexity is further enhanced by the prominent role of local governments. In the organisation of the state system, local communities belong to the federal states and cannot be directly addressed by the Federation with executive tasks. Instead, they must be commissioned by their federal state. In practice, this is very often the case. In fact, according to estimates, between 75% and 80% of federal laws are executed by local administrations (Stoy 2015: 85). Hence, the implementation of federal law may vary considerably across Germany depending on the local administrative practices and regional administrative regulations.

This report is organized into 5 sections. **Section 1** offers a brief explanation of the historical highlights of migration to Germany and the evolution and constitution of migration policy since 1945. In **Section 2** we turn to a quantitative overview of asylum in Germany between 2011 and 2017. **Section 3** discusses current asylum law, the steps involved in the application procedure and the overall legal status of foreigners in Germany whilst distinguishing between asylum seekers and other immigrant categories. **Section 4** draws a sketch of the overall constitutional entrenchment of the principle of asylum and immigration law in the country. Finally, **Section 5** points to changes provoked in part or as a direct result of the so-called “Refugee Crisis”. The report also contains 4 annexes and lists of basic terminology and abbreviations.

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<sup>4</sup> Available at: <https://www.btg-bestellservice.de/pdf/80201000.pdf>. Retrieved on 26/04/2018.

# 1. A History of Migration to Germany: The Evolution and Constitution of Migration Policy Since 1945

Today, Germany is one of the primary destinations in Western Europe for asylum seekers from the Eastern Mediterranean, Eastern Europe and Central Africa. However, the country has a much longer history of migration dating back centuries. For reasons of space, we will narrow our historical overview to the period between 1945 and the present day, whilst highlighting only the most relevant events for the purposes of this report. The different migration and asylum trends of post-war migration to (West-) Germany can be divided into “phases”, with accompanying legal regimes and administrative practices – see for instance the genealogy that Serhat Karakayali (2008) has developed.

## 1.1 The Guest Worker System

The first phase, lasting from 1955 to 1973, is usually described as the “**guest worker system**” (**Gastarbeit**). Economically, the 1950s in Germany were characterised by high growth rates (up to 12%) and shrinking unemployment (1% in 1961). In order to offset labor shortages, the federal government turned to a traditional model of recruiting and temporarily employing foreign workers. The first “**Agreement on the Recruitment and Placement of Workers**” (**Abkommen über Anwerbung und Vermittlung von Arbeitskräften**) was negotiated with Italy in 1955. Further contracts soon followed: with Greece and Spain (1960), Turkey (1961), Morocco (1963), Portugal (1964), Tunisia (1965) and Yugoslavia (1968). While supervision and implementation of these contracts lay with the **Federal Employment Office (Bundesanstalt für Arbeit)**, there existed two other practices of migration: **migration with a visaed passport (Sichtvermerk)** and **entry of the country as a tourist or student** with retroactive obtainment of a work permit. These two latter forms were less regulated. Initially, the relevant legislation was the **Foreigners’ Police Regulation (Ausländerpolizeiverordnung)** of 1938, a recast of the Weimar Republic law of 1932. It granted both a certain form of subjective rights to residence to foreigners, and leeway to local authorities. Generally, it was assumed that the “guest workers” (Gastarbeiter) would eventually return to their countries of origin (Heilbronner 1987). Based on that assumption, the development of socio-political or infrastructural concepts to account for longer term residence or societal integration were not put into practice. With the prolonged existence of the regime of Gastarbeiter and the ever-increasing presence of migrant workers in Germany, the public debate on the issue heated up over the 1960s (DOMID 2017, Heilbronner 1987). Particularly, new forms of re-asserting control over labour migration were sought.

**In 1965, the new Act on Foreigners<sup>5</sup> was passed**, replacing the Foreigners’ Police Regulation. Additional regulations were codified in the Implementing Regulation on the Act on Foreigners.<sup>6</sup> The Act did not specifically address guest workers or ethnic German re-settlers. In fact, it did not

<sup>5</sup>Ausländergesetz [Act on Foreigners], Apr. 28, 1965, BGBl. I at 353, Available at: [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&jumpTo=bgbl165s0353.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl165s0353.pdf), archived at <http://perma.cc/ETG7-ELMS>. Retrieved 22/01/2018.

<sup>6</sup>Verordnung zur Durchführung des Ausländergesetzes [DVAusIG] [Regulation to Implement the Act on Foreigners], Sept. 10, 1965, BGBl. I at 1341, Available at: [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&jumpTo=bgbl165s1341.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl165s1341.pdf), archived at <http://perma.cc/2HPM-H2KR>. Retrieved 22/01/2018.



differentiate at all between the different residence purposes, nor did it address questions of family reunification or social and political rights of foreigners. This was followed, **in 1969, by the Law on European Economic Community (EEC) Residence** to implement European Community (EC) law in West Germany regarding freedom of movement for workers from EEC Member States, freedom of establishment and freedom to provide services.<sup>7</sup> **In 1970, citizens from EEC Member States made up around 25% of the total number of foreigners present in the Federal Republic of Germany.**<sup>8</sup>

## 1.2 The Recruitment Ban and the End of the “*Gastarbeit*”- System

**In 1973, the recruitment ban (Anwerbestopp)**, set forth in a directive on November 23, 1973, marked the official end of the era of foreign labor recruitment to West Germany. What followed was a **slow transition to an asylum regime** also in reaction to the worldwide rising numbers of asylum seeking persons, lasting from 1973 until the reform of German asylum legislation in 1993. It was initially characterised by immigration along the legal avenues of family reunification, which were however successively restricted over the years, different forms of illegal migration, and especially since 1980 immigration of asylum seekers. **In 1980, for the first time, more than 100,000 asylum applications were registered. The political debate around migration in the 1980s focussed strongly on the proclaimed necessity to restrict access to asylum.** However, given the constitutional status of the right to asylum, there were – at the time – insurmountable hurdles to passing such legislation. Nevertheless, restrictive legislation was passed in the 1980s, such as the Return Assistance Act<sup>9</sup> of 1983, legislation that mandated the housing of asylum seekers in refugee camps and imposed a residential obligation, and a recast of the Act on Foreigners in 1990<sup>10</sup>. These legislative acts were premised on the notion that Germany was not a country of immigration.

Hence, we can say that a growing “repressive consensus” resultant from migration to Germany in the 1980s and 90s resulted in the 1992-93 reform of asylum laws and that since then Germany has displayed “a relatively strict migration and asylum policy” with continuous influence of a conservative tendency (Kirchhoff and Lorenz 2018: 55).

<sup>7</sup> Gesetz über Einreise und Aufenthalt von Staatsangehörigen der Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft (AufenthG/EWG) [Law on EEC Residence], July 22, 1969, BGBl. I at 927, Available at: [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&jumpTo=bgbl169s0927.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl169s0927.pdf), archived at <http://perma.cc/QV3F-J48W>. Retrieved 22/01/2018.

<sup>8</sup> Table 12521-0002, Foreigners: Germany, Reference Date, Sex, Country Groups/Citizenship, Destatis, Available at: [www-genesis.destatis.de/genesis/online](http://www-genesis.destatis.de/genesis/online) (select 1970 as “reference date” and EEC-6 as “country group,” Retrieved 22/01/2018.

<sup>9</sup> Rückkehrhilfegesetz (RückHG) [Return Assistance Act], Nov. 28, 1983, BGBl. I at 1377, Available at: [www.gesetze-im-internet.de/bundesrecht/r\\_ckhg/gesamt.pdf](http://www.gesetze-im-internet.de/bundesrecht/r_ckhg/gesamt.pdf), archived at <http://perma.cc/44U3-4K3C>. Retrieved 22/01/2018.

<sup>10</sup> Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet (Ausländergesetz - AuslG) [Act on Foreigners 1990], July 9, 1990, BGBl. I at 1354, 1356, Available at: [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&jumpTo=bgbl190s1354.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl190s1354.pdf), archived at <http://perma.cc/3HEY-A8PH>. Retrieved 23/01/2018.

### 1.3 The Aftermath of Reunification and the Balkan Wars

It was only with the dynamics of the post-Cold War global constellation that a decisive reform of German asylum law became feasible. The early 1990s were characterised by many different forms of migration to Germany: citizens of the former USSR that could lay claim to German ancestry were granted citizenship and resettled into Germany<sup>11</sup>, hundreds of thousands of refugees from the wars in Yugoslavia sought refuge in Germany, and in 1992, it was estimated at the time that around 400,000 asylum applications were lodged in Germany. Through a prolonged campaign from the conservative party that was accompanied by racist violence all over the recently unified Germany, the social-democratic party in 1992 gave in and accepted a reform of article 16 of the German **Basic Law**, in which the right to political asylum was enshrined. This reform, the so-called “asylum compromise”, passed in 1993, introducing the notions of Safe Third Countries, Safe Countries of Origin, accelerated asylum procedures at international airports, reinforcement of border controls, and a separate social welfare regime for asylum seekers which saw benefits reduced by 30 % and mandated a preference of in-kind transfers. Since Germany declared itself to be surrounded by Safe Third Countries, asylum applications after an entry across a land border were generally deemed inadmissible (Bosswick 2000)<sup>12,13</sup>

### 1.4 21<sup>st</sup> Century Reforms of Citizenship Law: The New Act on Migration

After the reform of Germany's asylum law, migration shifted to more irregular forms, with asylum applications declining throughout the 1990s. In 1998, after 16 years of a coalition government between the conservative and liberal parties, a new government was formed between the social-democratic and Green parties. An overhaul of Germany's migration law was one of the government's main priorities. To this end, **a bipartisan commission on immigration was constituted, and a reform of the German citizenship law was passed in 2000**. Until that moment, citizenship was based on the *ius sanguinis* principle, while the reform opened citizenship to the principle of *ius solis*. However, only children of EU citizens or parents from states with special agreements with Germany were allowed dual citizenship. All others were obliged to choose one of their nationalities upon reaching legal adulthood. Both the reforms of citizenship and migration policy were subject to deep political opposition, at the core, the status of Germany as a country of immigration was negotiated.

**In 2005, a new Act on Migration** was passed. Its first version, which had been proposed by the bipartisan commission and which had sought to open legal avenues of migration beyond asylum had been invalidated by the constitutional court on procedural reasons. The renegotiated version stated as its aim to restrict and manage migration to Germany. Through the **Act on Migration, the Act on Foreigners was replaced by a Act on Residence**, which is currently in force and which simplified

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<sup>11</sup>A law on ethnic Germans was passed that allowed for persecuted people from the eastern block to „return“ to Germany. Since 1950, a total of 4.5 million ethnic German re-settlers, including family members, have immigrated to Germany as a result of the **article 116, paragraph 1 of the German Basic Law**. The re-settlement of Ethnic Germans continues to this day. For instance in 2014, Germany received 4,215 ethnic German re-settlers.

<sup>12</sup> From the late 1980s to 1992, the numbers of asylum seekers and immigrants in Germany steadily increased, in particular due to the war in the former Yugoslavia. In 1992, the number of immigrants reached an all-time high of 440,000. The approval rate for asylum applications, however, was at 4.3% (Gesley 2017).

<sup>13</sup> Act to Amend Provisions on Asylum Procedure, Foreigners, and Citizenship Law art. 1, no. 10.



the available residence statuses, EU directives of the CEAS as well as the **Blue Card Directive** were transposed into national law, and integration was defined as a legal duty.<sup>14</sup> Despite the restrictive nature of the Act on Migration, its passage marks the end of the debate whether Germany was a country of immigration. From now on, domestic migration policy would focus on integration measures. However, the most profound effect on the legal status of migration to Germany would be the two rounds of EU accession of Eastern European countries in the 2000s, automatically legalising the presence of up to a million persons in Germany.

In 2006, the Federal Chancellor, religious representatives and communities, media, unions, sport associations, employers, charitable organisations and migrants took part in what became known as the “**integration summit**”. The trigger was the results from the PISA study, which said that success in the educational system is linked to the origin and the educational background of one’s family. The Integration Summit led to the development of the **national integration plan implemented in 2007**. In the same year amendments were made to the immigration law because of EU guidelines. **A third residence title was introduced: the permission for permanent residence (*Erlaubnis zum Daueraufhalt-EG*)** and that was followed by a **citizenship test introduced on the 1st September 2008**.

## 1.5 From 2011 to Present

At least since 2011, Germany, together with Sweden, has been one of the preferred countries of destination for many people who fled their countries in Africa and the Eastern Mediterranean and Middle East due to armed conflicts and social unrest. Germany is viewed as a socially stable country with a strong economy and an open democratic political system that encourages civic participation and guarantees basic freedoms. As a result of this image as well as due to long established diaspora networks, in 2015 alone, Germany received more than one million asylum seekers mainly from African and Middle Eastern countries. This has been termed “***Der Lange Sommer der Migration***” (the long summer of migration - Hess et al 2016). This large number of people crossing the German borders have signified a great variety of reactions and changes that have, in some cases, created anxieties regarding the possible impact of these new populations on national and local social, economic, religious and cultural dynamics in the country.

Such movement initiated a range of changes in immigration and asylum law and policy. One of **the latest most important amendments to the German migration framework entered into force on August 6, 2016. The Integration Act and the Regulation on the Integration Act** aim to facilitate the integration of refugees into German society.<sup>15</sup> The basic idea behind the legislation is a continuation of the policy of “**support and challenge**” (**Fördern und Fordern**), which had been introduced in 2005 in the Migration Act. Recognized refugees who show the potential to integrate and have a good chance of staying permanently in Germany are provided with easier and faster

<sup>14</sup>BT-Drs. 15/420, at 60, <http://dipbt.bundestag.de/doc/btd/15/004/1500420.pdf>, Available at: <http://perma.cc/MV54-ZYLU>. Retrieved 23/01/2018.

<sup>15</sup>Integrationsgesetz [Integration Act], July 31, 2016, BGBl. I at 1939, [http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&jumpTo=bgbl116s1939.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl116s1939.pdf), archived at <http://perma.cc/SF3C-MY53>; Verordnung zum Integrationsgesetz [Regulation on the Integration Act], July 31, 2016, BGBl. I at 1950, [http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&jumpTo=bgbl116s1950.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl116s1950.pdf), Available at <http://perma.cc/FDS7-2XAA>. Retrieved 23/01/2018.

access to integration classes and employment opportunities (Gesley 2016). The period after 2011, saw several amendments to German asylum law; they will be detailed in the remainder sections.

Germany's more recent history of migration policies is marked by an increasing Europeanization of policies on asylum and deportation. Yet, this Europeanization is faced with internal division, a certain level of conservatism and, sometimes significant, differences between the implementation of federal asylum policy by the **Länder**. Today, migration policy in Germany varies between, on one hand, restrictive asylum regulations and increased opportunities to remain on the other hand. "This in turn creates a complex context for protests, both for and against (rejected) asylum seekers" (Kirchhoff and Lorenz 2018: 55). A good example of this is found in housing. Housing is one of the most important issues faced by refugees as, together with nutrition, it is the most basic need asylum seekers have upon arrival (see Schiefer, 2017) an issue that is extremely dependent on the interplay between federal legislation and the application of this legislation in individual *Länder* and smaller geographical localities as a recent study by El-Kayed and Hamann (2018) show.

## 1.6 Religious, Cultural and Linguistic Context

It is important to define, even if very briefly, the kind of contextual historical background asylum seekers enter when they arrive in Germany. As with every nation in Europe, the asylum seeker must make sense of a great array of highly complex social environments imbued with religious, cultural and linguistic norms.

Upon its establishment in 1871, Germany was about two-thirds Protestant<sup>16</sup> and one-third Roman Catholic, with a notable Jewish minority. Other faiths existed in the state, but never achieved the demographic significance and cultural impact of these three confessions. However, the country lost nearly its entire Jewish minority during the Holocaust. Religious makeup changed gradually in the decades following 1945, with West Germany becoming more religiously diversified through immigration and East Germany becoming overwhelmingly irreligious through state policies (Thompson 2012)<sup>17</sup>. It continued to diversify after the German reunification in 1990, with an accompanying substantial decline in religiosity through all of Germany and a contrasting increase of Evangelical Protestants and Muslims. Geographically, Protestantism is concentrated in the northern, central and eastern parts of the country. These are mostly members of the EKD (Evangelical Church in Germany, *Evangelische Kirche in Deutschland*)<sup>18</sup>, which encompasses Lutheran, Reformed and administrative or confessional unions of both traditions dating back to the Prussian Union. Roman Catholicism is more concentrated in the south and west (REMID 2018)<sup>19</sup>.

According to the 2011 German Census, Christianity is the largest religion in Germany, claiming 66.8% of the total population. Relative to the whole population, 31.7% declared themselves as Protestants, including members of the EKD (30.8%) and the free churches (*Evangelische Freikirchen*) (0.9%), and 31.2% declared themselves to be Roman Catholics. Orthodox believers constituted 1.3%. Other religions accounted for 2.7%. According to the most recent data from 2016, the Catholic Church and the Evangelical Church claimed respectively 28.5% and 27.5% of the

<sup>16</sup>German Protestantism has been overwhelmingly a mixture of Lutheran, Reformed (i.e. Calvinist), and United (Lutheran and Reformed/Calvinist) churches, with Baptists, Pentecostals, Methodists, and various other Protestants being a more recent development.

<sup>17</sup> Available at: <https://www.theguardian.com/commentisfree/belief/2012/sep/22/atheism-east-germany-godless-place>. Retrieved 31/01/2018.

<sup>18</sup>for more information, please see EKD - <https://www.ekd.de>.

<sup>19</sup>Available at: [http://remid.de/info\\_zahlen/](http://remid.de/info_zahlen/). Retrieved 31/01/2018.

population. Both large churches have lost significant numbers of adherents since the 1950s. In 2011, 33% of Germans were not members of officially recognized religious associations with special status. Irreligion in Germany is strongest in the former East Germany, which used to be predominantly Protestant before, and major metropolitan areas. Islam is the second largest religion in the country. Indeed, 1.9% of the 2011 census population (1.52 million people) gave their religion as Islam, but this figure is stated as being unreliable because a disproportionate number of adherents of this religion (and other religions, such as Judaism) are likely to have made use of their right not to answer the question. Studies by the Federal Office for Migration and Refugees (BAMF) suggested a figure of 4.4 to 4.7 million (around 5.5% of the population) in 2015 and held that between 2011 and 2015 the Muslim population rose by 1.2 million people, mostly due to immigration. In contrast, a recent survey by the German Institute for Economic Research indicated a number of 2.7 million Muslim adults<sup>20</sup>. Most of the Muslims in Germany are Sunnis and Alevites from Turkey, but there are a small number of Shi'ites, Ahmadiyyas and other denominations. Other religions comprising less than one percent of Germany's population are Buddhism with 250,000 adherents (roughly 0.3%), Judaism with 200,000 adherents (around 0.2%), as well as Hinduism and Yezidism with some 100,000 adherents (0.1%). All other religious communities in Germany have fewer than 50,000 adherents each (DESTATIS 2013/REMID 2018)<sup>21</sup>

In cultural terms Germany was heterogeneous (or even fragmented) from the very beginning of its (reluctant) process of nation building, a constellation which is still strongly reflected in the federalist state system as well as (more or less mocking) intercultural animosities, e.g. between "Bavarians" and "Prussians". In addition, the of recruitment contracts with predominantly Roman Catholic countries, such as Italy (1955) and Spain (1960) as well as countries with a Muslim majority, such as Turkey (1961), Morocco (1963) and Tunisia (1965) entailed a considerable pluralization, not only in religious, but also in cultural terms. As a matter of fact, these older minorities position themselves towards recent refugees in different ways: On the one hand, people with a migration background, and Muslims in particular, have been more active in refugee aid than the German average (Karakayali and Kleist 2016; Nagel and El-Menouar 2017), on the other hand, there were factions within the Turkish and the Russian-German immigrant community who actively mobilized against refugees. It should be mentioned that the pattern of public awareness of the multicultural constellation has changed considerably over the last decades: while the perception of multiculturalism (and xenophobic stereotypes) used to concentrate on ethnic or national characteristics until the 1990s, cultural differences have been increasingly religionized along with the emergence of Islamophobic attitudes across the traditional cleavage between multiculturalists and assimilationists (see Kühnel, Leibhold 2007; Spielhaus 2013).

## 1.7 Languages

German is the official and predominant spoken language in Germany. Recognised native minority languages in Germany are Danish, Low German, Low Rhenish, Sorbian, Romany, North Frisian, and Saterland Frisian, which are officially protected by the European Charter for Regional or Minority Languages. The most used immigrant languages are Turkish, Kurdish, Polish, the Balkan languages

<sup>20</sup>[https://www.diw.de/de/diw\\_01.c.582774.de/themen\\_nachrichten/4\\_3\\_prozent\\_der\\_in\\_deutschland\\_lebenden\\_erwachsenen\\_sind\\_muslime.html](https://www.diw.de/de/diw_01.c.582774.de/themen_nachrichten/4_3_prozent_der_in_deutschland_lebenden_erwachsenen_sind_muslime.html).

<sup>21</sup>Available

at:[https://www.destatis.de/DE/PresseService/Presse/Pressekonferenzen/2013/Zensus2011/Statement\\_Egeler\\_zensus\\_PDF.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/PresseService/Presse/Pressekonferenzen/2013/Zensus2011/Statement_Egeler_zensus_PDF.pdf?__blob=publicationFile). Retrieved 31/01/2018.[http://remid.de/info\\_zahlen/](http://remid.de/info_zahlen/). Retrieved 20/04/2018.

and Russian. Germans are typically multilingual: 67% of German citizens claim to be able to communicate in at least one foreign language and 27% in at least two (EC 2004, Eurobarometer 2006)<sup>2223</sup>. The fact that many Germans (in particular the young) are able to communicate in English may facilitate the adaptation of some refugees. Yet, the majority of interactions, in particular with state officials, must be conducted in German and for refugees, the language is anything but easy to learn. The language barrier is a high hurdle to overcome in particular in the first few months, despite provisions for language learning.

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<sup>22</sup> European Commission (Europe on the Move. Many Tongues one Family: Languages in the European Union) Available at:<https://web.archive.org/web/20110430202922/http://ec.europa.eu/publications/booklets/move/45/en.pdf>. Retrieved 31/01/2018.

<sup>23</sup> European Commission (Special Eurobarometer, Europeans and their Languages). Available at:[http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs\\_243\\_en.pdf](http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_243_en.pdf). Retrieved 31/01/2018.

## 2. A Quantitative Overview of Asylum in Germany: 2011 - 2017

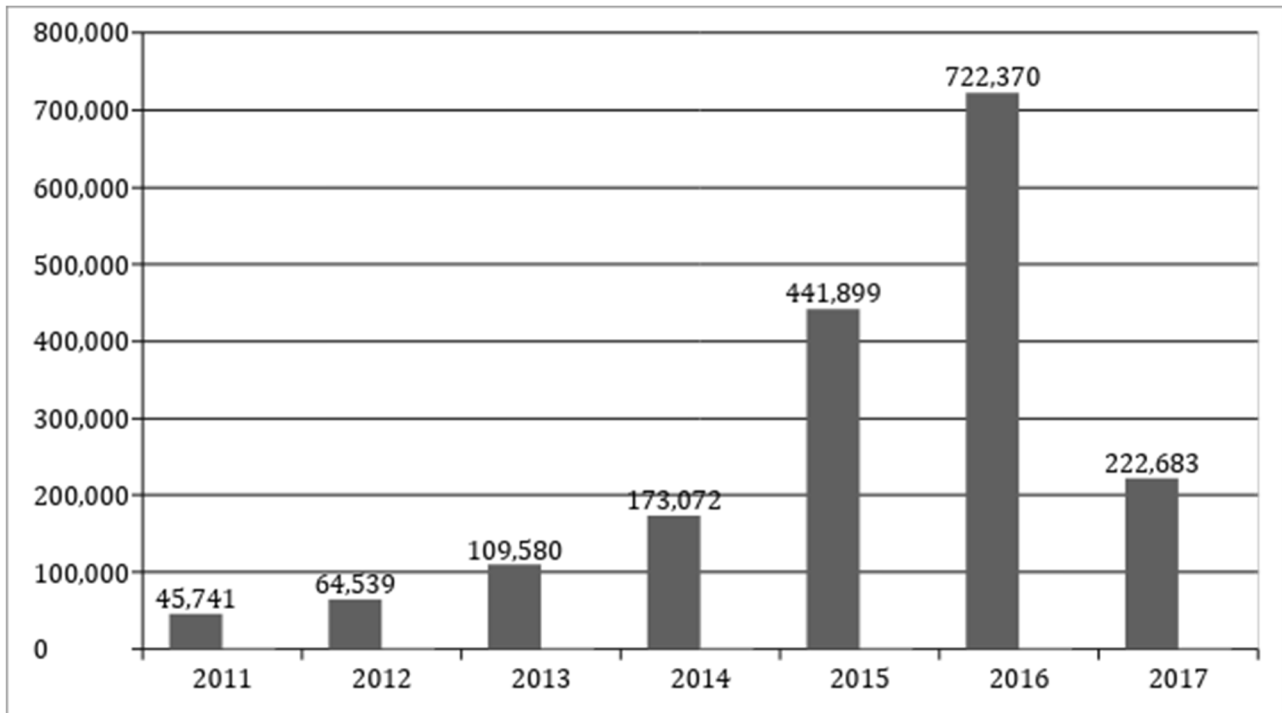
In the short historical overview presented in the past section, we showed the most important developments of migration policies taking place in Germany since 1945. We now bring this history up to date by turning to a brief quantitative summary of the numbers of asylum applications in Germany in the past few years. In the last years Europe has received hundred thousands of asylum seekers not only from Syria but also from the wider Eastern Mediterranean and Middle Eastern regions, Central Africa and Eastern Europe. Germany is one of the most sought-after asylum destinations in Europe and the numbers we present here are a reflection of this. These numbers have led to heated political debates and the governing coalition introduced several changes in migration and asylum policies all of which will be discussed in later sections of this report.

### 2.1 Some Basic Numbers

According to the Federal Statistical Office of Germany, in 2011, Germany had 80.3 million residents. Of those, 15.96 million - almost 19% of the entire population – had a migration background. In 2012, 92% of residents (73.9 million) had German citizenship, with 80% of the population being Germans (64.7 million) having no immigrant background. Of the 20% (16.3 million) people with immigrant background, 3.0 million (3.7%) had Turkish, 1.5 million (1.9%), Polish, 1.2 million (1.5%) Russian and 0.85 million (0.9%) Italian ancestry. In 2014, most people without German citizenship were Turkish (1.52 million), followed by Polish (0.67 million), Italian (0.57 million), Romanians (0.36 million) and Greek citizens (0.32 million). The German population at the end of 2016 was of 82.5 million. Of this total number, 18.6 million had a migration background whilst 8.7 million were foreign born. The latest available data on net migration is for 2016. It shows a positive balance of 497,964 (*Statistisches Bundesamt*, 2017). **Thus, since 2011, there has been a rise in people in Germany with migration background.**

**Parallel we have been seen as well a rise in asylum applications.** The latter in turn, is partly a result of conflicts in Syria, Afghanistan and Iraq, as well as social unrest, civil wars and economic problems in central Africa. In 2011, Germany received 53,347 asylum applications. **By 2016, that number had reached 745,545, an all-time high.** At least since 2015, there were many public, media and policy reactions to this rising numbers of asylum applications. As a direct consequence of these the (controversial) **EU-Turkey statement, or “deal”** was authorized in March 2016. Together with the closure of the Balkan corridor these measures essentially capped the number of asylum seekers coming to Germany. By 2017 we see a substantial reduction in the numbers of asylum seekers to Germany (207,157).

Figure 1. Illustrates this. It is important to note that 2016 shows a backlog, of the application for the prior two years. Thus the high number does not mean “arrivals” but rather *applications processed*.

**Figure 1. Total of Applications for International Protection (2011-2017)**

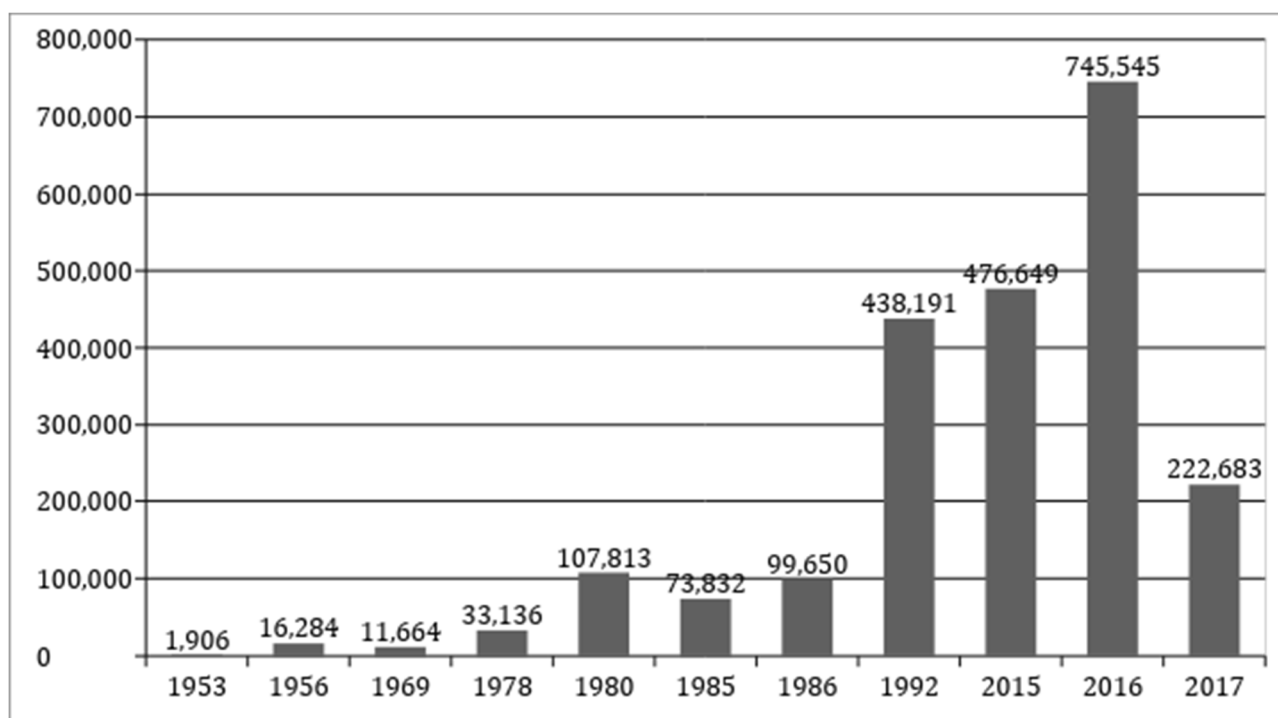
Source: BAMF

In 2017, 222,683 asylum applications were filed, including 198,317 initial applications. This is about one third of the applications submitted in 2016. The Federal Office for Migration and Refugees (BAMF) decided over 603,428 applications. **The protection rate** was 43.4 percent. If we compare this percentage with the protection rates of other EU member states, we could argue that Germany has a relatively low protection rate (for more detailed statistics, see report compiled by AIDA 2017)<sup>24</sup>. 186,644 asylum-seekers entered Germany during this period and were recorded in the core data system (BAMF 2017). In 2016, a total of 745,545 asylum applications were filed in Germany, 722,370 of which were initial applications. The main countries of origin were Syria, Afghanistan and Iraq. The Federal Office for Migration and Refugees has processed more than 695,733 asylum applications during this time. The protection rate was around 62 percent. According to the Ministry of the Interior (*Ministerium des Innern*), some 280,000 asylum seekers arrived in 2016 (BAMF 2016).

Before 2015, the previous peak in the number of applications for asylum was in 1992, when over 400,000 applications were received. At that time, most applicants came from the former Yugoslavia. However, after 1993 (the year of the German “Asylum Compromise” (*Asylkompromiss*)), there had been a continual decline in applications. In 2005, for example, 29,000 applications were received. The number of first-time applicants continued to decrease throughout 2007, when Germany saw only 19,164 applications, the lowest amount since 1977 (see figure2).

<sup>24</sup>Aida (2017). Available at: <http://www.asylumineurope.org/reports/country/germany/statistics>. Retrieved 26/04/2018.



**Figure 2. Asylum applications between 1953 and 2017 showing 1990s pick – comparable to 2015**

Source: BAMF

Since 2008, however, the number of applications has started to increase again. In 2014, the highest amount since 1993 was recorded. The reasons for this increase included the surge in asylum seekers from Serbia and Macedonia as a result of the abolishment of the visa requirements for both countries in December 2009. In the first half of 2013, the number of first-time applications for asylum increased 90% when compared to the same period in the previous year. The majority of the asylum seekers in this year came from Russia, followed by Syria and Afghanistan. The Federal Office of Migration and Refugees expected 450,000 applications for asylum in their calculations for 2015, based on the number of applications they received in the first half of the year. In August 2015, however, the Federal Ministry of the Interior corrected this number, claiming up to 800,000 applications. Data released by Germany's Federal Office for Migration and Refugees (BAMF) in January 2016 showed that Germany received 476,649 asylum applications in 2015, mainly from Syrians (162,510), Albanians (54,762), Kosovars (37,095), Afghans (31,902), Iraqis (31,379), Serbians (26,945), Macedonians (14,131), Eritreans (10,990) and Pakistanis (8,472).

Among the asylum seekers who applied in Germany in 2017, 39.5 percent were girls and women (see table 3). In the age group 16- to 18-year-olds, there was the lowest proportion of women with about 22 %. Among the children (under 16 years), the gender ratio is more balanced. Here the proportion of boys outweighs girls only slightly. Compared with the whole of 2016, the proportion of women among refugees has risen by about five percent. Asylum seekers to Germany are on average very young: 75.2 % of the total were under 30 years old according to statistics for 2017. Minors accounted for around 45 % of all asylum seekers. 60.5% of all asylum seekers are men. The profile of asylum seekers coming to Germany has been overwhelmingly that of young males. The data for the period January - November of 2017 shows that 75.2% of the asylum applicants were younger than 30 years old. 60.6% of all applicants were male (see table 3).

**Table 3. Asylum Applications for the year 2017 divided by age and gender groups (shown in both, absolute values and percentages<sup>25</sup>)**

	Asylum Applications							
Age Group								
	Total		Distribution of male applicants by age group		Distribution of female applicants by age group		Percentage of male applicants within the age groups	Percentage of female applicants within the age group
bis unter 4 Jahre	42.999	23,30%	22.240	19,90%	20.759	28,50%	51,70%	48,30%
von 4 bis unter 6 Jahre	5.804	3,10%	3.039	2,70%	2.765	3,80%	52,40%	47,60%
von 6 bis unter 11 Jahre	12.838	6,90%	6.760	6,00%	6.078	8,40%	52,70%	47,30%
von 11 bis unter 16 Jahre	10.959	5,90%	6.265	5,60%	4.694	6,40%	57,20%	42,80%
von 16 bis unter 18 Jahre	10.430	5,60%	8.115	7,20%	2.315	3,20%	77,80%	22,20%
von 18 bis unter 25 Jahre	34.894	18,90%	25.297	22,60%	9.597	13,20%	72,50%	27,50%
von 25 bis unter 30 Jahre	21.062	11,40%	14.027	12,50%	7.035	9,70%	66,60%	33,40%
von 30 bis unter 35 Jahre	15.965	8,60%	9.657	8,60%	6.308	8,70%	60,50%	39,50%
von 35 bis unter 40 Jahre	11.056	6,00%	6.392	5,70%	4.664	6,40%	57,80%	42,20%
von 40 bis unter 45 Jahre	7.044	3,80%	4.008	3,60%	3.036	4,20%	56,90%	43,10%
von 45 bis unter 50 Jahre	4.588	2,50%	2.576	2,30%	2.012	2,80%	56,10%	43,90%
von 50 bis unter 55 Jahre	2.854	1,50%	1.566	1,40%	1.288	1,80%	54,90%	45,10%
von 55 bis unter 60 Jahre	1.888	1,00%	937	0,80%	951	1,30%	49,60%	50,40%
von 60 bis unter 65 Jahre	1.216	0,70%	615	0,50%	601	0,80%	50,60%	49,40%
65 Jahre und älter	1.199	0,60%	518	0,50%	681	0,90%	43,20%	56,80%
Insgesamt	184.796	100,00%	112.012	100,00%	72.784	100,00%	60,60%	39,40%

Source: BAMF

The largest number for refugees presented in the data, prior to the “refugee crisis” of 2015/2016 was in 1992. The number often quoted is something in the region of 440,000 people in one single year. But that number was calculated on an extrapolation of potential arrivals, times two. It was believed at the time that single males would eventually bring their families over at some point in time. The reality is that we simply do not know how many people came to Germany during 1992 even if such number is often presented as fact. The great raise in the numbers for the much-discussed year of 2016, for example (nearly 750,000 asylum claims) must also be equally deconstructed for it does not represent yearly “arrivals” but simply the accumulation of all asylum claims that built up over the year because of the sheer volume of applications and the simultaneously lack of infrastructure in Germany to manage applications in a more timely manner. After 2016, we see a great reduction in the number of asylum applications. This is at least partly the result of the EU-Turkey statement of March 2016 and the official closure of the Balkan corridor at the same time. These events had tremendous effects on German asylum policy. However, the drastic fall in asylum applications between 2016 and 2017 is also due to the fast tracking of applications that occurred in Germany all along 2016. Hence, the fall in numbers is related to at least two aspects: the effect of the closure of the Balkan route added to a restructuring of the administrative infrastructure that allows for the faster processing of asylum applications in the last two years.

## 2.2 The Distribution of Asylum Seekers in the German Territory (*Königsteiner Schlüsse*) and the “residence rule”

Today, the majority of non-German citizens (migrants, asylum seekers, etc.) live in urban areas, with the highest number living in the conurbation region of North Rhine-Westphalia where the greatest

<sup>25</sup> Data adapted from BAMF (2018). Available at [http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/aktuelle-zahlen-zu-asyl-november-2017.pdf;jsessionid=B7746458AB00F24C77DA37873BA35915.1\\_cid286?\\_blob=publicationFile](http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/aktuelle-zahlen-zu-asyl-november-2017.pdf;jsessionid=B7746458AB00F24C77DA37873BA35915.1_cid286?_blob=publicationFile). Retrieved 18/01/2018.



concentration of industry is spread over this large area in West Germany (Destatis, 2017)<sup>26</sup>. NRW is the most populous state of Germany, with a population of approximately 18 million, and the fourth largest by area. Its capital is Düsseldorf; the largest city is Cologne.

Given its industrial strength, the Rhine-Ruhr region has also received the highest number of asylum seekers between 2011 and the present (21,2%). The second-largest percentage of asylum quotas is directed to Bavaria (15,5%) and to Baden-Württemberg (12,8%). Together, these three regions account for almost half (49,5%) of asylum quotas in Germany, most of which are directed at urban centres within these regions such as aforementioned cities in the Rhine-Ruhr region as well as Munich in Bavaria and Stuttgart in Baden-Württemberg (see table 4).

**Table 4. First Application for Asylum According to each of the 16 German Länder (Period 2011-2017 – Absolute values and Percentages)**

	First Application 2011	%	First Application 2012	%	First Application 2013	%	First Application 2014	%	First Application 2015	%	First Application 2016	%	First Application 2017	%
BadenWürttemberg	5.186	11,34%	7.481	11,59%	13.421	12,25%	16.482	9,52%	57.578	13,03%	84.610	11,70%	21.371	10,80%
Bayern	7.020	15,35%	9.827	15,23%	16.698	15,24%	25.667	14,83%	67.639	15,31%	82.003	11,40%	24.243	12,20%
Berlin	2.425	5,30%	3.582	5,55%	6.113	5,58%	10.375	5,99%	33.281	7,53%	27.247	3,70%	9.369	4,70%
Brandenburg	1.296	2,83%	1.679	2,60%	3.058	2,79%	4.906	2,83%	18.661	4,22%	18.112	2,50%	5.547	2,80%
Bremen	420	0,92%	629	0,97%	1.109	1,01%	2.222	1,28%	4.689	1,06%	8.771	1,20%	2.495	1,30%
Hamburg	1.421	3,11%	1.880	2,91%	3.207	2,93%	5.705	3,30%	12.437	2,81%	17.512	2,40%	4.664	2,40%
Hessen	3.283	7,18%	5.079	7,87%	8.129	7,42%	12.536	7,24%	27.239	6,16%	65.520	9,10%	14.676	7,40%
MecklenburgVorpommern	973	2,13%	1.231	1,91%	2.303	2,10%	4.418	2,55%	18.851	4,27%	7.273	1,00%	3.954	2,00%
Niedersachsen	4.310	9,42%	5.941	9,21%	10.225	9,33%	15.416	8,91%	34.248	7,75%	83.024	11,50%	18.861	9,50%
NordrheinWestfalen	10.587	23,15%	15.028	23,29%	23.719	21,65%	40.046	23,14%	66.758	15,11%	196.734	27,20%	53.343	26,90%
RheinlandPfalz	2.164	4,73%	2.872	4,45%	5.481	5,00%	8.716	5,04%	17.625	3,99%	36.985	5,10%	12.951	6,50%
Saarland	531	1,16%	679	1,05%	1.219	1,11%	2.564	1,48%	10.089	2,28%	6.865	1,00%	3.099	1,60%
Sachsen	2.128	4,65%	2.825	4,38%	5.040	4,60%	6.030	3,48%	27.180	6,15%	23.663	3,30%	7.389	3,70%
SachsenAnhalt	1.274	2,79%	1.867	2,89%	3.198	2,92%	5.978	3,45%	16.410	3,71%	19.484	2,70%	5.118	2,60%
SchleswigHolstein	1.510	3,30%	2.217	3,44%	3.756	3,43%	7.032	4,06%	15.572	3,52%	28.982	4,00%	6.084	3,10%
Thüringen	1.192	2,61%	1.680	2,60%	2.722	2,48%	4.867	2,81%	13.455	3,04%	15.422	2,10%	5.040	2,50%
Unbekannt	21	0,05%	42	0,07%	182	0,17%	112	0,06%	187	0,04%	163	0,09%	113	0,10%
Insgesamt	45.741	100,00%	64.539	100,00%	109.580	100,00%	173.072	100,00%	441.899	100,00%	722.370	100,00%	198.317	100,00%

Source: BAMF

Upon their arrival in Germany, asylum seekers are allocated to a specific federal member state through a distributional process based on the tax income of the federal member states (Länder) as well as their population size. This is known as the KönigsteinerSchlüssel (§45 AsylG). It is a processual mechanism that administers the distribution of asylum seekers and refugees across the German Federal Republic. Meanwhile, asylum seekers themselves have almost no choice regarding where they are going to live (Wendel, 2014, p. 9 cited in El-Kayed and Hamann 2018: 138). The distribution of asylum seekers in the German national territory is thus by no means a homogenous process, nor does it respect freedom of movement.

Applicants from countries in Europe and beyond labelled “safe countries of origin” have an “obligation to reside” (*Wohnverpflichtung*) in the initial accommodation throughout the full duration of their asylum proceedings and are thus subject to the residency requirement during the entire process (§47 IaAsylG)—a situation regarded by legal experts as a severe violation of basic civil rights (Pelzer & Pichl, 2016, pp. 99–100 cited in El-Kayed and Hamann 2018: 139). In such case, asylum seekers

<sup>26</sup>Available at:

[https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/MigrationIntegration/Migrationshintergrund2010220107004.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/MigrationIntegration/Migrationshintergrund2010220107004.pdf?__blob=publicationFile). Retrieved 11/01/2018.

are only allowed to leave the district with permission from the Foreigner's Office. The violation of the "residency requirement" may lead to detention and a criminal record (§59 II AsylG; §95 I Nr. 6a AufenthG; §95 I Nr. 7 AufenthG), and for some refugees from so-called "safe countries of origin", even to a termination of their asylum application (§33 II, §33 III AsylG.). This requirement is considered disproportional and in contradiction to European Law by legal experts (ibid.).

## 2.3 Rates of Success of Asylum Applications – Protection Rate

In 2014, 202,834 asylum applications were filed in Germany. 128,911 decisions were made. Only 1.8% of the applications led to a recognition of refugee status according to **Article 16a GG**; another 24.1% were recognised as refugees from **Section 3 (1) AsylG**; 4% received subsidiary protection of Section 4 (1); and 1.6% were granted a prohibition of deportation. Therefore, 31.5% of all applications were "successful" in the broadest sense (so called "protection rate"). 33.4% of the applications were rejected. Following the calculation of charity organisations, Germany has an adjusted protection rate of 48.5% (not including those whose cases were passed on to other EU countries according to the Dublin Regulation) If successful legal claims against the decisions of the BAMF are counted as well, more than half of the refugees were granted a status of protection in 2014. In 2015, Germany made 282,762 decisions on asylum applications; the overall asylum recognition rate was 49.8% (140,915 decisions were positive, so that applicants were granted protection). The most successful applicants were Syrians (101,419 positive decisions, with a 96% recognition rate), Eritreans (9,300 positive decisions; 92.1% recognition rate) and Iraqis (14,880 positive decisions; 88.6% recognition rate).

## 2.4 Deportations and Voluntary Departures

From 2007 until 2012, the numbers of deportations from Germany slightly dropped (9,617 in 2007 and 7,651 2012)<sup>27</sup>. Since 2013 it rose again significantly, correlating with rising numbers of asylum applications and marking an on-going trend: In 2014, there were 10,884 deportations, in 2015 20,888, and in 2016 25,375 (the last number includes 3,968 transfers of migrants to other EU member states based on the Dublin regulations). In 2017, 31,068 people were deported from Germany (including 7,102 Dublin transfers). The steadily rising numbers can be explained by a variety of factors such as an increasingly restrictive refugee and migration policy in Germany connected to the perceived 'refugee crisis' in 2015/16, including new categorizations of countries as safe countries of origin (currently Albanien, Bosnien/Herzegowina, Ghana, Kosovo, former Yugoslav Republic of Macedonia, Montenegro, Senegal, Serbia) and the introduction of additional bilateral readmission agreements.

On top of that, in 2016 there were 1,279 statistically noted expulsions (**Zurückschiebungen**) in the time frame of six months after irregular entry into Germany. For 2017, the number of expulsions was 1,707 (including 66 unaccompanied minors). In addition, as result of the introduction of EU-internal border controls in 2016 in particular at the German-Austrian border, a high number of people were refused entry at the German border (**Zurückweisungen**) (in 2016, 20,851 and in 2017 12,370). In 2017, 171 of the people refused entry were registered as unaccompanied minors.

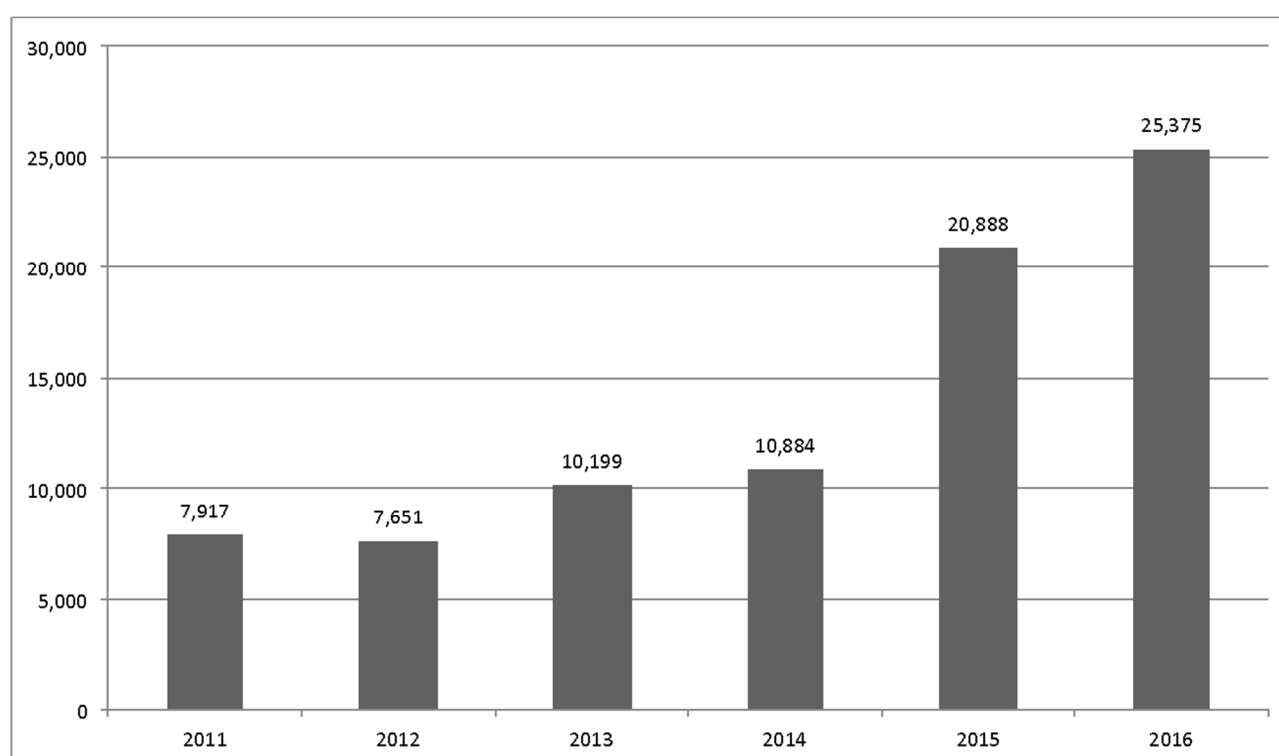
<sup>27</sup> Available at: <https://www.proasyl.de/wp-content/uploads/2015/12/2017-Abschiebungen-und-Ausreisen.pdf>. Retrieved 26/04/2018.

In some cases deportations could not be carried out because of lacking cooperation by countries of origin. In other cases, they were halted because of medical concerns, the refusal of airlines/pilots to transport deportees or because of acts of resistance by migrants and other civilians.

The estimated numbers of so-called ‘voluntary departures’ offering migrants financial rewards for their departure financed by the German state are significantly higher than the numbers of deportations. While the data is not collected with statistical reliability, for 2016, the German government presented a number of 54,069 departures in the frame of the Bund-Länder-programme REAG/GARP (Reintegration and Emigration Programme for Asylum Seekers in Germany/Government Assisted Repatriation Programme) and 29,587 departures in 2017. According to the Bundespolizei 43,019 people who had irregularly entered Germany departed voluntarily in 2017. Beside these, there are ‘voluntary departures’ supported by the German Bundes-Länder as well as voluntary departures without support that are not officially counted.

So-called ‘Erweiterte Rückkehrhilfen’<sup>28</sup> (Enhanced Return Assistance) that will grant higher rewards if applicants for international protection decide to withdraw their asylum claim have been politically criticized.<sup>29</sup>

**Figure 3. Deportation (Abschiebungen) Germany (Air, Land and Sea – 2011-2016)<sup>30</sup>**



Source: Bundestag/ProAsyl

## 2.5 Dublin Regulations

The Dublin procedure is a mechanism inherent in the Common European Asylum System. It is the part of the asylum procedure that determines which European state is responsible for applying for

<sup>28</sup> [www.bamf.de/DE/Rueckkehr/Rueckkehrprogramme/Starthilfe Plus/starthilfeplus.html](http://www.bamf.de/DE/Rueckkehr/Rueckkehrprogramme/Starthilfe Plus/starthilfeplus.html)

<sup>29</sup> <https://www.proasyl.de/wp-content/uploads/2015/12/2017-Abschiebungen-und-Ausreisen.pdf>

<sup>30</sup> Data from Bundestag from years 2011 to 2016 can be found compiled at [www.Proasyl.de](http://www.Proasyl.de) available at: <https://www.proasyl.de/thema/fakten-zahlen-argumente/statistiken/>. Retrieved 25/01/2018.

asylum. An asylum application in the European context is an application for "international protection", which covers both refugee protection as well as subsidiary protection<sup>31</sup>. The Dublin regime was originally established by the **Dublin Convention**, signed in Dublin, Ireland, on **15 June 1990**. In 2003, the Dublin Convention was replaced by the Dublin II Regulation. In 2013, the **Dublin III Regulation** (EU Regulation No 640/2013 of 26 June 2013) was adopted, replacing the Dublin II Regulation. The Dublin III Regulation has been in force since 1 January 2014<sup>32</sup>. In addition to the 28 states of the European Union, Switzerland, Norway, Liechtenstein and Iceland comply with this regulation. In total, there are 32 "Dublin states".

**The Dublin system was never designed to achieve a fair sharing of responsibility**; its main purpose from the very beginning was to assign responsibility for processing an asylum application to a single Member State. The **Dublin III Regulation** identifies the EU country responsible for examining an asylum application, by using a hierarchy of criteria such as family unity, possession of residence documents or visas, irregular entry or stay, and visa-waived entry. In practice, however, the most frequently applied criterion is the irregular entry, meaning that the Member State through which the asylum-seeker first entered the EU is responsible for examining his or her asylum claim. Asylum seekers should, as a rule, stay in the state responsible for them. Breaking this rule can result in deportation, referred to as "transference".

The current migration and refugee crisis has revealed significant structural weaknesses in the design and implementation of the CEAS and of the Dublin regime. This has been confirmed by recent external studies on the Dublin system (Meijers Committee 2016, Kasperek 2018) and acknowledged by the Commission in its communication of 6 April 2016 (European Commission 2016).

The number of Dublin returns from Germany to other EU-member states has been constantly rising from 2011 (2,902 returns) to 2017 (7,102 returns). Likewise, the number of readmission-requests to other European countries, which by far exceeds the actual returns, rose from 9,075 requests in 2011 to 64,267 in 2017<sup>33</sup>. In 2015 and 2016 the number of Dublin returns dropped slightly while Germany's return requests remained steadily rising. The most requested countries were Italy, Bulgaria, Poland, Hungary, Switzerland and France. In total, Germany requested from 2011 to 2017 in 255,788 cases to return migrants under the Dublin regulations to other EU-member states (see table. 30,137 returns were actually carried out. At the same time, Germany received 86,339 relocation/return-requests to its own country and approved 30,854 of them. Hence, **from 2011 until 2017, Germany received slightly more returnees from other EU members states (30,854) than were returned from Germany to other EU member states (30,137).**

<sup>31</sup> [http://www.asylumineurope.org/sites/default/files/resources/basisinf\\_2\\_dublin\\_fin.pdf](http://www.asylumineurope.org/sites/default/files/resources/basisinf_2_dublin_fin.pdf).

Retrieved 21/04/2018

<sup>32</sup> [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS\\_BRI%282016%29586639\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI%282016%29586639_EN.pdf).

Retrieved 21/04/2018.

<sup>33</sup> Pro Asyl:

<https://www.proasyl.de/wp-content/uploads/2015/12/2017-Dublin.pdf>

[https://www.proasyl.de/wp-content/uploads/2015/12/Dublin\\_2016.pdf](https://www.proasyl.de/wp-content/uploads/2015/12/Dublin_2016.pdf)

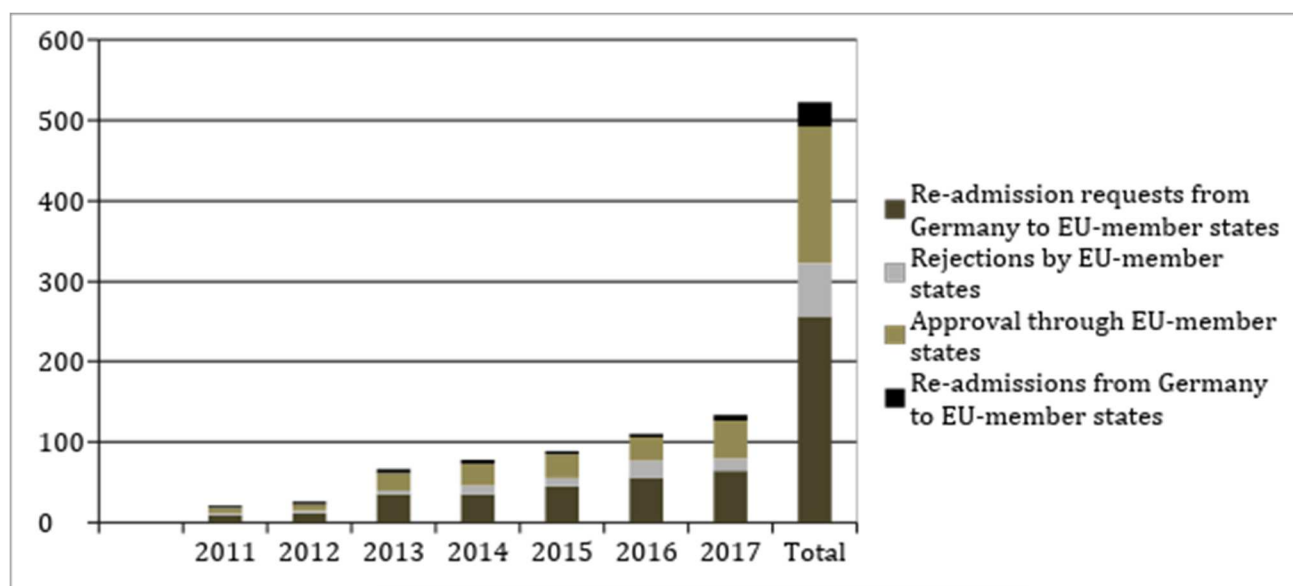
[https://www.proasyl.de/wp-content/uploads/2015/12/Dublin\\_2015.pdf](https://www.proasyl.de/wp-content/uploads/2015/12/Dublin_2015.pdf)

[https://www.proasyl.de/wp-content/uploads/2015/12/Dublin\\_2014.pdf](https://www.proasyl.de/wp-content/uploads/2015/12/Dublin_2014.pdf)

[https://www.proasyl.de/wp-content/uploads/2015/12/Dublin\\_2013.pdf](https://www.proasyl.de/wp-content/uploads/2015/12/Dublin_2013.pdf)

[https://www.proasyl.de/wp-content/uploads/2015/12/Dublin\\_2012.pdf](https://www.proasyl.de/wp-content/uploads/2015/12/Dublin_2012.pdf)

[https://www.proasyl.de/wp-content/uploads/2015/12/Dublin\\_2011.pdf](https://www.proasyl.de/wp-content/uploads/2015/12/Dublin_2011.pdf)

**Figure 4. Requests to EU Member States from Germany**

Source: ProAsyl

## 2.6 Relocation and Resettlement

Resettlement is an internationally recognized instrument in particular for the transfer of refugees as response to a “refugee crises”, mostly administered by the UN. The UN has annual requirements in terms of numbers for resettlement. For 2016 the world-wide requirement was more than 1,150,000 people (UNHCR 2015: 12). Resettlement only applies for people who have been recognized by the UNHCR as beneficiaries of international protection. The UNHCR provides proposals for admission to the Federal Office for Migration and Refugees (BAMF), which takes the final decision for the admission in Germany. Recently, we have seen the introduction of additional national and Länder-driven admission procedures, differing regarding the setup, target groups and benefits granted to the respective persons.

While Germany follows a highly restrictive visa policy<sup>34</sup>, there have been several procedures developed in the past few years that grant admission in Germany on humanitarian grounds. Most of them are related to requirements posed by the European Union and the United Nations. Currently, most programmes are in fact considered as achieved or halted, even if the committed number of admissions has not been achieved. The most relevant programmes are:

- 1) **The German Resettlement Programme** (2011 – 2015) that was extended for 2016-2017 after a European Council decision in the frame of the EU-Resettlement Programme.
- 2) **Humanitarian Admission Programmes** such as the HAP Syria (2013 – 2016) for a total of 20,000 beneficiaries of protection from Syria, its neighbouring countries, Egypt and Libya (HAP Syria) (extended for 2017 – 2018) and the admission procedure for Afghan local staff (2013-2016).
- 3) **Family-Reunification**
- 4) **The EU-Relocation Programme** (2015 – 2017)

<sup>34</sup><https://www.berlin.de/labo/willkommen-in-berlin/einreise/verlaengerung-eines-visums/artikel.280062.php>



**Resettlement Programmes:** In 2011, Germany adopted a pilot programme at federal and Länder level for resettling 300 particularly vulnerable refugees annually who would be admitted from third countries to Germany in the years 2012 to 2014 (Grote et al., 2016). In December 2014, the Conference of the Ministers of the Interior agreed to continue this resettlement programme and extend it to 500 persons per year.

In practice these numbers were roughly achieved until 2015: In 2012, 307 people (202 from Tunisia and 105 from Turkey) were resettled to Germany. In 2013, there were 293 people resettled – all of them from Turkey. In 2014, a total of 321 people came to Germany via this system (114 from Indonesia and 207 from Syria). For 2015 the number was 480 (300 from Egypt and 180 from Sudan).

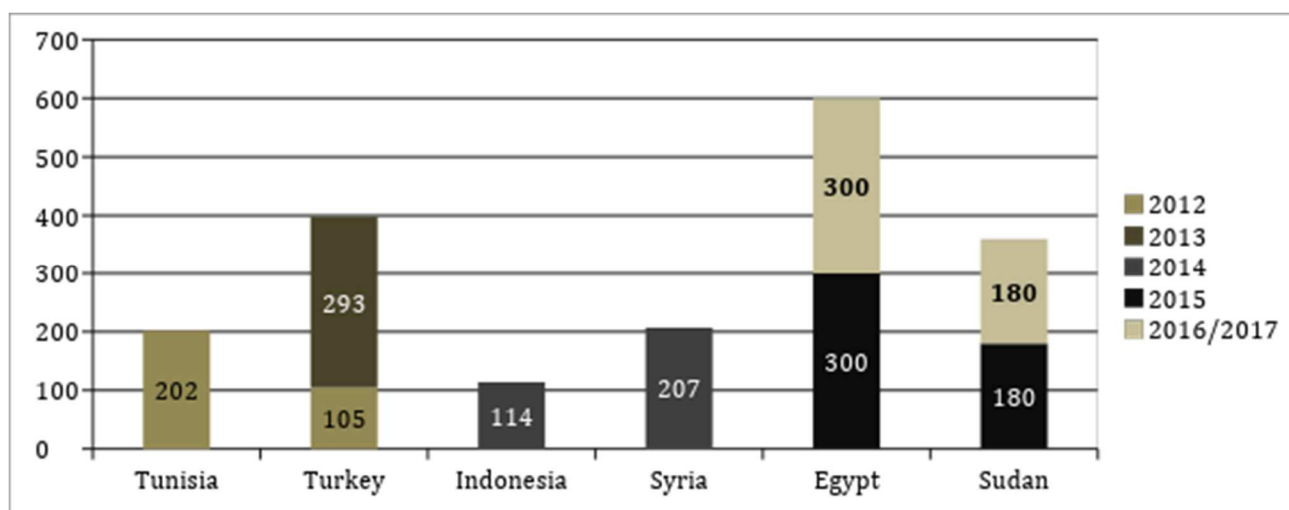
Since August 2015, the resettlement programme is legally based in the **August 2015 § 23 Abs. 4 AufenthG. - § 23(4)** – allowing resettled refugees to receive a residence permit (**Aufenthaltserlaubnis**), which is usually issued for an initial three years (Grote et al., 2016: 6). After five years, they are entitled to a residence permit.

In 2016, the German resettlement programme was extended and is now guided by a European quota: On 20<sup>th</sup> July of 2015, the European Council decided to implement an EU-Resettlement Programme for 2016/17 and to resettle 22.504 persons to the European Union. Taking into account the national quota, in 2016 and 2017, Germany expressed the intention to resettle **1,600 persons** in total and 800 persons per year within the framework of the EU resettlement pilot programme. According to the Ministry of Interior, they were supposed to be stateless people, refugees from Lebanon, Sudan, Egypt and possibly Turkey.

In fact, this **quota was mainly used to fulfil the obligation of the EU-Turkey Statement** where Germany had claimed among other states that one Syrian refugee would be resettled from Turkey to the European Union for each deported Syrian from the Greek Islands. Therefore, the promised 1:1 exchange defined in the EU-Turkey Statement did not lead to additional admissions apart from the existing requirements. In 2016, 1,215 people (1,060 from Turkey and 155 from Lebanon) were resettled via the EU-Resettlement Programme 2016-2017.

In April 2018, the European Commission decided to resettle up to 50,000 refugees from Northern Africa to EU member states. Germany to participate in this resettlement programme accommodating 10,000 people.

**Figure 5. German Resettlement Programme between 2012 and 2016/2017<sup>35</sup>**



Source: BAMF

<sup>35</sup><http://resettlement.de/aktuelle-aufnahmen/>

**Table 5. EU-Resettlement Admissions<sup>36</sup>**

Date of Entry	Number of People	Country	Nationality	Residence Permit
24.11.2015	258	Egypt	Ethiopia, Eritrea, Iraq, Somalia, Sudan, Uganda	§ 23, 2
14.12.2015		Sudan	Ethiopia, Eritrea, Syria	§ 23, 2
<b>Total for 2015</b>	<b>414</b>			
24.02.2016	24	Sudan	Ethiopia, Eritrea	§ 23, 4
04.04.2016	32	Turkey	Syrien	§ 23, 4
11.04.2016	5	Turkey	Syria	§ 23, 4
15.04.2016	17	Turkey	Syria	§ 23, 4
19.05.2016	103	Turkey	Syria	§ 23, 4
16.06.2016	135	Turkey	Syria	§ 23, 4
27.06.2016	2	Turkey	Syria	§ 23, 4
16.08.2016	143	Turkey	Syria	§ 23, 4
08.09.2016	172	Turkey	Syria	§ 23, 4
27.09.2016	5	Turkey	Syria	§ 23, 4
13.10.2016	152	Turkey	Syria	§ 23, 4
10.11.2016	170	Turkey	Syria	§ 23, 4
30.11.2016	155	Lebanon	Syria	§ 23, 4
01.12.2016	124	Turkey	Syria	§ 23, 4
<b>Total for 2016</b>	<b>1.239</b>			
12.01.2017	153	Turkey	Syria	§ 23, 2
23.02.2017	182	Turkey	Syria	§ 23, 2
16.03.2017	181	Turkey	Syria	§ 23, 2
20.04.2017	180	Turkey	Syria	§ 23, 2
09.05.2017	255	Turkey	Syria	§ 23, 2
23./24.05.2017	22	Lebanon	Syria	§ 23, 4
30.05.2017	237	Turkey	Syria	§ 23, 2
20.06.2017	246	Turkey	Syria	§ 23, 2
11.07.2017	247	Turkey	Syria	§ 23, 2
02.08.2017	140	Turkey	Syria	§ 23, 2
07.09.2017	236	Turkey	Syria	§ 23, 2
26.09.2017	185	Turkey	Syria	§ 23, 2
12.10.2017	237	Turkey	Syria	§ 23, 2
02.11.2017	231	Turkey	Syria	§ 23, 2
07.12.2017	256	Egypt	Sudan, Syria, Ethiopia, Eritrea, Somalia, Iraq, Iran, Zimbabwe, Chad	§ 23, 4
<b>Total for 2017</b>	<b>2.988</b>			
09.01.2018	267	Turkey	Syria	§ 23, 2
15.02.2018	107	Egypt	Syria	§ 23, 4
22.02.2018	251	Turkey	Syria	§ 23, 2
13.03.2018	176	Turkey	Syria	§ 23, 2
29.03.2018	173	Turkey	Syria	§ 23, 2
<b>Total for 2018 (April)</b>	<b>974</b>			

Source: Resettlement.de/Caritas

**Humanitarian Admission Programme:** Parallel to the resettlement programme, a humanitarian admission programme (HAP Syria) – granting only temporary protection for Syrians – was implemented since 2013 as reaction to the civil war in Syria. Through the HAP, Germany has accepted almost **20,000 Syrians** who were moved directly from countries in the neighbourhood of Syria (i.e. Egypt and Libya) between 2013 and 2017. In March 2013, the Federal Minister of the Interior agreed with the Interior Ministers and Senators of the federal Länder “to admit 5,000 particularly vulnerable Syrian refugees in 2013 for the duration of the conflict and its aftermath

<sup>36</sup>This data only includes individuals who were processed through the Friedland border transit camp (GDL Friedland). Direct entry into municipalities is not included. Consequently, this data could differ from other representations. Reproduced from Resettlement.de/Caritas. Available at <http://resettlement.de/en/current-admissions/> Retrieved 16/04/2018.



affecting the refugees, in anticipation of the expected all-European rescue mission to cope with the refugee crisis in Syria and its neighbouring countries [...]” (BMI 2013a: 1). At the end of 2013, it was agreed to accommodate 5,000 more people and in 2014 the programme HAP Syria 3 came into force aiming to transfer **another 10,000 people**.

These are temporary admissions, intended to bridge a period while the country of origin is undergoing crisis, war and dangerous conditions. The respective persons are provided with a residence permit under Section 23 subs. 2 and 3 in connection with Section 24 of the Residence Act, issued for two years with the option to renew the residence permit (BMI 2013a: 4 cited in Grote et al., 2016: 6). Officially, the programme has been closed in 2017 but was formally extended with a goal of 500 people per months and late registrations are still added to the statistics.

Beside the Humanitarian Admission Programme, from 2013-2016 there were other much smaller admission programmes in place designed to allow Syrians entry into Germany. They were carried out on the level of Germany’s federal **Länder**. The persons admitted under this programme are given a residence permit for up to two years under Section 23 subs. 1 of the Residence Act with the option to renew the residence permit.

Connected to the ISAF-mission in Afghanistan, Germany’s Foreign Office, Defence Ministry, Economic Ministry and Ministry of the Interior decided on a joint procedure for Afghan staff that had been working for German public agencies and Afghanistan and was therefore put at risk in Afghanistan. The Federal Government had offered it already since 2012. From 2012 – 2016, more than 1,800 local employees applied to be admitted to Germany, 771 were granted admission for themselves and their nuclear family and were enabled to get a visa for entering Germany. They were granted a residence permit for two years that can be renewed and lead to a permanent residence title after if certain criteria are met.

**Family-Reunification**<sup>37</sup>: There exists a EU-wide program or framework with provisions for family reunification designed for third-country nationals. It first came into existence in 2003, and was referred to as the “EU Family Reunification Directive” (2003/86/EC) (Grote 2017). As for the German national case, provisions are described in **Sections 27 – 36 of the German Residence Act** (ibid.). For the purposes of family reunification, one must first assert what constitutes a “family”. Here, civil partnership is treated as equal to officially married couples.

According to Grote (2017) at least since 2014, there has been a considerable rise in residence titles granted to third-country nationals for the purpose of family reunification with Germans or third-country nationals. The following numbers show this clearly. For instance, between 2010 and 2013, residence titles granted for the purpose of family reunification came close to 55,000 for each year. By 2014, the annual number had risen to 63,677. In 2015, it went up again to 82,440.

The majority of residence titles are issued to wives or “female registered partners” (42.8% of the total titles issues were for wives or female partners, or 35,319 in absolute numbers - figure from 2015) with the purpose that they join their **husbands or registered partners**. **Minor children** are the second-largest group (22.1% in 2011 and 33.9% in 2015). **Husbands and male registered partners** are the third-largest group, ahead of **parents and other family members**. Regarding specifically the issue of family reunification, the ten most important countries of origin in 2015 were: Syria (15,956), Turkey (7,720), the Russian Federation (4,726), India (4,605), Kosovo (3,808), the

<sup>37</sup>For the following few paragraphs, we rely heavily on the work conducted by Grote (2017) on behalf of BAMF.

US (3,098), Ukraine (2,693), China (2,635), Iraq (1,800) and Bosnia and Herzegovina (1,775). All this said, it is important to emphasize that this programs have recently come to a halt regarding asylum decisions processed as subsidiary protection (see Grote 2017).

**The EU Relocation-Programme:** According to the German Federal Office for Migration and Refugees, “Asylum-seekers are re-distributed via the “relocation” procedure from EU Member States whose asylum and reception systems are under particular pressure – as is the case at present in Greece and Italy – to other Member States, and go through the asylum procedure there.”<sup>38</sup> Generally, only asylum seekers coming from countries of origin with an average European recognition rate of 75% can be relocated, which currently only applies for Syrians and Eritreans.<sup>39</sup>

The procedure is legally based on EU decisions 2015/1523 of 14th September 2015 and 2015/1601 of 22th September 2015. In May 2015, the EU decided on a relocation of 40,000 persons from Italy and Greece that was followed by another relocation programme of 120,000 people seeking protection in September. In total, within two years from September 2015 until September 2017, 160,000 persons were supposed to be resettled from Greece, Italy and Hungary. (Hungary decided in hindsight not to participate in the programme).

Drawing on ideas of the European Agenda on Migration 2015 Emergency Clause Art. 78 III AEUV and an additional European Council decision from September 2016 (EU 2016/1754), Germany was allowed to partly use the quota to carry out relocation of Syrian refugees from Turkey in order to fulfil the goals of relocation of the EU-Turkey statement. The country agreed to admit in total 27,536 asylum seekers, among them 13,694 from Turkey. However, **Germany is far from living up to this commitment. Up to now, only 5,221 people were relocated from Italy and 5,391 from Greece** (data as of 19.04.2018).<sup>40</sup>

The 13,694 planned relocations from Turkey did not take place, apart from the comparatively low numbers of resettlement carried out under the frame of the mentioned Humanitarian Admission Programme and the Resettlement programme that can formally be used to fulfil the obligations of resettlement of the EU-Turkey statement. Although there is a gap of almost 17,000 people to fulfil the obligation for the relocation programme, the German Ministry of Interior considers the process of relocation as “almost completed” and only expects a few more relocations from Italy for the future.<sup>41</sup>

<sup>38</sup><http://www.bamf.de/EN/Fluechtlingsschutz/HumAufnahmeResettlement/Relocation/relocation-node.html>

<sup>39</sup>[http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/201707-statistik-anlage-asyl-geschaeftsbericht.pdf?\\_\\_blob=publicationFile](http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/201707-statistik-anlage-asyl-geschaeftsbericht.pdf?__blob=publicationFile)

<sup>40</sup>[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_relocation\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf)

<sup>41</sup> <https://www.tagesschau.de/inland/umverteilung-fluechtlinge-103.html>,  
<http://www.zeit.de/politik/deutschland/2018-01/eu-asylpolitik-fluechtlingsverteilung-prioritaet-thomas-de-maiziere>

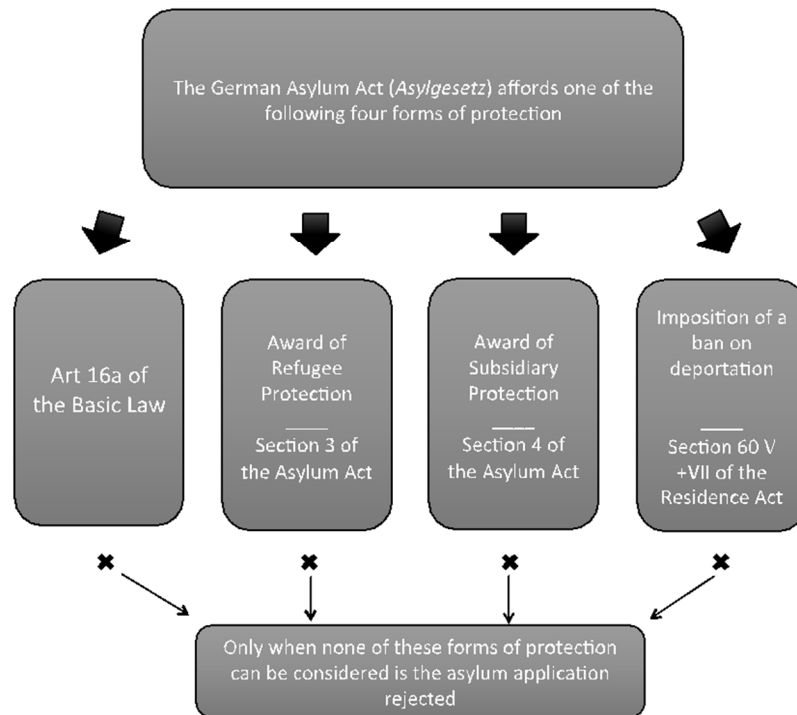
### 3. An Overview of Current Asylum Law, Application Procedures and overall Legal Status of Foreigners in Germany: Asylum Seekers and other Immigrant Categories

Before we can tackle the changes in the German asylum legislation, we must first draw the outline of the German asylum system.

The main provisions according to asylum related issues in Germany are regulated in three main acts: The Asylum Act (Asylgesetz - AsylG), the Residence Act (Aufenthaltsgesetz - AufenthG) and the Asylum Seekers Benefits Act (Asylbewerberleistungsgesetz – AsylbG). The Asylum Act outlines the process under which asylum is applied for and granted in Germany. The Residence Act spells the law governing residence, economic activity, and integration of foreigners into the federal territory of Germany; additionally frequent references to the Asylgesetz regarding specific rules for asylum seekers. Finally, the Asylum Seekers Benefits Act defines specific government benefits for asylum seekers and people with “toleration” during the first 15 months, including monthly payments for living expenses and health care services.

The different forms of protection based on provisions in the Asylum Act, the Residence Act as well as the German Basic Law and the Qualification Directive (2011/95/EU). According to this an asylum seeker coming to Germany may be granted one of the following four forms of protection after his/her case is assessed by the Federal Office for Migration and Refugees (***Bundesamt für Migration und Flüchtlinge*** – BAMF, see fig 6):

- **Entitlement to Asylum (Art. 16a of the Basic Law, Section 1 I of the Asylum Act)**
  - **Award of Refugee Protection (Section 3 of the Asylum Act, Section 60 I of the Residence Act)**
- **Award of Subsidiary Protection (Section 4 I of the Asylum Act)**
- **Imposition of a National ban on Deportation (Section 60 V+ VII of the Residence Act)**

**Figure 6. German Asylum Act and the Different Forms of Protection<sup>42</sup>**

Source: BAMF

### Entitlement to Asylum

On one side, the Right of Asylum is a basic right stipulated in Art. 16a of the German Basic Law (Grundgesetz - GG). Art. 16a I specifies that “Persons persecuted on political grounds shall have the right of Asylum” and is therefore the oldest form of protection. Since the concept of asylum is not defined in the Law, content and scope of application are primarily a result of the ruling by the Federal Constitutional Court/Refugee Convention. In accordance with the Court’s ruling a person is considered to be experiencing political persecution if he or she is suffering from infringements of his or her rights by the state or third person measures that can be attributed to the state, because of religious or political convictions or other inaccessible features that mark the individuals otherness. On the other side, the German legislature restricted the basic right by introducing Art. 16a II in 1993. For this reason today the Right of Asylum is insignificant within the protection system. However, it has to bear in mind that Art. 16a is the only basic right which is merely entitled to foreigners.

### Award of Refugee Protection/Non-Refoulement

Refugee Protection is granted to foreigners who are threatened with persecution in their country of origin. According to Section 3 I of the Asylum Act (see also Section 60 I of the Residence Act) a foreigner is regarded as a Refugee if he/she, owing to well-founded fear of persecution in his country of origin on account of his race, religion, nationality, political opinion or membership of a particular social group (No. 1) and resides outside the country of origin whose nationality he possesses and the protection of which he cannot, or, owing to such fear does not want to avail himself of, or where he/she used to have his/her habitual residence as a stateless person and where he/she cannot, or owing to said fear, does not want to return (No. 2). The prohibition of rejection of foreigners who face

<sup>42</sup>Based on information provided by BAMF – [www.bamf.de](http://www.bamf.de)

persecution in their country of origin is also known as the “Non-Refoulement-Principle”. Therefore this form of protection is directly linked to the Convention relating to the Status of Refugees (also known as the 1951 Refugee Convention), which is valid in Germany since 24. December 1953, and is also regulated in Art. 9 ff. of the Qualification Directive (2011/95/EU). Foreigners awarded with a refugee protection have no disadvantages compared to people entitled with the Right of Asylum according to Art. 16a GG.

### **Award of Subsidiary Protection**

The Subsidiary Protection, introduced on the European level in 2004 by the Council Directive 2004/83/EC (European Council 2004), closes a gap in the human rights protection since it refers to the fact, that some people are not threatened by persecution within the meaning of the 1951 Refugee Convention. Therefore, subsidiary protection is granted without the need of individual persecution. Instead Section 4 I of the Asylum Act states that a foreigner shall be eligible for subsidiary protection if he/she has shown substantial grounds for believing that he would face a real risk of suffering serious harm in his/her country of origin. According to this serious harm consists of the death penalty or execution, torture or inhuman or degrading treatment or punishment or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict. The three alternatives mentioned in Section 4 are based on Art. 15 of the Qualification Directive and - in case of torture - the wording of Art. 3 of the European Convention of Human Rights.

### **Imposition of a National ban on Deportation**

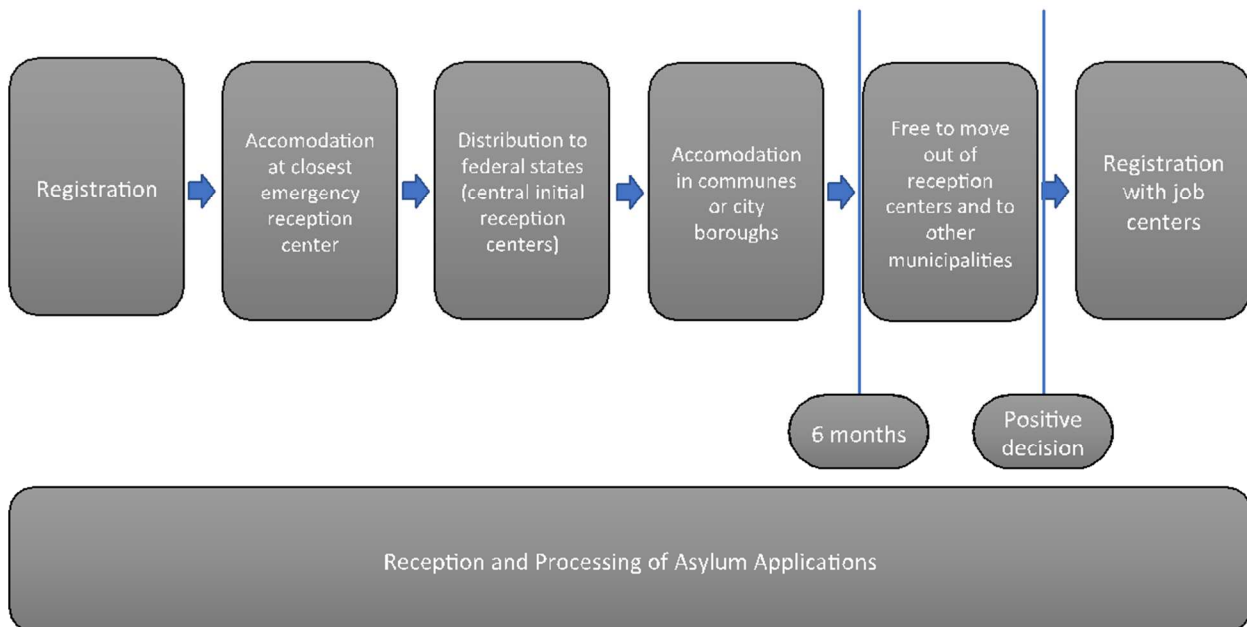
The Ban on Deportation applies only subsidiary when neither the right of asylum nor the refugee or subsidiary protections are applicable. Since this regulation is not based on European Law it’s also known as “national subsidiary protection”. Therefore in Germany a ban on Deportation is provided in two cases: According to Section 60 V and VII of the Act on Residence a foreigner may not be deported if deportation is inadmissible under the terms of the European Convention of Human Rights or when he/she faces a substantial concrete danger to his/her life and limb or liberty.<sup>43</sup> As long as Section 60 V refers to Art. 3 ECHR it overlaps with Section 4 I Nr. 2 of the Asylum Act.

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<sup>43</sup>BVerfG 80, 315 (333).

### 3.1 Application Procedures: Arrival, Registration, Reception Centres and Geographical Limitations

Fig. Process of Registration of Asylum Seekers in Germany



Source: AIDA

Authorities who are responsible if a foreigner crosses the border to enter Germany are the border authority (**Grenzbehörde**), the Federal Office (**Bundesamt für Migration und Flüchtlinge – BAMF**) and the police of the **Länder**. The border authority and police tasks and obligations are regulated in **Section 18 and Section 19 of the Asylum Act**. Therefore the border authority or the police shall take the foreigner's photograph and fingerprints for identification measures and has the obligation to refer him/her requesting asylum with an authority charged with police supervision of cross-border traffic to the competent reception centre, or, if that is not known, to the nearest one, for the purpose of registration. In accordance with the Asylum Act, the Federal Office shall be responsible for measures and decisions taken under foreigners law. Therefore the Federal Offices tasks and obligations are regulated in Section 5 as well as Section 24 of the Asylum Act. According to Section 5 I the Federal Office shall decide on asylum applications. Hence, they shall clarify the facts of the case and compile the necessary evidence. After the application for asylum has been filed, the Office shall inform the foreigner in a language he can reasonably be supposed to understand about the course of the procedure and his rights and obligations as well as interview the foreigner (see **Section 24 I of the Asylum Act**).

Asylum seekers who arrive at an international airport without the necessary documents may be subject to the airport procedure (see Section 18a of the Asylum Act). The accelerated procedure, which has a potential total duration of maximum 19 days, is only implemented at airports which can accommodate asylum applicants on their airport complex (this is for Berlin-Schönefeld, Düsseldorf, Frankfurt/Main, Hamburg, Munich).

Unless entry is denied at the border or at the airport, a regular procedure usually takes place. Applications have to be filed at the Federal Office for Migration and Refugees (**Bundesamt für**

**Migration und Flüchtlinge**, BAMF). Every applicant over the age of fourteen must submit to measures establishing his or her identity and provide fingerprints, which are cross-checked with national and European databases such as **EURODAC** and the Visa Information System.<sup>44</sup> As part of the application process, information such as the country of nationality, number of people, sex, and family ties of the asylum seeker will be recorded with the assistance of the “**EASY**”-programme (**Erstverteilung von Asylbewerbern**, "Initial Distribution of Asylum-seeker"). This then determines to which Bundesland and reception center the refugee is sent. The first reception centres are run by the federal states where various processes such as registration, identity checks, interview and decision-making are streamlined in the same facility (**Section 22 of the Asylum Act**).

At the moment, a new type of reception centres, the so called “arrival centres” are being tested, whereas the idea is that the whole asylum procedure is taking place under “one roof” that means also, that all different agencies are concentrated there. Around **26 facilities** (operated by BAMF) are in the pilot scheme functioning as arrival centres (see table 6 for list of competencies of each agency).

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<sup>44</sup>The Visa Information System (VIS) is an IT system that allows Schengen States to exchange visa data. The main purpose of the VIS is to simplify the visa issuance process, facilitate checks at external borders and to enhance security for everyone involved, including applicants. The Schengen States' Visa Information System has been operational since 11 October 2011. (European Commission. Available at: [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system_en). Retrieved: 11/01/18).



**Table 6. List of Procedures and Competent Authorities**

Stage of the procedure	Competent authority (EN)	Competent authority (DE)
Application at the border	Border Police	Bundespolizei
Application on the territory	Federal Office for Migration and Refugees (BAMF)	Bundesamt für Migration und Flüchtlinge (BAMF)
Dublin procedure	Federal Office for Migration and Refugees (BAMF)	Bundesamt für Migration und Flüchtlinge (BAMF)
Airport procedure	Federal Office for Migration and Refugees (BAMF)	Bundesamt für Migration und Flüchtlinge (BAMF)
Refugee status determination	Federal Office for Migration and Refugees (BAMF)	Bundesamt für Migration und Flüchtlinge (BAMF)
Appeal • First appeal • Second (onward) appeal • Final appeal	Administrative Court (local) • High Administrative Court (regional) • Federal Administrative Court	Verwaltungsgericht • Oberverwaltungsgericht or Verwaltungsgerichtshof • Bundesverwaltungsgericht
Subsequent application (admissibility)	Federal Office for Migration and Refugees (BAMF)	Bundesamt für Migration und Flüchtlinge (BAMF)

Source: Adapted from AIDA

A foreigner shall request for asylum either in front of the border authority (according to Section 18 and 18a of the Asylum Act), in front of the foreigners authority as well as the police (Section 19 of the Asylum Act) or directly in a reception centre (**Section 21 of the Asylum Act**). After personal information is collected, an “arrival certificate” (see **Section 63a of the Asylum Act**) is given to the applicant upon arrival. This certificate, which exists since autumn 2015, was first called “BÜMA” (*Bescheinigung über die Meldung als Asylsuchender*) and changed its name in “Ankunftsnachweis” in the spring of 2016.

At the centre, a “**formal decision**” can also be made. These decisions represent cases, which are closed without an examination of the substance of the asylum claims (for example, because it is found that Germany is not responsible for the procedure or because an asylum seeker withdraws the application). Such decision and others can be subject to a **Revision** or an appeal on points of law before the **Federal Administrative Court**.

A **Secondary Application** can be made. Under **Section 71a Asylum Act**, this is a subsequent application submitted in Germany after the person has had an application rejected in a safe third country or a **Dublin Member State**.

After registration, applicants are assigned to a reception centre (*Aufnahmeeinrichtung*) where the BAMF branch office is located and where asylum seekers are assigned to reside. According to



**Section 20 I, 22 III of the Asylum Act** the foreigner shall make his/her application for asylum in the reception centre. Asylum seekers are obligated to stay in the district of the Federal State where they have been assigned for a maximum period of 6 months, pursuant to **Section 56 Asylum Act**. This **geographical restriction** is known as the “**residence obligation**” (*Residenzpflicht*). Derogations apply for applicants who are obliged to stay in initial arrival centres for the entire asylum procedure or up to 24 months. There is another type of obligation, the so-called **residence rule** (*Wohnsitzauflage*) which applies for recognized refugees during their first three years and that demands to reside in the Federal State where their asylum procedure was conducted, pursuant to **Section 12a Residence Act**.

**Additionally there are so called “transit centres”** (*Transitzentrum*) or “special arrival centres” (besondere Aufnahmeeinrichtungen) that combine reception and deportation facilities and where asylum seekers have to stay for a period of up to 24 months. This **applies to refugees with a low “perspective to stay” and whose recognition rates are below 50%, mostly asylum seekers from countries defined as “safe countries of origin”**. Four such centres exist in Bavaria at the moment (Bamberg, Manching/Ingolstadt, Regensburg and Deggendorf).

For unaccompanied minors a special reception regime is assigned led by the youth welfare office (see chapter 3.8.).

Applications for asylum are processed by the Federal Agency for Migration and Refugees – the BAMF. **Section 13 of the Asylum Act** defines the application for asylum as follows. **The following conditions apply.**

1) An asylum application shall be deemed to have been made if it is clear from the foreigner’s written, oral or otherwise expressed desire that he is seeking protection in the federal territory from political persecution or that he wishes protection from deportation or other removal to a country where he would be subject to the persecution defined in Section 3 (1) or serious harm as defined in Section 4 (1).

2) Every application for asylum shall constitute an application for recognition of entitlement to asylum and to international protection within the meaning of Section 1 (1) no. 2. The foreigner may limit the application for asylum to the application for international protection. He shall be informed of the consequences of such limitation. Section 24 (2) shall remain unaffected.

3) Any foreigner who does not have the necessary entry documents shall apply for asylum at the border (Section 18). In the case of unauthorised entry he shall immediately report to a reception centre (Section 22) or apply for asylum with the foreigner’s authority or with the police (Section 19).

**Section 14 AsylG outlines the application procedure.** After application, the asylum seekers will receive a temporary residence permit for the duration of their asylum procedure. **Section 16 AsylG** states that every refugee’s identity must be recorded. Only children under the age of 14 are exempt from this rule.

Holders of a temporary residence permit are not allowed to work within the first 3 months after receiving the permit. After this time, they are allowed to apply for a work permit, which can be granted by the federal agency. However, holders of temporary residence permits will only receive secondary access to the labour market. However, in the reception facilities, applicants are provided with essential items like food, housing, heat, clothing, health care, and household items in kind or in the

form of vouchers. Persons who are housed outside of reception facilities primarily receive cash allowances to purchase essential items – both on the basis of the Benefits of Asylum Seekers Act that sums up to around 359 Euro for an single adult. The rent, heating and basic furniture is additionally financed by the municipality. These provisions are the result of the verdict of the Constitutional Court of Justice that recently ruled on the minimal provision of asylum seeker benefits (**BVerfG, Judgement of the First Senate of 18 July, 2012 - 1 BvL 10/10**). Education for children, language courses and vocational training is not obligatory during the asylum procedure and varies between the municipalities and Länder. Mostly asylum seekers have to look for NGOs and civil society initiatives offering language courses or childcare for free.

According to **Art. 47 Abs. 2 S.2 EUGRCH/Art. 22AsylVfRL (RL 2013/32/EU)** asylum seekers have a right to an effective legal advice in the whole asylum process. An effective access to the law is one of the key elements in a state under the rule of law. . There is wide spread criticism especially by advocacy groups that the recent information practice by the BAMF violates these obligations. As a result there is no effective legal advice in the asylum procedure, respectively only for those who can afford a lawyer.

### 3.2 The airport procedure

In its 1996 decision the Federal Constitutional Court ruled that **the airport procedure is constitutional (BVerfGE 94, 166/195 ff.)**, but also stated that the asylum seekers have to be granted effective legal protection by the authorities. **With the amendment adopted in 1993 to Art. 16 GG and the reformulation of Art. 16a GG** the airport procedure was introduced. Without this procedure the Federal Police would have to permit anyone who entered Germany by plane and requests asylum because of the *non-refoulement principle* that is contained in **Art. 33 of the Geneva Refugee Convention and in Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)**. Therefore this special procedure applies and is being carried out, when people attempt to enter the country by air and apply for asylum while they are still in the transit area. **The procedure, which is regulated in Section 18a of the Asylum Act**, has a potential **total duration of 19 days**. Since this procedure is operated subject to the principle of immediacy the **BAMF must interview the applicants within two days of receiving the asylum application**. It is then decided whether they are to be permitted to enter the country or the asylum application is to be rejected as “manifestly unfounded”. Following on from a rejection, they have three days’ time to submit an application for temporary legal protection to an administrative court. If the court approves the emergency application or has not ruled on it within 14 days, the asylum applicant may enter the country.

### 3.3 Processing the Application

Applications for asylum are processed by the Federal Office for Migration and Refugees (BAMF) According to section 10 of the **Asylum Act (AsylG)** asylum seekers are required to disclose any change in address to the aforementioned migration agency (BAMF) without delay for the entire course of their asylum in Germany; this also applies to any move that was dictated or enacted by the agency itself. The most important aspect in gaining asylum is the official hearing in front of the migration office. In the summer of 2015, the average processing time of an application for asylum was 5.4 months, as reported by the migration office (BAMF). However, experts like the national asylum rights organization PRO ASYL claim that the number is actually significantly higher, closer to one year. The difference in these figures is said to be due to the fact that BAMF measures the processing time starting at the moment an asylum seeker files with the migration office; this can be

many months after they enter the country. Furthermore, the office processes those applications that are easier to decide on more quickly, putting them in front of a pile of about 254,000 unprocessed applications.

### 3.4 Applications to be disregarded and “manifestly unfounded” applications

**Section 29 AsylG** constitutes that an application for political asylum has to be disregarded if the asylum seeker can be removed into a third country where he or she is safe from political persecution.

**Section 29 AsylG** determines how to treat an asylum seeker from a safe country of origin: his application shall be rejected as manifestly unfounded, unless the facts or evidence produced give reason to believe that he or she faces political persecution in his or her country of origin in spite of the general situation there.

**Section 30 of AsylG** sets further terms about when an application has to be rejected as *manifestly unfounded* and Section 36 determines the following proceedings for these cases. An application that has been rejected as “manifestly unfounded” has a barrier effect as long as the rejection is justified by **Section 30 (3.1–6) AsylG**, since with regard to **Section 10 (3) Residence Act (AufenthG)** prior to leaving the federal territory no residence title can be granted. An exception is granted when an unsuccessful asylum seeker is otherwise entitled to a residence permit. One common example is when an asylum seeker joins a German family (**Section 28 (1) AufenthG**). The German Bar Association demands the second sentence of **Section 10 (3) AufenthG** be removed, because its barrier effect, which prevents refugees from receiving a permanent permission to stay, results in the office granting temporary residence permissions multiple times, despite integration efforts. Other arguments include that the section conflicts with European and international laws and is an unjustifiable discrimination compared to expelled foreigners.

### 3.5 False or incomplete information

**False or incomplete information that is given on the asylum application and any following inaccuracies can lead to significant consequences for the asylum seeker, according to Section 30 AsylG.** This especially concerns false identity information, which can make procedures like weddings, childbirth or targeted naturalisation more difficult or even impossible until correct information can be clarified. Additionally, if these **untrue personal details are also intentionally used apart from the application for asylum, criminal liability according to the Act on Residence (AufenthG)** can come into consideration. If the foreigner is able to clear up the facts after a successful application, the asylum which is based on incorrect or incomplete information will usually be considered for a possible revocation by the Federal Office for Migration and Refugees. Parallel to this procedure the authorities can, if necessary, make further decisions and can even disregard deception which was relevant for the right of residence or deception for the right of residence which was used a long time ago. The verification can, however, also lead to a deportation. In some federal states of Germany false or incomplete information can exclude a consideration of the Hardship Commission. Otherwise false or incomplete information for relevant questions for the decision can also lead according to the European secondary law to revoke or deny renewal of the legal status as a refugee.

### 3.6 Legal prosecution

If asylum seekers enter the country without the required visa they cannot be prosecuted for this action according to Article 31 of the Convention relating to the Status of Refugees, provided they present themselves to the authorities without delay and show good cause for their illegal entry or presence. Furthermore, a common legal opinion is that a clearly unfounded application for asylum does not automatically represent an abusive misuse of the law. This would only be the case if purposeful, abusive activity can be proven. Contrary to common belief, false or incomplete statements during the process of the asylum procedure are not immediately prosecutable. Furthermore, the residence act does not apply during the first asylum procedure. Thus, **punishment according to Section 95 (1.5) and Section (2) of the Residence Act does not apply in this case.** Asylum seekers will only be prosecuted in the following cases: If they used fake or falsified passports they could be prosecuted according to Section 267 StGB; also if they use falsified personal data in their residence permit. However, merely making false statements during the asylum procedure does not qualify as a criminal offence and is regarded as an administrative offence. The aforementioned criminal offences of the Residence Act can only be fulfilled if false statements are made and used in following lawsuits concerning the rights of foreigners. A decree released by the ministry of internal affairs and justice of North-Rhine Westphalia for example states that false or incomplete statements or the submission of false documents during official asylum procedures conflicts with public interest because it raises public expenses and could tend to encourage xenophobia and the formation of criminal organisations.<sup>45</sup> These actions shall in retrospect lead to expulsion according to Section 55 of the Residence Act. Also, since 1 November 2007, Section 96 (2.2) penalises the use of false identification documents with the goal of suspending deportation. Thus, false or incomplete statements will be punished with prison sentences of up to one year (Section 95 (1)) or three years (Section 95 (2)) according to the Residence Act. According to Section 84 and 84a tempting somebody to make false statements while applying for asylum is prosecutable as well.

### 3.7 Revocation procedure

Until 1 August 2015, the Federal Office for Migration and Refugees was legally responsible for checking that a positive decision was still valid no later than 3 years after the decision was made. One criteria for revising the decision would be a felony that was penalised with more than three years in prison or a crime against peace. If an infringement is found, the Foreigner's Registration Office reviews the claim to residency. Under certain circumstances, such as a complete lack of integration or a severe felony, the residency is ended. If the protection of the Federal Office for Migration and Refugees is not revoked, the refugee is granted a permanent residence permit. In practice, it has been granted to 95 percent of all refugees. **The renewal of the asylum law (*Gesetz zur Neubestimmung des Bleiberechts und der Aufenthaltsbestimmung*), which became effective on 1 August 2015 is supposed to cut efforts for the Federal Office of Migration and Refugees on individual assessments.** The Foreigner's Registration Office is allowed to grant the right to stay after three years, if the Federal Office of Migration and Refugees does not give notice of an exceptional case that justifies the revocation of protection. Extensive individual assessment of applications of asylum with personal hearing which have been agreed on by the Conference of

<sup>45</sup> ["Konzeption zur Bekämpfung missbräuchlicher Verwendung des Asylantragsrechts, Gemeinsamer Runderlass des Innenministeriums – IV D I/I C-6592/2 und des Justizministeriums 4725 – III A-6 vom 1.8.1995"](https://www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2015/08/150801_Aufenthaltsbestimmung.html)

[https://recht.nrw.de/lmi/owa/br\\_bes\\_text?anw\\_nr=1&gld\\_nr=2&ugl\\_nr=2051&bes\\_id=3158&val=3158&ver=7&sg=0&aufgehoben=N&menu=0](https://recht.nrw.de/lmi/owa/br_bes_text?anw_nr=1&gld_nr=2&ugl_nr=2051&bes_id=3158&val=3158&ver=7&sg=0&aufgehoben=N&menu=0)

Ministers of the Interior in Koblenz on 3 December 2015 are part of the procedure since 1 January 2016: Applications from refugees from Syria, Iraq, Afghanistan and Eritrea are processed like that for safety reasons.

### 3.8 Rights and Duties Connected to Protection Status

Based on the section 25(2) of the residence act, persons with refugee status and beneficiaries of subsidiary protection have unrestricted access to the labour market under the same conditions as German citizens. Both groups are furthermore entitled to take up vocational training as well as school or university education, if their professional qualifications are recognized – which is often a practical obstacle to access the labour market and higher educational institutions. Generally, they can also receive support for the costs of living for the duration of training or studies under the same conditions as German citizens (AIDA 2017).

While asylum seekers are only provided with particularly low benefits during their ongoing asylum procedure, both refugees and beneficiaries of subsidiary protection are entitled to social benefits on the same level as German nationals. By law, they are entitled to the benefits directly after their recognition, however the actual payment can be delayed due to administrative reasons when the residence permit officially confirming their protection status (*Aufenthaltserlaubnis*) is not issued on time and individuals only hold the residence permit for asylum seekers (*Aufenthaltsgestattung*). Just as for German citizens, beneficiaries of international protection registered as unemployed can receive unemployment benefits by the employment agency or the job centre. This can include measures for integration into the labour market, language classes, job training measures etc. People who are not registered as unemployed for several reasons can turn to the Social Welfare Office (AIDA 2017).

Individuals who have been granted either asylum or refugee protection used to face no legal restrictions regarding their place of residence. However, since a legislative change in July 2016 also asylum seekers acknowledged under the German constitution law can be obliged to have a predetermined fixed abode under the ‘residence rule’ (*Wohnsitzauflage*). Likewise, the award of subsidiary protection is often accompanied by a *Wohnsitzauflage*. The respective individuals are – contrary to asylum seekers with residence obligation (*Residenzpflicht*) – free to travel within the Schengen zone. Since the legislative change, beneficiaries of protection are generally obliged to take up their place of residence within the Federal State in which their asylum procedures have been conducted. On the federal level, several states also enforce the obligation to reside in a specific municipality. Both restrictions are currently limited to a period of up to three years and can be lifted in specific cases. In case of subsidiary protection or a national ban on deportation, the *Wohnsitzauflage* is only imposed on individuals who are provided financially with social benefits.

### 3.9 Unaccompanied Foreign Minors: Some Legal Provisions

**While dealing with unaccompanied minors** Art. 24 of the Reception Conditions Directive 2013/33/EU<sup>46</sup>, Art. 25 of the Procedures Directive 2013/32/EU<sup>47</sup>, Art. 2 lit. I of the Qualifications Directive 2011/95/EU<sup>48</sup>, the Social Code VIII and §§ 12 and 14 of the Asylum Act. Art. 2 lit. I 2011/95/EU defines “unaccompanied minors” as a minor who arrives on the territory of the

<sup>46</sup><http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0033&from=DE>

<sup>47</sup><http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0032&from=DE>

<sup>48</sup><http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF>



**Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned**, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States. In accordance with this definition, children, adolescents and young adults under the age of 18 are regarded in the asylum procedure as being minors. If they enter Germany without being accompanied by an adult who is responsible for them, or if they are left there unaccompanied, they are regarded as unaccompanied minors.

If they entered Germany after the 1 Nov. 2015 they are taken into care by the youth welfare office that has the responsibility on the local level. **This ensures that they are accommodated with a suitable person or in a suitable facility.** Suitable persons can be relatives or foster families, whilst suitable facilities could be ‘clearing houses’ specializing in caring for minors, or youth welfare facilities. First, after provisionally taken into care the ‘initial screening’ is carried out, where the general examination of the state of health as well as the age of the unaccompanied minors is established. Methods are used for this range from simply estimating age through physical examinations to X-ray tests of the wrist, jaw or collarbone. The youth welfare office also estimates whether the implementation of the subsequent distribution procedure might endanger the child’s best interests in physical or psychological terms. The possibility of family reunification with relatives living in Germany is also examined in this context.<sup>49</sup>

It exists a nationwide distribution procedure, which is implemented within 14 days. After this distribution, the youth welfare office to which the minors have been assigned is responsible for the further proceedings. Next steps are the application for guardianship, the calculation of the need for education and clarification of the residence status. Regulated by legal provision a guardian must be appointed. Guardianship as a rule lasts until the minor attains majority and the Family Court decides who ultimately assumes the guardianship. Another important factor is that the age of majority is orientated towards the law in the minor’s country of origin and not towards German law. Therefore a minor does not attain the age of majority under this law until turning 18, the guardianship also does not end until this time.

However **since the national provisions apply to determining the age of majority within the asylum application, the minors once they have reached the age of 18 need to lodge their own asylum application, regardless of the law applying in their country of origin.** Minors aged under 18 are regarded as not having legal capacity within the asylum application. In such cases, the asylum application has to be filed in writing by the youth welfare office or guardian. If it is lodged by a guardian, a “**certificate of appointment**” needs to be forwarded. The following information regarding the minor is nonetheless helpful when it comes to simplifying the further organisation of the procedure: surname, forename(s), date of birth, or date of birth as ascertained in the age establishment, nationality, ethnicity and religious affiliation, place of birth, language knowledge, if possible the date of entry into the country.

**Since unaccompanied minors are regarded as a particularly vulnerable group of individuals enjoying special guarantees for their asylum procedure, their asylum applications are taken care of by specially commissioned case-officers.** Their procedural guarantees include for instance the determination that interviews do not take place until after a guardian has been appointed and are held as a matter of principle in the presence of the latter. Additionally an advisor (curator) can attend the interviews. The latter may also make statements on the individual case

<sup>49</sup><http://www.bamf.de/EN/Fluechtlingsschutz/UnbegleiteteMinderjaehrige/unbegleitete-minderjaehrige-node.html>. Retrieved 12/01/2018.

during the interviews or address questions to the minors, which are relevant to the asylum application. Particular emphasis is placed during the interviews on ascertaining whether there are indications of “child-specific ground for flight”. Child-specific grounds for flight are for instance genital mutilation, forced marriage, domestic violence, trafficking in human beings, as well as forced recruitment as a child soldier. A decision is taken on the respective asylum application on the basis of the interview. This notice is then served on the guardian or lawyer.

With more than 400 youth welfare associations as well as individuals’ one of the most important non-profit and non-governmental protagonists, the 1998 founded **Federal Association for Unaccompanied Refugee Minors (Bundesfachverband unbegleitete minderjährige Flüchtlinge)** advocates for the rights of displaced children, adolescents and young adults. They offer assistance to the young refugees as well as the legal guardians, social workers and the voluntary activists.

### 3.10 Immigration options for non-EU citizens

In 2005, the Immigration Act was passed. The act replaces the Aliens act of 1990 and therefore was one of the most essential pieces of legislative reforms in the last decade. Its first version, which had been proposed by the bipartisan commission and which had sought to open legal avenues of migration beyond asylum had been invalidated by the constitutional court on procedural reasons. The renegotiated version stated as its aim to restrict and manage migration to Germany. Through the Immigration Act, the Act on Foreigners was replaced by an Act on Residence, which is currently in force and which simplified the available residence statuses, EU directives of the CEAS as well as the Blue Card Directive were transposed into national law, and integration was defined as a legal duty. Despite the restrictive nature of the Act on Migration, its passage marks the end of the debate whether Germany was a country of immigration. From now on, domestic migration policy would focus on integration measures. However, the most profound effect on the legal status of migration to Germany would be the two rounds of EU accession of Eastern European countries in the 2000s, automatically legalising the presence of up to a million persons in Germany.

Immigration to Germany as a non-EU-citizen is still limited to skilled workers (individuals with either a university or polytechnic degree or at least 3 years of training together with job experience), students and their immediate family members. Germany has 3 immigration options: Visas (validity of up to 90 days), (temporary) residence permits, and settlement permits (permanent residence permits). Work permits, if granted, are no longer issued independently but included within the immigration title and are available for foreigners that either fall into one of the several available permit categories (IT specialists, company trained specialist within a group of companies, managing personnel, scientists, highly skilled workers with exceptional income, seasonal labour, contract labour, elderly persons-care etc.) or can prove a public interest in the employment. The categories and all requirements are listed in the ordinance on employment.

The former **Information Technology (IT) “Greencard program”** has been updated with a specific category within the ordinance on employment that allows IT specialists with a university or polytechnic degree to migrate to Germany for employment. Self-employment requires either an initial investment of EUR 250,000 and the creation of a minimum 5 jobs or the support of the local chambers of commerce or similar organizations that confirm the business plan’s socioeconomic value for the region. After obtaining a university degree in Germany, foreign students may stay for one additional year to find a job that matches their qualifications. Plans were discussed in 2009 to open the labour market for all foreigners holding a university degree that have a specific job offer

and for all graduates of German schools, including those located abroad. Any person married to a German citizen or being a parent of a German minor may immigrate to Germany. Immigrants need to be either enrolled in a school or university, have a specific job offer that fits the requirements of one of the work permit categories or intend to reunify with close family (spouse or minors) already residing in Germany (family reunification visa).

### **3.11 Business Visas**

Business visas are available for 90 days within every 6 months. Although it is possible to act as managing director, teacher, university scientist, sportsperson, actor, model or journalist on the basis of a business visa, businesspersons may only attend contract negotiations and buy or sell goods for an employer abroad. All other economic activity is considered work and must not be performed on the basis of a business visa. Germany is offering two different types of work or business visa categories: employment visa and self-employment visa.

### **3.12 Student Visa**

There are student applicant visas and student visas. The former can be applied for when the admission to a university is not yet completed, and lasts for three months, which can be extended up to six months. When a student visa is granted, the application for an extended residence permit should follow at the respective university office. This is relevant for non-EU citizens and all students who intend to stay longer than 90 days. While applying for a German national visa it is necessary for foreign student prepare in advance with documents that need to be submitted. In general, public German universities don't charge tuition fees. This usually also applies to foreign students. The German Academic Exchange Service (DAAD) provides support for international students and academic cooperation. After graduating, citizens of the EU or the European Economic Area (EEA) have free access to the German job market. Graduates from other countries can extend their residence permit for up to 18 months to look for employment. While many employers prefer proper German-language skills, there is also a great variety of English-language and globalised jobs in Germany, especially in multinational companies, many start-ups and in research fields. According to a study of the Federal Office for Migration and Refugees (BAMF), around 54 percent of foreign students in Germany decide to stay after graduation.

### **3.13 Rights and Duties of Legally Resident Foreigners**

The frequent changes and new legislation on the law concerning foreign nationals have resulted in changes to the rights of foreign nationals regarding living and working in Germany. Any description of the rights and duties of legal foreigners living in Germany, however, must differentiate between foreigners who are EU citizens living in Germany and foreigners who are categorized as third country nationals (from countries beyond the European borders).

Every EU citizen has the right to take up and perform employment under the same conditions as a German national. Nationals of EU member states as well as nationals of the EEA (EU member states as well as Iceland, Liechtenstein and Norway) and their spouses are – as a matter of principle – treated on equal terms as German nationals (irrespective of their own nationality) in the pursuance of self-employed or employed work. The same applies to EU citizens who wish to reside in Germany for the purpose of looking for employment or vocational training. Therefore, citizens from all EU member states enjoy the unrestricted freedom of establishment, freedom to provide services and freedom of movement for workers. This also includes every EU citizen being able to enter Germany without a particular residence title on an unrestricted basis. The only requirement is to be in



possession of a valid personal identity card/ passport, and register at the municipal office (*Bürgeramt*) should your stay last longer than three months (IHK 2017).

The most restrictive aspect of German immigration law is reserved to non-EU (Third Country Nationals) – those not applying for entry/residence under international protection/ asylum or having received refugee status. The frequent changes and new legislation on the law concerning foreign nationals (see amendments to the Residence Act made in 2017 for example) have resulted in changes to the rights of foreign nationals regarding living and working in Germany. The key provisions on residency are available in the “Law on Residence, Employment and Integration of Foreign Nationals in the Federal Republic (Residence Act - *AufenthG*)<sup>50</sup>” as well as Immigration Law (*ZuwandG*) - hence here we offer only a very short description of some basic elements.

It suffices to say that in German law, there are two types of residence permits: temporary residence permit (*Aufenthaltserlaubnis*) and a permanent settlement permit (*Niederlassungserlaubnis*). The latter can be an unrestricted residence permit (*unbefristete Aufenthaltserlaubnis*) or an establishment permit (*Aufenthaltsberechtigung*). As first admission is always for a limited period of time, the unrestricted residence permit and the establishment permit are only issued after a period of lawful residence in Germany on the basis of another residence document. According to the Residence Act<sup>51</sup> a foreigner shall be granted a permanent settlement permit if:

1. he/she has held a temporary residence permit for five years,
2. his/her subsistence is secure and if he/she has paid compulsory or voluntary contributions into the statutory pension scheme for at least 60 months or furnishes evidence of an entitlement to comparable benefits from an insurance or pension scheme or from an insurance company; time off for the purposes of child care or nursing at home shall be duly taken into account,
4. granting such a temporary residence permit is not precluded by reasons of public safety or order, according due consideration to the severity or the nature of the breach of public safety or order or the danger emanating from the foreigner, with due regard to the duration of the foreigner's stay to date and the existence of ties in the federal territory,
5. he/she is permitted to be in employment, if he/she is in employment,
6. he/she possesses the other permits required for the purpose of the permanent pursuit of his economic activity,
7. he/she has sufficient command of the German language,
8. he/she possesses a basic knowledge of the legal and social system and the way of life in the federal territory and
9. he/she possesses sufficient living space for himself and the members of his family forming part of his household.

Whether third country nationals have a temporary residence permit or an unrestricted residence permit, third country nationals resident in Germany are excluded from participation in all elections at federal, Länder and municipal level. The constitutional court (*Bundesverfassungsgericht*) has held, that the principles of democracy do not allow the legislator to grant these persons the right to vote, as they are not part of the nation's people (*Staatsvolk*). In German law the right to family reunion for third country nationals (spouses and children) depends, apart from other conditions such as sufficient

<sup>50</sup>Residence Act in the version promulgated on 25 February 2008 (Federal Law Gazette I p. 162), last amended Article 10 (4) of the Act of 30.10.2017 (Federal Law Gazette I p. 3618)

<sup>51</sup> Refer to section 9 of the Act. Available at: [http://www.gesetze-im-internet.de/englisch\\_aufenthg/englisch\\_aufenthg.html#p0010](http://www.gesetze-im-internet.de/englisch_aufenthg/englisch_aufenthg.html#p0010). Retrieved 05/06/2018.

income and housing, on the residence status of the principal. Other family members may only be admitted in case of extreme hardship (*außergewöhnliche Härte*)<sup>52</sup>.

Once a third country national has obtained an establishment permit, he or she has free access to the labour market and no longer needs a labour permit. Having an unrestricted residence permit only grants free access to the labour market after six years of lawful residence on the basis of a time-limited residence permit or if the person was born in Germany. Family members of a third country national holding an unrestricted residence status, who have not yet obtained that residence status themselves, need a labour permit, which can be refused on labour market grounds, e.g. there are German or EU citizens or other privileged foreign residents available for the job. Currently, in certain regions these family members may be excluded from all employment.

Third country nationals who hold an unrestricted residence permit or an establishment permit have access to social security benefits on the same conditions as German nationals. Social assistance is also granted to third country nationals. However, it may be a ground for withdrawal of a temporary residence permit, not of the two unrestricted residence documents.

### **3.14 Rights and Duties of Undocumented Migrants**

According to an in-depth report on the situation of undocumented migrants in Germany produced by the BAMF (see Sinn et al. 2005), “A fundamental dilemma linked to illegal residence is that illegally resident migrants indeed have rights concerning the access to social benefits, but that they don’t claim them as they have to fear legal consequences. This concerns the access to social services, health care, education and legal protection” (p. 77).

As a consequence, the rights of undocumented resident migrants in Germany is diluted into the good will work of non-governmental actors (NGOs and charities). They often live under precariously conditions with insufficient medical care, poor quality housing and a high probability of being exploited. More problematic is that school attendance of illegally resident children is not ensured given all the problems cited earlier. As the BAMF report makes clear: “Concerning the views of governmental and non-governmental actors on this problem, conflicting priorities between a human rights and a state-control position become apparent” (ibid.).

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<sup>52</sup>For more on family unification of third country nationals, we suggest a comprehensive focus-study by the German National Contact Point for the European Migration Network (EMN) that focus specifically on that issue (see Grote 2015).

## 4. Political Organization and the Constitutional Entrenchment of the Principle of Asylum and Immigration Law in Germany

In order to understand the place of asylum and immigration law in Germany, we do well to first grasp the basic political organization of the country.

Germany is a federal parliamentary, representative democratic republic. Its political system operates under a framework laid out in the 1949 constitutional document known as the **Grundgesetz (Basic Law)**. Amendments to the law generally require a two-thirds majority of both chambers of parliament; the fundamental principles of the constitution, as expressed in the articles guaranteeing human dignity, the separation of powers, the federal structure, and the rule of law are valid in perpetuity (Deutsche Bundestag, 2014)<sup>53</sup>.

The president is the head of state and invested primarily with representative responsibilities and powers. He is elected by the **Bundesversammlung (federal convention)**, an institution consisting of the members of the **Bundestag** (the parliament) and an equal number of state delegates. The second-highest official in the German order of precedence is the **Bundestagspräsident (President of the Bundestag)**, who is elected by the **Bundestag** and responsible for overseeing the daily sessions of the body. The third-highest official and the head of government is the Chancellor, who is appointed by the **Bundespräsident** after being elected by the **Bundestag**.

The chancellor is the head of government and exercises executive power, similar to the role of a Prime Minister in other parliamentary democracies. Federal legislative power is vested in the parliament consisting of the **Bundestag (Federal Diet)** and **Bundesrat (Federal Council)**, which together form **the legislative body**. The **Bundestag** is elected through direct elections, by **proportional representation** (mixed-member). The members of the **Bundesrat** represent the governments of the sixteen federated states and are members of the state cabinets (Bundesregierung, 2018)<sup>54</sup>.

The government is elected through a party system that since 1949 has been dominated by the **Christian Democratic Union (CDU/CSU)** and the **Social Democratic Party of Germany (SPD)**. Hence, every chancellor has been a member of one of these two parties. However, the smaller liberal **Free Democratic Party** (in parliament from 1949 to 2013) and the Alliance 90/The Greens (in parliament since 1983) have also played important roles. In the German federal election, 2017 **Alternative für Deutschland (AFD)**, a right wing populist party gained enough votes to attain representation in the parliament for the first time and become the third-largest party in Germany. This rise in the far-right in Germany has been partly attributed to the increasing numbers of refugees and migrants to the country over the past decade.

As laid down in its constitutional Basic Law, the Federal Republic of Germany is a democratic and social Federal State (**Art. 20 I GG**). Thus, policy formation and the enactment of laws and regulations take place within a political system, in which legislative and executive powers are divided between the Federation and the 16 Federal States (**Bundesländer** or **Länder**). In principle the Länder have the legislative power, unless the power is granted to the Federation by basic law (**Art. 70 I GG**). The basic law distinguishes between exclusive and competing legislative competence (**Art. 70 II GG**). Each of the individual Länder has its own constitution and government, which is

<sup>53</sup> Available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>. Retrieved 11/01/2018.

<sup>54</sup> Available at <https://www.bundesregierung.de/Content/EN/StatischeSeiten/breg/federal-government-function-and-constitutional-basis-structure-and-tasks.html>. Retrieved 11/01/2018.

responsible to an elected parliamentary assembly. Accordingly, administrative responsibilities in the area of migration and asylum are strongly intertwined and distributed among the federal, state and municipal levels (cf. section 2.3), in fact constituting a three-tiered executive structure 2004/2005 Immigration Act, (cf. Rudzio 2006: 319 in Schneider 2012).

In principle, the Länder have the legislative power, insofar the Basic Law does not confer legislative power on the **Federation (Art. 70 I GG)**. Therefore the Basic Law distinguishes between exclusive and competing legislative competence (**Art. 70 II GG**). On matters within the exclusive legislative power of the Federation, the Länder shall have power to legislate only when and to the extent that they are expressly authorized to do so by a federal law. While on matters within the concurrent legislative power, the Länder shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law. According to **Art. 71 in conjunction with Art. 73** the Federation has the exclusive power with respect to citizenship, freedom of movement, passports, residency registration and identity cards, immigration, emigration and extradition. While according to **Art. 72 in conjunction with Art. 74** concurrent legislative power extends the law relating to residence and establishment of foreign nationals as well as matters concerning refugees and expellees.

Beyond the level of federal acts, several legal and administrative provisions on federal or state levels prevail. Art 83 GG states that the Länder shall execute federal laws in their own right insofar as the Basic Law does not otherwise provide or permit. Therefore, in principle, administrative enforcement lies within the responsibility of the Federal States. Furthermore, where the Länder execute federal laws in their own right, they shall provide for the establishment of the requisite authorities and regulate their administrative procedure (Art. 84 I GG). As administrative enforcement lies within the responsibility of the Federal States, emphasis is placed on processes of consultation and cooperation, which inter alia take place within the Standing Conference of the Federal States' Ministers and Senators of the Interior. Areas of migration and asylum policy that were more or less totally delegated to the Länder are accommodation and reception policies, education, health and social policies such as integration.

The executive authorities may adopt statutory ordinances, administrative regulations or articles of incorporation in order to regulate the administrative procedure. Considering the legislative hierarchy ordinances as well as administrative regulations are below the existing federal laws. Therefore a power to issue statutory instruments is required. According to Art. 80 I GG the Federal Government, a Federal Minister or the Land governments only may be authorized by a law to issue statutory instruments. Further the content, purpose and scope of the authority conferred shall be specified in the law as well as each statutory instrument shall contain a statement of its legal basis. Any further sub-delegation shall be effected by statutory instrument (for a concrete example, see case study below).

### **Example of the multi-level governance system: Accommodation and reception**

The accommodation of refugees in the German territory is delegated to the **Länder** and further to the city level. Example of Lower Saxony: With the Lower Saxony Housing Act of 2003, the federal state of Lower Saxony withdrawn completely from the responsibility for communal accommodation and care, handing over the responsibility to the municipalities without clearly defining standards or further directions. In this respect, municipalities do have great power of action and decision-making but are at the same time under extreme financial pressure. Until a few years ago, the per capita lump sum, which the state of Lower Saxony paid to the local authorities, was under 5,000 euros per year pro refugee, which had to suffice to provide housing and care for the refugees, had to be completely

covered by the municipalities. In the last four years, a significant increase took place when in 2017, the municipalities began to receive 10,000 euros per person.

Asylum seekers who are moved to Lower Saxony are “distributed” to a residence period of up to six months to one of the six initial reception centres of the State Reception Office (**Landesaufnahmebehörde** - “**LAB**” for short). The LAB facilities have an average capacity of about 400 people each. In addition to these large accommodation complexes, emergency shelters such as gymnasiums, warehouses and tents have also been set up in recent years, due to increased numbers of refugees. After a period of officially three weeks, up to a maximum of six months, people are distributed among the municipalities. At the municipal level most cities had set up own local accommodation policies whereas before 2015 there was a high proportion of decentralized housing (about 83% 3) (see Wendel 2014: 71 cited in Elle and Hess 2017: 4). The Refugee Council for Lower Saxony is currently assuming a housing rate of less than 70% whilst the quantity and quality of housing and care-provisions changed significantly since 2015 with the set up of large scale community accommodation centers, called “Gemeinschaftsunterkunft”.

## 4.1 Constitutional entrenchment of the principle of asylum

**The right of asylum for persons persecuted on political grounds is a basic right stipulated in Art. 16a GG.** Since the origins rely on the lessons learned from the time between 1933 and 1945, when persons persecuted on political and racial grounds faced considerable difficulties to find refugee protection, the right is understood to **protect asylum seekers from deportation and grant them certain protections under the law.** In a wider sense, the right of asylum recognizes the definition of “refugee” **as established in the 1951 Refugee Convention in the form of the 1967 protocol.** Furthermore the term “refugee” must be interpreted in the sense of **the 2011/95/EU directive.**

Generally, these protection is a part of the asylum procedure itself and are verified by the **Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge* - BAMF)** without any further application. In 1993 and 2015, the initially unlimited right of asylum was revised in essential points and also limited as outlined in previous sections.

The utmost important function in policy formulation in the field of migration and asylum lies with the Federal Ministry of the Interior (BMI). The Federal Office for Migration and Refugees (BAMF) and the Federal Police (BPol) as subordinate authorities to the BMI are responsible for the majority of operative tasks on the federal level; other essential actors within the realms of administration and management of procedures are the Foreigners Authorities of the Federal States (regarding residence), the federal Employment Agency (regarding access to the labour market) and the Diplomatic Missions (regarding visa issuance). Furthermore, the spectrum of other actors engaged in asylum and migration policies has continuously broadened over the past few years. In addition to a growing number of non-governmental organisations, particularly the areas of migration research and policy advice have gained increased attention.

## 4.2 Organisation and Administration of Asylum and Migration Policies

Depending on the particular purpose of entry or residence, based on the **Residence Act**, various authorities are in charge of organisation and administration. More recently, it was predominantly in the area of visa and border management that a number of actions were taken in order preclude illegal entries, respectively. Thus, particularly German Diplomatic Missions, border and security authorities, Foreigners Authorities and the BAMF are collaborating closely. Furthermore, expulsions



have been facilitated through the introduction of additional facts of the matter; it is e.g. at the authorities' discretion to issue an expulsion order in case of certain acts which are particularly detrimental to integration. Upon entry, the municipal Foreigners Authorities are generally the competent administrative bodies for all residence- and passport-related measures and rulings. If, however, an asylum seeker reports to the border agency and is entitled to enter the country, he or she is then transferred to the nearest initial reception centre; thus, the BAMF takes over processing the asylum claim.

Over the past few years, the country has implemented important European acts of asylum legislation such as the **Dublin II Regulation** or the **Qualification Directive**. Likewise, in the area of immigration, changes in organisational responsibilities have been induced by EU-legislation. The 2007 Directives Implementation Act transposed a total of eleven European directives.

By introducing a one-stop-system, the dual authorisation procedure for residence (by the Foreigners Authority) and employment (by the Federal Employment Agency) has been replaced with one concentrated administrative act. Thus, the local Foreigners Authorities has become responsible for issuing residence titles and is now the primary (and only) location for all decisions regarding third country nationals' residence. Only in case of required assent for a certain occupation, the Federal Employment Agency is consulted by means of an internal procedure and then examines the prerequisites according to the law.

### 4.3 Infringement Procedures by the EU Commission against Germany

In September 2015, the Commission sent a letter of formal notice to 18 member states, including Germany, for having failed to fully transpose the revised Asylum Procedures Directive (2013/32/EU) into national law. The Asylum Procedure Directive sets EU-wide standards for common procedures of asylum application as well as granting and withdrawing international protection (European Commission 2015).

Furthermore, Germany was addressed in 2015 as one of 19 member states for a failure to fully transpose the updated Reception Conditions Directive (2013/33/EU). The directive determines common minimum standards concerning reception conditions of asylum seekers with regards to housing, food, health care and employment, as well as medical and psychological care and restricts detention of minors and other vulnerable groups (European Commission 2015). The 'Informationsverbund Asyl und Migration' (AIDA) and ECRE noted about Germany that "there is no requirement in law or mechanism in place to systematically identify vulnerable persons in the asylum procedure, with the exception of unaccompanied children" (AIDA 2017, p.42). They criticized that the procedure to determine vulnerability significantly varies in the different federal states of Germany and that information about vulnerability is not sufficiently forwarded to the national agency BAMF. Following a recent study on procedural safeguards for traumatized and mentally ill (Hager, Baron 2017) they argue that "identification procedures in Germany have been generally described as 'a matter of luck and coincidence'" (AIDA 2017, p.42).

In September 2016, the German government was furthermore among 14 other member states formally notified about its inadequate transposition of the Directive 2013/55/EU on the recognition of professional qualifications into German law. The directive aims at accelerating recognition procedures to allow qualified personal from EU member states to work in other EU countries (European Commission 2016).

## 4.4 Links to other Policy Areas

**Asylum and migration in Germany are rightly termed cross-sectional topics**, as they are connected to numerous other policy areas in various respects. The most striking overlaps can be perceived with regard to integration policy; key aspects of integration such as language and integration courses are directly regulated in the **Residence Act**. Apart from integration, labour market and health policies, migration policy is increasingly intertwined with development policy, e.g. in the area of assisted return. But also other areas such as security policy and anti-discrimination policy are not to be neglected in that respect. Furthermore, strong points of reference to other specialised policy domains and a generally broad topical inclusion of migration and asylum policies become evident in parliamentary affairs of the German Bundestag. All important draft bills in asylum and immigration law are normally deliberated upon in the leading Parliamentary Committee on Internal Affairs, and in most of the times also discussed in the Committees on Legal Affairs; Labour and Social Affairs; Education, Research and Technology Assessment; Foreign Affairs; Family Affairs, Senior Citizens, Women and Youth; as well as Human Rights and Humanitarian Aid.

## 4.5 Independence and structure of the judiciary and its role in the interpretation and definition of laws and policies on asylum

**Art. 19 IV GG** provides that any person have recourse to the courts, if his/her rights should be violated by public authority. This principle of effective legal protection (**Rechtsschutzgarantie**) protects every person's rights towards the authorities and guarantees that authority actions can be reviewed by independent courts. This is due to the fact that according to **Art. 20 III GG** and **Art. 97 I GG** courts and judges shall be independent and subject only to the law. In asylum law related cases foreigners have to take legal action in front of the administrative courts. The respondent is the Federal Republic represented by the Federal Office (BAMF).

The German legal system draws from the European codified civil law tradition. Its Civil Code was developed in the late nineteenth century, and has served as a template for other civil law jurisdictions. The judicial power in Germany is exercised by the Federal Constitutional Court (**Bundesverfassungsgericht**), by the federal courts provided for in the basic law, and by the courts of the Länder (**Art. 92 GG**). The Federal Constitutional Court is both a court and a constitutional organ. The courts sole duty is to ensure that the Basic Law is obeyed. In this function the Court helped to secure respect for and effectiveness of Germany's free and democratic basic order. Its decisions are final and all other government institutions are bound by its case-law. The court is based in Karlsruhe and is divided into two chambers (Senate) each of them with eight judges. According to **Art. 94 I GG** half of the 16 judges of the Court shall be elected by the Bundestag and half by the Bundesrat. As a consequence from the separation of powers, the judges are not allowed to be members of the Bundestag, Bundesrat, the Federal Government, or any of the corresponding bodies of the Land. Each Senate has its own, in **Section 14 Act** on the Federal Constitutional Court (**Bundesverfassungsgerichtsgesetz - BVerfGG**) precisely defined competences. In principle, the first Senat shall be competence for judicial review in proceedings in which the main issue is the alleged incompatibility of a legal provision with the basic rights as well as for constitutional complaints concerning the basic rights. While the second Senat has its main function in adjudicate competence disputes within the different constitutional organs and between the Federation and the Länder. Pursuant to **Section 14 IV BVerfGG** the Court may change the allocation of the competences, if this becomes imperative due to a work overlaid of one of the Senates, which is not merely of a temporary nature. Especially because of its statutory competence for constitutional complaints, the first Senate's caseload would otherwise be considerably heavier than that of the second Senate.

Therefore contrary to the statutory the second Senate currently has the competence for asylum related issues.<sup>55</sup> Although the Court is not a political body, its case-law has a wide impact on the political level. It could be said that the Court determines the constitutional framework within which politics may develop by its case-law. This becomes particularly clear when the Court declares a law to be unconstitutional. In this manner future legislation (changes) can be influenced directly or indirectly through Court decisions. One example for a case-law decision strongly affecting the situation of asylum seekers is the BVerfG Judgement of the First Senate of 18 July 2012.<sup>56</sup> It was decided that the amount of cash benefits paid according to § 3 of the Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz*) was insufficient because it had not been changed since 1993. The decision was based on Article 1.1 of the Basic Law (*Grundgesetz* – GG) in conjunction with the principle of the social welfare state in Article 20.1 of the Basic Law ensures a fundamental right to the guarantee of a dignified minimum existence. In effect this led to a significant amendment of the Asylum Seekers' Benefit Act (*Asylbewerberleistungsgesetz*) in March 2015.

## 4.6 Constitutional Case-Law on Asylum

Apart from the Constitutional Court the judicial power in Germany is divided up into ordinary and special jurisdiction. While civil - as well as criminal courts are part of the ordinary jurisdiction - labour, social, patent, fiscal, and finally, administrative courts belong to the special jurisdiction. In general the competence with asylum related cases lies with the administrative courts (**Section 40 I Code of Administrative Court Procedure**). The social courts have the competence for cases concerning the **Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz* - *AsylbLG* / Section 51 I Nr. 6a Social Court Act)**.<sup>57</sup> In principle but with some (for asylum related cases) important exceptions, the administrative court procedure is three tiered: Administrative Courts (***Verwaltungsgerichte***) on the local level - Higher Administrative Courts (***Oberverwaltungsgerichte* or *Verwaltungsgerichtshöfe***) on the *Länder* level - Federal Administrative Court (***Bundesverwaltungsgericht***). According to **Section 45 VwGO** the local administrative courts (*Verwaltungsgericht* – VG) shall adjudicate at first instance.

In the second instance the Higher Administrative Court of each Land (***Oberverwaltungsgericht* or *Verwaltungsgerichtshof***) shall adjudicate on the rights of appeal on points of fact and law against judgments of the administrative court and the complaint against other decisions of the administrative court (**Section 46 VwGO**). Apart this the OVG/VGH has several first instance competences (see. **Section 47, 48 VwGO**). However the Federal Administrative Court shall rule in appeals on points of law against judgements of the Higher Administrative Courts and appeals on points of law against judgments of administrative courts (**Section 49 VwGO**). As sole competent court it shall rule at first and last instance on regarding disputes against expulsion orders in accordance with Section 58a of the Residence Act and their implementation. Section 58a stated that the supreme Land authority may issue a deportation order for a foreigner without a prior expulsion order based on the assessment of facts, in order to avert a special danger to the security of the Federal Republic of Germany or a terrorist threat. The local administrative courts have to handle a large amount of

<sup>55</sup>[http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/GV\\_Plenum/GV\\_Plenum\\_2015-11-24.pdf?\\_\\_blob=publicationFile&v=13](http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/GV_Plenum/GV_Plenum_2015-11-24.pdf?__blob=publicationFile&v=13)

<sup>56</sup> BVerfG, BvL 10/10 – paras. (1-113)

<sup>57</sup> Especially at the peak of arrivals of asylum seekers in Germany in 2015/16, the social courts played a crucial role, e.g. when the Regional Office for Health and Social Affairs Berlin (LAGeSo) was unable to provide accommodation and social benefits for all applicants. Many asylum seekers issued complaints against the LAGeSo before the social court.



asylum related cases. In the end of 2017 there were 372.443 pending cases in front of the 51 administrative courts (BT-Drs. 19/1371). At the same time the number of constitutional complaints and interim order applications in front of the Constitutional Court has increased up to 400 in 2017. The average duration of court proceedings in asylum related cases is approximately 7, 3 months (BT-Drs. 19/385, S. 33). The number of positive decisions is about 40, 8 % (BT-Drs. 19/1371).

## 4.7 Legal Process in Asylum Cases

In contrast to other administrative court proceedings there is no objection or administrative opposition procedure against a negative Federal Office decision/notice in asylum cases. Therefore a foreigner has two different possibilities: legal court action and emergency petition. If the foreigner decides to take court action in the first instance he/she has to appeal and lodge an enforcement action against the negative decision in front of the Administrative Court (see Section 74 of the Asylum Act). In the second instance, an appeal on points of fact and law can only be lodged if it has been admitted by the Higher Administrative Court (**see Section 78 II, III of the Asylum Act**). The third instance is the appeal on points of law (Revision) in front of the Federal Administrative Court. With the aim to accelerate the court processes in asylum cases, there is the possibility of a so-called leapfrog appeal directly from the administrative courts to the Federal Administrative Court, since 2017. Petitions e.g. against deportations can be presented before different institutions such as the hardship commission (Härtefallkommission) or the committee on petitions (Petitionsausschuss) of the federal state parliaments. The committee on petitions will examine the request and write a recommendation to the agency in charge. However, the respective agency is not bound to follow the recommendation (vgl. Classen 2017).

## 5. “Refugee Crisis” driven Reforms and Current Proposals: Amendments to Current Laws and new Legislation on Asylum

Several amendments to current laws have been adopted in recent years as a response to the events in 2015/2016. Hereinafter the major amendments and their most important implications are shown:

- On October 24, 2015, the ‘**Asylum Package I**’ or **Act on the Acceleration of Asylum Procedures** (*Asylverfahrenbeschleunigungsgesetz*) entered into force. With the amendment the Asylum Procedure Act (*Asylverfahrensgesetz* – *AsylVfG*) changed its name into Asylum Act (*Asylum Act* – *AsylG*). The Act amended several laws in order to accelerate the asylum process and is therefore a turning point in the asylum legislation: foreigners required to live for a period up to six month in the reception centre (§ 47 I AsylG; before: three months); designation of Albania, Kosovo and Montenegro as safe countries of origin (§ 29a AsylG; see. Annex II of the Asylum Act); foreigners from a safe country of origin shall be required to live in the reception centre until the Federal Office has decided on their asylum application (§ 47 IaAsylG); no work permission for foreigners from safe countries of origin during the asylum procedure (§ 61 II AsylG); substitute in-kind benefits for cash benefits for reception center residents; benefit cuts for foreigners who are obligated to leave the country; upon expiry of the period allowed for voluntary departure, the foreigner must not be informed of the date of the deportation (§ 59 I S. 5 AufenthG); integration courses for asylum applicants with a good prospect to remain.

- On August 1, 2015, the **Act to Redefine the Right to Stay and the Termination of Residence** entered into force. It amended the Residence Act by ordering a ban on entry and residence for applicants from safe countries of origin and in case of repeat follow-up applications. Furthermore, the Act grants a residence permit to persons who can prove that they are well-integrated after a period of eight years and to well-integrated minors after four years.

- On November 1, 2015, the **Act to improve the Housing, Care, and Treatment of Foreign Minors and Adolescents** entered into force. Its goal is to improve the situation of young unaccompanied minor refugees and provide them with appropriate care: distribution procedure for minors; legal regulation of the age determination.

- On February 5, 2016, the **Data Sharing Improvement Act** entered into force. Its goal is to register new arrivals more swiftly with a standardised recording of refugee data. Therefore asylum seekers are to be issued with a standardised refugee identity card. The Act also regulates the recording of other relevant information (e.g basic information like name, date and place of birth, as well as information about accompanying children, health checks and vaccinations, schooling and other qualifications).

- On March 17, 2016, the ‘**Asylum Package II**’ entered into force. In order to accelerate the asylum process it agrees on a set of stricter asylum measures, which has been debated by the German Bundestag: according to **§ 30a AsylG** swifter procedures for certain specified groups of asylum seekers come into force (safe countries; submitting a repeat request for asylum; asylum seekers who do not cooperate during the procedure); withdraw of the asylum procedure if the foreigner failed to pursue it (**§ 33 AsylG**); creation of new reception facilities; limitations on deportation bans (**§§ 60a IIb, § 60 VII S.2 - 4**); suspense of the reunification for refugees entitled with subsidiary protection until March 2018 (**§ 104 Abs. 13 AufenthG**).

– Also on March 17, 2016 the **Act to Facilitate Deportation of Foreign Criminal Offenders** entered into force. In Response to the New Year's Eve attacks in Cologne, the act make it possible to deport foreign criminals significantly faster. Therefore it provides for the deportation of foreign criminal offenders given a custodial sentence - irrespective of whether or not the sentence is suspended.

– August 6, 2016 the **Integration Act** entered into force. Its aim is to promote the integration: according to **§ 12a AufenthG** foreigners who have been recognised as being entitled shall be obliged to take up their place of residence for a period of three years in that *Land* to which they have been allocated for the purposes of their asylum procedure or in context of their admission process; foreigners who are in possession of a temporary residence permit in accordance with § 25 I or II S.1 first alternative, shall be granted a permanent settlement permit if they have been in possession of the temporary residence permit for three years, possess a good command of the language and their subsistence is for the most part ensured; suspension of deportation is to be granted if the foreigners begin or On have begun a vocational qualification in a state-recognised or similarly regulated occupation which requires formal training in Germany (**§ 60a II S. 4 AufenthG**).

– On July 20, 2017 the **Act to Enforce the Obligation to Leave the Country** entered into force: according to **§ 47 Ib AsylG** the *Länder* have the right to extend the stay in arrival centers up to 24 months; with the aim to determine a foreigners' identity the BAMF may use his data carriers (e.g. smartphone); the youth office has the obligation to submit the asylum application immediately (§ 42 II SGB VII); introduction of a 'leapfrog appeal' in asylum cases (revision of the Administrative Court's decision in front of the Federal Administrative Court).

– **Reform Proposals:** Currently the designation of Algeria, Morocco and Tunisia as safe countries of origin failed since the Bundesrat refused its consent. Likewise the planed reform on the youth welfare law in regard to benefit cuts for unaccompanied foreign minors (Social Code V) hasn't implemented yet. However on EU-level a potential intended revaluation of the Directive 2013/32/EU into an ordinance could have an impact on the Asylum Act, since by then some provisions could not longer be applicable.

– **Act on the Acceleration of Asylum Procedures:** Substitution of Benefits in Kind for Cash Benefits: Before the recent changes, asylum seekers in a reception facility received essential benefits in kind and an additional cash allowance (pocket money) for personal use. The pocket money totaled €140 per month for a single adult or €126 per month for each of two adult recipients living in a common household. According to the amendment, refugees and asylum seekers in reception facilities now only receive essential items like food, housing, heat, clothing, health care, and household items in kind or in the form of vouchers. Items for personal use are also provided in kind, but states retain discretion to provide refugees and asylum seekers with cash if necessary. Cash allowances cannot be disbursed more than one month in advance.

– Asylum seekers who are housed outside of reception facilities primarily receive cash allowances to purchase essential items. A single adult recipient receives €216 per month; two adult recipients with a common household each receive €194 per month; other adult beneficiaries without a household, €174 per month; adolescents between fifteen and eighteen years old, €198 per month; children between seven and fourteen years old, €157 per month; and children up to six years old, €133 per month.

– **Reduction of the Financial Burden of German States and Municipalities:**

Currently, the municipalities that receive refugees and asylum seekers pay for their essential needs and are reimbursed by the German states. Starting in 2016, the federal government will pay the German states €670 per asylum seeker per month, until the asylum procedure has been concluded, in order to reduce the financial burden on the German states. The federal government will therefore allocate a provisional sum of approximately €2.8 billion (about US\$3.1 billion) to the states. The sum is only an estimate and will be adjusted as needed at the end of 2016. The allocation is based on the assumption that there will be around 800,000 applicants for asylum, with an average processing time of five months, and around 400,000 denied applications, for which the states will receive another month's worth of compensation. The allocation also includes money to cover expenses for unaccompanied refugee minors.

– **Safe Countries of Origin:** The Act on the Acceleration of Asylum Procedures designates Albania, Kosovo, and Montenegro as safe countries of origin and adds them to the list contained in appendix II of section 29a of the Asylum Act. The designation as a safe country of origin allows the accelerated processing of applications from asylum seekers from these countries, because there is a presumption that the application is manifestly without merit. In such a case, the applicant has only one week to leave the country instead of the usual thirty days.

– **Integration Classes and Employment:** The Federal Employment Agency assumes the costs for integration and language classes for asylum seekers whose applications are likely to be approved, in order to improve their chances in the job market and accelerate their integration into Germany.

– **Housing for Refugees:** The Act on the Acceleration of Asylum Procedures also dispensed with some building code and renewable energy law requirements, in order to facilitate and accelerate the building of new accommodations and the repurposing of existing facilities to provide housing for refugees. There are only few provisions concerning accommodation on EU level. According to **Art. 12 Asylaufnahmerichtlinie (RL 2013/33/EU)** states shall take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the state concerned. According to **Art. 18 Abs. 2 - 4** gender- and age related measures have to be considered. There is a right of livelihood security which contains the right of a humanely accommodation. The **Länder** have different systems of accommodation responsibility (one,-two or three stages).

– **Support for Unaccompanied Refugee Minors:** Under current rules, the youth office in the district in which an unaccompanied minor arrives is obligated to take him or her into its care. Some local communities in central arrival locations are therefore disproportionately affected. In order to distribute the burden evenly, the Act to Improve the Housing, Care, and Treatment of Foreign Minors and Adolescents created an obligation for all German states to receive unaccompanied refugee minors. Refugee minors will be distributed throughout Germany by the local youth office according to the quota system, **Königsteiner Schlüssel**. In addition, the age of legal capacity to act in an asylum procedure was raised from sixteen to eighteen years. That means that every asylum seeker under the age of eighteen is provided with a legal guardian to act on his or her behalf and to handle the complex asylum procedure.

## Conclusion

### The Past and the Present: Germany as a “reluctant” immigration country

Germany as a “reluctant” immigration country: Germany has been an immigration country ever since the 19th century. After World War II it saw several considerable “waves” of immigration (e.g. expellees from the former German territories in the East, labor migrants in the 1960s and refugees since the 1980s). Even though its immigration history makes Germany a de facto immigration country, migration policy making has for a very long time been defensive and erratic. The very term “guest workers” for the early labour migrant indicates that the right to stay is transitory and based on appropriate behaviour. It purports an asymmetric understanding of hospitality and stands exemplary for a human capital centered strand of the public discussion of immigration which is also prevalent in actual debates on refugees compensating for a lack of skilled workers.

### Federation, Länder, Municipalities

As a consequence, policy measures have so far been defensively aimed at keeping and/or relocating (potential) immigrants either in their countries of origin or third countries. The so called repatriation grant (Rückkehrprämie) and other monetary incentives to leave as well as the actual development of incorporating migration as an issue of foreign and developmental policy may serve as paradigmatic examples of this strategy. The strong federal structure of Germany fosters an incoherence of migration policies and practice within and across different levels of migration governance (national, Länder, municipalities). Border management and protection (e.g. Asylum application) are national responsibilities, whereas reception and integration (in the terminology of RESPOND) are in the general responsibility of the Länder and in the organizational responsibility of the municipalities. Länder and municipalities differ remarkably in terms of reception practice (e.g. central vs. decentral housing, Wohnsitzauflage, monetary vs. material allowances).

### Europeanization & Restriction

We can also ask the question: What are the repercussions of the German case for Europeanization in Germany, as in many other European countries, immigration is part of the European *Arbeitnehmerfreizügigkeit*, particularly from Bulgaria and Romania, and the recent immigration of refugees are closely linked in the public perception. As a consequence, a restrictive stance to immigration has become part of a broader anti-European policy agenda, which is being promoted by new political movements and parties.

Apart from this, the standards for reception and procedural guarantees for asylum seekers set by the European Union are not ensured in Germany. This is exemplified by the infringement procedures of the EU Commission against Germany. In several cases, the European Commission found that Germany did not live up to the European Union’s standards regarding the treatment of migrants/asylum seekers regarding the asylum procedure, the reception conditions through a failure to transpose EU directives into national legislation.

Especially the many amendments the last three years have not only led to a new confusion also by lawyers but increased the legal vulnerability and insecurity of asylum seekers in respect of their right to information and legal advice especially due to the acceleration of asylum procedures and the expansion of the period in the so called arrival centers up to 24 months; in respect of their bodily integrity being affected by the generalisation of mass accommodation without proper legal precautions defining minimum housing standards that is particularly worrying in respect of missing

legally binding protection standards against all forms of (sexualized) violence against vulnerable groups as well as missing clearing procedures.

### **Cultural and Religious Landscape**

We can also discuss the changes in the cultural and religious landscape that tend to be asked with regards to asylum. Change in the religious immigration pattern: from Christian to Muslim majority goes along with a rising awareness of religion as a marker of cultural difference. Ambivalent reactions of the “old” immigrant to the “new” ones: high proportion of people with a migration background (particularly Muslims) in refugee aid suggest that the so-called “refugee crisis” can activate the civic potentials of “old” immigrants. At the same time we see hesitations and counter-mobilization by some factions of Russian-German and Turkish immigrants.



# Appendices I & II

Annex I: Overview of the Legal Framework on Migration, Asylum and Reception Conditions				
Legislation title and number	Date	Type of law	Object	Web Link
Grundgesetz für die Bundesrepublik Deutschland, Art. 16 (Basic Law for the Federal Republic of Germany, Art. 16)	23.05.1949	Constitution	Right to Asylum	<a href="https://www.gesetze-im-internet.de/gg">https://www.gesetze-im-internet.de/gg</a>
Asylbewerberleistungsgesetz (Benefits for Asylum Seekers Act)	30.6.1993	Legislation	social security benefits to asylum	<a href="https://www.gesetze-im-internet.de/asylblg">https://www.gesetze-im-internet.de/asylblg</a>
Verordnung über die Bescheinigung über die Meldung als Asylsuchender (AKNV) (Regulation on the certification of the declaration of asylum seeker)	05.2.2016	Regulation	Official Documents for Asylum Applicants	<a href="https://www.gesetze-im-internet.de/aknv">https://www.gesetze-im-internet.de/aknv</a>
Asylgesetz (AsylG) (Act on Asylum)	26.6.1992	Legislation	asylum seeker, asylum application	<a href="https://www.gesetze-im-internet.de/asylvfg_1992">https://www.gesetze-im-internet.de/asylvfg_1992</a>
Gesetz zur Neuordnung des Asylverfahrens (Act on the Revision of the Asylum Application Process)	26.6.1992	Legislation	Asylum Application	<a href="https://www.gesetze-im-internet.de/asylvfgng">https://www.gesetze-im-internet.de/asylvfgng</a>
Verordnung zur Neufassung der Asylzuständigkeitsbestimmungsverordnung (AsylZBV) (Regulation on the Revision of the Regulation on the Determination of the Responsibility for Asylum)	02.4.2008	Regulation	Authority on Asylum	<a href="https://www.gesetze-im-internet.de/asylzbv_2008">https://www.gesetze-im-internet.de/asylzbv_2008</a>
Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz - AufenthG) (Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory - Residence Act)	30.7.2004	Legislation	migration, residence, employment, integration	<a href="https://www.gesetze-im-internet.de/aufenthg_2004">https://www.gesetze-im-internet.de/aufenthg_2004</a>
Aufenthaltsverordnung (AufenthV) (Regulation on Residence)	25.11.2004	Regulation	Residence	<a href="https://www.gesetze-im-internet.de/aufenthv">https://www.gesetze-im-internet.de/aufenthv</a>
Gesetz über das Ausländerzentralregister (AZR-Gesetz) (Act on the Central Register for Foreigners)	02.9.1994	Legislation	Database	<a href="https://www.gesetze-im-internet.de/azrg">https://www.gesetze-im-internet.de/azrg</a>
Verordnung zur Durchführung des Gesetzes über das Ausländerzentralregister (AZRG-Durchführungsverordnung - AZRG- DV) Regulation on the Implementation of the Act on the Central (Register for Foreigners)	17.5.1995	Regulation	Database	<a href="https://www.gesetze-im-internet.de/azrg-dv">https://www.gesetze-im-internet.de/azrg-dv</a>
Verordnung über die Beschäftigung von Ausländerinnen und Ausländern (Beschäftigungsverordnung - BeschV) (Regulation on the Employment of Foreigners)	06.6.2013	Regulation	Employment	<a href="https://www.gesetze-im-internet.de/beschv_2013">https://www.gesetze-im-internet.de/beschv_2013</a>
Gesetz über die Rechtsstellung heimatloser Ausländer im Bundesgebiet (Act on the Legal Status of Stateless Foreigners in the Federal Territory)	25.4.1951	Legislation	Stateless Person	<a href="https://www.gesetze-im-internet.de/hauslg">https://www.gesetze-im-internet.de/hauslg</a>
Verordnung über die Durchführung von Integrationskursen für Ausländer und Spätaussiedler (Integrationskursverordnung - IntV) (Regulation on the Implementation of Integration Courses for Foreigners and Late Repatriates)	13.12.2004	Regulation	Integration	<a href="https://www.gesetze-im-internet.de/intv">https://www.gesetze-im-internet.de/intv</a>
Verordnung über die Prüfungs- und Nachweismodalitäten für die Abschlusstests des Integrationskurses (Integrationskurstestverordnung - IntTestV) (Regulation on the Modalities of Examination and Verification for the Final Exams of the Integration Courses)	09.4. 2013	Regulation	Integration	<a href="https://www.gesetze-im-internet.de/inttestv">https://www.gesetze-im-internet.de/inttestv</a>
Integrationsgesetz (Act on Integration)	31.7.2016	Legislation	Integration	<a href="http://www.bgb1.de/xaver/bgb1/start.xav?startbk=Bundesanzeiger_BGBI&amp;jumpTo=bgb1116s1939.pdf">http://www.bgb1.de/xaver/bgb1/start.xav?startbk=Bundesanzeiger_BGBI&amp;jumpTo=bgb1116s1939.pdf</a>
Gesetz zur Einführung beschleunigter Asylverfahren (Act Introducing an Accelerated Asylum Procedure)	11.3.2016	Legislation	Asylum Procedure	<a href="http://www.bgb1.de/xaver/bgb1/start.xav?startbk=Bundesanzeiger_BGBI&amp;jumpTo=bgb1116s0390.pdf">http://www.bgb1.de/xaver/bgb1/start.xav?startbk=Bundesanzeiger_BGBI&amp;jumpTo=bgb1116s0390.pdf</a>
Gesetz zur Verbesserung der Registrierung und des Datenaustausches zu aufenthalts- und asylrechtlichen Zwecken (Datenaustauschverbesserungsgesetz) (Act on Improving Registration and Exchange of Data for Residence and Asylum Law Purposes (Data Exchange Improvement Act))	02.2.2016	Legislation	Data Exchange	<a href="http://www.bgb1.de/xaver/bgb1/start.xav?startbk=Bundesanzeiger_BGBI&amp;jumpTo=bgb1115s0130.pdf">http://www.bgb1.de/xaver/bgb1/start.xav?startbk=Bundesanzeiger_BGBI&amp;jumpTo=bgb1115s0130.pdf</a>
Gesetz zur erleichterten Ausweisung von straffälligen Ausländern und zum erweiterten Ausschluss der Flüchtlingsanerkennung bei straffälligen Asylbewerbern (Act Simplifying Expulsion of Foreign Criminals and the Broadened Suspension of Refugee Recognition for Criminal Asylum Applicants)	11.3.2016	Legislation	Expulsion	<a href="http://www.bgb1.de/xaver/bgb1/start.xav?startbk=Bundesanzeiger_BGBI&amp;jumpTo=bgb1116s0394.pdf">http://www.bgb1.de/xaver/bgb1/start.xav?startbk=Bundesanzeiger_BGBI&amp;jumpTo=bgb1116s0394.pdf</a>
Gesetz zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung (Act to Redefine the Right to Stay and the Termination of Residence)	01.8.2015	Legislation	Residence/Expulsion	<a href="http://www.bgb1.de/xaver/bgb1/start.xav?startbk=Bundesanzeiger_BGBI&amp;jumpTo=bgb1115s1386.pdf">http://www.bgb1.de/xaver/bgb1/start.xav?startbk=Bundesanzeiger_BGBI&amp;jumpTo=bgb1115s1386.pdf</a>
Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz) Act to Control and Restrict Immigration and to Regulate the (Residence and Integration of EU Citizens and Foreigners Immigration Act)	30.7.2004	Legislation	Migration	<a href="https://www.bmi.bund.de/SharedDocs/downloads/DE/gesetzentexte/Zuwanderungsgesetz.pdf?__blob=publicationFile&amp;v=1">https://www.bmi.bund.de/SharedDocs/downloads/DE/gesetzentexte/Zuwanderungsgesetz.pdf?__blob=publicationFile&amp;v=1</a>
Gesetz zur Verbesserung der Unterbringung, Versorgung und Betreuung ausländischer Kinder und Jugendlicher (Act to improve the Housing, Care, and Treatment of Foreign Minors and Adolescents)	28.10.2015	Legislation	Minors	<a href="http://www.bgb1.de/xaver/bgb1/start.xav?startbk=Bundesanzeiger_BGBI&amp;jumpTo=bgb1115s1802.pdf">http://www.bgb1.de/xaver/bgb1/start.xav?startbk=Bundesanzeiger_BGBI&amp;jumpTo=bgb1115s1802.pdf</a>

Annex II. List of Authorities involved in the Migration Governance				
Name of Authority	Tier of government	Type of organization	Area of competence	Web Link
Bundesministerium des Inneren (Federal Ministry of the Interior)	national/federal	ministry	borders, migration, asylum, return	<a href="https://www.bmi.bund.de/DE/startseite/startseite-node.html">https://www.bmi.bund.de/DE/startseite/startseite-node.html</a>
Bundesministerium des Inneren - Abteilung M: Migration, Flüchtlinge, Rückkehrpolitik (Ministry of Interior)	national/federal	ministerial department	migration, asylum, return	n.a.
Bundesministerium des Inneren - Unterabteilung M: Migration, Flüchtlinge, Europäische Harmonisierung (Federal Ministry of the Interior - Subdepartment M: Migration, Refugees, European Harmonisation)	national/federal	ministerial subdepartment	migration, asylum, EU coherence	n.a.
Bundesministerium des Inneren - Stab R: Rückkehr (Federal Ministry of the Interior - Field Staff R: Return)	national/federal	ministerial field staff	return	n.a.
Bundesministerium des Inneren - Abteilung B: Angelegenheiten der Bundespolizei (Federal Ministry of the Interior - Department B: Federal Police)	national/federal	ministerial department	border protection	n.a.
Bundesministerium für Arbeit und Soziales (Federal Ministry for Labour and Social Affairs)	national/federal	federal ministry	labour market/integration	<a href="http://www.bmas.de/DE/Startseite/start.html">http://www.bmas.de/DE/Startseite/start.html</a>
Bundesministerium für Arbeit und Soziales - Referat II a 5 (Federal Ministry for Labour and Social Affairs - Unit II a 5)	national/federal	ministerial unit	employment of foreigners	n.a.
Bundesministerium für Arbeit und Soziales - Referat II a 6 (Federal Ministry for Labour and Social Affairs - Unit II a 6)	national/federal	ministerial unit	fundamental issues on migration and integration policy	n.a.
Bundesministerium für Arbeit und Soziales - Referat II a 7 (Federal Ministry for Labour and Social Affairs - Unit II a 7)	national/federal	ministerial unit	fundamental issues on refugee policy and foreigners' law	n.a.
Bundesministerium für Arbeit und Soziales - Projektgruppe Soziale Sicherheit und Migration (Federal Ministry for Labour and Social Affairs - Project Group Social Security and Migration)	national/federal	ministerial project group	social security and migration	n.a.
Bundesministerium für Arbeit und Soziales - Referat VI a 2 (Federal Ministry for Labour and Social Affairs - Unit VI a 2)	national/federal	ministerial unit	European migration	n.a.
Bundespolizei (Federal Police, formerly Federal Border Police)	national	police unit	border protection	<a href="https://www.bundespolizei.de/Web/DE/_Home/home_node.html">https://www.bundespolizei.de/Web/DE/_Home/home_node.html</a>
Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees)	national/federal	federal office	asylum, integration, return	<a href="https://www.bamf.de/DE/Startseite/startseite-node.html">https://www.bamf.de/DE/Startseite/startseite-node.html</a>
Landesinnenministerium (generisch) (Ministry of the Interior of a federal state (Bundesland) (generic))	state	state ministry	varying competences due to German federalism	n.a.
Landesministerium für Soziales und Arbeit (generisch) (Ministry of Labour and Social Affairs of a federal state (Bundesland) (generic))	state	state ministry	varying competences due to German federalism	n.a.
Landespolizei (generisch) (State police (generic))	state	state police unit	varying competences due to German federalism	n.a.
Kommunale Ausländerbehörde (generisch) (Municipal Foreigners' Office (generic))	municipal	municipal office	enforcement of foreigners' law	n.a.



**NOTE ON ANNEXES:** Since a new federal government has been formed only recently, competences might have shifted since. For example, the former MOI is now officially the "Ministry for Interior, Construction, and Home/Homeland", and might have been restructured as a response to the events of 2015 and after. Due to German federalism and the limited scope of the research, only generic authorities are listed below the federal level

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# **RESPOND**

## **Greece**

### **Country Report**

**D1.2 – April 2018**

**Department of Geography, University of the Aegean**

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## Executive summary

This report intends to present the current situation regarding migration and asylum policy in Greece since 2015. One of the main conclusions is that Greece continues to be a country of main entry in the EU having at the same time a permanent refugee population.

More precisely, report contains a presentation of the most up to date data concerning (a) arrivals of non EU citizens at the land and sea Greek borders mainly for the period 2011-2017, (b) asylum applications and decisions by country of origin, sex and age groups, (c) reception and accommodation centres (d) numbers of rejection and return to Turkey and (e) the latest numbers of migrants in Greece. The sources of data are mainly from governmental authorities such as the Asylum Service and international organizations and national nongovernmental organizations such as the UNHCR, GCR and most of them are open and available on the internet.

It contains a brief history of migration and border policies in Greece particularly since 1990s with the main turning points of immigration and asylum phenomenon and relevant national policies. It also highlights the main dimensions of socioeconomic situation particularly during the recession and underlines the most important features of political situation in Greece since the beginning of the economic crisis.

Specifically, it presents the most important laws and presidential decrees concerning migration and asylum as well as which EU directives have been incorporated by the national legal system. It describes the prevailing principles and goals of the legal framework and migration management. Moreover, it refers to basic provisions and debates on the naturalization process.

Furthermore, this report mentions different statuses and their rights and duties, procedures of reception, protection and different forms of granting protection. It presents the structure of the reception system and the responsible national authorities, NGOs and international organizations. It points out detention policies in pre-removal centers concerning non-EU nationals and asylum seekers.

Moreover, it includes a presentation of the integration measures for women and vulnerable groups as well as the main national goals of integration policies.

Finally, the report presents recent developments in refugee issues in Greek islands and mainland. Furthermore, it examines the compliance of agreements with international law for international protection and human rights as well as the ways that Greece deals with the international protection, reception and integration of asylum seekers and refugees.

## Introduction

Forms of population movements in Greece have undergone changes all through the 20<sup>th</sup> and 21<sup>st</sup> centuries. However, it is safe to say that Greece has experienced two major changes regarding immigration and asylum movements in its territory since 1989. First, in the beginning of the decade of 1990s, when a considerable number of people from Central and Eastern European countries started to migrate to Greece due to the collapse of the socialist regimes. The second, in the period of 2015-2016, with the massive arrival, via Turkey, of people from countries at war or other conditions that endanger their lives. We can argue that immigration has become an issue in the public discourse mainly since 1990 even though it has been taking place at least since 1970.

In order to develop more coherent management policies, governments' priorities concerning migration and refugee issues led to the introduction and implementation of the National Action Plan for Migration Management in 2009. It was drafted by the Ministry of Public Order and Citizen Protection and was intended to be implemented gradually within a three years period. This emphasized the need for strategic management of migration in Greece and led to the introduction and adoption of Law 3907/2011 which introduced legislative changes in the screening mechanisms, registration procedures, detention, repatriation and returns. It established new services, such as First Reception Service, a new Asylum Service, and more accommodation centers in order to cover the needs of international protection and those with specific protection needs.

The priorities were evident and focused on the border control and combating unauthorized entries while close to zero percentage rates of recognitions of international protection, difficult access to asylum procedures, great delays and long waiting times for decisions, pending asylum applications, detention of asylum seekers and refoulement remained systematic practice. The UNHCR characterized the situation at the borders and the reception conditions as a humanitarian crisis and opposed transfers to Greece under the Dublin Regulation because of inadequate protection of asylum seekers. Following judgment of the European Court of Human Rights in *MSS vs Belgium and Greece* the other member states suspended Dublin transfers to Greece since 2011.

Sweeping operations in different areas were one of the main policies in order to reinforce controls to migrants since 1990s while in 2010, these operations became more frequent under the name of "Xenios Zeus" (Hospitable Zeus) and took place in Athens as well as in other areas.

Furthermore, since 2010 border controls were significantly increased in Greece, partly due to the efforts of the European Commission to guarantee that the border control procedures in the country were in line with the Schengen agreement. To this end, FRONTEX increased its operational support to Greece in the framework of the joint land and sea operations Poseidon, contributing personnel, equipment, and technical and operational expertise to the national authorities (mainly the Police and the Coast Guard) that were responsible for border control (UNHCR-CoA-Greece-2014).

Towards the end of 2012, a new electronic surveillance system was introduced along the Greek-Turkish land borders, while the construction of a wall of 12 Km was completed (even though the Commission was against its construction), making essentially impossible the entry from this part of the land borders by the river Evros. These measures led to a change in the mode of entry of refugees and migrants in Greece, who then attempted to enter the country by sea, on the islands of the North-Eastern and South-Eastern Aegean. This rendered the migrant and

refugee travel to Greece much more dangerous and often caused the lives of a significant number of persons.

A positive measure for the integration of immigrants in Greek society was the adoption of Law 3838 in 2010 (L. 3838/2010), which contained two important provisions. The first concerned the framework through which children of immigrants that were born in Greece or attended Greek school for a number of years could be granted Greek citizenship. The second concerned the participation of citizens of non EE countries to the local elections. However, in 2011, the Council of State annulled these two provisions on the grounds of being unconstitutional. Finally, Law 4332/2015 amended the previous L. 4251/2014 making provisions for the framework of naturalization of children of immigrants.

During the same period, there was an increase of the number of racial incidents, organized racial attacks, threats and sometimes lethal attacks against migrants and asylum seekers, mainly from extreme right organizations such as the Golden Dawn while in certain cases according to reports with the tolerance of the police.

In the spring of 2015, as a result of the war (mainly in Syria) and of the general adverse conditions prevailing in other countries, refugees mostly from Syria, but also from Iraq, Afghanistan, Eritrea, started to enter Greece from the sea borders with Turkey.

These movements coincided with the difficult economic condition in Greece because of the crisis but also with a turn of the immigration policy of Greece that was in favor of the reception of asylum seekers and the mobilization of international protection procedures. Unfortunately, these intentions could not be supported by the existing insufficient infrastructure and this was made even more difficult by the large number of people on the move. As an indication of this turn, one may note that the detention centers were closed down and the sweeping operations on borders and in urban areas were stopped, while the discourse was not based on illegality and irregularity but on the need for granting protection to refugees. On the other hand, there were no adequate numbers of reception centers and there were insufficient means (both from the point of view of material and human resources) for the effective implementation of the legal procedures for recording (transcribing) the requests of asylum applications or covering their needs. The answer to this problem was partially found on the solidarity of the population of various island or mainland regions and the mobilization of solidarity movements, activists, NGOs and immigrant organizations from Greece and all over the world who helped in covering part of the refugees needs. In February 2015 the Northern borders of Greece (Bulgaria and FYROM) were closed and later the Treaty with Turkey was signed, leading to the confinement of a large number of asylum seekers in Greece, which subsequently led to new developments in immigration policies.

The Ministry of Immigration Policy was founded, with responsibilities concerning immigration and integration, along with an Independent Asylum Service operating under the Ministry's supervision. The number of asylum applications increased, but so were the recognitions, while there were developments towards the access of children to the educational system. In general however, the access of asylum seekers and refugees to services and employment is difficult and limited, mainly because of the adverse economic conditions in Greece, resulting from the global financial crisis.

This report aims to present the basic refugee and migration policies and action plans implemented during the period 2011-2018 in Greece by both governmental and nongovernmental actors and organizations. It is mainly based on published material collected by our research team from February- April 2018.

This material includes reports, reviews, data and corresponded statistics, provided by involved institutions and entities such as the Greek Asylum Service (AS), the Reception and Identification Service (RIS), the Greek Statistics Authority (ELSTAT), the UNHCR, various NGOs, independent researchers and the Press.

It consists of 4 sections:

The first section is oriented in presenting a quantitative approach using data and statistics generated by governmental entities.

Arrivals, asylum procedure, family reunification under the Dublin III regulation, the relocation scheme, return statistics regarding Non-EU citizens, are part of this section. Statistics concerning identification and reception along with the spatial distribution of the persons of concern (POCs) at different sites of the Greek mainland and islands are also presented. Moreover, apart from the new comers, the section refers to foreign population already settled in the country holding a residence permit or having obtained the Greek citizenship.

The second section points out the effects of the economic crisis in labour market and living conditions in Greece, increasing rates of unemployment and poverty and deprived considerable numbers of population. In addition, it presents the main results of the Greek national elections and cabinets since the beginning of the crisis. Furthermore, it presents the main aspects of immigration and asylum as well as the main goals of the immigration policy in Greece.

The third section highlights an overview of the national legal framework regarding rights, obligations and penalties applied on non-EU citizens in Greece and its implementation. More specifically, the section refers to legislation such as controlling entry and exit of the territory, asylum and first reception procedure law, detention and control policies, migration law including general requirements for rights on residence, and categories of residence permits. This section also refers to the establishment of the National Asylum and Reception System through the creation of three national authorities: Asylum Service, Reception and Identification Service and Appeals Authority.

It also focuses to an in depth overview of the reception system structure and its applicable policies after the year 2015 along with the relevant legal framework. This structure includes the various reception and identification centers, open temporary reception sites and open temporary accommodation facilities, along with pre-removal (detention centers) where POCs are distributed according to their legal status as well as to the responsible authorities, which operate in the above mentioned system in Greece.

Moreover, it deals with the integration process of asylum seekers, refugees and migrants in Greece. The scope is to present a comparative overview of recent versus past developments in legislation and practices of integration. It also includes the Greek state's attempts to introduce a national strategy for the inclusion of non-EU-citizens, while emphasizing in the training and development of those already "integrated" in the Greek social context. The section finally assesses the differentiation between the notion of citizenship and nationality, as well as the prerequisites for obtaining the Greek citizenship as defined by the Greek national law.

The last section tackles the recent reception policy initiatives and emergency measures as an initial response to the exceptional flows after the year 2015. Furthermore the section refers to 2016 EU-Turkey Statement and its implementation onwards. More particularly it describes its influence on influxes, the reception and identification system plus the Asylum procedure. The

recent decision by the Greek Council of State annulling the geographical restriction of asylum seekers on the Greek islands is also mentioned.

## Statistics and data overview

The last years have seen an unprecedented increase in the number of people fleeing war, violence and persecution, undertaking dangerous sea and land journeys to reach safety in Europe. Located at an external border of the European Union (EU) area, Greece has traditionally been a ‘gateway’ for the crossing of migrants and refugees into Europe, and since 2015 has received more than one million people mainly fleeing the Syrian war as well as protracted conflicts and insecurity in other parts of the world in search of protection in Europe.

The starkest figures of incoming refugee flows in Greece were recorded over 2015, with an overall of 856,723 people having arrived by sea from Turkey to the North-Eastern Aegean islands throughout the course of the year – in comparison to a total of 41,038 sea arrivals over 2014, and accounting for 80 per cent of total arrivals in Europe in 2015<sup>1</sup>. In terms of country of origin, more than half of this newly arrived population were Syrians escaping war, while Afghans accounted for 20% and Iraqis for 7%. Overall, as reported by UNHCR<sup>2</sup>, 84% of the people reaching Europe in 2015 came from the world’s top ten refugee-producing countries – indicating that war and persecution indeed constituted the primary reasons for displacement.

Following the 2015 landmark arrivals and the emergency situation that was formed in the Greek islands, mainly in Lesbos, Samos, Chios, Kos and Leros, incoming flows via sea subsequently and substantially decreased to a total of 173,450 and 29,718 persons in 2016 and 2017, respectively (See Table 1). Regarding irregular entry at the land border of Greece and Turkey, the number of recorded arrivals in 2017 reached 5,677 persons – representing an approximately 50% increase compared to 2016, while the Turkish authorities reportedly intercepted over 28,400 persons trying to cross into Greece via this land route<sup>3</sup>.

**Table 1: Sea arrivals in Greece (2014-2018)**

Year	Sea arrivals	Dead and missing
2018	8,114 (last updated on 26 April)	
2017	29,718	54
2016	173,450	441
2015	856,723	799
2014	41,038	405

Source: UNHCR – <https://data2.unhcr.org/en/situations/mediterranean/location/5179> (last accessed on 28 April 2018)

The above drops in arrivals in 2016 and 2017 are attributed to two key political developments in Europe, namely the closure of the so-called Balkan route on 8 March 2016 and the entry into force of the EU-Turkey Common Statement on 20 March 2016 under the aim to halt irregular migration movement from Turkey to Europe.

<sup>1</sup><http://www.unhcr.org/afr/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>

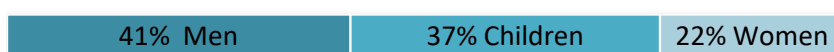
<sup>2</sup>ibid

<sup>3</sup>UNHCR, *Desperate Journeys January 2017 – March 2018*, March 2018  
<https://data2.unhcr.org/en/documents/download/63039>

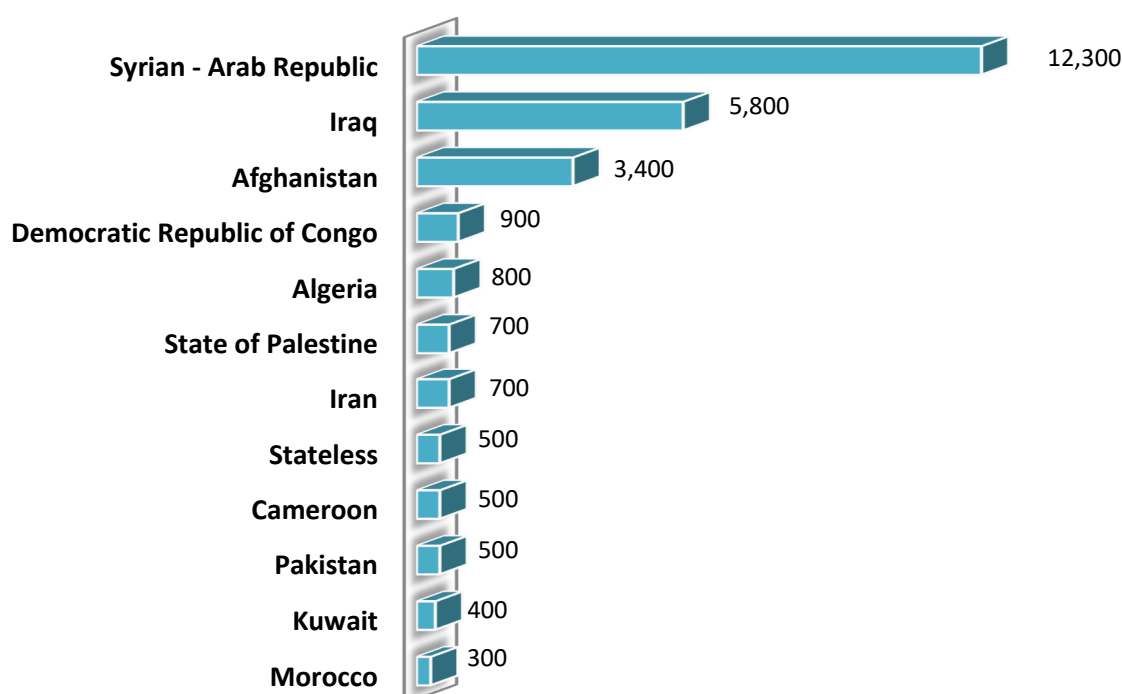


Similar to 2015 as well as 2016, the vast majority of new arrivals in 2017 originated from Syria, Iraq and Afghanistan, while approximately 60% were women and children (see Figure 1). As noted in a recent UNHCR report, UN field staff operating at the islands of reception accounted that new arrivals from Syria and Iraq in the later part of 2017 were from conflict areas such as Idlib, Deirez-Zor and Raqqa in Syria, and Mosul in Iraq<sup>4</sup>.

**Figure 1: Sea arrivals in Greece, January – December 2017**



**UASC: 1.458 children (13% of all children that arrived in 2017)**



Source: UNHCR <https://data2.unhcr.org/en/documents/download/62023>

In 2018, as per the most recent UNHCR statistics<sup>5</sup>, a total of 8,114 refugees and migrants arrived in Greece by sea until 26 April 2018. Syria, Iraq and Afghanistan continue to feature as the top nationalities, accounting for 41,1%, 20,8% and 11,6%, respectively. Women (22%) and children (38%) accounted for more than half of the incoming population, while 40% were adult men. Arrivals during the first three months of 2018 were 33% higher than those of 2017, with the islands of Lesbos and Samos and the Dodecanese islands having received 94% of all new arrivals, followed by Chios (6%). Arrivals at the land border in Evros show an increasing trend

<sup>4</sup>ibid

<sup>5</sup><http://data2.unhcr.org/en/situations/mediterranean/location/5179>

over 2018, with over 1,480 recorded in March, more than 50% of the arrivals in February (nearly 530) and January (over 560)<sup>6</sup>.

As of 28 February<sup>7</sup> 2017, an overall of 50,800 refugees and migrants were present on the Greek islands and the mainland. More specifically, 11,000 people were on the islands of reception in the Northern Aegean Sea (at the Reception and Identification Centers, other state run or UNHCR facilities), seriously exceeding the overall reception capacity of 8,741 people. Population breakdown per island was as follows<sup>8</sup>:

- 6,000 Persons of Concern (PoCs) on Lesbos
- 1,600 PoCs on Chios
- 1,700 PoCs on Samos
- 500 PoCs on Leros
- 1000 PoCs on Kos
- 150 PoCs on other islands (Rodos, Telos)

The trends in arrivals over 2012-2018 have changed compared to the first part of the decade. More specifically, from 2010 to 2012 there was a rapid increase in the incoming number of refugees and migrants from the land borders of Greece and Turkey, while migration activity at the sea borders was at a low level. After 2012, the activity at the land borders significantly decreased, probably as a result of the construction of the wall at the Evros area in Thrace, whereas incoming flows at the sea borders followed exactly the opposite direction (Papayiannis, et al., 2016)<sup>9</sup>.

## Unaccompanied minors

According to statistics issued by the 'National Centre for Social Solidarity' (EKKA), 12,022 unaccompanied children (UAC) were identified in Greece between January 2016 and 15 April 2018. 3,050 unaccompanied children were officially registered and present in Greece as of 15 April 2018. Only a third of these children have access to appropriate accommodation and care, while 2,200 UAC were on the waiting list for placement in shelters, including 186 children at the Reception and Identification Centres (RICs) at the islands of reception, 272 children in temporary accommodation in hotels<sup>10</sup> in the mainland, 198 children at designated safe zones<sup>11</sup> in open refugee sites in the mainland, 103 children held under protective custody (detention) in police stations across the country, while 617 UAC were reported homeless.<sup>12</sup>

<sup>6</sup>UNHCR, *Europe Monthly Report March 2018*, 22 April 2018: <https://reliefweb.int/sites/reliefweb.int/files/resources/63198.pdf>

<sup>7</sup><https://data2.unhcr.org/en/documents/download/62950>

<sup>8</sup><https://data2.unhcr.org/en/documents/download/63194>

<sup>9</sup>Papayiannis, G., Pistikos, I., Tselepi, N., Petracou, E. & Yannacopoulos, A., Migration in the North - Eastern Greek Islands with special reference to Lesbos: towards the construction of a qualitative & quantitative data base, ISISA Islands of the World XIV Conference 2016, Niss(i)ology and Utopia: back to the roots of Island Studies 23 - 27 May 2016 Mytilene, Lesbos Island, Greece

<sup>10</sup>**Hotels** are short-term accommodation spaces being used as a measure to care for UAC in light of the insufficient number of available shelter places. Priority is given to UAC in Reception and Identification Centers.

<sup>11</sup>**Safe Zones** are designated supervised spaces within accommodation sites (camps), which provide UAC with 24/7 emergency protection and care. They should be used as short term (maximum 3 months) measures to care for UAC in light of the insufficient number of available shelter places. Safe Zone priority is given to UAC in detention as well as other vulnerable children, in line with their best interests.

<sup>12</sup><https://data2.unhcr.org/en/documents/download/63153>

According to the same statistics by EKKA, the majority of UAC currently present in Greece are from Pakistan (42,01%), followed by Afghanistan (25,287%), Syria (13,16%) and other nationalities (19,55%). The vast majority of children are teenage boys between 14 and 18 years old.<sup>13</sup>

## Asylum in Greece

Overall in 2017, the Greek Asylum Service registered 58,661 asylum applications of which 26,668 were submitted on the five islands of reception (Lesvos, Chios, Samos, Leros, and Kos)<sup>14</sup>. In total, the vast majority of the applications (40,127) were submitted by men, followed by applications submitted by women (18,535), while 2,275 applications concerned cases of unaccompanied minors. In January 2018, a total of 4,752 asylum applications were registered.<sup>15</sup> As illustrated in Table 2, the main nationalities of asylum seekers in Greece are Syria, Pakistan, Afghanistan and Iraq.

Over 2017, more than 10,000 asylum seekers were granted refugee status or subsidiary protection in Greece in first instance procedures, compared to less than 3,000 cases in 2016 (see Table 3). 34,646 applications were rejected either as ineligible (12,149) or as inadmissible (22,497). The grounds for rejection of cases based on inadmissibility relocation in another EU Member State (12,323 cases), acceptance by another Member State pursuant to the Dublin III Regulation (8,330 cases, primarily for reasons of family reunification), and the application of the concept of 'safe third country' as part of border procedures (919 cases). In 6,989 cases, the asylum procedure was discontinued, primarily owing to the tacit withdrawal of the asylum claim by the applicant.<sup>16</sup>

The increase in the number of people granted refugee status in Greece is considered both as a result of the increased capacity of the Asylum Service to review cases, as well as of the increase in the recognition rate from 26% in 2016 to 46% in 2017.

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<sup>13</sup>ibid

<sup>14</sup><http://asylo.gov.gr/en/?p=3259>

<sup>15</sup>ibid

<sup>16</sup>ibid

**Table 2: Asylum Applications – Countries of Origin (7.6.2013 – 31.01.2018)**

	2013	2014	2015	2016	2017	January 2018	2018	Total	%
Syria	252	773	3,490	26,675	16,396	1,213	1,213	48,799	34.4%
Pakistan	610	1,618	1,822	4,693	8,923	557	557	18,223	12.8%
Afghanistan	803	1,709	1,720	4,366	7,567	528	528	16,693	11.8%
Iraq	107	174	661	4,811	7,924	967	967	14,664	10.3%
Albania	419	569	1,003	1,420	2,450	236	236	6,097	4.3%
Bangladesh	230	633	738	1,215	1,383	125	125	4,324	3.0%
Iran	131	361	241	1,096	1,316	94	94	3,239	2.3%
Georgia	342	350	386	687	1,107	112	112	2,984	2.1%
Palestine	17	74	60	852	1,311	48	48	2,362	1.7%
Turkey	17	41	43	189	1,827	122	122	2,239	1.6%
Other Countries	1,886	3,129	3,024	5,057	8,457	750	750	22,303	15.7%
<b>Total</b>	<b>4,814</b>	<b>9,431</b>	<b>13,188</b>	<b>51,061</b>	<b>58,661</b>	<b>4,752</b>	<b>4,752</b>	<b>141,907</b>	

Source: [Greek Asylum Service](#)

**Table 3: 1<sup>st</sup> Instance Procedures (7.6.2013 – 31.01.2018)**

	2013	2014	2015	2016	2017	January 2018	2018	Total
Refugee Status	229	1,223	3,647	2,451	9,319	1,026	1,026	17,895
Subsidiary Protection	93	487	347	249	1,041	154	154	2,371
Negative in Substance	1,754	4,254	4,434	6,588	12,131	1,254	1,254	30,415
Inadmissible decisions	261	1,453	2,019	15,241	22,485	613	613	42,072
a) due to the application of the safe third country principle (Border Procedures)				1,312	918	55	55	
b) due to acceptance by another Member State (Dublin Regulation Procedures)				2,070	8,319	461	461	
c) due to acceptance by another Member State (Relocation Procedures)				11,000	12,323	0	0	
d) on subsequent (repeated) applications				775	915	97	97	
e) due to administrative reasons				84	10	0	0	

	2013	2014	2015	2016	2017	January 2018	2018	Total
Implicit and Explicit Withdrawals	243	1,078	2,375	2,385	6,875	889	889	13,845
Total	2,580	8,495	12,822	26,914	51,851	3,936	3,936	106,598
Monthly Average	369	708	1,069	2,243	4,321		3,936	1,904
Recognition Rate (%)	15,5%	28,7%	47,4%	29,1%	46,1%	48,5%	48,5%	40,0%

Source: [Greek Asylum Service](#)

Of the 2,275 asylum applications submitted by unaccompanied children in 2017, a total of 160 cases were granted refugee status, 27 children were granted subsidiary protection, while 493 UAC asylum applications received negative first instance decisions. 740 UAC asylum applications were judged inadmissible, including as part of the Dublin III family reunification procedures (see Table 4).

**Table 4: 1<sup>st</sup> Instance Procedures - Unaccompanied Minors (7.6.2013 – 31.01.2018)<sup>17</sup>**

	2013			2014			2015			2016			2017			January 2018		
	M	F	T	M	F	T	M	F	T	M	F	T	M	F	T	M	F	T
Refugee Status	7	1	8	45	6	51	54	19	73	52	13	65	131	29	160	25	2	27
Subsidiary Protection	4		4	24		24	22		22	17		17	27		27	1		1
Negative in Substance	53	2	55	147	6	153	92	6	98	216	6	222	485	8	493	54		54
Inadmissible Decisions	12	3	15	56	21	77	68	10	78	310	117	427	572	168	740	30	3	33
Implicit and Explicit Withdrawals	14		14	85		85	106	10	116	55	9	64	235	29	264	48	3	51
Total	90	6	96	357	33	390	342	45	387	650	145	795	1,450	234	1,684	158	8	166

Source: [Greek Asylum Service](#)

<sup>17</sup>The category of inadmissible decisions includes decisions:(a) due to the application of the safe third country principle (Border Procedures), (b) due to acceptance by another Member State (Relocation procedures), (c) due to acceptance by another Member State (Dublin Regulation procedures), (d) on subsequent (repeated) applications, (e) due to administrative reasons.

## Family reunification and relocation statistics

On 8 January, the Greek Asylum Service and the International Office for Migration (IOM) held a joint press conference on the conclusion of the EU Relocation Scheme. As per the relevant press release<sup>18</sup> issued by the Asylum Service, 21,726 asylum seekers, predominantly Syrians, (6,982 men, 4,925 women and 9,819 minors) have been relocated from Greece to other EU Member States, since December 2015. The total number was expected to reach over 22,000 asylum seekers (out of 66,400 originally foreseen, 33% of the target), following the completion of pending cases.

According to the above press release, Germany (5,376), France (4,399), the Netherlands (1,748), Sweden (1,658), Finland (1,202), Portugal (1,193) and Spain (1,126) are the Member States which received the largest numbers of asylum seekers, within the framework of the relocation program. Finland (137) and the Netherlands (81), followed by Germany (57), Spain (46) and Ireland (38), received the largest numbers of unaccompanied children.

Based on statistics of the Greek Asylum Service<sup>19</sup>, over 2017 Greece sent 9,675 Take Charge Requests (TCRs) for family reunification under the EC Dublin III Regulation. In the same period, 7,733 acceptances were received by other EU member states and 4,793 transfers were implemented – compared to 962 transfers in 2016. The majority of outgoing TCRs concerned applications under Articles 9 and 10, followed by Article 17 of the Dublin III Regulation. In 2018, as of 31 March 2018, 1,690 outgoing TCRs were sent by the Greek Dublin Unit, while 549 acceptances and 747 rejections were received and 1,168 transfers were effectuated.<sup>20</sup>

## Returns

Regarding the asylum procedure conducted in the framework of the EU-Turkey Statement of 18 March 2016, the procedure on the islands was completed in 25,814 cases over 2017. Of these cases, 5,437 resulted in a rejection of the asylum claim, and 20,377 resulted in the lifting of the geographical restriction and the subsequent transfer of the applicants to the mainland<sup>21</sup>.

According to statistics published by UNHCR, from April 2016 to 28 February 2018, 1,554 asylum seekers (94% men, children 5%, women 4%) have been returned from the Greek islands to Turkey on the basis of the EU-Turkey Common Statement. The vast majority of those returned to Turkey originate from countries other than Syria, with Pakistani nationals accounting for 42% of the total returns. In total, 258 Syrians have been returned to Turkey during the aforementioned period. Of all nationals returned, 47% did not express a will to apply for asylum or withdrew their will to apply for asylum or withdrew their asylum claims in Greece<sup>22</sup>. The European Commission has argued that the pace of returns is too slow, arguing that '*significant additional efforts are still*

<sup>18</sup>[http://asylo.gov.gr/en/wp-content/uploads/2018/01/Press\\_Releas-Conclusion-of-the-EU-Relocation-Scheme.pdf](http://asylo.gov.gr/en/wp-content/uploads/2018/01/Press_Releas-Conclusion-of-the-EU-Relocation-Scheme.pdf)

<sup>19</sup>[http://asylo.gov.gr/en/wp-content/uploads/2018/04/Dublin-stats\\_march18EN.pdf](http://asylo.gov.gr/en/wp-content/uploads/2018/04/Dublin-stats_march18EN.pdf)

<sup>20</sup>ibid

<sup>21</sup><http://asylo.gov.gr/en/wp-content/uploads/2018/01/Press-Release-25.1.2018.pdf>

<sup>22</sup><https://data2.unhcr.org/en/documents/download/62508>

*needed to reduce the backlog of asylum applications, address the insufficient pre-return processing and detention capacity in Greece to improve returns.*<sup>23</sup>

From June 2016 until 14 February 2018, 9,611 people have been returned from Greece to their country of origin via the IOM's 'Assisted Voluntary Return and Reintegration Program'<sup>24</sup>.

## Immigrant population

Over the last thirty to forty years Greece has witnessed an increase in the number of immigrant population. In 2011, the national census data registered 713,000 third country nationals (TCN) and 199,000 EU citizens (non-Greek) living in Greece, accounting respectively for 6.5% and 1.8% of the total resident population. More updated figures of the 2016 Labour Force Survey suggest a significant decrease in the total migrant population to 586,164 people and 99,422 EU citizens (non-Greeks) in 2016 (see tables 5 and 6), accounting for 4.5% and 0.9% respectively of the total resident population. It is possible that the data of the Labour Force Survey over-represent the reduction of the immigrant population, as they are not as accurate as census data; nonetheless the decrease in migrant residents is dramatic (Triandafyllidou, et al., 2016)<sup>25</sup>.

**Table 5: Stock of foreign population in Greece, 4<sup>th</sup> trimester 2015**

	Size of immigrant stock	% of total resident population
Total TCN population	491,850	4.5%
Total EU population (non-Greeks)	99,475	0.9%
Total immigrant stock	591,325	5.5%
Total population in Greece	10,814,188	100.00

Source: Hellenic Statistical Authority (ELSTAT), Labour Force Survey 2015

**Table 6: Stock of foreign population in Greece, 2<sup>nd</sup> trimester 2016**

	Size of immigrant stock	% of total resident population
Total TCN population	486,742	5% (4.5%)
Total EU population (non-Greeks)	99,422	1% (0.9%)
Total immigrant stock	586,164	6% (5.4%)
Total population in Greece	10,789,602	100.00

Source: Hellenic Statistical Authority (ELSTAT), Labour Force Survey 2016

<sup>23</sup>See p.2: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171207\\_eu\\_turkey\\_statement\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171207_eu_turkey_statement_en.pdf)

<sup>24</sup><https://greece.iom.int/worldmap>

<sup>25</sup>Triandafyllidou A., Mantanika R., 2016. Migration in Greece: Recent Developments

2016 <http://www.eliampep.gr/wp-content/uploads/2014/10/2016.pdf>



Data on effective inflows and outflows of immigrants in Greece are based on the issuing and renewal (or not) of residence permits but may not be accurate as people may stay on in the country even if they lose their legal status or may enter the country undocumented. However, data on residence permits do give an indication of the actual trend in terms of inflows and outflows and also in terms of the possible de-legalisation of migrants who previously had a legal status (Triandafyllidou, et al., 2016).

**Table 7: Valid Stay Permits for Third Country Nationals, per gender – 2010-2016**

<b>Valid Stay permits</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>
Men	297,924	292,469	288,837	298,800	298,830
Women	262,437	262,292	261,824	273,569	273,744
Total	560,361	554,752	550,661	572,369	573,574

Source: (Triandafyllidou&Mantanika, 2016)

## Greece: society, economy and migration

### The Greek socioeconomic and political context

After Greece's entrance into the Eurozone trade costs were reduced and low interest rates led to a rise in wages and incomes in Greece relative to Germany. This produced surpluses in Germany and widened current account deficits in Greece and some other member states. The credit ratings of Greece, Portugal, and Ireland were marked down, and spreads on their government debt relative to German debt began to rise. Because these countries were euro-area members they could not do any adjustment in currency and remained in the euro area and continued to run current account deficits, despite rapidly falling private capital inflows, and, in some cases, capital flight.<sup>26</sup>

As consequence in 2009, an economic crisis has begun as the result of a global and regional economic instability, with enormous social and political consequences for the Greek Society. The global crisis and the traditional rigidities of the Greek labour market have, combined with the eruption of the crisis in Greece (2010) and the imposition of severe austerity measures, produced soaring unemployment rates and shrinking the public sector (Sotiropoulos, 2014:7). The economy of Greece was one of the first where the symptoms of the crisis are so intense, with particularly adverse effects on employment, income and living conditions of its inhabitants. The economic crisis and the fiscal discipline policies have already significantly changed the labor market, affecting the risk of poverty faced by both the total population of the country and individual groups such as the unemployed (Ioannidis et al, 2012:9).

The period 2010 – 2015 was accompanied by particularly negative social impacts as expressed by relative indicators of poverty and inequality. The human poverty and social exclusion was raised from 27.7% in 2010 to 35.7% in 2015. Also, the rate of unemployment increased approximately 14.3% in the same period. In addition the poverty rate of employed workers increased significantly after 2011 and was 18%. (INE GSEE, 2017: 18). In 2016, Greece continues to be confronted with the highest unemployment rate in the EU (23.6 % annual average) while the proportion of young unemployed (aged 15 - 24) among the labour force is highest in Greece (47.3%) as well as 17% of the active population in Greece (employed together with unemployed) are long-term unemployed<sup>27</sup>.

Moreover, in 2012 as much as 35 per cent of the country's population ran the risk of poverty or social exclusion, while the share of those who were severely materially deprived was 19 per cent. Soon it became clear that social citizenship rights were curtailed. A series of welfare reforms led to severe restrictions in social protection and affected negatively social rights (Sotiropoulos & Bourikos, 2014). After the start of the economic crisis in 2008 it is estimated that more than 427,000 people left Greece. In 2013, 100,000 people migrated, tripling the annual average until then. The Greek immigration does not seem to slow down as unemployment rate remains in high levels.

<sup>26</sup>Hale, Galina, 2013, Balance of Payments in the European Periphery, FRBSF ECONOMIC LETTER, January 14, 2013, <https://www.frbsf.org/economic-research/files/el2013-01.pdf>, 22-5-2018

<sup>27</sup>European Parliament, EMPLOYMENT AND SOCIAL AFFAIRS Policy Department A: Economic and Scientific Policy, 2016, Unemployment and Poverty: Greece and Other (Post-)Programme Countries, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/602051/IPOL\\_BRI\(2017\)602051\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/602051/IPOL_BRI(2017)602051_EN.pdf), 22-5-2018

It is worth noting that Greece has limited welfare services and with the huge increase of indirect, direct and property tax rates and pension cuts the last years the result has been the poverty rates to rise dramatically. According to a report of Eurostat<sup>28</sup> 21.1% of people in Greece experience severe material deprivation<sup>29</sup> which it is the second highest rate among the EU member states. Among Member States, the at-risk-of-poverty or social exclusion rate has grown from 2008 in ten Member States, with the highest increases being recorded in Greece (from 28.1% in 2008 to 35.6% in 2016, or +7.5 percentage points)<sup>30</sup>.

In 2009, approximately six months before bail out of Greece, national elections were called in October by Prime Minister Costas Karamanlis (ND) and PASOK returned to power. In the beginning of 2010, George Papandreou, the Prime Minister, requested a bailout for Greece and the European Union, the European Central Bank and the International Monetary Fund respond to this call. The first memorandum signed and the First bailout package for €110 billion was agreed by the Eurozone leaders and IMF. During 2010, austerity measures, concerning cuts on salaries, pensions, public expenditure and increase of retirement age etc, were passed by the Greek parliament while at the same time strikes and demonstrations took place in cities and the Square movement protested on daily basis in Syntagma Square, in Athens. The Prime Minister George Papandreou resigned under pressure in November 2011 and Lucas Papademos, former head of the Bank of Greece and not elected, became the new Prime minister of a three coalition party government consisting of the PASOK, New Democracy, and Popular Orthodox Rally (LAOS). Papademos resigned in April 2012 and after two rounds of election New Democracy won and formed a coalition government with PASOK and DIMAR (the Democratic Left) with Prime Minister, Antonis Samaras who was the leader of the New Democracy. An important dimension of the results of June's 2015 elections was that for the first time Golden Dawn, the right-wing extremist party, entered Parliament with a percentage of about 7.

In December 2014, Greek Parliament failed to elect the government's candidate for the president; Stavros Dimas replacing retiring president; Karolos Papoulias and national elections scheduled for January 2015. Syriza (the Coalition of the Radical Left) won elections and formed government with Independent Greeks (ANEL) a conservative-nationalistic party. Due to the end of bail out period in the end of June, capital controls imposed in Greece and Tsipras, the Prime Minister announced a new bail out referendum on measures that the European Commission, European Central Bank and International Monetary Fund proposed after five months negotiations between them and Greek government. The 61% of voters were against them however the Greek Parliament approved these measures in August 2015. Due to the SYRIZA former campaign against austerity packages and the split within the SYRIZA members of parliament and the party, Tsipras called snap elections in September 2015 and SYRIZA won the vote and formed once again a coalition with ANEL.

<sup>28</sup>Eurostat, 24/04/2018 Can you afford to pay all your bills? 24/04/2018 <http://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180424-1> 20-5-2018

<sup>29</sup>Material deprivation refers to a state of economic strain and durables, defined as the enforced inability (rather than the *choice* not to do so) to pay unexpected expenses, afford a one-week annual holiday away from home, a meal involving meat, chicken or fish every second day, the adequate heating of a dwelling, durable goods like a washing machine, colour television, telephone or car, being confronted with payment arrears (mortgage or rent, utility bills, hire purchase instalments or other loan payments [http://ec.europa.eu/eurostat/statisticsexplained/index.php/Glossary:Severe\\_material\\_deprivation\\_rate](http://ec.europa.eu/eurostat/statisticsexplained/index.php/Glossary:Severe_material_deprivation_rate)

<sup>30</sup>Eurostat, Downward trend in the share of persons at risk of poverty or social exclusion in the EU, newrelease, 155/2017 - 16 October 2017

## Short overview of migration policy in Greece

From 1950 until 1990s Greece was a country that sent refugees worldwide due to the 1944-1948 civil war, the subsequent persecution and marginalization of the left and the 1967-1974 dictatorship. Greece was also a territory on which International Organizations, such as the World Council of Churches and the UNHC, arranged mainly relocation programs of asylum seekers from countries of the Eastern block and the Middle East to other European countries and to the USA, Canada, Australia etc.

In the 1990s, immigration and asylum policies in Greece were characterized by the adoption of strict immigration laws, deportation policies, negative coverage of the migration phenomenon from the mass media, and racist attacks against migrants and particular groups of migrants. Greece is considered as an immigration and transit country by governmental entities, certain media and particular parts of the Greek society. The informal entrance of the majority of the migrants and the lack of their legal status is attributed to the alleged inability of Greece to exert effective controls against migration as well as to the natural form of its geographical borders that makes effective guarding difficult, rather than to the existence of very strict legal and policy framework within Greece but also in other countries involved. At the same time, Greece as a member state of the EU has participated in the attempts of gradual harmonization of migration and asylum policies, which began with the Maastricht Treaty, continued and strengthened with the Common European Asylum System (CEAS) and onwards, in the process of creating union policies even though each member state could incorporate directives and develop their own policies for asylum and migration as long as these policies ensured compliance with some minimum standards. We can argue that the priority has been set on the control of borders especially with the developments of the Schengen agreement and the consequent abolishment of internal controls which led to the establishment of Frontex. As a result, Greece has been established as the external border of the EU and one of the main entries in the Schengen area.

During the period 1990-2005 the main focus was to combat the irregular arrivals of people and to exercise border controls as well as to register the migrant population and give them temporary residence and employment permits. At the same time, especially in the 2000s, asylum policies were very restrictive, consisting of detention, time consuming procedures, very low rates of recognition and granting mainly temporary humanitarian protection.

In 2012 the focus of migration policy was on combating “illegal migration” while at the same year, the new government (New Democracy-led coalition) introduced a bill which returned the citizenship law back to the basis of the *jus sanguinis*. Moreover, it introduced Operations such as *Aspida* (Shield) at the Greek - Turkish land border and *Xenios Zeus* in mainland Greece in order to combat informal entry and stay of third-country nationals. Moreover, in October 2012, the government extended the detention period of migrants and asylum seekers by up to twelve months (18 months in total). Finally, in December 2012, the construction of a 12.5 km-long barbed wire fence was completed at the Greek - Turkish land border (Skleparis, 2017:2).

In addition to an economy in deep recession with economic and social hardships and harsh living conditions, an unprecedented numbers of asylum seekers came to Greece. In 2015 the arrival of hundreds of thousands of migrants and refugees fleeing war and political instability in the Middle East, Africa, and elsewhere strained the Greek state’s ability to accommodate such a large population, leading to a humanitarian crisis. Most refugees entered Greece by boat from Turkey to Greek islands: Lesbos, Chios, Kos, and Samos. In 2015 alone, more than 850,000 migrants made the crossing to, most of them Greece attempting to make their way to other EU

countries. Generally, international and local NGOs, movements and activists provided their services and assist Greek government to respond to refugees' reception and assistance. Furthermore, people offered help and showed support refugees. NGOs together with solidarity and self-organized movements, which have already established networks for the economic crisis, started to provide their services and facilities to asylum seekers and refugees' arrivals.

Since February 2015, public discourse shifted from walls against "illegal" migration and sweeping operations to concern on humanitarian aspects of massive migration and European collaboration in order to protect people and their rights. The Alternate Minister for Immigration Policy Tasia Christodouloupoulou, who held her office in January 2015, pointed out that people, who arrived in Greece by sea and obtain temporary residence permits, cannot be held at detention centres but they should go to reception centres and they were free to move around Greece.

In March 2016, FYROM decided to close its borders with Greece and the Statement between the European Union (EU) and Turkey had resulted in a number of people left / remained in Greece and a reduction of numbers of new arrivals entering the country. So, a considerable number of people were forced to stay in inadequate and precarious conditions in overcrowded hotspots on Greek islands. Greek government with assistance of NGOs attempted to improve these conditions and tranfered people to the mainland. However, still asylum seekers are trapped in Greek islands due to implication of geographical restriction as defined in the EU-Turkey Statement.

## **The relevant legislative framework in the fields of migration and asylum**

### **Institutionalization of the right to asylum in Greek legislation**

Every person, on Greek territory has fundamental rights equating in many cases the status of aliens, including refugee, with that of Greeks. The relevant articles of the Greek Constitution are the following:

“It guarantees respect and protection of the value of the human being (art. 2); full protection of life, honour and liberty, irrespective of nationality, race or language, religious or political beliefs for all persons living within Greek territory (art. 5, para. 2) and inviolability of personal liberty (art. 5, para. 3). Furthermore, no person shall be arrested or imprisoned without a reasoned judicial warrant which must be served at the moment of arrest or detention pending trial, except when caught in the act of committing a crime (art. 6, para. 1) and torture, any bodily maltreatment, impairment of health or the use of psychological violence, as well as any other offence against human dignity are prohibited and punished as provided by law (art. 7, para. 2). Every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests, as specified by law (art. 20, para. 1) and the right of a person to a prior hearing also applies in any administrative action or measure adopted at the expense of his rights or interests (art. 20, para. 2)” (Crépeau, 2013: 6).

Moreover, the national legislation has incorporated international and regional provisions and provides the rules and procedures for protection of asylum applicants and refugees as we present in the subsection.

### **The national legislation on immigration and asylum**

Greece’s legal system on asylum is based on the 1951 Geneva Convention and its 1967 Protocol, as well as on European Union (EU) legislation on the Common European Asylum System (CEAS). Greece is bound to provide asylum to those who meet the criteria. Greece is also obliged to respect the binding Charter of Fundamental Rights of the European Union, which recognizes the right to asylum.

The 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), while not referring specifically to migrants, protects them insofar as it is applicable to all persons under a State’s jurisdiction. The 1961 European Social Charter (ESC) and the 1996 Revised European Social Charter (RESC) also afford some degree of protection to undocumented migrants, mainly on the basis of the right to non-discrimination in relation to different rights, such as labour rights and guarantees of non-expulsion (Estrada-Tanck, 2016:128).

The first attempt to regulate the entry and residence in Greece dates back to Law 1975 of 1991, which was followed by Law 2910 in 2001. Both these laws were focused on controlling entry and considered economic migration as temporary. These tendencies are also evident in Law 3386 introduced in 2005, which nevertheless attempted to also provide for long-term residence and integration.

The Law 2452 which introduced in 1996 established normal and accelerated procedures and introduced the concepts of manifestly unfounded applications and safe third country, in line with developments in EU soft law. Refugee and asylum laws were also introduced in late 2000, with the transposition of the Dublin Regulation (2003), the Reception (2007) Procedures and the Qualifications (2008) directives.

Following these developments, Law 3907/2011 led to the creation of needed services in Greece, introducing significant reforms of the asylum and reception systems and establishing three independent authorities: the Asylum Service, the First Reception Service, and the Appeals Authority. The provisions of Law 3386/2005, subsequent amendments and other laws transposing EU directives – for instance on family reunification and long-term residence status – were codified in Law 4251/2014.

More recently, the refugee crisis since 2015 represented a key turning point for asylum legislation in Greece. In particular, in order to facilitate the implementation of the ‘hotspot approach’ and the EU-Turkey Statement of 18 March 2016, Law 4375/2016 was adopted, introducing significant and controversial changes to asylum and reception procedures. Most notably, it introduced an ‘exceptional’ border procedure, the blanket detention of migrants in closed ‘Reception and Identification Centres’ (RICs), and the application of the concept of ‘safe third country’, so as to provide a basis for the return to Turkey of arrivals after March 20<sup>th</sup> 2016, as foreseen by the EU-Turkey Statement (Karamanidou, 2017).

According to Gazette 51/A/3-4-2016 Law 4375/2016 refers on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC “on common procedures for granting and withdrawing the status of international protection (recast) (L 180/29.6.2013), provisions on the employment of beneficiaries of international protection and other provisions”.<sup>31</sup>

## Requirements and relevant procedures

Part III of Law 4375/2016, as modified by Law 4399/2016, transposes the provisions of Article 6 the recast Asylum Procedures Directive relating to access to the procedure.

Furthermore, any alien or stateless person has the right to apply for international protection according to Article 36 of the Law 4375/2016. Additionally article 39 points out that all applications for international protection are initially examined regarding the recognition of refugee status, and in case these are not fulfilled, they are examined for the recognition of subsidiary protection status.<sup>32</sup>

Greek Law (4375/2016) refers to registration to describe both the notion of “registration” and “lodging” of an application under the Directive. Applications for international protection are

<sup>31</sup>[http://asylo.gov.gr/en/?page\\_id=113](http://asylo.gov.gr/en/?page_id=113)

<sup>32</sup>[http://asylo.gov.gr/en/?page\\_id=113](http://asylo.gov.gr/en/?page_id=113)

received and registered by either the RAOs, Asylum Units (AAU) or Mobile Asylum Units operating in different jurisdictions and locations. The Asylum Service shall as soon as possible proceed to the “full registration” of the asylum application, following which an application is considered to be lodged (AIDA,2017:31).

The number of asylum applications has fluctuated over the years, marking a significant increase in 2016, as a result to political measures put in place in response to the 2015 refugee crisis, including the EU-Turkey Statement.

**Table 8: Applications and First Instance decisions**

	2009	2010	2011	2012	2013	2014	2015	2016
Total applications	15,925	10,275	9,310	9,575	8,225	9,430	13,205	51091
Total decisions	14,350	3,455	8,670	11,195	13,080	13,305	9,640	9,319
Total positive decisions	165	105	180	95	500	1,970	4,030	
Geneva Convention status	35	60	45	30	255	1,270	3,665	2,467
Humanitarian status	25	30	45	20	70	115	10	
Subsidiary protection	105	20	85	45	175	590	355	244
Rejected	14,185	3,350	8,490	11,095	12,580	11,335	5,610	6,608

Source: Eurostat/Asylum Service (Karamanidou,2017:9)

Before June 2013, the authority responsible for receiving and examining applications was the Hellenic Police. Since June 2013, the designated authority to examine applications for international protection in the first instance under the regular or the accelerated procedure is the Asylum Service <sup>33</sup> under the Ministry of Migration Policy, including its central offices in Athens and Regional Asylum Offices (RAO) across the country.

The applications of the following categories of persons have priority (accelerated procedure): (a) vulnerable persons<sup>34</sup>, (b) those in detention or in transit, (c) persons whose applications are prima facie substantiated, (d) those whose applications are manifestly unfounded, and (e)

<sup>33</sup>Law 4375/2016 in article 1 (amended by law 4399/2016) operates an autonomous Service within the Ministry of Migration Policy, entitled “Asylum Service”, as it is established by article 1 of Law 3907/2011 (O.G. A’ 7), directly dependent on the Minister and with a territorial competence on the entire country. This Service operates as a Directorate and its mission is to apply the legislation on asylum and other forms of international protection for aliens and stateless persons, as well as to contribute to the development and the formulation of the national asylum policy

<sup>34</sup>As vulnerability can be assessed at any stage of the procedure, legal aid should be available to the applicants in order to access information and get assistance in elaborating and supporting their vulnerability claim ( medical records etc).



persons who are deemed by the police in substantiated decisions to be a danger to national security and public order.

- **Regular procedure**

Applicants are subject to personal interviews through interpreters by staff who have experience in such matters and who are expected to maintain confidentiality.

Prioritised examination: For applications likely to be well founded or made by vulnerable applicants.

Fast-track processing: Accelerating the processing of specific caseloads as part of the regular procedure; “Fast-track processing” is not foreseen in the national legislation as such. The Asylum Service implements since September 2014 a fast-track processing of applications lodged by Syrian nationals, provided that they are holders of a national passport and lodge an asylum claim for the first time. Under this procedure, asylum claims are registered and decisions are issued on the same day (AIDA,2017 update:40).

- **Accelerated procedure**

Accelerated procedures are applied to people who:

(a) come from a safe country of origin: applications filed by nationals of safe countries of origin are fast-tracked and such persons are sent back to their countries of origin. Greece recognizes as safe countries of origin those third countries where (i) there is no threat to life or freedom based on religion, race, ethnicity, participation in a particular social group, or political convictions; (ii) there is no danger to the life of the applicant; and (iii) the non-refoulement principle of the Geneva Convention is followed.

(b) have submitted manifestly unfounded applications

(c) have presented false information or documents

(d) made another asylum application in another Member State with different personal data.

Applications must be reviewed within six months<sup>35</sup>.

- **Border procedure**

As aforementioned, Article 60(4) of Law 4375/2016 foresees a special border procedure, known as a “fast-track” border procedure, connected to the implementation of the EU-Turkey Statement. A fast-track border procedure is applied to applicants who arrived on Greek islands after 20 March 2016, and takes place in the Reception and Identification Centres where hotspots have been established (Lesvos, Chios, Samos, Leros, Kos).

Under the fast-track border procedure, interviews may also be conducted by staff of the EASO, while very short deadlines are provided to applicants. The concept of “safe third country” has been applied for the first time for applicants belonging to a nationality with a recognition rate over 25%, including Syrians ( AIDA,2017: 70).

- **Procedure for the application of the EC Dublin III Regulation**

The Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013, also referred to as the ‘Dublin III’ Regulation, as well as its two Implementing Regulations<sup>36</sup>, provide the legal framework for determining the EU Member State responsible for examining the

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<sup>35</sup>The Library of Congress website <https://www.loc.gov/law/help/refugee-law/greece.php#Legal>

<sup>36</sup>Regulations No.1560/2003 and No. 118/2014.

application for international protection lodged in another Member State by a third country national or stateless person.

The Member States which implement the “Dublin III” Regulation are: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, the Netherlands, Hungary, Iceland, Ireland, Italy, Latvia, Lichtenstein, Lithuania, Luxemburg, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United Kingdom<sup>37</sup>.

When an applicant over the age of fourteen submits an application for international protection, he/she is fingerprinted. The fingerprints are entered into the European Central Database EURODAC, which facilitates the implementation of the “Dublin III” Regulation.

**Regarding the outgoing procedure from first reception countries such as Greece, on the basis of the Dublin III Regulation, applicants have the right to request family reunification with a family member or relative who is present in another EU Member State party to ‘Dublin III’, as per below:**

- If the applicant is an *unaccompanied minor* and a member of his/her family (parent, brother/sister, uncle/aunt, grandfather/grandmother) is legally present in another EU Member State. If the applicant is an *adult* and a member of his/her family, provided the family already existed in their country of origin, is present in one of the “Dublin III” countries States as a beneficiary of international protection or as an international protection applicant, if the applicant so wish, that country is responsible for examining his/her application. In greek case, members of the family are considered to be: the spouse (husband or wife) and minor children.

If the applicant has a residence permit, the State responsible for the examination of his/her application is the “Dublin III” country that issued the residence permit, even if it has expired for two years. If, before entering Greece, the applicant illegally entered another “Dublin III” country, that country is responsible competent for the examination of his/her application. This responsibility expires twelve (12) months after the illegal entry. If none of the aforementioned criteria is applicable, then the country which is responsible for the examination of the application is Greece<sup>38</sup>.

<sup>37</sup>Asylum Service website [http://asylo.gov.gr/en/?page\\_id=81](http://asylo.gov.gr/en/?page_id=81)

<sup>38</sup>Asylum Service website [http://asylo.gov.gr/en/?page\\_id=81](http://asylo.gov.gr/en/?page_id=81)

**Table 9: List of Authorities Intervening in Each Stage of the Procedure**

Stage of the Procedure		Competent Authority
Application	At the Border	Asylum Service
	On the Territory	Asylum Service
Dublin (Responsibility Assessment)		Asylum Service
Refugee Status Determination		Asylum Service
Appeal	First Appeal	Independent Appeals Committees (Appeals Authority)
	Second (Onward) Appeal	Administrative Court of Appeal
Subsequent Application (Admissibility)		Asylum Service

Source: (AIDA, 2017: 21)

Overall, access to international protection (asylum) procedures is free of charge. The competent authorities to which the applicants need to submit the application in person are the Regional Asylum Offices and the Asylum Units. If the applicant is an unaccompanied minor (under 18 years of age) and not accompanied by an adult who is responsible of looking after him/her, according to Law 4251/2014, the authorities must immediately inform the competent public prosecutor. The Public Prosecutor will appoint a representative who will be responsible for the applicant and will defend its interests. If the applicant is detained by the Police or confined in a Reception and Identification Centre, the applicant needs to inform the Police Officers or the staff of the Reception and Identification Centre who will then inform the Asylum Service regarding his will to submit an application for international protection<sup>39</sup>.

## Interview

On the date determined by the Asylum Service, the applicant is interviewed by an Asylum Service staff member. The Asylum Service provides the applicant with all the necessary information regarding the procedure. The applicant will have to answer questions with absolute truthfulness. If the applicant is not able to communicate with the Asylum Service interviewer due to a language barrier, an interpreter is made available. A lawyer representing the applicant can also attend the interview. The interview is confidential and can be audio recorded. After the interview, the Asylum Service will decide whether to grant the applicant refugee status, subsidiary protection status, or reject the application<sup>40</sup>.

## Second instance procedures

The applicant gets notified with the decision concerning his/her application in person by an employee of the Asylum Service. If the application is rejected, the applicant has the right to submit an appeal to the Regional Asylum Offices or Asylum Unit. A subsequent application is an application for international protection which is submitted once more after a final negative decision

<sup>39</sup>Asylum Service website [http://asylo.gov.gr/en/?page\\_id=316](http://asylo.gov.gr/en/?page_id=316)

<sup>40</sup>Asylum Service website [http://asylo.gov.gr/en/?page\\_id=75](http://asylo.gov.gr/en/?page_id=75)

by the Asylum Service. In order to submit a subsequent application to the Asylum Service, the applicant should have been notified by the Asylum Service with a final negative decision which has been appealed by the applicants against before the administrative courts.

The authorities responsible for examining appeals before June 2013 were Appeal Committees comprised of a civil servant from the Ministry of Interior or from the Ministry of Justice, a representative of the UNHCR, and a lawyer specialised in refugee as well as human rights law. Since 2013, appeals are examined by the Appeals Authority first established by Law 3907/2011 (Karamanidou, 2017:7). Moreover, pursuant Law 4375/2016 (amended by law 4399/2016) establishes the Appeals Authority as an autonomous Service, which reports directly to the Ministry of Migration Policy. The Appeals Authority shall be composed of the Central Administrative Service and the Appeals Committees. The Appeals Committees shall be competent to examine, decide upon and issue decisions on quasi-judicial appeals against decisions by the Asylum Service, in accordance with article 7, paragraph 5 of this law and they shall be supported in the fulfillment of their tasks by the Central Administrative Service

Procedures at second instance are defined through Law 4375/2016 Article 61 and Article 62. In particular article 61 defines that any applicant has the right to lodge a quasi-judicial appeal against the decision rejecting the application for international protection and Article 62 defines the examination procedure of the appeals. The procedure before the Appeals Committee shall be, as a rule, in writing and the examination of the appeals shall be performed based on the elements from the case file, without the presence of the appellant. During the examination procedure of the appeal, the Committee shall examine both the legality of the act under appeal and the merits of the case shall accept or reject the appeal and issue a relevant decision. The decision on the appeal shall be notified to the appellant according to the provisions of Article 40 of the same law.<sup>41</sup>

## Final provisions

### Withdrawal of the international protection status

Based on Article 64 of the Law 4375/2016 the applicants for international protection have the right to apply for the annulment of decisions taken in application of the provisions of this Part, before the competent court, in accordance with the provisions of Article 15 paragraph (3) of Law 3068/2002 (O.G. A' 274), as amended by Article 49 of Law 3900/2010 (O.G. A' 13) as in force. In particular applicants for international protection may lodge an application for annulment (*αίτηση ακύρωσης*) of a second instance decision of the Appeals Authority Committees or the Backlog Committees, before the Administrative Court of Appeals within 60 days from the notification of the decision.<sup>42</sup> The possibility to file such a request, the time limits, as well as the competent court for the judicial review, must be expressly stated in the body of the administrative decision. Following the application for annulment, an application for suspension (*αίτηση αναστολής*) together with a request for an interim order (*προσωρινή διαταγή*) can be filled (AIDA, 2017:50).

### Current challenges in judicial review

Greek Forum of Refugees points out the following severe obstacles concerning the effectiveness of the above legal remedy:

<sup>41</sup>[http://asylo.gov.gr/en/?page\\_id=113](http://asylo.gov.gr/en/?page_id=113)

<sup>42</sup>Article 29 PD 114/2010 and Article 64 L 4375/2016, citing Article 15 L 3068/2002.

- The application for annulment, application for suspension and request for an interim order can only be filled by a lawyer. In addition, no legal aid is provided in order to challenge a second instance negative decision on asylum application and the capacity of NGOs to file such application is very limited due to high legal fees. Legal aid may only be requested under the general provisions of Greek law,<sup>43</sup> which are in any event not tailored to asylum seekers and cannot be accessed by them in practice due to a number of obstacles: for example, the request for legal aid is submitted by an application written in Greek; free legal aid is granted only if the legal remedy for which the legal assistance is requested is not considered “manifestly inadmissible” or “manifestly unfounded” (AIDA,2017:50).<sup>44</sup>
- The application for annulment, application for suspension and request for an interim order do not have automatic suspensive effect.<sup>45</sup> Therefore between the application of suspension and/or the request for interim order and the decision of the court, there is no guarantee that the applicant will not be removed for the territory. Moreover, in practice, even if suspensive effect is requested, the Administrative Court may not issue a decision on the request for suspension / interim order up until the decision on the application for annulment.<sup>46</sup>
- The Administrative Court can only examine the legality of the decision and not the merits of the case.
- The judicial procedure is lengthy. GCR is aware of cases pending for a period between two to three years for the issuance of a decision of the Administrative Court of Appeals (AIDA, 2017:51).
- Last but not least it should be mentioned that the European Court of Human Rights (ECtHR) has granted interim measures under Rule 39 in two cases of rejected asylum seekers in 2017 in order to prevent their return.<sup>47</sup> Both applicants have challenged second instance negative decision before national Courts by submitting an application for annulment and an application for suspension together with a request for interim measures has been lodged (AIDA, 2017:51).

## Relocation

As part of the EU’s response to the 2015 massive arrivals in Greece as well as to significant incoming flows in Italy, in September 2015, the European Council adopted two binding Decisions establishing a temporary ‘Emergency Relocation Scheme’, for the relocation of a total of 160,00 newly arrived asylum seekers from Greece and Italy to other EU Member States under a quota system.

The Relocation Scheme is not defined in Greek law, although it is referred to in Law 4375/2016. Asylum seekers, including unaccompanied minors, are eligible for relocation if they belong to a nationality with an EU-average recognition rate for international protection of 75% or higher (according to EUROSTAT figures), and have entered Greece after 16 September 2015.

<sup>43</sup>Articles 276 and 276A Code of Administrative Procedure.

<sup>44</sup>Articles 276 and 276A Code of Administrative Procedure.

<sup>45</sup>See e.g. ECtHR, *M.S.S. v. Belgium and Greece*, Application No 30696/09, Judgment of 21 January 2011.

<sup>46</sup>ECtHR, *R.U. v. Greece*, Application No 2237/08, Judgment of 7 June 2011, paras 77-78.

<sup>47</sup>Efsyn, ‘Μήνυμα ΕΔΔΑ κατά των απελάσεων’, 2 May 2017, available in Greek at: <http://bit.ly/2mYuS6s>; ECRE, ‘Greece: Strasbourg Court halts return of rejected asylum seeker to Turkey’, 30 June 2017, available at: <http://bit.ly/2t8dNJ3>.

Eligibility also requires the submission of an asylum application in Greece. The examination of the claim is then examined by the Member State where the applicants is transferred. Relocation candidates were not provided with choice as to the relocation country, though some criteria such as vulnerability and family composition were taken into consideration.

The scheme ended on 26 September 2017, and in January 2018 the Asylum Service announced the closure of the program as additional transfers of processed were pending.

### **Irregular entry**

Many persons arriving in the EU are without any travel documents. While some deliberately destroy them, others – especially those fleeing persecution or armed conflicts – are often forced to leave their country of origin without travel documents or lose them on their way to Europe. This issue presents complications during registration, immigration and asylum procedures to establish their identity and may cause negative consequences – ranging from delays in the asylum procedure to undermining actual chances of obtaining international protection (FRA, 2017:39).

Under Law 3386/2005 as amended by Art. 121 of Law 4249/2014 irregular entry into Greece is a penal offence. The Public Prosecutor of each jurisdiction has the option, within 48 hours from irregular entry, to press charges due to the absence of legitimisation documents or to abstain from charges against the individual entering in an irregular manner. In practice, the Public Prosecutor does not (or rarely) press(es) charges against third country nationals for irregular entry. Thus, following the Public Prosecutor's abstention, new arrivals should be immediately transferred to facilities where first reception procedures take place. Should a prosecution actually take place, the person who entered in an irregular manner is referred for a court hearing. The Public Prosecutor is notified of an irregular arrival either by the police, for crossings occurring at the land border, or by the Hellenic Coast Guard, for crossings occurring at sea (UNHCR, 2014:10).

### **Detention**

According to Law 3907/2011, Article 7, third-country nationals who are entering Greece without residence status or documentation are subject to administrative detention. The purpose of this policy is to identify individuals, to manage removals, including to boost voluntary returns, and to deter further arrivals. Detention policies and practices have become more restrictive, affecting many who are in need of international protection, mainly through significant prolongation of the detention period (UNHCR, 2014:28).

When detention is imposed, it is done without a proper individual assessment or consideration of alternatives to detention. Particularly concerning is the absence of a proper judicial review, and the prolongation of the detention for periods that can exceed the maximum 18-month timeframe allowed by the Returns Directive. The conditions of administrative detention are also seriously problematic. According to administrative guidance by Asylum Service the detention is necessary on the grounds of "the verification of the applicant's identity or origin" and "the speedy and effective completion of the examination of the application". The police may also issue a detention order, on the grounds that the asylum-seeker constitutes a danger to national security or public order, provided there is due and specific justification of these grounds (UNHCR, 2014:29).

In line with the European legal framework, both the Law 4375/2016 as well as the Presidential Decree 114/2010 underline that third country nationals should not be held in detention for the sole reason that they are applying for international protection. It is also against the law to detain a

person for the reason that he or she entered the country illegally. Pursuant to the Law 4375, Greek authorities retain the right to detain an asylum seeker based on one of the following grounds: a) in order to determine his or her identity or nationality, b) when there is a risk of absconding, c) when it is highly probable that the application for international protection has been made only for the applicant to delay the enforcement of a return decision, d) for reasons of national security or public order. The exact same grounds figure among the provisions of Presidential Decree 114/2010. The only difference is that Presidential Decree 114/2010 adds the reason that an asylum seeker can also be detained if it seems necessary “for the prompt and effective” completion of the application for asylum (Katsogiannou, 2017:15).

Eight pre-removal detention centres were active in Greece by the end of 2017, compared to six in 2016. A ninth pre-removal centre has been legally established on Samos but is not yet operational. The total pre-removal detention capacity was 6,627 places in 2017, up from 5,215 places in 2016. (see Table 10)

**Table 10: Capacity of pre-removal detention centres**

Centre	Region	Year of Establishment	Capacity
Amygdaleza	Attica	2016	2,000
Tavros	Attica	2016	340
Corinth	Peloponnese	2016	1,536
Paranesti (Drama)	Eastern Macedonia-Thrace	2016	977
Xanthi	Eastern Macedonia-Thrace	2016	480
Fylakio (Orestiada)	Eastern Macedonia-Thrace	2016	374
Lesvos	Eastern Aegean	2016	420
Kos	Dodecanese	2017	500
Samos	Eastern Aegean	2017	300
<b>Total</b>			<b>5,215</b>

Source: Directorate of the Hellenic Police

As per table 11 below, an overall of 9,534 asylum seekers were detained in pre-removal detention centres in 2017:



**Table 11: Breakdown of asylum seekers detained by pre-removal centre - 2017**

Centre	Asylum Seekers Detained in 2017	Asylum Seekers in Detention at end 2017	Total People in Detention at end 2017
Amygdaleza	1,217	294	434
Tavros	603	116	238
Corinth	1,657	603	675
Paranesti, Drama	736	363	403
Xanthi	1,079	208	216
Fylakio, Orestiada	3,273	4	4
Lesvos	716	131	157
Kos	253	52	86
Samos	0	0	0
<b>Total</b>	<b>9,534</b>	<b>1,771</b>	<b>2,213</b>

Source: Directorate of the Hellenic Police

Apart from the aforementioned pre-removal facilities, and despite commitments from the Greek authorities to phase out such practices, third-country nationals including asylum seekers continue, to date, to be detained in police stations and special holding facilities during 2017, as confirmed inter alia by GCR visits. The only available data on police stations concerns the Eastern Aegean islands. (Aida, 2017:160)

**Table 12: Detention capacity and occupancy of police stations on the islands**

Police Station	Capacity	Occupancy at end 2017
Lesvos	40	5
Chios	18	29
Samos	21	25
Leros	6	1
Kos	35	2
Rhodes	63	28

Source: National Coordination Centre for Border Control, Immigration and Asylum: <http://bit.ly/2o1jivV>

The implementation of the EU-Turkey Statement (see below), as of 20 March 2016, had an important impact for the detention practice on the Eastern Aegean islands but also in the mainland, resulting in a significant toughening of the practices applied in the field. In 2017, a total of 46,124 removal decisions were issued, 25,810 (56%) of which also contained a detention order. In line with the Joint Action Plan<sup>48</sup> on the implementation of the EU-Turkey statement, which

<sup>48</sup>On 18 March 2016, the European Council and Turkey reached an agreement aimed at stopping the flow of irregular migration via Turkey to Europe. According to the EU-Turkey Statement, all new 'irregular' migrants and asylum seekers arriving from Turkey to the Greek islands and whose applications for asylum have been declared inadmissible should be returned to Turkey. After the EU - Turkey Statement a series of meetings with Turkey occurred since November 2015 dedicated to deepening Turkey-EU relations as well as to strengthening their cooperation on the migration crisis, with notably the EU-Turkey Joint Action Plan activated on 29 November 2015 and the 7 March 2016 EU-Turkey statement. Available at:



recommended an increase in detention capacity on the islands, the pre-removal detention centre of Moria in Lesbos, initially established in 2015, was reopened in mid-2017. A “pilot project” was also implemented on Lesbos in 2017, under which newly arrived persons with low recognition rates were immediately placed in detention upon arrival and remained there for the entire asylum procedure<sup>49</sup>. This arbitrary detention practice ended in January 2018, while since the EU-Turkey Agreement came into effect in 2016 all newly arrived asylum seekers on the islands continue to be subject to geographical restriction, forcing them to remain on the island they arrived, as part of the application of fast track border procedures.

## The reception system

Within the European legal framework the term ‘reception’ is not well defined, and the ‘Reception Conditions Directive’ sets out only minimum standards for the treatment of those in need of international protection. In Greece, the “First Reception Service” (FRS) was established in 2011 as an important component of the Greek Action Plan. As stipulated in Law 3907/2011, the FRS operates under the supervision of the Minister of Public Order and Citizen Protection (MoPOCP). Composed of a Central Service and Regional Services (First Reception Centres - FRCs - and Mobile Units), the FRS’ objective is to process new arrivals, including through appropriate routing, assessment of needs, and the provision of assistance. The FRS is responsible for both establishing and running first reception centres (UNHCR, 2014:9).

According to Article 7 of the above Law, all third-country nationals who are arrested while entering the country without legal formalities shall be subjected to First Reception Procedures. First Reception procedures for third-country nationals shall include: (a) verification of their identity and nationality (b) registration (c) medical examination, and any necessary medical care and psycho-social support, (d) information about rights and obligations, in particular about the conditions under which one can be placed under international protection and (e) identifying those who belong to vulnerable groups, so that the relevant procedures are followed (Lymperopoulou, et al., 2016:39).

The Greek reception system has been long criticized as inadequate, and in year 2016 the asylum reform brought about institutional changes to the reception system by transferring responsibility from the Ministry of Labour, Social Insurance and Social Solidarity to the Ministry of Migration Policy. On 31 October 2016, a draft law on the transposition of the recast ‘Reception Conditions Directive’ was submitted for public consultation; however it has not yet been transposed into national law, with the exception of the ‘Detention provisions’, which have been partially transposed by Law 4375/2016. Therefore, Presidential Decree (PD) 220/2007 (transposing Directive 2003/9/EC), which lays down minimum standards for the reception of asylum seekers, is still applicable (AIDA, 2017:11). According to PD 220/2007, reception conditions should provide to asylum applicants “standards of living which guarantee their health, covering living expenses and protecting their fundamental rights” (AIDA, 2016:102).

As provided by Law 4375/2016, in 2016 the FRS was subsumed by the ‘Reception and Identification Service’ (RIS) under the General Secretariat of Reception of the Ministry of Migration Policy, and responsible for: “Registration, identification and data verification

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<http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan>

<sup>49</sup>Aida, Greek Council for Refugees <http://www.asylumineurope.org/reports/country/greece/detention-asylum-seekers/general>

procedures, medical screening, identification of vulnerable persons, the provision of information, especially for international or another form of protection and return procedures, as well as the temporary stay of third-country nationals or stateless persons entering the country without complying with the legal formalities and their further referral to the appropriate reception or temporary accommodation structures.”<sup>50</sup>

**Table 13: Overview Of The Legal Framework Reception Conditions**

Legislation title (original and English) and number	Date	Type of law (i.e. legislative act, regulations, etc...)	Object	Link/PDF
<b>Law 3907</b>	<b>26/1/2011</b>	<b>Law</b>	«Establishment of an Asylum Service and a First Reception Service, adaptation of the Greek legislation to the provisions of Directive 1008/115/EC 'with regard to the common rules and procedures in Member States for the return of illegally staying third-country nationals' and other provisions»	<a href="http://asylo.gov.gr/en/?page_id=113">http://asylo.gov.gr/en/?page_id=113</a>
<b>Law 4375</b>	<b>3/4/2016</b>	<b>Law</b>	«On the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC "on common procedures for granting and withdrawing the status of international protection (recast) (L 180/29.6.2013), provisions on the employment of beneficiaries of international protection and other provisions»	<a href="http://asylo.gov.gr/en/?page_id=113">http://asylo.gov.gr/en/?page_id=113</a>
<b>Presidential Decree 220/2007</b>	<b>13/11/2007</b>		Adaptation of Greek Legislation to the provisions of Council Directive 2003/9 / EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States	<a href="http://www.firstreception.gov.gr/PRIImages/EditorImages/pd220_2007.pdf">http://www.firstreception.gov.gr/PRIImages/EditorImages/pd220_2007.pdf</a>
<b>Presidential Decree 102/2012</b>	<b>3/9.2012</b>		Organization and operation of the First Reception Service at the Ministry of Public Order and Citizen Protection	<a href="http://www.firstreception.gov.gr/PRIImages/EditorImages/P.D.102_2012_First_Reception_Service.pdf">http://www.firstreception.gov.gr/PRIImages/EditorImages/P.D.102_2012_First_Reception_Service.pdf</a>

At the national level, as provided by Law 3907/2011, families shall be provided with separate accommodation, while minors shall have the possibility to engage in leisure activities, have access to education and should be provided with accommodation in institutions with personnel and facilities, which take into account the needs of their age (Lympieropoulou, et al., 2016:16). Article 12(1) PD 220/2007 provides that the authorities competent to receive and accommodate asylum seekers shall take adequate measures in order to ensure that material reception conditions are available to applicants of international protection. These conditions must provide applicants with a standard of living adequate for their health, capable of ensuring their subsistence

<sup>50</sup>[http://www.asylumineurope.org/reports/country/greece/asylum-procedure/access-procedure-and-registration/reception-and#footnote16\\_5zta9zo](http://www.asylumineurope.org/reports/country/greece/asylum-procedure/access-procedure-and-registration/reception-and#footnote16_5zta9zo)

and to protect their fundamental rights. While according to Article 17 PD 220/2007, the aforementioned standard of living must also be provided to persons who have special needs, as well as to persons who are in detention (AIDA, 2015:65). Therefore, the provision of all or some material reception conditions and health care is subject to the condition that applicants do not have sufficient means to maintain an adequate standard of living adequate for their health and capable of ensuring their subsistence (AIDA, 2016:92).

### **The structure of the reception system**

The 'National Centre for Social Solidarity' (EKKA) is the official government body, under the Ministry of Labour, Social Insurance and Social Solidarity, managing the requests for the accommodation of adult asylum seekers and unaccompanied minors at accommodation schemes mainly run by Non Governmental Organisations (NGOs). However, parallel to the national accommodation management system of EKKA, a number of emergency temporary accommodation schemes were introduced in the mainland (including open-type camps) and the islands. These include the UNHCR accommodation scheme which has been in place since November 2015 primarily dedicated to asylum seekers eligible for relocation, family reunification candidates on the basis of the Dublin III Regulation and vulnerable applicants.

The legal system indeed includes provisions for the establishment of different accommodation facilities. In addition to Reception and Identification Centres, the Ministry of Finance and the Ministry of Migration Policy may, by joint decision, establish open Temporary Reception Facilities for Asylum Seekers, as well as open Temporary Accommodation Facilities for persons subject to return procedures, or whose return has been suspended.<sup>51</sup> Though not withstanding these provisions, most temporary accommodation centres and emergency facilities operate without a prior Ministerial Decision and the requisite legal basis.<sup>52</sup>

Accommodation is a key component of any reception system. On this matter, however, Greece presents a challenging case due to the absence of mainstream welfare services and allowances. These types of provisions are mainly provided via accommodation schemes funded mainly by EU Funds. As provided by Presidential Decree 220/2007, material reception conditions include accommodation in reception centres as well as a financial allowance. Asylum seekers may not stay in reception centres for more than one year, after which they are assisted with finding accommodation. As mentioned above, in order to address the needs of persons remaining in Greece after the imposition of border restrictions, several temporary camps have been created in the mainland in order to increase accommodation capacity, managed by the Greek government. Their legal status remains unclear and different administrative authorities are responsible for their operation in practice (AIDA, 2016:97).

<sup>51</sup>According to Law 4375/2016, art 10, by joint decision of the Minister of Finance and the Minister of Internal Affairs and Administrative Reconstruction, open Temporary Reception Facilities are established for third-country nationals or stateless persons who enter or reside in the country without the legal formalities, who:

- a) are in the process of return according to article 22 of Law 3907/2011 or in accordance with paragraph 3 of this article in conjunction with article 30 of Law 3907/2011; or
- b) are in deportation, in accordance with Article 24 of Law 3907/2011; or
- c) they are subject to the provisions of article 76 par. 5 or 78 or 78A of Law 3386/2005

<sup>52</sup><http://www.asylumineurope.org/reports/country/greece/reception-conditions/housing/types-accommodation>.

**Table 14: Accommodation sites in Greece**

Northern Greece	15,550	3,455
Polykastro (Nea Kavala)	4,200	853
Pieria (Iraklis Farm)	200	38
Veroia Imathias (Armatolou Kokkinou Camp)	400	259
Alexandria Imathias (Pelagou Camp)	1,200	418
Diavata (Anagnostopoulou Camp)	2,500	363
Derveni-Alexil	850	97
Thessaloniki (Sindos-Frakapor)	600	53
Thessaloniki (Kordelio-Softex)	1,900	450
Thessaloniki (Sinatex-Kavalari)	500	165
Vassilika (Kordogiannis Farm)	1,500	72
Derveni-Dion Avete	400	154
Konitsa (Municipality)	200	150
Ioannina (Doliana)	400	154
Preveza-Filippiada (Petropoulaki Camp)	700	238
Central Greece	4,160	3,083
Larissa-Koutsohero (Efthimiopoulou Camp)	1,500	978
Volos (Magnesia Prefecture)	1,500	978
Trikala (Atlantik)	360	217
Oinofyta Voiotia	600	679
Tirsona Evoia (A.F. Camp)	1,000	679
Thermopyles Fthiotida	500	442
Southern Greece	300	164
Andravida (Municipality)	300	164
Attica	10,666	7,796
Elaionas	2,500	1,984
Schisto	2,000	950
Skaramangas	3,200	3,200
Elefsina (Merchant Marine Academy)	346	320
Malakasa	1,500	483
Rafina	120	118
Lavrio (Hosting Area for Asylum Seekers)	600	407
Lavrio (Ministry of Agriculture Summer Camp)	400	334
Non-Official Settlements	4,100	1,517
Hockey Field ("Elliniko 1)	1,400	514
Airport Arrivals Area ("Elliniko 2)	1,400	689
Baseball Field ("Elliniko3")	1,300	314

Source: Coordination Body for the Management of the Refugee Crisis

## Reception and identification centres

According to Law 4375/2016, newly arrived persons should be directly transferred to a Reception and identification Centre, where they are subject to a 3-day “restriction of freedom within the premises of the centre”, which can be further extended by a maximum of 25 days if reception and identification procedures have not been completed. This restriction of freedom entails “the prohibition to leave the Centre and the obligation to remain in it”. As provided by Article 9(1) of the Law 4375/2016: “All third-country nationals and stateless persons who enter without

complying with the legal formalities in the country shall be submitted to reception and identification procedures”. These include:

- the registration of their personal data and the taking and registering of fingerprints for those who have reached the age of 14,
- the verification of their identity and nationality,
- their medical screening and provision any necessary care and psycho-social support,
- informing them about their rights and obligations, in particular the procedure for international protection or the procedure for entering a voluntary return program,
- attention for those belonging to vulnerable groups, in order to put them under the appropriate, in each case, procedure and to provide them with specialised care and protection,
- referring those who wish to submit an application for international protection to start the procedure for such an application,
- referring those who do not submit an application for international protection or whose application is rejected while they remain in the RIC to the competent authorities for readmission, removal or return procedures” (AIDA, 2017:27).

Five ‘hotspots’, under the legal form of First Reception Centres – subsumed as Reception and Identification Centres (RIC) in 2016 – operate in Greece in the main islands of reception, Lesbos, Chios, Samos, Kos and Leros. The total capacity of the five hotspots was initially planned to be 7,450 places. However, according to official data available by the end of 2017, their capacity has been reduced to 5,576 places:

**Table 15: Capacity and occupancy of hotspots per island of reception**

Hotspot	Start of Operation	Capacity	Occupancy
Lesvos	October 2015	2,330	5,452
Chios	February 2016	894	1,742
Samos	March 2016	700	2,368
Leros	March 2016	880	643
Kos	June 2016	772	702
<b>Total</b>		<b>5,576</b>	<b>10,907</b>

Source: AIDA, 2017

Key actors present in the RICs include the:

**Police:** The Police is responsible for guarding the external area of the hotspot facilities, as well as for the identification and verification of nationalities of newcomers.

**Frontex:** Frontex staff is also engaged in the identification and verification of nationality. Although Frontex should have an assisting role, it conducts nationality screening almost exclusively in practice, as the Greek authorities lack relevant capacity such as interpreters. The conduct of said procedures by Frontex is defined by an internal regulation.

**UNHCR / IOM:** Information is provided by UNHCR and International Organisation for Migration (IOM) staff, while interpretation services are currently provided by IOM and NGO Metadrasi.

**Asylum Service:** Similarly, the Asylum Service has presence in the hotspots. According to Law 4375/2016, those registered by the RIS and express their will to seek international protection shall be referred to the competent Regional Asylum Office in order to have their claims registered and processed.

**EASO:** EASO is also engaged in the asylum procedure. EASO experts have a rather active role within the scope of the Fast-Track Border Procedure, as they conduct personal interviews, they issue opinions regarding asylum applications and they are also involved in the vulnerability assessment procedure.

**RIS:** The RIS used to outsource medical and psychosocial care provision to NGOs, namely Médecins du Monde (MdM), PRAKSIS and Medical Intervention (MedIn). Since June 2017 the Centre for Disease Control and Prevention (KEELPNO), a private law entity supervised and funded directly by the Ministry of Health and Social Solidarity, has started taking over the provision of the medical and psychosocial services. The Hellenic Red Cross was providing services during the transitional period, albeit with drastically reduced resources. As reported, “following the departure of NGOs, medical and social services have seriously been minimised in the RICs, the needs of refugees are not being covered effectively (AIDA, 2017:30).

## Competent authorities

The Reception and Identification Service (RIS) has the competence to effectively manage third country nationals and stateless individuals who enter Greece irregularly. The RIS also collaborates with other institutions such as the European Committee, the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), as well as Non-Governmental Organizations (NGOs)<sup>53</sup>. According to article 12(1), PD 220/2007, the authorities responsible of receiving and accommodating asylum seekers, i.e. the Ministry of Migration Policy, shall take adequate measures in order to ensure that material reception conditions are available to applicants for asylum (Aida, 31/12/2016). The National Centre for Social Solidarity (EKKA) is the responsible authority for managing accommodation referrals to different housing schemes registered in its system.

In addition, the European Asylum Support Office (EASO) has been working with Greece since April 2011 on asylum issues, when the implementation of ‘Operating Plan Phase I’ started. Greece has faced particular asylum pressures in the past years due to a significant influx of irregular migrants at the European external borders. Following a request made by the Greek Government, in February 2011, EASO agreed to support Greece and to deploy Asylum Support Teams (ASTs) to Greece. Then, under ‘Operating Plan Phase II’, EASO assisted the country in building up a new asylum system, in particular by supporting Greece to enhance and build its capacity in tackling the backlog of asylum cases and supporting the setup of a sustainable and efficient asylum and reception structure: new First Reception Service, Asylum Service and Appeals Authority and improving reception conditions (EASO, 2014:2).

The authorities competent to receive and accommodate asylum seekers and the persons responsible for the management of accommodation centres must ensure that the right to family

<sup>53</sup>[http://www.firstreception.gov.gr/PRIImages/Prints/52\\_12042016\\_FRS\\_ENG.pdf](http://www.firstreception.gov.gr/PRIImages/Prints/52_12042016_FRS_ENG.pdf)



life and to personal security are protected within those centres. The Articles 17 and 20 PD 220/2007, which transpose into Greek legislation Articles 17 and 20 of Council Directive 2003/9/EC respectively foresees a referral system laying down minimum standards for the reception of asylum seekers. More specifically, the competent authorities must make sure that special treatment is provided to applicants belonging to vulnerable groups such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence (AIDA, 2015:73).

According to Amnesty International, although there have been attempts to increase reception capacity for asylum-seekers in Greece, available shelter space is currently well below the needs. In 2015, the National Centre for Social Solidarity (EKKA) received requests to place 1,839 asylum-seekers in a reception facility, while 12,771 adults and accompanied children sought asylum the same year. The actual need being much higher than the referrals of 2015 is also confirmed by representatives of Médecins du Monde (MdM), which operates reception facilities. According to Médecins Sans Frontières, many asylum-seekers do not ask for accommodation knowing that they would need to wait for a very long time. There are also no special shelters for asylum-seekers who require special care other than unaccompanied children, such as people with dementia or serious mental health disorders (Amnesty International, 2016:19).

### **The maximum length of stay in the reception centres**

The EU - Turkey Statement of 18 March 2016, which brought about a significant decrease of refugee flows to the Greek islands, at the same time, launched a practice of blanket detention of all newly arrived persons on the hotspot facilities for a maximum period of 25 days. After this period, newly arrived third country nationals are obliged to remain on the island and to reside in the hotspot facilities for an uncertain period, thus resulting in a serious overcrowding. During these first 25 days, newly arrived are de facto detained under a decision imposing a freedom of movement restriction within the premises of the hotspot. After the expiry of this deadline, they are free to enter and exit the hotspot when they wish to (AIDA, 2016:100).

Although Article 13(2) Presidential Decree 220/2007 sets a maximum time limit of one year regarding the stay in accommodation centres, in reality this timeframe is often violated, as shown by a number of surveys such as a research led by the Greek Council for Refugees in 2014, which concludes that asylum seekers often stay in reception centres 18 months and even longer (AIDA, 2015:69).

According to a research by the Danish Red Cross, which took place at the RIC of Moria in Lesvos, the detainment of asylum seekers can cause long-term effects on their mental health, whereas the negative impacts produced by detention conditions tend to persist over time. Under these living conditions that include the lack of basic resources, the risk of exploitation, and violence, common psychological symptoms that are developed among detained asylum seekers are hopelessness, self-harm, suicidal ideation, distress, and a diminished sense of dignity and control, which in turn may lead to increased family violence. Also, the use of alcohol and drugs is common, as well as sleeping disorder, anxiety, and depression (Eriksen, et al., 2018:10).

As stated in Article 15(1) Presidential Decree 220/2007 the reception conditions may be reduced or withdrawn when the applicant: a) abandons the place of stay assigned without informing that authority or where required, without obtaining permission, b) does not comply with the obligation to declare personal data, does not respond to a request to provide information, or

does not attend the personal interview within the set deadline, c) has lodged a subsequent application, d) has concealed their resources and illegitimately takes advantage of material reception conditions and e) violates the house rules of the reception centre <sup>54</sup>.

## Returns and pushbacks

In practice, those arriving on the Greek islands and falling under the EU-Turkey Statement are subject to a “restriction of freedom of movement” decision issued by the Head of the competent RIC. The decision is revoked once the registration by the RIC is completed, usually within a couple of days. This is followed by a return decision “based on the readmission procedure” and a pre-removal detention order issued by the competent Police Directorate. The return decision and detention order are respectively suspended by a “postponement of deportation” decision of the General Regional Police Director.

Throughout 2017, cases of alleged pushbacks at the Greek-Turkish border of Evros have been systematically reported (AIDA, 2017:23). According to these allegations, the Greek authorities follow a pattern of arbitrary arrest of newly arrived persons entering the Greek territory from the Turkish land borders, *de facto* detention in police stations close to the borders, and transfer to the border, accompanied by the police, where they are pushed back to Turkey. In February 2018, a report issued by the Greek Council for Refugees (GCR) documented a number of complaints of pushbacks in the Evros region. GCR mentioned that allegations of push backs have been consistent and increasing in numbers, referring *inter alia* to large families, pregnant women, victims of torture, children and other persons belonging to vulnerable groups. The Council of Europe Commissioner for Human Rights has expressed deep concerns about reported collective expulsions from Greece (AIDA,2017:23).

## Provisions for people with special needs

For persons declared as disable, who have a disability degree over 67% certified according to an opinion of the nearby Health Commission, the Ministry of Health and Social Affairs Solidarity grants an invalidity allowance for as long as period of examination of the application, if it is not possible for applicants to stay in accommodation centres<sup>55</sup>. The amount of financial assistance is defined in accordance with the level of assistance provided by social welfare legislation. The level of financial assistance for asylum seekers must be equal to that available to Greek nationals (AIDA, 2016:93). However, contrary to what is stipulated in the law, the vast majority of asylum seekers still do not receive adequate reception conditions in Greece to date. There is no financial allowance in practice to cover the living expenses of applicants (AIDA, 2015:66-67).

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<sup>54</sup><http://www.asylumineurope.org/reports/country/greece/reception-conditions/access-and-forms-reception-conditions/reduction-or>

<sup>55</sup>Article 12(1) Presidential Decree 220/2007



## The legal status of foreigners

### Criteria for recognition of refugees and those eligible for subsidiary protection

#### Refugee status

Refugee status<sup>56</sup> is granted to a third-country national or a stateless person who meets the criteria established by Presidential Decree 141/2013. Legal assistance is essential to guarantee the procedural guarantees of detainees. The criteria for granting of refugee status are as follows:

- The applicant must face a well-founded fear of persecution within the meaning of article 1A of the Geneva Convention.
- The grounds for persecution must be related to the applicant's race, religion, nationality, political opinion, or membership in a particular social group.
- A causal link must exist between the well-founded fear of persecution on the grounds of one's race, religion, nationality, political opinion, or membership in a particular social group and the acts of persecution.
- The acts of persecution may take a variety of forms, such as physical or mental violence, including sexual violence, and in the case of a minor may also include acts of a gender-specific or child-specific nature.

#### Subsidiary protection status

In order to be granted subsidiary protection status, there must be substantial grounds to believe that an applicant who does not otherwise qualify for refugee status would face a real risk of suffering serious harm if returned to his/her country of origin. The applicant must provide information pertaining to his/her age, background, country of origin, relatives, travel documents (if any), and reasons for applying for international protection. Each application is examined individually. The qualification for subsidiary protection from a "real risk of suffering serious harm" includes the death penalty or execution, torture or other inhuman or degrading treatment or punishment, or a serious and individualized threat to persons due to violence in the case of internal armed conflict<sup>57</sup>.

#### Applicants for international protection

According to Greek Law 4251/2014, a beneficiary of international protection is a foreign national or stateless person to whom the competent Greek authority granted refugee or beneficiary of subsidiary protection status. A person seeking international protection is any alien or stateless person<sup>58</sup> who declares to any Greek authority, orally or in writing, that he/she is seeking asylum

<sup>56</sup>"Refugee" is defined in accordance to the definition provided in Art 1A of the Geneva Convention (UNHCR 2011) as a person 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out-side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'

<sup>57</sup>The Library of Congress website: <https://www.loc.gov/law/help/refugee-law/greece.php#Legal>

<sup>58</sup>The term "stateless person" means a person who is not considered as a national by any State under the operation of its law. According to Greek Law 4251/2014 "Stateless means any natural person who meets the conditions set out in the 1954 New York Conventions relating to the status of stateless persons, which has been ratified by Law 139/1975 (Government Gazette, Series A, No 176)". [http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.24\\_convention%20stateless.pdf](http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.24_convention%20stateless.pdf)

or requests not to be deported because he/she is in fear of persecution because of his/her race, religion, nationality, participation in a particular social group or his/her political beliefs, or because he/she is in danger of suffering serious harm in his/her country of origin or country of previous residence, especially because he/she is in danger of facing the death penalty or execution, torture or inhuman or degrading treatment or his/her life or physical integrity is in danger because of an international or civil war. Also, any alien who is transferred to Greece by a European state which implements the EC “Dublin III” Regulation is regarded to be a person seeking international protection (asylum).<sup>59</sup>

As of June 2013, applications for international protection fall within a new procedure established by Presidential Decree 113/2013. Every foreigner or stateless person has the right to submit an application for international protection, provided that he or she meets the criteria of the Geneva Convention and applicable national law or qualifies for subsidiary protection. The competent national authorities of first reception are obliged to inform the applicants of such rights. Decisions are made by the Asylum Service on a case-by-case basis. Applicants have the right to stay in Greece during the application process.<sup>60</sup>

## Rights and obligations according to law 4251/2014

### Rights of applicants for international protection

As an applicant for international protection in Greece:

- Deportation is prohibited until the examination of the application is completed.
- He/she may move freely throughout the country, apart from specific areas of the country.
- If the applicant is homeless, he/she may ask to be hosted in a Reception Centre or another facility. Provision accommodation will depend on the availability of spaces.
- The applicant has the right to work under the conditions set by Greek law. As an employee, the applicant has the same rights and obligations, regarding social security, as any Greek citizen.
- The applicant has the right to receive medical and pharmaceutical treatment free of charge, provided that he/she is uninsured and indigent. If the applicant is a disabled person with a disability percentage of 67%, he/she has the right to receive a disability allowance.
- Children have access to the public educational system free of charge and adults have access to vocational training.
- As long as the applicant remains an applicant for international protection, he/she cannot travel outside Greece and cannot transfer his/her family from their country of origin to Greece.

### Obligations of applicants for international protection

As an applicant for international protection in Greece, it is his/her obligation to:

- Remain in Greece until the examination of the application is completed.

<sup>59</sup>[http://asylo.gov.gr/en/?page\\_id=66](http://asylo.gov.gr/en/?page_id=66)

<sup>60</sup>The Library of Congress website:<https://www.loc.gov/law/help/refugee-law/greece.php#Legal>

- Cooperate with the Greek authorities regarding any issue related to the application and the verification of his/her personal data.
- Go in person to the Asylum Service in order to renew his/her card before it expires and, at the latest, on the next business day after its expiry date.
- Inform immediately the Asylum Service regarding the address of his/her residence and contact information as well as any change in them. The Asylum Service sends documents related to his/her case to the address that he/she has declared.
- Abide by the deadlines, as these are determined throughout the different stages of the procedure of examination of the application.
- Disclose his/her true financial situation in the event he/she receives social benefits from the Greek state.
- Comply with the obligations that apply in the event he/she is housed in a Reception Centre or other facility.

## Rights of refugees and beneficiaries of subsidiary protection

Greek law foresees the following rights and benefits for persons granted refugee status or subsidiary protection<sup>61</sup>:

### 1. Family unity

Greek asylum authorities are required to ensure the family unity of those who are recognized as refugees or beneficiaries of subsidiary protection. Family reunification is defined by the Directive 2003/86/EC as:

“the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry”.

Third country nationals holding a residence permit valid for at least two years and recipients of international protection are eligible for family reunification. However, the existing legal framework does not specify if recipients of subsidiary protection or humanitarian status are eligible, despite generally having equal rights as recognised refugees (Karamanidou, 2017:19)

**Third country nationals** legally residing in Greece can apply for family reunification with:

- spouses over 18 years old
- their biological or legally adopted children under 18
- biological or adopted children under 18 of either of the spouses, included those legally adopted where the spouse has custody and the children are dependent on him or her
- in cases of polygamy, with children under 18 by a another spouse only if the applicant has guardianship

In addition to the above family members, **refugees** can request reunification with:

- adult unmarried children of the applicant if they are unable to provide financially for themselves because of health issues

<sup>61</sup>The Library of Congress website <https://www.loc.gov/law/help/refugee-law/greece.php#Legal>

- parents dependent financially on the applicant in their country of origin
- partners to whom they are not married if there sufficient evidence of a long term relationship

Recognised refugees who are **unaccompanied minors** can ask for reunification with:

- first-degree relatives in the direct ascending line of the sponsor or their spouse, where they are dependent on them and do not enjoy proper family support in the country of origin
- the legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced.

In case the family reunification application falling under the above categories is accepted and the family member is transferred to Greece, the family member acquires the same legal status as the applicant, unless they do not wish to have such status.

## 2. Residence permit

Recognized refugees or beneficiaries of secondary international protection are granted a residence permit for three years, which is renewable at the request of the person concerned, except for those who pose a threat to national security or to public safety due to conviction for an especially serious crime. The family members of refugees or beneficiaries of international protection are also granted a residence permit.

## 3. Travel documents/repatriation

Recognized refugees are provided travel documents to be able to travel abroad pursuant to the sample contained in the Annex of the Geneva Convention, unless reasons exist for banning the travel of the person concerned. The passport is granted by the Passport Office of the Greek Police and the required documents, duration and renewal are determined by Law 3103/2003. The Greek authorities are required to provide assistance to international protection beneficiaries to return to their countries of origin, if they so wish.

## 4. Education

All refugee children must have access to public education. In addition, adults have access to educational training and development under the same terms and conditions as nationals.

## 5. Access to employment

Those who are recognized as persons in need of international protection have access to employment, either salaried or independent, pursuant to Presidential Decree 189/1998. The national legislation on remuneration, terms of employment, training, and educational opportunities also applies to those who have been recognized as refugees.

## 6. Health care

Recognized refugees or persons with subsidiary protection status have the right to health care on the same basis and conditions as Greek nationals. Persons with special needs, such as pregnant women, the elderly, unaccompanied children, people who have been subject to torture or other inhuman or degrading treatment, or persons with disabilities, as well as trafficking victims and those who come from conflict areas, are entitled to appropriate medical care, including psychological care and support, also under the same conditions as Greek nationals. Presidential

Decree 220/2007 provides for free healthcare services for all asylum seekers regardless of whether they are hosted in the reception facilities or not.

### Unaccompanied foreigner minors

The mixed migration flows recorded in Greece over the last years have included increasing numbers of children under 18 years old who arrive alone in the country, unaccompanied by their parents, relatives or a legal guardian. These children are referred in the refugee jargon by the terms unaccompanied minors or unaccompanied children (UAC), and represent a specific category due to their high vulnerability that requires special attention from the authorities. As defined by the United Nations (UN) Convention on the Rights of the Child:

“Unaccompanied children (also called unaccompanied minors) are children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so”. (UN, 2005: 6)

Unaccompanied children who arrive in Greece are entitled to care and protection from the Greek State – including in line with its obligations deriving *inter alia* from the UN Convention on the Rights of the Child and the ECHR. However, Greece lacks a comprehensive protection system for unaccompanied children and faces a chronic shortage of suitable accommodation facilities. As a result, UAC are exposed to significant risks as they often remain homeless, in poor transit sites and under prolonged administrative detention in sub-standard and degrading conditions in protective custody at police stations, in pre-removal detention centres, and in closed facilities on the Greek islands (at the RICs), while awaiting transfer to appropriate accommodation centres (Human Rights Watch, 2016:2).

According to The Greek Ombudsman while Article 32 (1) of the Law 3907 underlines that detention of families and unaccompanied minors should only be perceived as “a measure of last resort”,

“Greek law allows the detention of unaccompanied children identified at border areas or within the Greek mainland, for reasons of ‘protective custody’ while awaiting transfer to appropriate shelters. Also there are three legislative frameworks regulating the administrative detention of unaccompanied minors: a) the recent law 4375/2016, which in Article 14(2) provides for the restriction of the liberty of all irregularly entering third-country nationals, including unaccompanied minors, at the RICs, for up to 25 days, and in Article 46(10) the detention of asylum seeking unaccompanied minors for up to 45 days, and until they are referred to a suitable accommodation facility, an option that must be the last resort, b) law 3386/2005, which in Article 76(3), as in force, allows the administrative detention for the cases of unaccompanied minors who are arrested on the borders of the country, where deportation is possible, and c) Article 30 of Law 3907/2011, that allows the administrative detention of unaccompanied minors arrested on the

mainland, for whom return is possible, according to Article 25 of the same law”<sup>62</sup>.

Regarding the detention conditions of minors, Art. 32 of Law 3907/2011 stipulates that:

“minors shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education, in accordance with the provisions of article 72 Law 3386/2005. Unaccompanied minors shall as far as possible be provided with accommodation in institutions with personnel and facilities taking into account the needs of their age. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal”.

## **Guardianship**

In case relatives or other next-of-kin are not identified as caregivers for unaccompanied and separated children (UASC) in Greece, by law the local Public Prosecutor is assigned as their legal guardian and they are then placed in accommodation facilities around Greece, including shelters, safe zones and emergency schemes (e.g. hotels). UNHCR observed that different issues pertaining to the protection of UASC are dealt with by different Ministries, which have so far not established sufficiently strong coordination mechanisms. Furthermore, no steps have been taken to mainstream services for UASC into the national child-protection system. In parallel, the competent Ministry of Justice established a working group for the review of the guardianship system for UASC. This group, engaging national authorities and human rights bodies, has been identifying existing gaps and looking at guardianship schemes elsewhere in Europe with a view to proposing improvements for Greece. However, the guardianship system remains highly insufficient (UNHCR, 2014:23).

According to Article 19 of the Presidential Decree 220/2007 :

“competent authorities shall take the appropriate measures to ensure the minor’s necessary representation. For this purpose, they shall inform the Public Prosecutor for Minors or, in the absence thereof, the territorially competent First Instance Public Prosecutor, who shall act as a provisional guardian and shall take the necessary steps in view of the appointment of a guardian for the minor”.

However, Greece lacks an effective guardianship system for UAC and minors identified throughout the country by border, police, or reception and identification authorities or NGOs are obliged to notify the Public Prosecutor who then acts as a provisional guardian. At the same time, the latter authorities refer the minor to the National Centre for Social Solidarity (EKKA) for placement in appropriate accommodation centers. In lack of an overall legal framework for effective guardianship, functions related to guardianship of UAC are implemented by NGOs, including shelter-providers.

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<sup>62</sup>The Greek Ombudsman, 2017:26



## Age assessment

Provisions on age assessment are included in the Joint Ministerial Decision 1982/2016 of the Minister of Interior and Administrative Reconstruction and the Minister of Health. They foresee age assessment via a macroscopic medical examination, and, in case of doubt, assessment of the person's cognitive, behavioural, and psychological development. Referring the person to a hospital for specialized medical examination should be a measure of last resort. In the Reception and Identification centres, age assessment is often carried out by NGOs. Implementation issues related to age assessment have, in some cases, resulted in unaccompanied children being identified as adults and being placed in detention with no effective means of appealing against the outcome of the assessment. Furthermore, misidentification of migrant children as adults puts them in risk of abuse and lack of special care and protection guaranteed by Greek and international law (Civis Plus, 2018:20).

The Joint Ministerial Decision 1982/2016 (Government Gazette, series B, No. 335/2016) and Ministerial Decision G.P.oik. 92490/2013 (Government Gazette, series B, No. 2745/2013),

“instituted programs for the medical check, psychosocial diagnosis and support, in relation to third-country nationals arriving without documentation in first reception facilities. According to these, the age of unaccompanied minors is verified through a three-phase procedure. The verification of minority age at the first phase, excludes the second one, and so forth, making the medical check the last phase of the procedure. The verification of age appears to still be based mainly on the medical assessment carried out at the hospitals, according to a standard method that includes an x-ray and dental examination, without recording the method followed or other information, while the clinical assessment of the anthropometric figures and the psychosocial assessment is either absent or limited. This renders the verification of the scientific correctness of the assessments even more difficult”.<sup>63</sup>

## Rights and duties

As all third country nationals entering Greece without legal documents, according to Law 3907/2011 unaccompanied children identified in Greece are also subject to first reception procedures, including the provision of information on their rights and legal options. They have the right to apply for international protection under the regular procedure (Law 4375/2016) and depending on their individual needs and family links in Europe, they can apply either for (i) asylum in Greece, or (ii) family reunification under the Dublin III Regulation, or (iii) assisted voluntary return to their country or origin

In accordance with relevant provisions of the ECHR, the Dublin III Regulation and the UN Convention on the Rights of the Child, the best interest of the child must be a primary consideration. However, registration and asylum procedures are complex to navigate and assistance and representation by legal practitioners is in most cases necessary. Unaccompanied children younger than 15 years cannot submit an asylum application without a legal representative, and those younger than 14 years old are not subjected to fingerprinting in the context of Dublin III procedures.

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<sup>63</sup>The Greek Ombudsman, 2017:25

Delays are noted in the processing of UAC asylum and family reunification applications, including their actual registration, which can have serious implications for their psychological state and well-being. The UN Committee on the Rights of the Child has underlined that delays or prolonged decision making have particularly adverse effects on children; recommending that procedures or processes concerning children be completed in the shortest time possible. Besides heightened protection risks and increased need for durable solutions resulting from their age and lack of family environment, unaccompanied children however are in many hotspots subject to additional restrictions compared with other persons, such as the placement in closed facilities or longer waiting times to be transferred to specialised accommodation (FRA, 2016:19).

Unaccompanied children also have the right to appropriate accommodation and supporting services that take into account their specific needs. The accommodation centres and shelters where these minors are placed by EKKA are operated by NGOs. Due to the lack of sufficient overall spaces in UAC shelter, other emergency or temporary accommodation alternatives have been introduced since 2016, including safe zones in the open sites in the mainland and emergency accommodation in hotels. These specialized accommodation centres are financed by the European Union, as well as by International Organizations such as the UNHCR, the International Organization for Migration, UNICEF or private actors. Unaccompanied minors may stay at the shelters until they are: a) relocated, b) reunited with members of their family in other EU countries or c) integrated into the Greek society (General Secretariat on Media & Communication, 2017:4).

According to a report led by the Institute of Child Health in September 2017, there were increased reports by UAC shelter providers of mental health concerns among UAC, including stress related aggressive behaviour, high levels of anxiety, depression or acts of self-harm and/or increasing incidents of high risk behaviour. Challenges to accommodate and respond to the increased caseload of UASC, combined with the limited availability of child and adolescent focused mental health services nationwide, raised questions among authorities and child protection actors about the most appropriate mode of response (Nikolaidis et al, 2017:1).

Moreover, similar to adult asylum seekers, unaccompanied children have free access to the national health care system, while, according to national legislation, children are entitled to education irrespective of their legal status. The Greek State implements two parallel systems for the education of refugee and minor children: a) enrolment and attendance at the regular school curriculum (for children accommodated outside accommodation centres and facilities) and b) integration in Facilities for the Reception and Education of Refugees (DYEP) for the rest of the cases. In particular, the planning of the DYEPs aimed at meeting the need for a gradual educational integration of minor refugee populations living in accommodation centres or facilities of the Greek state or of the UNHCR, and to prevent any tensions and excessive burden on the basic educational system, without the appropriate preparation (The Greek Ombudsman, 2017:62). Law 3907/2011 also provides for constructive ways for minors to spend their free time. This means they have the chance to engage in leisure activities such as games and recreational activities (Katsogiannou, 2017:14).

## **The legal status of immigrants**

### **General requirements for Right of residence**

According to Law 4251/2014, the right of residence of third-country nationals legally entering Greece shall be subject to the following requirements:



- a) They shall hold valid travel documents recognised by Greece, the validity of which extends at least three months after the last intended date of departure
- b) They shall hold a valid national visa
- c) They shall pose no threat to public policy, national security or international relations, and not be registered in the national databases of undesirable aliens. If there are reasons relating to public policy and security, the competent agency may refuse to issue or renew the residence permit
- d) They shall pose no threat to public health
- e) They shall have full health insurance for all risks covered for Greek nationals<sup>64</sup>.

### Categories of residence permits

A third-country national who has been granted a visa in Greece for one of the reasons set out here must request a residence permit for the same reason on entry to the country. The categories of residence permits and the types of permissions that these include are:

- a) Residence permit for employment and business purposes (paid employment – provision of services or work, special purpose employees, investment activity, highly qualified employment EU Blue Card)
- b) Temporary residence (seasonal employment, fishermen, members of artistic groups, third-country nationals who move from undertakings established in EU or EEA Member States with the purpose of providing services, third-country nationals who move from undertakings established in third countries with the purpose of providing services, tour leaders, third-country nationals who are tertiary education students participating in traineeship programmes)
- c) Residence permit for humanitarian, exceptional and other reasons (humanitarian reasons, exceptional reasons, public interest)
- d) Residence permit for studies, voluntary work, research and vocational training (studies, voluntary work, research, vocational training)
- e) Residence permit for victims of human trafficking and smuggling of immigrants
- f) Residence permit for family reunification (family members of third-country nationals, family members of Greek nationals or expatriates, individual residence permit for family members of third-country nationals or expatriates, and personal right of residence for family members of Greek nationals)
- g) Indefinite-term residence permit (long-term resident permit, second-generation residence permit, ten-year residence permit).

Each residence permit indicates whether access to the labour market is allowed. The initial residence permit shall be valid for two years and each renewal shall be for a three-year period<sup>65</sup>.

<sup>64</sup>Ministry of Interior website <http://www.ypes.gr/UserFiles/24e0c302-6021-4a6b-b7e4-8259e281e5f3/metanast-N4251-2014.pdf>

<sup>65</sup>Ministry of Interior website <http://www.ypes.gr/UserFiles/24e0c302-6021-4a6b-b7e4-8259e281e5f3/metanast-N4251-2014.pdf>

[http://www.ypes.gr/UserFiles/24e0c302-6021-4a6b-b7e4-](http://www.ypes.gr/UserFiles/24e0c302-6021-4a6b-b7e4-8259e281e5f3/metanast-N4251-2014.pdf)

[http://www.ypes.gr/UserFiles/24e0c302-6021-4a6b-b7e4-](http://www.ypes.gr/UserFiles/24e0c302-6021-4a6b-b7e4-8259e281e5f3/metanast-N4251-2014.pdf)

### **Temporary residence – Employment subject to a D-visa**

Third-country nationals entering the country for a specific purpose and for a specific period of time which depends on attainment of the relevant purpose shall be granted by the competent consular authority a D-visa for a duration of over ninety days which allows them to reside in the country for employment or other purposes, without prejudice to the general and special provisions on visas. This D-visa shall be granted to third-country nationals that fall under the following categories: a. Seasonal workers b. Fishermen c. Members of artistic groups.

### **Issue of residence permit for exceptional reasons**

The Minister for the Interior may exceptionally grant a one-year residence permit, on opinion of the committees referred to in Article 134(1), to third country nationals who reside in Greece and can prove to have developed strong bonds with the country.

### **Other reasons for the issue of residence permits**

A third-country national who has been granted a visa shall be granted a residence permit accordingly:

- Financially independent persons
- Owners of property in Greece
- Adult children, over the age of 20, of members of the diplomatic staff and of the administrative and technical staff of a diplomatic mission, and children of consular officers and special consular employees serving in Greece, if they live with their parents.
- Dependent family members, being lineal ascendants, of members of the diplomatic staff and of the administrative and technical staff of a diplomatic mission, and of consular officers and special consular employees serving in Greece.
- By decision of the secretary general of the decentralised administration, residence permits shall be issued to the area of Mount Athos for studies or acquaintance with monastic life in Mount Athos<sup>66</sup>.

### **Common rights of third - country nationals**

1. Third-country nationals who legally reside in the country may freely move and settle anywhere in its territory. By presidential decree issued at the proposal of the Ministers for the Interior, Foreign Affairs, National Defence and Public Order & Citizen Protection, residence or settlement may be prohibited in certain geographic regions of the country for reasons of public interest<sup>67</sup>.

2. Third-country nationals who legally reside in Greece shall be insured with the relevant insurance organisation<sup>68</sup> and have the same insurance rights as Greek nationals.

3. The provisions of Legislative Decree 57/1973 on social protection, as amended and in force, shall also apply to third-country nationals who legally reside in Greece.

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<sup>66</sup>Ministry of Interior website <http://www.ypes.gr/UserFiles/24e0c302-6021-4a6b-b7e4-8259e281e5f3/metanast-N4251-2014.pdf>

<sup>67</sup>Law 4251/ 2014 Article 21. It does not mention specific areas.

<sup>68</sup>Health & Pension insurance.

4. Detained third-country nationals shall be informed in a language they can understand about the rules of conduct and their rights and obligations as soon as they are admitted to an institution.
5. The validity of a residence permit shall not be affected by temporary absences which do not exceed six months in total per year, by longer absences for military service purposes or by one continuous absence of twelve months maximum, for serious reasons, especially related to motherhood or pregnancy, serious illness, studies or vocational training in another Member State or third country.
6. Minor third-country nationals who reside in the Greek territory shall be subject to the same requirement of compulsory education as Greek nationals. Minor third-country nationals who are students on any level of education shall have unlimited access to the activities of school or academic communities.
7. Enrolment of minor third-country nationals to Greek schools of any level shall require the same supporting documents requested from Greek nationals. Exceptionally, the children of third-country nationals may be enrolled to public schools with incomplete supporting documents if: a. They are protected by the Greek State as beneficiaries of international protection and the protection of the United Nations High Commissioner for Refugees; b. They come from highly turbulent areas; c. They have lodged an application for international protection; d. They are third-country nationals residing in Greece, even if their legal residence in the country has not been regulated.
8. The terms and conditions for the recognition of primary and secondary education degrees obtained in the country of origin and the conditions for inclusion in the Greek education system, and for the enrolment of students who are third-country nationals to public schools may be determined by decision of the Minister for Education and Religious Affairs.
9. Without prejudice to more special provisions of the applicable legislation, third-country nationals who are secondary education graduates in Greece shall have access to tertiary education, on the same terms and conditions as Greek nationals.
10. Exercise of any professional activity by third country nationals, provided that all other legal requirements are met, shall not require the procurement of a reciprocity certificate<sup>69</sup>.

### **Obligations of third - country nationals<sup>70</sup>**

1. While residing in Greece, a third-country national shall declare to the competent agencies to the decentralised administrations of Greece or to the Directorate for Migration Policy to the Ministry for the Interior: a. Any change to his home address; b. Any change to his personal status, particularly the change of nationality, entering into a marriage, dissolution or annulment of marriage, or birth of child; c. The loss or renewal of, or change to, the particulars of his passport or other travel document; d. The loss of the permit or of the residence or permanent residence certificate.
2. A third-country national who is in possession of a residence permit must depart at no further notice by the last day of the duration of validity, unless he has lodged an application for renewal before expiry and has been granted the certificate referred to in Article 8(7) and Article 9(6).

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<sup>69</sup>Ministry of Interior website <http://www.ypes.gr/UserFiles/24e0c302-6021-4a6b-b7e4-8259e281e5f3/metanast-N4251-2014.pdf>

<sup>70</sup>Law 4251/2014

3. Public documents issued by foreign authorities which are required shall be authenticated by affixing the apostille of the Hague Convention<sup>71</sup>, if so required. In the cases where no apostille is required, these documents shall be certified by the Greek consular authority or the Greek Ministry for Foreign Affairs in terms of authenticity of signature of the foreign authority officer.

### **Rejection – Withdrawal of residence permit**

A residence permit shall not be issued or renewed, or shall be withdrawn if:

- a. The requirements are not met no longer or at all;
- b. An official document issued by a competent Greek authority or a final court judgment declares that false or misleading information, false or falsified documents were used, that fraud was otherwise committed or other unlawful means were used for the issue of the residence permit;
- c. The applicant fails to respond within two months to a written notice relating to any matter pertinent to the issue of the residence permit. The applicant may submit an application for reconsideration within one month from notice that his application has been rejected.

If an issued residence permit is withdrawn or the request for the issue or renewal of a residence permit is rejected, the services competent as appropriate shall issue a return decision pursuant to the provisions of Article 16 to 41 of Law 3907/2011<sup>72</sup>.

### **Integration of immigrants, asylum seekers and refugees**

The aim of this section is to present a overview of recent developments in the integration of immigrants and refugees in Greece, while the country has been struggling with the consequences of a financial and humanitarian crisis, and in the wake of the Syrian war the number of refugee and migrant flows in Greece increased dramatically. “The Greek state currently faces the major challenges of a shrinking labour market and an ongoing restructuring of labour relations, which hinder, the already problematic, integration of legally residing third country nationals” (Skleparis, 2018:2).

Immigrants in Greece are among the most vulnerable social groups facing a constant risk of poverty and social exclusion. More specifically, immigrants are over-represented among the groups with low socioeconomic standing and are disproportionately affected by unstable employment and unemployment, in addition to the lack of housing or poor housing quality, poor access to the national health system and to education and training as well as to overall low living standards. In Greece, participation in the labour market is intertwined with social inclusion, while unemployment is intertwined with the risk of marginalization and social exclusion (Anagnostou, et al., 2015:27).

Refugee and migrant integration policies in Greece focus on three policy areas, which are key to social and economic integration: a) labour market; b) healthcare and social welfare services; and c) education and training (Skleparis, 2018). It took nearly twenty years for Greek authorities to realize that migration policy planning should be considered as a long-term and multi-faceted phenomenon rather than a temporary emergency phenomenon (Anagnostou, et al., 2015:20). In this context, one of the key purposes of the new Immigration Code in 2014,<sup>73</sup> was to

<sup>71</sup>The Hage Convention of 1961 allows for the legal recognition of official documents of third countries

<sup>72</sup>Ministry of Interior website <http://www.ypes.gr/UserFiles/24e0c302-6021-4a6b-b7e4-8259e281e5f3/metanast-N4251-2014.pdf>

<sup>73</sup>Law 4251/2014, Article 128.

promote the recognition and acceptance of legal migrants and their equal participation in the economic, social and cultural life of the country. According to this legal framework, TCNs legally residing in the country enjoy equal access to the labour market as Greek nationals, with a few exceptions (e.g. restricted access to public sector jobs). In reality however, legally residing TCNs are still mainly employed in low-skilled and highly precarious jobs, while facing large percentages of unemployment (Skleparis, 2018:2).

According to MIDAS Project from 2008 to 2013:

“the Greek authorities applied an ‘Integrated Border Management’ policy, by reinforcing Greece’s external borders through human and material resources, while at the same time pursuing a similar agenda in non-border areas by persecuting irregular migrant population. During this period, Greece was the biggest beneficiary of the European Return Fund (2008-2013) receiving around 125 million euro, plus almost 5 million in emergency funding, 50% of this allocation was earmarked for the implementation of actual returns, and approximately 32 % for costs related to detention facilities in order to improve their conditions. At the same time, voluntary return seemed to hold the key to an effective migration management” (Angeli, et al., 2014:15).

Those practices were largely in line with EU aims and objectives, as they were approved both by the European Council and the Commission, while the main sponsor of Greece's asylum and migration policy was the European Commission, through the “SOLID” Framework Programme (funding period 2007- 2013) (Angeli, et al., 2014:18).

In April 2014, a new legal framework on migrant integration was introduced, with the adoption of law 4251/2014 ‘Code for Immigration and Social Integration’. This law simplified procedures and provided migrants possessing ten-year or indefinite duration residence permits, the right to convert them into permits for long-term residents, thus promoting legal security and establishing a status of rights and entitlements (Civis Plus, 2017:31). According to a 2017 ‘CivisPlus’ report concerning the years 2014-2016, these measures have not worked as expected, since they were implemented without proper monitoring and evaluation, in addition to coordination problems in the design and implementation of integration policies. Until February 2015, at least five Ministries were directly involved in the design of immigration policy and three other services in its implementation. This situation changed, with the merging of the Ministry of Public Order with the Ministry of Interior, and the establishment of a new Ministerial position, that of the Deputy Minister for Immigration (Civis Plus, 2017:32).

A subsequent Law(4375/2016) established that all international protection beneficiaries and applicants have access to wage employment or self-employment on the same terms and conditions as Greek nationals. However, in practice, very few international protection beneficiaries and applicants make use of this provision and bureaucratic obstacles in obtaining the necessary documents for employment, as well as opening a bank account, hinder access of international protection beneficiaries and applicants to the labour market (Skleparis, 2018:3).

Prior to Law 4375/2016, the rights of the international protection beneficiaries in Greece (recognized refugees and beneficiaries of subsidiary protection) were regulated by Presidential Decree 141/2013, which incorporated Directive 95/2011/EC on the procedures of determining the refugee status. According to Presidential Decree 141/2013 and Article 128, Paragraph 2 of Law 4251/2014, *“Integration policies apply to all legally residing third country nationals and to*

*members of their families*”. The access to the labour market was regulated through Presidential Decree 141/2013 (Art. 27), in conjunction with Presidential Decree 189/1998 (Karantinos, 2016:2). However, even following the enactment of Law 4375/2016, it is exceptionally difficult for asylum seekers and refugees to find employment, as priority by employers is predominantly awarded to Greek and EU citizens. As a consequence, asylum seekers resort to illegal employment, which has severe repercussions, mainly the lack of certain basic social rights which in turn subjects them to further poverty and vulnerability (Karantinos, 2016:3).

According to National Statistical Service of Greece in Labour Force Survey (1st quarter 2008-1st quarter 2011) recorded a steady increase in unemployment of foreigners since the beginning of 2009, surpassing by almost five percentage points the equivalent general average rate of unemployment during the first quarter of 2011. In absolute numbers, during 2009-2011 the number of unemployed foreigners exceeded the number of working foreigners. Last but not least, the fact that approximately 600.000 residence permits were valid in early 2010 and their number at the end of 2011 was around 445.000 indicates a decrease of the legal immigrant population that is probably associated with unemployment (Maroukis, 2012:2). In 2013, the regional authorities issued and renewed 6,952 work permits for asylum-seekers and rejected 1,620 requests while, in the same period, there were more than 33,000 active cases of applications for international protection pending with the police and the new Asylum Service. Without a valid work permit, asylum-seekers were deprived of the enjoyment of a series of rights, including the possibility to participate in EU-funded programs for access to the labour market, access to social benefits, such as unemployment allowances, allowances for children in single-parent families, enrolment of children in nursery schools and other rights (Karantinos, 2016:3).

Moreover, as illustrated by data of the NGO ‘Solidarity Now’, refugees in Greece appear to have an increased level of dependency which impedes their integration into Greek society. The country has yet to develop an integrated plan with regards to the integration of refugees, beneficiaries of international protection (and TCNs for that matter). Indicatively: a) 73.68% of asylum seekers and refugees report that they depend on NGOs assistance to pay rent for their families, b) 72.19% report that their primary source of income derives from assistance by NGOs and international organisations, c) 32% of those stating that they have found employment work in the shadow labour market (Vasilaki, 2017:16).

In April 2013, the Greece introduced a National Strategy for the inclusion of third-country nationals,

“this Strategy places emphasis on training and developing the skills of those already in Greece; setting out the categories of professions for which there have been increased needs in the past five years, such as: seasonal employment (tourism), transfer of fishery workers, highly qualified workers, and transfer of seasonal workers to the agricultural economy. In addition, the Strategy also includes measures on access to: social and health services, reception and introductory courses, combating informal employment by fostering legitimate employment, combating discrimination and the promotion of equal treatment. Furthermore, it targets vulnerable groups such as women, children, elderly people and people with disabilities” (Karantinos, 2016:5).

However, the above National Strategy has only been partially implemented so far, mainly due to budgetary constraints and delays in the implementation of Asylum, Migration and Integration Fund (AMIF) related actions. Part of AMIF allocations go to international organisations such as

UNHCR and NGOs as emergency funding. Greece received EUR 259.4 million under AMIF to increase its reception capacity to 2,500 places by the end of 2015, to improve the quality and speed of the asylum decision-making process, and to implement a comprehensive policy on the integration of immigrants. However, Greece could not absorb the biggest part of the funding (Samek, et al., 2017:60).

The Main Pillars of the Strategy include provisions for the promotion of regular migration with Country of Origin (CoO) pre-departure measures, enhancement of TCNs' language skills, improvement of attainment in education system, assistance of TCNs integration into the labour market, promotion of access to social security, healthcare, participation in TCNs organisations, promotion of inter-culturalism and combating racism and xenophobia.

Additional provisions aim at the promotion of integration for specific vulnerable groups, the sensitisation of local society through awareness raising campaigns, intercultural training of civil servants, creation of intercultural dialogue platforms, etc. Other Pillars cover the accommodation in rented apartments for vulnerable groups of legally residing TCNs, the strengthening of intercultural mediation services, increasing cultural awareness, the establishment of a sustainable, efficient guardianship system for UASC, and the establishment of Community Support Centres (CSC), under the overall aim to create a sustainable and coherent integration framework<sup>74</sup>.

In practice, to date most integration initiatives are implemented by civil society actors, including refugee and migrant communities, which have undertaken a key role for TCNs' inclusion in Greece. Especially since 2015, UNHCR has also played a key role in relation to the accommodation of the recently arrived asylum-seeking population and vulnerable refugees. Notably, in the framework of the Emergency Support To Integration & Accommodation – ESTIA programme, as of 24 April 2018, the total number of places for refugees and asylum-seekers created by UNHCR, the UN Refugee Agency, reached 24,197.<sup>75</sup> Simultaneously the UNHCR works with the Ministry of Migration Policy, the Local Government and Non-Governmental Organizations to provide housing and support through prepaid cash cards for asylum seekers in Greece, funded the European Union's Civil Protection and Humanitarian Aid.<sup>76</sup>

Housing in apartments improves the daily lives asylum seekers and refugees in Greece, facilitating their access to services, including education. In this way, the integration of those who will remain in the country is gradually being supported. The local community is enriched with coexistence with its new members, while the local economy is boosted by renting the apartments. Also financial support through prepaid cards strengthens the sense of dignity and empowers refugees and asylum seekers by enabling them to choose how they will meet their everyday needs. At the same time, the local market for products and services is directly enhanced.<sup>77</sup>

<sup>74</sup>Main Pillars of the National Strategy on Integration, is available at [http://asylo.gov.gr/wp-content/uploads/2016/12/Programme\\_2014GR65AMNP001\\_4\\_4\\_el.pdf](http://asylo.gov.gr/wp-content/uploads/2016/12/Programme_2014GR65AMNP001_4_4_el.pdf)

<sup>75</sup>ESTIA- UNHCR Greece. Accommodation Programme – Weekly Update, 24 April 2018, is available at <http://estia.unhcr.gr/en/accommodation-programme-weekly-update-24-april-2018/>

<sup>76</sup>ESTIA - A new chapter in the life of refugees in Greece is available at [http://estia.unhcr.gr/el/home\\_page/](http://estia.unhcr.gr/el/home_page/)

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## Integration of refugee and migrant children

The Greek Constitution guarantees the right of all children to education and, according to the law, all children must attend school. In Greece, the schools' autonomy allows them to be in cooperation with parents' associations or with the municipality as well as to produce information in their languages of choice. Sometimes, at their own initiative, teachers inform stakeholders and NGOs about the curriculum of the so-called intercultural school in all languages, including in Swahili (Mancheva, et al.,2015:103). On 30 July 2017, the Minister of Migration Policy announced that the Ministry is currently working on an integral integration plan focused on education and employment, after systematic assessment of refugees' skills and qualification and consultation with all stakeholders in the field of employment. However, for the time being, this plan has not been translated into concrete measures. Efforts with regards to areas fundamental for the integration of the refugee or migrant community, such as education/training and employment/apprenticeships, are sporadic and mostly originating into civil society (NGOs and international organisations) (Vasilaki, 2017:16).

## Acquisition of Greek citizenship

In Greece, the term *citizenship* (or *nationality*) refers to the legal link that connects the individual with the country in which he or she belongs, while the term *ethnicity* refers to a non-legal bond of a person with a particular nation. Those belonging to the same nation are regarded as part of a homogeneous whole, while the rest are referred to as *aliens* or *third country nationals*.

The Greek legal framework concerning nationality is regulated by provisions of the Law 3284/2004, as subsequently altered by Laws 3838/2010 and 4332/2015. According to Law 3284/2004 and to Law 3838/2010, a child may acquire Greek nationality:

### By birth

- a) A child of a Greek father or a Greek mother acquires Greek Citizenship by birth.
- b) Greek Citizenship is acquired upon the birth of a child in Greece in the event that one of the parents of the child was born in Greece and has been permanently domiciled in the country since his or her birth.

### By birth or school attendance in Greece

- a) A child of foreign nationals who was born and continues to live in Greece and whose both parents have permanently and lawfully resided in the country for at least five consecutive years, acquires Greek Citizenship upon his or her birth in the event that his or her parents submit a common declaration and application for registration of the child at the City Registry of his or her city of permanent domicile within three years after the child's birth.
- b) A child of foreign nationals that has successfully attended at least six school years at a Greek school in Greece and resides lawfully permanently in the country, acquires Greek Citizenship upon completion of the sixth year of school by declaration and application at the City Registry of the city of his or her permanent residence, as submitted by his or her parents within three years from the completion of the required school attendance.



### **By adoption**

A person who has been adopted as a minor by a Greek citizen becomes a Greek citizen upon the date of his or her adoption.

### **By enlistment in the armed forces**

In accordance with current regulations, foreign nationals of Greek origin, who are either admitted to military academies as officers, or are non-commissioned officers of the armed forces, or have been enlisted in the armed forces as volunteers (including volunteers during mobilization or war), lawfully acquire Greek Citizenship upon their admittance to the academies or upon their enlistment.

### **By naturalization**

A foreign national who wishes to become a Greek citizen by naturalization should have:

- a) reached the age of majority at the time of submission of the declaration of naturalization
- b) not been irrevocably sentenced to deprivation of liberty
- c) not been undergoing deportation or face other pending issues regarding his or her lawful stay in the country
- d) lawfully resided in Greece for seven continuous years before the submission of the application for naturalization

Moreover, according to Article 13 on *Honorary Naturalization*, a foreign national who has provided special services to Greece or whose naturalization may serve the country's interest, can be naturalized as a Greek citizen by Presidential Decree, following a justified proposal of the Minister of Interior. Also, according to Article 16 on *Loss of Greek Citizenship*, the Minister of Interior may grant permission to an individual who wishes to renounce Greek citizenship, if he or she voluntarily acquired the citizenship of a foreign state, or took over a position in the public sector of a foreign state and by taking that position he or she would need to acquire the citizenship of that state.

### **Reform of the Greek nationality code**

According to the *Law 4332/2015 'Amendments of provisions of the Greek Nationality Code'*, a child of parents of non-Greek nationality may acquire Greek nationality under the following conditions:

- a. Registration at the 1st class of a Greek primary school and continuous attendance at the time of declaration of nationality acquisition
- b. Continuous lawful residence of one of his or her parents for a minimum of five years before birth. If the child is born before the lapse of the five years' residence, Greek nationality may be acquired after a period of 10 years of continuous lawful residence of the parent
- c. Lawful residence of both parents at the moment of nationality declaration in addition to one of them holding one of the following residence permits: i) long-term residence permit, ii) ten-year or indefinite residence permit, iii) certificate of permanent residence of an EU citizen, iv) refugee residence permit or status of subsidiary protection, v) special identity card of Greek ethnic origin (Homogenis), and vi) 'Second generation' residence permit.

According to Article 1A of the above Law, a minor third country national permanently and lawfully residing in Greece may acquire Greek nationality if he/she has successfully attended nine years of primary and secondary education or six years of secondary education. Kindergarten preschool attendance does not count.

Furthermore, a non-Greek citizen who lawfully and permanently resides in Greece and has graduated from a Greek University or Technical School may acquire Greek nationality within a period of three years following graduation. If nationality acquisition is requested on the basis of school or university attendance after reaching majority age and until the age of 23, the third country national who continues to reside lawfully and permanently in Greece may submit the declaration within a period of three years upon graduation.

### **Key issues related to the law 3838/2010**

The important reform of the Greek Citizenship Code dates back to the initial introduction of the Citizenship Law in 2010. The new law on citizenship and naturalisation demonstrated a vision for migrant integration and was deemed progressive. But Public debate and reactions ensued, leading to the Law's partial annulation after having been declared as unconstitutional by the Council of State in 2012<sup>78</sup> and replacement by a new law in 2016. Until then, the issue of Greek nationality represented a non-issue in the political agenda of the country. The reactions centered around two issues. The first concerned the right to vote and be voted (for positions of municipal counselors) in local elections for specific categories of third-country citizens who live legally in the country, and their homogeneous. The second innovation was the establishment of special procedures for the acquisition of the Greek citizenship for children of migrant parents (2<sup>nd</sup> generation) i) either by birth – if the parents are staying legally in Greece for at least 5 continuous years – ii) or after the successful completion of at least 6 grades in Greek school.

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<sup>78</sup>Case number 460/2013

## Reforms after 2015

### Recent reception policy initiatives and emergency measures

The Greek reception system established by Law 3907/2011 was transformed in April 2015 by what the EU Commission established as the ‘Hotspot’ approach. In particular the “hotspot approach”, first introduced in 2015 by the European Commission in the European Agenda on Migration as an initial response to the exceptional flows, is implemented in Greece through the legal framework governing the reception and identification procedure under Law 4375/2016. In practice, the concept of reception and identification procedures for newly arrived populations under Greek law predates the “hotspot” approach (AIDA, 2016 update: 22).

In March 2016, Greek government prepared an emergency action plan in order to address the emerging gaps and problems concerning accommodation for 100,000 refugees and migrants. The provisions of the action plan foresaw that 50,000 would be hosted in reception facilities and the other 50,000 in hotels or other centres near big cities. Furthermore, those who arrived after March 20<sup>th</sup> 2016 face a different treatment, as they are detained in inadequate conditions on the islands where they arrived, while for most of them a potential return in Turkey is pending. In order to face a quickly escalating emergency in late February 2016, the ‘Coordinating Body for the Management of the Refugee Crisis’ was established on early March 2016 by the Greek government. This is an inter-ministerial body, headed by the Deputy Minister of National Defence, and composed by the ministries of National Defence, Citizen’s Protection, Migration Policy, Infrastructure – Transports and Networks, Marine, and the Ministry of Macedonia and Thrace. The task that this body bears is to organise and coordinate the management of the flows as well as the establishment of reception centres (Triandafyllidou, et al., 2016:21).

Additionally at institutional level, a crucial change was the establishment of a New Ministry of Migration Policy<sup>79</sup> in the Cabinet emerged after the elections of September 2016. Its responsibilities include asylum, migration and integration policies.

As per Migration Policy Minister, Ioannis Mouzalas:

“In 2017 we seek to gradually reduce the number of camps. For this reason, we are proceeding with a plan to create 8,500 accommodation places for asylum seekers and unaccompanied minors, following a call for expression of interest by the competent Special Secretariat for the Coordination and Management of the National Programs of AMIF/ISF. This is addressed to potential local administration bodies, international organizations, legal persons governed by public law, NGOs, charities etc., and supervised by the Ministry of Migration Policy Reception Directorate. We support the United Nations High Commissioner for Refugees (UNHCR) program for an additional 20,000 accommodation places” (General Secretariat on Media & Communication, 2017:17).

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<sup>79</sup>Presidential Decree 123/2016 – State Gazette 208/A/4-11-2016

## The EU-Turkey statement

Over the time period of 2011 until 2016, the pivotal political development driven by the recent refugee crisis in Greece is undoubtedly the adoption – and subsequent immediate implementation – of the EU-Turkey Common Statement of 18 March 2016. This so-called ‘EU-Turkey Agreement’ represents a culmination of a series of EU-level discussions with Turkey, aimed at ending the unprecedented refugee and migrant flows to Europe recorded since early 2015. Combined with the definitive closure of the European borders (the Balkan route) in early March 2016, the EU-Turkey Agreement had a profound effect on the refugee situation in Greece and significant implications for the rights, reception conditions, living standards and the protection framework faced by new arrivals.

More specifically, the Agreement came into effect at midnight on 20 March 2016. Based on the Agreement, any new arrivals on the Greek islands or people intercepted in the Aegean Sea after the latter date – regardless of nationality and need for international protection – are subject to possible deportation back to Turkey after a fast-tracked asylum process. In return, the EU *inter alia* agreed to resettle directly from Turkey a number of Syrian refugees equal to the number of those intercepted and returned from Greece (see Box 1). The Agreement applies to all irregular migrants and asylum seekers who arrive in Greece after 20 March 2016, as Turkey was declared a “safe third country” and hence article 38 of the Asylum Procedures Directive about the Safe Third Country principle applies. Refugees and migrants can still claim asylum in Greece but applications can be declared inadmissible on the basis of the application of the latter principle.

### Box 1: Snapshot of EU-Turkey Statement – What was agreed?

On 18 March, following on from the EU-Turkey Joint Action Plan activated on 29 November 2015 and the 7 March EU-Turkey Statement, the European Union and Turkey decided to end the irregular migration from Turkey to the EU. In short, the EU and Turkey agreed that:

- 1) All new irregular migrants crossing from Turkey to the Greek islands as of 20 March 2016 will be returned to Turkey;
- 2) For every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU;
- 3) Turkey will take any necessary measures to prevent new sea or land routes for irregular migration opening from Turkey to the EU;
- 4) Once irregular crossings between Turkey and the EU are ending or have been substantially reduced, a Voluntary Humanitarian Admission Scheme will be activated;
- 5) The fulfilment of the visa liberalisation roadmap will be accelerated with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016. Turkey will take all the necessary steps to fulfil the remaining requirements;
- 6) The EU will, in close cooperation with Turkey, further speed up the disbursement of the initially allocated €3 billion under the Facility for Refugees in Turkey. Once these resources are about to be used in full, the EU will mobilise additional funding for the Facility up to an additional €3 billion to the end of 2018;
- 7) The EU and Turkey welcomed the on going work on the upgrading of the Customs Union.
- 8) The accession process will be re-energised, with Chapter 33 to be opened during the Dutch Presidency of the Council of the European Union and preparatory work on the opening of other chapters to continue at an accelerated pace;
- 9) The EU and Turkey will work to improve humanitarian conditions inside Syria.

Source: [http://europa.eu/rapid/press-release MEMO-16-963 en.htm](http://europa.eu/rapid/press-release_MEMO-16-963_en.htm)

Following the entry into force of the Agreement, a worrisome new reality started to drastically shape at the islands of the Eastern Aegean Sea – the key entry points of sea arrivals in Greece. The open registration and reception sites processing and supporting the incoming refugee population, who previously freely transited through the Greek mainland to cross into Europe via the Northern Greek border of Idomeni, were suddenly transformed into closed, police-run detention facilities (hotspots), in order to manage the return and readmission of all new arrivals, as of March 20<sup>th</sup> 2016 to Turkey.

Additionally, one of the immediate impacts of the EU-Turkey Statement was a *de facto* divide in the asylum procedures applied in Greece. Asylum seekers arriving after 20 March 2016 are subject to a fast-track border procedure and excluded from relocation to Europe via the EU Relocation Programme. In particular, newcomers at the Greek islands after March 20<sup>th</sup> are:

- Returned to Turkey in case they do not seek international protection or their asylum applications are rejected.
- Geographically restricted at the islands of first reception until their asylum applications have been examined.
- Allowed to move to the Greek mainland if their asylum application is declared admissible, either due to exemption from the Statement or because the “safe third country” or “first country of asylum” concepts are not applicable to their case.

Substantial asylum reforms, many of which were driven by the implementation of the Statement, were also adopted in 2016. In particular, Law no 4375/2016 was adopted in April 2016, transposing the recast Asylum Procedures Directive into Greek law. The latter Law was subsequently amended in June 2016 and March 2017, while a draft law transposing the recast Reception Conditions Directive has not been adopted yet.

As a result of the Agreement and ensuing policy reforms, the mobility of asylum seekers and the options for official recognition of their status were reduced. In addition, while over 2015 and the first months of 2016 relief efforts had predominantly concentrated on providing frontline assistance and humanitarian aid to people throughout their transit all the way to the Northern border of Idomeni, as of late February 2016 Greece was called to provide both secondary reception facilities as well as implement border procedures and large-scale registration and examination of asylum claims.

Overall, the geographical restriction of asylum seekers on the islands, delays in transfers to the mainland of those exempted from return to Turkey led to significant over-crowding at the five Reception and Identification Centres (or hotspots) in Lesbos, Samos, Chios, Kos and Leros. Reacting to the new deal and the return (and detention) policy it mandates, many humanitarian actors, including UNHCR, were quick to suspend all – or part of – their activities in the hotspots. As a result, the humanitarian situation deteriorated dramatically, protection gaps and vulnerabilities were exacerbated, while frustration led to a series of protests by refugees and migrants as well incidences of violence within the closed facilities.

Key concerns raised by a multitude of humanitarian and other actors included issues around the compliance of the EU-Turkey agreement with international refugee law and human rights, its implementation in Greece given an overstretched Asylum Service and limited reception capacity, and safeguards for access to asylum and international protection, including for vulnerable groups. Meanwhile, the humanitarian response developing in the Greek mainland in 2016 and 2017 was called to cover serious gaps in the provision of immediate basic needs while also taking into

account more long-term needs as the profile of the refugee and migrant population in Greece changed from a transit population on the move to a more static one.

Serious concerns about the compatibility of the EU-Turkey statement with international and European law were also notably expressed by the Parliamentary Assembly of the Council of Europe (PACE) and the Greek National Commission for Human Rights (NCHR). Following a joint inquiry, the European Ombudsman stated that the political aspect of the Statement:

“does not absolve the [European] Commission of its responsibility to ensure that its actions are in compliance with the EU’s fundamental rights commitments. The Ombudsman believes that the Commission should do more to demonstrate that its implementation of the agreement seeks to respect the EU’s fundamental rights commitments”.<sup>80</sup>

In February 2017, the General Court of the European Union (CJEU) declared that:

“the EU-Turkey statement as published by means of Press Release No 144/16, cannot be regarded as a measure adopted by the European Council or moreover by any other institution, body, office or agency of the European Union, or as revealing the existence of such a measure that corresponds to the contested measures”<sup>81</sup>.

An appeal was lodged before the CJEU in April 2017<sup>82</sup>.

On 17 April 2018, a decision of the Greek Council of State also called into question the legal basis of the geographical restriction imposed on key arrivals. As announced on the AIDA website:

“the Greek Council of State issued Decision No 805/2018, allowing an action brought by the Greek Council for Refugees for the annulment of the Asylum Service Director Decision which established the geographical restriction imposed on asylum seekers arriving on the islands of Lesbos, Rhodes, Chios, Samos, Leros and Kos after 20 March 2016.

The Council of State held that the regime of geographical restriction within the aforementioned islands has resulted in unequal distribution of asylum seekers across the national territory and significant pressure on the affected islands compared to other regions, including negative effects on their economy and public order.

It also highlighted that the Decision of the Asylum Service Director, issued pursuant to Article 41 of Law 4375/2016, does not set out legal grounds for the imposition of restrictions on asylum seekers' freedom of movement. Insofar as it deduced no serious reasons of public interest from the Decision in order to justify such a measure, the Council of State majority annulled the Decision in question.

<sup>80</sup>European Ombudsman, *Decision of the European Ombudsman in the joint inquiry into complaints 506-509- 674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement*, available at: <http://bit.ly/2ndIPyV>

<sup>81</sup>General Court of the European Union, Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v. European Council*, Order of 28 February 2017, press release available at: <http://bit.ly/2lWZPrr>

<sup>82</sup>CJEU, Cases C-208/17 P, C-209/17 P and C-210/17 P *NF, NG and NM v. European Council*.

Accordingly, the basis for the restriction of persons who apply for international protection on the islands of Lesbos, Rhodes, Chios, Samos, Leros and Kos is void”.<sup>83</sup>

However, on 20 April 2018, the newly appointed Asylum Service Director quickly reinstated the annulled Decision<sup>84</sup>.

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<sup>83</sup>AIDA website: <http://www.asylumineurope.org/news/17-04-2018/greece-council-state-annuls-geographical-restriction-asylum-seekers-islands>

<sup>84</sup>(GCR Press Release on the reinstatement of CoS's annulled decision, 23 April 2018, available at: <http://www.gcr.gr/index.php/en/news/press-releases-announcements/item/813-pligma-sto-kratos-dikaou>).



## Concluding remarks

The current report attempts to outline the refugee/migration issue in Greece, during the period from 2011-2018, emphasizing the years after 2014. The period after 2014 is by far the most crucial as there was a rapid increase of new arrivals with a peak on the summer of 2015 when the so-called refugee crisis took place and started the mass involvement of the international actors, NGOs and other partners.

Gradually the focus was totally shifted from migration to refugees and asylum seekers, and this is obvious from the availability of migration data in Greece which are very poor compared to data concerning asylum issues. Another important consequence was that the Greek state in order to cope with these conditions, established in 2016 a new Ministry called “Ministry for Migration Policy”.

In particular at first we attempted to feature recent statistical about the arrivals, asylum procedures, the relocation scheme, returns, identification and reception, as well as some data concerning the foreign population already settled in the country holding a residence permit or having obtained the Greek citizenship.

However, we can say that available data are still incomplete as they do not differentiate according to important features such as: gender, sexuality (LGBTQI persons), sexual and gender based violence, single-parent families, victims of torture, victims of trafficking etc. As we mentioned earlier, not only most of the data concern newcomers and asylum seekers but also the data concerning the foreign population already settled in the country are lacking details.

Following, we tried an overview of recent developments in the integration policies for immigrants and refugees in Greece while the main focus of the current report was the transforming legal framework and legislation concerning refugees, asylum seekers immigrants, persons with Greek citizenship.

Based on our primary results it seems that the most important highlights of the legislation changes and modifications are the establishment of the Asylum Service, the Reception and Identification Service (RIS), the Appeals Authority and the more intensive involvement of EASO and FRONTEX in Greece. Moreover, we identify as crucial issues the relocation of beneficiaries of international protection from the reception country to other EU members, the EU-Turkey Statement which implied among others the geographical limitation in the Greek islands that led to the trapping of the newcomers for a long period and the poor living conditions in the various reception centers.

In the upcoming reports, we are planning to further explore all the different aspects of the current report in order to achieve a more detailed record of the current situation in Greece concerning asylum seekers and refugees. Moreover, there is a need to focus on the conditions in the different sites that host non EU citizens, according to their legal status, and especially in the pre-removal centers in which the detention practice is implemented. In addition, there is a serious lack of data and information concerning those people that are detained in police stations which need to be further explored.

In conclusion Greek legal framework incorporates international protection provisions and treaties and seems to compliance with the international standards. Greece has also transferred relevant European Union regulations, directives and acts into national legislation. However, our research will explore whether there are discrepancies between what laws and regulations foresee and what happens in reality either in emergency or regular conditions.



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## Annexes

### Annex 1: Overview of the Legal Framework on Migration, Asylum and Reception Conditions

Legislation title (original and English) and number	Date	Type of law (i.e. legislative act, regulations, etc...)	Object	Link/PDF
Law 2910	02/05/2001	Law	Entry and Stay of Aliens in Greek Territory	<a href="http://www.refworld.org/pdfid/3b209fd54.pdf">http://www.refworld.org/pdfid/3b209fd54.pdf</a>
Law 3386	23/08/2005	Law	Entry, residence and social integration of third country citizens into the Greek Territory	<a href="https://www.mfa.gr/images/docs/ethnikes_theoriseis/codification_of_legislation_en.pdf">https://www.mfa.gr/images/docs/ethnikes_theoriseis/codification_of_legislation_en.pdf</a>
Presidential Decree 220/2007	13/11/2007	Presidential Decree	Adaptation of Greek Legislation to the provisions of Council Directive 2003/9 / EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States	<a href="http://www.firstreception.gov.gr/PRIimages/EditorImages/pd220_2007.pdf">http://www.firstreception.gov.gr/PRIimages/EditorImages/pd220_2007.pdf</a>
Law 3907	26/01/2011	Law	«Establishment of an Asylum Service and a First Reception Service, adaptation of the Greek legislation to the provisions of Directive 1008/115/EC 'with regard to the common rules and procedures in Member States for the return of illegally staying third-country nationals' and other provisions»	<a href="http://asylo.gov.gr/en/?page_id=113">http://asylo.gov.gr/en/?page_id=113</a>
Presidential Decree 102/2012	03/09/12	Presidential Decree	Organization and operation of the First Reception Service at the Ministry of Public Order and Citizen Protection	<a href="http://www.firstreception.gov.gr/PRIimages/EditorImages/P.D.102_2012_First_Reception_Service.pdf">http://www.firstreception.gov.gr/PRIimages/EditorImages/P.D.102_2012_First_Reception_Service.pdf</a>
Law 4198	11/10/13	Law	Transposing directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims	<a href="http://stoptrafficking.gr/images/nomothesia/N.4198.2013_TRAFFICKING.pdf">http://stoptrafficking.gr/images/nomothesia/N.4198.2013_TRAFFICKING.pdf</a>
Law 4375	03/04/2016	Law	«On the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC "on common procedures for granting and withdrawing the status of	<a href="http://asylo.gov.gr/en/?page_id=113">http://asylo.gov.gr/en/?page_id=113</a>

Legislation title (original and English) and number	Date	Type of law (i.e. legislative act, regulations, etc...)	Object	Link/PDF
			international protection (recast) (L 180/29.6.2013), provisions on the employment of beneficiaries of international protection and other provisions»	
Law 4251	03/04/16	Law	Immigration and Social Integration Code and other provisions	<a href="http://www.ypes.gr/UserFiles/24e0c302-6021-4a6b-b7e4-8259e281e5f3/meta_nast-N4251-2014.pdf">http://www.ypes.gr/UserFiles/24e0c302-6021-4a6b-b7e4-8259e281e5f3/meta_nast-N4251-2014.pdf</a>
Law 4375	15/05/2016	Law	«On the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC “on common procedures for granting and withdrawing the status of international protection (recast) (L 180/29.6.2013), provisions on the employment of beneficiaries of international protection and other provisions»	<a href="http://asylo.gov.gr/en/wp-content/uploads/2016/05/GREECE_Law_4375_2016_EN_final.pdf">http://asylo.gov.gr/en/wp-content/uploads/2016/05/GREECE_Law_4375_2016_EN_final.pdf</a>

Source: AIDA, 2017

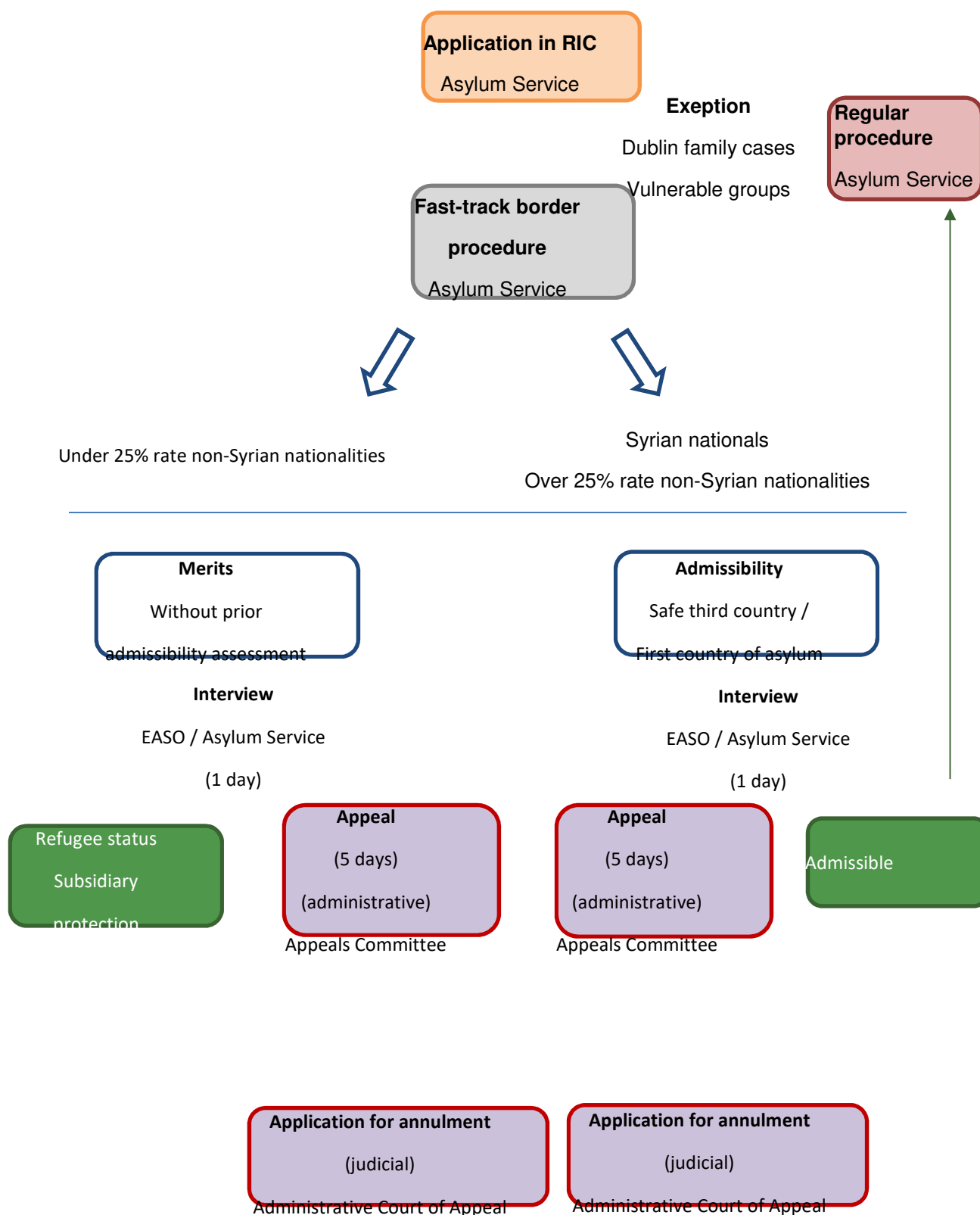
**Annex 2:** List of Authorities Intervening in Each Stage of the Procedure

Stage of the Procedure		Competent Authority
Application	At the Border	Asylum Service
	On the Territory	Asylum Service
Dublin (Responsibility Assessment)		Asylum Service
Refugee Status Determination		Asylum Service
Appeal	First Appeal	Independent Appeals Committees (Appeals Authority)
	Second (Onward) Appeal	Administrative Court of Appeal
Subsequent Application (Admissibility)		Asylum Service

Source: AIDA, 2017

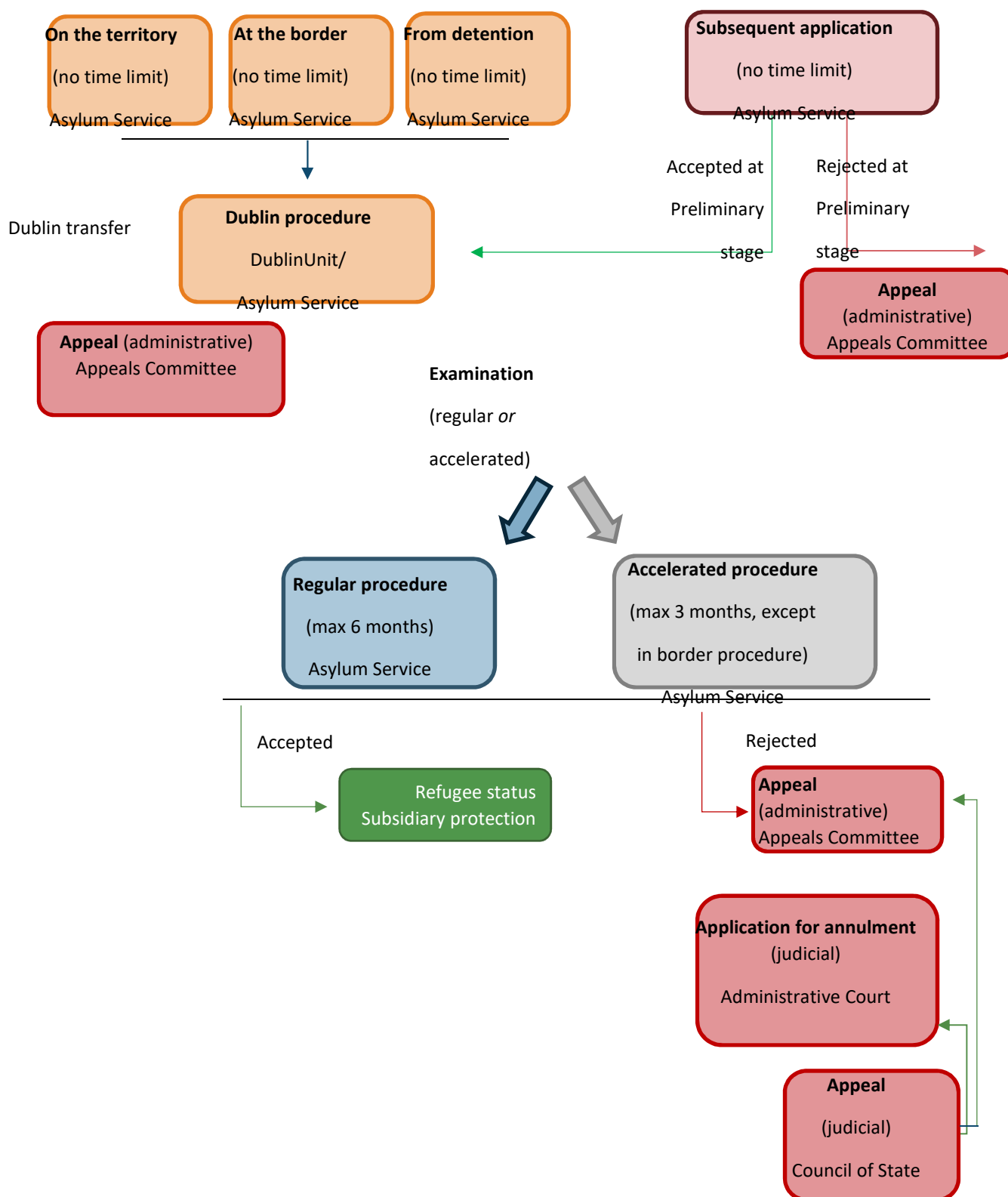


**Annex 3:** Fast-track Border Procedure: Applications on the Eastern Aegean Islands Subject to the EU-Turkey Statement



Source: AIDA, 2017

**Annex 4:** Applications not Subject to the EU-Turkey Statment



Source: AIDA, 2017

## Glossary and list of abbreviations

**AAU:** Autonomous Asylum Units

**AIDA:** Asylum Information Database

**AMIF:** Asylum, Migration and Intergration Fund

**AST:** Asylum Support Teams

**CEAS:** Common European Asylum System

**CJEU:** Court of Justice of the European Union

**CSC:** Community Support Centers

**DYEP:** Facilities For The Reception And Education Of Refugees (Δομές Υποδοχής για την Εκπαίδευση των Προσφύγων)

**EASO:** European Asylum Support Office

**ECHR:** European Court Of Human Rights

**EKKA:** National Centre for Social Solidarity (Εθνικό Κέντρο Κοινωνικής Αλληλεγγύης)

**ELSTAT:** Greek Statistic Agency (Ελληνική Στατιστική Αρχή)

**ESC:** European Social Charter

**EURODAC:** European Central Database

**FRS:** First Reception Service

**GCR:** Greek Council For Refugees

**IOM:** International Office for Migration

**ISF:** Internal Security Fund

**LGBTQI:** Lesbian, Gay, Bisexual, Transgender, Queer and Intesex Life

**POC:** Persons of Concern

**RAO:** Regional Asylum Office

**RESC:** Revised European Social Charter

**RIC:** Reception and Identification Centre

**RIS:** Reception and Identification Service

**TCR:** Take Charge Request

**UAC:** Unaccompanied Children

**UASC:** Unaccompanied Asylum Seeking Children

# **RESPOND**

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## **Hungary**

### **Country Report**

#### **D1.2 – April 2018**

**Daniel Gyollai – Glasgow Caledonian University**

Horizon 2020  
RESPOND: Multilevel Governance  
of Mass Migration in Europe and  
Beyond (770564)



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## Executive summary

In this report, our objective is to provide a snapshot of the current situation of the governance and management of migration in Hungary, the regulatory landscape, citing and reflecting on developments and events occurred between 2011 and 2018. Section 1) gives a statistical overview of international migration to Hungary. The data displayed shows the main patterns of asylum seeker flows, their recognition rates and the scale of people being expelled from the territory. We briefly describe the demographic composition of third-country nationals residing in the country, closing the section with a few remarks on migratory balance. Section 2) outlines the political, cultural and socio-economic context in which migration management enfold. It briefly introduces the linguistic and religious cleavages and the political and institutional arrangements of the state. Without engaging in a thorough analysis, we will try to pin down those critical socio-economic and political factors that are accountable for the current escalation of tensions. In doing so, we move on to Section 3) that gives an insight on how the constitutional organization of the state has been altered and restructured over the past years, thus establishing an ideological, legal and institutional base for the transformation of the migration and asylum framework. Section 4) accounts for the legislative and institutional framework of immigration and asylum by introducing the major Acts that govern the field, the authorities that are responsible for the implementation of the policy, and the Government's migration strategy. Since the recent developments fundamentally changed the scope of the framework, now representing its basic tenets, instead of discussing the amendments in a separate section, the refugee crisis driven reforms will be embedded here. In chronological order we will address all major amendments since 2015 that affected the legislative framework. Section 5) explains the legal status of foreigners, including asylum applicants, beneficiaries of international protection, the main categories of third country nationals legally residing in the country in terms of the type of residence permit they hold, irregular migrants, and unaccompanied minors. In describing the situation of asylum seekers, we will outline the first main stages of the application procedure. Reception conditions and detention of asylum seekers, however, being subject of another work package of the project, are out of the scope of the report. Finally, in Section 6) we will analyse the national framework compliance with the European Convention on Human Rights based on the Court's case law in relation to migration and asylum.

# 1. Statistics and data overview

## Asylum seekers

The first significant number of asylum seekers since the Balkan War arrived in Hungary in the winter 2014/2015. They were Kosovars, who only transited through Hungary on their way towards Germany (Kékesi, 2017). Partly due to the worsening socio-economic situation and political deadlock in Kosovo, tens of thousands people have left the country (Alexander, 2015). According to Nagy, the reason for Afghans being one of the three largest groups is because the local networks/smuggling routes are arguably well established, since their arrival to Hungary goes back to 1990s (Nagy, 2016a). As the table shows, the situation escalated when the Syrian asylum seekers reached the border in 2015, and the authorities registered more than 177,000 asylum applications in total.

**Table 1. Asylum applications 2011-2017**

	2011	2012	2013	2014	2015	2016	2017
Application, total	1,693	2,157	18,900	42,777	177,135	29,432	3,397
3 Main countries of origin	Afghan (649) Kosovar (211) Pakistani (121)	Afghan (880) Pakistani (327) Kosovar (226)	Kosovar (6,212) Pakistani (3,081) Afghan (2,328)	Kosovo (21,453) Afghan (8,796) Syrian (6,857)	Syrian (64,587) Afghan (46,227) Kosovar (24,454)	Afghan (11,052) Syrian (4,979) Pakistani (3,873)	Afghan (1,432) Iraqi (812) Syrian (577)
Refugee	52	87	198	240	146	154	106
Subsidiary Protection	139	328	217	236	356	271	1,110
Tolerated Stay	14	47	4	7	6	7	75
Rejection	740	751	4,185	4,553	2,917	4,675	2,880
Termination	623	1,110	11,339	23,406	152,260	49,479	2,049

Source: Nagy, 2016a; IAO;<sup>1</sup> CSO<sup>2</sup>

In early 2015, most of the arrivals were men under the age of 20 (70-80%) (WHO, 2016). Over the year this pattern changed, and greater number of women and children arrived. Concerning single men, the age range also expanded to include younger, unaccompanied minors (UAMs), as well as older males (WHO, 2016). In 2016, 6,599 women and 8,551 children, of which 1221 UAMs (ECRE, 2017:8), last year 1,241 women and 1,596 children, of which 232 UAMs, applied for asylum (ECRE, 2018:8).

<sup>1</sup> Statistics of the Immigration and Asylum Office (IAO), Available at: [http://www.bmbah.hu/index.php?option=com\\_k2&view=item&layout=item&id=492&Itemid=1259&lang=en](http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=492&Itemid=1259&lang=en).

<sup>2</sup> Statistics of the Central Statistical Office (CSO), Available at: [https://www.ksh.hu/stadat\\_annual\\_1](https://www.ksh.hu/stadat_annual_1).

Recognition rates, especially in comparison to the EU average, have been extremely low; termination decisions are the most dominant. As Nagy notes, between January 2014 and June 2016, 215,322 cases were closed without decision on merits. Termination refers to situations when the applicant absconds or withdraws the application. Other grounds for termination such as death of applicant or change of immigration status hardly ever occur (Nagy, 2016a).

Although not visible in annual breakdown, the construction of the fence<sup>3</sup> at the Serbian-Hungarian border in September 2015, and its later extension along the Croatian section, resulted in a massive decrease in asylum applications. From September to October the total number of applications dropped from 30,795 to 615.<sup>4</sup> The fence did not deter asylum seekers from coming, it only diverted the entire Western Balkan route towards Croatia, and created a domino effect of border closures throughout the Balkan (Trauner and Neelsen, 2017:180-183). Moreover, the Hungarian authorities transported thousands of asylum seekers to the Austrian border without registration in September 2015.<sup>5</sup>

## Expulsions

**Table 2. Expulsions 2011-2017**

	2011		2012	2013	2014	2015	2016	2017
Expulsions	1,904		2,039	1,352	1,962	2,603	3,274	1,057

Source: IAO

Since the Government criminalised illegal entry, as of 15 September 2015, expulsion of the illegal border crossers has been mandatory.<sup>6</sup> Until 30 November 2016, 2,843 people were convicted for ‘unauthorised crossing of the border closure’.<sup>7</sup> The decrease of 2017 may be accounted for by an amendment to the Act on the State Border that came into force 5 July 2016. The new provision provided for the police to automatically push back undocumented migrants apprehended within 8 km of the Serbian/Croatian-Hungarian border, rendering their arrest and conviction ‘unnecessary’. In March 2017, this rule has become applicable to the entire territory of Hungary. Under the new rule, in 2016, 19,057 migrant were refused entry or escorted back to the other side of the fence (ECRE, 2017:17-18); the number reached 20,100 in 2017.<sup>8</sup>

## Foreign citizens residing in Hungary

In 2011, there were 206,909 foreign citizens residing in the country, which decreased to 141,357 in 2013, a share of 1,4% of the population. It has remained fairly stable, although last

<sup>3</sup> See Section 4 of this report.

<sup>4</sup> Asylum and first time asylum applications by citizenship, age and sex Monthly data (rounded), Eurostat, Available at: <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>.

<sup>5</sup> See VS. Available at: <https://vs.hu/kozelet/osszes/tizezer-menekultet-engedhettunk-at-a-ausztriaba-regisztracio-nelkul1-0920>.

<sup>6</sup> See Section 4 of this report.

<sup>7</sup> HHC, Hungary: Key Asylum Figures as of 1 December 2016. Available at: <https://www.helsinki.hu/wp-content/uploads/HHC-Hungary-asylum-figures-1-December-2016.pdf>.

<sup>8</sup> HHC, Hungary: Key Asylum Figures for 2017, Available at: <https://www.helsinki.hu/wp-content/uploads/HHC-Hungary-asylum-figures-1-January-2018.pdf>.

year statistics show 7% increase. Regarding the foreign-born population, the number was 383,236 (4%) in 2011, which raised to 4,3% in 2013. Unlike in most EU Member States, where the majority of the foreigner population are third country nationals, in Hungary they made up just over 40% (Gödri, 2015:199). The largest group of third country nationals, approximately 26% of the total foreign population, come from Asia, mainly from China (12%). The share of males and females is generally balanced among them. Men are slightly over-represented concerning Serbia, while more women arrived from Ukraine and Russia.<sup>9</sup> These immigrants are characterised by a younger age composition, more than half of them aged between 20 and 39 years (Gödri, 2015:191).

Foreigners in Hungary are concentrated in three main settlements. 80% of the Chinese immigrants live in Budapest (Kováts, 2016:357). In general, most of the foreigners live in the capital and Pest county, although people from neighbouring countries prefer the border areas. The Balaton is a favourable destination among elderly generations (Kincses, 2014).

## Migratory balance

Between 2011 and 2013, there was a rapid growth in emigration. Although the process somewhat slowed in 2013, the overall number of people living abroad has been constantly increasing (Gödri, 2015). Neither the Central Statistical Office, however, nor other authorities publish data on the emigration of Hungarian citizens (Gödri et al, 2014:7,25). Based on aggregate mirror statistics of 2017, the number of Hungarians resident in other EU Member States is about 600.000. The most popular destination countries are the UK (250.000), Germany (192.340) and Austria (72.390).<sup>10</sup> The reasons are mainly the absence of economic growth, low wages and the difficulties of young generations to enter the labour market. Although the official statistics show positive net migration rate, according to the mirror statistics, Hungary has become an emigration rather than an immigration country (Gödri, 2015). Emigrants who fail to inform the National Health Service and de-register from the system may face a fine up to 100,000 HUF (€320). In case of self-employed persons, the fine may reach up to 1,000,000 HUF (€3,203).<sup>11</sup>

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<sup>9</sup> See CSO statistics, Available at: [https://www.ksh.hu/docs/eng/xstadat/xstadat\\_annual/i\\_wvn001b.html](https://www.ksh.hu/docs/eng/xstadat/xstadat_annual/i_wvn001b.html).

<sup>10</sup> Portfolio, 'Ide vezetett a tömeges kivándorlás: több magyar lépett le, mint gondoltuk, 30 August 2017, Available at: <https://www.portfolio.hu/gazdasag/ide-vezetett-a-tomeges-kivandorlas-tobb-magyar-lepett-le-mint-gondoltuk.260665.html>.

<sup>11</sup> Art 80(5)-(6) of Act LXXXIII of 1997 on the Benefits of Compulsory Health Insurance.

## 2. The socio-economic, cultural and political context

Although the unemployment rate has been constantly decreasing in Hungary since 2010, it was way over the EU average in 2011, only Greece was behind Hungary in the list (Gödri et al, 2014:46). The decrease, instead of an economic boom, is in large part attributable to the controversial and inadequate public works scheme (Albert, 2017), the growing number of persons working abroad,<sup>12</sup> and the raise of the official retirement age (Scharle, 2016). The Human Development Index (HDI) for 2015 was 0.836, which means an increase of 18.9% since the end of the communist era. The life expectancy increased by 6% and the GNI per capita by about 46.3%. This value still remained below the average of 0.887 for the OECD area, including that of the fellow post-communist countries, Poland, Czech Republic and Slovakia. For every 100.000 live births, 17 women died from pregnancy related causes. The Gender Inequality Index (GII) was 0,252; female participation in the labour market was 46.4% compared to 62.5% for men, the percentage of seats in the Parliament held by women was 10.1 (UNDP, 2016).

According to the last census in 2011, 39% of the population were Catholic (of which 1,8% Greek Catholic), 11,6% Calvinist, 2,2% Evangelical, and only 0,1% Muslim and 0,1% Jewish. 27,2 % did not declare a religion, and 18,2 % answered they had none.<sup>13</sup>

In November 2016, Ásotthalom, a village of Southern Hungary, adopted an anti-Muslim legislation forbidding *inter alia* the wearing of the burka.<sup>14</sup> In June 2017, the Constitutional Court overturned the ban for violating the right to the freedom of conscience and religion, and to the freedom of speech. It is, however, important to note that three judges of the Court stressed in their concurring opinion that there is an “apparent risk for the Islamisation of Europe”, and the Court made its decision merely on procedural grounds and did not go on to consider whether it would be possible to order such a ban at the appropriate legislative level.<sup>15</sup>

It is also notable, that as a consequence of the adoption of the 2011 Church Act, several religious communities previously registered as Churches lost their status as such. The ECtHR in *Magyar Keresztény Mennonita Egyház and Others v. Hungary* ruled that this amounted to a violation of the right to freedom of thought, conscience and religion, as well as to the right to freedom of association. To date, both the provisions of the Church Act in question and their legal basis in the Constitution remain intact, no necessary measures were implemented to remedy the breach of the Convention.<sup>16</sup>

<sup>12</sup> People having been worked abroad less than a year are included into the employment statistics, as well as those occasionally returning and contributing to the family budget.

<sup>13</sup> See Central Statistical Office, Census 2011, Available at: [http://www.ksh.hu/nepszamlalas/tablak\\_vallas](http://www.ksh.hu/nepszamlalas/tablak_vallas).

<sup>14</sup> HVG, Toroczkai odacsap a bevándorlóknak: megtiltják a mecsetépítést Ásotthalmon, [Online] Available at: [http://hvg.hu/itthon/20161124\\_toroczkai\\_asotthalom\\_muszlim\\_tiltas](http://hvg.hu/itthon/20161124_toroczkai_asotthalom_muszlim_tiltas).

<sup>15</sup> See 7/2017. (IV.18.) AB.

<sup>16</sup> For further information on the issue, see Forum for Religious Freedom - Europe, ‘Hungary: Two years after ruling by ECtHR Church Law remains unaltered’, Warsaw, 27 September 2016, Available at: <http://www.osce.org/odihr/268711?download=true>.

The official language of Hungary is the Hungarian, the first language of some 99% of the population. The second largest linguistic group is the Romani and Boyash.<sup>17</sup> Roma make up the largest minority group as well as the most marginalised in Hungary. Empirical research estimates 650,000 Roma people living in the country.<sup>18</sup> After Roma, the most populous groups are Germans, Romanians and Slovaks, non-indigenous ethnic minorities are mostly Russians, Chinese, Arabs and Vietnamese (Gödri et al, 2014:41-44).

Concerning internal migration flows, the spatial redistribution of the local population, the most popular destinations are traditionally Budapest and Pest county. In 2011, 29,6% of the entire population (9,982,000) lived here.<sup>19</sup> Fejér and Győr-Moson-Sopron counties have positive migration balance, while only a few people move to Borsod-Abaúj-Zemplén, Szabolcs-Szatmár, Békés and Baranya counties (Bálint and Gödri, 2015). These patterns are not accidental, the employment rate is the highest in the western and central part of the country.

Hungary is a parliamentary representative democracy. The legislative power is vested in the Parliament. The executive Government, accountable to the Parliament, is led by the Prime Minister. As the head of the state, the President mostly performs ceremonial functions, may however veto a law passed by the Parliament by sending it to the Constitutional Court for review. The members of the Parliament are elected to a 4-year term.<sup>20</sup> The current Assembly comprises the governing center-right<sup>21</sup> Fidesz party in alliance<sup>22</sup> with the KDNP (Cristian democrats), and the Jobbik (far-right), MSZP (socialists), and the LMP (green-liberals) in opposition. Although the Fidesz-KDNP coalition lost its two-thirds majority after a by-election defeat in February 2015, the governing parties have dominated and controlled the legislative process ever since (see more on that in Section 3).

## Migration history in a nutshell - unfolding demographic nationalism

Before 1980, Hungary was a 'closed country'. The political and societal transformation in Southeastern Europe starting in the late 1980's changed the *status quo*, immigration and transit migration were intensified. Immigrants, most of whom were ethnic Hungarian, arrived mainly from the neighbouring countries, Romania, Ukraine and Yugoslavia. With the introduction of the right to free travel abroad in January 1988, out-migration has also emerged. Hungary faced significant migration flows during the Bosnian War in the early 1990s, when over 100,000 people, also ethnic Bosnians, Croats, Serbs, Albanians and Roma refugees,

<sup>17</sup> See Central Statistical Office, Census 2011, Available at: <http://www.ksh.hu/nepszamlalas/tablak>.

<sup>18</sup> In the 2011 eleven census 316,000 people claimed to belong this group, however many Roma identify themselves as Hungarian denying their real Roma identity – see Simon cited in Timmer AD (2016) *Educating the Hungarian Roma: Nongovernmental Organisations and Minority Rights*, London: Lexington Books, p31.

<sup>19</sup> Központi Statisztikai Hivatal, 2011. Évi Népszámlálás: 1. előzetes adatok, Budapest, 2012. Available at: <https://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepszelo2011.pdf>.

<sup>20</sup> Next general election is scheduled for 8 April 2018.

<sup>21</sup> In reality, the Fidesz has rather become a radical authoritarian party with a dominant national populist overtone – See Krekó P and Juhász A (2017) *The Hungarian Far Right: Social Demand, Political Supply and International Context*, Stuttgart: Ibidem.

<sup>22</sup> This is a formally coalition government with no significant role assigned to KDNP.



former-Yugoslav citizens, were settled in the country. In the meantime, although in a small proportion, non-European groups, notably Chinese and some Middle Eastern nationals, took advantage of the collapsing socialist economy and opened small businesses, fast food buffets, restaurants or clothing stores in Budapest. With Hungary's accession to the EU in 2004, both inward and outward migration gained a new impetus. The number of registered immigrants was over 25,000 in 2005, reaching 35,000 in 2008. The new rules on immigration introduced in 2007 allowed EEA citizens to more easily obtain long-term residence permits. Between 2009 and 2012 there was a decline in numbers, partly because the Government introduced a simplified naturalisation procedure available for foreign nationals of Hungarian origin, residing not only in, but also outside Hungary. This procedure applies to anyone who can evidence having had an ancestor living in Hungarian territory and who can speak Hungarian with a certain level of fluency. In the first four years of the implementation, 670.000 people have completed the registration (Gyurok, 1994; Gödri et al, 2014; Gödri, 2015). The number of the new Hungarian citizens under the program reached one million in December 2017.<sup>23</sup>

In the April 8<sup>th</sup> 2018 general election, Hungarian citizens without a Hungarian address (mainly ethnic Hungarians living in neighbouring countries) were eligible to register and vote by mail - as opposed to residents of Hungary who were abroad at the time of the election. This latter group could exercise their right to vote only at a chosen consulate personally. Thus, many were forced to travel hundreds of kilometres to participate in the election.<sup>24</sup>

In the last two decades, Hungary developed a hierarchy of immigration policies. On one hand, the Government privileges and endorses links with ethnic Hungarians living in neighbouring countries. Unlike other countries, however, it does in a way that shows a symbolic, quasi revisionist attempt of nation building across borders, with the aim of maintaining the “cultural legacies” and “spiritual unity” of the historical Hungary in claiming responsibility for the Hungarians living abroad.<sup>25</sup> On the other hand, regarding third-country nationals from non-neighbouring countries, Hungary has adopted a less supportive policy in failing to establish a coherent integration strategy and maintaining a discriminative, if not segregating practices in the institutionalisation of migration: they receive no state support, such as vocational, language training or housing benefits, and issues of cultural diversity and the notion of mutual recognition is disregarded in certain settings, even in education (Melegh, 2016; Ceccorulli et al, 2017). Irrespective of the relatively small number of non-ethnic Hungarian immigrants in the country, “foreignness-averse” discourses have been constantly bolstering xenophobic feelings towards them (Korkut, 2014).

In parallel, outward migration of Hungarians has not only become significant, but also particularly high among the skilled and young population; doctors, health care professionals, engineers, technical workers. Labour shortages have already become prevalent in certain

<sup>23</sup> Bloomberg, ‘Hungary Citizenship Plan Reaches 1 Million Mark in Boost for Orban’, [Online] Available at: <https://www.bloomberg.com/news/articles/2018-03-15/trump-s-next-big-idea-to-save-coal-is-miniature-power-plants/>.

<sup>24</sup> HVG, ‘Nem változtat a külföldön élők szavazásán a kormány’ [Online] Available at: [http://hvg.hu/itthon/20170831\\_Nem\\_valtoztat\\_a\\_kuloldon\\_elok\\_szavazasan\\_a\\_kormany](http://hvg.hu/itthon/20170831_Nem_valtoztat_a_kuloldon_elok_szavazasan_a_kormany).

<sup>25</sup> The purposes are electoral rather than irredentist - See Pogonyi Sz (2015) Transborder Kin-minority as Symbolic Resource in Hungary, *Journal of Ethnopolitics and Minority Issues in Europe*, 14(3): 73-98.



professions (Hárs, 2016) with about 200,000 vacant positions in the labour market.<sup>26</sup> The *brain drain* effect has also had an impact on higher education, with more and more students planning to get a degree abroad (Gödri et al, 2014). Moreover, there is an “unequal exchange” between emigrants and immigrants, the latter flows do not counterbalance the former (Melegh, 2015; 2016). These patterns and the otherwise aging and shrinking population cause significant loss of welfare contribution putting the sustainability of the pension system in peril, and the economy already shows signs of dependence on migrant remittance (Földházi, 2015; Böröcz, 2014). The Government has so far failed to adequately address these demographic challenges and their associated negative social and financial consequences. Instead of enhancing demographic revitalisation through structural reforms, the Government has focused on non-Western, *illegal* migration flows supposedly threatening the already fragile welfare-system (Melegh, 2016). Right-wing populism has dominated the domestic political scene since the end of the 2000s (Ádám and Bozóki, 2016), and with it a climate of mistrust towards third-country nationals, and in this sense Hungary demonstrates how securitisation of migration has never been unfamiliar to EU migration policy as a whole (Huysmans, 2006; Baldaccini et al, 2007; Karamanidou, 2015). In Hungary, however, as Melegh argues, a radical and “authoritarian version of nationalism” has emerged and become mainstream, to some extent, possibly because of the serious demographic and migration-related challenges the country is facing (Melegh, 2016). Non-supportive institutional attitudes have turned into social exclusion and hostility, sentiments that reached their peak during the refugee crisis. In 2015/2016, the Government claimed “ethnic homogeneity” in demolishing the asylum system, while presenting itself as the defender of the nation and “European Christianity” (Fekete, 2016). The Government exploited the crisis for political purposes to justify its opposition of the elitist liberalism of the West (Korkut, 2012), that was, yet again, politically manifested with the so-called *lenient* politics of Brussels in tackling the migrant crisis. The Prime Minister claimed that only the reconstruction of politics along Christian and national, rather than liberal, principles can save Europe. To understand the Government’s rhetoric, it is important to note that Christianity is embraced by Fidesz as a question of national identity and not as religion, as Brubaker phrased it: “a matter of belonging rather than believing” (Brubaker, 2017). In the Hungarian political discourse, Christianity has been reconstructed in a way that it is lacking religious references, and serves as marker of traditional nationalism. Combined with the memories of “a proud past”, it is utilised to unify and elevate the nation, thus legitimising illiberal and anti-democratic practices (Ádám and Bozóki, 2016). A political asset that enables Fidesz (and the Jobbik) to mainstream their agendas on both issues of Europeanisation and migration (Korkut, 2015).

In reflecting these arguments, in the next section we will briefly outline how the constitutional order and organization of the state has been altered and restructured since 2011, thus providing an ideological, normative and institutional base for the transformation of the asylum/migration framework.

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<sup>26</sup> Portfolio, ‘Megszólaltak a cégvezetők Már majdnem mindenkit elért Magyarország legnagyobb problémája, [Online] Available at: <https://www.portfolio.hu/gazdasag/megszolaltak-a-cegvezetok-mar-majdnem-mindenkit-elert-magyarorszag-legnagyobb-problemaja.278965.html>.

### 3. The constitutional organization of the state, separation of powers and constitutional principles on immigration and asylum

#### Checks and balances

Hungary has a unicameral parliament. While badly designed unicameral systems may fail to provide a credible control over the government (Constitution Unit, 1998), Hungary's 1989 Constitution ensured an appropriate system of checks and balances. All this changed when the 2010 parliamentary election gave a qualified majority enough to Fidesz-KDNP to rewrite the Constitution. Fidesz expressed the necessity of a new Constitution to enhance democracy, and to demolish the elitist and partocratic scope of the 1989 Constitution. The 2011 "Fundamental Law", the new Constitution, however, led to regression in both terms (Korkut, 2012). As of 1 January 2012, the then well-balanced legislative decision making process has been dismantled, and was replaced by a centralised executive control; "Hungary has become a constitutional democracy in name only", in fact, Hungary has become a "guided" and "broken" democracy (Bánkuti et al, 2012; Korkut, 2014; Bozóki, 2015).

Fidesz laid down a constitutional order where appointments to key offices, independent institutions and parliamentary committees crucial to democracy and to checks on parliamentary procedure, no longer require multi-party consultation or representation. Positions such as the Chief Prosecutor, Head of the State Auditor and the Budget Council, members of the Electoral Commission, judges of the Constitutional Court, the President of the National Media and Info-communications Authority or the National Bank are all unilaterally<sup>27</sup> elected by the Fidesz-controlled Parliament (Bánkuti et al, 2012).

In practice, each and every piece of new legislation has been crafted and approved by one party only. Even cardinal laws governing the basic rules of taxation, pensions, and the electoral system have been crafted in a way to reflect the policy preferences of the ruling Fidesz party. Laws are passed without adequate debate on the floor, impact assessment, or without consultation with expert groups or stakeholders.<sup>28</sup> Although the President of the Republic is responsible for preliminary norm control and to review the constitutionality of a law proposal, the position has been filled by former Fidesz party leaders, previously Pál Schmitt and now János Áder (Bánkuti et al, 2012). Schmitt signed every law the Parliament passed without objection.

#### Structure and independence of the judiciary

The new constitution and its amendments introduced changes that raised serious concerns about the independence of judiciary (IBAHRI, 2012). The 'Fundamental Law', even more so, the subsequent Act on the Organization and Administration of Courts of Hungary<sup>29</sup> and the

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<sup>27</sup> With two-third majority of the Members present.

<sup>28</sup> European Parliament Report on the Situation of Fundamental Rights: standards and practices in Hungary, pursuant to the European Parliament of 16 February 2012, 2012/2130 (INI), Committee on Civil Liberties, Justice and Home Affairs.

<sup>29</sup> Act CLXI of 2011.

Act on the Legal Status and Remuneration of Judges<sup>30</sup> have brought a radical reconstruction of the judicial system.

The Hungarian judiciary comprises of four levels: The *Kúria* (The Supreme Court of Hungary), the regional courts of appeal, regional courts, administrative and labour courts, and the district courts. District courts hear criminal and civil cases in the first instance. Administrative and labour courts, as regional level courts, review decisions in the first instance relating to administrative and employment law. Regional courts are second instance courts but also hear special first instance cases where the law so provides. The regional courts of appeal hear appeals filed against the decisions of the regional courts. On the top of the hierarchy, as the highest judicial body of Hungary, The *Kúria* hears appeals filed against the decision of the regional courts and regional courts of appeal, and ensures the uniform application of the law. It adopts law harmonising decisions with binding force to all other courts, publishes decisions on legal principles, and annuls local authority decrees that are incompatible with these decisions and the law.<sup>31</sup>

Disregarding his 17 years of experience as a judge of the ECtHR, the new ‘Fundamental Law’ deemed the sitting president of the *Kúria*, András Baka unqualified, and his mandate was terminated. His replacement was elected by the two-thirds majority vote of the (Fidesz-KDNP) Parliament. In *Baka v. Hungary* (App. No. 20261/12) the ECtHR later held that the premature termination of Mr Baka’s mandate without providing judicial review violated art 6(1) of the Convention. The Court furthermore found a violation of the right to freedom of expression (Art 10), given the casual link between the termination of the applicant’s mandate and his previous criticism concerning the constitutional and legislative reforms.

The central administration of courts, a task that previously belonged to National Judicial Council (NJC), has been transferred to the President of National Office of Judiciary (NOJ), who was elected by the supermajority of the Parliament for a 9-year period. The Act attaches significantly more weight to the President as opposed to the members of the Council. The President exercises most prerogatives of the administration including the appointment of judges to senior judicial positions. Moreover, until its annulment, Art 27(4) of the ‘Fundamental Law’ authorised the President to allocate and reassign cases from one court to another.<sup>32</sup> The NJC only retained a nominal supervisory role. The judges of the Council have very limited power and influence on actual decisions, their opinions and proposals can be ignored, their decisions are not binding. These changes in the institutional structure and the strong personal leadership under which the Office was set up met fierce criticism, focusing on the current system’s lack of judicial self-governance and issues relating to accountability (Venice Commission, 2012; Fleck, 2013). Critics raised alarms about the potential danger of political interference with independent judiciary, since the first President of the Office is the wife of a founding member of Fidesz (Badó, 2013).

Finally, the Fundamental Law excessively lowered the mandatory retirement age of judges (from 70 to 62 years), forcing some 270 judges into retirement. The new law met fierce

<sup>30</sup> Act CLXII of 2011.

<sup>31</sup> See <http://birosag.hu/en/information/hungarian-judicial-system>.

<sup>32</sup> The Fifth Amendment annulled Art 27(4) of the Fundamental Law, previously introduced by Art 14 of the Fourth Amendment.

criticism as it undermines the security of judicial tenure,<sup>33</sup> let alone the risk of “political capture” given the extraordinary power of the President of the NJO to fill in the vacant positions (IBAHRI, 2015:26-27).

On 26 March 2018, the first instance court ruled that the President of the NJO abused her power in declining the application of a judge for a senior judicial post.<sup>34</sup>

## Packing and weakening the Constitutional Court

Prior to the introduction of the Fundamental Law, in June 2010, the Fidesz-dominated Parliament amended the old Constitution in order to alter the procedure for electing members of the Constitutional Court. Nomination by the majority of all parties in the Parliament is no longer needed before election, the only requirement is an overall two-thirds parliamentary vote. In September 2011, the number of judges of the Court was increased from 11 to 15. As of now, all judges on the bench were elected after June 2010, each nominated by the governing parties.<sup>35</sup> Unlike ‘regular’ judges, members of the Constitutional Court may remain in their seats until the end of their 12-year term, their upper age limit has been abolished (Eötvös Károly Policy Institute et al, 2013b).

The Fundamental Law curtailed the review jurisdiction of the Constitutional Court over budgetary and tax issues. The Court may only review such issues in relation to ‘the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion’ or the rights related to Hungarian citizenship’, and do so only if the state debt exceeds half of the GDP.<sup>36</sup> The reasons for setting such criteria are, arguably, politically motivated: the Court has previously abolished tax and financial measures with reference to principles that are not in the list (Kovács and Tóth, 2011; Lembcke and Boulanger, 2012:283). Moreover, in March 2013, the Fourth Amendment annulled the entire case law prior to the entry into force of the Fundamental Law, and provided that the Court may review amendments to the Fundamental Law on procedural grounds only. This latter amendment was, arguably, necessary since the Court, a few months earlier, abolished a provision of the so-called “Transitional Provisions” of the Constitution that provided legal basis for a radical and highly controversial change in the structure and registration of churches in Hungary,<sup>37</sup> however, technically restored by the Fourth Amendment (Eötvös Károly Policy Institute et al, 2013a). Such restrictions of the Court’s competence received severe criticism, including that of László Sólyom, the former President of the Constitutional Court, who stated: “we are back from where the Court started in 1989.”<sup>38</sup>

<sup>33</sup> In *European Commission v Hungary* (C-286/12), the CJEU found the law discriminatory, and ruled that Hungary failed to fulfil obligations under Directive 2000/78/EC on equal treatment in employment and occupation.

<sup>34</sup> Budapest Beacon, ‘Court rules: Handó abused her power’ [Online] Available: <https://budapestbeacon.com/court-rules-hando-abused-her-power/>.

<sup>35</sup> The last election of four members to fill newly vacant positions due to retirement of former judges was in November 2016. Since the Fidesz-KDNP lost its two-thirds majority in February 2015, for the nomination they made alliance with LMP (Green Liberals).

<sup>36</sup> Art 37(4) of Fundamental Law.

<sup>37</sup> See p12 of this report and Constitutional Court Decision 45/2012. (XII. 29.).

<sup>38</sup> See, <https://vs.hu/kozelet/osszes/solyom-laszlo-mar-nem-az-orzaggyulessel-harcol-az-alkotmanybirosag-0221#s1>

## Rights protection

The Fundamental Law has been criticised for failing to properly guarantee fundamental human rights, on the basis of being both anti-egalitarian and lacking in explicit protection of minorities (Kovács, 2012). By changing the original “We the people” formula to “We the members of the Hungarian nation”, the Preamble implies an ethnic connotation. Besides being problematic in inter-state relations for a potential revisionist interpretation, it also excludes “nationalities living with us” (non-ethnic Hungarian citizens of Hungary) from the enactment of the Constitution (Venice Commission, 2011:para 40,149; Körtvélyesi, 2012). The Fundamental Law’s concept of human dignity fails to represent an inherent quality acknowledged for all human beings. In attributing constitutive role to Christianity, it is “loaded with religious and family values” whilst restricts women’s dignity, autonomy and privacy (Kis, 2012; Dupré, 2012). Since its birth, the *carved-in-granite* constitution has gone through a number of amendments, very few of which remained without comments condemning the new provisions for, *inter alia*, their incompatibility with EU law, criminalising homelessness, restricting the right to vote,<sup>39</sup> narrowing the notion of family, violating the freedom of religion, and undermining the rule of law.<sup>40</sup>

As of January 2012, the National Agency for Data Protection and Freedom of Information was established. The prior independent Data Protection Ombudsman was substituted by the head of the new authority, nominated by the Prime Minister and appointed by the President of the Republic.<sup>41</sup> The offices of the Commissioner for Citizens’ Rights, the Commissioner for National and Ethnic Minority Rights and the Commissioner for Future Generations have been merged into one single office of the Commissioner for Fundamental Rights,<sup>42</sup> who remained silent during the entire migration crisis.

The European Committee of Social Rights in its latest country report listed the following shortcomings of the Hungarian framework and issues of legislative non-conformity with the European Social Charter:<sup>43</sup>

<sup>39</sup> The criticised provisions of the Second Amendment that required preliminary registration for participation in national elections were later abolished by the Constitutional Court on procedural grounds (45/2012 (XII. 29.) AB.).

<sup>40</sup> European Parliament Report on the Situation of Fundamental Rights: standards and practices in Hungary, pursuant to the European Parliament of 16 February 2012, 2012/2130 (INI), Committee on Civil Liberties, Justice and Home Affairs, Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0229+0+DOC+PDF+V0//EN>; Eötvös Károly Policy Institute, HHC and the Hungarian Civil Liberties Union, Joint Opinion, Main concerns regarding the Fourth Amendment to the Fundamental Law of Hungary, 26 February 2013, Available at: [https://helsinki.hu/wp-content/uploads/Appendix\\_1\\_Main\\_concerns\\_regarding\\_the\\_4th\\_Amendment\\_to\\_the\\_Fundamental\\_Law\\_of\\_Hungary.pdf](https://helsinki.hu/wp-content/uploads/Appendix_1_Main_concerns_regarding_the_4th_Amendment_to_the_Fundamental_Law_of_Hungary.pdf); Venice Commission, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, Venice, 14-15 June 2013, Available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2013\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2013)012-e); European Commission, The European Commission reiterates its serious concerns over the Fourth Amendment to the Constitution of Hungary. Available at: [http://europa.eu/rapid/press-release\\_IP-13-327\\_en.htm](http://europa.eu/rapid/press-release_IP-13-327_en.htm).

<sup>41</sup> Concerning the independence of the data protection authority, in *European Commission v Hungary* (C-288/12) the CJEU found that Hungary failed to fulfil obligations under Directive 95/46/EC on the Protection of individuals with regard to the processing of personal data and on the free movement of such data.

<sup>42</sup> Art 15 and 16 of the Transnational Provisions to the Fundamental Law.

<sup>43</sup> Department of the European Social Charter, Directorate General of Human Rights and the Rule of Law, Hungary and the European Social Charter, January 2018. Available at: <https://rm.coe.int/16805ac0a9>.



- Insufficient access to social services for lawfully resident nationals of all State Parties;
- Inadequate supply of housing for vulnerable families; evicted and Roma families can be left homeless;
- Roma children are subject to segregation in the educational field;
- Inadequate level of social assistance paid to single person without resources including elderly persons;
- Inadequate minimum amount of old-age pensions, jobseeker's aid/allowance, rehabilitation and invalidity benefits;
- Workers are not protected by occupational health and safety regulations;
- Insufficient measures taken to reduce the maternal mortality;
- Persons with disabilities are not guaranteed an effective and equal access to employment and mainstream training.<sup>44</sup>

## Constitutional entrenchment of the principle of asylum and case law

As set out in the Fundamental Law: “No one shall be expelled or extradited to a State where he or she would be in danger of being sentenced to death, being tortured or being subjected to other inhuman treatment or punishment”.<sup>45</sup> As McBride points out, this provision neither includes the risk of being subjected to treatment that is degrading,<sup>46</sup> nor does it provide protection against expulsion where there is a risk of an unjustified deprivation of liberty, and unfair trial. All of which have been recognized by the ECtHR as requiring a High Contracting Party not to expose an individual to such a risk through his or her deportation or expulsion (McBride, 2012). Moreover, the Fundamental Law provides that noncitizens shall be granted asylum only if another country does not provide protection for them.<sup>47</sup>

In June 2016, the Parliament (Fidesz-KDNP and the far-right Jobbik party) introduced the Sixth Amendment to the Fundamental Law.<sup>48</sup> The new provision enables the Parliament, at the initiative of the Government, to declare a “state of terror threat” in the event of a “significant and direct threat of a terrorist attack” with a two-thirds majority vote of the members present. The Government may introduce extraordinary measures that derogate from or suspend regular procedures prescribed by law governing matters of public administration, defence and law-enforcement forces, security services, as well as procedures laid down in cardinal Acts. The exceptional measures introduced and carried out during ‘state of terrorist threat’ neither require parliamentary oversight nor judicial authorisation. The adopted provision only requires

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<sup>44</sup> Further information on the situation of non-conformity is available at: [http://hudoc.esc.coe.int/eng#/{\"fulltext\":\[\"hungary\"\],\"ESCDcType\":\[\"FOND\",\"Conclusion\",\"Ob\"\]}](http://hudoc.esc.coe.int/eng#/{\).

<sup>45</sup> Art XIV(2) of The Fundamental Law of Hungary.

<sup>46</sup> See Art 3 of ECHR.

<sup>47</sup> Art XIV(3) of The Fundamental Law of Hungary.

<sup>48</sup> Art 51/A of the Fundamental Law.

the Government to keep the President of the Republic and the designated parliamentary committees “informed” (Kovács, 2016).

In addition, there is the complete lack of definition provided for what constitutes “threat of terrorist attack” (Amnesty International, 2016a). A couple of weeks before the amendment proposal was released, the Minister of the Prime Minister’s Office, nevertheless, referred to the clashes occurred at Röszke border crossing<sup>49</sup> in 2015 as a *quasi* “terror threat situation” (Kovács, 2016). In fact, one of the participants was arrested and sentenced to 10 years imprisonment for terrorism on 30 November 2016 (Amnesty International, 2016b).

In October 2016, Hungary held a referendum whether to comply with the European Council decision 2015/1601 of 22 September 2015 on the mandatory relocation of refugees. Despite the Government ‘NO’-campaign, the referendum was invalid due to insufficient turnout (Halmai, 2016). Shortly after the failed referendum, the Minister of Justice submitted an amendment proposal (Seventh Amendment) to the Fundamental Law, according to which no “foreign population” could be settled in Hungary. Although the draft proposal was rejected, it was a clear attempt of the Government to circumvent and derogate from obligations under EU law, with reference to Hungary’s “constitutional identity” (Nagy-Nádasi and Kőhalmi, 2017; Halmai, 2017).

Regarding the asylum status determination procedure, appeals against rejection are dealt with at the administrative and labour courts by single judges, who are typically not asylum specialists (ECRE, 2017:22). The short notice deadlines<sup>50</sup> provided for submitting a judicial review requests, let alone during “state of crisis due to mass migration”, arguably constitute serious shortcomings of administrative justice. Moreover, the court’s right to change the decision of the Immigration and Asylum Office (IAO) has been revoked in September 2015, and the decisions passed by the court cannot be challenged by way of a second appeal. Although the law foresees the possibility of constitutional review of administrative matters in general, the effectiveness of the complaint mechanism is questionable. The Constitutional Court’s case law shows that very few appeals are admitted and adjudicated on the merits (Gárdos-Orosz and Temesi, 2017).

As the Venice Commission notes, neither the judges of the immigration proceedings, nor the Commissioner for Fundamental Rights (the Ombudsman) submitted complaints to challenge the constitutionality of the new measures introduced in the peak period of the refugee crisis that were at odds with international human rights obligations<sup>51</sup> (Venice Commission, 2016). There were only two cases before the Constitutional Court. The Fundamental Law radically restricted the range of actors who could initiate a constitutional review. Due to the abolition of the institution of *actio popularis*, NGOs and advocacy groups are no longer entitled to submit *ex post* norm control requests (Arato et al, 2012:477).

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<sup>49</sup> The authorities sealed Röszke border crossing on 16 September 2015 leaving hundreds of asylum seekers stranded in the border zone. 11 migrants (‘the Röszke 11’) were arrested during clashes with the riot police and accused of illegal border crossing and participating in mass-riot, following a spontaneous protest against the blockade.

<sup>50</sup> See Section 4) of this report.

<sup>51</sup> See Section 4) of this report.

The first case was submitted by multiple petitioners requesting the Court to declare the referendum against the compulsory relocation of refugees unconstitutional. One of the petitioners' main concerns was that referendums, as set out in the Constitution, may only be held about questions that fall within the scope of the Parliament's power,<sup>52</sup> while the subject of the upcoming referendum related to EU common policy. The Court in its decision rejected all petitions claiming lack of jurisdiction to examine whether the question of the referendum relates to a matter within the authority of the Parliament.<sup>53</sup>

The second was filed by the Ombudsman after the failed amendment proposal to the Fundamental Law, in which he asked for an abstract interpretation in relation to the Council decision on the relocation quotas. The Commissioner did not explicitly ask the Court to review the lawfulness of the Decision, but of actions within the EU legal framework that "facilitate the relocation of a large group of foreigners legally staying in one of the Member States without their expressed or implied consent and without personalised and objective criteria applied during their selection" (Drinóczi, 2016). Although the Court in its decision<sup>54</sup> declared the question out of its jurisdiction, it "rubber stamped the constitutional identity defence of the Orbán-government" by ruling that the Constitutional Court has the power to override EU law if it violates Hungary's sovereignty or constitutional identity rooted in its "historical constitution" (Halmai, 2017). The Government, to date, has failed to comply with the Council Decision which eventually resulted in an infringement procedure against Hungary in May 2017.<sup>55</sup>

As the Venice Commission observed, the way the Constitutional Court protects rights is 'Janus-faced' since both the petition of the Ombudsman and the referendum are in conflict with, if not specifically aimed to undermine, the efforts made by the EU to protect the rights of asylum seekers (Venice Commission, 2016).

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<sup>52</sup> Art 8(2) of Fundamental Law.

<sup>53</sup> 12/2016. (VI. 22.) AB.

<sup>54</sup> 22/2016. (XII. 6.) AB.

<sup>55</sup> Later in the year, the Court of Justice of the European Union turned down Hungary's action against the relocation scheme - See Court of Justice of the European Union, 'The Court dismisses the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers', Press Release No 91/17, 6 September 2017, Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf>. On the infringement procedure see European Commission, 'Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland', IP/17/1607, 14 June 2017, Available at: [http://europa.eu/rapid/press-release\\_IP-17-1607\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1607_en.htm);



## 4. The relevant legislative and institutional framework in the field of migration and asylum<sup>56</sup>

### Legislative framework

The national legislation alignment with EU law started in early 2000s (Gödri, 2015). During the pre-accession process the main domestic rules on migration were harmonised with EU legal norms. Hungary entered the EU in 2004, and developed a four-tier immigration system in line with all the relevant EU instruments by the adoption of the Schengen *acquis* in 2007 (Gödri, 2015; Melegh, 2016). Act I of 2007 on the Entry and Residence of Persons with the Right of Free Movement and Residence sanctions the situation of EEA citizens, Act II of 2007 that of third-country nationals, and Act LXXX of 2007 sets the rules for asylum. Finally, Act LV of 1993 on Citizenship deals with the naturalisation of foreign citizens with ethnic ties to Hungary, stateless persons and recognised refugees.<sup>57</sup> The rules of implementation of these Acts are laid down in the corresponding government decrees. After 2010, the policy concerning asylum seekers and beneficiaries of international protection has switched from permissive to rather restrictive mode, and Hungary mainly adopted the stricter rules of the Common European Asylum System (Ceccorulli et al, 2017); the detention of asylum seekers, for example, was introduced in 2013.<sup>58</sup>

The Hungarian framework on immigration and asylum is a centralised system at the national level concerning both legislative and institutional design, local authorities play no role in the process (Ceccorulli et al, 2017).

### Institutional framework

In Hungary it is the Minister of Interior who is responsible for policy making in the field of immigration and asylum, as well as for related EU matters. He works in cooperation with other ministries in charge of relevant issues, such as the Minister for National Economy (work permit issuance), Minister of Human Resources (education of migrant children) and the Minister of Foreign Affairs (co-elaboration of migration policy).<sup>59</sup> Under the oversight of Ministry of Interior, Act XXXIX of 2001 established the Office of Immigration and Nationality (OIN), now Immigration and Asylum Office (IAO), as the only competent authority dealing with administrative duties related to visa, residence permits, asylum, and citizenship.<sup>60</sup> The IAO is also in charge of running open reception facilities and closed detention centres for asylum seekers, and it works in close partnership with the Police, military and civil security services in migration management. The Police have responsibility for border control, removal-, return

<sup>56</sup> The country reports published by ECRE (2017, 2018), that were written by the Hungarian Helsinki Committee, provide extensive and detailed information on the legislative and institutional framework.

<sup>57</sup> The already mentioned simplified naturalisation process was introduced to the 1993 Act by an amendment of Act XLIV of 2010.

<sup>58</sup> Detention of asylum seekers as a preventive measure had been in use prior to 2013, the ECtHR was, however, not satisfied with the lawfulness of these practices – see *Lokpo and Touré v. Hungary*; *Abdelhakim v. Hungary*; *Said v. Hungary*; *Nabil and Others v. Hungary*.

<sup>59</sup> European Commission Migration and Home Affairs, Annual Report 2016 on Migration and Asylum Policy (Part 2) in Hungary, Available at: Framework [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/13a\\_hungary\\_apr\\_part2\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/13a_hungary_apr_part2_en.pdf).

<sup>60</sup> As of 01 January 2017, citizenship matters have been transferred to the Prime Minister's Office and the Government Office of the Capital.

procedures and monitoring detention in shelters.<sup>61</sup> According to its website, the IAO maintains “an outstanding relationship with the Regional Representation of the UNHCR”.<sup>62</sup> Up until October 2017, the IAO had cooperation agreements with NGOs allowing oversight of the sites run by IAO, which was later terminated.<sup>63</sup>

## Policy

The UNHCR in its feedback on the Government Migration Strategy for 2014-2020 expressed concerns about multiple aspects of the draft and called on the Government to adhere to a proactive rather than defensive communication and policy plan (UNHCR, 2013). The comments of the UNHCR, *inter alia*, reflect on the complete lack of ‘Best Interest Determination Procedure’, victim protection of trafficked persons, an institutionalised system of resettlement and a separate ‘Integration Strategy’, and an ‘Exit Strategy’ concerning protected individuals whose entitlement to stay in the reception facilities expires. The UNHCR furthermore underlined the shortcomings of detention monitoring, and criticised the ‘weak’ relationship with NGOs, as well as the lack of explicit reference in the draft for minimum standards of treatment. The Government, however, did not only disregard the UNHCR recommendations, but from 2015 onward, in shifting away from the already positive features of the migration policy, launched a crackdown on immigration.

This began in February 2015, with an anti-immigrant billboard campaign with messages, such as “If you come to Hungary, you have to respect our culture” or “If you come to Hungary, you can’t take the jobs of the Hungarian”. It was followed by the National Consultation on Immigration and Terrorism, a questionnaire sent to every household, in which asylum seekers were portrayed as “economic migrants”, a threat to the welfare system, and included statements suggesting a link between migration and terrorism. The objective of national consultation as policy tool is to gain legitimacy of policy implementations, demonstrating that decisions are made to reflect the majoritarian will.<sup>64</sup>

The campaign was followed by a plethora of law amendments that systematically transformed the framework, which has now arguably become, concerning asylum seekers, a caricature of the 1951 Geneva Convention. The overall restrictive nature of the new developments and the clear negligence of best international practice triggered fierce objection by NGOs, such as the Amnesty International, and the Council of Europe at the very early stages (HHC, 2015a; Amnesty International, 2015; ECRE, 2015; Council of Europe Commissioner for Human Rights, 2015). The measures, however, showed increasing derogation from EU law. The most controversial law amendments relevant to migration and asylum are listed below in chronological order.

<sup>61</sup> For further information on institutional framework, organisational structure, see Annex II.

<sup>62</sup> See IAO’s website – Available at: [http://www.bmbah.hu/index.php?option=com\\_k2&view=item&layout=item&id=391&Itemid=666&lang=en](http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=391&Itemid=666&lang=en), Accessed on: 21 February 2018.

<sup>63</sup> See HHC, Authorities Terminated Cooperation Agreements with the HHC, Available at: <https://www.helsinki.hu/en/authorities-terminated-cooperation-agreements-with-the-hhc/>.

<sup>64</sup> For national consultations, referendum questions and billboards see Annex IV.

## Amendments 2015-2017

### 2015

Act CVI of 2015 gave authorisation to the Government to issue a decree establishing a list of safe third countries including all countries along the Western Balkans route.<sup>65</sup>

The safe third country concept was introduced into Hungarian law by an amendment to the Asylum Act in November 2010.<sup>66</sup> The country in respect to which Hungary applied the safe third country concept was mainly Serbia (UNHCR, 2016a), though the Hungarian Helsinki Committee (HHC) warned that Serbia cannot be regarded as safe third country, *inter alia* due to its poor recognition rate (HHC, 2011). In August 2012 the UNHCR reaffirmed this view by calling for the suspension of returns to Serbia (UNHCR, 2012a). The Administrative and Labour Law Panel of the Supreme Court (Kúria) also held that countries whose asylum system is 'overburdened' cannot be considered as safe third country.<sup>67</sup> Hungary, however, continued to apply this practice, resulting in the UNHCR, to avoid chain-*refoulement*, in October 2012 to call on states to refrain from transferring asylum-seekers back to Hungary (UNHCR, 2012b). When Hungary stopped applying the safe third country concept, UNHCR reversed this position. Notwithstanding these warnings, 30 June 2015 the Hungarian Parliament amended the Asylum Act, which provided for the Government to issue a decree establishing the above list of safe third countries.<sup>68</sup>

Act CXXVII of 2015 introduced the accelerated procedure, where submission deadlines are curtailed and suspensive effect of appeals is denied (Nagy, 2016a).<sup>69</sup> The Act provides that the asylum application is inadmissible if the applicant stayed/travelled through the territory of a safe third country and would have had the opportunity to apply for effective protection, or has relatives in that country and may enter its territory.<sup>70</sup> In the event of rejection on this basis, the applicant may - no later than within three days - make a declaration concerning why in her or his case that country in question cannot be considered as safe.<sup>71</sup> Originally, the judicial review request against the rejection decision had to be submitted within 3 days in the first period,<sup>72</sup> in which new facts or new circumstances could not be referred to.<sup>73</sup> The submission of judicial review request, similarly to accelerated procedures, had no suspensive effect on the enforcement of the decision.<sup>74</sup>

<sup>65</sup> Government Decree no 191/2015 (VII. 21.) on Safe Countries of Origin and Safe Third Countries. Available at: <http://www.refworld.org/pdfid/55ca02c74.pdf>.

<sup>66</sup> For critical analysis see Gyollai D and Amatrudo A (2018) Controlling irregular migration: International human rights standards and the Hungarian legal framework, *European Journal of Criminology*, (forthcoming).

<sup>67</sup> 2/2012 (XII. 10.) KMK Opinion, Available at: <http://www.refworld.org/docid/50ee7a732.html>.

<sup>68</sup> Art 93(2) of Asylum Act, as amended by Act CVI of 2015.

<sup>69</sup> See 'Accelerated procedure' in this report.

<sup>70</sup> Art 51(4) of Asylum Act, as amended by Act CXXVII of 2015.

<sup>71</sup> Art 51(11) of Asylum Act, as amended by Act CXXVII of 2015.

<sup>72</sup> Former Art 53(3) of Asylum Act, later amended by Act CXL of 2015 – now 7 days.

<sup>73</sup> Former Art 53(2a) of Asylum Act, as amended by Act CXL of 2015, and abolished by Act CXLIII of 2017.

<sup>74</sup> Former Art 53(2) of Asylum Act, as amended by Act CXXVII of 2015, and amended by Act CXLIII of 2017 – Judicial review request submitted against rejection decision made on this ground, as of 01 January 2018, has suspensive effect. As general rule, appeals against inadmissibility decision otherwise have still no suspensive effect, see Art 53(6).

The Act provides for the establishment of border closure (fence) on the border.<sup>75</sup> By mid-September, a 175 km long barbed wire fence had accordingly been constructed on the border between Hungary and Serbia, which was later extended to the Croatian border section (ECRE, 2015).

Act CXL of 2015 provides for the establishment of ‘transit zones’ at the borders, and refers to asylum-seekers being ‘temporarily accommodated’ in the zones for the purpose of immigration and refugee status determination process.<sup>76</sup> The Act accordingly introduced a simplified ‘border procedure’, which, in practice, represents a very limited access to the refugee status determination procedure.<sup>77</sup>

The Act provides for the declaration of ‘crisis situation caused by mass immigration’, if, *inter alia*, any circumstance related to the migration situation directly endanger public security, public order or public health.<sup>78</sup> The Government declared crisis situations in two Southern counties on 15 September 2015,<sup>79</sup> which was expanded 9 March 2016 covering the whole territory of the country.<sup>80</sup> The crisis situation has since been extended several times, and is currently in effect until 6 September 2018.<sup>81</sup> During this newly introduced state of emergency, by the explicit order of the minister, the army may be deployed in the registration of asylum applications; the police has been assigned a *quasi*-unfettered power in the management of mass migration.<sup>82</sup>

The following offences have been introduced to the Criminal Code, punishable by 3 to 10 years’ imprisonment respectively: unauthorised crossing of the border closure,<sup>83</sup> damaging the border closure,<sup>84</sup> and obstruction of the construction works related to the border closure.<sup>85</sup> Individually, or in combination with other sentences, expulsion of the convicted would be mandatory.<sup>86</sup>

A new chapter of the Act on Criminal Proceedings provides for the procedure to be followed in case of the new criminal offences listed above.<sup>87</sup> The defendant can be brought to trial within 15 days after his or her interrogation, or within 8 days if caught *in flagrante*.<sup>88</sup> During the ‘crisis situation caused by mass immigration’ these criminal proceedings are to be

<sup>75</sup> Art 5 of Act LXXXIX of 2007 on the State Border, as amended by Act CXXVII of 2015.

<sup>76</sup> Art 15/A of Act LXXXIX of 2007, as amended by Act CXL of 2015.

<sup>77</sup> See ‘Border procedure’ in this report.

<sup>78</sup> Art 80/A of Asylum Act, as amended by Act CXL of 2015.

<sup>79</sup> Government Decree 269/2015. (IX. 15.) announcing crisis situation caused by mass migration. Available at: <http://www.refworld.org/docid/55f90f614.html>.

<sup>80</sup> Government Decree 41/2016. (III. 9.) Available at: [https://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=a1600041.kor](https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a1600041.kor).

<sup>81</sup> Government Decree 21/2018. (II. 16.) Available at: [https://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A1800021.KOR&timeshift=ffffff4&txtreferer=00000001.TXT](https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1800021.KOR&timeshift=ffffff4&txtreferer=00000001.TXT).

<sup>82</sup> Art 80/G of Asylum Act and Act CXLII of 2015 on the Amendments of Certain Acts Related to the More Efficient Protection of Hungary’s Border and the Management of Mass Migration.

<sup>83</sup> Art 352/A of Act C of 2012 on the Criminal Code, as amended by Act CXL of 2015.

<sup>84</sup> Art 352/B of Act C of 2012 on the Criminal Code, as amended by Act CXL of 2015.

<sup>85</sup> Art 352/C of Act C of 2012 on the Criminal Code, as amended by Act CXL of 2015.

<sup>86</sup> Art 60(2a) of Act C of 2012 on the Criminal Code, as amended by Act CXL of 2015.

<sup>87</sup> Chap XXVI/A of Act XIX of 1998 on Criminal Proceedings, as amended by Act CXL of 2015.

<sup>88</sup> Art 542/N of Act XIX of 1998, as amended by Act CXL of 2015.

conducted prior to all other cases.<sup>89</sup> There is no requirement to provide a written translation of the indictment and of the judgement to the defendant who does not speak the Hungarian language.<sup>90</sup> Whilst the amendments also provide for mandatory participation of a defence lawyer, in practice, most lawyers appointed by the court only had met their clients immediately prior to the hearings, where the indictment was generally presented only orally, without having been served in writing beforehand (UNHCR, 2016a:21; HHC, 2015c).<sup>91</sup>

## 2016

Act XXXIX of 2016 reduced the maximum length of stay of people granted international protection in reception centres from 60 to 30 days of the date of the decision on recognition.<sup>92</sup> In practice, this means they are required to leave the centre before being issued an ID card (ECRE, 2018:106). The entitlement of refugees and beneficiaries of subsidiary protection to basic healthcare was also reduced from 1 year to 6 months.<sup>93</sup> The Act provides for the mandatory revision of the existence of criteria for recognition of beneficiaries of subsidiary protection and refugees at least every 3 years following recognition.<sup>94</sup>

Act XCIV of 2016 provides for the police to ‘escort’ migrants illegally present in the territory to the other side of the border closure, insofar as they are apprehended within 8 km of the border.<sup>95</sup> Asylum seekers who experienced such push backs and were later interviewed by Human Rights Watch, providing accounts of police violence and cruelty: violent pushbacks, beatings, the setting of dogs on asylum seekers (Human Rights Watch, 2016).

Before 2014, recognised refugees and beneficiaries of subsidiary protection were transferred from the reception facilities to a “pre-integration reception centre” in Bicske. The initial length of stay was six months, which could be extended once for another six-month period. Persons with tolerated stay could stay the reception facility in Debrecen, or be placed in the community shelter in Balassagyarmat (ECRE, 2013:35). As of January 2014, the integration system shifted from camp-based to community-based integration. Integration support was provided to a person granted international protection for 2 years following recognition. The amount of integration support was set in an integration contract and the support was provided by the family care service of the local council. A social worker was appointed supporting them throughout the integration process (ECRE, 2018:106-107). In 2016, the Government significantly decreased the financial support provided to asylum seekers, including the monthly cash allowance and the school enrolment benefit for minor asylum seekers.<sup>96</sup> Moreover, the new decree abolished all previous integration benefits, and

<sup>89</sup> Art 542/E of Act XIX of 1998, as amended by Act CXL of 2015.

<sup>90</sup> Art 542/K of Act XIX of 1998, as amended by Act CXL of 2015.

<sup>91</sup> For critical analysis see Gyollai D and Amatrudo A (2018) Controlling irregular migration: International human rights standards and the Hungarian legal framework, *European Journal of Criminology*, (forthcoming).

<sup>92</sup> Art 32(1) of Asylum Act, as amended by Act XXXIX of 2016 on the Amendment of Certain Acts Relating to Migration and Other Relevant Acts.

<sup>93</sup> Art 32(1a) of Asylum Act, as amended by Act XXXIX of 2016.

<sup>94</sup> Art 7/A and 14 of Asylum Act, as amended by Act XXXIX of 2016.

<sup>95</sup> Art 5(1a) of Act LXXXIX of 2007, as amended by Act XCIV of 2016.

<sup>96</sup> Former Art 22 and 30 Government Decree 301/2007 (XI. 9.) on the implementation of Act LXXX of 2007 on Asylum, repelled by Art 8 of Government Decree 62/2016 (III. 31.) on the Amendments of Certain Government Decrees Relating to Migration and Asylum.



the integration contract for asylum seekers who are granted international protection,<sup>97</sup> meaning that upon exit of the reception facilities they cannot rely on any institutionalised support other than that of NGOs.

## 2017

Act XX of 2017 provides for the extension of the '8-km Rule' to the entire territory of Hungary during 'crisis situation caused by mass immigration'.<sup>98</sup> The grounds for declaration of such state of crisis have been broadened,<sup>99</sup> and so have the discretion of the authorities in this regard.<sup>100</sup> During the state of crisis, asylum application can only be submitted in person in the transit zone.<sup>101</sup> Third country nationals, who are otherwise accommodated in open reception facilities or detained in immigration or asylum detention centres, may be allocated and transferred to the transit zone,<sup>102</sup> including unaccompanied minors between the age of 14 and 18 years; if new applicants, even without guardian assigned.<sup>103</sup> The HHC successfully requested interim measures by ECtHR to halt, among others, eight unaccompanied minor asylum seekers to the transit zone (HHC, 2017a). The Act eliminates the maximum time cap of 4 weeks and provides for indefinite placement (*de facto* detention)<sup>104</sup> of third country nationals in the transit zone.<sup>105</sup> Unless granted protection, the expenses of the stay are borne by the third-country national.<sup>106</sup> The deadline for submitting judicial review request against inadmissibility decision and against rejection in accelerated procedure is shortened to 3 days.<sup>107</sup>

The latest amendment package (Act CXLIII of 2017) amending 16 related Acts came into force 01 January 2018. The amending Act mainly contains technical changes that were necessary due to the coming into force of Act CL of 2016 on General Public Administration Procedures, leaving the above issues unresolved.

The Government's opposition to and non-compliance with EU law have not remained without consequence. In December 2015, and then in May 2017 the European Commission opened infringement procedure against Hungary claiming the new rules were in breach of the recast Asylum Procedures Directive (2013/32/EU), the Return Directive (2008/115/EC), the Reception Conditions Directive (2013/33/EU), the Directive on the right to interpretation and

<sup>97</sup> Former Art 37 of Government Decree 301/2007 (XI. 9.), abolished by Art 8 of Government Decree 62/2016 (III. 31.).

<sup>98</sup> Art 5(1b) of Act LXXXIX of 2007, as amended by Act XX of 2017.

<sup>99</sup> Art 80/A(c) of Asylum Act, as amended by Act XX of 2017.

<sup>100</sup> Art 80/H-I of Asylum Act, as amended by Act XX of 2017.

<sup>101</sup> Art 80/J (1) of Asylum Act, as amended by Act XX of 2017.

<sup>102</sup> Art 62 (3a) and Art 110 (20) of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals; Art 92/C of Asylum Act, as amended by Act XX of 2017.

<sup>103</sup> Art 80/H and Art 92/C of Asylum Act, Art 62 (3a) and Art 110 (20) of Act II of 2007, read in conjunction with Art 4 (1)(c) of Act XXXI of 1997 on the Protection of Children and the Administration of Guardianship, as amended by Act XX of 2017.

<sup>104</sup> See *Ilias and Ahmed v Hungary*, ECtHR, 14 March 2017, App no 47287/15.

<sup>105</sup> Art 15/A (2) and (2a) of Act LXXXIX of 2007, as amended by Act XX of 2017.

<sup>106</sup> Art 62 (4) of Act II of 2007, as amended by Act XX of 2017 – not applied in practice.

<sup>107</sup> Art 80/K of Asylum Act, as amended by Act XX of 2017.

translation in criminal proceedings (2010/64/EU), and ‘several provisions of the Charter of Fundamental Rights of the EU’.<sup>108</sup>

## “Stop Brussels” and “Stop Soros” – NGOs under attack

One month prior to the infringement procedure in May, the Government, launched another national consultation entitled “Stop Brussels” focusing on various topics. The questionnaire included statements such as, “Brussels wants to force Hungary to let in illegal immigrants”, “Illegal immigrants heading to Hungary are encouraged to illegal acts by not just human traffickers but also by some international organizations” or “More and more organizations supported from abroad operate in Hungary with the aim to interfere with Hungarian internal affairs in a non-transparent manner”.<sup>109</sup>

Instead of supporting, at the very least, making use of the expertise, enthusiasm and sources provided by the NGOs in Hungary during the migration crisis, the Government, in fact, launched an offensive against civil organizations as the “enemies of the state” (Nagy, 2016a; Timmer, 2017). The explanation given by the Government is as follows: the migration crisis is attributable to and stoked by the Hungarian-American investor and philanthropist George Soros, whose plan is to “settle one million migrants in Europe”. NGOs providing humanitarian aid to asylum seekers only serve the execution of this so-called “Soros Plan” acting on behalf of Mr Soros as his *agents*. The “Stop Brussels” campaign was followed by, yet again, another consultation; this time entitled “About the Soros-Plan: Let us not leave it without comment!”. The summary of the questionnaire in brief: Soros along with EU leaders want to dismantle the fence and open borders for immigrants Africa and Middle-East. In order “to enhance the integration of illegal immigrants”, he is aiming “to push the native population’s language and culture into the background”. It singled out the Hungarian Helsinki Committee and the Amnesty International as Soros-founded organizations defending illegal immigrants.<sup>110</sup> The Government has spent 7.2 billion forints (€23 million) in total on the anti-EU and anti-Soros campaigns to support and spread its views.<sup>111</sup> Moreover, in January 2018, the Government outlined a law proposal including mandatory registration of all NGOs that “support migration” and 25% tax imposition on foreign donation of such NGOs.<sup>112</sup> The new bill would restrict movements of activists in preventing them from approaching the borders, activities of advocacy, recruitment of volunteers, production of information booklets. NGOs continuing such activities without the approval of the Interior Minister would face heavy fines, and potential total ban by withdrawal of their tax number. The draft proposal has now been

<sup>108</sup> European Commission, ‘Commission opens infringement procedure against Hungary concerning its asylum law’, IP/15/6228, 10 December 2015, Available at: <http://europa.eu/rapid/press-release-IP-15-6228-en.htm>; European Commission, ‘Commission follows up on infringement procedure against Hungary concerning its asylum law, IP/17/1285, 17 May 2017, Available at: <http://europa.eu/rapid/press-release-IP-17-1285-en.htm>.

<sup>109</sup> European Commission, Facts Matter: European Commission responds to Hungarian National Consultation, Available at: [https://ec.europa.eu/commission/sites/beta-political/files/commission-answers-stop-brussels-consultation\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/commission-answers-stop-brussels-consultation_en.pdf).

<sup>110</sup> The questionnaire in English available at: <https://theorangefiles.hu/?s=stop+soros&submit=Search>.

<sup>111</sup> EUobserver, ‘Orban stokes up his voters with anti-Soros consultation’, 22 November 2017, Available at: <https://euobserver.com/beyond-brussels/139965>.

<sup>112</sup> See draft proposal, Available at: <https://www.helsinki.hu/wp-content/uploads/Stop-Soros-package-Bills-T19776-T19774-T19775.pdf>.



submitted to the Parliament and will be debated after the election in April.<sup>113</sup> Although unprecedented in scope, the draft proposal did not come as a surprise. In October 2017, the Prime Minister called on national security services to investigate NGOs of the “Soros Empire” that criticise his policies.<sup>114</sup> Earlier, in June, the Parliament already passed a law on the mandatory registration and transparency of foreign-funded NGOs.<sup>115</sup> Interfering with the right to freedom of association, the right to protection of private life and of personal data, the law met fierce criticism (Venice Commission, 2017), and eventually led to, yet again, another infringement procedure.<sup>116</sup> In December 2017 the case was referred to the Court of Justice of European Union.

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<sup>113</sup> Reuters, ‘Hungary submits anti-immigration ‘Stop Soros’ bill to parliament’, 14 February 2018, Available at: <https://uk.reuters.com/article/uk-hungary-soros-law/hungary-submits-anti-immigration-stop-soros-bill-to-parliament-idUKKCN1FY1O0>.

<sup>114</sup> Financial Times, ‘Orban calls for Hungarian spy agencies to probe ‘Soros empire’ of NGOs’, 27 October 2017, Available at: <https://www.ft.com/content/e3888348-bb23-11e7-9bfb-4a9c83ffa852>.

<sup>115</sup> Act LXXVI of 2017 on the Transparency of Organisations Receiving Foreign Funds, Available at: <https://www.helsinki.hu/wp-content/uploads/LexNGO-adopted-text-unofficial-ENG-14June2017.pdf>.

<sup>116</sup> European Commission, Hungary: Commission launches infringement procedure for law on foreign-funded NGOs, Brussels, 13 July 2017, Available at: [http://europa.eu/rapid/press-release\\_IP-17-1982\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1982_en.htm).

## 5. The legal status of foreigners<sup>117</sup>

### Asylum applicants

There is no time-limit or restrictions prescribed by law for submitting an asylum application. The application shall be submitted to the refugee authority in person.<sup>118</sup> If the asylum application was submitted in immigration, criminal, or misdemeanour procedure, the proceeding authority shall refer the applicant to the refugee authority with no delay.<sup>119</sup>

Concerning individuals, however, who were prosecuted for unauthorised crossing of the border fence<sup>120</sup> and applied for asylum during the criminal trial, as witnessed by the UNHCR, applications for the stay of criminal proceedings referring to the non-penalisation principle of the 1951 Convention were dismissed on the grounds that eligibility for international protection was not a relevant issue to criminal liability. The judge argued, *inter alia*, that the defendant did not contact the authorities immediately after entering the territory; he presented an asylum application at the court three days after being apprehended. The applicants were referred to the IAO only after being convicted and sentenced to expulsion (UNHCR, 2016a:23). While the asylum application has a suspensive effect, and the law foresees the possibility to order a stay of enforcement of the expulsion if the individual in question is entitled to international protection,<sup>121</sup> the stay order does not annul the sentence, never mind the conviction.

### Access to the territory

Under the '8-km Rule' that came into force in July 2016 and its expansion in March 2017,<sup>122</sup> the police automatically push back potential asylum seekers to the external side of the border fence. As a consequence of the measure, between 5 July 2016 and 31 August 2017, 14,438 irregular migrants were pushed back from Hungarian territory, either towards Serbia or Croatia, without registration or allowing them to submit an asylum application (HHC, 2017c).

As of 28 March 2017, transit zones have been the only access to the territory for asylum seekers. There are two transit zones along the Serbian border located in Tompa and Röske, and two along the Croatian section in Beremend and Letenye.<sup>123</sup> The zones comprise of containers that serve as accommodation for asylum seekers as well as place for the refugee status determination process.<sup>124</sup> The process starts with recording new arrival and clarifying the route taken by the applicant, who is then handed over to an immigration officer (Nagy, 2015). The identification process comprises document-, body- and luggage check, registration of personal data, provision of information on the procedure, taking photograph and sending

<sup>117</sup> The country reports published by ECRE (2017, 2018), that were written by the Hungarian Helsinki Committee, provide extensive and detailed information on the legal status of asylum seekers and beneficiaries of international protection.

<sup>118</sup> Art 35(1)-(2) of Asylum Act.

<sup>119</sup> Art 64(2)-(3) of Government Decree 301/2007. (XI. 9.).

<sup>120</sup> See '2015-2017 Amendments' in this report.

<sup>121</sup> Art 301(6) of Act CCXL of 2013 on the Execution of Criminal Punishments and Measures, read in conjunction with Art 51-52 of Act II of 2007.

<sup>122</sup> See '2015-2017 Amendments' in this report.

<sup>123</sup> Transit zones at Baranya and Letenye have never been visited by asylum seekers.

<sup>124</sup> See 'Border procedure' in this report.

fingerprints to AFIS (Automated Fingerprint Identification System) and the EURODAC (EASO, 2015).<sup>125</sup>

Although the fence along with other deterrence measures have successfully diverted the Western Balkans route towards Croatia, the Hungarian-Serbian border section remained one of the major entry points to Western Europe (ECRE, 2017:16).

Between 15 and 19 September 2015, thousands of asylum seekers arrived at Röszke, but only 352 people were allowed to enter the transit zone. Many of them left towards Croatia after waiting days on the other side of the fence without adequate care in a so-called 'pre-transit zone' (UNHCR, 2016a:11). The processing capacity of each zone was said to be 100 people per day, which was later reduced to 20-30, and as of 2 November 2015, only 10 people were let in, and on working days only (ECRE, 2017:16). As of 23 January 2018, only 1 person is let in at each zone (ECRE, 2018:11). The conditions in the pre-transit zones were reported as appalling. As described by HHC (2016) and the UNHCR (2016b) asylum seekers were waiting for entry in tents made of blankets distributed by UNHCR, while others sat amidst rubbish. Approximately one-third of the people waiting were children, many infants, some still breastfeeding. Families with small children and usually unaccompanied minors enjoyed priority over single men in terms of admission. Some single men had to wait for over 20 days without toilets and without being able to take a shower. While UNHCR distributed food packages every day, on at least one documented occasion the authorities prevented access to the volunteers of Oltalom and Migszol (Hungarian NGOs) to deliver food for those waiting in the pre-transit zone at Röszke.<sup>126</sup>

In Autumn 2016, the Serbian authorities put an end to the practice of waiting in pre-transit zones. Asylum seekers are now placed in temporary reception centres in Serbia. The admission to transit zones is coordinated by a "community-leader" chosen by the Serbian Commissariat for Refugees, who serves as a contact person for both the Hungarian and Serbian authorities, the only person staying in the pre-transit zone. The waiting lists are managed by the Commissariat. The criteria determining the order of entry is the time of arrival and the scale of vulnerability (ECRE, 2018:17-18).

### Border procedure

Border procedure is to be followed in case the application has been submitted in the transit zone.<sup>127</sup> During the procedure conducted at the border, the applicant is neither entitled to stay/obtain a permit authorising stay in the territory of Hungary, nor does she or he have the right to work in a reception centre or at a workplace<sup>128</sup> as set out elsewhere in the Asylum Act and as determined by the general rules applicable to foreigners.<sup>129</sup> Asylum seekers can be

<sup>125</sup> See also IAO, Transit zones of Röszke and Tompa Expanded, April 2017, Available at: [http://www.bmbah.hu/index.php?option=com\\_k2&view=item&id=1055:transit-zones-of-roszke-and-tompa-expanded&lang=en](http://www.bmbah.hu/index.php?option=com_k2&view=item&id=1055:transit-zones-of-roszke-and-tompa-expanded&lang=en).

<sup>126</sup> Szlakovits, R. Határsértésnek számít az ételosztás Röszkénél? Megtöltötték az ételosztást az Oltalom Karitatív Egyesületnek a röszkei tranzitónánál, közben a száz fő befogadására alkalmas szabadkai táborban is már több mint ötszázan vannak. Delmagyar, 29 July 2016, Available at: [http://www.delmagyar.hu/szeged\\_hirek/hatarserteresnek\\_szamit\\_az\\_etelosztas\\_roszkenel/2484185/](http://www.delmagyar.hu/szeged_hirek/hatarserteresnek_szamit_az_etelosztas_roszkenel/2484185/).

<sup>127</sup> Art 71/A of Asylum Act, as amended by Act CXL of 2015. As of 28 March 2017, the regular procedure is conducted in transit zones – See Amendments 2017 in this report.

<sup>128</sup> Art 71/A (2) of Asylum Act, as amended by Act CXL of 2015.

<sup>129</sup> Art 5(1) a) and c) of Asylum Act.

held in the transit zone for a period of maximum 4 weeks.<sup>130</sup> The refugee authority shall deliver a decision on admissibility ‘with priority’ but no later than within 8 days.<sup>131</sup> The deadline for submitting a judicial review request was extended from 3 days to 7 days.<sup>132</sup> The rules of the review process are the same that apply in admissibility or accelerated procedure.<sup>133</sup> In the review process, before January 2018, a court clerk, as well, had the authority to act, including the decision on the merits of the case.<sup>134</sup> The personal hearing can be conducted via telecommunication network.<sup>135</sup>

Although the border procedure cannot be applied to vulnerable individuals requiring special treatment,<sup>136</sup> in practice, there is no assessment mechanism in place, only visible vulnerabilities are considered.<sup>137</sup> Usually only families, unaccompanied minors, single women, elderly and disabled people are excluded from the border procedure after admittance to the transit zone, and transferred to open or closed reception facilities (ECRE, 2018:42).<sup>138</sup> These centres are run by IAO in cooperation with NGOs providing supplementary services for applicants. Medical services are available in each facility, though with insufficient access to interpretation (ECRE, 2018:70).

Until spring 2017, the assessment of the asylum application focuses, in most cases, on the whether the applicant entered Hungary from a safe third country. The applicant’s personal circumstances and his or her need for international protection are not examined or taken into account. The IAO, in cases witnessed by the HHC, delivered an inadmissible decision in less than an hour, and ordered a ban on entry and stay for 1 or 2 years in the Schengen Information System (SIS). Regarding the opportunity to challenge that decision based on the safe third country concept, after providing brief information, IAO offered the applicants to sign a statement format, according to which the applicant disagrees. The IAO did not provide an opportunity to consult a legal adviser or to collect a supporting argument. The asylum-seekers interviewed by HHC did not understand the reasons for the inadmissibility and their right to judicial review (HHC, 2015b). NGOs, such as the HHC, have not always been able to monitor the procedure and provide legal advice due to lack of access to the zones. In 2015 only nine rejected asylum seekers submitted requests for judicial review, of which seven later withdrew their request. The hearings of the remaining two were conducted over Skype, and the judge after appeal still upheld the IAO’s decision, irrespective of the medical evidence proving that the applicants were suffering from post-traumatic stress disorder (UNHCR, 2016a).<sup>139</sup>

<sup>130</sup> Art 71/A (4) of Asylum Act, as amended by Act CXL of 2015.

<sup>131</sup> Art 71/A (3) of Asylum Act, as amended by Act CXL of 2015.

<sup>132</sup> Art 53(3) of Asylum Act, as amended by Act CXL of 2015.

<sup>133</sup> See ‘Admissibility procedure’ in this report.

<sup>134</sup> Former Art 71/A (9) of Asylum Act, as amended by Act CXL of 2015 and abolished by Act CXLI of 2017.

<sup>135</sup> Art 71/A (10) of Asylum Act.

<sup>136</sup> Art 71/A (7) of Asylum Act, as amended by Act CXL of 2015.

<sup>137</sup> Inadequate vulnerability assessment has always been an issue of concern - See *O.M v. Hungary*, ECtHR, App no 9912/15.

<sup>138</sup> All this changed in March 2017 – See Amendments 2017 in this report.

<sup>139</sup> For critical analysis see Gyollai D and Amatrudo A (2018) Controlling irregular migration: International human rights standards and the Hungarian legal framework, *European Journal of Criminology*, (forthcoming).

### **Airport procedure**

Although the Asylum Act provides for ‘airport procedure’ in case the asylum application is submitted at the airport, the procedure is rarely applied in practice. In the airport procedure the applicants shall be provided accommodation in the designated facilities in the transit area of the airport.<sup>140</sup> If the application is not inadmissible, or a period of 8 days has elapsed after submitting the application, the applicant shall be permitted entry to the territory.<sup>141</sup> Asylum seekers admitted to the country are, however, routinely detained (ECRE, 2017:36); as of July 2013, applying for asylum in airport procedure constitutes grounds for asylum detention.<sup>142</sup> There are approximately 100-200 applications submitted at the airport each year (ECRE, 2017:35).

### **Regular procedure**

Following the submission of an application, the refugee authority shall determine whether the applicant falls under the Dublin Regulations, then examines whether the application is inadmissible, or if the conditions are met for an accelerated procedure. The inadmissibility decision, or the decision in accelerated procedure shall be made within 15 days, otherwise the IAO shall deliver its decision within 60 days.<sup>143</sup> In practice, the deadlines are not always met; in cases that involve age assessment of unaccompanied minors, the procedure may take up to 2-5 months (ECRE, 2017:17). With respect to detained individuals seeking asylum<sup>144</sup> and unaccompanied minors<sup>145</sup>, the procedure shall be conducted as a matter of priority. Unlike in case of detainees, regarding unaccompanied minors, this requirement is hardly fulfilled in practice (ECRE, 2017:20).

The first instance decision is taken by the Refugee Directorate of the IAO.

The possible outcomes are (ECRE, 2018:23):<sup>146</sup>

- a) Grant refugee status;
- b) Grant subsidiary protection status;
- c) Grant tolerated status;
- d) Rejection due to inadmissibility;
- e) Rejection on merits.

### **Personal interview in the regular procedure**

Personal hearing of the asylum applicant is mandatory. It can be omitted only if the applicant:

- a) Is not fit for being heard;
- b) Submitted a subsequent application in which he or she failed to share facts or provide evidence that would indicate his or her recognition as a refugee or beneficiary of subsidiary protection. The personal interview cannot be omitted if the subsequent application is submitted by someone whose previous application was submitted on his

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<sup>140</sup> Art 72(3) of Asylum Act.

<sup>141</sup> Art 72(5) of Asylum Act.

<sup>142</sup> Art 31/A (1) e) of asylum Act, as amended by Act XCIII of 2013.

<sup>143</sup> Art 47 of Asylum Act.

<sup>144</sup> Art 35/A of Asylum Act.

<sup>145</sup> Art 35(7) of Asylum Act.

<sup>146</sup> See ‘Beneficiaries of International Protection’ in this report.

or her behalf, referring to the applicant as a dependent person or an unmarried minor.<sup>147</sup>

To determine the applicants' fitness for interview, the IAO may consider a psychologist's expert opinion. If necessary, the applicant may be given the opportunity to provide a written statement, or alternatively family members can be interviewed. If the applicant does not feel fit to be interviewed, the IAO may give permission for a family member or psychologist to be present at the hearing (ECRE, 2018:50-51).

With the consent of the applicant, the IAO may require medical expert opinion to determine whether the applicant would comply with the criteria of a person with special needs.<sup>148</sup> However, the procedure for requesting such document is not laid down in law. The Asylum Act further provides for the issuance of medical expert opinion in order to determine whether previous trauma, psychological condition accounts for contradictions and the incoherence of the applicant's statement.<sup>149</sup> In practice, however, medical expert opinions were mostly issued at the applicants' request (ECRE, 2018:52).

As the ECRE report notes, the only NGO that provides psycho-social rehabilitation for victims of torture is the Cordelia Foundation.<sup>150</sup> Although Cordelia Foundation issues medical expert reports in line with the Istanbul Protocol, it does not qualify as forensic expertise in Hungarian law: thus both the IAO and the courts sometimes exclude or disregard its opinions. Moreover, the Cordelia Foundation has no access to transit zones, medical expert reports are therefore not used in border procedures (ECRE, 2018:52-53).

The applicant may use his or her mother tongue or a language he or she understands. The refugee authority shall provide an interpreter, unless the refugee officer speaks a language understood by the applicant, and the asylum seeker gives his or her consent in writing to exclude the interpreter.<sup>151</sup> Upon request, unless considered to be an obstacle, a same-sex interpreter and interviewer shall be provided.<sup>152</sup> For asylum seekers who have faced gender-based persecution, this designation is compulsory, the provision gives no discretion whatsoever to the authority in this regard.<sup>153</sup>

Asylum seekers have their first interview usually within a few days after arrival. According to HHC, based on their observations in Békéscsaba asylum detention centre, asylum seekers often undergo an excessive number of repeated interviews (4-6). To HHC's knowledge, there are no gender- or vulnerability-specific guidelines available for officers to conduct interviews. There is no code of conduct for interpreters in the context of asylum procedures, many of the interpreters have received no training on dealing with asylum cases. There is no quality assessment, nor are there professional standard requirements to become an interpreter for the IAO. The interpretation is often full of flaws and anomalies both in refugee camps and at the court (ECRE, 2017:20-22). In May 2017, the prosecutors sought a suspended prison sentence for an interpreter who was found deliberately tampering and falsifying the testimony

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<sup>147</sup> Art 43 of Asylum Act.

<sup>148</sup> Art 3(2) of Government Decree on the Implementation of the Asylum Act.

<sup>149</sup> Art 59(2) of Asylum Act.

<sup>150</sup> See <http://www.cordelia.hu/index.php/en/>.

<sup>151</sup> Art 36 of Asylum Act and Art 66 of Government Decree 301/2007. (XI. 9.).

<sup>152</sup> Art 66(2) of Gov. Decree 301/2007. (XI. 9.).

<sup>153</sup> Art 66(3) of Gov. Decree 301/2007. (XI. 9.).

of an asylum-seeking defendant put on trial in 2016 for his alleged role in the Battle of Rösztke.<sup>154</sup>

### Appeals in regular procedure

The decision must be communicated to the applicant orally in his or her mother tongue or in a language he or she understands, as well as in writing in Hungarian.<sup>155</sup>

According to HHC's observation in Kiskunhalas refugee camp, most decisions are not translated to asylum seekers by an interpreter, only by case officers, or even by fellow applicants. Only the main points of the decision are communicated, the decision is hardly ever explained (ECRE, 2017:22). There is no hard copy of the decision available for asylum applicants (ECRE, 2018:40).

Decisions rejecting the application may be subject to judicial review. The review request shall be submitted to the IAO within 8 days of the communication of the decision, and the court shall decide within 60 days of receipt of the claim.<sup>156</sup> The judicial review request has suspensive effect. The procedure is a single instance judicial review; the law provides for no onward appeal.<sup>157</sup>

The personal hearing of the applicant is mandatory if she or he is a detainee, unless:

- a) The applicant cannot be summoned from his or her accommodation;
- b) The applicant has departed to an unknown destination;
- c) The appeal concerns a subsequent application presenting no new facts or circumstances.<sup>158</sup>

### Dublin Procedure

The Dublin Procedure is applied whenever the criteria of the Dublin Regulation are met.<sup>159</sup> Once it is initiated, the asylum procedure is suspended until a decision is made determining the state responsible. This decision suspending the procedure is not challengeable.<sup>160</sup>

There is no available official information on how the criteria are applied. If an asylum seeker informs the refugee authority about a family member in another Member State, the IAO would request for original documents as proof of family ties. Costs of DNA testing shall be payable by the applicant (ECRE, 2017:25).

Asylum seekers are systematically fingerprinted by the police. In 2015/2016, the IAO did not have the capacity to store all fingerprint data under the 'asylum seeker' category (category 1) in EURODAC. In some occasions, the fingerprints have been registered in category 2 and 3 of 'irregular migrants'. Some people were forced to give fingerprints (ECRE, 2017:26). Refusal constitutes a ground for accelerated procedure,<sup>161</sup> or the IAO may proceed with a

<sup>154</sup> The Budapest Beacon, Pro-gov't media's Middle East "expert" has long history of plagiarism, bribery and perjury. November 15, 2017.

<sup>155</sup> Art 36(2) of Asylum Act.

<sup>156</sup> Art 68(1)-(2) of Asylum Act.

<sup>157</sup> Art 68(6) of Asylum Act.

<sup>158</sup> Art 68(3) of Asylum Act.

<sup>159</sup> Art 49-50 of Asylum Act.

<sup>160</sup> Art 49(2)-(3) of Asylum Act.

<sup>161</sup> Art 57(7) i) of Asylum Act.



decision on the merits of the application without conducting a personal interview.<sup>162</sup> Dublin procedure can no longer be initiated after the IAO has made a decision on the merits of the asylum application (ECRE, 2017:26).

As of February 2017, the HHC was not aware of cases where the IAO sought personal guarantees from the receiving Member State prior to the transfer (ECRE, 2017:26). If a Member State accepts responsibility, the IAO issues a decision on the transfer within 8 days.<sup>163</sup> Once this resolution is issued, the asylum seeker can no longer withdraw his or her application.<sup>164</sup>

The asylum seeker has the right to appeal against the Dublin decision within 3 days.<sup>165</sup> The IAO shall forward the request to the court with no delay.<sup>166</sup> The judicial review request has no automatic suspensive effect, nor has the application for such suspension of the implementation of the transfer.<sup>167</sup> The court shall deliver its decision within 8 days. There is no personal hearing in the procedure, and the decision is not appealable.<sup>168</sup>

The applicant is not always informed of the 3-day deadline for the review request. In case of submission of review request, the HHC observed cases when the Dublin Unit of the IAO forwarded the appeals to the court with several months delay. This practice has, since the end of 2016, been changed, when the HHC and the UNHCR raised the issue with IAO, and the head of the Dublin Unit was replaced. Although the Asylum Act does not provide for suspensive effect of appeals, in practice it leads to having a suspensive effect. While the court, as opposed to the 8-day deadline, delivers its decision within months (ECRE, 2017:28).

Where the applicant is not detained, it may be prohibited for him or her to leave the designated place of residence for a maximum of 72 hours in order to ensure the transfer is carried out.<sup>169</sup> The transfer is organized by the Dublin Unit of the IAO in cooperation with the receiving Member State. The transfer is carried out by the police who assist with boarding and escort the foreigner unless the circumstances do not require; voluntary transfers are rare (ECRE, 2017:27).

### **Admissibility procedure**

The admissibility of the application shall be decided within 15 days. In practice, due to the large number of asylum seekers in 2015 and 2016, the procedure took a few weeks longer (ECRE, 2017:32).

The application is inadmissible if:

- a) The applicant is EU citizen;
- b) The applicant was granted international protection by another EU Member State;

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<sup>162</sup> Art 66(2) f) of Asylum Act, as amended by Act CXXVII of 2015.

<sup>163</sup> Art 83(3) of Gov. Decree 301/2007. (XI. 9.).

<sup>164</sup> Art 49(4) of Asylum Act.

<sup>165</sup> Art 49(6) of Asylum Act.

<sup>166</sup> Art 49(7) of Asylum Act.

<sup>167</sup> Art 49(9) of Asylum Act.

<sup>168</sup> Art 49(8) of Asylum Act.

<sup>169</sup> Art 49(5) of Asylum Act.

- c) The applicant was recognised as refugee by a third country, and the protection exists at the time of the assessment, and the third country in question is ready to readmit the applicant;
- d) The application is repeated and no new circumstance or fact occurred that would suggest that the applicant's recognition as refugee or beneficiary of subsidiary protection (BSP) is justified;
- e) There exists a country that qualifies as a safe third country for the applicant.<sup>170</sup>

The application may be declared inadmissible under e) if:

- a) The applicant stayed in or travelled through the territory of a safe third country, and she or he would have had the opportunity to apply for effective protection;
- b) Has relatives in that country and may enter the territory;
- c) The safe third country requests the extradition of the person seeking recognition.<sup>171</sup>

If the application was found inadmissible due to the safe third country concept, the applicant may declare immediately, but within 3 days, why in his or her case the country in question does not qualify as safe.<sup>172</sup> Request for judicial review shall be submitted within 7 days,<sup>173</sup> the court shall deliver its decision within 8 days,<sup>174</sup> which is not appealable.<sup>175</sup> The judicial review request has no suspensive effect, unless it challenges a decision based on the safe third country concept.<sup>176</sup> If the safe third country refuses to readmit the applicant, the refugee authority shall withdraw its decision and continue the procedure.<sup>177</sup>

Before its abolishment as of January 2018, Art 53(2a) of the Asylum Act provided that no new facts or circumstances could be referred to in the judicial review request.

Although Serbia, since 15 September 2015, has not readmitted third-country nationals under the readmission agreement, except for those who hold valid travel documents issued by former Yugoslav states, the IAO kept issuing inadmissibility decisions based on safe third country grounds. The IAO did not automatically withdraw the inadmissibility decision, and individuals had to apply for asylum again. The ECRE report notes that asylum seekers had to go through the admissibility assessment two or three times. In some cases, their case has been declared admissible only after the fourth repeated application. Many failed to understand the reasons for rejection, as the vast majority had no access to legal assistance. Asylum seekers were sometimes being held in detention pending removal to Serbia after the final rejection decision. The IAO argued that Serbia could at any time change its position and start respecting the readmission agreement. In 2017, the IAO stopped issuing inadmissibility decisions based on safe third country grounds.<sup>178</sup>

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<sup>170</sup> Art 51(2) of Asylum Act, as amended by Act CXXVII of 2015.

<sup>171</sup> Art 51(4) of Asylum Act.

<sup>172</sup> Art 51(11) of Asylum Act.

<sup>173</sup> Art 53(3) of Asylum Act.

<sup>174</sup> Art 53(4) of Asylum Act.

<sup>175</sup> Art 53(5) of Asylum Act.

<sup>176</sup> Art 53(6) of Asylum Act.

<sup>177</sup> Art 51/A of Asylum Act.

<sup>178</sup> For further information on the discrepancies of the admissibility process and its judicial review, see ECRE, Country Report: Hungary, February 2018, p37-40.

### Accelerated procedure

The accelerated procedure was introduced in 2015. The decision on the asylum application shall be made within 15 days.<sup>179</sup> The application may be decided in an accelerated procedure if the applicant:

- a) Only discloses irrelevant information supporting his or her recognition as refugee or BSP;
- b) Originates from a country listed as a safe third country by national law or by the EU;
- c) Misled the authorities concerning his or her identity or nationality:
  - by providing false information;
  - by submitting false documents;
  - by withholding information or documents that may have had a negative influence on the decision making process;
- d) Presumably with bad-faith intent, has destroyed or dropped his or her ID card or travel document that would have been helpful in establishing his or her identity or nationality;
- e) Makes incoherent, contradictory, false or unlikely statements contradicting the substantiated information related to the country of origin, which makes clear that on the basis of his or her application, he or she is not entitled to recognition as refugee or BSP;
- f) Submitted a subsequent application with a new circumstance or fact that suggests that the applicant's recognition as refugee or BSP is justified;
- g) Submitted an application with the only purpose of delaying or obstructing the expulsion order, or the implementation of the expulsion order issued by the refugee authority, the immigration police or the court;
- h) Unlawfully entered or extended his or her stay in the territory by failing to submit an application for recognition within a reasonable time frame, although he or she would have had an opportunity to submit such application, and has no reasonable excuse for the delay;
- i) Refuses to comply with his or her obligation to give fingerprints;
- j) He or she represents a serious threat to national security or public order, or an expulsion order has been issued by the immigration authority for violating or 'endangering' public order.<sup>180</sup>

To determine whether the applicant represents a serious threat to national security or public order, the IAO shall request the national intelligence agency of Hungary (Alkotmányvédelmi Hivatal) or the Counter Terrorism Centre (Terrorelhárítási Központ – TEK) to provide an expert opinion.<sup>181</sup> The ECRE report notes, however, as set out in Art 71/A(8) of the Asylum Act, these authorities are not involved in asylum status determination in border procedures (ECRE, 2018:117).

The application cannot be rejected solely on the ground of subsection h).<sup>182</sup> The IAO, with the exception of subsection b), shall assess the merits of the application for recognition as

<sup>179</sup> Art 47 of Asylum Act, as amended by Act CXXVII of 2015.

<sup>180</sup> Art 51(7) of Asylum Act.

<sup>181</sup> Art 2/A(a) of Government Decree on the Implementation of the Asylum Act.

<sup>182</sup> Art 51(8) of the Asylum Act.

refugee or BSP.<sup>183</sup> When applying subsection b), the applicant may declare immediately, but within 3 days, why in his or her case the country in question does not qualify as safe.<sup>184</sup> The rules governing the judicial review request in accelerated procedure are the same as that apply in case of inadmissible decisions.

In practice, before March 2017, the IAO initiated the execution of the expulsion order before the 7-day deadline for submitting a judicial review request, and asylum seekers were automatically transferred to immigration detention (ECRE, 2017:40-42).

## Beneficiaries of international protection

The Hungarian legal framework distinguishes four categories of beneficiaries of international protection: refugee ('menekült'), beneficiary of subsidiary protection ('oltalmazott'), beneficiary of temporary protection ('menedékes'), and person with tolerated stay ('befogadott')<sup>185</sup>. The refugee/subsidiary protection status is to be reviewed every 3 years.<sup>186</sup> Refugees and beneficiaries of subsidiary protection have the right to free movement in the country, although shelters provided by NGOs are all located in Budapest. Concerning their education, adults have access to courses offered by NGOs and other independent bodies, such as the Central European University (ECRE, 2018:108). Refugees and beneficiaries of subsidiary protection have access to the labour market and healthcare under the same conditions as Hungarian citizens. There is, however, no data available on their employment. Due to the lack of institutionalised state support in place to enhance their employment prospects, they face serious difficulties and obstacles, as well as a significant language barrier. There are several forms of social welfare benefits available, such as public health care, unemployment benefit and other entitlements and social assistance, many of which, social housing for example, however, are conditioned to certain number of years of established domicile. Thus, protected persons, in practice, have very limited access to these benefits upon exit of reception facilities (ECRE, 2018:99-109).

## Refugee

A refugee is a foreign individual experiencing persecution, or holds a well-founded fear of persecution, in his or her country of origin or in the country of his or her usual residence, for reasons of race, nationality, membership of a particular social group, religious or political belief. The well-founded fear of persecution may also be based on events which occurred, or on activities that the foreigner has been engaged in, following departure from his or her country of origin.<sup>187</sup> Hungary shall recognise a person as such if she or he verifies or implies that the criteria determined above, in compliance with the 1951 Geneva Convention, applies in his or her case,<sup>188</sup> and she or he does not receive protection from his or her country of origin or from any other country.<sup>189</sup> The minister responsible for immigration and asylum policy may otherwise grant refugee status to a foreigner in an *ad hoc* manner, if such recognition is

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<sup>183</sup> Art 51(9) of Asylum Act.

<sup>184</sup> Art 51(11) of Asylum Act.

<sup>185</sup> Ch V/A of Asylum Act, as amended by Act XXXIX of 2016.

<sup>186</sup> Art 7/A(1) and 14(1) of Asylum Act, as amended by Act XXXIX of 2016.

<sup>187</sup> Art 6(3) of Asylum Act.

<sup>188</sup> Art 7(1) of Asylum Act.

<sup>189</sup> Art XIV(3) of The Fundamental Law of Hungary.

warranted due to humanitarian reasons.<sup>190</sup> The minister also may grant refugee status to a foreigner who was recognised as such by the UNHCR or another state, provided that the refugee authority established the applicability of the 1951 Convention in case of the foreigner in question.<sup>191</sup> Besides the reasons set out in the 1951 Convention,<sup>192</sup> a foreigner shall not be recognised as a refugee if he or she represents a risk to national security,<sup>193</sup> or is convicted for a crime punishable by at least 5 years' imprisonment (in Hungarian law).<sup>194</sup> If the country of origin of the applicant is on the national list of safe third countries or that of the EU, the burden of proof is on the applicant to prove that the country in question is not safe for him or her.<sup>195</sup> For the purpose of family reunification, upon request, family members of a foreigner recognised as refugee shall as well be recognised as refugee.<sup>196</sup> Children of recognised refugees born in Hungary, upon request, shall also be recognised as refugee.<sup>197</sup>

The status shall cease if the refugee acquires Hungarian citizenship or it is withdrawn by the authority.<sup>198</sup> The recognition can be withdrawn if:

- a) the refugee re-availed himself or herself of the protection of the country of origin;
- b) the refugee has voluntarily re-acquired his or her nationality;
- c) the refugee has acquired new citizenship and enjoys the protection of the new country of citizenship;
- d) the refugee has voluntarily resettled in the country he or she fled from;
- e) the reason of recognition has ceased to exist;
- f) the refugee waives the legal status of refugee in writing;
- g) the refugee was recognised in spite of a reason for exclusion or such a reason occurred;
- h) the refugee has been granted status even though the criteria for recognition were not met;
- i) Having influenced the decision on its merits, the refugee failed to disclose relevant information, made a false statement or used false/forged documents in the application process.

As a general rule, with exceptions provided by certain acts and government decrees, refugees enjoy the same rights and have the same obligations as Hungarian citizens.<sup>199</sup> Refugees have no right to vote, except in local elections, and may not hold an office tied by law to Hungarian citizenship (civil servant positions).<sup>200</sup> The refugee is entitled to an identity

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<sup>190</sup> Art7(4) of Asylum Act.

<sup>191</sup> Art 7(5) of Asylum Act.

<sup>192</sup> Art 8 (1) - (3) of Asylum Act.

<sup>193</sup> Art 8(4) of Asylum Act, as amended by Act CXXVII of 2015.

<sup>194</sup> Art 8(5) of Asylum Act, as amended by Act CXLIII of 2017.

<sup>195</sup> Art 9 of Asylum Act.

<sup>196</sup> Art 7(2) of Asylum Act.

<sup>197</sup> Art 7(3) of Asylum Act.

<sup>198</sup> Art 11 of Asylum Act.

<sup>199</sup> Art 10(1) of Asylum Act.

<sup>200</sup> Art 10(2) of Asylum Act.

card and a bilingual travel document, unless public order and national security considerations require otherwise.<sup>201</sup>

### **Beneficiary of subsidiary protection**

Beneficiaries of subsidiary protection (BSPs) are foreigners who do not satisfy the criteria for recognition as refugee, but they face a real risk of being exposed to serious harm upon return to their country of origin, and are unable or, due to fear of such risk, unwilling to benefit from the protection of their country of origin.<sup>202</sup> The fear of serious harm or of the risk of such harm is also considered to be well-founded if it relates to events that occurred, or to activities that the BSP has been engaged in, following departure from his or her country of origin.<sup>203</sup> Hungary shall recognise a person as BSP if she or he verifies or implies that the criteria determined above applies in his or her case.<sup>204</sup>

Children of BSPs born in Hungary, upon request, shall be recognised as BSP.<sup>205</sup> Family members of BSPs shall as well be recognised as BSPs if the application for recognition has been jointly submitted, or the application of the family member is submitted with the consent of the BSP prior to the decision on his or her own application.<sup>206</sup> No subsidiary protection shall be granted to a foreigner if there are reasonable grounds to believe that he or she has committed a war crime, crimes against humanity as defined in international law, a crime punishable by at least 5 years' imprisonment in Hungarian law, or a crime contrary to the purposes and principles of the United Nations. Nor shall a person be granted subsidiary protection whose presence in Hungary is not conducive to national security.<sup>207</sup> Concerning safe third countries, the same rules apply to BSPs as to refugees. Moreover, if the applicant travelled through or stayed in a safe third country prior to his or her arrival to Hungary, it is the applicant who shall prove that she or he had no opportunity for effective protection in that country.<sup>208</sup> The rules of cessation and withdrawal are the same that apply to refugees.<sup>209</sup>

Unless act or government decree provides otherwise, BSPs have the same rights and obligations as refugees.<sup>210</sup> They receive a special travel document, not a refugee passport.<sup>211</sup>

### **Beneficiary of temporary protection<sup>212</sup>**

A foreigner shall be granted temporary protection for one year if she or he belongs to a group of displaced persons arriving in Hungary *en masse* who are recognised by:

- a) the Council of the European Union as eligible for temporary protection under the procedure determined by Council Directive 2001/55/EC on minimum standards for

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<sup>201</sup> Art 10(3)(a) of Asylum Act.

<sup>202</sup> Art 12(1) of Asylum Act.

<sup>203</sup> Art 12(2) of Asylum Act.

<sup>204</sup> Art 13(1) of Asylum Act.

<sup>205</sup> Art 13(3) of Asylum Act.

<sup>206</sup> Art 13(2) of Asylum Act.

<sup>207</sup> Art 15 of Asylum Act.

<sup>208</sup> Art 16 of Asylum Act.

<sup>209</sup> Art 18 of Asylum Act.

<sup>210</sup> Art 17(1) Asylum Act.

<sup>211</sup> Art 10(3)(a) and 17(2) of Gov. Decree 101/1998. (V. 22.) on the Implementation of Act XII of 1998 on Travelling Abroad.

<sup>212</sup> Prescribed by law, but not used in practice.

giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance efforts between Member States in receiving such persons and bearing the consequences thereof.<sup>213</sup>

- b) the Government as eligible for temporary protection as they have been forced to leave their country due to armed conflict, civil war or ethnic conflict, or systematic, widespread or severe violation of human rights, torture, cruel, inhuman or degrading treatment in particular.<sup>214</sup>

Regarding eligibility criteria, similarly to refugee and BSP status, the burden of proof is on the applicant.<sup>215</sup> Family members of beneficiaries of temporary protection who are under the temporary protection of another Member State of the EU shall also be recognised as beneficiaries of temporary protection.<sup>216</sup> Concerning the rules of exclusion, besides those applicable to BSPs, no temporary protection shall be granted to a foreigner, if she or he committed a serious, non-political criminal offence outside the territory of Hungary.<sup>217</sup> They are entitled to a document verifying their identity, a travel document authorising a single exit and return, and employment according to general rules applicable to foreigners.<sup>218</sup> The duration of protection granted by the Government is set out in the normative decision of the Government, which can be extended.<sup>219</sup>

The status shall cease if:<sup>220</sup>

- a) The term of temporary protection as determined by the Government expires;
- b) The Council of the EU withdraws recognition;
- c) The beneficiary of temporary protection is granted resident status;
- d) He or she is recognised as refugee or BSP;
- e) The authority withdraws the status if;
- f) He or she acquires Hungarian citizenship.<sup>221</sup>

The recognition shall be withdrawn if:<sup>222</sup>

- a) The beneficiary of temporary protection, with his or her consent, is granted temporary protection status by another state applying Directive 2001/55/EC;
- b) He or she was recognised in spite of a reason for exclusion or such a reason occurred;
- c) He or she waives the legal status of refugee in writing;

<sup>213</sup> Art 19 a) of Asylum Act.

<sup>214</sup> Art 19 b) of Asylum Act.

<sup>215</sup> Art 20 (1) of Asylum Act.

<sup>216</sup> Art 20 (2) of Asylum Act.

<sup>217</sup> Art 21 (1) ab) and (2) of Asylum Act.

<sup>218</sup> Art 22 (1) of Asylum Act.

<sup>219</sup> Art 24 of Asylum Act.

<sup>220</sup> Art 25 of Asylum Act.

<sup>221</sup> As of 01 Jan 2018, as amended by Act CXLI of 2017.

<sup>222</sup> Art 25(2) of Asylum Act.



- d) He or she has been granted status even though the criteria for recognition were not met.

### Person with tolerated stay

Hungary shall grant protection of “tolerated stay” to a foreigner who does not comply with the requirements for recognition as refugee or BSP, however, in the event of his or her return to the country of origin, he or she would face a real risk of persecution for reasons of race, religion, ethnicity, membership of a particular social group, political opinion, or would be exposed to danger of being sentenced to death, being tortured or subjected to other inhuman treatment or punishment.<sup>223</sup> The refugee authority shall recognise a foreigner as a person with tolerated stay regarding whom the prohibition of *non-refoulement* was found established during the immigration procedure, even if his or her asylum application was rejected.<sup>224</sup> Persons with tolerated stay are entitled to the rights afforded to residence permit holders.<sup>225</sup>

Since the status is granted on the basis of the *non-refoulement* obligation, as opposed to subsidiary protection and refugee status, the law provides no grounds for exclusion.

The status shall cease if:<sup>226</sup>

- a) The beneficiary of tolerated status is granted resident status on different grounds;
- b) The authority withdraws the status;
- c) She or he acquires Hungarian citizenship.<sup>227</sup>

The rules for withdrawal are the same that apply for refugees.<sup>228</sup>

### Regular migrants

Since Hungary is part of the Schengen Area, the entry conditions for third-country nationals for a stay in Hungary of a duration of no more than 90 days in a 180-day period are as per Regulation (EU) 2016/399 (Schengen Borders Code).<sup>229</sup> No one shall stay in the country who is subject to expulsion or ban on entry or stay, or whose stay is not conducive to public order, public health or to national security.<sup>230</sup> Third country nationals who intend to stay for over three months may apply for long-term visa and residence permit. Rules of eligibility and the procedure to be followed are set out in Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals and the Government Decree 114/2007 (V. 24.) on the Implementation of the Act. The applying rules are fairly complex, a simplified English language

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<sup>223</sup> Art 25/A of Asylum Act.

<sup>224</sup> Art 25/B of Asylum Act, as amended by Act XXXIX of 2016. (This status based on the principle of *non-refoulement* had been existing before the amendment - Art 45 -, it has only been distinguished in a new chapter in 2016.)

<sup>225</sup> Art 25/C of Asylum Act.

<sup>226</sup> Art 25/D(1) of Asylum Act.

<sup>227</sup> As of 01 January 2018, as amended by Act CXLIII of 2017.

<sup>228</sup> Art 25/D(2) of Asylum Act.

<sup>229</sup> Art 6(1) of Act II of 2007.

<sup>230</sup> Art 6(3); 9(1); 13(1)(h) of Act II of 2007, as amended by Act XXXIX of 2016.

guideline for each category is available on OIN's website.<sup>231</sup> The main purposes for applying for residence are: gainful activity, employment, studies, and family reunification.<sup>232</sup>

The application may be submitted in the country of origin. Documents verifying evidence of the purpose of the stay, sufficient means of subsistence (including healthcare, accommodation and return travel), proof of address, and a valid travel document shall be enclosed. A third-country national holding a valid residence permit has the right to entry and residence in a Schengen Member State, not exceeding 90 days within any 180-day period. They are required to promptly report if the residence permit is lost, stolen or destroyed. In case of change of address they shall notify the regional directorate of jurisdiction within three days. Third-country nationals shall report the birth of a child.

Residence permit for the purpose of study may be issued to a third country national who is accepted by a public education institution pursuing full-time or daytime course, or preparatory course prior to such education, and able to verify the linguistic knowledge required for the pursuit of studies. The validity of the residence permit shall correspond with the duration of studies, or be extended if it is more than two years. Third-country nationals holding a residence permit for the purpose of studies may engage in any full time occupational activity, and have the right to the pursuit of gainful activity or to engage in employment. No work permit is necessary during the time of studies, insofar as the total working hours do not exceed a maximum of 24 hours weekly during term-time, and 90 days or 66 working days per year out of term-time.

Regarding residence permit for the purpose of employment, the validity of the permit is determined by the authority. As to gainful activities, the period is maximum three years, which may be extended by another three years. As mentioned before, as of June 2017, Serbian and Ukrainian citizens do not need work permit for employment in certain job categories, such as catering, nursing, IT,<sup>233</sup> and no visa is required for them for a stay of up to 90 days.<sup>234</sup>

For the purpose of family reunification, family members are:

- The spouse of a third-country national;
- The minor child (including adopted and foster children) of a third-country national with his/her spouse;
- The minor child of a third-country national who is a custodial parent and the child is dependent on him/her;
- The minor child of the spouse of a third-country national, where the spouse is a custodial parent.

<sup>231</sup> IAO - <http://www.bmbah.hu/index.php?lang=en>, Accessed: 26 February 2018.

<sup>232</sup> See IAO Statistics, Available at: [http://www.bmbah.hu/index.php?option=com\\_k2&view=item&layout=item&id=492&Itemid=1259&lang=en](http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=492&Itemid=1259&lang=en).

<sup>233</sup> Hivatalos Értesítő, A Magyar Közlöny Melléklete, 15 June 2017, p2928, Available at: <http://www.kozlonyok.hu/kozlonyok/Kozlonyok/12/PDF/2017/28.pdf>.

<sup>234</sup> HVG, 'Engedély sem kell a szerb és ukrán gazdasági bevándorlóknak Magyarországon,' 13 July 2017, Available at: [http://hvg.hu/gazdasag/20170712\\_Engedely\\_sem\\_kell\\_a\\_szerb\\_es\\_ukran\\_gazdasagi\\_bevandorlokna\\_k\\_Magyarorszagon](http://hvg.hu/gazdasag/20170712_Engedely_sem_kell_a_szerb_es_ukran_gazdasagi_bevandorlokna_k_Magyarorszagon).

The spouse of a person granted refugee status may be issue residence permit if their marriage was contracted before the entry of the person with refugee status. The validity period of the residence permit issued for family reunification cannot exceed that of the sponsor.<sup>235</sup>

Besides the categories discussed in the previous section, residence permit is granted on humanitarian grounds to stateless persons, third-country nationals who cooperate with the Police in fighting crime, to those who have been exposed to particularly exploitative working conditions, and minors who were employed illegally without valid residence permit (Ceccorulli, 2017:126).

### **‘Beneficiaries’ of residency bond**

The Hungarian Investment Immigration Programme was launched in 2013 and had undergone several changes before the Government Debt Management Agency put a hold on the sale in March 2017. The programme, justified by the state’s economic interests in reducing state debt, made available for third-country nationals long-term residency in Hungary through the purchase of a ‘state bond’ worth €250.000, which was raised to €300.000 in 2015. The transactions were made via intermediary – mainly offshore – companies, selected by the Economic Committee of the Parliament then chaired by Antal Rogán (Fidesz). The service charge was €40-60,000 per bond. Between 2013 and 2016, altogether 17,009 bonds were sold for a total amount of €1.158 billion.<sup>236</sup> Although the Government denied any connection or influence, prior to the termination of the settlement bond programme, Jobbik (right wing) offered their votes for the planned amendment of the Fundamental Law<sup>237</sup> in condition that the Government stop the sale.

Nagy concludes that, 1) the programme did not entail any investment into the economy, as the immigrants actually bought “securities” from the intermediary companies, who in turn purchased five-year zero bonds issued on behalf of the State at a discount; 2) most of the investors did not move to Hungary, the system functioned as a “loosely controlled backdoor into the Schengen area”;<sup>238</sup> 3) the system was designed with minimal parliamentary scrutiny. The real beneficiaries of the Programme are the agent companies, whose income, through a complex web of further contributors, is not taxable in Hungary (Nagy, 2016b).

### **Irregular migrants**

Immigration to Hungary is mainly transit migration. Irregular migrants using the Western Balkan path have been en route to Western European countries when passing through Hungarian territory. Approximately 90% of them stay only for a few days, maximum two weeks before absconding (WHO, 2016:4). The paths to irregularity are: irregular entry, overstay visa/residence permit, leaving the reception facility during immigration process (possibly

<sup>235</sup> IAO website, Residence Permit for the Purpose of Family Reunification, Available at: [http://www.bmbah.hu/index.php?option=com\\_k2&view=item&id=54:residence-permit-for-family-reunification&Itemid=808&lang=en#eligibility](http://www.bmbah.hu/index.php?option=com_k2&view=item&id=54:residence-permit-for-family-reunification&Itemid=808&lang=en#eligibility). Accessed: 27 February 2018.

<sup>236</sup> HVG, ‘Kiderült, mennyit kapott a letelepedési kötvényekért az állam’, 28 June 2017, Available at: [http://hvg.hu/gazdasag/20170628\\_Kiderult\\_ennt\\_kotvenyekert\\_az\\_allam\\_a\\_letelepedesi\\_kotvenyekkel](http://hvg.hu/gazdasag/20170628_Kiderult_ennt_kotvenyekert_az_allam_a_letelepedesi_kotvenyekkel).

<sup>237</sup> Failed Seventh Amendment - See Section 3 of this report.

<sup>238</sup> See 444.hu, ‘A suspected international criminal and the Syrian dictator’s money man also bought Hungarian residency bonds’ [Online] Available at: <https://444.hu/2018/03/28/a-suspected-international-criminal-and-the-syrian-dictators-money-man-also-bought-hungarian-residency-bonds>.

moved on to other EU Member States), unlawful employment, typically seasonal or temporary (EMN, 2015; Futo, 2016).

Although there is no official statistical data available, based on expert opinion and administrative data of the Police, the number of long-term resident irregular population in Hungary is low. The estimate number was between 10,000 and 50,000 in 2008 (EMN, 2015:7-9; Biffi, 2012:50).

Irregular migrants mainly arrived from the neighbouring countries, especially from Romania. With Romania's accession to the EU in 2007, and even more so after the naturalisation programme, this ceased to be a problem (Szeman, 2012). In 2008, Chinese and Vietnamese visa over-stayers constituted the largest number of irregular migrants residing in the country.

Hungary initiated only one amnesty programme. During EU accession in 2004, the authorities declared amnesty for those who clarified their personal data and fulfilled one of the following criteria: a) were married to a Hungarian citizen or to a non-Hungarian citizen legally resident in Hungary, b) had a Hungarian citizen child, c) were able to prove that they received income as the owner or manager of a company, d) were able to prove cultural link to Hungary, e) applied for asylum and were able to provide proof of entry prior to 1 May 2003. Altogether 1,406 people registered and reported themselves to the authorities, more than 60% of which Chinese and Vietnamese citizens.<sup>239</sup>

In past years, the primary issue of irregular migration was the increasing number of irregular border crossings attributable to the refugee crisis. In 2014, there were 43,360 irregular border crossings registered (EMN, 2015). According to the IAO's statistical data, two thirds of the 161,000 asylum seekers registered in the first eight months of 2015 entered the country irregularly (Amnesty International, 2015:4). The overall number of irregular migrants who are not in contact with the authorities, however, cannot be defined.

When apprehended, for most irregular migrants, entering the asylum process were the major form of regularising their stay. Since the entry into force of Act I of 2007 on the Entry and Residence of Persons with the Right to Free Movement and Residence, legalisation by marriage of an EEA citizen or by parenthood has become more frequent than legalisation by asylum application (Futo, 2008).

Irregular migrants only have the right to emergency health care. The service includes, among other things, major trauma and wounds, maternity needs, serious infectious diseases, attempted suicide and acute psychological disorders (WHO, 2016:13). Maternity needs means basic care, in which pregnancy related complications are included, but further maternity care is conditioned to residence (Björngren-Cuadra, 2012:118). Any medical issue beyond that would have to be paid by the irregular migrant. A 2010 research found that irregular migrants' biggest concern was the high cost of healthcare services, since it is very difficult to access medical services without insurance coverage. Whilst doctors occasionally provided service out of personal compassion, migrants were usually refused service provision by general practitioners. The only exception in this regard is HIV/AIDS and hepatitis treatment, which are

<sup>239</sup> DEMIG (2015) DEMIG POLICY, version 1.3, Online Edition, Oxford: International Migration Institute, University of Oxford. Available at: <https://www.imi.ox.ac.uk/data/demig-data/demig-policy-1/download-the-data/demig-policy-data-downloads>; Futo P (2016) Hungary: A Quantitative Overview of Irregular Migration, In: A Triandafyllidou (ed) *Irregular Migration in Europe: Myths and Realities*, Abingdon: Routledge.

free of charge. The most vulnerable group of irregular migrants were women, especially single women with children; many cases of sexual harassment were reported. There are no official transition services in place, only NGOs have the capacity to inform and help migrants with advice if they are approached with such requests. Irregular migrants have no access to social housing or homeless centres; often their only alternative is sleeping outdoors (PICUM, 2010).

Undocumented migrants have restricted access to the education system in Hungary (PICUM, 2012). Concerning the irregular employment of migrants, there is no statistical data available. It is notable that irregular employment, irrespective of immigration status, looks back on a long tradition in Hungary. Irregular employment of legally residing migrants and employment of irregular migrants is just a piece in the puzzle. Foreigners are most likely employed irregularly in sectors that are already affected by irregular employment, such as catering, agriculture, household, process manufacturing, and construction. Regarding labour rights, undocumented migrants are vulnerable to exploitation, if caught, they face the risk of expulsion (Menedék, 2014). Although irregular migrant workers have mainly arrived from neighbouring countries, the recently adopted favourable conditions concerning their employment will most likely change this pattern: according to a Communication issued by the Minister of National Economy, as of June 2017, Serbian and Ukrainian jobseekers do not need work permit for employment within 41 skill shortage categories.<sup>240</sup>

## Unaccompanied minors

Under Hungarian law, an unaccompanied minor (UAM) is a foreigner, under-18 years of age, who entered the territory of Hungary without the company of an adult responsible for his/her supervision on the basis of law or custom, or remained without supervision following entry; as long as she or he is not transferred under the supervision of such a person.<sup>241</sup> Since they lack parental care, the IAO is responsible for initiating the placement of UAMs under interim care,<sup>242</sup> by contacting the guardianship authority for placement and requesting for the appointment of a guardian who represents the UAM's interests.<sup>243</sup> UAMs cannot be detained.<sup>244</sup> They may be placed in child protection institution or in private accommodation at relatives, if the relative undertakes a commitment in writing to provide room, board and support for the minor, and if it is evident that such placement is in the minor's best interest.<sup>245</sup> In practice, UAMs are accommodated in the Children's Home in Fót. Until April 2016, non-asylum seeker unaccompanied minors were accommodated in the Children's Home in Hódmezővásárhely. This practice has since been changed, the institution only receives Hungarian citizen children (Ivan, 2016:20). Unaccompanied minors seeking international protection (UASC) are all accommodated in a designated child protection institution in Fót.<sup>246</sup> The home can host 50

<sup>240</sup> Hivatalos Értesítő, A Magyar Közlöny Melléklete, 15 June 2017, p2928, Available at: <http://www.kozlonyok.hu/kozlonyok/Kozlonyok/12/PDF/2017/28.pdf>.

<sup>241</sup> Art 2 e) of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, and Art 2(f) of Asylum Act.

<sup>242</sup> Art 72 (1) of 1997 on the Protection of Children and the Administration of Guardianship.

<sup>243</sup> Art 72 (2)(3) of Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals.

<sup>244</sup> Art 56(2) of Act II of 2007 and Art 31/B (2) of Asylum Act.

<sup>245</sup> Art 62(1) b) of Act II of 2007 and Art 130(4) of Government Decree 114/2007 (V. 24.).

<sup>246</sup> Art 48(2) of Asylum Act.



children. Between April and October 2017, the occupancy level was 36-74%.<sup>247</sup> In January 2017, the Government announced the shutdown of the Home by mid-2018. Besides Hungarian citizen children with special needs, the institution currently provides accommodation for UASC awaiting a decision in their asylum case, and minors who have already been granted international protection. At the time of writing, however, it is not entirely clear where the unaccompanied minors will be allocated after the closure (HHC, 2017b:17). UASC (and UAMs) fall within the category of a ‘person in need of special treatment’,<sup>248</sup> and as such they cannot be subject to the border procedure in the transit zone.<sup>249</sup> As of March 2017, UASC above 14 are held in transit zones in *de facto* detention. In 2017, altogether 91 unaccompanied children were detained in transit zones (ECRE, 2018:82).

UAMs, regardless of immigration status, cannot be returned to a country where family reunification or adequate care is not possible.<sup>250</sup> Rejected UASC usually abscond and continue their journey in an irregular manner. Since September 2015, Serbian authorities have been reluctant to readmit third-country nationals. Prior to that practice, UAMs, including rejected UASC, were readmitted to Serbia as well (HHC, 2017b:7). UAMs shall be granted a residence permit on humanitarian grounds,<sup>251</sup> and have access to Hungarian citizenship on preferential terms.<sup>252</sup> The asylum procedure shall be conducted as a matter of priority in their case.<sup>253</sup> The refugee authority shall, without delay, request the guardianship authority to appoint a child protection guardian, who serves to represent the minor. The guardian shall be appointed within 8 days of the arrival of the request. Both the unaccompanied minor and the OIN shall, without delay, be notified of the person of the guardian appointed.<sup>254</sup>

Prior to an amendment to the Child Protection Act, before 2014, a ‘temporary guardian’ was appointed to UASC, who was responsible for their legal representation in the asylum procedure, the children’s overall care and property management. As of January 2014, a ‘child protection guardian’ shall be appointed to both UASC and UAMs.<sup>255</sup> The child protection guardian is employed by the Child Protection Services of Budapest (TEGYESZ).

In 2015, due to the high number of new arrivals, there were significant delays in the process, and UAMs having transited through Hungary often never met their appointed child protection guardian. Since the legislator set an 8-day deadline,<sup>256</sup> and the number of asylum seekers entering the country dropped, there has been a major improvement in the practice. Although the guardians provided by Child Protection Services are not affiliated to, but are based at the designated children protection institution in Fót, as they were before the

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<sup>247</sup> See 24.hu, ‘Európában példátlan, amit a kormány a kiskorú menekültekkel tenne’ [Online] Available at: <https://24.hu/belfold/2017/10/11/europaban-peldatlan-amit-a-kormany-a-kiskoru-menekulekkel-tenne/>.

<sup>248</sup> Art 2(t) of Act II of 2007, and Art 2(k) of Asylum Act.

<sup>249</sup> Art 71/A of (7) Asylum Act.

<sup>250</sup> Art 45(5) of Act II of 2007, and Art 45(2) of Asylum Act.

<sup>251</sup> Art 29(d) of Act II of 2007.

<sup>252</sup> Art 4(4) Act of LV of 1993 on Hungarian Citizenship.

<sup>253</sup> Art 35(7) of Asylum Act.

<sup>254</sup> Art 35(6) of Asylum Act.

<sup>255</sup> Art 84 (1)(c) of Act XXXI of 1997. See Policies, practices and data on unaccompanied minors in 2014: Hungary, European Migration Network, 2014, p11-14, Supra note x.

<sup>256</sup> Art 35(6) of Asylum Act, as amended by Act CXXVII of 2015.

amendment, they frequently visit the children, and actively cooperate with NGOs in performing their tasks (Ivan, 2016:10).

The child protection guardian is responsible for the legal representation of the UAM in all proceedings, making sure that the child's opinion is heard.<sup>257</sup> In order to ensure the child's physical, mental and emotional development, the guardian, *inter alia*:

- Contacts and communicates with the child in a manner appropriate to the child's age;
- Shall be available for the child for consultation over the phone, and upon request, arrange personal meetings;
- Supervises the education of the child by consulting with the educational institution;
- Cooperates with the children protection institution in obtaining information about the family of the child;
- Participates in drafting the child's personal care plan;
- Cooperates with the children protection institution in order to prevent reoffending in case the child has been charged/convicted of a criminal offence;
- Assists the child in choosing profession and career;
- Shall, at least semi-annually, submit reports on the guardianship activity.<sup>258</sup>

Except UASC during 'crisis situation caused by mass immigration',<sup>259</sup> UAMs fall under the personal scope of the Child Protection Act.<sup>260</sup> Thus, with a very few exceptions they enjoy the same rights, including access to kindergarten and school education, and healthcare as children with Hungarian citizenship.

Under the age of 16, UAMs are entitled and obliged to attend public education.<sup>261</sup> UASC granted international protection are enrolled in the mainstream child welfare system, the same rules apply as to all other children in Hungary. Upon request, until the UASC (also children with parents) turns 21, during his or her stay in the reception centre, the refugee authority shall reimburse the costs of education, inclusive the relevant travel expenses, the costs of meals at the educational institution, and of the accommodation at a student hostel.<sup>262</sup> Once they turn 18, only UAMs granted international protection are eligible for after-care arrangements (EMN, 2014:17). After-care service provides financial support, free education and housing, and some personal assistance until the age of 24.<sup>263</sup>

Within Fót Children's Home, the educators provide educational, lifestyle and economic monitoring. Several NGOs, such as SOS Children's Village, Menedék, Open Doors provide non-formal education sessions, Hungarian language classes and community programs for minors (HHC, 2017b:19).

<sup>257</sup> Art 11(2) of Act XXXI of 1997.

<sup>258</sup> Art 86 of Act XXXI of 1997.

<sup>259</sup> Art 4 (1) (c) of Act XXXI of 1997 on the Protection of Children and the Administration of Guardianship. See 2017 amendments in Chapter 6 of this report.

<sup>260</sup> Art 4 (3) of Act XXXI of 1997.

<sup>261</sup> Art 45(3) Act of CXC of 2011 on National Public Education.

<sup>262</sup> Art 29 (1) of Government Decree 301/2007 (XI. 9.), as amended by Government Decree 62/2016 (III. 31.).

<sup>263</sup> Art 77(1)(d), (2) and Art 93 of Act XXXI of 1997; See HHC, Best Interest Out of Sight - The Treatment of Asylum Seeking Children in Hungary, 17 May 2017, p8; Ivan J (2016) Research Report: Children on the Move in Hungary, Terre des Hommes, p13.



Irrespective of immigration status, UAMs have unconditional access to emergency health care services, inclusive life-saving medical interventions and all treatment necessary to prevent any severe or irreversible health deterioration.<sup>264</sup> Otherwise, only UAMs with refugee status and beneficiaries of subsidiary protection are entitled to the same health care services as Hungarian citizen children, as well as to health insurance during their enrolment to school (EMN, 2014:22). Fót Children's Home provides paediatric services for the children, and there is a hospital with qualified child specialist staff in close proximity (HHC, 2017b:19).

Representatives of international organizations and NGOs (HHC, Menedék, Cordelia Foundation, Terre des Homes, Kék Vonal, Refugee Mission of the Reformed Church and the UNHCR) organized a roundtable with the Ministry of Human Resources in 2013 on the situations of UAMs. After three meetings, it stopped functioning in 2014 (Ivan, 2016:18).

The registration of UAMs in transit zones shows inconsistency, and due to the contradictions found in IAO's statistical data, is arguably dysfunctional (Ivan, 2016:9). Although the best interest of minors should be a primary consideration throughout the entire asylum procedure,<sup>265</sup> the practice is far from satisfying the specific needs arising from their situation.

Despite the efforts made by HHC, the Hungarian asylum system still lacks a formalized best interest determination procedure or protocol (Ivan, 2016:29). Although the Asylum Act provides that the detention shall be terminated without delay if it has been established that the detainee is UASC,<sup>266</sup> the age assessment practices are not of multidisciplinary character, as opposed to the guidelines of, *inter alia*, EASO and UNHCR. The applied methods are merely based on medical examinations, completely disregarding the differences between various populations of the world regarding pubescence, psychological and emotional development of children, as well as their cultural background and the impact of different nutrition. In some cases, the IAO rejects the applicants' request for age assessment, or claims that the costs of assessment, unaffordable to many, are payable by the asylum seeker. Children arriving in Hungary without valid documents face a real risk of being detained due to the inaccuracy of the age assessment (HHC, 2017b:10-12).

The 2015 amendments to the Act on Criminal Procedure require that all coercive measures must be used with respect to the interest of minors.<sup>267</sup> The special safeguards and rules applying to minors in general<sup>268</sup> were, however, not applicable in the criminal procedures relating to the border closure.<sup>269</sup> There was no requirement to appoint a guardian for minors, and legal guardians, if there were any, were not able to exercise their rights related to the criminal case. Neither the favourable rules relating to deferred prosecution, nor the specialised rules of evidence pertaining to juveniles (minors between 12 and 18) applied in these cases (HHC, 2015c). This complete exemption of the favourable rules applying to minors was abolished in 2017, the new amendments are nevertheless still restrictive compared to the general procedures.<sup>270</sup>

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<sup>264</sup> Art 4 (1)(a) and Art 6 of Act CLIV of 1997 on Health Care.

<sup>265</sup> Art 4 of Asylum Act.

<sup>266</sup> Art 31/A 8(c) of Asylum Act.

<sup>267</sup> Art 542/H of Act XIX of 1998 on Criminal Proceedings, as amended by Act CXL of 2015.

<sup>268</sup> Ch. XXI of Act XIX of 1998 on Criminal Proceedings.

<sup>269</sup> Art 25 of Act CXL of 2015.

<sup>270</sup> Art 542/M of Act XIX of 1998 on Criminal Proceedings, as amended by Act XXIX of 2017.

## 6. Conclusion

On 14 March 2017, the ECtHR delivered its judgement in *Ilias and Ahmed v Hungary*, a case of two Bangladeshi asylum seekers who were held in Röszke transit zone for 23 days, and then sent back to Serbia based on Hungary's safe third country rules.<sup>271</sup> The Court held that the applicants' expulsion from the transit zone to Serbia constituted a breach of Art 3 of ECHR, arguing that the procedure applied by the authorities was not appropriate to provide necessary protection against a real risk of inhuman and degrading treatment: the authorities relied on the Government's list of safe third countries, disregarding reports by, *inter alia*, the UNHCR, and other evidence submitted by the applicants, and imposed an unfair and excessive burden of proof on them.<sup>272</sup> Furthermore, the Court found that the Hungarian practice of holding asylum seekers in the transit zone can amount to the deprivation of liberty within the meaning of Art 5. The measure, however, has no legal basis, the rules regarding procedural safeguards sufficiently guaranteeing the applicants' right to liberty are not laid down in Hungarian law. It follows that there has been a violation of Art 5 (1) and (4) of ECHR.<sup>273</sup> Although the ECtHR found no violation of Art 3 in respect of the conditions in which the applicants were held in Röszke transit zone, the Court observed that the Government has not indicated any remedy by which the applicants could have complained about it: there has been a violation of Art 13 read in conjunction with Art 3 of the Convention.<sup>274</sup>

Rules governing the appeal process in transit zones: by not providing adequate access to legal advice, given the short notice deadlines, never mind accelerated procedure, and the extremely limited admission, the authorities are arguably in breach of Art 13 of ECHR.<sup>275</sup>

People waiting in pre-transit zones: in *Hirsi Jamaa and others v Italy* (para 74) the ECtHR held that whenever a state exercises effective control and authority over an individual, the state is under an obligation to secure the rights that are relevant to the situation. It is irrelevant whether the acts attributable to the state happen within or outside the territory of the state.<sup>276</sup> Moreover, in *M.S.S v Belgium and Greece* (para 263-264), the Court found that the humiliating conditions coupled with 'the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.'

'House arrest' of asylum seekers during criminal procedure:<sup>277</sup> since the measure is to be carried out in immigration detention centres, alternatively in police jails, as HHC argued, it technically constitutes pre-trial detention of asylum seekers (HHC, 2015c). In *Amuur v France* (para 43) the ECtHR made it clear, that detention of asylum seekers is not arbitrary *per se*, if prescribed by and done in accordance with the law in compliance with international obligations. In illuminating the non-penalisation obligation of the 1951 Geneva Convention, the Court implicitly prohibits practices where asylum seekers and criminals fall into the same

<sup>271</sup> The case has since been referred to the Grand Chamber.

<sup>272</sup> See *Ilias and Ahmed v Hungary* (para 102-125).

<sup>273</sup> See *Ilias and Ahmed v Hungary* (para 48-77).

<sup>274</sup> See *Ilias and Ahmed v Hungary* (para 91-101).

<sup>275</sup> See *Bahaddar v. The Netherlands* (para 45); *Jabari v. Turkey* (para 50); *Chahal v. United Kingdom* (para 154);

<sup>276</sup> Also see *Loizidou v. Turkey*.

<sup>277</sup> Though applied in a very few cases.

category. Furthermore, the expression ‘in accordance with the law’ also refers to the ‘quality’ of the law: whenever domestic law authorises deprivation of liberty, it must be sufficiently accessible and precise (*Amuur*, para 50). House arrest as a measure in the context of pre-trial detention is blurred and contradictory. Moreover, detention of asylum seekers under such indirect and equivocal authorisation is arguably not ‘carried out in good faith’, thus arbitrary and violates Art 5 of ECHR, as established in the *Saadi v. United Kingdom* (para 74), let alone the ‘appropriateness’ of a police jail as the place of detention’ (*Amuur* para 43).

‘8-km Rule’: on 3 October 2017, in *N.D. and N.T. v. Spain* the Court found that the applicants’ removal to Morocco amounted to a violation of Art 4 of Protocol 4 of ECHR. The case concerned a Malian and an Ivorian national who illegally crossed the border fence between Melilla and Morocco. When apprehended, they were sent back to Morocco by the Spanish Guardia Civil without identification and without being given the opportunity to apply for asylum. Although collective expulsion has been explicitly acknowledged in Art 4 of Protocol 4 as an absolute prohibition with no exception whatsoever, the Hungarian authorities pushed back tens of thousands asylum seekers in a manner identical to that of the fellow Spanish officers.

The new criminal offences criminalised migration and the asylum procedure limited access to refugee status determination by deterring and *de facto* preventing asylum seekers from entering Hungarian territory. Deprivation of fundamental rights has become an everyday reality at the borders without adequate constitutional control.<sup>278</sup> Dublin transfers to Hungary had already been suspended by a number of EU member states, before the UNHCR requested full suspension in April 2017,<sup>279</sup> on the basis that asylum seekers would have to face a real risk of treatment contrary to Art 3 of ECHR (ECRE, 2016b). A razor-wired fence constructed to keep asylum seekers out of the territory, as well as (criminal) proceedings specifically tailored to the situation at hand can all be interpreted as examples of the wholesale rejection of existing social and legal norms, and as Nagy has shown, these are all “textbook examples of crimmigration” (Nagy, 2016). Moreover, not only asylum seekers, but also their supporters, NGOs have been portrayed and dealt with as ‘enemies’. A case study focusing on public attitudes towards Roma communities has recently established how intolerance and xenophobia can go mainstream in public discourse in Hungary (Vidra and Fox, 2014). Negative public perception towards migration in Hungary arguably peaked in 2016 (Simonovits and Bernát, 2016). The fact that the term “Gypsy criminal” has been taken over by the “criminal migrant” shows, as Thorleifsson phrased, “how old grammars of exclusion inform new fears” (Thorleifsson, 2017). The Hungarian Government’s ambition to define itself in opposition to liberal values is well-demonstrated by the new developments of migration and asylum policy. Moreover, this inflexible and monolithic approach to the governance of migration has gained an overwhelming social acceptance and support: the Fidesz-KDNP won a landslide victory at the parliamentary election of April 8.

<sup>278</sup> For further analysis of the framework in relation to ECtHR case law see Gyollai D and Amatrudo A (2018) Controlling irregular migration: International human rights standards and the Hungarian legal framework, *European Journal of Criminology*, (forthcoming).

<sup>279</sup> See UNHCR, ‘UNHCR urges suspension of transfers of asylum-seekers to Hungary under Dublin’ [Online] Available at: <http://www.unhcr.org/news/press/2017/4/58eb7e454/unhcr-urges-suspension-transfers-asylum-seekers-hungary-under-dublin.html>.

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European Commission v Hungary, C-286/12

European Commission v Hungary, C-288/12

Slovakia and Hungary v Council, C-643/15 and C-647/15



## ANNEX I: OVERVIEW OF THE LEGAL FRAMEWORK ON MIGRATION AND ASYLUM

Legislation title (original / English) and number	Date (passed/ commencement)	Type of law	Link
2003. évi LXXX. törvény a jogi segítségnyújtásról / Act LXXX of 2003 on Legal Aid	20/10/2003 / 01/04/2004	Act	<a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300080.TV">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300080.TV</a> (HU)
2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról / Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals	18/12/2006 / 01/07/2007	Act	<a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0700002.TV">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0700002.TV</a> (HU) <a href="http://www.refworld.org/pdfid/4979cae12.pdf">http://www.refworld.org/pdfid/4979cae12.pdf</a> (EN) (as of 29/05/2012)
114/2007. (V. 24.) Korm. rendelet a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. Törvény végrehajtásáról / Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals	24/05/2007 / 01/07/2007	Decree	<a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0700114.kor">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0700114.kor</a> (HU) <a href="http://www.refworld.org/docid/4979cae12.html">http://www.refworld.org/docid/4979cae12.html</a> (EN) (as of 29/05/2012)
2007. évi LXXX. törvény a menedékjogról / Act LXXX of 2007 on Asylum	25/06/2007 / 01/01/2008	Act	<a href="http://www.refworld.org/docid/4979cc072.html">http://www.refworld.org/docid/4979cc072.html</a> (EN) (as of 5 July 2016) <a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0700080.tv">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0700080.tv</a> (HU)
301/2007. (XI. 9.) Korm. rendelet a menedékjogról szóló 2007. évi LXXX. törvény végrehajtásáról / Government Decree 301/2007 (XI. 9.) on the implementation of Act LXXX of 2007 on Asylum	09/11/2007 / 01/01/2008	Decree	<a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0700301.kor">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0700301.kor</a> (HU)
2007. évi LXXXIX. törvény az államhatárról / Act LXXXIX of 2007 on the State Border	18/06/2007 / 01/01/2008	Act	<a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0700089.tv">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0700089.tv</a> (HU)
29/2013. (VI. 28.) BM rendelet a menekültügyi őrizet végrehajtásának szabályairól és a menekültügyi óvadékról / Interior Minister Decree no. 29/2013 (VI.28.) on the rules of	28/06/2013 / 01/07/2013	Decree	<a href="http://www.police.hu/sites/default/files/29-2013.pdf">http://www.police.hu/sites/default/files/29-2013.pdf</a> (HU)

execution of asylum detention and bail.			
2015. évi CVI. törvény a menedéjogról szóló 2007. évi LXXX. törvény módosításáról / Act CVI of 2015 on the amendment of Act LXXX of 2007 on Asylum	30/06/2015 / 09/07/2015	Act	<a href="https://mkogy.jogtar.hu/?page=show&amp;docid=A1500106.TV#lbj0id9947">https://mkogy.jogtar.hu/?page=show&amp;docid=A1500106.TV#lbj0id9947</a> (HU)
191/2015 (VII. 21.) Korm. rendelet a nemzeti szinten biztonságosnak nyilvánított származási országok és biztonságos harmadik országok meghatározásáról / Government Decree no 191/2015 (VII. 21.) on safe countries of origin and safe third countries	21/07/2015 / 22/07/2015	Decree	<a href="http://www.refworld.org/docid/55ca02c74.html">http://www.refworld.org/docid/55ca02c74.html</a> (EN) <a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a1500191.kor">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a1500191.kor</a> (HU)
2015. évi CXXVII. törvény az ideiglenes biztonsági határzár létesítésével, valamint a migrációval összefüggő törvények módosításáról / Act CXXVII of 2015 on the temporary closure of the borders and amendment of migration related acts	06/07/2015 – 01/08/2015	Act	<a href="https://mkogy.jogtar.hu/?page=show&amp;docid=a1500127.TV">https://mkogy.jogtar.hu/?page=show&amp;docid=a1500127.TV</a> (HU)
2015. évi CXL. törvény egyes törvényeknek a tömeges bevándorlás kezelésével összefüggő módosításáról / Act CXL of 2015 on the amendment of certain acts related to the management of mass migration	04/09/2015 / 15/09/2015	Act	<a href="https://mkogy.jogtar.hu/?page=show&amp;docid=a1500140.TV">https://mkogy.jogtar.hu/?page=show&amp;docid=a1500140.TV</a> (HU)
2015. évi CXLII. törvény az egyes törvények Magyarország államhatárának hatékonyabb védelmével és a tömeges bevándorlás kezelésével összefüggő módosításáról / Act CXLII of 2015 on the Amendments of Certain Acts Related to the More Efficient Protection of Hungary's Border and the Management of Mass Migration.	21/09/2015 / 22/09/2015	Act	<a href="https://mkogy.jogtar.hu/?page=show&amp;docid=a1500142.TV">https://mkogy.jogtar.hu/?page=show&amp;docid=a1500142.TV</a> (HU)
2016. évi XXXIX. törvény egyes migrációs tárgyú és ezekkel összefüggésben más törvények módosításáról / Act XXXIX of 2016 on the amendment of certain acts relating to migration and other relevant acts	10/05/2016 / 01/06/2016	Act	<a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600039.TV&amp;timeshift=ffffff4&amp;txtreferer=00000001.TXT">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600039.TV&amp;timeshift=ffffff4&amp;txtreferer=00000001.TXT</a> (HU)
2016. évi XCIV. Törvény a határon lefolytatott menekültügyi eljárás széles körben való alkalmazhatóságának megvalósításához szükséges törvények módosításáról / Act XCIV of 2016 on the amendment of acts	13/06/2016 / 05/07/2016	Act	<a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600094.TV&amp;timeshift=20160705&amp;txtreferer=00000001.txt">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600094.TV&amp;timeshift=20160705&amp;txtreferer=00000001.txt</a> (HU)

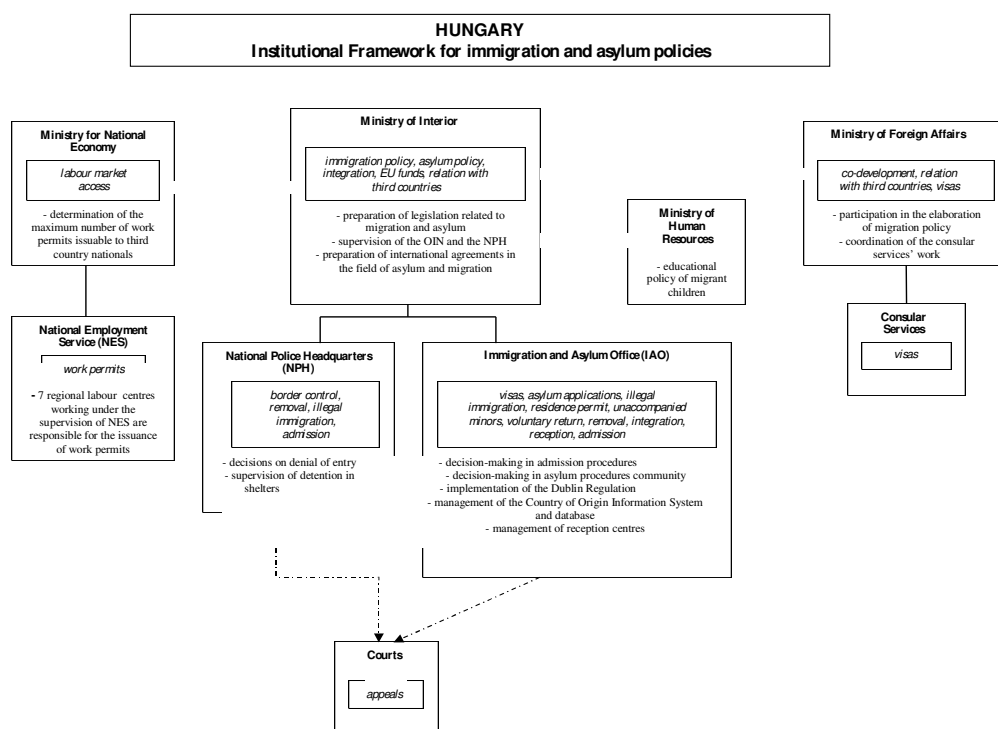


necessary to the broad application of the border procedures			
62/2016. (III. 31.) Korm. rendelet az egyes migrációs és menekültügyi tárgyú kormányrendeletek módosításáról / Government Decree no. 62/2016. (III. 31.) on the amendments of certain government decrees relating to migration and asylum	31/03/2016 / 01/04/2016	Decree	<a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600062.KOR&amp;timeshift=ffffff4&amp;txtreferer=00000001.TXT">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600062.KOR&amp;timeshift=ffffff4&amp;txtreferer=00000001.TXT</a> (HU)
113/2016. (V. 30.) Korm. rendelet az egyes migrációs tárgyú és velük összefüggésben egyes további kormányrendeletek módosításáról / Government Decree no. 113/2016. (V. 30.) on the amendments of certain government decrees relating to migration and other relevant decrees	30/05/2016 / 01/06/2016	Decree	<a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600113.KOR&amp;timeshift=ffffff4&amp;txtreferer=00000001.TXT">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600113.KOR&amp;timeshift=ffffff4&amp;txtreferer=00000001.TXT</a> (HU)
2017. évi XX. törvény a határőrizeti területen lefolytatott eljárás szigorításával kapcsolatos törvények módosításáról / Act XX of 2017 on the amendment of certain acts relating to the strengthening of the procedure conducted in border areas	07/03/2017 / 28/03/2017	Act	<a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700020.TV&amp;timeshift=ffffff4&amp;txtreferer=00000001.TXT">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700020.TV&amp;timeshift=ffffff4&amp;txtreferer=00000001.TXT</a> (HU)
70/2017. (III. 31.) Korm. rendelet a határőrizeti területen lefolytatott eljárás szigorításával kapcsolatos egyes kormányrendeletek módosításáról / Government Decree no. 70/2017. (III.31.) on the amendments of certain governmental decrees relating to the strengthening of the procedures conducted in border areas	31/03/2017 / 01/04/2017	Decree	<a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700070.KOR&amp;txtreferer=00000003.TXT">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700070.KOR&amp;txtreferer=00000003.TXT</a> (HU)
147/2017. (VI. 12.) Korm. rendelet a menedékjogról szóló 2007. évi LXXX. törvény végrehajtásáról szóló 301/2007. (XI. 9.) Korm. rendelet módosításáról / Government Decree no. 147/2017. (VI. 12.) on the amendments of Government Decree no. 301/2007 (XI. 9.) on the implementation of Act LXXX of 2007 on asylum	12/06/2017 – 27/06/2017	Decree	<a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700147.KOR&amp;timeshift=ffffff4&amp;txtreferer=00000001.TXT">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700147.KOR&amp;timeshift=ffffff4&amp;txtreferer=00000001.TXT</a> (HU)

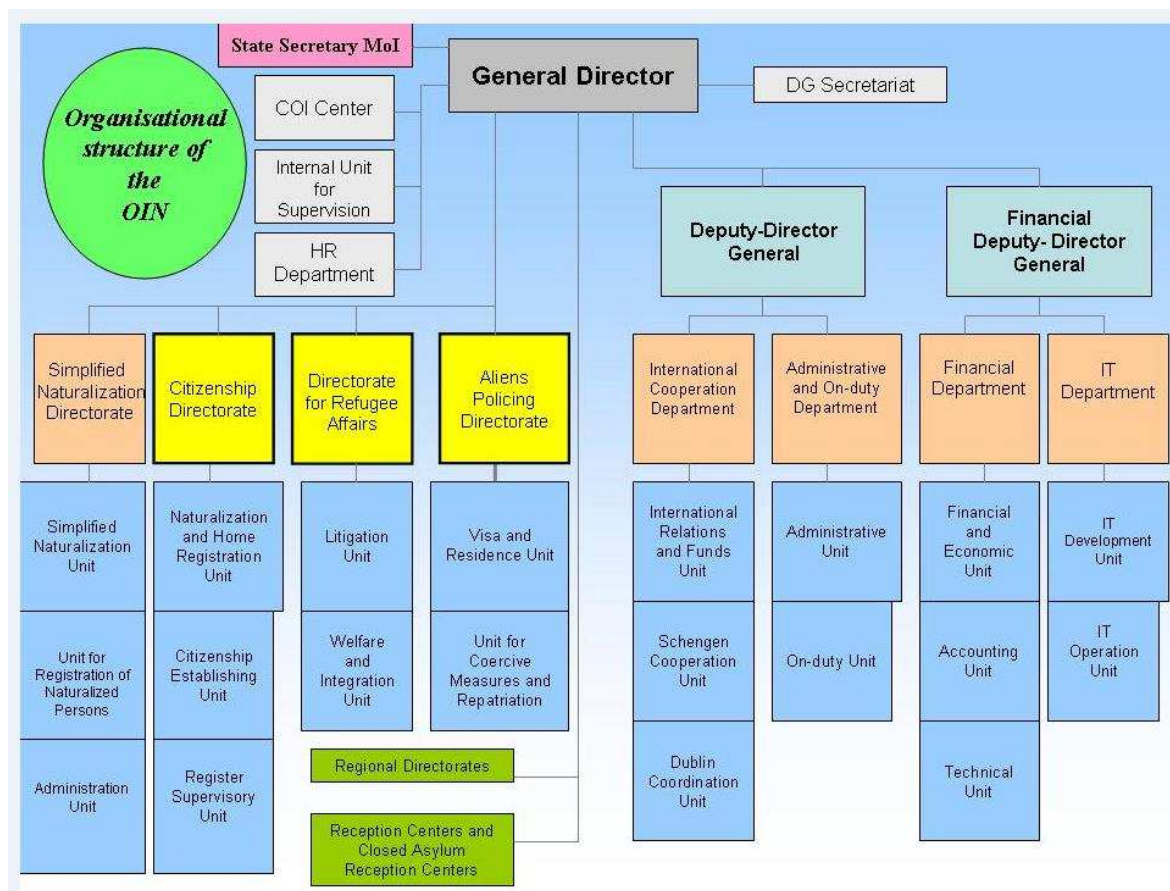
2017. évi CXLI. törvény az egyes migrációs tárgyú törvények módosításáról / Act CXLI of 2017 on the amendments of certain acts relating to migration	31/10/2017 / 01/01/2018	Act	<a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700143.TV&amp;timeshift=ffffff4&amp;txtreferer=00000001.TXT">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700143.TV&amp;timeshift=ffffff4&amp;txtreferer=00000001.TXT</a> (HU)
411/2017. (XII. 15.) Korm.rendelet az egyes migráció tárgyú és velük összefüggésben egyes további kormányrendeletek módosításáról / Government Decree no. 411/2017 (XII. 15.) on the amendments of certain governmental decrees relating to migration and of other related decrees	15/12/2017 / 01/01/2018	Decree	<a href="https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700411.KOR&amp;timeshift=ffffff4&amp;txtreferer=00000001.TXT">https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700411.KOR&amp;timeshift=ffffff4&amp;txtreferer=00000001.TXT</a> (HU)

## ANNEX II: LIST OF AUTHORITIES INVOLVED IN MIGRATION GOVERNANCE

Authority	Tier of Government	Area of competence in the fields of migration and asylum	Link
Immigration and Asylum Office	Ministry of Interior	Application at the border, Application on the territory, Dublin (responsibility assessment), Subsequent application (admissibility), Refugee status determination, Issuance of visa and resident permit.	<a href="http://www.bmbah.hu/index.php?option=com_k2&amp;view=item&amp;layout=item&amp;id=390&amp;Itemid=459&amp;lang=hu">http://www.bmbah.hu/index.php?option=com_k2&amp;view=item&amp;layout=item&amp;id=390&amp;Itemid=459&amp;lang=hu</a> .
Regional Administrative and Labour Court		Appeal	<a href="http://birosag.hu/kozigazgatasi-es-munkaugyi-regionalis-kollegium">http://birosag.hu/kozigazgatasi-es-munkaugyi-regionalis-kollegium</a> .
Police	Ministry of Interior	Application at the border, border control, return, removal, detention.	



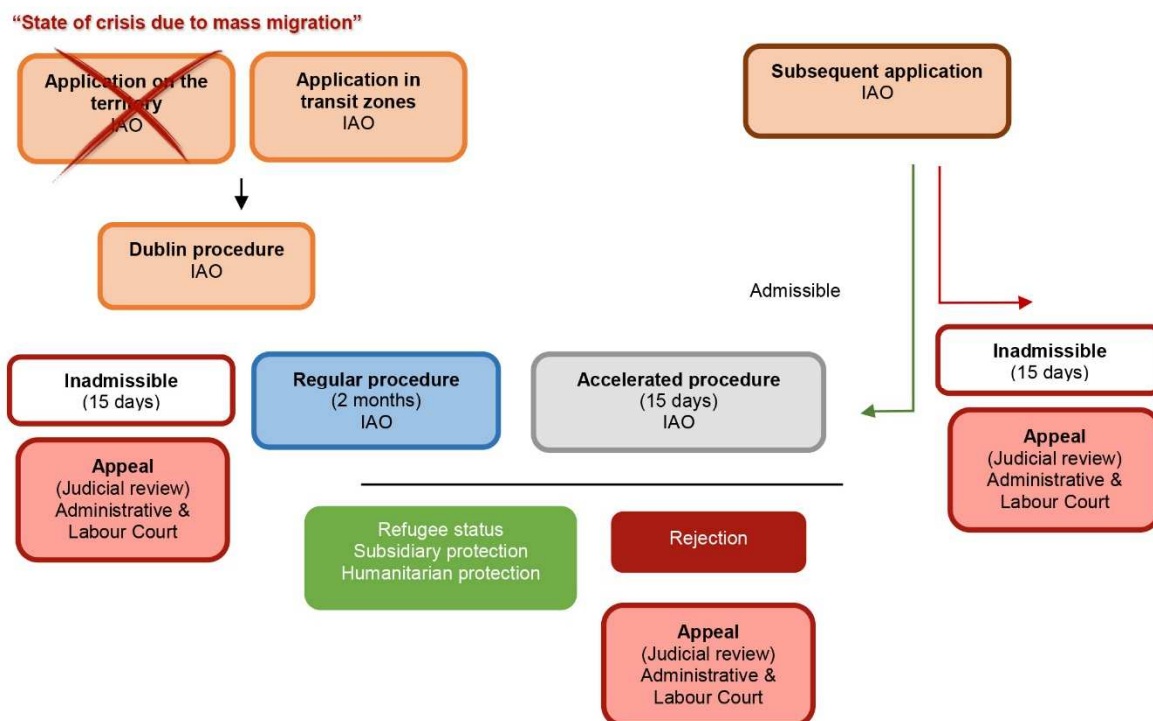
Source: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/docs/pages/hu\\_organogram\\_dec\\_2017.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/docs/pages/hu_organogram_dec_2017.pdf).



Source: EASO<sup>280</sup>

<sup>280</sup> EASO, Description of the Hungarian asylum system, May 2015, p3. Available at: <https://www.easo.europa.eu/sites/default/files/public/Description-of-the-Hungarian-asylum-system-18-May-final.pdf>;

## ANNEX III: FLOW CHART OF THE INTERNATIONAL PROTECTION PROCEDURE



Source: ECRE<sup>281</sup>

<sup>281</sup> Asylum Information Database, Country Report: Hungary, 2016, p13, Available at: <http://www.asylumineurope.org/reports/country/hungary/asylum-procedure/general/flow-chart>.

## ANNEX IV: THE NATIONAL CONSULTATION AND POSTER CAMPAIGN

### NATIONAL CONSULTATION on immigration and terrorism

Published by the Prime Minister's Office

Please complete this questionnaire.

1] We hear different views on increasing levels of terrorism. How relevant do you think the spread of terrorism (the bloodshed in France, the shocking acts of ISIS) is to your own life?

Very relevant

Relevant

Not relevant

2] Do you think that Hungary could be the target of an act of terror in the next few years?

There is a very real chance

It could occur

Out of the question

3] There are some who think that mismanagement of the immigration question by Brussels may have something to do with increased terrorism. Do you agree with this view?

I fully agree

I tend to agree

I do not agree

4] Did you know that economic migrants cross the Hungarian border illegally, and that recently the number of immigrants in Hungary has increased twentyfold?

Yes

I have heard about it

I did not know

5] We hear different views on the issue of immigration. There are some who think that economic migrants jeopardise the jobs and livelihoods of Hungarians. Do you agree?

I fully agree

I tend to agree

I do not agree

6] There are some who believe that Brussels' policy on immigration and terrorism has failed, and that we therefore need a new approach to these questions. Do you agree?

I fully agree

I tend to agree

I do not agree

7] Would you support the Hungarian Government in the introduction of more stringent immigration regulations, in contrast to Brussels' lenient policy?

Yes, I would fully support the Government

I would partially support the Government

I would not support the Government

**8] Would you support the Hungarian government in the introduction of more stringent regulations, according to which migrants illegally crossing the Hungarian border could be taken into custody?**

Yes, I would fully support the Government

I would partially support the Government

I would not support the Government

**9] Do you agree with the view that migrants illegally crossing the Hungarian border should be returned to their own countries within the shortest possible time?**

I fully agree

I tend to agree

I do not agree

**10] Do you agree with the concept that economic migrants themselves should cover the costs associated with their time in Hungary?**

I fully agree

I tend to agree

I do not agree

**11] Do you agree that the best means of combating immigration is for Member States of the European Union to assist in the development of the countries from which migrants arrive?**

I fully agree

I tend to agree

I do not agree

**12] Do you agree with the Hungarian government that support should be focused more on Hungarian families and the children they can have, rather than on immigration?**

I fully agree

I tend to agree

I do not agree



*"If you come to Hungary, you can't take the job of the Hungarian!"*



Source: <http://shelener2.blogspot.co.uk/2015/06/ha-magyarorszagra-jossz-nem-veheted-el.html>.

*"If you come to Hungary, you have to respect our culture!"*



Source: <http://4.kerulet.ittlakunk.hu/utcak-terek/150609/uipesten-egy-iskola-udvarara-kerult-bevandorlas-ellenes-plakatokbol>.

*“Let us stop Brussels!”*



Source: <https://theorangefiles.hu/2017/10/11/from-the-archives-the-lets-stop-brussels-national-consultation/>.

*“Do not let Soros have the last laugh!”*



Source: <https://www.npr.org/sections/parallels/2018/02/23/588218227/hungarys-leader-pushes-for-stop-soros-laws-against-ngos-that-help-migrants>.



*“Soros would settle millions from Africa and the Middles-East”*



Source: <http://www.euronews.com/2018/02/14/hungary-submits-anti-immigration-stop-soros-bill-to-parliament>.

## List of abbreviations:

BSPs: Beneficiaries of Subsidiary Protection  
EASO: European Asylum Support Office  
ECHR: European Convention on Human Rights  
ECtHR: European Court of Human Rights  
EMN: European Migration Network  
HHC: Hungarian Helsinki Committee  
IAO: Immigration and Asylum Office (former OIN)  
OIN: Office of Immigration and Nationality  
UAM: Unaccompanied minor  
UASC: Unaccompanied asylum seeking children  
UNHCR: Office of the United Nations High Commissioner for Refugees  
WHO: World Health Organisation

# **RESPOND**

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## **Iraq**

### **Country Report**

#### **D1.2 – April 2018**

#### **HHRO**

Horizon 2020  
RESPOND: Multilevel Governance  
of Mass Migration in Europe and  
Beyond (770564)



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William KhammooWarda

Iraq Team Leader

Baghdad- April 27, 2018

## Executive Summary

The issues of migration, displacement and refugees have not received as much attention as they do today, because of the gravity, sensitivity and the heavy burden imposed on countries. After 2015, it became a collective trait as a result of the turmoil, instability and armed conflicts witnessed by many countries in the South, Syria, Yemen and others. The Arab Spring brought disappointment to the hopes of the people for change towards freedom and democracy. Fear, violence and instability are driving many frustrated young people to leave their countries and seek shelter in safer and more stable countries to ensure a better life for themselves and their families. Their destinations are European and Scandinavian countries, due to their closeness to the Middle East, through Turkey, Greece, and Eastern European countries, then to the United States of America, Australia etc. They took legitimate and illegitimate ways to reach their destination. Hundreds lost their lives as they crossed the sea, rivers, prairies and mine fields.

It is impossible to address the problem and grant the rights of refugees and asylum seekers without conducting an in-depth study of the problem in all its dimensions and levels, and without international cooperation and joint efforts to reach a satisfactory solution. This requires a deep understanding of the social and humanitarian factors, and of the importance of continuing the work to avoid tension in international relations.

International attention to the protection of refugees and displaced persons is not new. The international community demonstrated its interest in this issue by reaffirming its desire to reinstate, consolidate and widen the scope of the previous conventions on refugee status through the Convention of 28 July on the status of Refugees, known as the Geneva Convention, defines the conditions under which a state must grant refugee status to persons who so request, as well as the rights and duties of such persons. It was adopted on 28 July 1951 by a conference of Plenipotentiaries on the status of Refugees and stateless Persons convened by the United Nations, pursuant to General Assembly resolution 429(V) of 14 December 1950. This convention was completed in 1967 by the Protocol Relating to the Status of Refugees.

This Convention relating to the Status of Refugees should not be confused with the Geneva Conventions, which since 1949 codify the rights and duties of combatants and civilians in time of war.

The Convention of 28 July 1951 relating to the status of Refugees constitutes, after its adoption, the main legal framework defining the right of asylum in the signatory States. It gives a particular meaning to the thousand-year-old idea of asylum.

However, the major powers influencing the international system have an increasing concern for immigrants and asylum seekers, especially after the emergence of the phenomenon of terrorism and the exploitation by the terrorist groups of the humanitarian nature of immigration to infiltrate these countries in order to carry out acts of violence and influence the public security and the prevailing order.

The problem is that citizens or certain groups within their countries feel that they are in danger and live in constant fear or face a threat to their lives due to civil war or armed conflicts on a religious, racial, or ethnic basis.

In the absence of a state capable of protecting the life of its citizens or ensuring their rights; when the state itself violates these rights; and when national laws fail to address such matters;

then, for humanitarian reasons, there is no recourse but to emigrate and to resort to other countries seeking safety and protection. The existence of cross-border relations, extensions and contacts with citizens of other countries with whom they have religious, sectarian, national or linguistic links, facilitates the process of crossing borders to neighbouring states and seeking asylum or migration.

Exodus to certain countries may increase tension between neighbouring countries. Therefore, to control and manage the implications of the problem, the study needs to focus on the humanitarian aspects by understanding the socio-economic relations, on one hand; and the legal and political aspects related to the protection of refugees and asylum seekers and the nature of conflict between states or between a state and a certain group, on the other hand. The conflict in Syria since 2011, and in Yemen since 2015 are among many examples.

Iraq is one country that experienced a bitter internal conflict. In 1933, it witnessed the massacre of Assyrian Christians forcibly displacing thousands of Assyrians to Syria. In 1975, After the Kurdish revolution claiming the rights of Kurds in northern Iraq failed, thousands of Kurdish families fled to Iran and settled there. In 1988, Saddam's regime carried out the "Anfal operations" against the Kurds, the Assyrians and all other Christians in the North Region as well as Fali Kurds, forcing thousands of families to flee to Turkey. Moreover, the eight year Iraq-Iran war forced thousands of families to relocate to safer places within the country or flee to Europe, the United States, Canada, Australia, and New Zealand etc.

The crisis with Kuwait in 1991, followed by years of sanctions, drove Iraqis to leave their country and settle in neighbouring countries or seek asylum in Europe, the United States, or other countries. The change in 2003; the sectarian violence in 2005-2007; the invasion of the so called Islamic State in Iraq and the Levant (ISIL) which occupied one third of Iraq in 2014; and the subsequent military operations against ISIL in 2016-2017, triggered more waves of migrants and internally displaced Iraqis. Although instability and lack of security are the main drivers for migration among Iraqis, other factors cannot be neglected.

Iraq is seeking to develop its legal system in terms of immigration and asylum to live up to the international standards. Political divisions and instability undermine the ability of the government to set comprehensive legislative priorities. A new bill on refugees, which passed the first reading in January 2018, is still pending at the Council of Representative.

This report discusses the constitutional, legal, political and procedural framework applicable in Iraq; legal gaps; legal instruments in addressing migration and asylum rights; as well as protection.

## **The Importance of the Research**

Migration and asylum is becoming an important and sensitive issue, both on national and international levels. Since 2015, the nature of migration changed into mass migration. It increasingly became an issue of concern, especially for European countries, affecting international relations as well. The importance of this research stems from the following factors:

- The protection of refugees and displaced persons is closely linked to international stability, security and peace, especially after the growing phenomenon of terrorism. Reducing migration while guaranteeing refugee rights helps to create a more stable environment and reduce tension among nations.

- The existence of effective laws for the protection of refugees and displaced persons complying with the international law will promote stability and justice and will minimize the sense of inferiority among refugees and displaced persons that exists in the absence of protection. Also, it will undermine the ability of terrorist organizations to recruit refugees or displaced persons, exploiting their suffering.
- Iraq, in its transition towards democracy, is still in search of peace and stability. It is struggling to manage its internal crisis with millions of internally displaced persons caused by years of violence; adding to that, it is hosting hundreds of thousands of refugees from Syria and other neighboring countries. This study seeks to draw a civilized model for Iraq to address migration and asylum, especially as it is located in a hot zone with severe internal and regional conflicts involving major international powers.
- Providing a legal environment and policies protective of human norms to the migrants and the displaced may reduce the likelihood of migration among Iraq's ethnic, religious, nationalistic and linguistic groups. Therefore, the number of asylum seekers from Iraq would be reduced gradually.

## Research Objective

This research aims to present the situation of refugees and displaced persons in Iraq, and to discuss the governance of this dossier through: understanding the socio-economic context; the constitutional and legal context; and policies and practices of the Iraqi government in terms of protection. Also, the research aims at discussing the evolution of both the legal and organizational framework as they relate to migration and asylum, the role of multiple governmental levels in providing protection to migrants and asylum seekers in Iraq in line with Iraq's internal and international commitments.

This research addresses the problem of rights and protection of refugees and displaced persons in Iraq from the perspective of legislation, mechanisms, and international obligations, especially since Iraq does not have an internationally recognized legal and procedural system for the protection of refugees and displaced people, and because the country is a source for migrants and asylum seekers. This raises many questions:

- Is Iraq, under its current conditions, capable of absorbing such a large number of refugees and asylum seekers?
- Do Iraq's own laws(internal laws) and policies relating to migration and asylum management measure up to the international standards?
- Are Iraq's laws and policies evolving to improve the management of migration and asylum?
- Does Iraq deal with migration and asylum for political reasons, or with religious, ethnic or regional sympathy?
- Will Iraq be a safe haven for asylum seekers in the future?
- Will Iraq be a tempting destination country for asylum seekers or will it be a transit country only?



## Research hypothesis

Iraq's legislative framework, procedures, and policies in terms of management of migration and asylum are incapable of responding to the volume of refugees and displaced persons. Despite the efforts to further develop existing policies and institutions, the Iraqi political system must commit to the related international conventions and laws in the provision of protection to the displaced and asylum seekers, or at least to develop its national laws and legislation to live up to the international standards on migration and asylum.

## Challenges and Difficulties

Iraq did not enact a law on access to information yet, and thus, the team faced difficulty collecting statistics and data as this requires the special approval of higher authorities. Also, officials were reluctant to provide the team with unpublished data and documents for fear of legal accountability within the frame of national security.

## Limitation

The research focuses on the situation of refugees and displaced persons in Iraq during the period following the turmoil in Syria and the Arab Spring Revolutions from 2011-2017.

## Research Methodology

The nature of this research required the use of the historical descriptive approach, where historical review of Iraq must be viewed as a country attracting people from neighbouring countries, to work and live, for its natural wealth and richness. This research also required the use of the comparative legal and political approach, whereby past and current laws and policies, in terms of migration and asylum, are reviewed. In addition this research relied on a systematic analysis method to better understand the internal and external factors controlling migration and asylum, thus leading to more objective results on the reaction, and the surrounding inputs and outputs.

## Structure of the Research

The body of this research is divided into eight parts. It begins with a brief overview of data and statistics about refugees and internally displaced persons in Iraq during the period covered by the research, their geographic distribution, affiliation, country of origin, age and sex (gender). The second part focuses on Iraq's social, economic, political and cultural context. The third part focuses on the constitutional organization of Iraq and the constitutional principles on migration and asylum. Part four focuses on the legislative and institutional frame work in the field of migration and asylum. Part five focuses on the legal status of foreigners in Iraq. Part six addresses reforms driven by the refugee crisis Part seven introduces the conclusion and recommendations, and part eight presents the references and sources used for this research.

## Means for Data Collection

The Iraqi national team collected the data for this report through direct and indirect meetings with governmental officials involved in the management of migration and asylum in Iraq. Desk review of laws, regulations and reports produced by the government of Iraq and international organizations and agencies working within the country.

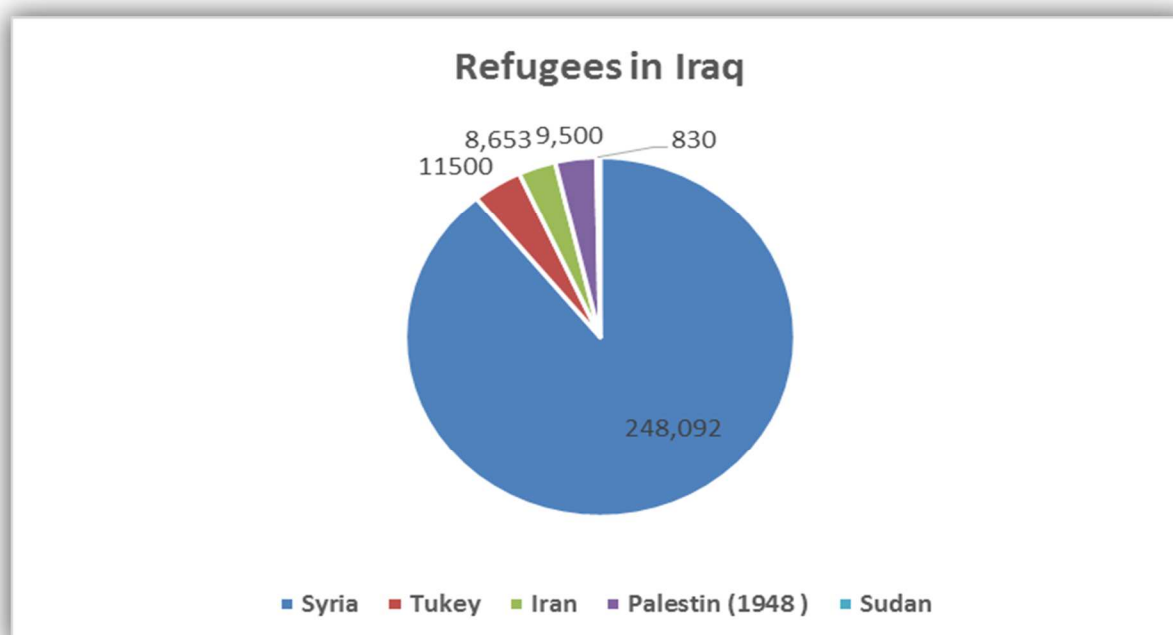
## 1. Statistics and Data Overview

Conflict and other forms of violence are the main reasons for migration among Iraqis, as well as Syrians. Some had been directly impacted by the conflict, with many experiencing the death of family members and the destruction of their homes, while others had feared that conflict escalation would negatively impact their livelihoods and security.

According to the UN High Commissioner for Refugees (UNHCR), the total population of concern in Iraq reached 7,169,117 as of February 28, 2018. This includes internally displaced Iraqis (IDPs); Iraqi refugees who have returned from Syria after the Syrian civil war in 2011; Syrian refugees; non-Syrian refugees; and the stateless<sup>1</sup>.

Iraq is currently hosting refugees from Syria; Turkey, Iran, Palestine, and Sudan. The distribution of refugees, as well as IDPs within Iraq, highly depends on the ethnic and religious background of the host community, as well as the relative stability and security of the area. As such, the Kurdistan Region of Iraq is hosting the majority of refugees and asylum seekers.

**Figure 1: Refugees in Iraq-Data Overview**



Since 2014, UN agencies and other international organizations have worked in collaboration with both Iraqi national and regional governmental authorities to better respond to the multiple waves of internally displaced Iraqis; as well as to the influx of Syrian refugees.

There are multiple governmental authorities involved in the registration of refugees and asylum seekers, as well as IDPs and returnees, and these are: the Ministry of Migration and Displacement; the Directorate of Residency at the National Ministry of Interior; the Directorate

<sup>1</sup><http://reporting.unhcr.org/sites/default/files/UNHCR%20Iraq%20Factsheet%20March%202018.pdf>

of Residency at the Ministry of Interior of the Kurdistan Regional Government; the Joint Crisis Coordination Centre (JCC) at the Ministry of Interior of the Kurdistan Regional Government; and the Asayish which is the primary security agency operating in the Kurdistan region of Iraq.

Each authority collects the data based on their specialty and area of focus. Data collected by governmental authorities are not public. UN agencies, such as UNHCR, produce periodic reports including monthly fact sheets on populations of concern, including Syrian and non-Syrian refugees in Iraq.

The UNHCR keeps an expanded database for all refugees and asylum seekers, segregated by gender, age groups, geographic area, and types of shelters, and whether or not the refugee is in camp or out of camp. It is the primary source for data. On the other hand, the International Organization for Migration (IOM) keeps an updated Displacement Tracking Matrix, or the DTM. The DTM is a tool that helps IOM Iraq actively monitor on-going displacements and track movements of people uprooted from violence across Iraq. It records those who fled their place of origin since January 2014 and have since returned.

As such, collecting detailed information (such as the number of cases in which entry at the border was refused, migratory balance, expulsion, etc.) requires the approval of multiple higher authorities from both national and regional governments, which is time consuming due to bureaucratic system.

## **1.1 Non-Syrian Refugees and Asylum- Seekers**

Before the large influx of Syrian refugees in 2012, Turks and Iranians (most of Kurdish descent), made up the majority of refugee communities in camps, settlements and urban areas in Erbil, Duhok, and Sulaymaniyah governorates of the Kurdistan Region in addition to Palestinian and Sudanese refugees living out of camps mostly in (Baghdad) and other Iraq governorates.

They have been granted humanitarian residency permits by the Iraqi government and renewed on fixed basis, but some of them granted political residency as Palestinians because of the Palestinian situation, there are quite few Iranians and Turks who have been granted residency for political reasons because they are opponents or are families of PKK fighters opposed to Turkey.

**Table 1: Non-Syrian Refugees in Iraq**

	<b>Country of Origin</b>	<b># Refugees</b>	<b>Background</b>	<b>Place of Residency in Iraq</b>
1	Turkey	11,500	Kurdish Descent	Kurdistan Region of Iraq
2	Iran	8,500	Kurdish Descent	Kurdistan Region of Iraq
3	Iran	153	Arab Descent	Baghdad, Basra and Qadisiya Governorates
4	Palestine (1948)	9,500	Arab Descent	Mostly in Baghdad
5	Sudan	830	Arab Descent	Mostly in Baghdad

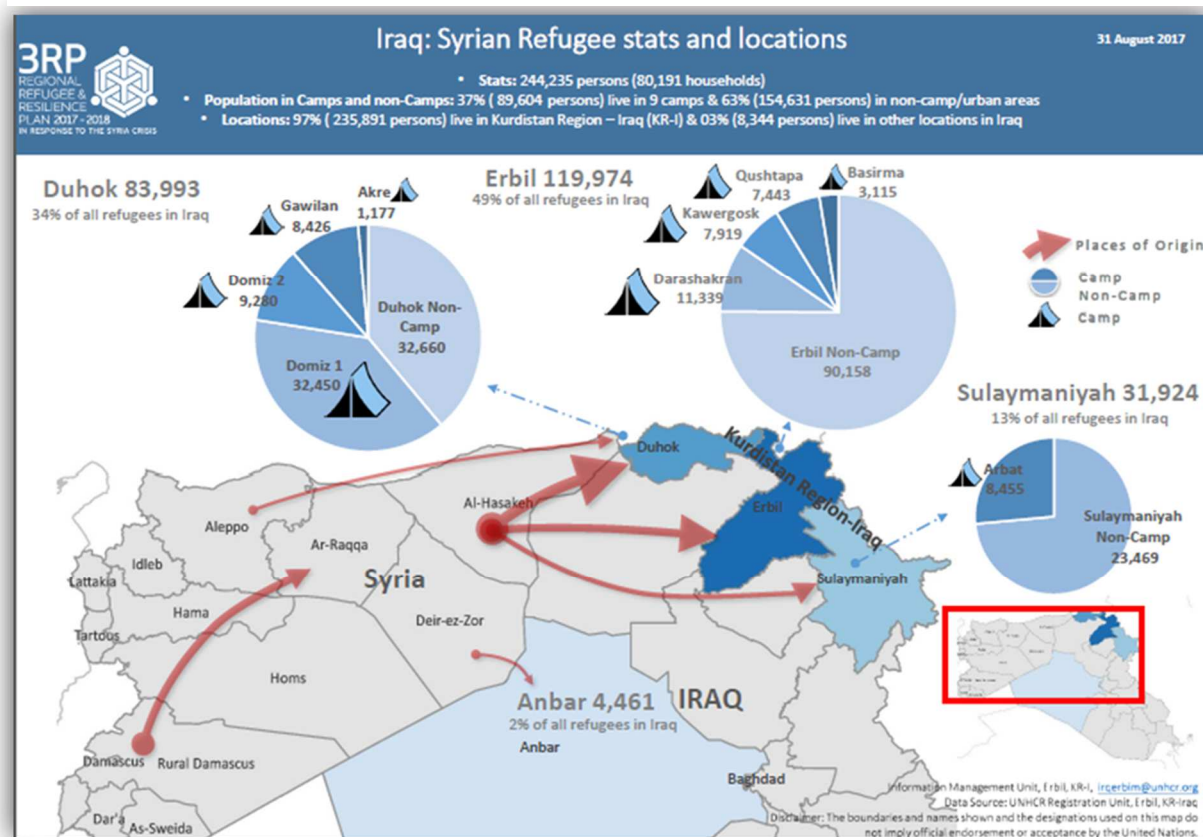
(Dosa, 2017)

## 1.2 Syrian Refugees and Asylum- Seekers

The Syrian refugees constitute the largest group of refugees in Iraq. They took several routes to Iraq. Some have directly crossed the borders from Al-Hasakeh to the Kurdistan Region of Iraq, others have crossed from DierEzor to Anbar Governorate, or from Turkey to the Kurdistan Region of Iraq. Fewer have entered Iraq with a valid visa for religious tourism and have stayed in the southern governorates of Najaf and Karbala. In general, they have settled in the areas where they share close ethnic and cultural affinities with the host population.

Out of a total of 248,092 Syrian refugees, the Kurdistan Region of Iraq hosts 231,000, with 38% sheltered in 10 camps, while the remaining 62% live in urban areas among local communities.

**Figure 2: Iraq- Syrian refugee Stats and Locations**



(UNHCR, 2017)

**Table 2: Syrian Refugees in Iraq Segregated by Age and Gender (%)**

Age Group	Male	Female	Total
0-4	8.32%	7.96%	16.28%
5-11	8.61%	8.28%	16.89%
12-17	5.3%	4.56%	9.86%
18-59	30.54%	23.99%	54.53%
60+	1.12%	1.32%	2.44%
Total	53.89%	46.11%	100%

(Meften, 2017)

Most Syrian refugees in Iraq come from the governorates of Hassakeh in Northeast Syria, Aleppo and Damascus in addition to rural Damascus, Homs, Dei res Zour and other places.

**Table 3: Syrian Refugees in Iraq by Governorate of Origin (%)**

<b>Governorate of Origin</b>	<b>Percentage of Refugees</b>
Hassakeh	57.81%
Aleppo	24.5%
Damascus	9.51%
Rural Damascus	0.74%
Homs	0.25%
Darah	0.1%
DeiresZour	2.18%
Other	4.91%
Total	100%

(Meften, 2017)

## 2. The Socio-Economic, Political and Cultural Context

### 2.1 Brief Migration History

Iraq is a country with a civilization deeply rooted in history. It has witnessed many conflicts and wars in its history. Also in modern times, the country witnessed occupations by British and American, wars and siege leading to significant political changes and a security vacuum. As a result, the country has been faced with an influx of immigrants as well as the migration of its own population, and thus changing the demographic composition of Iraqi society.

The migration of North Caucasians to Iraq goes back many centuries, peaking during the Caucasian War (1817–1864) and in the aftermath of the Russian–Circassian War with the Circassian Exile of the 1860s. The number of Iraqis of Circassian, Dagestan and Chechen origins is estimated to be between 30,000 and 50,000. They have integrated into Iraqi society while preserving their traditional North Caucasian culture and customs. These include traditions during wedding and birth ceremonies, and other special occasions. In addition to these, they have preserved their traditional languages and traditional cuisine (alDagestani, 2016).

Armenian history in Iraq has been documented since late Sumerian and Babylonian times. During the Ottoman Empire, some Armenians were forced to relocate to Iran in 1604, and then subsequently moved on to settle in Iraq. An additional 25,000 Armenians arrived in Iraq during the early twentieth century as they fled the persecution of the Armenian Genocide. Armenians have traditionally played an important role in Iraqi culture, particularly in literature, music and in art in general. They have also established schools, athletic and cultural clubs, and political and religious institutions in urban centres across Iraq (Jamil, 2010).

In addition, Palestinians have been residing in Iraq since 1948. Before the change in 2003, there were approximately 34,000 Palestinians in Iraq, concentrated mainly in Baghdad. However, after 2003<sup>2</sup>, the figure dropped to only 10,000. They have been the target of persecution and violence. Several hundred of them have been living in border camps since 2003, after having been refused entry into neighbouring countries Jordan and Syria. In other cases, Palestinians have been resettled to third countries (Hantook, 2018).

In the 1990s, thousands of families of PKK fighters moved to Iraq and were embraced by Iraq for humanitarian reasons and placed in special compounds in northern Iraq. Since the end of the 1970s and during the 1980s, Iraq embraced thousands of Iranian refugees who fled Iran after the regime change in 1979. Some who were loyal to the Shah of Iran, others are families of those opposing Iran's new regime. Iraq granted them political asylum status (Guardian, 2016).

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<sup>2</sup>After the fall of the regime in 2003, Iraq state institutions collapsed. Security and military services were dissolved by a US decision. This led to chaos in the administration of the country and successive waves of conflicts starting with the conflict between the American forces and the so-called resistance; the emergence of terrorist groups such as al-Qaeda; and the sectarian violence between Sunnis and Shia that almost amounted to a civil war. As a result, waves of internal/forced displacement led to demographic changes in many areas in Iraq. In the absence of security, refugees from Palestinian, Syrian and Iranian origins, once enjoying protection by the former regime, were targeted and faced a lot of pressure by different influential groups and the new ruling parties. Some of them had to flee the country, and many others were protected by the American forces until arranging their resettlement in a third country after coordination with the relevant UN agencies.



The escalation of violence in Iraq from 2005 to 2007 because of the terrorist activity of Al-Qaeda and the sectarian tension between Sunni and Shia and then the subsequent control of the so called Islamic State in Iraq and the Levant (also known as: ISIL, ISIS, IS, or Daesh in Arabic) over large swaths of Iraq in 2014, has led to the internal displacement of more than 3.3 million people, in addition to hundreds of thousands emigrants.

The effects of the economic crisis caused by the drop in oil prices, combined with the internal displacement and the heavy influx of Syrian refugees, placed a huge socio-economic burden on Iraq in general and on its resources, infrastructure and in particular the services of the Kurdistan governorates, as Syrian refugees and IDPs today constitute about 23 per cent of the population in the Kurdistan Region of Iraq (MPC, Iraq, 2015). This results in a strain on employment and livelihood opportunities, as well as on services. The demands for education facilities, sanitation, housing, and public transport has increased in parallel as well. The arrival of Syrian refugees has had a negative impact on local economies and labour markets, leading to a significant decline in job opportunities. Increased competition for housing outside the camps drove up costs and led to overcrowding and resorting to substandard accommodations, which significantly strained the Iraqi Government's budget (MPC, Iraq, 2015). At the same time, some positive accounts of the influx of Syrian refugees have been reported in Erbil, where host community members describe how the arrival of Syrians has bolstered the labour market by bringing in new skills and capacities (brain-gain)(MPC, Iraq, 2015).

Host community residents have generally welcomed Syrian refugees, often providing support in the form of food and clothing. In some cases Syrian refugees are hosted within their houses until alternative accommodation is located (MPC, Iraq, 2015).

Syrian refugees often mention feeling welcomed and having good relations with their host community. In turn, host community members frequently demonstrate solidarity, speaking of an obligation to provide for the needs of Syrian refugees due to the past hospitality shown to Iraqi refugees in Syria (MPC, Iraq, 2015). Syrian families arriving in Iraq predominantly chose their final locations according to ethno-religious similarities with the members of the host community. This partly mitigates the difficulties of integration, positively impacting the relations with host communities (MPC, Iraq, 2015).

## 2.2 Iraq Profile

Iraq is composed of many national, ethnic, religious, sectarian, linguistic, and cultural groups that form a mosaic of many colors, shapes and characteristics. The Muslim Arab makes up the overwhelming majority. Non-Arab Muslims include the Kurds, Turkomans, Farsi Kurds and Shabaks. Muslims in Iraq are divided into two main sects, Shia and Sunnis. In the absence of census, unofficial sources claim that Shia in Iraq make up the majority of Muslim Arab. They mostly live in Iraq southern provinces, in addition to many neighborhoods in Baghdad. The majority of Kurds and Turkomans are Sunnis, while the majority of the Shabak and the Farsi Kurds are Shia. In addition, there are other Islamic movements and methods, such as the Kakais, Sarliah, Naqshbandis, Ismailis, Baha'is, and others.

There are non-Muslim and non-Arab minority groups in Iraq, such as the Chaldeans, Syriacs, Assyrians, Armenians, Yezidis and Sabean Mandaean. The Chaldeans, Assyrians

and Syriacs<sup>3</sup> are the same people affiliated to different churches, such as Catholic (Chaldean Catholic, Syriac Catholic), Syriac Orthodox and Assyrian Church of the East, and other more recently established churches such as the Protestant and the Evangelical Churches (Warda, 2013). They use various dialects of Aramaic as their mother tongue, although in big cities they have adopted majority languages (e.g. Arabic).

Armenians are another ethnic group who are divided into different churches, such as Catholics and Orthodox. Armenians came to Iraq in multiple exoduses throughout the history (Warda, 2013).

Other non-Muslim and non-Christian minorities in Iraq are the Yazidis and SabeenMandaeans. Yazidis mostly live in the northern provinces of Nineveh and Dohuk. They speak Kurdish language with Kirmanji dialects (Warda, 2013). SabeenMandaeans live in central and southern Iraq provinces, mostly in Baghdad, Misan and Basra. They speak Arabic. Their native language is one of the ancient Aramaic dialects, which is used in the Mendi<sup>4</sup> by their clerics and by those who have special interest in this minority group (Warda, 2013).

Iraq is a *rentier* state. Its economy has been dominated by the oil sector, which historically has generated more than 95% of export earnings. In contrast, agricultural productivity has continuously declined. Iraq's population is 39,192,111 (July 2017 est.) with 2.55% population growth. Its population is among the youngest in the world.

Major cities population: Baghdad (capital) 6.643 million; Mosul 1.694 million; Erbil 1.166 million; Basra 1.019 million; Sulaymaniyah 1.004 million; Najaf 889,000 (2015). Urban population constitute 69.7% of total population (2017) with 2.97% annual rate of change. Net migration rate is -1.2 migrant(s)/1,000 populations (2017 est.) (Iraq Demographics Profile , 2018).

Iraq's HDI value for 2015 is 0.649— which put the country in the medium human development category— positioning it at 121 out of 188 countries and territories. Its Multidimensional Poverty Index (MPI) is 0.052; Employment to population ratio (% ages 15 and older) is 35.3; youth unemployment rate (% ages 15-24) is 35.1 (UNDP, 2016).

Ethnic groups: Arab 75-80%, Kurdish 15-20%, other 5% (includes Turkmen, Yezidi, Shabak, Kaka'i, bedouin, Romani, Assyrian, Circassian, Sabaeen-Mandaeen, Persian). The data is based on a 1987 government estimate; no more recent reliable numbers are available (ibid.).

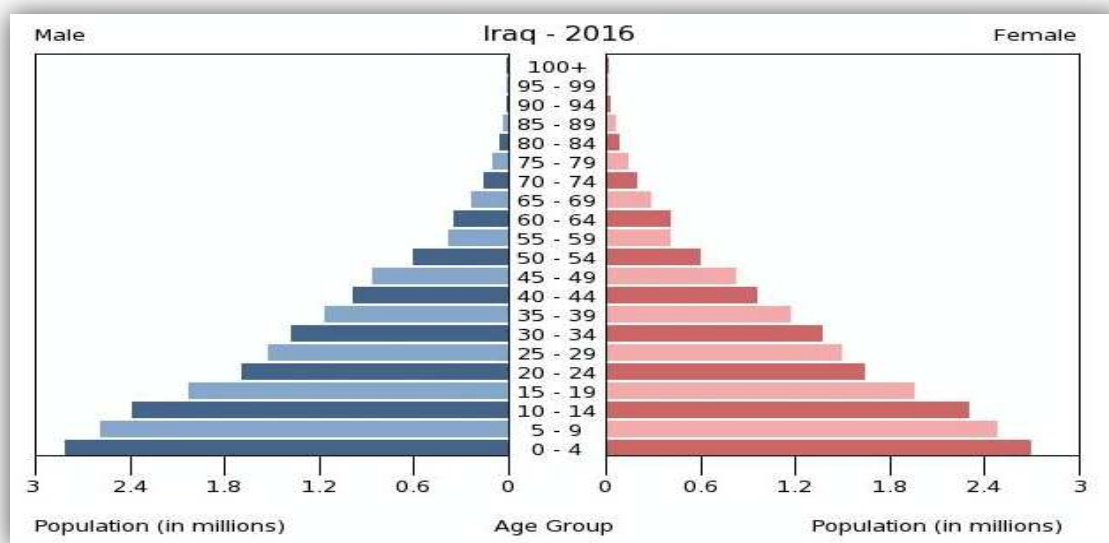
Religions: Muslim (official) 95-98% (Shia 64-69%, Sunni 29-34%), Christian 1% (includes Catholic, Orthodox, Protestant, Assyrian Church of the East), other 1-4% (ibid.).

Languages: Arabic (official), Kurdish (official), Turkmen (a Turkish dialect), Syriac (Neo-Aramaic), and Armenian are official in areas where native speakers of these languages constitute a majority of the population (ibid.).

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<sup>3</sup>Due to their long history and to the ecclesiastical and sectarian divisions, different names have been used for the same people. Scholars and writers have used many names, such as Chaldean; Aramaic; Assyrians; Syriac; Chaldo Assyrians; and most recently the (Chaldean Syriac Assyrians).

<sup>4</sup> Place of worship for SabeenMandaeans.

**Figure 3: Iraq population pyramid illustrates the age and sex structure of the country**

## 2.3 Iraq Socio-Political Structure

Iraq is a pluralist state encompassing several ethnic, religious, nationalistic, linguistic and cultural groups. Each has its own cultural and religious concerns as well as demands of the political system. Decades of a totalitarian Arab nationalist regime (The Baath Arabic Socialist Party) has obliterated the diverse ethnicities of Iraqi society. The Arabization policy adopted by the regime undermined the ability of various groups to exercise their rights, including the right to use their own languages.

For example, the Assyrian Christians, the oldest of the original Iraqi groups were considered as Arab according to the Baath Doctrine, their education was prohibited in their Syriac Aramaic language, the language of Jesus Christ, as they still retain and speak. Thus, the national identity of Turkmen, Chaldeans, Shabaks and others was changed in the framework of the policy of Arabization.

The 2003 changes in Iraq undertaken to dismantle a regime that had long threatened its own population and regional peace, as well as to establish a stable, democratic state in the heart of the Middle East gave a way to establishing a multi-party political system. The most enduring parties were those that had flourished in opposition during Saddam's era. Other parties emerged afterwards. Almost all these parties were formed along ethnic, sectarian or nationalist lines.

The struggle to forge a new identity for the political system provided these parties the opportunity to assert their own identities and the interests of their communities in the new political system in Iraq.

The 2005 elections institutionalized sectarian dynamics, given the parties' organization into ethno-sectarian blocs to maximize their electoral power. Ethnicity and sectarianism was used to mobilize citizens for voting purposes. Following the destruction of the al-Askari

mosque in Samarra in a terrorist attack in February 2006, the country descended into sectarian tension that resembled a civil war between the Sunnis and the Shia. As a result, millions of Iraqis were displaced; thousands were murdered.

Iraqis get to elect a new parliament in May 2018, and new Provincial Councils in December 2018. The country's party system is highly fragmented as Iraq's three major political camps – Shia, Sunnis and Kurds – have each splintered into factions that have little in common.

## 2.4 Iraq Minority Communities

For nearly a half century, Iraq has experienced on-going conflicts that have caused severe destruction and under-development. Internal and external warfare have taken a heavy toll on citizens leaving many in need of immediate and long-term assistance. Violence, sanctions, insecurity, and economic stagnation have inhibited progress while ethno-religious tensions, extremism, and discrimination have intensified violence over the years.

Particularly, Iraq's minorities have experienced consistent challenges to their security and livelihood. While the country at large remains in a fragile state, the situation for minorities like Yazidis, Christians, Sabeen-Mandaeans, Shabaks, Turkmans, etc. has been especially distressing. Overtime, these vulnerable communities have experienced extreme persecution leading to voluntary or forced relocation of many families to safer areas inside Iraq or causing them to seek refuge in other countries.

Reports by the UN and human rights organizations implicate ISIS in attacks against the civilian population, murder (including execution without due process), abduction, torture, rape and other forms of sexual violence, sexual slavery against women, captivity, forced religious conversion and the conscription of children. These acts may amount to war crimes, crimes against humanity, and, in the case of certain communities, including the Yazidi religious community, possibly genocide (UN High Commissioner for Refugees, 2016).

In fact, what happened to the Yazidis in Sinjar and the Christian in the Nineveh Plains by ISIS is daunting and constitutes several crimes against humanity, including genocide.

Recent reports indicate a sharp drop in the number of religious minorities in Iraq. The overall Christian population may have dropped from 1.5 million to 0.5 million since the fall of the Saddam Hussain regime in 2003. Sabeen-Mandaeans face extinction as a people. Since the outbreak of violence in 2003, most Sabeen-Mandaeans have either fled the country or have been killed. Of the 30,000 in mid-1990s, there are fewer than 5,000 remaining in Iraq today (MRG, 2017). As their small community is scattered throughout the world, the Sabeen-Mandaeans' ancient language, culture and religion face the threat of extinction (MRG, 2017). In 2006, UNESCO listed the Sabeen-Mandaeans' language in its Atlas of the World's Languages in Danger of Disappearing. The departure of many Sabeen-Mandean religious leaders from Iraq also threatens the ability of the remaining community to retain their rituals (ibid.).

It is clear that ethno-religious minorities continue to be under threat in Iraq. Civic activists repeatedly expressed concerns about the extinction of minorities in Iraq<sup>5</sup>. Due to weak government protection, security concerns, and discrimination including in laws and legislations. Article 2- First of Iraq constitution (Constitution, 2005) states that Islam is the

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<sup>5</sup><https://edition.cnn.com/2016/12/14/middleeast/iraq-minority-voices/index.html>

official religion of the State and is a foundation source of legislation. Clause A of the same article states that no law may be enacted that contradicts the established provisions of Islam(ibid.).

Article 26 of the Unified National Identity Law<sup>6</sup> No. 3 of 2016 is one example of discrimination against the non-Muslim minorities like Chaldeans/Assyrians/Syriacs, Armenians, Yazidis, and SabeenMandaeans. It constitutes a violation to the Iraqi Constitution, which in Article 37<sup>7</sup> protects the individual from intellectual, political and religious coercion; in Article 41<sup>8</sup> grants freedom in commitment to personal status choices; in Article 42<sup>9</sup> grants freedom of thought, conscience, and belief; and in Article 14<sup>10</sup> grants all Iraqis equality before the law(Constitution, 2005).

Article 26 of the Unified National Identity Law also makes it permissible for a non-Muslim to change his religion in accordance with the provisions of the Unified National Identity Law, while acknowledging that it is not permissible to change the religion of a Muslim because it is considered apostasy according to the concept of Islamic law (Shari'aa).The article providesfor changing the civil record of a minor indicate his religion as a Muslim once one of the parents converts to Islam. Also, the article contradicts with the Islamic Shari'aaLaw which states "no compulsion in religion".

The forceful conversion of minors to Islam has had its negative social consequences, creating problems to many Christian, SabeenMandaeans, and Yazidi families. For years, non-Muslim Iraqis have sought to amend the law so children can maintain their religion at birth and to be given the right to choose to change their religion after reaching adulthood but with no luck(HHRO, 2016).

On the other hand, provisions of Article 2 of the Personal Status Law No. 188 of 1959, states that the law is applicable to all Iraqis excluding those who have a special law to regulate their personal status affairs. Since thenon-Muslim communities in Iraq do not have a special law to regulate their personal status affairs, as such, Law No. 188 of 1959 which is mainly derived from the Islamic Shari'aa applies to non-Muslim communities as well in all matters including marriage, divorce, inheritance, custody over children, adoption...etc, in spite of the fact that non-Muslim communities have different provisions in their respective jurisprudence.

These laws place considerable pressure on non-Muslim minorities, who often feel their religious freedom is constrained, and a driving factor for considering immigration in search of an environment where they can enjoy religious freedom and exercise it openly(HHRO, 2016).

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<sup>6</sup> Article 26: Minors should follow the religion of the parent whom converted to Islam.

<sup>7</sup>Article 37- Second of the constitution: Second: The State shall guarantee protection of the individual from intellectual, political and religious coercion.

<sup>8</sup>Article 41 of the constitution: Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law.

<sup>9</sup>Article 42 of the constitution:Each individual shall have the freedom of thought, conscience, and belief.

<sup>10</sup> Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.

### **3. The Constitutional Organization of the State and Constitutional Principles on Immigration and Asylum**

#### **3.1 Constitutional Organization of the State**

The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic.

Article 1: The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq.

Article 47: The federal powers shall consist of the legislative, executive, and judicial powers, and they shall exercise their competencies and tasks on the basis of the principle of separation of powers.

The Judiciary is independent. The federal judicial power is comprised of the Higher Juridical Council, the Federal Supreme Court, the Federal Court of Cassation, the Public Prosecution Department, the Judiciary Oversight Commission, and other federal courts as regulated by law.

Article 87: The judicial power is independent. The courts, in their various types and levels, shall assume this power and issue decisions in accordance with the law.

Article 88: Judges are independent, and there is no authority over them except that of the law. No power shall have the right to interfere in the judiciary and the affairs of justice.

Article 89: The federal judicial power is comprised of the Higher Juridical Council, the Federal Supreme Court, the Federal Court of Cassation, the Public Prosecution Department, the Judiciary Oversight Commission, and other federal courts that are regulated in accordance with the law.

The constitution gives the Federal Supreme Court jurisdiction to oversee the constitutionality of laws and regulations in effect; interpreting the provisions of the Constitution; settling disputes that may arise between the federal government and the regional or provincial governments; settling accusations against the President, the Prime Minister or the Ministers;

and ratifying results of national elections (Articles 93)<sup>11</sup>. Decisions of the Federal Supreme Court are final and binding for all authorities (Article 94)<sup>12</sup>.

The Iraq federal system is composed of a decentralized capital (Baghdad); the Kurdistan Region; governorates; as well as local administrations.

The constitution clearly identifies the exclusive powers of the federal government. Among other issues, the federal government has exclusive powers over: Formulation of foreign policy and diplomatic representation; Formulation of and the execution of national security policy and the security of borders; Formulating fiscal and customs policy; and Regulating issues of citizenship, naturalization, residency, and the right for political asylum. The constitution gives supremacy to the region and governorates on all matters that do not constitute an exclusive power to the federal government<sup>13</sup>.

The decentralization process in Iraq is facing many challenges due to power overlap and conflicts over the distribution and management of wealth and revenues between the central, regional and provincial government. The Kurdistan region of Iraq is enjoying more autonomy comparing with other areas of Iraq, for its own pre-2003 status as a None Fly Zone, which puts the region outside the jurisdiction of Baghdad and enjoys international protection.

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<sup>11</sup>Article 93: The Federal Supreme Court shall have jurisdiction over the following: First: Overseeing the constitutionality of laws and regulations in effect. Second: Interpreting the provisions of the Constitution. Third: Settling matters that arise from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law shall guarantee the right of direct appeal to the Court to the Council of Ministers, those concerned individuals, and others. Fourth: Settling disputes that arise between the federal government and the governments of the regions and governorates, municipalities, and local administrations. Fifth: Settling disputes that arise between the governments of the regions and governments of the governorates. Sixth: Settling accusations directed against the President, the Prime Minister and the Ministers, and this shall be regulated by law. Seventh: Ratifying the final results of the general elections for membership in the Council of Representatives. Eight: A. Settling competency disputes between the federal judiciary and the judicial institutions of the regions and governorates that are not organized in a region. B. Settling competency disputes between judicial institutions of the regions or governorates that are not organized in a region.

<sup>12</sup>Article 94: Decisions of the Federal Supreme Court are final and binding for all authorities.

<sup>13</sup>Article 110: The federal government shall have exclusive authorities in the following matters: First: Formulating foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; negotiating, signing, and ratifying debt policies and formulating foreign sovereign economic and trade policy. Second: Formulating and executing national security policy, including establishing and managing armed forces to secure the protection and guarantee the security of Iraq's borders and to defend Iraq. Third: Formulating fiscal and customs policy; issuing currency; regulating commercial policy across regional and governorate boundaries in Iraq; drawing up the national budget of the State; formulating monetary policy; and establishing and administering a central bank. Fourth: Regulating standards, weights, and measures. Fifth: Regulating issues of citizenship, naturalization, residency, and the right to apply for political asylum. Sixth: Regulating the policies of broadcast frequencies and mail. Seventh: Drawing up the general and investment budget bill. Eighth: Planning policies relating to water sources from outside Iraq and guaranteeing the rate of water flow to Iraq and its just distribution inside Iraq in accordance with international laws and conventions. Ninth: General population statistics and census



### 3.2 Constitutional Entrenchment of the Principle of Asylum

The Constitution of Iraq guarantees the right for political asylum in Iraq. Article 110 gives the federal government the exclusive power over governing issues of citizenship, naturalization, residency, and the right for political asylum. Provisions of Article 21 sets the scope as follow:

Article 21-Second states “A law shall regulate the right of political asylum in Iraq. No political refugee shall be surrendered to a foreign entity or returned forcibly to the country from which he fled”.

Article 21-Third states “Political asylum shall not be granted to a person accused of committing international or terrorist crimes or to any person who inflicted damage on Iraq”.

Although the Iraqi Constitution and laws guarantee rights to citizens and all who lives on Iraqi territory, as stated by the Rights and Liberties in Section Two of the constitution, but the practice is totally different.

Political instability and fragile security undermine the ability of the executive authorities to enforce the law and to ensure the rights. Also, the independency of the Judiciary is questionable due to high political pressure without enough protection. Judges fearing for their lives and the lives of their families cannot enforce the law and achieve justice especially when many of them became victims to terrorism. (Bayazid, 2016)

The same applies to the refugees, their legal status, rights and scope of protection. In light of this reality, one can imagine the level of vulnerability of refugees and displaced persons in terms of their rights and protection.

## 4. The Relevant Legislative and Institutional Framework in the Fields of Migration and Asylum

Iraq does not have an integrated plan on immigration and asylum seekers. Iraq has not enacted a relevant law until now. But Iraq has a law regulating the residency of foreigners only.

Prior to the change in 2003, the government only recognized asylum for political or military reasons. Also, the government then offered some groups special treatment, such as the Palestinians who fled their homeland in 1948, granting them all the benefits that Iraqi nationals are entitled to except citizenship. The same was extended to the Iranian Opposition known as Mujahedeen-e-Khalq (MEK) based in Iraq since the 1980s. On the other hand, it stripped thousands of Iraqis of their Iraqi citizenship on the grounds of their affiliation with other countries, especially Iran, and took forceful measures to deport them.

Before 2003 Iraq also embraced Turkish refugees of Kurdish origin, most of them the families of PKK and settled in camps. The most important is the camp of Makhmour, 25 kilometers east of Mosul on the way to Erbil.

Similarly, Iranian Kurds opposed to the regime of Iran were placed in the Tash camp near Ramadi, some fifty kilometres from Fallujah, which was closed in 2006 by the order of the Ministry of Interior in coordination with Kurdistan Regional Government of Iraq where UNHCR transferred the refugees to the Kurdistan Region of Iraq and were then merged into the Kurdish community there, where low-cost houses established within the residential complex of Barika near Sulaymaniyah, some of them were resettled in Sweden by the relevant UN agencies.

“Given the Arab nationalist ideology of the Baath regime that promotes for the development and creation of a unified Arab state, the government did not provide the status of refugees to asylum seekers from Arab countries. Instead, they were treated as cross-border displaced”. (Hantook, 2018)

After the change in 2003, the US military in Iraq signed an agreement with the MEK in 2004, promising that members would be treated as “protected persons” under the Fourth Geneva Convention. In 2009, Iraqi forces raided Camp Ashraf, the group’s long-time base north east of Baghdad (Khalis Area), shortly after US-led forces handed over responsibility for the camp to the Iraqi government. The group was later relocated to Camp Liberty, a former military base in the capital. The UN repeatedly expressed concern about the safety and security of residents of these camps. (UNAMI, 2011)

In December 2011, a Memorandum of Understanding was reached between the United Nations and the Government of Iraq, and brokered by the Government of the United States, for the express purpose of resettling these individuals as refugees in third countries. The camp was officially closed after the last 280 residents were flown to Albania in September 2016. (The Guardian, 2016)

UNHCR supervised the camp of Makhmour for Turkish refugees of Kurdish origin until 2008, and later came under the supervision of the Iraqi state, supervised directly by Kurdistan Regional Government of Iraq at present. The camp administratively follows the province of

Nineveh, 45Km from Erbil, "where the number of refugees is more than (10000) Turkish refugees, and that their legal status is considered asylum seekers" (Hantook, 2018)

## 4.1 The National Policy on Immigration and Asylum

While Iraq is not a party to the Refugee Convention of 1951 or its protocol of 1967, the Iraqi government has issued two legislative instruments related to refugees in Iraq: Law No 21 of 2009 establishes the Ministry of Migration and Displacement to provide assistance and services to both internally displaced persons and foreign refugees inside Iraq; and the Political Refugee Act No. 51 of 1971 regulating political asylum in Iraq. Nevertheless, Iraq does not have a national system for the protection of refugees and asylum seekers.

The government generally cooperates with the UNHCR and other humanitarian organizations to provide protection and assistance to the refugees, IDPs, asylum seekers, and stateless residents in the country. Since the beginning of the crisis in 2014, after ISIL invasion of Iraq and Syria, the UNHCR took the lead in the registration and determination of refugee status for asylum-seekers.

The humanitarian community - under the leadership of the UNHCR, 10 UN sister agencies and some 34 partner organizations - has been working closely with the government of Iraq and the Kurdistan Regional Government in order to provide a coordinated response to the protection and access to services for Syrian refugees in Iraq. The Ministry of Migration and Displacement is a key government partner and the Ministry of Interior of the Kurdistan Regional Government is the main partner for the refugee response specific to the Kurdistan Region of Iraq, while the Ministry of Planning is playing an increasingly important and dynamic role in the design and monitoring of the refugee response programme.

The need for effective coordination between the UN and the KRG has resulted in the establishment of a Joint Crisis Centre (JCC) in May 2015, which has been operationally equipped with support from UNDP, the objective of which is to effectively coordinate government actions in response to the crisis and to liaise with the international community. (UNHCR, 2016)

Since January 2016, there are on-going efforts to handover responsibility of primary health care in camps to governmental health departments. The goal is to integrate provision of primary health care in the national system.

**Table 4: Sector Support by Agency**

Sector	Lead/ Co-lead
Protection	UNHCR
Food	WFP/FAO
Education	UNICEF/Save the Children
Health	WHO/UNHCR
Shelter	UNHCR
Basic Needs	UNHCR
WASH	UNICEF/UNHCR

(UNHCR, 2016)

UNHCR is leading the Registration process; Protection; Camp Coordination and Camp Management (CCCM); Shelter/Non-Food items clusters, as part of the cluster coordination mechanism for IDP response; and leading the humanitarian response for Syrian refugees in coordination with the authorities through the Regional Refugee and Resilience Plan (3RP).

The Government formed a Relief Committee, chaired by the Minister of Migration and Displaced, as well as support committees to facilitate procurement, camp constructions, and provision of health services.

On the other hand, The KRG has granted residency permits to Syrian refugees that grant freedom of movement within the Kurdistan Region of Iraq; right to education free of charge in public schools on par with Iraqi nationals as well as right to work. Refugees holding a residency permit are also granted free access to health services in the Kurdish region. Those without residency permits find free services in refugee camps.

## 4.2 The National Legislation on Immigration and Asylum

While Iraq is not a party to the Refugee Convention of 1951 and the protocol of 1967, the Iraqi government has issued two legislative instruments related to refugees in Iraq: The Ministry of Migration and Displacement Law No 21 Of 2009; and The Foreigners' Residency Law No. 76 of 2017. (The Council of Ministers)

### 4.2.1 The Ministry of Migration and Displacement Law No 21 Of 2009

The law sets the scope of work of the Ministry as providing assistance and services to both internally displaced persons and foreign refugees inside Iraq.

Article 2- Sixth of the law defines Palestinian refugees as those who have been forced to leave their homeland since 1948 and who have been legally residing in Iraq and whose asylum has been accepted until the date of enforcement of the law. While Article 2- Seventh recognizes refugees of other nationalities as a result of persecution due to race, religion, nationality, belonging to a particular social group or political view, or as a result of exposure to violence or events seriously undermining public security and threatening their lives, physical

safety or freedoms, whose asylum has been accepted in accordance with the law and international conventions to which Iraq is a party.

Article 3 of the law sets the framework of support, facilitation, coordination and provision of services in emergency circumstances to the categories recognized by the law, including internally displaced Iraqis and Iraqis in the Diaspora; in addition to refugees from Palestinian descent and other nationalities. Article 3- Second provides for improving their conditions to reach the minimum basis determined based on clear and specific criteria in light of the guidelines of the United Nations and international laws, charters and conventions taking into account national interest and internal considerations. While Article 3- Fifth focuses on coordination and cooperation with the concerned parties inside and outside Iraq to provide solutions and services.

Article 7 of the law provides for the formation of a National Committee for Migration and Displaced Persons' Affairs, under the chairmanship of the Minister and the membership of a number of experts and specialists from within the Ministry, for coordination with other ministries. It gives the Minister the authority to regulate the work of the committee.

Article 8 of the law provides for the formation of an Emergency Operation Room headed by the Minister or his designee. The Emergency Operation Room is responsible for coordination with other ministries and competent authorities; civil society organizations; and international organizations to create adequate resources and take the necessary action in response to emergency situations facing the categories identified in Article 2 of the Law.

In addition, Article 12 of the law gives the Ministry the power to open offices, in coordination with the Ministry of Foreign Affairs, in Iraqi embassies and consulates in countries where there is an Iraqi community, for the purpose of extending its services to Iraqi refugees in those countries.

In general, Law No. 21 of 2009 constitutes the first legal instrument for the Iraqi government to identify the beneficiaries from refugees and internally displaced persons as recognized by Article 2 of the law. But the implementation of the law is facing setbacks to the extent that the ministry cannot achieve its main objectives in terms of providing the protection required to the categories covered by the law.

The law repeats expressions like care, provision of services, solutions, etc. but does not mention the term Protection in any of its clauses, nor the type and quality of services provided. Ambiguity folds all aspects related to the legal status of refugees and asylum seekers. It left open all matters related to requirements for protection such as identification papers, temporary residency...etc.

The law also grants the ministry the right to form a committee specialized in the affairs of migrants and displaced persons, while the ministry as a whole is responsible for providing its services to migrants and displaced persons.

Article 3- first of the law focuses on addressing the affairs of the categories identified in Article 2 of the law as groups and not as individuals. It gives an exception to individuals with special cases without identifying the standards, that the phrases in it are generally opened .

The law in its current form is vague and fails to provide specific remedies to many of the problems facing migrants and asylum seekers in Iraq as well as facing internally displaced Iraqis.

### **4.2.2 The Political Refugee Law No. 51 of 1971**

The law addresses political refugees in Iraq. Article 1- Third of the law defines the Refugee as any person who resorts to the Republic of Iraq for political or military reasons.

Article 2 allows for Arab citizens or foreigners residing outside Iraq, residing in Iraq, or displaced from the border area to Iraqi territory to apply for asylum in Iraq.

Article 3 lists the conditions for accepting an application for asylum when the following is ascertained: Being a refugee, his good intention to resort to the Republic of Iraq is proved, the sole purpose of the asylum is not only to find a way to earn and live, and no warnings and doubts in his request.

Article 4 prohibits the extradition of a refugee to his country under any circumstance. An applicant may be deported to another country in case the application is rejected.

Article 5 of the law provides for the formation of a Permanent Committee for Political Refugees' Affairs in Baghdad. It is responsible for examining refugee cases in accordance with the instructions issued by the Minister. The Committee is headed by the Deputy Minister of Interior or his designee. Its membership is composed of representatives from: the Revolutionary Command Council; the Ministry of Interior; the Directorate of Military Intelligence; the Directorate of Public Security; and the General Directorate of Nationality. The Committee is administratively and financially linked to the Ministry of Interior, including salaries, allowances and expenses for the refugees. The Committee may assign Iraqi diplomatic missions the task of investigations on persons residing outside Iraq.

Article 6 sets the responsibility of the committee to submitting recommendations with justifications on each case to the Minister of Interior for final decision. The decision of the Minister can be appealed before the President of the Republic within 15 days from the date of notification. Decisions of the President of the Republic are final.

Article 8 the provisions of the Foreigners' Residence Act shall be exempted from: A person his asylum has been accepted or has entered Iraq as refugee. When a request is denied to a person covered by provisions of article 2 of this law regarding admission of asylum in Iraq, the Minister (Interior Minister) may accept his residence application according to the Foreigner's Residence Law or reject it and the decision of the Minister shall be final.

Article 16 of the law grants the Minister of Interior the power to revoke the decision of asylum if the refugee breaches the security or political interest of the state. He may order the deportation thereof, in addition to referral to the court if his act is punishable by law. The Minister may issue an order to detain a refugee in the event of his breach of security or the order for a period not exceeding two months pending the decision to deport him.

Although, Articles 11, 12 and 13 of the law grant the political refugee many benefits; Articles 14, 15, 17 and 18 oblige the Ministry of Interior and other security agencies to follow up on all matters related to the political refugee. Changes to place of residence or movement inside and outside of Iraq require the approval of the Minister of Interior, and the approval of the President of the Republic for a trip outside Iraq exceeding one month.

The law has some flaws especially in Article 8, it is not clear about the status of residency of applicants, the law is excluding applicants for asylum from the provisions of the Foreigners' Residency Law and also excludes those whose application is approved. In addition, the law does not grant asylum applicants whose application is denied the right to appeal the decision

before the judicial court, while the draft of a new law on refugees proposed by the Ministry of Migration and Displacement to the Parliament for discussion and voting indicate in Article 5 Sixth, that those who has been refused for asylum have the rights to challenge the decision in the administrative court. Unfortunately, the draft is still not passed in the Iraqi Parliament (Hantook, 2017).

In a meeting with Major General Retired, Dr.Mared Abdulhasan Hasoun, he said:

“Although Iraq has a Law for Political Refugees since 1971, but its implementation is totally controlled by Saddam. Political refugees in Iraq were either leaders of Bath Party from other countries (like Syria), or members of oppositional parties in other neighboring countries who did not have good relations with Iraq (like the Iranian opposition MEK)”.

### **4.2.3 The Foreigners’ Residency Law No. 76 of 2017**

The Iraqi Council of Representatives passed a new law to regulate the residency of foreigners in Iraq: the Foreigners’ Residency Law No. 76 of 2017

The law aims to regulate the entry and exit of foreigners to and from the Republic of Iraq; identify types of entry and exit visas for foreigners to the Republic of Iraq; and regulate the residency of foreigners inside Iraq.

Articles 3 and 8 of the law give the right to a foreigner to enter Iraq according to specific conditions and criteria.The law provides for the foreigner to have a passport or a travel document with not less than six months validity; having an entry visa stamped in his passport or travel document upon his arrival, and a stamped exit visa upon his departure; a proof for being free of communicable diseases, infectious diseases and HIV; and to enter and exit the country through the official border crossing points (Art.3).

Avisa applicant must submit proof on being: financially able to cover the costs during his stay in the country; there is no impediment to his entry into Iraqi territory related to public health, public morals, or public security; not being accused of or convicted of a crime outside Iraq; has not been deported or expelled from the country before unless the causes are removed provided the passage of two years on the deportation or expulsion; and being free of communicable diseases, infectious diseases and HIV (Art 8).

Article 9 of the law allows for the granting of a renewable one-year entry visa in the following cases: for the purpose of joining the head of the household or the guardian; for the purpose of studying in one of Iraq’s educational institutions or trainings in one of the public institutions, uniting the family; a foreigner widow or divorcee of an Iraqi husband; and to the foreign passport holder spouse and children of an Iraqi (man or woman).

Article 10 of the law provides for the applicant to provide evidence on the reason for his entry to Iraq and on the entity that will sponsor his stay in the event that he becomes financially dependent.

Article 11, 12, 13 and 15 of the law set the entry and exit visa requirements for foreigners working in Iraq.

Article 19- First of the law provides that a foreigner with a regular visa and who wishes to extend his stay in Iraq may apply for a residency permit of one year, renewable as long as the requirements for granting the permit stand. Article 19- Second grants the Director General of the General Residency Directorate at the Ministry of Interior the right to reject or approve the



extension of the residency permits according to public interest. The applicant may appeal the decision before the Minister of Interior within 15 days from the day of notification provided that he receives an answer to his appeal within 30 days. Article 19- Third grants the Minister of Interior the right to withdraw a valid residency permit for reasons related to public interest. Article 19- Fourth, provides that a foreigner return his expired residency permit when applies for the exit visa. Article 19- Fifth states that if a foreigner leaves Iraq for a period exceeds six months, the remaining period of his residency permit will be cancelled and he must apply for a new residency permit upon his return.

Chapter Five of the law (Articles 24-35) regulates the process of deportation and expulsion of foreigners from Iraqi territories. Article 26 grants the right to the officer in charge to expel a foreigner who has illegally entered the country. Article 27 gives the right to the Minister of Interior, or his designee, to deport a foreigner who has legally entered Iraq but is not complying with the visa requirements; or a foreign resident who lost one of the conditions for his residency in Iraq. Article 28 and 29 gives the right to the minister, or his designee, to restrict the place of residence of a foreigner, a stateless person, or one who presents a threat to public security for a period specified in the decision for expulsion or deportation. Article 30 states that a decision to deport a foreigner may include the deportation of his dependents. Article 31 states that a deported foreigner cannot enter Iraq without a prior decision from the minister. Article 34 gives the right to the foreigner to ask for a period not exceeding 60 days to settle his affairs in the country before deportation provided that he has an Iraqi grantor.

When the Minister or his representative issues a decision of deportation or expulsion against a foreigner, the foreigner shall be held in the detention centre until deportation to his country or to a third country in the event of a danger to his life in his country is arranged because Iraq does not have special centres for the deportation of foreigners. The level of respect to human rights depends on the police measurements of the detention centre in which the foreigner is being held. One of the disadvantages of this law is not granting the right to a foreigner to appeal the decision of deportation or expulsion before the judiciary.

Chapter Seven of the law (Articles 38-48) sets penalties in case of violations to its provisions. Penalties vary from imposing fines to imprisonment or both penalties; as well as deportation.

Article 44 of the law sets the penalty in the case of the expiration of residency permit. Penalties start from a fine of 100,000 Iraqi Dinars and increases by 10,000 Iraqi Dinars for every day, provided that the total penalty does not exceed 5,000,000 Iraqi Dinars.

The new Foreigners' Residency Law No. 76 of 2017 is more acceptable and relatively in line with human rights laws and norms. The law reduced the penalty for a foreigner illegally staying in Iraq from life imprisonment and confiscation of movable and immovable property in the annulled law No. 118 of 1978 to a fine of 5 million Iraqi dinars (equivalent to 4 thousand U.S dollars).

Under the current circumstances in Iraq, the law can be exploited especially by foreign terrorists to access Iraq and carry out their terrorist attacks.

### 4.3 The sub-National Legislation

The Iraqi Constitution gives the federal government the exclusive power over regulating issues of borders, citizenship, naturalization, residency, and the right to political asylum. Nevertheless, there are procedural discrepancies between the region and the central government of Iraq.

The central government does not issue residency permits, nor work permits to asylum seekers. While the Kurdistan Regional Government issues residency permits that grant the right to work; freedom of movement within the three governorates of Kurdistan region of Iraq; and the right to education free of charge in public schools on par with Iraqi nationals. Refugees holding a residency permit are also granted free access to health services in the Kurdistan region. Those without residency permits find free services in refugee camps.

## 5. The Legal Status of Foreigners

### 5.1 Asylum applicants

Syrians and other citizens of the Arab countries in Iraq are treated as Defacto Refugees. In the absence of a law regulating the situation of refugees, Iraq treats arrivals to Iraq without political asylum or residency as displaced persons and are treated as refugees (Hantook, 2018).

According to Law 21 of 2009 Iraq adheres to the guidelines of the United Nations. The UNHCR registers Syrian and non-Syrian migrants as asylum seekers.

A Syrian migrant must pass the security check at the border cross point with Kurdistan Region of Iraq. The Asayish is in charge of security in border cross points in the region. In case of any doubts or security concerns, the migrant will be expelled immediately. Those who are admitted entrance will be referred to a joint committee composed of a representative of the security forces in the region and of the Camp Management Authority in the area to finalize the requirements for registration as asylum seekers.

Then, applicants will be transferred to the camps and provided with aid and assistance. Applicants who wish not to stay in camps must apply for a residency permit in order to live and work in any of the governorates within the Kurdistan Region of Iraq. The residency permit entails right to work; freedom of movement within the three governorates of Kurdistan Region of Iraq<sup>14</sup>; and the right to education free of charge in public schools on par with Iraqi nationals. Refugees holding a residency permit are also granted free access to health services in the Kurdish region. Those without residency permits find free services in refugee camps.

Syrians who wish to stay outside the Kurdistan Region must have a valid visa. The central government may grant a three-month visa for Syrians. They face immense challenges with applications for asylum upon expiry of the entry visa. (Hantook, 2018)

Increasing security concerns have also led to some instances of refoulement of refugees without their ability to access courts or benefit from legal assistance.

The Ministry of Migration and Displacement with the support of UNHCR is taking over registration of Syrian and non-Syrian asylum seekers in the rest of the Iraqi governorates. The central government does not issue residency permits, nor work permits to asylum seekers.

However, local authorities in the holy provinces of Najaf and Karbala have granted residency to Syrians who arrived these provinces for religious visits. The local authorities are turning a blind eye for Syrians working without work permit. The two provinces consider Syrians as tolerant refugees. (Hantook, 2018)

Iraq laws related to asylum do not give role to the judiciary in deciding on asylum application. They grant such authority to the Minister of Interior or his representative. If the Minister refuses the application for asylum in Iraq, the asylum seeker may apply for residency. The judiciary has no role in the process<sup>15</sup>.

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<sup>14</sup>Erbil, Duhuk and Sulaimania

<sup>15</sup>Law No. 51 of 1971

## **5.2 Beneficiaries of international protection**

According to the policy of the Iraqi Government, all non-Iraqis registered by the UNHCR and holding the Protection Document are treated as asylum seekers. Those who do not possess the Protection Document are subject to the provisions of The Foreigners' Residency Law No. 76 of 2017.

## **5.3 Regular migrant**

The Iraq Foreigners' Residency Law No. 76 of 2017 regulates all matters related to granting visas and residency permits to non-Iraqis. A work permit to a foreigner is regulated by the Labour Law No. 37 of 2015; Directives No.18 of 1987 and Resolution of the Ministry of Labour and Social Affairs No. 80 of 2013. In the Kurdistan Region of Iraq, a residency permit entails the right to work in the region.

## **5.4 Undocumented migrants**

All undocumented migrants are subject to the Iraq Foreigners' Residency Law No. 76 of 2017, that previously discussed .

## **5.5 Unaccompanied foreigner minors**

The UNHCR protection team at the border cross points is responsible for the registration of all migrants. It establishes family composition, documentation, identification of specific needs and vulnerabilities, and allows for the referral of persons with specific protection needs, such as those with medical needs, the elderly, unaccompanied and separated children, and so forth. It also provides access to assistance and protection, including protection from refoulement.

Unaccompanied minors either live with their relatives or with people who are comfortable with them. They may have formerly been a neighbor to them, or have had prior relationship with them in the mother country or camp. They are provided with social and psychiatric care by International Organizations and the Ministry of Migration and Displacement.. Families hosting unaccompanied minors take priority in the provision of services. Orphan minors take priority in the resettlement process.

## 6. Refugee Crisis Driven Reforms

In response to the refugee crises, the Iraqi Government took significant steps to reform its national legal and procedural system in terms of migration and asylum.

The government established mechanisms for close coordination with UNHCR and sister organizations, the Kurdistan Regional Government, as well as with local NGOs. The government, with the support of the UNHCR, focused on building capacity of staff of the Ministry of Migration and Displacement in terms of international protection to migrants and asylum seekers.

On October 31, 2016, the UNHCR, the UN Refugee Agency, and the Permanent Committee for Refugees at the Ministry of Interior signed a Memorandum of Understanding to enhance the protection of refugees and asylum seekers in Iraq. Under the terms of the Memorandum, the Government of Iraq will provide registration and documentation to refugees, asylum seekers and persons of concern. The UNHCR will provide advice, technical and other support to the Permanent Committee for Refugees to facilitate the management of refugee affairs in Iraq.

The Government has been deeply involved in the planning and design of the Iraq 3RP Regional Refugees & Resilience plan 2017-2018 in response to the Syria crisis.

On the legislative side, the Iraqi Council of Representatives passed a new law to regulate the residency of foreigners in Iraq, the Foreigners' Residency Act No. 76 of 2017. Also, in 2017 the Iraq Council of Ministers approved a new bill on refugees. The bill came after consultation with many stakeholders in order to meet international requirements for the protection of refugees. However, political division crippled the enactment of the new law. The bill passed the first reading in the Council of Representatives, and is still pending.

## 7. CONCLUSION

Though Iraq has not acceded to Geneva Convention for the year 1951 on Refugees and annexed thereto the Protocol of 1967, however it is devoting effort to implement its previously mentioned national laws, such as the law of the Ministry of Displacement and Migration Act No. 21 of the year 2009 and the Foreign Residence Act No. 76 of the year 2017, to fill the void.

In addition to the fact should not be ignored that the declarations and international conventions on human rights ratified by Iraq and published in the Iraqi Gazette have the force of law in Iraq, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights of the year 1966 (ICCPR), International Covenant on Economic, Social and Cultural Rights of the year 1966 (ICESCR), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) and other international instruments ratified by Iraq and published in the official Gazette, have the force of Iraqi law, and can be used by the perpetrators of the law in the judiciary and administration, as well as in dealing with humanitarian commitment to refugees within the framework of respect for human rights, however the mechanisms of implementation according to the international rules often in the field were deficient in the application due to a lack of expertise and experience.

Iraq is a country with a new experience in reception of huge number of refugees. Regional conflicts drove the citizens of surrounding countries, especially the Syrians, to seek asylum in Iraq and mostly in the Kurdistan Region of Iraq. The majority of asylum seekers are Syrian Kurds and they find sympathy from the regional authorities.

In spite of hosting a considerable number of asylum seekers, Iraq lacks the financial, organizational and administrative capacity to respond to the influx of refugees at a time when the country is facing political instability and security challenges. The invasion of the so called Islamic State in Iraq and the Levant (ISIL) into large swaths of Iraq in 2014 forced the internal displacement of over three million Iraqis and the migration of thousands to other countries. The Iraqi forces could not defeat ISIL unless the support of international forces leaded by the US.

Iraq has all the elements required for being a destination country for refugees, but decades of a totalitarian ruling regime intolerant to his own people forced members of ethnic and religious communities to flee the country and seek refuge in other countries.

Following the fall of previous regime in 2003, there was a significant change in Iraq's governing system and in policy directions requiring the revision of the applicable laws and the development of new legislative priorities to respond to the constitutional context and to upgrade the legal system in order to live up to the international standards in terms of migration and asylum.

The role of UN agencies and the International and National particularly Non-Governmental Organizations proved vital in the protection of millions of internally displaced Iraqis and hundreds of thousands of Syrian and non-Syrian migrants and in responding to their urgent needs. Host communities were very supportive and hospitable towards the new comers and contributed to the support efforts.

Building on the above factors, more effort needs to be made to invest in the progress achieved so far in terms of migration and asylum in Iraq.



## 8. Appendices

### 8.1 ANNEX I: Overview Of The Legal Framework On Migration, Asylum And Reception Conditions

Legislation title (original and English) and number	Date	Type of law (i.e. legislative act, regulation, etc...)	Object	Link/PDF
<b>Law No. 21 of 2009</b> Ministry of Migration and Displacement قانون وزارة الهجرة والمهجرين رقم 21 لسنة 2009	11/1/2010	Law	For the purpose of forming a ministry to carry out the task of providing care for migrants, displaced persons, and refugees, and find solutions to address their situation and secure their livelihood.	<a href="http://www.iraqlid.iq/LoadLawBook.aspx?page=1&amp;SC=&amp;BookID=29035">http://www.iraqlid.iq/LoadLawBook.aspx?page=1&amp;SC=&amp;BookID=29035</a> Al Waqa'a al Iraqyah, vol. 4141, 11 Jan. 2010, P:1
<b>Law No. 51 of 1971</b> Political Refugee Law قانون اللاجئين السياسيين رقم 51 لسنة 1971	10/4/1971	Law	To regulate political refugee in Iraq and the formation of a permanent committee to examine and study refugee cases and to deal with them.	<a href="http://www.iraqlid.iq/LoadLawBook.aspx?page=1&amp;SC=&amp;BookID=8823">http://www.iraqlid.iq/LoadLawBook.aspx?page=1&amp;SC=&amp;BookID=8823</a> Al Waqa'a al Iraqyah, vol. 1985, 10 Apr. 1971, P:8
<b>Law No. 76 of 2017</b> The Foreigners' Residency قانون اقامة الاجانب رقم 76 لسنة 2017	23/10/2017	Law	To regulate the entry to, and exit of foreigners the Republic of Iraq; identify types of entry and exit visas for foreigners to the Republic of Iraq; and regulating the residency of foreigners inside Iraq.	Al Waqa'a al Iraqyah, vol. 4466, 23 Oct. 2017, P:1

## 8.2 ANNEX 2: List of Authorities Involved In The Migration Governance

Authority	Tier of government	Type of organization	Area of competence in the fields of migration and asylum	Link
The Ministry of Migration and Displacement وزارة الهجرة والمهجرين	National	Provide assistance and services to refugees, asylum seekers, internally displaced population, and returnees.	<p>It is responsible for proposing policies and legislations as related to and internally displaced population.</p> <p>It leads the humanitarian and assistance services provided to internally displaced Iraqis, returnees, refugees and asylum seekers.</p> <p>It performs its duties in close coordination with the UN agencies; national and international organizations; authorities in Kurdistan Region of Iraq; and other ministries.</p> <p>It collects data on internally displaced Iraqis, returnees, refugees and asylum seekers.</p> <p>It has offices in all governorates except in the Kurdistan Region of Iraq.</p>	
The Permanent Committee of Refugees' Affairs- The Ministry of Interior اللجنة الدائمة لشؤون اللاجئين في وزارة الداخلية	National	Responsible for deciding on refugee application in Iraq	<p>It includes representatives from all security agencies in Iraq, Ministry of Foreign Affairs, and other ministries.</p> <p>It is responsible for reviewing all applications for refugees and proposes recommendations to the minister of interior.</p>	
The Directorate of	National	Responsible for issuing visas and residency permits for	It is responsible for admittance of foreigners to Iraqi territories at	

Residency at the Ministry of Interior المديرية العامة للإقامة —وزارة الداخلية		all foreigners in Iraq except in the Kurdistan region of Iraq	border cross point; issue residency permits, and has the power to deport or expel foreigners.  It does not issue a residency permit to asylum seekers.	
The Directorates of Residency in the Kurdistan Region of Iraq Government مديريات الإقامة في أقليم كردستان	Governorates	They are responsible for issuing residency permits in the Kurdistan region of Iraq. They are linked administratively to Iraq Ministry of Interior.	It provides asylum seekers in Kurdistan Region of Iraq with a residency permit that entail the right to work in the region.	
The Asayish الأسايش	Regional	The primary security agency operating in the Kurdistan region of Iraq	Responsible for the security check at border cross points	
The Joint Crisis Coordination Centre (JCC) at the Ministry of Interior of the Kurdistan Regional Government مركز العمليات المشتركة في إقليم كردستان	Regional		It is responsible for Collecting, collating and analyzing information about all crisis and humanitarian developments.	

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# **RESPOND**

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## **Italy**

### **Country Report**

**D1.2 – June 2018**

**Paola Pannia, Veronica Federico and Silvia D'Amato  
– University of Florence**

Horizon 2020  
RESPOND: Multilevel Governance  
of Mass Migration in Europe and  
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## Glossary and List of Abbreviations

**AIDA:** Asylum Information Database

**ANCI:** National Association of local municipalities (Associazione nazionale Comuni Italiani)

**ARCI:** Italian cultural and recreational association (Associazione Ricreativa e Culturale Italiana)

**ASGI:** Association on Immigration Juridical Studies (Associazione di Studi Giuridici sull'Immigrazione)

**CARA:** Centre of reception for asylum seekers (Centri di Accoglienza per Richiedenti Asilo)

**CAS:** Emergency accommodation centre (Centri di Accoglienza Straordinaria)

**CDA:** Centre of reception (Centri Di Accoglienza)

**CPSA:** First aid and reception centre (Centri di Primo Soccorso e Accoglienza)

**ECHR:** European Convention on Human Rights

**EU:** European Union

**ISMU:** Iniziative e Studi sulla Multiethnicità (Initiatives and studies on multiethnicity)

**RSD:** Refugee Status Determination

**SPRAR:** National system of protection for asylum seekers and refugees (Sistema di Protezione per Richiedenti Asilo e Rifugiati)

**UNHCR:** United Nations High Commissioner for Refugees

## Executive summary

The report aims at presenting the legal and policy framework of migration governance in Italy, with a specific emphasis on the period between 2011 and 2017, so as to shed light on the series of implemented changes and responses given to the recent migration crisis.

In the last few decades, Italy — traditionally an emigration country — has gradually turned *also* into an immigration country. Since 2014, Italy is receiving the highest number of non-EU citizens looking for economic opportunities and for international protection in its history. In 2016, migrants with their permit recognised for international and humanitarian protection were 77.927, approximately seven times what they were in 2010. Nonetheless, the main channel to obtain the permit of residence seems to be constantly represented by family reunification, which consistently represents between 40% and 45% of permits granted between 2011 and 2016.

The Italian Constitution provides only few rules directly addressing asylum, migration and the legal status of foreigners (namely art. 10). However, other pivotal constitutional provisions contribute enhancing the national standards of foreigners' rights, such as the “personalist principle” of art. 2, the equality clause of art. 3, and art. 117, through which the EU legislation and international treaties signed by Italy acquire “constitutional relevance”.

The Constitutional Court has represented a fundamental anchor in promoting the legal entitlements of foreigners and in preventing standards downgrading. Besides the Court, a crucial role in shaping the national legislation on immigration and asylum and in extending foreigners' rights has also been played by judges.

At domestic level, the national policy on migration has been featured with a structural lack of organic, coherent and effective instruments of planning and management. With reference to the legal framework, the Italian Consolidated Law on Immigration dates back 1998 and results in multiple, fragmentary normative stratifications. The asylum regulation relies on a number of legislative decrees, transposing the EU Directives into the Italian legal system, while an organic and complete law is still lacking.

Concerning the asylum and migration management structure, the responsibility to enact the various procedures does not belong to a single governmental body. Rather, it is scattered among different institutional entities emanating from different tiers of government (from national to local), and it also involves the third sector. Each entity (with its own mandate and mission) is competent and responsible for single apparatus of the complex migration machine.

In the section “Legal status of foreigners”, the report explores the main typologies of residence permits provided by the Italian legal system, requirements to be fulfilled in order to gain that status and the aggregate of rights attached to it. After having presented the legal process of granting the international protection in Italy, and the status of asylum applicants and beneficiaries of international protection, the report illustrates the legal status related to the permit to stay for “humanitarian reasons”, a specific feature of the Italian legal system. In addition, the report examines legal status related to the following permits to stay: work, family, study, EU long-term residence permit and unaccompanied minors. Finally, the report illustrates the legal status connected to the condition of the so-called ‘undocumented migrants’, which in Italy are excluded from a number of rights. Nonetheless, the report accounts for the relevant role of the Constitutional Court, which enlarged the number of rights

to which undocumented migrants are entitled, by allowing Regions to enhance the protection of migrants' fundamental rights in areas of social assistance and public services.

Section 6 focuses on the time-span 2011–2017, when a number of legislative reforms have been issued with the aim to manage the growing arrival of migrants to Italian shores. These reforms were inspired by an increasingly security-oriented approach.

The conclusion highlights that Italy has proven to be a very complex case of migration management that has developed in the grip of structural national limits, as well as a case of slow and inadequately controlled process of integration of the foreign population residing in the country for the last three decades. In the last few years, Italy has proven itself incapable of dealing with mass migratory flows. Moreover, besides a lack of cohesiveness of national policies and poor and inconsistent implementation, the country has put into question the very same principles of respect and protection of human rights enshrined in the Constitution and international standards.

## 1. Statistics and Data Overview

This report expects to analyse the Italian framework of reception of migration. First, it reconstructs the socio-political context between 2011 and 2017 by presenting the most updated data concerning the impact of the phenomenon of migration on the Italian society. Second, a more in-depth overview of the socio-political specificities will be presented that will set the basis for a juridical analysis of the legal governance of migration in Italy. The aim of this report is indeed to shed light on the national features characterizing the response to the migratory crisis. More specifically, it intends to highlight common patterns and inconsistencies of the Italian approach so as to eventually evaluate potential implications of such contradictory dynamics of migration management. In many instances, Italy is a revealing case when considering its historical experience as a country of emigration and its current centrality in the European geo-political context of mass migration. Indeed, as it will be shown further in the report, Italy is currently engaged in the management of a twofold dynamics: on the one hand, a process of stabilisation of the foreign presence as demonstrated by the increase of citizenship recognitions; on the other hand, Italy is also facing a quite considerable percentage of new presences which reveal a less stable and coherent management on the ground.

According to the National Institute of Statistics (ISTAT) the resident population in Italy in 2017 totalled 60.589.445, while the foreign resident population counted 5.047.028 individuals, representing the 8,32% of the total population. Data collected by Eurostat allow to insert the Italian experience within the European context. In 1998 the foreign population resident in Italy totalled less than one million. In 2015 it was five times more, representing a rise of the +405%. This arguably represents the most conspicuous relative increase among European states, considering that the rest of notable increases in 2015 reached the +357% in Ireland, the +171% in Finland and the +143% in the United Kingdom. However, taking into account the relationship with the total population, the picture seems to change. Indeed, the Italian percentage (8,32%) is similar to the United Kingdom (8,4%), higher than France (6,6%) but less than Germany (9,3%), Belgium (11,6%), Ireland (11,9%) and Austria (13,2%).

The real watershed in terms of migration flow for Italy has been 2014. Indeed, since then, Italy is receiving the highest number of non-EU citizens looking for economic opportunities and for international protection in its history. Therefore, new practices and policies have been developed in the past few years to respond to this challenge. Following a first peak in 2011 (when 62.692 people arrived in Italy pushed by the turmoils in North-Africa), migration flows have temporarily decreased in 2012<sup>1</sup>, but increased again<sup>2</sup> to reach the second most important peak in 2016, when 181.436 non-EU citizens landed Italian coasts<sup>3</sup> (Table 1).

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<sup>1</sup> The decrease in arrivals in 2012 is mostly due to two factors: on the one hand, the bilateral agreement signed between Italy and the Tunisian government that concerned Tunisian but also Sub-Saharan citizens from Libya. On the other hand, both the elections in Tunisia and the formation of the National Transitional Council government represented two moments of temporal stability and control of the fluxes.

<sup>2</sup> According to the Bank of Italy, in the two-years period 2014-2015, the cost of management of arrivals and sea-rescues totalled 1.7 billion euros to which reception in infrastructures for Italy totalled 1.5 billion euros (Ballatore et al. 2017).

<sup>3</sup> Among these numbers, unaccompanied children do account for a significant extent. According to the available data (Italian Ministry of the Interior and ISMU), more than ten-thousands non-accompanied

**Table 1. Arrivals of Non-EU Citizens by the sea**

	Total
2011	62.692
2012	13.267
2013	42.925
2014	170.100
2015	153.842
2016	181.436
2017	119.310

Source: Department of Public Security, Ministry of the Interior, Italy and ISMU<sup>4</sup>

However, with the rise in arrivals, rejections rose as well. According to the Report released by the 2017 Italian Special Parliamentary Commission on Reception of Migrations, border push-backs constitute the primary type of rejection. As Table 2 shows, in 2015 border rejections totalled almost threefold the deferred push-backs, and in 2017 the 61% of the refusals of entry were in fact rejections at the border reaching a total of 10.496 (Chamber Inquiry Committee, 2017:74).

**Table 2. Number of Non-EU Citizens refused entry at the external border**

	Border Push-Back	Deferred Push-Back
2014	7.573	2.573
2015	8.736	1.345
2016	-	-
2017	10.496 <sup>5</sup>	-

Source: Chamber Inquiry Committee (2016 and 2017, [http://www.camera.it/leg17/465?tema=centri di identificazione ed espulsione](http://www.camera.it/leg17/465?tema=centri%20di%20identificazione%20ed%20espulsione))

It is also to be considered that in the last few decades, Italy — traditionally an emigration country — has gradually turned *also* into an immigration country. As mentioned, Italy is indeed in the process of stabilising the foreign presence, the majority of which appears interested in staying. Among the migrants arrived in 2012, for instance, the 53,4% was still present in Italy in 2017. A slightly less percentage concerns those migrants with political asylum permits (51,5%), while the 65,8% of the migrants recognised for family reunification remained. With respect to the migratory balance of the country, there is an interesting dynamics deserving closer attention. As confirmed by Table 3, Italy shows a positive migratory balance during the period under investigation, meaning that the number of immigrants between 2010 and 2017 has been constantly larger than the number of Italian leaving the country. Yet, the Italian

children arrive to Italy each year (13.026 in 2014 and 15.371 in 2017). Proportionally, the peak of arrivals in 2016 of non-accompanied children was actually higher than the rest of arrivals.

<sup>4</sup> Iniziative e Studi sulla Multietnicità (ISMU).

<sup>5</sup> At 31 October 2017.

migratory balance remains lower than the overall EU average, as well as other European countries (713.631 in 2011, 1.760.854 in 2013 and 1.222.979 in 2016).

**Table 3. Migratory Balance across Europe**

	2011	2012	2013	2014	2015	2016
EU average	713.631	894.789	1.760.854	1.101.159	1.854.445	1.222.979
Germany	295.478	391.884	455.473	583.503	1.165.772	464.734
Greece	-32.315	-66.494	-59.148	-47.198	-44.934	10.332
Spain	66.509	-142.555	-251.531	-94.976	-7.490	87.422
France	19.220	71.509	98.939	23.804	68.310	68.310
Italy	76.359	369.717	1.183.877	108.712	31.730	65.717
Finland	16.615	17.621	17.934	15.437	12.575	17.098
Sweden	45.453	51.799	65.780	76.560	79.699	117.693
UK	217.227	166.048	242.445	316.942	331.917	247.286
Norway	46.738	47.142	38.948	39.916	29.353	26.168

Source: Eurostat (2018)

In addition to that, it is worth noticing that after the peak in 2013 (1.183.877), Italy is experiencing an overall decreasing trend<sup>6</sup>, despite mixed results per year (108.712 in 2014, 31.730 in 2015 and 65.717 in 2016<sup>7</sup>). Arguably, migration flows in Italy are indeed crucial to contribute to a positive demographic balance. As a matter of fact, Eurostat confirms that, while Italian population is on average elderly, the foreign population in Italy is quite young (average age under 34). Overall, the percentage of young people among 0 and 14 years old is five points higher than Italians of the same age range. The range of foreigners between 15 and 39 years old does represent almost the 45% percent of the total foreign population in Italy, while the Italian counterpart represents the 26,2%. On the contrary, foreigners older than 65 years old represent the 3%, against the 23,7% among Italian citizens.

Among the foreign population resident in Italy, non-EU migrants represent the majority (Table 4). According to the National Institute of Statistics (ISTAT), the first ten non-EU

<sup>6</sup> Other than a reduced percentage of arrivals in 2013, there are other two factors to be taken into consideration when discussing such an increase. Indeed, according to the data released by ISTAT, in 2013 there has been a decrease in natality with an average of 1,39 children born per woman against the 1,42 average in 2012. In addition, emigrations abroad increased significantly, with a total of 126.000 in 2013, meaning 200.000 more than 2012.

<sup>7</sup> In this regard, it is worth considering that a good proportion of Italian emigrants living in EU countries does not acquire the residency of the host country.



nationalities resident in Italy, namely Morocco, Albania, China, Ukraine, Philippines, India, Egypt, Bangladesh, Moldova and Pakistan, account for 61.6% of presence (ISTAT 2017b).

**Table 4. Stock of Non-EU Migrant Population residing in Italy**

Year	Non-EU migrants	Total Migrants	% of Non-EU migrants
2010	3.448.562	4.570.317	75.4
2011	2.811.924	4.052.081	69.3
2012	2.964.014	4.387.721	67.5
2013	3.711.835	4.922.085	75.4
2014	3.515.466	5.014.437	70.1
2015	3.508.429	5.026.153	69.8

Source: Authors' adaptation from Caponio and Cappiali (2017: 120)

In addition, the number of non-EU citizens acquiring the Italian nationality is also increasing. While between 1998 and 2002 a total of 53.889 new Italian citizens were recognised, between 2012 and 2016 a total of 541.000 non-EU citizens became Italian, with 184.638 new citizens only in 2016. Among them, the majority were Albanians (36.920) and Moroccans (35.212)<sup>8</sup>.

As displayed by Table 5, since 2011 the general trend of the legal reason for acquiring the permit to stay has been changing as well. For instance, residence permits for working reasons represented almost the 50 per cent of the total permits released, while they have been decreasing consistently every year, reaching the lowest level in 2016 with 12.873 working permits released, meaning a total of 346.267 less than 2010.

<sup>8</sup> According to the D.P.R 18 April 1994 n. 362, the waiting time is not supposed to exceed 730 days after the submission. Yet, it is worth considering that the timescale to be granted the Italian citizenship is quite extensive. In fact, not only applications can be submitted after ten years of residence and six years holding a long-stay resident permit, but due to the complicated and slow bureaucratic proceeding process, institutions usually employ between three and four years to give an answer to the applicant, exceeding the total waiting time by thirteen/fourteen years on average (Cappiali 2018).

**Table 5. Resident Permit of Non-EU Citizens in Italy per reason of stay**

	Work	%	Family	%	Study	%	Asylum and Humanitarian reasons	%	Other Reasons	%	Total
2011	124.544	34.4	140.846	38.9	31.295	8.65	42.672	11.8	22.333	6.17	361.690
2012	70.892	26.8	116.891	44.2	31.005	11.74	22.916	8.68	22.264	8.43	263.968
2013	84.540	33	105.266	41	27.321	10.6	19.146	7.4	19.373	7.5	255.646
2014	57.040	22.9	101.422	40.8	24.477	9.8	47.873	19.2	17.511	7	248.323
2015	21.728	9	107.096	44.8	23.030	9.6	67.271	28	19.811	8.2	238.936
2016	12.873	5.6	102.351	45	17.130	7.5	77.927	34.3	16.653	7.3	226.934

Source: ISTAT (2018)

On the contrary, resident permits for asylum or humanitarian reasons have significantly increased. In 2016, migrants with their permit recognised for this type of reason were 77.927, approximately seven times what they were in 2010. Nonetheless, the main channel to obtain the permit of residence seems to be constantly represented by family reunification which consistently represents between 40% and 45% of permits granted between 2011 and 2016. In fact, despite some annual differences, since 2008 the total never decreased below the 100.000 units, exceeding more than a half the permits granted for asylum and humanitarian reasons (Ambrosini 2017). These data seem to confirm an overall shift in the nature of the permits granted, which confirms the impact of the economic crisis and humanitarian emergencies on migration flows (Caponio and Cappiali 2017).

**Table 6. Number of Applications for International Protection per gender**

	Male	Female	Total
2011	-	-	37.350
2012	-	-	17.352
2013	24.005	3.925	27.930
2014	58.703	4.753	63.456
2015	74.280	9.690	83.970
2016	105.006	18.594	123.600

Source: Ministry of the Interior, 2018a

However, while it has been mentioned that the number of permits related to humanitarian reasons has been constantly raising in the last years, it seems fair to argue that such an increase mirrors the increasing trend registered with respect to the number of applications for international protection. As Table 6 displays, in 2014 the number of applications (63.456) were more than twofold the applications presented in 2013 (27.930), while in 2015 the total reached 83.970. The net increase overlaps with the overall increase of arrivals, especially in 2016 when

123.600 applications were filled corresponding to more than 47% increase with respect to 2015<sup>9</sup>. In addition, the female component represents around the 40% of the new flows. Female immigrants with successful applications for humanitarian reasons or political asylum do represent a relative small percentage, accounting for the 11,6% in 2016. Interestingly, however, female incidence increases when considering resident permits for family reunification (around the 59%) and for study (57,3%) or work reasons (36,3%).

The number of applications for International Protection, however, does not suffice to illustrate the complex picture of the Italian status quo. First, because not all applications are successful. Second, as we will discuss later in the report, because there are three different legal status: refugee status, subsidiary protection and humanitarian protection<sup>10</sup>.

**Table 7. Final Decision on Applications for International Protection**

	Refugee Status	%	Subsidiary Protection	%	Humanitarian Protection	%	Other Decision	%	Non-Recognised	%	Total
2011	2.057	8	2.569	10	5.662	22	1.868	16	11.131	44	25.626
2012	2.048	7	4.497	15	15.486	52	1.483	9	5.259	17	29.969
2013	3.078	13	5.564	24	5.750	24	67	0	6.765	39	23.634
2014	3.641	10	8.338	23	10.034	28	40	0	13.122	39	36.270
2015	3.555	5	10.225	14	15.768	22	66	0	37.400	58	71.117
2016	4.808	5	12.873	14	18.979	21	188	0	51.170	60	91.102
2017	6.827	8	6.880	8	20.166	25	662	1	46.992	58	81.527

Source: Ministry of the Interior, 2018a

As illustrated in Table 7, within an overall increasing trend among the different forms of protection ('refugee status', 'subsidiary protection' and 'humanitarian protection'), humanitarian protection displays the highest growth. In 2011, a total of 5.662 status permits for 'humanitarian protection' were granted, whereas in 2017 they reached 20.166. However, the rejection of applications increased significantly as well, from 11.131 in 2011 to 46.992 refusals in 2017. Quite interestingly, according to the 2017 UNHCR report on International Protection in Italy, on average 6 over 10 applicants from the African continent are rejected,

<sup>9</sup> However, in this respect, it is worth noting that the processing time between the submission of the application and the permit acceptance and release is usually quite extensive. On this see paragraph 5.2.

<sup>10</sup> For a detailed explanation of these three different status in Italy, see paragraph 5.1.

while the 22.2% of cases gains ‘humanitarian protection’. Among European and American applicants, ‘humanitarian protection’ prevails (40.5% and 38.1%) over the ‘non-recognition’ (37.1% and 33.2%). Finally, applications from Asian migrants are mostly rejected (47.3%) or recognised as ‘subsidiary protection’ status.

Overall, according to the data offered by the Bank of Italy, Italy displays an acceptance rate of asylum applications of the 43.5% over the three years period 2014-2016. With respect to the general EU average (54%), it is the country that more likely grants the status of humanitarian protection (50% of the total of positive outcomes). On the contrary, it is among the countries that are less likely to recognise the refugee status (14% against an EU average of 60,2%) (Ballatore et al. 2017).

Differently from a general picture of increasing numbers linked to migration flows to Italy, data on non-EU citizens repatriation (Table 8), instead, are not that explicit. In fact, despite a rise in 2012 with 7.360 non-EU citizens repatriated, the final amount of repatriations per year appears to remain stable.

**Table 8. Non-EU Citizens Repatriation in Italy**

Year	Total
2010	4.890
2011	6.180
2012	7.365
2013	5.860
2014	5.310
2015	4.670
2016	5.715

Source: Eurostat (2018)

Overall, the displayed data seem to suggest that the challenge of mass migration that Italy is currently facing is not necessarily an alone-standing emergency. The growing presence of foreign population on the Italian territory is not exclusively related to current international conflicts or crises, but also to a slow process of stabilisation of the migratory phenomena of the last two decades. Certainly, a comprehensive account of the contemporary Italian approach to mass migration does require a deeper analysis of the social and political context, in order to understand the characterizing trends and highlight the implications related to the data. Hence, in the following, an overview of the history of the migration phenomena in Italy is displayed. Consequently, the report offers insights on the Italian socio-political and cultural framework so as to gain a stronger sense of the national setting and an exhaustive picture of the surrounding conditions to the politics of migration.

## 2. The Socio-economic, political and cultural context

Migrations do not happen *in a vacuum* or *in a terrae*. Migrants inevitably enter into communities and societies characterised by a set of cultural, religious or traditional features (Geertz 1987; Aime 2004; Benhabib 2005) and into countries characterised by different legal, political and economic systems. In order to understand the complex network of bilateral relations that migrants (both as group and as individuals) establish with receiving communities, it is crucial to provide a brief insight on the most important traits of Italian society. Nonetheless, stereotypization of the relative immobility of receiving countries and societies and of the capacity of immigrants to adapt should be avoided. Migration dynamics, indeed, always entail a constant process of multidirectional interactions which should never be neglected.

Similarly to other European countries, migration trends and developments have been influenced by the geographical, economic, political and sociocultural peculiarities of the Italian context in many regards. It goes without saying that the geographical position of the Italian peninsula and its close proximity to North African coasts plays a big role, making of Italy a country of transit and subsequently of destination. As we are witnessing today, the crossing of the Mediterranean Sea became the main route to Europe, especially since other routes gradually faded and the political turmoil in Libya weakened the country capabilities to control its borders. However, a more comprehensive understanding of the implications of this contemporary unfolding of events for Italy does require a brief overview of the main historical dynamics of migration in the country.

### 2.1. Italian migration history

For a long time Italy has been considered an emigration country. Since its unification in 1861 until the post-World War II millions of Italians migrated to North and South America, and to a number of European Country (mainly Belgium, Switzerland and Germany), accounting for the largest voluntary migration in recorded history (Ben-Ghiat and Hom 2016). Nonetheless, according to data on residence permits provided by the Ministry of the Interior, from the mid-1970s the trend started to reverse. In order to explain this shift, scholars usually consider the reduced capacity to attract migrant workers by Northern European countries' labour markets — due to the 1973 oil crisis — as a key explanatory factor (Sciortino 2000; Bonifazi 1998). However, Colombo and Sciortino (2004), who purged the official data from the number of expired residence permits raise some interesting additional points. The authors underline that, despite the fact that Italy has mostly been a transitory country, it became more attractive for migrants already during the 1960s as a result of the post-war economic boom. Indeed, the first immigration wave was concerned with seasonal workers and female domestic workers especially from Eastern Africa (such as Somalia, Eritrea and Ethiopia, which were former Italian colonies), the Philippines and former Portuguese territories (Andall 2000; Calchi-Novati and Vanzetti 2016). This means that Italy was not chosen as a backup option, but rather as an independent destination. Moreover, Colombo and Sciortino (2004) underlined that official data did not account for undocumented migrants, which — as it will be highlighted later in the report — represented the bulk of migration to Italy in 1970s and 1980s, “in a context of large-scale closure of legal entry points”. Indeed, at least until 1998, when the Consolidated Law on migration was published, “phases of growth in the number of residency permits coincides with amnesties for the legalization of status” of foreigners who have previously entered Italy illegally

in response to labour demand (Colombo and Sciortino 2004: 54). Interestingly, the first immigration flows concern also students and self-employee migrants. However, since the very beginning the Italian migratory influx has been characterised by high diversification with regard to nationality, gender, type of work, and length of stay.

Alongside migrant workers and students, the trend of refugees and asylum seekers has somehow followed the same pattern. After 150 years of emigration, Italy was considered as a small, poor and overpopulated country, and therefore as a country of transit or temporary sojourn (Hein 2010). Besides, until 1990 the right of asylum was limited to European citizens, since Italy had ratified the Geneva Convention with this “geographical limitation”. Nonetheless, asylum claims began to grow with the flow of Albanians approaching the Italian shores by sea in 1991 consequently to the collapse of the Hoxha regime, and again in 1999, reaching the number of more than 37.000 asylum applications (compared to the 4.573 requests of 1990) (Ministry of the Interior 2018a). Finally, following the 2011 “Arab Spring”, Italy started to play a paramount role in the so-called “refugee crisis”. In 2011, over 50.000 foreigners approached the Italian shores, with around 37.000 requests for asylum. Number of arrivals diminished in 2012, but kept increasing again in the following years, until reaching another peak in 2016. As mentioned, amongst these new arrivals to Italy, a significant component is covered by the unaccompanied foreign children.

The 2008 economic crisis has, once again, induced high numbers of Italians to emigrate. However, the new emigration wave is socially and demographically different: the new Italian migrants are mainly young and, for the most part, highly educated (around one-third). This is why the new emigration wave has been labelled “brain-drain”, which entails an enormous and worrying human, social and economic cost for the Italian state<sup>11</sup>.

## **2.2. The socio-economic context**

The relevance of the Italian geographical element juxtaposes with some peculiar economic and demographic traits. In particular, research has often emphasized the link between immigration and the extended informal sector of the country and of other Southern European states (Testaì 2015; Ambrosini 2013). However, also the formal sector, with its unmet labour demand, has contributed to attract foreign workers. Thus, it is not a coincidence that the majority of foreign workers are concentrated in the highly-industrialized and developed Northern regions, while only a small quota, mainly seasonal workers, resides in the less-developed and more agriculture-dependent Southern ones. Quite interestingly, foreigners’ participation to the Italian economic life remained high even after the economic crisis of 2008. Indeed, it has been shown (Ambrosini and Panichella 2016; Sciarra and Chiaromonte 2014) that the crisis had a lower impact on the foreigners’ employment rate, except for the sector of manufacturing and construction. Nonetheless, the crisis did enhance the above-mentioned structural criticalities and problems of Italian labour market such as segmentation, disparities and pay gaps. It has to be highlighted, however, that “in the Italian labour market, foreigners easily face discriminatory behaviours, widespread risk of informal employment and high

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<sup>11</sup> “From 2010 to 2020 it is estimated that Italy stands to lose about 30,000 researchers, which will have cost the country €5 billion, considering just the public spending necessary for their training” (Bergami 2017).

mobility. But foreign workers are strongly labour-oriented, so that the phenomenon of the so-called “disheartenment”, that is the renounce to search employment, is very uncommon. In fact, unemployed foreigners can be constrained to accept the first job they find, under the pressure to maintain themselves and their families and/or renovate the residence permit” (Italian Ministry of Labour, 2017: 41). Furthermore, studies report that foreigners are often over-educated with respect to job qualification. In addition, the Italian labour market is characterised by a strong professional segmentation, with foreigners mainly employed in low-skilled sectors, namely agriculture, tourism, constructions and domestic work.

Domestic work, which is one of the most important sectors for immigrant participation in the Italian labour market, reflects some of the prominent features of the Italian society. In fact, it has been shown (Ambrosini 2008) that the high number of foreigners employed in the domestic service can be explained by looking at a twofold dynamics. On the one hand, by the relative population ageing due to a low birth rate, as well as the growth of elderly in need of assistance. On the other hand, by cultural changes such as the higher rate of Italian female workers, coupled with a general unwillingness of Italians to work in the social care sectors and the inadequacy of the national welfare system which is more and more under strain.

### 2.3. The political and cultural context

The Italian political discourse started to focus on immigration only in the early 1990s<sup>12</sup>. However, the public debate in those years was dominated by the unfolding of a series of severe corruption scandals, commonly known as *Mani Pulite* (literally, ‘clean hands’). Since the scandals involved a significant share of Italian MPs, they led to major political transformations symbolised by the collapse of the ‘First Republic’ and the birth of the ‘Second Republic’ (Guzzini 1995). For instance, the legitimisation crisis of traditional parties, together with the electoral reform of 1993 establishing a mix of “proportional representation” and “plurality system” (Cetin 2015), paved the way for the emergence of a new political parties, such as *Forza Italia* – FI (Go Italy), and also pro-secession and increasingly hostile to migrants as the *Lega Nord* - LN (Norther League<sup>13</sup>) which remain, however, largely locally-affiliated and marginal in the political competition.

Yet, in the aftermath of the 2008 financial crisis, the essentially bipolar party system started facing new political challengers. Indeed, new anti-establishment parties, such as the *Movimento Cinque Stelle* - M5S (Five Star Movement), a ‘web-populist’ party created by the former comedian Beppe Grillo, gradually reshaped the system into a multipolar one moving beyond the traditional left-wing and right-wing competition, also concerning migration issues (Tronconi 2016; Conti 2014).

Similarly to the overall European political trend, the political discourse in Italy has been polluted by anti-immigrant narratives, particularly during the pre-electoral periods (Kurkut et, al. 2013). Under the slogan “Italian first” and the creation of the dangerous equation immigrants=criminals, echoed by mainstream media, requests of closure of borders and the progressive reduction of migrants’ rights permeated the political arena. Consequently, the

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<sup>12</sup> For a synthetic overview of the Italian normative intervention on the field see chapter 4.

<sup>13</sup> The party renamed ‘Lega’ in 2017, loosing the regionalistic territorial affiliation.



politicization of migration featured both the 2009 and 2014 European elections, as well as the 2008 and 2013 national elections, during which the troops of anti-immigrant parties could also rely on the far-right and Euro-sceptical party *Fratelli D'Italia* (Italian Brothers) and the already mentioned M5S.

Ironically, as a wide literature points out, this tough approach of closure in principle usually deflates when moving to the practice (Caponio and Cappiali 2017; Ambrosini 2012). To put it in another way, the anti-immigrant discourses, essentially used to gain electoral support, were often dismissed after the elections, also due to the social and economic costs of the entire system of stopping, detection, deportation and expulsion. Meanwhile, the limited stability of Italian governments (with 13 different executives from 1992 to 2017) did not help to establish and unfold a clear and solid immigration policy. On the contrary, the Italian response to mass migration has been mostly characterized by an emergency approach, as with the first relevant migratory influxes of Balkans during the 1990s<sup>14</sup>.

Overall, an increasingly harsh political discourse, together with the negative media representation of migration, has contributed to deteriorate the Italian attitude toward migrants (Diamanti 2016). Furthermore, scapegoating the “other” of threatening the Italian cultural identity as well as its social welfare, its security and economic stability, has found a fertile terrain in the limited sense of nationhood and belonging traditionally featuring Italian citizens (Tryandafillidou and Ambrosini 2011).

Despite such an opposing trend to migration, the practical management of migration displays examples of openness and solidarity. Indeed, the migration crisis has shed new light on the long-standing tradition of volunteerism, fed by a curious interplay between the Catholic Church, trade unions and others secular associations of left matrix, such as the ARCI<sup>15</sup> (Ambrosini 2018). Indeed, Italy may count on the activism and strong response by many social groups and no-profit organizations of the third sector. From the last national census organised by ISTAT (2017a), up to 31 December 2015 the total of non-profit organisation working in Italy are 336.275, 11,6% more than 2011, concerning a total of 5.290.000 volunteers and 788.000 employees.

Amongst them, the catholic Caritas currently plays a prominent role in the assistance and reception of migrants and asylum seekers in conjunction with a number of local social cooperatives. Nonetheless, it should be mentioned that the whole issue of solidarity towards migrants is currently in the spotlight of Italian public opinion. In fact, a delicate controversy is capsizing NGOs active in migrants' assistance and rescue at sea, accused of being colluding with people smuggling operations. Although the Italian Parliament investigated these claims and has found them to be unsubstantiated (Senate 2017), right-wing newspapers and politicians have continued campaigning against Italian and foreign NGOs.

Meanwhile, despite numerous positive examples of solidarity and reception by almost the totality of NGOs, associations and cooperatives of the third sector that are running the majority of reception centres in Italy, their role has been recently overshadowed by a number of other scandals. Indeed, a system of corruption and mafia infiltration has been recently disclosed by journalistic and criminal investigations (Nadeau B.L. 2018). For instance, in large-scale

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<sup>14</sup> As an example of this approach, see the Law n. 563/1995 (the so-called “Legge Puglia”).

<sup>15</sup> Associazione Ricreativa e Culturale Italiana.

buildings, such as CARA of Mineo and the Sant'Anna reception centre in the Isola di Capo Rizzuto in Calabria, asylum seekers not only face inhuman conditions but they are also subject to constant threats of sexual and labour exploitation, or even of human trafficking.

On a conclusive note, this brief overview of the cultural and political background of Italy has revealed a complex picture involving intertwined systems of power, many of which directly compete with political authorities or exercise typical public sector functions due to the ineffectiveness of public administration. Currently, the migration crisis has unfolded competing interests within and outside the political competition. Moreover, the lack of cohesive policies or concrete instruments to implement them have contributed to an incoherent approach to the management of migration which has soon turned into an 'emergency'.

### 3. The Constitutional Organization of the State and Constitutional Principles on Immigration and Asylum

Until the 1970s, Italy was primarily a country of emigration. This is reflected in the Italian Constitution of 1948<sup>16</sup>, which proclaims that “every citizen is free to leave the territory of the Republic and return to it except for obligations defined by law” (art. 16(2)) and “it recognizes the freedom to emigrate, except for legal limitations for the common good, and protects Italian labour abroad” (art. 35(4)). Only few and generic provisions, however, are devoted to the right of asylum and the legal status of foreigners.

#### The Constitutional Organisation of the State in Italy

The Italian Constitution establishes a typical parliamentary system of government, with the Government appointed by the President of the Republic, requiring the confidence of the Parliament (art. 94), and the President of the Republic being entrusted with the power of dissolving the Parliament (art. 88).

According to the Constitution, the legislative authority, which is concerned with the power to make legislation, is vested in the Parliament at the national level and in the Regional Councils at regional level (arts. 70 and 117); the executive authority, which is primarily concerned with the implementation of the law, is attributed to the Government, “made up of the President of the Council and the Ministers, who together form the Council of Ministers” (art. 92), and at the regional level in the Regional Executive and its President (art. 121). The judicial authority, which is concerned with granting a remedy if a rule is infringed, is conferred to the Judiciary.

The President of the Republic is the “Head of the State and represents the unity of the nation” (art. 87). While being neither vested with legislative or executive authority, the President of the Republic is entrusted with crucial functions, and is considered an independent, *super partes*, institution.

In particular, art. 10 states that “(2) legal regulation of the status of foreigners conforms to international rules and treaties; [and] (3) foreigners who are, in their own country, denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution, are entitled to the right to asylum under those conditions provided by law.”

With the Constitutional reform of 2001, asylum, the legal status of foreigner and immigration appeared among the subjects listed by art. 117, which distributes legislative powers in Italy between the State and the Regions. According to art. 117, the legislation on immigration, right of asylum and legal status of non-EU citizens, is subjected to the exclusive legislative competence of the State. Meanwhile, other policy area affecting the management of migration and the legal status of foreigners, such as housing, healthcare, education, are

<sup>16</sup> For the official English version of the Italian Constitution, see [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).

assigned to the concurrent (i.e. education and health care) or exclusive regional legislative competence<sup>17</sup>.

## Decentralisation

There are two Constitutional pillars of the Italian regionalism: article 5 that, while stating the indissolubility of the State and its unity, grants a constitutional value to the principle of regional/local autonomy, and article 114. The latter provision, as amended by the Constitutional Reform of 2001, declares that “the Republic is composed of the Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State”: a bottom-up description (in line with the renewed principle of subsidiarity) of entities that, on an equal basis, compose the Republic, with no hierarchy among them.

Art. 117 of the Italian Constitution distributes the legislative power between the State and the Regions. In particular, after the amendments of the Constitutional Law No. 3/2001, art. 117 identifies a number of policy areas divided in two lists. A first list of matters (art. 117(2)) falls under the exclusive legislative competence of the national Parliament. A second list of matters (art. 117(3)), instead, constitutes the so-called “concurrent competence” between the State and Regions, in which the State is in charge to give the guidelines regulating the subject matter, while regional authorities have to provide detailed legislation in observance of the general principles laid down in State legislation. Finally, legislative powers are vested in the Regions in all the subject matters that are not covered by State legislation (art. 117(4)).

Although the Constitution provides only few rules directly addressing asylum, migration and the legal status of foreigners, other pivotal constitutional provisions contribute enhancing the national standards of foreigners’ rights. In particular, art. 117<sup>18</sup>, through which the EU legislation and international treaties signed by Italy acquire “constitutional relevance”; the “personalist principle” of art. 2, according to which “the Republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity”, and the equality clause of art. 3 that forbids unfair discrimination and entrenches substantial equality (“(1) All citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions. (2) It is the duty of the Republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country”).

<sup>17</sup> Art. 117(3) of the Italian Constitution. For more info on the concurrent regional legislative competence, see the box on decentralisation.

<sup>18</sup> Art. 117(1) of the Italian Constitution proclaims that “Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations”.

In fact, international conventions and jurisprudence (especially the European Convention on Human Rights (ECHR) and the principle of non-discrimination proclaimed by art. 14 ECHR), equality and the personalist principle have been frequently invoked by the Italian Constitutional Court to secure and extend the fundamental rights of foreigners<sup>19</sup> (Corsi 2018 and 2014; Carrozza 2016; Biondi Dal Monte 2013; Chiaromonte 2008)

The Constitutional Court has ruled that, despite art. 3 makes reference to citizens only, when the respect of fundamental rights is at stake, the principle of equality applies also to foreigners.<sup>20</sup> The Court's reasoning is more complex than a simple equalization between citizens and foreigner. It ascertained the difference between citizens and foreigners: while citizens have an "original" relation with the State, foreigners have a non-original and often temporary relation with the State. Hence, the different legal status of foreigners may justify a different legal treatment (decision No. 104/1969) with regard to security, public health, public order, international treaties and national policy on migration (decision No. 62/1994), but not with regard to the protection of inviolable rights (decision No. 249/2010), since they belong "to individuals not as members of a political community but as human beings as such" <sup>21</sup>.

Following the same reasoning, a Constitutional Court's consolidated case-law maintained foreigners' entitlement to social rights, such as the right to health and healthcare services (decision No. 269/2010) and to "essential social benefits", such as invalidity benefits for mobility, blindness and deafness, regardless of the length of their residence. In particular, the Court clarified that specific social benefits that constitute "a remedy to satisfy the primary needs for the protection of the human person", have to be considered "fundamental rights because they represent a guarantee for the person's survival"<sup>22</sup>. The same reasoning, coupled with the anti-discrimination principle, permitted the Italian Constitutional Court to extend some guarantees and (social) rights to undocumented migrants.

The recognition of a "hard core" of fundamental and inviolable rights, regardless of citizenship and legal status, led the Constitutional Court to rule that expulsions cannot be enforced if the undocumented migrant is under an essential therapeutic treatment (decision No. 252/2001). Moreover, a similar reasoning underpins the foreigner's rights to legal defence, even in case of undocumented foreigners.<sup>23</sup>

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<sup>19</sup> In particular, in several decisions the Constitutional Court affirmed that limiting the access to social benefits aimed to satisfy human basic needs only to foreigners with an EC residence permit for long-residents entails an "unreasonable discrimination" between Italian citizens and foreigners regularly residing in Italy. See, amongst the others, the decision of the Constitutional Court No. 187/2010, in which the Court also makes explicit reference to the decisions of the European Court of Human Rights *Gaygusuz v. Austria* 16.9.96 and *Niedzwieck v. Germania* 25.10.05.

<sup>20</sup> See the following decisions of the Constitutional Court: No. 120/67; No. 104/1969; No. 46/1997.

<sup>21</sup> Among the others see Constitutional Court, decision No. 105/2001, No. 249/2010.

<sup>22</sup> Constitutional Court, decision No. 187/2010. See also Constitutional Court No. 329/2011; No. 40/2013, No. 22/2015 and No. 230/2015.

<sup>23</sup> Constitutional Court, decision No. 198/2000, where the Constitutional Court clarified that the effective exercise of the right of defence "implies that the recipient of a provision of restriction of the self-determination freedom, be enabled to understand its content and meaning". As a consequence, "under the hypothesis of ignorance without fault of the expulsion order - in particular for non-compliance with the obligation of translation of the legal act - the deadline for proposing an appeal should not be considered" (No. 198/2000)

Clearly, the Constitutional Court has represented a fundamental anchor in promoting the legal entitlements of foreigners and in preventing standards downgrading. However, besides the Court, a crucial role in shaping the national legislation on immigration and asylum and in extending foreigners' rights has also been played by ordinary judges (Cartabia 2016; Benvenuti 2014). In Italy, cases involving migrants and refugees are dealt with by the ordinary jurisdiction, whereas there are no special courts on migrant issues<sup>24</sup>. However, recently, the Law Decree No. 13/2017 (the Minniti Decree, converted into Law, after amendments, by Law No. 46/2017)<sup>25</sup> introduced specialised court sections within the ordinary jurisdiction, competent for examining specific area pertaining to asylum law and immigration law.<sup>26</sup> However, amongst this area of competence, the Minniti Decree does not mention important subjects, such as the revision of expulsion orders (which remains under the competence of the Justices of Peace) and the revision of decisions to refuse entry (Savio 2017).

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<sup>24</sup> In this regard, it is noteworthy to specify that art. 102 of the Constitution prohibits the establishment of new "extraordinary or special" judges in the ordinary jurisdiction, and it only allows the creation of specialised sections in certain area. There are special judges provided for, such as the Administrative Courts, the Court of Auditors and the military judge, already existing when the Constitution entered into force (Article 103 of the Constitution).

<sup>25</sup> The Law Decree is an act having force of law and an act of primary legislation. According to art. 77 of the Constitution "1. The government may not issue decrees with the force of law unless empowered by a proper delegation of the chambers. 2. As an exception by necessity and urgency, government may issue provisional measures with the force of law and submits them on the same day to the chambers for confirmation; if the chambers are not in session, they have to be summoned for that purpose within five days. (3) Legal decrees lose effect at the date of issue if they are not confirmed within sixty days of their publication. However, chambers may sanction rights and obligations arising out of decrees are not confirmed". For further details see G. F. Ferrari 2008.

<sup>26</sup> Art. 1 Law Decree No. 13/2017 as converted by Law No. 46/2017; according to art. 2(1) of the same Decree, judges are appointed on the basis of specific skills to be acquired through professional experience and training.

## The Italian Judicial System

According to art. 101 of the Italian Constitution “judges are subject only to the law”, meaning that, in principle, judges should be free of interference by any other power. Moreover, art. 108 states that “the provisions concerning the organisation of the Judiciary and the judges are laid out by law”. The law is the only regulating principle and limit of the Judiciary. Art. 104 of the Constitution states that the “The Judiciary is a branch that is autonomous and independent of all other powers”.

Ordinary jurisdiction is divided into two sectors: criminal law and civil law. Ordinary jurisdiction is administered by “professional” judges and by “honorary” judges, whose function is of temporary nature and in no case implies the existence of a public employment relationship. (L.D. No. 116, art. 1(3).). Amongst the latter one, there are the Justices of Peace, which are competent to review decisions of expulsion, compulsory escorting to the border (*accompagnamento forzato alla frontiera*) and detention.

With specific reference to asylum law, the Tribunals and the Supreme Courts (civil, administrative, and criminal), have been crucial in the process of aligning the asylum national legislation to the supranational and constitutional principles. A selection of the most relevant rulings illustrates how Italian courts have been and continue being very relevant actors in this field<sup>27</sup>:

- *Requirements to obtain international protection*: The Supreme Court of Cassation has repeatedly ruled that: “in terms of international protection of the foreigner, the recognition of the right to obtain political refugee status, or the most graded measure of subsidiary protection, cannot be excluded, in our system, by virtue of the reasonable possibility for the applicant to move to another area of his/her country of origin, where he/she has no reasonable grounds to fear being persecuted or does not take effective risks of suffering serious damage, because this condition, contained in Article 8 of Directive 2004/83 / EC, was not laid down in Legislative Decree 251/2007, being a power left to the Member States to include it in the act implementing the Directive”<sup>28</sup>.
- *Requirements to obtain humanitarian protection*: Italian judges addressed the indefinite content of art. 5, para. 6 of the Consolidated Immigration Law, which provides the requirements to obtain the permit to stay for humanitarian reasons, identifying the “serious humanitarian reasons” mentioned by the above normative provision. Based on a judgment of the Constitutional Court (decision No. 381/1999), the Court of Cassation ruled that the condition to obtain a humanitarian permit to stay is the recognition of a situation of vulnerability, to protect on the lights of international and

<sup>27</sup> For an ampler lists of judgments on international protection delivered by the Italian ordinary jurisdiction see the following website: [https://www.asgi.it/banca-dati/?fwf\\_tematica=asiloprotezione-internazionale&fwf\\_aree=giurisprudenza&fwf\\_sotto\\_aree=giurisprudenza-italiana&fwf\\_tipologia\\_del\\_documento=sentenza&fwf\\_sort=date\\_desc](https://www.asgi.it/banca-dati/?fwf_tematica=asiloprotezione-internazionale&fwf_aree=giurisprudenza&fwf_sotto_aree=giurisprudenza-italiana&fwf_tipologia_del_documento=sentenza&fwf_sort=date_desc)

<sup>28</sup> See, among the others, Court of Cassation, decision No. 13172/2013



constitutional obligations assumed by Italy<sup>29</sup>. More specifically, even beyond the constitutional and international obligations, the judiciary stressed on the particular vulnerability of the person strongly undermining his/her fundamental rights<sup>30</sup>.

- *Definition of third safe country*: with the decision No. 4004/2016, the Council of State, the highest Italian administrative court, quashed the decision to transfer international protection applicants to Hungary, within the framework of the Dublin Regulation. This because the Court considered that it is highly likely that asylum seekers are subjected to inhuman and degrading treatments in Hungary, in contrast with humanitarian principles and with art. 4 of the Charter of fundamental rights of the EU. The same conclusion has been reached by the Council of State in a case involving the transfer to Bulgaria of an international protection applicant<sup>31</sup>.
- *Effective respect of the Dublin Regulation procedures*: Italian judges ruled that the participatory guarantees related to the procedures for the recognition of international protection cannot be waived and must include all the information foreseen by the EU regulation No. 604/2013. Therefore, the person applying for international protection must receive in writing and in a language understandable to him/her all the information concerning the consequences of his/her application, the criteria for determining the State responsible for the examination, the possibility of presenting information concerning family members already present, the methods of appeal and legal protection, the processing of personal data. For this reason, the simple fact that the applicant carried out an interview in which she/he had the opportunity to request information with the help of an intermediary does not comply with the information guarantees<sup>32</sup>.

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<sup>29</sup> See among the others the following judgments: Court of Cassation No. 4139/2011; No. 6879/2011; No. 24544/2011.

<sup>30</sup> See Morandi 2008 for a punctual reference to the jurisprudence on the humanitarian permit to stay.

<sup>31</sup> Council of State, decisions No. 3998/2016, No. 3999/2016, No. 5085/2017.

<sup>32</sup> Council of State, decision No. 4199/2015.

## 4. The Relevant Legislative and Institutional Framework in the Fields of Migration and Asylum

### 4.1. The national policy on immigration and asylum

The traditional separation between domestic policies and foreign ones fades when speaking of migration, given the transnationality of the concept. Indeed, when analysing the Italian policy on migration, policy measures enacted at an external level cannot be neglected (even if this report will only summarily mention this aspect). In particular, Italy signed a number of acts of international cooperation with numerous countries, such as Tunisia, Sudan and particularly Libya, which agreed to prevent migrants from reaching the Italian territory. As will be discussed in section 7, these agreements had severe consequences in terms of infringements of fundamental rights. However, beyond this approach of progressive “externalization of the borders control”, the national migration policy also comprehends the humanitarian and military operations of Mare Nostrum, subsequently replaced by Triton and Operation Sophia<sup>33</sup>.

At domestic level, the national policy on migration has been featured with a structural lack of organic, coherent and effective instruments of planning and management.

Art. 3 of the Italian Consolidated Law on Immigration (D. Lgs. 286/1998), that is the framework law in the field, as we will discuss in the next sections, establishes that every three years the government must release a “programmatic document” presenting the national policy on migration. This document shall identify: (a) the State’s main interventions (including social and economic measures for non-national residents); (b) the public actions for migrants’ integration; and (c) the criteria to determine the annual entry foreigners’ quota.

The most recent “programmatic document” dates back to the triennium 2007 – 2010, which means that in the last seven years the government has failed to fulfil its duty (Bacci 2011)<sup>34</sup>. The absence of a coherent vision and a clear policy planning, with a cascade-effect, had a number of negative impacts. The most severe consequence is that the annual measure establishing the quota of working permits (the so-called *Decreto Flussi*), coupled with the 2002 reform which reframed the system of the permit to stay for work reasons, has not been

<sup>33</sup> The Mission ‘Mare Nostrum’, lead by Italy alone, was launched in October 2013 with the twofold aim of saving lives in the Mediterranean and prosecuting human traffickers (<http://www.marina.difesa.it/cosa-facciamo/operazioni-concluse/Pagine/mare-nostrum.aspx>). On November 2014, this operation was partially replaced by the Triton operation, an Italian-led Frontex mission, whose scope was limited to few miles beyond Italian territorial waters ([https://www.senato.it/japp/bgt/showdoc/17/DOSSIER/912705/index.html?part=dossier\\_dossier1-sezione\\_sezione11-table\\_table7](https://www.senato.it/japp/bgt/showdoc/17/DOSSIER/912705/index.html?part=dossier_dossier1-sezione_sezione11-table_table7)). On April 2015, Triton was replaced by Operation Sophia, an Italian-led EU mission, aimed at neutralising migrants’ smuggling routes in the Mediterranean ([https://www.difesa.it/InformazioniDellaDifesa/Pagine/Operazione\\_Sophia.aspx](https://www.difesa.it/InformazioniDellaDifesa/Pagine/Operazione_Sophia.aspx)). For a critical perspective see Cuttitta (2014) and Del Valle (2016).

<sup>34</sup> Sonia Viale, State Secretary at the Ministry of the interior for Immigration, justified the lack of the programmatic document as such: “over time the provision of Article 3 of the Consolidated Law on Immigration has lost most of its original value, due to the occurrence of new phenomena and situations. In fact, the programming of foreign workers’ flows must be modulated according to the needs of the economy and presupposes a macroeconomic stability framework, without which it is not possible to proportion the entry of workers non-EU citizens to the demand for internal work”. See [http://old.asgi.it/home\\_asgi.php%3Fn=print&id=1655&type=news&mode=print&l=it.html](http://old.asgi.it/home_asgi.php%3Fn=print&id=1655&type=news&mode=print&l=it.html) 1/

responding to any meaningful analysis of Italian needs. Thus, the *Decreto Flussi* proved to be an unrealistic, inefficient and inadequate system (Corte dei Conti 2008; Ferraris 2009).

Until the economic crisis, the number of migrants admitted to the Italian territory for reasons of work has progressively decreased, following a political wave of securitization and migration control. Annual entry quota were far below labour demand, especially in the industrial and agriculture sectors. Furthermore, complex procedures and delays in the examination of applications rendered the system inefficient to match labour supply and demand (Ministero Interno 2007). As a result, the *Decreto Flussi* has been used “de facto” to regularize undocumented migrants already working in Italy, having the same effect of mass regularization processes (Zanfrini 2007).

**Table 9. Programmed Quotas for Extra-Communitarian Workers**

Publication of the Decree	Seasonal Work	Autonomous Work	Dependent Work			
			General Dependent Work	Skilled Profession	Descendants of Italian Emigrants (non-citizens)	Conversions (tot)
<b>2011</b>	-	-	52080	4000	500	11500
<b>2012</b>	35000	2000	16150	-	100	11750
<b>2013</b>	30000	2300	-	3000	100	12250
<b>2014</b>	15000	2400	-	1000	100	12350
<b>2015</b>	13000	2400	-	1000	100	12340
<b>2016</b>	13000	2400	100 (Expo Workers)	1000	100	14250
<b>2017</b>	17000	2400	-	500	100	10850

Source: [www.integrazionemigranti.gov.it](http://www.integrazionemigranti.gov.it) and [http://www.prefettura.it/latina/contenuti/Flussi\\_lavoratori\\_stagionali](http://www.prefettura.it/latina/contenuti/Flussi_lavoratori_stagionali)

Note: The ‘flows decree’ indicates the quotas of the maximum number of applications for non-EU workers to be admitted in the following year.

Table 10 shows that in 2011, due to the economic crisis, the government decided to radically change its approach and to limit the entry quota only to few foreigners: mainly high-qualified workers, rich entrepreneurs and “seasonal workers” in the field of agriculture and tourism. As a consequence, opportunities to regularly enter the Italian territory has been dramatically reduced.

A second severe weakness of the Italian migration policy lies in the lack of a strong governance. In Italy, the management of asylum and migration does not fall under the responsibility of a single governmental body. Rather, it is scattered among different institutional entities emanating from different tiers of government (from national to local), and it also involves the third sector. Each entity (with its own mandate and mission) is competent and responsible for single apparatus of the complex migration machine.

The necessity for some mechanisms of coordination was already detected by the Constitution itself, which stated that “State legislation shall provide for co-ordinated action between the State and the Regions” in the field of migration (art. 118(2)).

However, the constitutional provision has been very partially complied with, as the sole coordination activity is provided at the local level by the “Territorial Councils of Migration” (*Consigli Territoriali per l’Immigrazione*), whose impact, nonetheless, has been very limited<sup>35</sup>.

In the field of asylum, under the EU impetus a number of relevant policy actions have been undertaken. In 2015, following the Council Decision (EU) 2015/1523 of 22 September 2015 “establishing provisional measures in the area of international protection for the benefit of Italy and Greece”, the “Italian Roadmap 2015” has been conceived.<sup>36</sup> The Roadmap defines the measures for “improving the capacity, quality and efficiency of the Italian system in the fields of asylum, early reception and repatriation; and ensuring the correct measures for enacting the decision” (p. 2).

Furthermore, in 2015 the Legislative Decree (hereinafter also D. Lgs.)<sup>37</sup> No. 142/2015 provided a “National Coordination Board” (*Tavolo di Coordinamento Nazionale*) at the Ministry of the Interior (art. 16), competent to define the guidelines and the program for the improvement of the national reception system, including the distribution of migrants quotas among the Regions. To this end, every year the national Coordination Board elaborates the “National Reception Plan” to be enacted by the “Regional Coordination Boards” (*Tavoli di Coordinamento Regionali*). Furthermore, the National Asylum Board plays an important coordination role, putting together the voices of the main associations promoting the right of asylum in Italy (reunited in the ‘National Coordination Board’).

In 2017, the National Coordination Board released the “National Plan for Integration”, as envisaged by the law<sup>38</sup>. This document dictates the guidelines to enhance the effective

<sup>35</sup> According to the Presidential Decree No. 394/99, art. 57, the Territorial Councils of Migration are competent to: a) monitor the migration phenomenon; b) analyse the needs; c) promote adequate interventions. These Councils are composed of representatives from: the Prefecture, the Region, the local municipality, migrants’ associations, employers and employee organizations. For more information see: <http://www.interno.gov.it/it/temi/immigrazione-e-asilo/politiche-migratorie/consigli-territoriali-immigrazione>. The limited impact of the “Territorial Councils of migration” is confirmed also by the “national report on Territorial Councils of migration” released in 2015 by the Department of civil liberties and migration of the Ministry of the Interior (available at <http://www.prefettura.it/FILES/AllegatiPag/1179/reportXSTAMPA.pdf>). Amongst the reasons which concurred to hamper the functioning of this body, the report mentions: a) the difficulty to identify clear and shared objectives (particularly with the local municipalities and migrants’ associations); b) the lack of recognition of its coordinating function; c) the excessive turn-over; d) the absenteeism of the appointed components. (pp. 15 – 20).

<sup>36</sup> The Italian roadmap is a policy document approved on September 28, 2015. It is available here: [http://www.immigrazione.biz/upload/Roadmap\\_2015.pdf](http://www.immigrazione.biz/upload/Roadmap_2015.pdf). For an annotated commentary of the roadmap in English, see Maccanico Y., Statewatch Briefing, *The Italian Roadmap 2015*, <http://www.statewatch.org/news/2015/dec/no-279-Italian-Road-Map-2015.pdf>. A more detailed analysis of this policy document will be developed in the following chapters.

<sup>37</sup> The Legislative Decree is an act having force of law and an act of primary legislation. It is a complex statute passed by the Government after a Parliament law has delegated it to do so, specifying how the statute should be written, and its deadline (see art. 76 of the Italian Constitution).

<sup>38</sup> Art. 29 (3), D. Lgs. 251/2007 as amended by D. Lgs. 18/2014, art. 1 (1), the National Integration Plan is available at <http://www.interno.gov.it/sites/default/files/piano-nazionale-integrazione.pdf>

integration of the beneficiaries of international protection currently residing in the national territory, through a multilevel approach. In particular, the aspects addressed are: job placement, social inclusion, access to health and social assistance, housing, linguistic training and education, and the contrast to discrimination.

## **4.2. The national legislation on immigration and asylum and its main trends**

The first attempt to regulate the migration phenomenon dates back to 1998, when the Legislative Decree No. 286/1998, that is the Italian “Consolidated Act of Provisions concerning immigration and the conditions of third country nationals” (the Consolidated Law on Immigration) has been issued. It provided a fundamental set of principles on foreigners’ legal status (such as the right to non-discrimination and to the recognition of fundamental rights) and a framework of regulations (such as the normative provisions concerning entry and stay) which is still binding. However, the Consolidated Law on Immigration fails to provide a solid and thorough basis for the regulation of asylum and migration in Italy. In particular, on the one hand, with specific reference to migration, the national legislation results in multiple, fragmentary normative stratifications, with important sectors<sup>39</sup> regulated by circulars edited by the Ministry of the Interior<sup>40</sup> or other legislative acts of minor importance (Nascimbene 2004:140; Gjergji 2016b). On the other hand, the asylum field is characterised by the very same structural weaknesses. Indeed, the asylum regulation relies on a number of legislative decrees, transposing the EU Directives into the Italian legal system, while an organic and complete law is still lacking since 1948<sup>41</sup>.

The main stages of the evolution of the Italian legislation on immigration and asylum can be identified as follows:

- **ITALY AS COUNTRY OF EMIGRATION (1861 – 1980):** From the national unification (1861) until the 1970s Italy was a country of emigration (Colombo, Sciortino 2004). At that time, the law regulating migration was the “Public Security Consolidated Law No. 773/1931, which looked at foreigners’ entry and stay essentially in terms of public order protection (Nascimbene 2004:4).
- **THE FIRST ATTEMPTS TO REGULATE MIGRATION (1980 – 1997):** Although the migration balance became positive already in the 70’s, a new law on migration intervened only in 1986 (the so-called “Foschi Law”), approved by a large, multiparty centrist coalition. This law, strongly linked to the ratification of the OIM International Convention of 1975, only addressed specific aspects of the migration phenomenon, which were essentially related to the labour market and the conditions of migrant

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<sup>39</sup> See, *ex multis*, the Circular No. 400 of 29.06.2004 concerning the “Authorization to foreigners, holding the receipt of the application to renew the permit to stay, to exit and re-enter the national territory”. For further details, see Bucci (2004).

<sup>40</sup> Circulars are acts of secondary law.

<sup>41</sup> To this end, amongst the main normative provisions, which have been issued to face emergency situations, see in particular the Decree 09.09.1992 after the Somali conflict, the Law No. 390/1992 after the ex-Yugoslavia crisis and the Law No. 563/1995 to face the arrivals of refugees from Albania.

workers. In the same year, the status of around 118.000 irregular migrants was regularized (Abbondanza 2017). A second attempt to regulate migration was the Law No. 39/1990 (the so-called “Martelli Law”), approved by the same political coalition. As for the Foschi Law, even this law was influenced by an “international driving force”, which in this case was the European Union, and the same will apply with all the subsequent migration laws. The Martelli law introduced important normative provisions on the refugee status, extending the international protection recognition also to non-EU nationals. It also provided new tools, such as the introduction of entry quota of migrant workers and the regulation of visa, with new entry visa. It also regulated the expulsions for undocumented migrants and set the procedures for refusal of entry. Finally, it opened a new regularization process for undocumented migrants (Castellazzi 2010). In 1992, the Parliament approved a new citizenship law (Law No. 91/92), mainly based on the *jus sanguinis* criterion, according to which the Italian citizenship is automatically attributed only to Italian citizens’ descendants. In order to apply for citizenship non-EU migrants shall demonstrate continuous and uninterrupted residency of ten years (reduced to five for beneficiaries of international protection), while second generations migrants had to demonstrate an uninterrupted residency from birth to the age of 18 years to apply for naturalization when turning eighteen. Finally, spouses of Italian citizens could apply for naturalization after two years of cohabitation and residency in Italy (reduced to one year in case children are born or adopted by the spouses). Remarkably, even when these requirements are fulfilled, citizenship is not automatically granted, as it lies on a discretionary decision of the Ministry of the Interior.

In 1995, around 250.000 irregular migrants benefitted from another regularization process.

- THE TIME FOR MORE RELEVANT NORMATIVE CHANGES (1998 – 2007): the progressive relevance of the phenomenon of migration paved the way for significant normative changes. The beginning of this phase is marked by the Law No. 40/1998 (the so-called “Turco-Napolitano Law”) approved by a centre-left coalition. This Law has been soon incorporated into the Legislative Decree No. 286/1998 (the so-called “Consolidated Law”), which introduced a comprehensive regulatory framework on immigration and the legal status of foreigners. The law was characterized by a two-tracks strategy: an “integration approach” toward legally resident migrants coexisted with a tough fight against irregular immigration. In fact, on the one hand, the Consolidated Law established migrants’ rights and duties, equalizing them to Italian citizens for what it concerns civil rights and judicial protection (arts. 1 – 4). The Law also recognized foreigner children’s rights and migrant’s right to family unity (arts. 28 - 33). For the first time, even social rights (such as the right to health, education and social integration) received a coherent regulation (arts. 34 – 46). Rules on migrants’ employment and migrant workers’ rights were also provided. In particular, a new measure was introduced: a system of “sponsorship”, guaranteed by an Italian citizen or by a legally resident foreigner, which allowed migrants to enter the country ‘to search for a job’, without being previously hired (art. 23). On the other hand, the Consolidated Law provided an organic regulation of conditions of entry (through the “programmatic

document” and the establishment of yearly entry quotas)<sup>42</sup> and stay. The Law entrenched the principle of *non-refoulement* (art. 19), but it also provided more stringent controls at the borders (art. 9), and a broader recurs to pushback and deportation (arts. 8 – 13). Temporary detention centres were established for migrants waiting to be deported (the so called *Centri di permanenza e assistenza*) (art. 14). In 1999, around 250.000 undocumented migrants were regularised by a new regularization programme. After a few years, the Consolidated Law was partially amended by the new centre-right government through the Law No. 189/2002, the (so-called “Bossi-Fini Law”). The Bossi-Fini Law lowered entry quota and strongly linked third nationals’ regular entry and residence to employment, but it hampered the possibility to obtain a regular visa for work reasons. The previous system of sponsorship was substituted by a complicated mechanism where migrants willing to enter the country for work reasons had to demonstrate there was an employer in Italy already committed to hire them. The Law also introduced more restrictive provisions on expulsion and detention. Nonetheless, the paradox was that it also provided for the largest regularization process ever approved in Italy, involving the regularization of 646.000 foreign workers (McMahon 2015:48). The centre right coalition further stressed the security approach to migration using the criminal law to fight against illegal entry and residence (the so-called “clandestinity”). Laws No. 125/2008 and No. 94/2009, named “Security Packages” (*Pacchetto Sicurezza*) introduced the “aggravating circumstance of clandestinity” (under which the punishment for a crime committed by an undocumented foreigner could be increased up to one third compared with the same crime committed by an Italian citizen or a regularly resident foreigner), and the crimes of “clandestinity” and of refusal to comply with a removal order issued for illegal entry, together with a broad harshening of detention and expulsion measures. These provisions triggered the intervention of the Constitutional Court, which declared the aggravating circumstance of clandestinity unconstitutional (decision No. 249/2010) while dismissing the question of constitutionality of the crime of clandestinity (decision No. 250/2010). At the same time, the Decree law No. 78/2009 established the regularization of foreign workers in the domestic labour and in the care sector. Meanwhile, as far as asylum is concerned, a number of normative provisions were approved in order to comply with the EU obligations and the construction of a “Common European Asylum System”<sup>43</sup>, in particular, the Legislative Decrees No. 85/2003; No. 140/2005; No. 251/2007; No. 25/2008, which respectively transposed the EU Directives on “temporary protection”, “reception conditions”, “qualification”, “asylum procedures”.

- THE EMERGENCY WAVE (2011 – 2013): the North Africa extraordinary migration flow of 2011 was faced by the Italian government through the declaration of the “state of emergency”<sup>44</sup> in the country (named the “North Africa Emergency”). The “state of

<sup>42</sup> For further details, see chapter 3.

<sup>43</sup> For further details on the Common European Asylum system see the following webpage: [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en)

<sup>44</sup> Decree of the President of the Council of Ministers, 7.04.2011, Declaration of the state of humanitarian emergency in the territory of North Africa to allow an effective contrast to the exceptional



emergency” was protracted until February 2013. It allowed the Civil Protection to manage the reception of mixed migratory flow<sup>45</sup> coming from North Africa, through an extraordinary reception Plan, in cooperation with Regions and local municipalities, entrusted to take charge of a certain quota of “new arrivals”, notwithstanding the existing National System for the asylum seekers and refugees’ protection. This resulted in the creation of a parallel system of reception, uncontrolled, with highly inconsistent standards of accommodation, often lacking the minimum standard of care provided by law and insufficient integration plans (UNHCR 2013). Meanwhile, in 2012, under the Monti government that succeeded the centre-right coalition, the L.D. No. 109 enforcing the EU directive 2009/52/CE concerning the employment of irregular workers provided a new regularization process.

- THE REFORMIST PHASE<sup>46</sup> (2014 – 2017): Italy was committed to cope with the unprecedented mixed migration flow with a number of radical reforms. The national system of reception has been entirely reframed by the new provisions of the D. Lgs. No. 142/2015. The EU migration policy pushed Italy to entrench new tools to manage the migratory flow: the creation of “hotspots” and the relocation programme. A new law regulating the situation of foreign unaccompanied children was approved (the so-called “Zampa Law”). Finally, the Law Decree No. 46/2017 introduced significant changes to the international recognition procedure and to the procedures of identification and expulsion/contrast to illegal migration of non-EU nationals. These normative reforms were approved by a centre-left coalition.

To sum up, we can outline the most important traits of the national legislation on migration and asylum:

- The Italian asylum and migration legal framework results from the fragmentary combination of different provisions, of primary and secondary laws, conceived with different objectives and scopes, whereas a complete, coherent and organic law is still missing.
- In the absence of a clear and structured policy plan, the national legislation dealing with migration and asylum has been often informed by an emergency logic. As a result, authors have highlighted how the emergency management of immigration, amongst other things, “subtracted important resources from the accounting control [...] from the ordinary planning of resources and interventions by the State” (Vrenna, Biondi dal Monte 2011: 3).

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influx of non-EU citizens in the national territory. [http://www.protezionecivile.gov.it/jcms/it/view\\_prov.wp?contentId=LEG24032](http://www.protezionecivile.gov.it/jcms/it/view_prov.wp?contentId=LEG24032). The competence to manage the migrants’ reception is given to “the national civil protection service”, which typically comes into play in cases of “natural disasters, catastrophes or other events that, due to their intensity and extent, must be faced with extraordinary means and powers” (Law No. 225/1992, art. 5). It is noteworthy that during the state of emergency the regulation process becomes faster but also more discretionary and less subjected to the ordinary democratic control.

<sup>45</sup> For a definition of “mixed migratory flow” see <http://www.mixedmigrationhub.org/member-agencies/>

<sup>46</sup> This last phase will be here just synthetically presented. For a more detailed analysis, please see Chapter 6: “The refugee crisis-driven reforms”.

- The national legislation has been more and more affected by a political “securitization” wave, where the need to contrast the irregular migration and to guarantee the public security has been translated into restrictive measures on expulsion and detention.
- The “schizophrenic” attitude toward undocumented migrants; political narratives of harsh repression against illegal migrants cohabit with the recognition of basic welfare rights to undocumented migrants and with a series of “regularization acts” approved both by left and right coalitions<sup>47</sup>. Curiously, this frequent resort to *ex post* regularization schemes has been twined with a progressive reduction of the channels for regular entry into the country (Olivito 2016; Ferraris 2009). In this regard, scholars have talked about “institutionalized irregularity”, i.e. an illegality of the stay, generated or at least favoured by the same legal system (Calavita 2007:33, Ferraris 2009).
- In the absence of coherent and consistent legislative interventions aimed at aligning the national normative framework on migration to the international and constitutional standards, the judiciary assumed a leading role in the recognition of foreigners’ fundamental rights.

Finally, as will be illustrated below, the national framework of migration in Italy involves a plurality of actors dealing with the management of migration, including regions, local municipalities and the third sector.

### 4.3. The sub-national legislation

According to the Legislative Decree No. 286/1998, Regions and local municipalities are entrusted to play an essential role in the governance of migration, in close collaboration with the central government. In particular, local governments have to play a crucial role in a number of domains, such as education (art. 38) and social integration (art. 42). Local authorities, in fact, should remove any obstacles to the full recognition of foreigners’ legal entitlements provided at national level, with specific reference to housing, Italian language and social integration, guaranteeing the respect of fundamental rights.<sup>48</sup>

The concrete enforcement of the constitutional reform of 2011<sup>49</sup>, transforming Italy into a truly decentralised state, which allocated migration management to the exclusive competence of the central government, did not result in the exclusion of the regional legislations from the field of migration. Thus, Regions kept playing a decisive role in the migration governance, according to an effective ‘multilevel model’, as outlined by the Constitutional Court (Panzeri 2018)<sup>50</sup>. Scholars have elaborated a distinction between the “immigration politics” and

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<sup>47</sup> The largest regularization ever applied in Europe was approved by Berlusconi in 2002. For a thorough analysis of this paradox of the Italian migration policies, see Zincone (2002)

<sup>48</sup> Art. 3 (4). Other relevant normative provisions are art. 35 and 36 (with regard to health services); art. 44 (12) with regard to legal assistance; art. 45 (2) concerning the promotion of integration and equal opportunities.

<sup>49</sup> For more details, see Chapter 3.

<sup>50</sup> Italian Constitutional Court, decisions No. 300/2005; No. 269/2006; No. 156/2008; No. 50/2008; No. 134/2010; No. 269/2010; No. 299/2010; No. 61/2011.

“immigrants politics” (Hammar 1990; Covino 2011: 392; Benvenuti 2015:82; Caponio 2004:805). The former ones, which belong to the exclusive competence of the State, comprehends all the measures establishing the condition for the regular entry and stay of foreigners in the Italian territory, whereas the latter refer to issues such as social assistance, education, health, housing and public interventions for migrants’ integration, where Regions have a concurrent, or even exclusive, legislative competence.

To this end, the Court eloquently stated that public intervention in the migration field cannot be limited to the controls of entry and stay of foreigners, but it also involves other fields, such as public assistance, education, health care or housing, where “national and regional competences are intertwined, as established by the Constitution” (decision No. 300/2005). In other words, asylum and migration necessarily intersect both central and regional interventions, even beyond the strict distribution of powers provided by art. 117 of the Constitution<sup>51</sup>. Through this reasoning, the Constitutional Court dismissed the government requests to censor some regional laws, such as the ones which extended undocumented migrants’ entitlements to health,<sup>52</sup> and social services<sup>53</sup> (Salazar 2010; Biondi dal Monte 2011; Corsi 2012; Gentilini 2012).

However, regions have not always demonstrated more inclusiveness than the State and the Constitutional Court also intervened to declare the illegitimacy of regional laws, which subjected migrants’ access to rights (such as housing or social security) to a prolonged residence in the region territory<sup>54</sup>.

In Italy, local municipalities do not hold any legislative powers, but can have important administrative and regulation-making competences. In particular in the area of asylum, immigration and legal status of foreigners, local municipalities are responsible for organizing important sectors of Services delivery<sup>55</sup>.

## Subsidiarity

A fundamental cornerstone of the Italian Constitution is the principle of subsidiarity, which has a vertical and a horizontal dimension. Concerning the first one, article 118 of the Constitution, following the principle of subsidiarity, differentiation and proportionality, attributes administrative functions to the municipalities “unless they are attributed to the provinces, metropolitan cities and regions or to the State”. Instead, in

<sup>51</sup> Art. 117 of the Italian Constitution distributes legislative powers between the State and the Regions (for further insights, see para. 3 and the box on decentralisation).

<sup>52</sup> Constitutional Court, decision No. 299/2010 concerning the law No. 32/2009 of the Region of Puglia

<sup>53</sup> Constitutional Court, decision No. 269/2010 concerning the law No. 29/2009 of the Region of Tuscany and decision No. 61/2011 concerning the law No. 6/2010 of the Region of Campania.

<sup>54</sup> See amongst the others, the decision No. 168/2014 of the Constitutional Court, which declared the constitutional illegitimacy of art. 19 (1), lett. b), Valle d’Aosta Regional Law No. 3/2013.

<sup>55</sup> Art. 118 of the Constitution and Law No. 328/2000 (Consolidated Law for the realization of an integrated system of social services and interventions).

its horizontal sense, the subsidiarity qualifies the interconnection between the public sector and the private one in the delivery of services.

Finally, together with Regions and local municipalities, in Italy also the third sector is highly involved in the management of immigration. In particular, the third sector intervention, as acknowledged by the national as well as the regional legislation (Biondi dal Monte, Vrenna 2013), is expressly foreseen by the Consolidated Law on Immigration with reference to the intercultural education (art. 38), the foreigners' access to housing (art. 40), education and professional trainings (art. 23), and social integration (art. 42).

## 5. The Legal Status of Foreigners

### 5.1. Asylum applicants

D. Lgs. No. 142/2015, enforcing the EU Directive on reception (recast) and on asylum procedures<sup>56</sup>, defines as international protection applicant (hereinafter also “asylum applicant or asylum seeker”) any third country national who “formally applied for international protection, pending a final decision”, or “expressed the will to apply for protection” (art. 2 (1a)).

Recently, the Law Decree No. 13/2017 amended the Consolidation Law on migration, introducing new identification procedures: undocumented foreigners intercepted within the Italian territory succoured during rescue operations in the sea are conducted to specialised structures, the so-called “hotspots”, where they are fingerprinted and receive information on the international protection, the relocation and the assisted voluntary return<sup>57</sup>.

#### The Hotspot Approach

The “*hotspots approach*” is defined by a set of measures drawn up under the “*Italian Roadmap 2015*”, adopted by the Ministry of the Interior to fulfil the requirements of the European Council’s Decisions of September 2015<sup>58</sup>.

By the end of February 2018, five facilities (out of the six structures foreseen by the Roadmap) were fully operational under the “*hotspot approach*” in Pozzallo, Lampedusa, Trapani, Taranto and Messina<sup>59</sup> (European Commission 2017c:8) enacting procedures which include medical screening, pre-identification, registration, photo-identification, fingerprinting. However, the term “hotspot” identifies not only a geographical space, but also a methodology, according to which Italian institutions work with the support of Frontex, EASO, Europol European agencies and international organizations and NGOs, to inject greater order into migration management (The Italian roadmap 2015).

Based on the report released by the EU Court of auditors, the “hotspot approach” has significantly improved the migrants’ identification and, more broadly, the management of migration, with the fingerprinting rate reaching the 97% for the whole

<sup>56</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32013L0033> and Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0032>

<sup>57</sup> Art. 10 ter of the Consolidated Law on migration, as introduced by the Law Decree. No. 13/2017, art. 17.

<sup>58</sup> Provisional measures in the area of international protection for the benefit of Italy and Greece, Council decision 2015/1523 of 14 September 2015 ([http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL\\_2015\\_239\\_R\\_0011](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL_2015_239_R_0011)) and Council decision 2015/1601 of 22 September 2015 (<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015D1601>).

<sup>59</sup> In March 2018 the hotspot of Lampedusa was temporarily closed due to the deplorable living conditions highlighted by several organizations. Also the hotspot of Taranto was temporarily closed due to some procurement irregularities detected by the National Anti-Corruption Authority (Bagnoli L., 2018).

2016 (European Court of auditors 2017:39). However, the same report, together with the below-mentioned documents elaborated by NGOs as well as institutional actors, highlights severe shortcomings.

In particular, although standard operating procedures (SOPs) have been elaborated<sup>60</sup>, a detailed regulation of the operations conducted in the “hotspots” facilities still lacks at legislative level (Neville, Sy and Rigon 2016:39). Only recently, the Law No. 47/2017 introduced an explicit reference to the hotspots, without providing, however, a clear and standardised procedure. Hence, as pointed out by the Council for the Judiciary (CSM 2017), and ASGI and Magistratura Democratica (2017), the problem of a legal basis remains open. This normative gap brings two series of problems. Firstly, the operations conducted in the hotspots should be concluded within 24 – 48 hours. However, as documented also by parliamentary reports, migrants remain within these structures much more, sometimes subjected to a “de facto” detention for several weeks (Chamber Inquiry Committee 2016 a and b). This limitation of the liberty, in the lack of a law regulating it, raises severe problems of constitutional legitimacy, under art. 13 of the Constitution<sup>61</sup>.

Second, activities performed within hotspots facilities are far from being harmonized (OHCHR 2016). In some of these facilities migrants are often subjected to scarce healthcare, poor sanitary and hygienic conditions, while often foreign unaccompanied children are deprived of dedicated spaces, suffering from inadequate care and assistance. Concerns have been voiced by institutions, specialized literature and civil society organizations against some of the practices enacted within the hotspots, such as detention, the use of force in obtaining fingerprints and the issuing of orders to leave the country without any proper hearing or access to the asylum procedure, which undermine migrants’ fundamental rights and their right to international protection (Tavolo Nazionale Asilo 2016; Senate extraordinary Committee on human rights 2017a; Mangiaracina 2017; Oxfam 2016; Amnesty International 2016; MSF 2015; Cild, Asgi, Indiewatch 2018)<sup>62</sup>.

<sup>60</sup> STANDARD OPERATING PROCEDURES (SOPs) applicable to ITALIAN HOTSPOTS, 2015, p. 15, available at [http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots\\_sops\\_-\\_english\\_version.pdf](http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_english_version.pdf)

<sup>61</sup> The SOPs clearly states that “the person can leave the Hotspot only after having been photocopied as envisaged by current regulations and if all the security checks in national and international police databases have been completed” (p. 8). However, according to the art. 13 of the Constitution, “No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law. In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law, the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours, shall be revoked and considered null and void”.

<sup>62</sup> See also the Circular of the Ministry of the Interior of 8.01.2016 mentioning the lack of appropriate information given by Italian authorities.



## The Relocation Programme

The relocation programme was a two year scheme provided by the “*Provisional measures in the area of international protection for the benefit of Italy and Greece*” adopted by the European Council in 2015, aimed at reducing the migratory pressure on frontline States (Italy and Greece).<sup>63</sup> The relocation is defined as “*the transfer of an applicant from the territory of the Member State which the criteria laid down in Chapter III of Regulation (EU) No 604/2013 indicate as responsible for examining his or her application for international protection to the territory of the Member State of relocation*”. Only asylum-seekers of nationalities with an average recognition rate of 75 per cent or higher at the EU level are considered eligible for relocation.

The relocation programme, however, which officially ended up in September 2017, fell short of expectations. Despite the high number of potential applicants for relocation arriving in Italy, since the beginning of the implementation of the relocation scheme as of December 2017, just 11.464 persons have been effectively relocated (of which just 99 unaccompanied foreign children) (Ministry of the Interior 2018b), out of the 34.953 persons the Council Decision envisaged (European Commission 2017b).

The failure of the relocation programme can be explained because of domestic shortcomings, such as the lengthy appointment of a guardian for unaccompanied foreign children in Italy and the slow identification and registration procedure (UNHCR 2016a:6), in association with the reluctance of a number of EU member states towards burden-sharing. An infringement procedure was launched by the EU Commission against Hungary, Poland and Czech republic for non-compliance with their legal obligations on relocation (EU Commission 2017a).

According to Legislative Decree No. 25/2008, police headquarters and border police are in charge of the operations of registration of the asylum application (art. 6), which has to be timely transmitted to the Territorial Commission that is the competent institution to decide (art. 3 and 26). Police Headquarters are also entrusted to provide the asylum applicants with all the necessary information concerning the international protection procedure and the applicants’ rights and obligations, in a language s/he can understand (art. 10 and 10 bis).

Shortcomings have been reported with regard to a timely access to the international protection procedure, due to the delays and structural problems of some Police Headquarters, such as the insufficient personnel and their inadequate training (ASGI, 2017b). Moreover, there have been allegations about some Police Headquarters, which illegitimately refused to receive international protection applications (ASGI, 2017d). However, the most problematic point remains the lack of information provided to asylum applicants, and the Italian Supreme Court ruled that an order of pushback at the border is illegitimate when issued in violation of the duty of information on the right to asylum (decision No. 5926/2015).

<sup>63</sup> See note 61.



After having filled the asylum application (through the so-called C3 form), the asylum applicant is entitled to receive a temporary (6-months), renewable, “asylum seeker permit to stay”. This permit to stay envisages a number of rights, including the right not to be expelled until the end of the procedure of international protection<sup>64</sup>. Legislative Decree No. 142/2015 prohibits that asylum seekers are detained on the sole ground of the examination of their application. However, some form of detention are envisaged when the asylum applicant a) falls under the conditions of art. 1F of the Geneva Convention<sup>65</sup>; b) receives an expulsion order for mafia or terrorism related crimes; c) becomes a danger for public order and security; d) presents a risk of absconding (art. 6). In these cases, the asylum seeker is transferred in detention centres for repatriation (the so-called *Centri di Permanenza per il Rimpatrio* – CPR), where she/he can be detained up to 12 months. In 2016, official statistics reveal that 161 asylum seekers have been detained in CPR out of 2.984 detainees (Senate extraordinary Committee on human rights 2017b:9). According to D. Lgs. 142/2015, the necessary assistance and full respect of human rights shall be guaranteed to the detainees (art. 7). However, severe violations to the fundamental rights of foreigners in CPR have been reported by institutions as well as NGOs and international organizations.<sup>66</sup>

After a preliminary phase of first aid and assistance taking place close to the disembarkation area (art. 8), D. Lgs. 142/2015 establishes that asylum seekers are channelled in the Italian system of reception, which is organized in two different tiers. Operations of identification, registration of the asylum application and assessment of the health conditions are conducted in governmental first-line reception facilities, the so-called “regional hubs”, meant to progressively substitute the already existent centres of reception (the so-called CDA and CARA) (art. 9). When these operations are concluded, asylum seekers who do not have sufficient financial resources (art. 14(3))<sup>67</sup> should be transferred to second line reception centres which are managed by local municipalities within the national system of protection for refugees and asylum seekers (the so-called SPRAR network), with the financial support of the National fund for asylum (art. 14(1)).

If in both first line governmental facilities and second line SPRAR facilities there are no places available, the asylum seeker should be temporarily accommodated in Centres of extraordinary reception (CAS) activated by the Prefectures.

Despite this detailed legislation, what happens in reality is that asylum applicants’ right to housing is hampered by a number of criticalities. The system of “regional hubs”, aimed at replacing the existent centres, has not been fully implemented, yet. Consequently, asylum seekers remain for long time in first aid and reception centres (CPSA), which are not equipped to provide a long-term assistance. Otherwise, asylum seekers are currently accommodated in

<sup>64</sup> Art. 7 c. 1 D. Lgs. 25/08. For further details on the rights related to this status, see Chapter 6.

<sup>65</sup> Article 1F of the Geneva Convention reads: “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.”.

<sup>66</sup> See for further details Chapter 5.5 and 7.

<sup>67</sup> Prefectures are competent to assess the insufficiency of migrants’ financial resources on the basis of the annual social allowance (€ 5.889,00).

emergency facilities (mainly CAS or also CDA), or in large-scale buildings (CARA), where asylum applicants often suffer from critical situation, due to chronic overcrowding and low standard of services (AIDA 2018:70).

Within the second-line SPRAR facilities, instead, asylum seekers are accommodated in small and decentralised facilities where they are entitled to receive long-term assistance and integration services. However, available places in the SPRAR network do not suffice to respond to the current presence of asylum applicants in Italy. As consequence, the main channel of reception remains the CAS facilities, which, conceived in principle as temporary measure of last resort, in December 2017 accounted for 80.9% asylum seekers accommodated (Chamber Inquiry Committee 2017:98).

Furthermore, despite the D. Lgs. 142/2015 subjects the whole system of reception to the monitoring of the Ministry of the Interior (art. 20), a thorough monitor and control system, particularly with reference to CAS, is not yet in place. The transparency and accountability of the selection procedures of CAS, which in some cases present a limited and inadequate organization and incompetent staff, is under question. As result, the Italian system of reception is fragmented in a plurality of centres, featured with high-diversified standards, not always complaining with foreigners' fundamental rights (Banca d'Italia 2017; Oxfam 2017; Inmigracione 2017). Meanwhile, the creation and implementation of CAS subtract important financial resources to what should be the ordinary reception system, but that in reality remains marginal.

In case the asylum application is rejected, the applicant has the right to lodge an appeal before the competent ordinary Tribunal asking for the suspension of the decision. Hence, if the suspension is granted by the judge, the reception measures can be prolonged until the final decision<sup>68</sup>. It is noteworthy that, according to D. Lgs. 142/2015 the right to reception can be withdrawn if the asylum applicant: a) left the centre without any justification and without notifying the competent Prefecture; b) did not attend the territorial commission interview; c) lodged reiterative asylum applications. Furthermore, the reception conditions can be also revoked when the authorities ascertain that the asylum seeker has sufficient financial resources or that s/he committed serious or continuous violations of the accommodation centre's internal rules (arts. 13 and 23).

As mentioned, asylum applicants are entitled to a number of rights, first the right to healthcare and free and compulsory enrolment in the National Health Service<sup>69</sup>; they have the right to work after 60 days from the registration of their asylum application. Furthermore, D. Lgs. 142/2015, as recently amended by L. 46/2017, promoted the asylum seekers' voluntary involvement in activities of social value for the local community, (art. 22 bis). In addition, in SPRAR reception centre asylum seekers may attend professional trainings, while this is highly limited in the other type of reception centres, and particularly in CAS, due to their structural weaknesses.

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<sup>68</sup> Art. 36, D. Lgs. 25/2008, and Circular of the Ministry of the Interior 20.02.2015.

<sup>69</sup> Art. 34 Consolidated Law on immigration, arts. 21 D. Lgs. 142/2015; art. 21 PD 21/2015.

Asylum seekers are not entitled to apply for family reunification. The right to family unity only finds a little guarantee: within the reception centre, asylum seekers have the right to be accommodated together with their spouse and first-related relatives (art. 10).

Finally, it is noteworthy that Legislative Decree No. 142/2015 dedicates specific provisions for asylum seekers with special needs. According to the normative provision, people with special needs are: children, unaccompanied children, people with disability, the elderly, pregnant women, single parent with children, persons who have been subjected to torture, rape or other forms of psychological, physical or sexual violence, victims of trafficking and genital mutilation and persons affected by serious illness or mental disorders (art. 17). In particular, in first-line reception centres asylum seekers are subjected to a health-assessment aimed at detecting the presence of specific vulnerabilities (arts. 9 (4) and 11(1)). In addition, special services of reception shall be provided to meet the specific needs of these vulnerable persons within first-line and SPRAR facilities (art. 17).

## 5.2. Beneficiaries of International Protection

D. Lgs. 251/2007 defines the “beneficiaries of international protection” as the foreigners who obtained the status of refugee or subsidiary protection (art. 2 lett.a) bis). In the Italian asylum system, both these status are granted through the same procedure, which fall under the responsibility of the Territorial Commissions.

Territorial Commissions are administrative bodies in charge to examine asylum applications and to determine the international protection status. In particular, art. 12 of D. Lgs. 25/2008 establishes that the Territorial Commission interviews the asylum applicant within 30 days after having received the application from the Police Headquarter. The personal interview is generally conducted by a member of the Commission, possibly of the same gender of the asylum applicant, with the assistance of an interpreter. The interview contents are transcribed in a report, a copy of which is also given to the asylum applicant. Within 3 days from the personal interview, the Territorial Commission has to take a decision. The law also envisages exceptional situations, which may require an extension of time, up to a maximum of 18 months.

However, it takes about one year from the application of international protection to the notification of the first decision, which is much longer than what established by the law and it exposes asylum seekers to frustration and further vulnerability. In July 2017, the backlog of pending international protection applications amounted at 140.000 (Anci et al. 2017:23)<sup>70</sup> and the excessive length of international protection procedure remains one of the most critical shortcomings of the national asylum system (Anci et al. 2017; Banca d'Italia 2017).

In order to boost and speed-up the international protection procedure, a number of legal reforms have been undertaken since 2014. The number of Territorial Commissions has been

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<sup>70</sup> The yearly report released by the SPRAR network announced the results of the first survey realised in Italy on the duration of the international protection procedure in Italy. According to the study, conducted on 5.416 asylum seekers, the average time from the registration of the application to the notification of the decision of the Territorial Commission amounts to about 1 year, while, in case of appeal the asylum seekers has to wait about 10 months (from the lodging of the appeal) for the final decision.

progressively increased, with the institutions of additional Commissions (currently 20) and sub-commissions (now 30), equally distributed across the country<sup>71</sup>. Moreover, the Law Decree No. 13/2017 devoted to “expedite the international protection procedure and to curtail illegal immigration”, has modified the composition of the Territorial Commission (previously composed by a representative of: UNHCR, the Ministry of the Interior, the competent Police Headquarter and the local municipality) with newly hired highly qualified and specialised officers replacing the representatives of both Police Headquarters and local municipalities.

In addition, the Law Decree No. 13/2017 intervened to streamline also the judicial procedure occurring in case of appeal against first rejection of asylum application. The law provided for 26 specialised court sections within the ordinary jurisdiction, competent to deal exclusively with immigration, EU citizens’ freedom of movement and international protection issues (art. 8). Besides this, further procedural changes were introduced, raising concern about the respect of asylum applicants’ legal guarantees (OHCHR 2017; CSM 2017; Asgi, Magistratura democratica 2017). Under the previous legislation, the asylum seekers could lodge an appeal before the Civil Tribunal within 30 days, in case of rejection of the application. If the judge dismissed the appeal, the asylum seekers could appeal this decision before the Court of Appeal and, in the event of a further rejection, a final appeal could be lodged before the Supreme Court of Cassation (the court of last resort)<sup>72</sup>.

The Law Decree No. 13/2017 removed one appeal stage from the procedure for international protection (art. 6(13)). Hence, against the first rejection of asylum application, the asylum seeker can only appeal before the Court of Cassation, which, however, can not enquire into the essence of the case, but ensures the correct application of the law. Moreover, the appeal does not automatically suspend the effects of the decision, and a formal suspension has to be specifically required. Finally, the appeal judge mainly founds his/her decision upon the video recording of the asylum applicant interview at the Territorial Commission<sup>73</sup>, without cross-examination, and she/he may hear the asylum applicant only in exceptional cases, such as when the videotaping is not available or if the personal interview is considered essential to clarify some aspects (art. 6).

Against this “regular” procedure, art. 28-bis of the D. Lgs.25/2008, as inserted by LD 142/2015 provides also for an “accelerated procedure” applying when: a) the foreigner applies for asylum while placed in a CPR; b) the application is considered manifestly unfounded; c) the asylum seeker has lodged a subsequent application for international protection; d) the foreigner applies for asylum after being stopped for avoiding or attempting to avoid border controls or after being stopped for irregular stay, with the sole intention to delay or prevent expulsion or pushback. In these cases, the procedure has to end within a shortest time frame (i.e. the time to lodge an appeal is halved) and there is no automatic suspensive effect.

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<sup>71</sup> Law Decree No. 119/2014, converted into a Law, after amendments by Law No. 146/2014, Decree of the Ministry of the Interior 10.11.2014.

<sup>72</sup> The Italian judicial system foresees three judicial levels, regardless of the type of controversy (either civil or penal law). The same applies to the migration matter up until the Law Decree No. 13/2017 was approved eliminating a judicial level for refugee status determination controversies.

<sup>73</sup> According to art. 14 of the Legislative Decree No. 25/2008, as amended by art. 6 of the Law Decree No. 13/2017, the interview of the asylum applicant must be taped by audio-visual means and transcribed in Italian through automatic voice recognition system.

In addition, asylum applications may be also proceeded under the Dublin III Regulation rules.

### **The Dublin Procedure**

The Dublin Regulation (EU) 604/2013 (hereinafter Dublin III Regulation) is an agreement among EU Member States, Iceland, Liechtenstein, Norway and Switzerland establishing criteria to determine the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

In Italy, the national authority responsible for the Dublin III procedure is the “Dublin Unit”, with the Department for Civil Liberties and Immigration at the Ministry of the Interior (Legislative Decree No. 25/2008 art. 3(3)). The Police Headquarter competent to receive the application for international protection, once verified the preconditions to access the Dublin procedure, shall send the whole documentation to the Dublin Unity. The Dublin Unity, entrusted to identify the responsible Member State, has to promptly inform the competent Territorial Commission and the Police Headquarter that is competent to organize the transfer (Presidential Decree No. 21/2015 art. 3(4)). According to statistical data, the time for processing cases falling under the Dublin III Regulation in Italy is excessively long (with the largest backlog of pending Dublin requests of any other Dublin Member State in 2014), also due to the relevant load of request received by Italian authorities (EU Commission, 2016:27)<sup>74</sup> and to the insufficient number of personnel of the Dublin Unit (Parliamentary Committee of Control 2015:7)<sup>75</sup>. Moreover, as reported by the head of the Dublin Unit (Chamber Inquiry Committee 2016c), the obstacles set by other Member States contributes to further slow down the procedure. Usually, when the procedure exceeds 11 months, far beyond the term provided by the Dublin III Regulation<sup>76</sup>, Italy takes the exam of the application upon itself (AIDA 2018).

The refugee and the subsidiary protection status can be withdrawn when: a) the events that grounded the recognition of international protection were incorrectly presented or were omitted or were based on false evidences; b) the foreigner falls within the exclusion clauses

<sup>74</sup> On this, the European Commission reports that according to Eurostat data, “Italian authorities faced 3.126 pending incoming Dublin requests as of the end of 2014”.

<sup>75</sup> The length of the procedure has severe consequences particularly for unaccompanied children, who, in order to rapidly reach their parents or relatives residing in other European countries, abscond from Italian authorities, so heightening risks of abuse, violence and exploitation (Unhcr 2012)

<sup>76</sup> Dublin III Regulation, art. 22, para. 1 stipulates that once received a request to take charge of an applicant, the member state shall take a decision within two months; when the examination of the request is particularly complex, this term may be extended by one additional month (para. 6)

set by art. 10 of D. Lgs. 251/2007<sup>77</sup>; c) the foreigner represents a danger for public order and security<sup>78</sup>.

D. Lgs. No. 251/2007 also rules over the cessation and review of international protection status, which have to be determined after a case-by-case assessment by the National Commission for the right of asylum<sup>79</sup>. Generally speaking, the status can be reviewed when the beneficiaries of international protection decides to re-avail of the protection of his/her country of origin or when a change of the circumstances which grounded the recognition of international protection occurs (art. 9 and 15). However, the beneficiary of international protection can always invoke compelling reasons for not availing of his/her country of origin protection, based on previous persecutions (art. 9(2 bis)).

According to art 23 of D. Lgs. No. 251/2007, an international protection permit of five years, renewable, is granted to beneficiaries of international protection. This permit to stay entails a number of civil and social rights, which however, as we will discuss, are not always uniformly enforced.

According to the SPRAR Guidelines<sup>80</sup>, the beneficiaries of international protection have the right to be accommodated in the national system of reception for 6 months. This period can be further prolonged for 6 months, after a case-by-case assessment. Remarkably, no normative provision regulates how long refugees can be accommodated in CAS and in other emergency facilities. Moreover, although art. 40(6) of the Consolidation Law and art. 29 of D. Lgs. No. 251/2007 guarantees the right to access public housing, in practice, a widespread recourse to informal settlements has been reported amongst refugees, also due to the absence of systematic and efficacy integration policies (MSF 2017b).

Beneficiaries of international protections have access to professional training and to work, even public employment, at the same conditions of Italian citizens. They also are equalized to Italian citizens as regards social rights and social assistance measures. In this field, the judiciary has played a crucial role, enforcing the anti-discrimination principle against some practices of local municipalities undermining the effective enjoyment of social rights (Guarisio 2017). Furthermore, research highlights the limitation of the right to healthcare, especially for refugees (and asylum seekers) living in informal settlements, who are denied the enrolment in the civil registry, which is *conditio-sine-qua-non* for the enrolment in the National Healthcare system (MSF 2017b; Giannoni 2010; Geraci and El Hamad 2011).

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<sup>77</sup> Art. 13 makes reference to art. 12, which mentions the exclusion clauses of art. 10, that is, amongst the others, the commitment of crimes against the peace, war crime or crimes against the humanity; the commitment of severe crimes and the exclusion clause of art. 1D of the Geneva Convention stating that ““This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance”.

<sup>78</sup> Art. 13 (for refugee status) and art. 18 (for subsidiary protection) of Legislative Decree No. 251/2007.

<sup>79</sup> For further details, see ANNEX 2.

<sup>80</sup> Guidelines for the functioning of the SPRAR, approved with Ministerial Decree 10/08/2016, available at <http://www.sprar.it/wp-content/uploads/2016/11/Vademecum-Decreto-Funzionamento-Sprar-2017-01.pdf>

For refugees and subsidiary protection beneficiaries, the sole requirement to obtain the EU long-term residence permit consists in demonstrating an income equal or higher than the minimum income guaranteed by the State, while the further requirements provided by law for other third-country nationals do not have to be fulfilled. A favourable legislation also applies to family reunification rights. In fact, beneficiaries of international protection who want to apply for family reunification are not required to prove minimum income and adequate accommodation (art. 29 of the Consolidated Law).

### **5.3. Beneficiaries of Humanitarian Protection**

Beyond international protection, the Italian normative framework foresees a further form of protection (the so-called humanitarian protection) which grants a permit of stay for humanitarian reasons with a duration ranging from 6 months to 2 years (renewable). In particular, the main reference is art. 5 of the immigration Consolidated Law, which recognizes the right to humanitarian protection in presence of international obligations (such as the right to non-refoulement, in the absence of the requirements to obtain the international protection), constitutional obligations (such as the right to health), or other humanitarian reasons. According to the jurisprudence, the definition of “humanitarian reasons” mainly refer to the vulnerability of the person. This requires a case-by-case assessment, which mainly relies upon the core human rights envisaged by the international conventions signed by Italy<sup>81</sup>.

The humanitarian permit of stay is always released by the competent Police Headquarter. However, the competence to conduct the assessment on the application may belong to the Police Headquarter itself, when it directly receives the application, or to the Territorial Commission. In fact, the D. Lgs. 25/2008 provides that, having ascertained the absence of grounds for the recognition of international protection, the Territorial Commission can determine the presence of “humanitarian grounds” and transmit the documents to the competent Police Headquarter (art. 32(3)).

Furthermore, there are also other situations which, according to the national legislation, may trigger the humanitarian protection (or, to be more precise, the so called “social protection”). In particular, the foreigner may obtain a humanitarian permit of stay when the following requirements occur: a) s/he is subjected to violence or serious exploitation; and b) a concrete danger jeopardize her/his safety. More specifically, this danger might derive from an attempt to escape the exploitation itself or from the statements made during the criminal proceedings. This protection, in fact, applies in relation to a close set of crimes identified by the normative provision: trafficking, domestic violence and labor exploitation. In order to obtain the permit of stay, the foreigner has also to adhere to a programme of assistance or social integration activated by either the territorial social services or the third sector. Art. 18 of the Italian Consolidated Law represents an important measure of prevention and protection, allowing foreigners to obtain assistance, protection and a regular status, regardless if they have reported the crime or have otherwise collaborated with the judicial authorities. Furthermore, a national anti-trafficking system has been created under the Ministry of equal opportunity. Nevertheless, the efficacy of this system is undermined by a fragmentary and uneven implementation of the law, and by the weakness of measures addressing the

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<sup>81</sup> Constitutional Court Decision No. 381/1999. See for further references Ch. 3



identification of victims of human-trafficking. On this regard, recently, important initiatives have been launched to facilitate the identification of potential victims of human trafficking within the asylum procedure and trigger mechanisms of referral to the Anti-trafficking Units (UNHCR, 2016b). Meanwhile, the anti-trafficking National Plan has been released (Ministry of the Interior, 2016).

Even in this case, the permit of stay is issued by the Police Headquarters, but on the impetus of the territorial social services or the public prosecutor's office.

Concerning the rights of foreigners with a permit of stay for humanitarian reasons, the Consolidated Law on Immigration clearly recognizes the right to work, to have access to professional trainings (art. 22(15)) and to schooling and academy (arts. 38 and 39(5)) in a condition of parity with Italian citizens. The right to health is guaranteed along with the free enrolment in the National Health Service (art. 34(1)).

Foreigners who have the permit of stay for humanitarian reasons have the right to be accommodated within the national reception system. Moreover, when the humanitarian permit of stay has a duration of at least one year, foreigners are entitled to social assistance measures. In fact, the Consolidate Law on Immigration stipulates that foreigners holding a year-long permit of stay can enjoy measures of social assistance and social benefit at the same conditions of Italian citizens (art. 41). This normative provision, which public administrations often did not comply with, has been recently reinforced by a decision of the Constitutional Court<sup>82</sup>. The Court recalled that the Legislative Decree No. 251/2007 expressly recognises that foreigners with an humanitarian permit have the same rights of beneficiaries of subsidiary protection (art. 34 (5)), including the right to access measures of sanitary and social assistance (art. 27(1)).

The humanitarian permit of stay does not allow to obtain the so-called “EC permit for long-term residents”(art. 9(3)) of the Consolidated Law on Immigration). However, it can be converted into a permit of stay for work, unemployment, study or family reasons.

Concerning the right to family unity, according to the Consolidated Law, foreigners holding a humanitarian permit of stay are excluded from the right to family reunification. However, some jurisprudence, considering this blanket ban as discriminatory, has recognized the right to family reunification also to beneficiaries of humanitarian permit of stay<sup>83</sup>.

## **5.4. Regular migrants**

### **5.4.1. Requirements**

Except for asylum claimants, non-EU foreigners do not have an actual right to enter the Italian State, but just a legitimate expectation against the discretionary decision of Italian authorities<sup>84</sup>. In order to enter Italian borders, foreigners are required to have a valid passport, a visa and adequate economic resources (allowing the stay and return to the country of origin). Furthermore, foreigners must also fulfil another requirement: s/he should not represent a

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<sup>82</sup> Constitutional Court, decision No. 95/2017

<sup>83</sup> See amongst the others, Tribunale di Firenze, decision 02.07.2005.

<sup>84</sup> See among the others Corte Cass., S.U., decision No. 1417/2004.

danger for public order and security, neither for Italy nor for any other Schengen State (art. 4 of the Consolidated Law on Immigration). In principle – more details will be provided with reference to each specific permit to stay – foreigners must apply for visa at the Italian Consulate or Embassy of their country of residence. In case the visa is refused, a motivated decision must be communicated to the foreigner who can appeal against it before the Italian courts.

Visa may be temporary, i.e. lasting up to 90 days (for visits, business and tourism), which follows the common EU Visa Code<sup>85</sup>, or “long-stay”. These visa, subjected to the specific national legislation, are the prerequisite to obtain a permit to stay related to the same reasons mentioned in the visa (i.e work, study, family, religious reasons, etc.). The permit to stay, which should be asked to the Police Headquarter or the Prefecture within 8 days from the entry, grants to third-country nationals the right to stay in the Italian territory (art. 5 of the Consolidated Law on Immigration). However, the Consolidated Law on Immigration foresees some exceptions to this general rule. In particularly critical situations, the foreigner cannot be expelled or rejected even if s/he does not hold a visa or a regular permit to stay. This is the case for unaccompanied children, for pregnant women, up to 6 months from the childbirth,<sup>86</sup> and for foreigners cohabiting with an Italian first-degree relative or spouse (art. 19).

In case of permit to stay of minimum one year, the foreigner has to sign an “integration agreement” with the State, that commits, on the one hand, the foreigner to reach an adequate knowledge of Italian language, of Italian civic life and of the fundamental principles of the Constitution, and, on the other hand, the State to support social integration.

The permit to stay is revoked or its renewal is denied if the conditions required for its issuance do not recur anymore (art. 5 of the Consolidated Law on Immigration). The permits to stay are released for the following purposes: a) work; b) family; c) study. Beyond these, the Consolidated Law on Immigration also provides further types of permit to stay (such as the permits to stay for “elective residence”, for “justice reasons” and for “child assistance”) and also the so-called EU long-term residence permit.

#### 5.4.2. Work Reasons

Since 2002, every year the *Decreto Flussi* determines the quota of foreigners who may enter Italy to work. Priority is given to workers specifically trained abroad in preparation for emigration to Italy (art. 23 Consolidated Law on Immigration) and sub-quotas may be reserved to descendants of Italian emigrants. Some years ago the *Decreto Flussi* even specified the nationality of employees that will be granted working visa, in accordance with bilateral agreements signed by Italy with third countries.

To obtain a visa for work reasons, the foreigner must receive an offer of employment before entering the national borders. More precisely, according to the quota established by law, the employer, after having verified that no employee already residing in Italy is available,

<sup>85</sup> Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:243:0001:0058:en:PDF>

<sup>86</sup> According to the Constitutional Court, Decision No. 76/2000, neither the husband cohabiting with the pregnant woman can be expelled.

submits the request together with the documents proving the employees' accommodation and the commitment to pay the foreigner's travel costs to return to his/her country of origin (art. 22 Consolidated Law on Immigration).

The length of the work permit depends on the typology of contract: two years for permanent employment, one year for temporary employment.

The same system of entry quota also applies to seasonal workers (art. 24), who are granted permits between 20 days and 9 months and will get priority in case of re-entering in Italy, and to non EU self-employed workers, who must demonstrate to have an adequate accommodation and financial means. They receive a permit to stay up to two years (art. 26 Consolidated Law on Immigration).

The Consolidated Law on Immigration provides also the possibility to obtain a work permit "out of the entry quota" for specific typologies of work, such as managers and high-qualified workers of foreign companies; mother tongue language teachers, professors, university researchers and teachers in foreign institutions; skilled workers for specific duties; maritime workers; interpreters; domestic workers<sup>87</sup>; professional trainees; workers of foreign companies temporarily transferred to Italy; sport and show-business workers; professional healthcare assistants; journalists; persons involved in mobility programmes or 'au pairs'; foreign workers of diplomatic mission or governmental organization with headquarters in Italy (art. 27). These typologies of workers can submit an application at any time, beyond the temporal and numerical limitations.

Finally, 2017 budget law amended the Consolidated Law on Immigration to grant foreign investors the entry (and stay) out of quota.<sup>88</sup>

Beyond these cases, specific provisions regulate the voluntary work (with a permit to stay up to 18 months, not renewable nor convertible into a proper work permit) and the academic work ("out of quota").

The permit to stay for work reasons can be renewed at the same conditions. Foreigner workers who get unemployed and are registered as job seekers, may apply for a residence permit for "pending employment". This permit lasts no more than one year. However, this term is suspended if the foreigner is hired again (art. 22(11)).

### **5.4.3. Family Reasons**

Foreigners who want to enter Italy to join a family member must have previously obtained a family visa. However, the Italian Consolidated Law on Immigration also permits to a family member eligible for family reunification, already in Italy with a regular status (i.e. a touristic visa), to apply for a permit to stay for family reasons, without having previously obtained a family visa: it is the so-called "special family reunification" (*ricongiungimento familiare in deroga*) (art. 30 (1c)).

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<sup>87</sup> These are domestic workers employed by an Italian or EU employer who subsequently moved to Italy.

<sup>88</sup> Art. 26 bis of the Consolidated Law on Immigration, introduced by the Law No. 232/2016 (Budget Law 2017).

According art. 29 of the Consolidated Law on Immigration, family members eligible for family reunification are: a) the spouse (not legally separated and unless the existence of another marriage is ascertained); b) children under 18 or children over 18 if totally disabled; c) parents who are not economically independent and do not have any other child in their country of origin, or parents aged more than 65 years when other children cannot provide for them; d) the foreigner parent of an Italian child under 18 years. Recently, a circular of the Ministry of the Interior has clarified that non-married partners with a registered partnership (also same-sex partner) are eligible for family reunification<sup>89</sup>.

The foreigner applying for family reunification must demonstrate to have a regular permit to stay of at least one year; sufficient financial resources (also incomes of other cohabitants family members is taken into account)<sup>90</sup> and a suitable accommodation<sup>91</sup>. When all requirements are fulfilled, a declaration of “no impediment” is transmitted to the diplomatic representation of the family member’s country of origin. Once obtained the family visa, the family member can enter the Italian borders and apply for a permit to stay for family reasons within 8 days.

The residence permit for family reasons is strongly linked to the permit to stay of the foreigner who requested the family reunification, with the same duration and rights granted (art. 30 of the Consolidated Law on Immigration).

The revocation or the denial of renewal of the permit to stay for family reasons may occur when the conditions for its issuance do not recur anymore or for reasons of public order when the foreigner has committed a serious crime and represents a threat to the public order. Conviction for such an offence does not entail an automatic denial of the permit renewal, but must be evaluated together with the conduct of the foreigner, his/her level of social integration and his/her family ties in Italy (art. 5 and 5(5bis) Consolidated Law on Immigration).

#### 5.4.4. Study Reasons

A permit of stay for study reasons is issued to foreigners who want to attend the University or another education or training course in Italy, after having obtained a study visa from the Italian Embassy or Consulate in their country of origin, within the limit of the entry quota envisaged by the Ministry of Labour. To this end, the foreigner must demonstrate to have adequate accommodation in Italy; sufficient financial means (also to return to the country of origin) and a health insurance.<sup>92</sup> However, the study visa is not required if the course lasts less than 90

<sup>89</sup> Circular of the Ministry of the Interior, 05.08.2016, available at <http://www.meltingpot.org/IMG/pdf/circ.-prot.-nr.-3511-del-05.08.2016-ricongiungimento-familiare-unioni-civili.pdf>

<sup>90</sup> In particular, the foreigner must have a yearly gross income, current or presumed, from legal sources, that is not lower than the yearly social allowance. As provided for by the law, this amount is increased by half for each family member to be reunited.

<sup>91</sup> To this end, a special certificate should be issued by the local authority where the foreigner is resident (the so-called *certificato di idoneità alloggiativa*).

<sup>92</sup> Art. 39 D. Lgs. No. 286/98; arts. 44 bis, 45 and 46 DPR 394/99

days and the foreigner comes from a country which is exempted from the visa for short term stays<sup>93</sup>.

The length of the permit to stay for study reasons is related to the length of the education or professional course that will be attended.

This permit to stay allows the foreigner to study and also to work, but only with part-time contracts up to 1.040 hours per year.

#### **5.4.5. Other Reasons**

Additional typologies of residence permits are envisaged by the Consolidated Law on Immigration and art. 11 of its Implementation Regulation (DPR 94/99). Among them: the visa and permit to stay for “elective residence”, where foreigners have to demonstrate high self-sustaining incomes and financial assets to support themselves autonomously without an employment contract<sup>94</sup>; the visa and permit to stay for religious reasons<sup>95</sup>; the visa and permit to stay for medical treatments (art. 36 Consolidated Law); the visa and permit to stay for justice reasons, when the foreigner’ stay is indispensable to criminal proceedings (art. 17 Consolidated Law); and finally the permit to stay which authorises the entry and stay of the foreigner to assist and support a child in Italy (the so called “permit of stay for child assistance”) (art. 31 Consolidated Law).

#### **5.4.6. The EU Long-Term Residence Permit**

The EU long-term residence permit is a permanent residence card granted to third-state nationals who fulfil the following requirements: holding a regular permit to stay (only certain typologies of permits)<sup>96</sup>, having continuously stayed in Italy for a minimum of five years; owing sufficient financial resources; having passed an Italian language test. This residence permit cannot be released to foreigners holding a permit to stay for study or professional training, for diplomatic reasons, for asylum application, for humanitarian reasons or short-term residence permits (art. 9 of the Consolidated Law on Immigration).

The EU long-term residence permit can be issued also to family members of the entitled foreigner. However, in this case, also the availability of a suitable accommodation should be demonstrated.

This particular residence permit can be revoked when it has been fraudulently obtained or if the foreigner represents a danger for the public order and security or has been expelled, or if s/he have resided out of Italy for six years (or out of the EU for twelve consecutive months).

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<sup>93</sup> Circular of the Ministry of Foreign Affairs, 23.08.2010.

<sup>94</sup> Decree of the Ministry of Foreign Affairs, 12.07.2000

<sup>95</sup> Ministry of Foreign Affairs, Decree 12.07.2000

<sup>96</sup> According to art. 9 (3) of the Consolidated Law on Immigration, the EU long-term residence permit cannot be requested by foreigners holding a permit to stay: a) for study reasons or professional training; b) for humanitarian reason; c) for asylum seekers; d) for temporary stay; or by foreigners with the specific legal status foreseen by: a) the 1961 Vienna Convention on diplomatic relations; b) the 1963 Vienna Convention on consular relations; c) by the 1975 Vienna Convention on the representation of States in their relations with international organizations.

### 5.4.7. Rights

D. Lgs. 286/1998 recognises to foreigners full civil rights, but also the right to: a) be enrolled in the civil registry of residents (art. 6 (7)); b) be enrolled in professional registers; c) have access to alphabetization courses and other education courses (art. 38 (5)); d) be entitled to measures of social integration (art. 42 (1 a) and c)); e) obtain legal protection against discriminatory practices (art. 43 (2 c) and d)); f) be entitled to all measures that support the right to study, including scholarship, student loans and housing (art. 39). In addition, the Consolidated Law on Immigration stipulates that measures of social assistance are granted to foreigners holding an EU long-term residence permit or a permit to stay of no less than one year<sup>97</sup>. Hence, the Consolidated Law on immigration is informed by a strong equalitarian approach when enlisting the rights which foreigners are entitled to.

However, this equalitarian approach has been subsequently subjected to severe limitations, with specific regard to social benefits. Law No. 388/2000 (Budgetary Law for 2001) reserved the access to social welfare allowances to EU long-term residence permit holders<sup>98</sup>. The Constitutional Court has several times declared that the limitation is unreasonable<sup>99</sup>, but the Court declared the constitutional illegitimacy only of specific provisions, not of the entire law, so that, in terms of certain rights, the Italian legislation still maintains a distinction between long-term residents (with EU long-term residence permit) and migrants who have a short-term permit (one or two years). Indeed, EU long-term residence permit holders are entitled to all measures of social assistance at the same conditions of Italian citizens, whereas other foreigners regularly residing in Italy with a different status are denied a number of social welfare allowances, such as the maternity allowances.<sup>100</sup>

This legal framework raises severe concerns about the compliance of the national legislative framework with the Italian Constitution, the ECHR jurisprudence and the EU Directive 2011/98/EU on third-country workers<sup>101</sup> (Corsi 2016; Sciarra 2017; Ferrara 2017).

Beyond the social welfare allowances, also the access to housing is subjected to limitations. In fact, the Consolidated Law on Immigration stipulates that only foreigners holding

<sup>97</sup> Art. 41 CL, which is also mentioned by the L. No. 328/2000, the Consolidated Law for the realization of an integrated system of social services and interventions (art. 2, para. 1).

<sup>98</sup> Originally, the law reproduced the same equalitarian approach as art. 41 of the Consolidated Law on Immigration (art. 2 (1)). However, it has been subsequently amended by art. 80 (19), L. 23.12.2000 n. 388, which introduced the above-mentioned restrictions.

<sup>99</sup> See Constitutional Court decisions No. 306/2008; No. 11/2009; No. 187/2010; No. 329/2011; No. 40/2013; No. 22/2015; No. 230/2015.

<sup>100</sup> Concerning maternity allowances, the legislation has not already been declared constitutionally illegitimate by the Constitutional Court. However, some circulars of INPS (The national institute for public welfare) recognized these social rights to non-EU relatives of EU citizens and to beneficiaries of international protection. Meanwhile, a consistent case law has extended this right also to women holding a permit to stay for work, family or humanitarian reasons. For a complete list of the social welfare allowances to which foreign workers are entitled see Guarisio 2018.

<sup>101</sup> Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.



a EU long-term residence permit or foreigner workers with a permit to stay of no less than two years can have access to public housing accommodations and to housing support measures.

Finally, no political rights are granted to foreigners legally residing in Italy. Indeed, according to art. 48 of the Constitution, only Italian citizens have the right to vote. However, scholars have contested the legitimacy of the exclusion of foreigners also from political rights at the administrative local level (Santoro 2013).

## 5.5. Undocumented migrants

No definition of “undocumented migrant”, (the term ‘migrant’ is here limited to non-EU citizens) is provided by any law. However, according to the national acquis on migration, this status applies to a) migrants who irregularly entered the country; b) migrants who have entered legally and then overstayed their visas; c) migrants who failed to renew their valid residence documents at a certain stage of their permanence in the country.

The status of “undocumented migrant” only refer to undocumented aliens over 18 years. In the Italian legal system, as we will discuss in the next section, foreign children can never been considered irregular: they have the right not to be expelled and to obtain a residence permit for “minor age” until they turn 18.

Despite the alarms raised by media and the political discourses about the “mass inflow of clandestine migrants”, official statistics and research point out that ‘overstayers’ represent the large majority of undocumented migrants in Italy (e.g. Einaudi 2007; Finotelli and Sciortino 2013). Against the limited effectiveness of the repressive apparatus, the high-sounding actions against illegal immigration often proclaimed by politics reveal their inconsistency. Moreover, the concrete implementation throughout the country of the system of interception, detention and deportation have proved to be discretionary and random, also because of the high (economic and social) costs involved (Ambrosini 2012). Hence, out of the total number of foreigners traced under an irregular position on the Italian territory, the percentage of foreigners effectively removed and repatriated, has been respectively 46% and 16% in 2015, 45% and 14% in 2016 and 43,9% and 13,5% at 31 October 2017 (Chamber Inquiry Committee, 2017).

### Rejection and Expulsion

The Italian legislation envisages two different instruments for third-country nationals’ removal: rejections and expulsions. Concerning the first, according to Law Decree No. 13/2017, undocumented foreigners who have been intercepted in Italy or have been succoured during rescue operations in the sea are conducted to the “hotspots”. After having provided the required information, authorities shall proceed to identification: when foreigners neither have a valid visa and passport nor documents proving the aim of their stay and adequate financial resources and do not ask to apply for asylum, an order refusing entry (*ordine di respingimento*) is issued right away. A deferred rejection (*respingimento differito*) order can be also adopted by the Police Headquarter against foreigners who have entered Italy avoiding border controls and have been intercepted



afterwards or against foreigners who entered irregularly and were temporarily admitted for emergency aid (art. 10 of the Consolidated Law on Immigration).

Expulsions can be issued by administrative authorities (Ministry of the Interior and Prefects) against foreigners who represent a danger for public order and security or illegally resident in the country<sup>102</sup> or judicial authorities, as consequence of a criminal proceedings<sup>103</sup>. In some cases (mainly related to public security issues or flight risks), the effective enforcement of the expulsion is enacted through the compulsory escorting to the border (*accompagnamento forzato alla frontiera*) of the foreigner by the police.<sup>104</sup> When it is not possible to immediately enforce rejections or expulsions through the escorting to the border, the foreigner is detained in the closest centre for repatriation (CPR, the formerly CIE - centre for identification and expulsion -). According to art. 10 ter (3), of the Consolidated Law on Immigration, as recently introduced by the Law Decree No. 13/2017, also foreigners who repeatedly refuse to be fingerprinted may be detained in CPR. The detention in CPR centres cannot last over 90 days.<sup>105</sup> Alternatively, the foreigner who received a measure of expulsion may adhere to programmes of voluntary assisted return to the country of origin or provenience (art. 14 ter of the Consolidated Law on Immigration). However, this option finds a very limited application in practice, entailing severe economic and bureaucratic constraints, such as difficulties to obtain documents (Genoviva 2017).

As reported by the Chamber Inquiry Committee 2017:75, “given the limited availability of places in CPR and difficulties to effectively repatriate non-citizens, in the absence of ad hoc readmission agreements, often the Police resort to a mere formal measure (which, in theory, should be residual): the order to leave the Italian territory within 7 days” (art. 14 (5bis) of the Consolidated Law on Immigration). However, this order is rarely complied with: during the time-span 1 January – 31 October 2017, only 385 foreigners actually respected the order out of 1.408 (Chamber Inquiry Committee, 2017).

Recently, in the attempt to find a solution, the Law No. 46/2017 foresaw the allocation of financial resources to guarantee the effective enforcement of expulsions and pushbacks and to create (and manage) new centres for repatriation (CPR) preferably in rural areas, fairly distributed throughout the country. Nonetheless,

<sup>102</sup> Expulsion orders must always be issued after a case-by-case assessment, taking into account immigrant’s family ties and the length of the stay in Italy (art. 13 CL)

<sup>103</sup> In this case the expulsion is issued as a security measure (art. 15 of the Consolidated Law on Immigration). It can be also issued as an alternative measure to detention (art. 16 of the Consolidated Law on Immigration).

<sup>104</sup> Art. 13 (4) of the Consolidated Law on Immigration does not require the validation of the judicial authority in case of compulsory escorting to the border of the foreigner. Recently, with the decision No. 275/2017, the Constitutional Court has addressed an admonishment to the Parliament asking to modify the law. In fact, the measure in object entails a restriction of the personal liberty. Consequently, according to art. 13 (3) of the Constitution, it must be validated by the judge within the following 48 hours. See the Court’s warning to the Parliament at [https://www.cortecostituzionale.it/documenti/comunicatistampa/CC\\_CS\\_20171220123128.pdf](https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20171220123128.pdf)

<sup>105</sup> However, as already illustrated, it is noteworthy that the detention in CPR may be prolonged until 12 months in cases of immigrants who applied for asylum once in the CPR.

concerns have been raised about the effectiveness of these measures aimed at increasing the percentage of repatriation, which currently concern 49-50% of immigrants detained in CPR. According to the report released by the Senate Special Committee on human rights, difficulties to enforce expulsions shall be related to the identification operation (and the complicated relations with the various diplomatic authorities) rather than to the number and location of CPR (Senate extraordinary Committee on human rights 2017b).

Immigrants who received an expulsion order are barred from re-enter Italy for a period between three and five years, depending on the specific circumstances. In case of re-entry, they are prosecuted for a crime punished with the imprisonment from one to four years. Furthermore, irregular entry in Italy is punished with a penalty from 5.000 to 10.000 euro (the so-called crime of “clandestine immigration”).

Finally, it is noteworthy that, with the Law No. 271/2004, the responsibility to supervise expulsion and detention of undocumented migrants has been transferred from professional judges to the justice of peace. In this way, the protection of the rights of migrants subject to expulsion and detention, and of their access to justice is deferred to a differentiated system of justice, raising several flaws with Italy’s obligations under international human rights and EU law. In particular, a number of NGOs and juridical associations, such as the International Commission of Jurists, contested that “the precariousness of the status of the justices of the peace, the irregularities, inconsistencies and informalities in practice, and lack of uniformity and adequately articulated reasoning inherent in the system, somehow seem to reflect the most precarious condition faced by the undocumented migrant him or herself” (International Commission of Jurists 2014:62). Curiously, it has to be remarked that the specialized judges recently instituted by the Law Decree No. 46/2017 would not deal with procedures related to the reverse of expulsion orders, which will remain under the competence of justice of peace.

Undocumented third country nationals are excluded from a number of rights: according to art. 6 of the Italian Consolidated Law, the residence permit is a necessary requirement to benefit from public services, with the sole exception of the compulsory education for children and some urgent and essential health-care services. Nonetheless, the Constitutional Court has progressively enlarged the number of rights to which undocumented migrants are entitled, by allowing Regions to intervene in areas of social assistance and public services with the aim to enhance the protection of migrants’ fundamental rights. However, as result, as will be discussed, different standards of protection currently apply to undocumented third-country nationals across the country (Salazar 2010; Spencer Delvino 2014).

A synthetic analysis of some of the most important cases will be here provided.

- Access to healthcare: against the national Consolidated Law on Immigration which guarantee only to urgent and essential health-care services, the Apulia Regional Law No. 4/2009, for example, endows undocumented migrants with a number of medical treatments, including mental health services, pharmaceutical assistance, gynaecology, abortion, etc... (art. 10 (5)).

- Housing: the Italian Consolidated Law provides accommodation centres and access to social housing to regularly resident migrants who are temporarily unable to provide on their own for their living and subsistence needs (art. 40). However, the Region of Campania, for example, extended this right to all foreigners, regardless of their status (art. 16, Law No. 6/2010 of the Region of Campania).
- Welfare benefits: against provision of welfare benefits exclusively for long-term residents (art. 41 of the Consolidated Law on Immigration), Law No. 29/2009 of the Region of Tuscany entitled all migrants in Tuscany to enjoy the “urgent and non-delayable social welfare measures, which are necessary to ensure the respect of fundamental rights” (art. 6(35)). The Italian government claimed that these measures were all exceeding the regional legislative power and that were irrespective of the national legislation and the State exclusive competence on migration. However, the Constitutional Court, as already mentioned, ruled these regional provisions are legitimate, highlighting that migrants, irrespective of their status, are entitled to a hard-core set of inviolable and fundamental rights.
- Finally, the Constitutional Court proved to be essential also for the enforcement of the right to obtain certificates of civil status. In fact, the “Security Packages” of 2009 (Law n. 94/2009) amended art. 116 of the Italian civil code regulating the marriage of a foreigner in Italy, establishing that migrants who wanted to get married in Italy were required to present documents proving the regularity of their stay. The Constitutional Court declared this provision in breach of the fundamental right to get married of both undocumented migrants and Italian spouses (decision No. 245/2011).

## 5.6. Unaccompanied foreign children

The “unaccompanied foreign child” is defined by D. Lgs. 142/2015 as person under 18, neither Italian nor EU citizen, who is in Italy without assistance or legal representation (art. 2, e)).

According to the Consolidated Immigration Law, foreign children may never be rejected at the border, and expulsion is prohibited, unless they represent a danger for public order and security<sup>106</sup>.

The public security authorities shall be responsible for the identification of unaccompanied foreign children (hereinafter also unaccompanied children) who reach the Italian coasts or are subsequently intercepted in the national territory.<sup>107</sup> While being identified, their presence shall be reported to the General Directorate of Immigration at the Ministry of Labour, responsible for the unaccompanied children census. Public authorities are also required to place unaccompanied children in a safe location<sup>108</sup> and, precisely, in dedicated facilities

<sup>106</sup> Legislative Decree No. 286/98, art. 19, para. 2, while a decree of the Juvenile Court can order the expulsion of the minor on the grounds of public order and security of the State (Legislative Decree No. 286/98, art. 31, para. 4; art. 13, para. 3).

<sup>107</sup> Legislative Decree No. 286/98, art. 2, par. 7; Presidential Decree No. 535/1999, art. 5, para. 3.

<sup>108</sup> Civil Code, art. 403, Legislative Decree No. 251/2007, art. 28.

ensuring first assistance and protection. As already mentioned, children cannot be retained in centres for repatriation (CPR) and their accommodation with unrelated adults is firmly prohibited by the law, even if this provision is not always fulfilled in practice, as will be illustrated below.

The responsibility to care for unaccompanied children belongs to the local municipality in which the child has been traced<sup>109</sup>. In order to face the increasing arrival of unaccompanied children, relieving municipalities and local welfare of the enormous costs related to this specific reception (Anci et al. 2017), the entire national system of reception has been subjected to a profound process of review, firstly planned by the Unified Conference<sup>110</sup> in 2014<sup>111</sup>, and then institutionalized by Legislative Decree No. 142/2015.

A stronger governance of the phenomenon has been envisaged, with the entire system of reception moving under the responsibility of the Ministry of the Interior, and a dedicated National Fund to support municipalities' assistance and reception measures has been established<sup>112</sup>. The new system, composed of two different tiers of reception, is meant to provide harmonized assistance to all foreign unaccompanied children in Italy, irrespective of their status of asylum applicants. Thus, after being detected, unaccompanied children should be immediately accommodated in dedicated, high-specialized first-line reception facilities, fairly distributed through the country, activated by the Ministry of the Interior with funds of the Asylum Migration and Integration Fund (AMIF)<sup>113</sup>. In these governmental facilities, operations of identification, age assessment along with a thorough information about their rights are carried out by a multidisciplinary team<sup>114</sup>. As soon as the phase of first aid and assistance is

<sup>109</sup> Art. 403 c.c.; Law 328/2000 "Framework legislation for the realization of an integrated system of social interventions and services" art. 6 (2c); art. 11(1) and art. 8(3g).

<sup>110</sup> The Unified Conference is composed by the State-Regions Conference and the State-municipalities and local autonomies Conference. The Unified Conference is required to "coordinate all relations between the State and local autonomies, as well as to research, inform and debate on matters connected to the main political guidelines affecting the specific or devolved functions of municipalities and provinces. It is also the place of discussion and examination of issues concerning the structure and performance of local bodies, as well as of all pertinent legislative initiatives and general Government measures" (art. 9 D. Lgs. 281/1997). For further details see: [http://www.statoregioni.it/home\\_UNI.asp?CONF=UNI](http://www.statoregioni.it/home_UNI.asp?CONF=UNI)

<sup>111</sup> The document is available here [http://www.interno.gov.it/sites/default/files/sub-allegato\\_n.25\\_intesa\\_conferenza\\_stato\\_regioni\\_del\\_10\\_luglio\\_2014.pdf](http://www.interno.gov.it/sites/default/files/sub-allegato_n.25_intesa_conferenza_stato_regioni_del_10_luglio_2014.pdf).

<sup>112</sup> The national fund for unaccompanied and separated children has been foreseen by art. 23 L. 135/2012. The competence, originally belonged to the Ministry of Labour, has been transferred to the Ministry of the Interior by the art. 1, para. 183 L. 190/2014 (the so called *Legge di Stabilità* 2015). Contributions from the UASC National Fund go to the local municipalities through the Prefecture according to the procedures provided by the Circular of the Ministry of the Interior of 20.01.2016, ([http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/prot.\\_861.pdf](http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/prot._861.pdf) and [http://www.camera.it/leg17/465?tema=minor\\_i\\_stranieri\\_non\\_accompagnati](http://www.camera.it/leg17/465?tema=minor_i_stranieri_non_accompagnati)). Concerning the triennium 2018 – 2020, the financial allocation to the National Fund for unaccompanied foreign children corresponds to 170 million of euros (Law No. 205/2017, the so-called *Legge di Stabilità* 2018).

<sup>113</sup> For further details on the Asylum Migration and Integration Fund see the following webpage: [http://www.interno.gov.it/sites/default/files/avviso\\_mu\\_msna\\_23.12.14\\_sito.pdf](http://www.interno.gov.it/sites/default/files/avviso_mu_msna_23.12.14_sito.pdf) and [https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund\\_en](https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en)

<sup>114</sup> Legislative Decree No. 142/2015, Art. 19, para. 1. See the Decree of the Ministry of the Interior, 1.9.2016, identifying requirements and services to be provided by the governmental first line reception

concluded, and in any case within the maximum term of 30 days, unaccompanied children are transferred to second line reception centres within the SPRAR network, where long-term services are granted.

If first line governmental facilities and second line SPRAR facilities are not available, municipalities should step in and take full responsibility, relying on the National Fund for unaccompanied foreign children. Moreover, in 2016, the creation of extraordinary reception centres managed by Prefectures for unaccompanied children over 14 years has been established, should municipalities fail to provide reception services.

A number of safeguards and fundamental rights are entrenched in the national legislation, which provides high standards of protection and care to foreign unaccompanied children. However, the problem lies in the laws and policies implementation, and the chronic insufficiency of places threatens the entire reception system.

In particular, places within the ordinary system of reception (that is governmental first level facilities and second level SPRAR centres) are still not enough to respond to the current presence of unaccompanied children. In this context, unaccompanied children are mainly channelled in reception facilities run by local municipalities (Ministry of Labour 2017),<sup>115</sup> or in emergency reception facilities run by Prefectures or by local municipalities<sup>116</sup>. Even unaccompanied children's prompt referral to dedicated centres is strongly jeopardised, with allegations of children being accommodated for prolonged period of time in reception centres with unrelated adults or in detention-like condition in hotspots, while waiting for transfer (ANCI 2016; Garante Nazionale per i diritti delle persone detenute 2017; Terres des Hommes 2016; Human Rights Watch 2016).

The national system of reception for unaccompanied children is consequently undermined by a high fragmentation of procedures for taking charge of unaccompanied children and uneven standards of care, which vary a lot between different type of reception centres, undermining the national system of reception and compromising the right to adequate protection (CRC 2017; OHCHR 2016). Meanwhile, the prolonged stay, even beyond the legal term of 30 days, in governmental first level facilities often prevents unaccompanied children to access fundamental services, such as school enrolment, vocational training or employment support, only granted in SPRAR reception centres.

The respect of children's rights is even more critical in reception facilities close to disembarkation areas. What lacks for children is a compulsory system of quota across regions that would allow for an equal distribution of accommodation centres across the country. As a result, Sicily hosts the large majority of unaccompanied foreign children in Italy (Ministry of Labour 2017:19)<sup>117</sup>.

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facilities, <http://www.interno.gov.it/it/notizie/minori-stranieri-non-accompagnati-pubblicati-standard-laccoglienza-e-i-servizi>.

<sup>115</sup> Data for December 2017 reveals that the SPRAR system can accommodate up to 3.110 unaccompanied children. However, affordable and up-to-date data concerning children accommodated in reception facilities run by local municipalities are not available.

<sup>116</sup> For more details on emergency facilities, see the previous chapter.

<sup>117</sup> According to data provided by the Ministry of Labour 43.6% of unaccompanied children in Italy are accommodated in Sicily.

Nonetheless, unaccompanied foreign children should be preferably accommodated in either foster families/homes<sup>118</sup> or under the responsibility of an adult relative regularly residing in Italy<sup>119</sup>. However, this option is unfortunately seldom enacted, as it relies exclusively on the political and financial responsibility of local municipalities, while *ad hoc* economic resources are not provided for at the national level.

The national system of guardianship, which mainly consisted in obsolete and very general rules for all children deprived of parental care<sup>120</sup>, has been recently innovated to address the specific needs of unaccompanied foreign children. According to Legislative Decree n.141 of 2015, public authorities who come into contact with unaccompanied children must report their presence to the Guardianship Judge who has to timely appoint a guardian (art. 19(5))<sup>121</sup>. The guardian has to be a qualified and independent person, who cannot be substituted unless in case of necessity (19(6)).

The law prohibits any conflicts of interests, even only potential, stressing that all the guardian's tasks have to be informed by the principle of the child's best interests (art. 19(6)). The guardian is entrusted to provide care, education and support, and exercise legal representation in all the procedures affecting the child's life<sup>122</sup>, including enrolment in school and in the national health system, involvement in sport and recreational activities and submission of the application for the residence permit. Until mid-2017, the appointment of the guardian was also necessary to lodge an application for asylum.

However, the excessive length of time required to appoint a guardian (up to 11 months), as contested by the EU Commission with the infringement decision No. 2014/2171, has prevented unaccompanied children to swiftly access the asylum procedure and, hence, receive the necessary protection. To overcome this criticality, Law No. 47/2017 has recently introduced the possibility for the legal representative of reception centres where unaccompanied children are accommodated to temporarily exercise the guardianship's powers, in order to smooth the access to asylum procedure for unaccompanied children. In order to further improve the quality of the national guardianship system, the new law also provides that guardians selection should be based on a register established by Juvenile Courts with a list of voluntary persons, selected and adequately trained by the Ombudsperson for Children.

The aforementioned law introduced fundamental guarantees also with reference to another crucial issue: the age assessment. In particular, under the new provisions, in case of

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<sup>118</sup> Law No. 183/1984, art. 2 (1 and 2) and art. 4. Legislative Decree No. 251/2007, art. 28; Law No. 47/2017, art. 7

<sup>119</sup> Legislative Decree No. 251/2007, art. 28.

<sup>120</sup> Art. 346 and ss. of the civil Code which dates back to 1942, and Law No. 184/1983

<sup>121</sup> See also Directive of the Ministries of the Interior and Justice, 7.12.2006; Legislative Decree No.25/2008, art. 26, para. 5, (the guardian for UASC asylum seekers has to be appointed within 48 hours from the notification to the guardianship Judge of the child's intention to apply for international protection); Law No. 184/1983, art. 3, para. 2 (the guardian has to be nominated by the first week and in any case no longer than 30 days since the child's accommodation in a residential care facility).

<sup>122</sup> Art. 343, 357 cc. according to art. 374 and 375 of the civil code, the guardian may undertake important decision and perform valid acts only once s/he has obtained the authorization of the Juvenile Judge or of the Tribunal if required (art. 374, 375).



doubts concerning the minor's age in absence of documentary evidences, the Juvenile Court may order a multidisciplinary age assessment procedure. According to the new provision, the child has to be adequately informed in a language s/he can understand. In addition, while the procedure is pending, s/he must be treated as a minor. The new integrated procedure intervened to eliminate the fragmented practices enacted throughout the Italian territory, with age assessment merely based on the child's declaration and/or systematic recourse to X-ray (UNHCR 2014; Feltz 2015). These procedures, in breach of international standards, reportedly resulted in unaccompanied children channelled in procedures highly abusing of their rights, such as expulsion or referral to adults' reception centres or administrative detention facilities<sup>123</sup>.

Important safeguards specifically addressing unaccompanied foreign children asylum seekers are provided by Legislative Decree No. 251/2007, first of all the prioritized examination of their application, which should take place in a non-public hearing, according to the principle of confidentiality, with the assistance of the guardian and the interpreter, and of any support personnel when needed. In addition, the personal interview should be conducted by a member of the Territorial Commission specifically trained in child related matter, in a child-sensitive manner (art. 3(3c)), taking into account the level of maturity and personal development of the child, when evaluating his/her credibility (art. 3(5)).<sup>124</sup>

Different types of residence permits can be issued depending on specific needs and status: unaccompanied foreign children non-asylum seekers are entitled to receive a temporary residence permit for "*minor age*" (Presidential Decree No. 394/1999, art. 28(1)), which may be converted under a different title (for reasons of study, pending employment or work, out of the entry quota yearly established) when they turn 18<sup>125</sup>. Other types of residence permits are instead provided to unaccompanied children victims of human trafficking,<sup>126</sup> to unaccompanied children asylum seekers<sup>127</sup> and to unaccompanied children in custody or under foster care.<sup>128</sup>

The right of the child to the family unity is expressly established by the Italian legislation, providing for the prompt activation of family tracing procedures.<sup>129</sup> The Immigration General

<sup>123</sup> See on this purpose the report released by the campaign *Lasciateci centrare*, available here: <http://www.lasciateci centrare.it/j25/italia/news-italia/163-report-della-campagna-lasciateci centrare-dal-cara-e-cie-di-pian-del-lago-caltanissetta>.

<sup>124</sup> See also the Legislative Decree No. 251/2007, art. 32; Presidential Decree No. 21/2015, art. 2, para. 1 and Legislative Decree No. 25/2008, art. 15.

<sup>125</sup> It is the so-called residence permit for "integration reasons", which is issued under the procedure provided by Legislative Decree No. 286/1998, art. 32 and Presidential Decree No. 394/99, art. 11, para. 1 let. c).

<sup>126</sup> Legislative Decree No. 286/98, art. 18; Presidential Decree No. 394/99, art. 27.

<sup>127</sup> Legislative Decree No. 140/2005, art. 4, para. 1; see also the Directive of the Ministry of the Interior 7 December 2006, art. 3.

<sup>128</sup> In particular, a residence permit for family reasons is issued to unaccompanied children in custody or under foster care, as stipulated by art. 10, Law No. 47/2017.

<sup>129</sup> Legislative Decree No. 142/2015, art. 19, para. 7. More precisely, family tracing activities have manifold aims, such as increasing the understanding of the child's background and consequently determine the best integration path, or assessing the opportunity to recur to the assisted voluntary repatriation of the child. See also the Presidential Decree (D.P.C.M.) No. 535/99, art. 2, para. 2, let. f).



Directorate at the Ministry of Labour is responsible for promoting the family tracing in the country of origin or in a third country, with the collaboration of public authorities and other national and international organizations, such as IOM. Thus far, however, only in few cases family tracing activities have been undertaken (Ministry of Labour 2017). Alternatively, also the Dublin III Regulation represents a relevant instrument to fulfil unaccompanied children's right to family unity. Nonetheless, due to its limited scope (it only applies to unaccompanied children asylum seekers, which intend to reunify with their family in another European Member States) and its difficult implementation, in practice, the Dublin III procedure rarely applies.

Unaccompanied foreign children have access to healthcare and medical assistance, regardless of their status of irregular migrants, along with *ad hoc* sanitary measures, including psychological support.<sup>130</sup> In practice, however, sometimes the effective exercise of the right to health is hampered by scarce economic resources and limited availability of cultural mediators (CRC 2017).

The right to education is granted on the same basis as Italian children, irrespective of their regular status. In particular, they have access to primary education, which is compulsory and free<sup>131</sup> and the enrolment shall be accepted by schools at any moment of the school year (Presidential Decree No. 394/99, art. 45). However, in practice some shortcomings are reported, such as enrolment in lower-level classes (CRC 2016), and relayed enrolment, particularly for unaccompanied children accommodated in first-line reception facilities.

Under adequate safeguards, only after the conclusion of the compulsory education and not earlier than the age of 16 years, unaccompanied migrant children can access the labour market (Law No. 296/2006 art. 1(622)), while apprenticeship contracts are open also to children aged 15.<sup>132</sup> In addition, *ad hoc* measures for socio-cultural integration are foreseen, including the activation of extra-courses for Italian language and intercultural programs.<sup>133</sup>

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<sup>130</sup> Italian Constitution, art. 32; Legislative Decree No. 286/1998, arts. 34 and 35, para. 3, let. b; see also Legislative Decree No. 251/2007, art. 27 and Legislative Decree No. 142/2015, art. 17 (3 and 4) and art. 21, para. 1.

<sup>131</sup> Italian Constitution, art. 34; Legislative Decree No. 286/1998, art. 38; see also Legislative Decree No. 251/2007, art. 26 and Legislative Decree No. 142/2015, art. 21, para. 2.

<sup>132</sup> Legislative Decree No. 167/2011. For further details, see the following page: <http://www.integrazionemigranti.gov.it/normativa/Documents/Minori/minori%20normativa/disciplina%20lavorativa%20minori.pdf>.

<sup>133</sup> Legislative Decree No. 286/1998, art. 38, paras. 2 and 3. On this see also the Guidelines for the reception and integration of foreigner students, released by the Ministry of the Education on 19 February 2014; See also the specific area dedicated to the integration issue on the website of the Ministry of the Education: <http://hubmiur.pubblica.istruzione.it/web/istruzione/intercultura>.

## 6. Refugee Crisis Driven Reforms

During the time-span 2011–2017, triggered by the pressure to manage an unprecedented number of migrants landing on Italian shores, a number of legislative reforms have been issued. These reforms were inspired by an increasingly security-oriented approach, on which the EU influence cannot be overlooked (Caponio, Cappiali 2018; UN Human Rights Council, Special Rapporteur human rights of migrants 2014). Indeed, “the border management” has been presented by the EU Agenda on Migration as one of the “four pillars to manage migration better” (EU Commission 2015a:10). Needless to say, hotspots have been created to fulfil the requirements of the European Council’s Decisions of September 2015. In addition, the stipulation of bilateral agreements of readmission has been explicitly encouraged by the EU Commission. The same applies to repatriation policies (EU Commission 2017d)<sup>134</sup>. Furthermore, the enlargement of detention facilities has been welcomed by the EU, also with the aim to prevent secondary movements of undocumented migrants to Northern EU member States (European Commission 2015b).

As already highlighted, under the pressure of the “migration emergency”, in 2014 the Unified Conference reconfigured the national migration system of reception, both for adults and children. A two tiers system was created, divided into a first-line accommodation for first aid and assistance and a second-line reception for long-term services, aimed at the foreigners’ integration. The Legislative Decree No. 142/2015 has provided the legal basis for this large reform, while transposing the EU reception and procedure Directive (recast). Concisely, the decree subjected the national reception system under the political and economic responsibility of the Ministry of the Interior, giving local municipalities – at least in theory – only a subsidiary role (they intervene only in case of shortage of accommodation in the ordinary reception system)<sup>135</sup>. Furthermore, a more incisive and structured assistance was provided to unaccompanied foreign children, creating a common system of reception, dedicated for both unaccompanied children asylum seekers and unaccompanied children non-asylum seekers.

However, already in 2016, new legal reforms were announced by the Ministry of Justice, which expressed his concern on the possible overload of the Italian court system, due to the increasing number of appeal against the rejection of asylum applications by the Territorial Commissions<sup>136</sup>.

Indeed, the Law Decree No. 13/2017 was subsequently approved with the twofold aim to “expedite the international protection procedure and curtail illegal immigration”. Therefore, the creation of new specialized sections of trained judges was established, along with the suppression of the second appeal for refugee status determination (RSD). In addition, a new

<sup>134</sup> See also the letter of the EU Commission Jean-Claude Juncker to Italy Prime Minister Paolo Gentiloni on the EU support to Italy about the management of migration flows [https://ec.europa.eu/italy/news/20170727\\_migrazione\\_juncker\\_gentiloni\\_it](https://ec.europa.eu/italy/news/20170727_migrazione_juncker_gentiloni_it)

<sup>135</sup> Meanwhile, it cannot be neglected that local municipalities play a big role within the SPRAR system, which, according to Legislative Decree No. 142/2015, should be the main actor in the second-layer of reception.

<sup>136</sup> Chamber Inquiry Committee on the system of reception, of identification and expulsion and on the conditions of detention of migrants and on public resources committed, 21.06.2016, available at <http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/pdf/69/audiz2/audizione/2016/06/21/leg.17.stencomm.data20160621.U1.com69.audiz2.audizione.0051.pdf>

trial procedure was introduced. As mentioned, in this case the judge is not required to audit the asylum applicants but, except from few cases, can rely on the video-recording of the applicant's interview made by the Territorial Commission, the administrative body competent to examine the asylum application at the first stage of the RSD.

On the other hand, the decree has reinforced the securitization approach and increased the number of CPR - Centres for Residence and Repatriation (the former CIE - Centres for Identification Expulsion (CIE) from four to twenty throughout Italy, with a total capacity of 1,600 places (compared to the current 400 (Masera 2017; Campesi e Fabini 2017). The same approach upheld a 2016 circular of the Italian Chief of the Police, who called the Police officers to intensify the operations of tracing undocumented migrants within the Italian territory so as to increase the repatriation rate<sup>137</sup>.

No reform intervened in the field of migrants' integration, aggravating the shortage of thorough and efficacy policies and services addressing integration.

"The contrast between an economy, including families that has absorbed around 2.5 – 3 million immigrants and a political stance that resists their acceptance as legitimated members of Italian society has culminated with the law on citizenship" (Ambrosini 2014:207). The Citizenship Law has been vividly debated in the past years<sup>138</sup>. At the heart of discussion are the long and complex bureaucratic process of naturalization (finalized after an average of 11 months or more), the extremely restrictive requirements and the wide margin of administrative discretion, often resulting in negative decisions. Against this background, the campaign "I am Italy too" (*l'Italia sono anche io*) has been promoted by pro-immigrant associations<sup>139</sup>. Nonetheless, despite the efforts, the bill reviewing citizenship legislation is still pending in Parliament<sup>140</sup>.

However, in this context, two important reforms addressing the protection of migrants with specific needs, and particularly of foreign unaccompanied children, have to be mentioned.

Hence, in 2014, the EU Anti-trafficking Directive was transposed by the Legislative Decree No. 24/2014. This legislation addressed, among others, issues of identification and referral of asylum seekers victims of trafficking. Furthermore, specific safeguards were provided for unaccompanied children victims of trafficking.

As result of the long advocacy actions of Italian NGOs and international organizations, in 2017 the Italian Parliament finally approved the "Zampa Law" on unaccompanied foreign children. New regulations were established with reference to unaccompanied children's age

<sup>137</sup> The Circular of the Chief of the Police, 30.12.2016, is available here: <https://www.asgi.it/allontamento-espulsione/attivita-rintraccio-stranieri-rimpatrio-circolare-2016/>

<sup>138</sup> The Bill No. 2092 is available here <http://www.senato.it/japp/bgt/showdoc/17/DDLPRES/940816/index.html>. In particular, the bill aims at recognizing Italian citizenship to children born in Italy to foreign parents, one of whom has to have held a EU long-term residency permit and to children who arrived in Italy before the age of 12 and who have completed at least one scholastic cycle.

<sup>139</sup> For further details see the website of the campaign *L'Italia sono anch' io*: <http://www.litaliasonoanchio.it/>

<sup>140</sup> The bill's passage through Parliament can be checked here: <http://www.senato.it/leg/17/BGT/Schede/Ddliter/46079.htm>

assessment and the national guardianship system. Despite this law failed to address the loopholes and dis-homogeneities of the national reception system for unaccompanied foreign children, it is an important step forward for the protection and promotion of children rights.

## 7. Conclusion

The aim of this report has been to analyse and problematize the Italian approach to the management of mass migration with a specific emphasis on the period between 2011 and 2017, so as to shed light on the series of implemented changes and responses given to the recent migration crisis. Italy has proven to be a very complex case of migration management that has developed in the grip of structural national limits, as well as a case of slow and inadequately controlled process of integration of the foreign population residing in the country for the last three decades. In the last few years, Italy has proven itself incapable of dealing with mass migratory flows. Moreover, besides a lack of cohesiveness of national policies and poor and inconsistent implementation, the country has put into question the very same principles of respect and protection of human rights enshrined in the Constitution and international standards.

In the well-known decision *Hirsi Jamaa and Others v. Italy*, the European Convention on Human Rights (ECHR) acknowledged that “the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers. [The ECHR] does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 223, ECHR 2011)”<sup>141</sup>. However, the Court found that “problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State’s obligations under the Convention.”<sup>142</sup>. Therefore, the Court condemned Italy for having forcibly returned a group of Somali and Eritrean nationals to Libya, where they were at risk of human rights’ violations and of repatriation<sup>143</sup>.

In spite of the ECHR judgment, an increasing recourse to security-oriented measures, professedly motivated by the pressure of controlling borders, seem to prevail upon any other humanitarian concern and respect of human rights obligations, deriving from both national and supranational normative provisions<sup>144</sup>.

New allegations of illegitimate repatriation have been recently moved against Italy<sup>145</sup> (and a complaint has been lodged at the ECHR for the case of the repatriation of a group of

<sup>141</sup> *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: <http://www.refworld.org/cases/ECHR.4f4507942.html>, para. 122.

<sup>142</sup> *Ibidem*, para. 179

<sup>143</sup> *Ibidem*, para. 136

<sup>144</sup> Besides the the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Additional Protocols, Italy abides a number of international treaties addressing the protection of human rights, such as the European Convention on the Legal Status of Migrant Workers (1995) and the Convention on Action against Trafficking in Human Beings (2010). Furthermore, the entire EU *acquis* on migration and asylum is applicable to Italy, which transposed the relevant EU Directives into national legislation. Finally, as already mentioned, human rights protection is enshrined in Italian Constitution and other relevant national legislations.

<sup>145</sup> See the letter that the Special Commissioner on human rights of the Council of Europe addressed to the Italian Ministry of the Interior in 2017, available here: <https://rm.coe.int/letter-to-the-minister-of-interior-of-italy-regarding-government-s-res/168075baea>

Sudanese in August 2016 (ASGI, 2017c)<sup>146</sup>. Moreover, Italy is called to respond to further human rights violations against migrants, especially those violations occurring in the hotspots. Indeed, hotspots, originally conceived as operational support to the relocation process, have soon turned into hubs where policies of migration control are enforced (ECRE et al. 2016; Guild, Costello, Moreno-Lax 2017). In the hotspots, the standard operating procedures (i.e. the only measures regulating the hotspots operations in the absence of a specific legal basis) allow authorities competent to conduct operations of identification through fingerprints to overcome possible resistances by using the force “with full respect for the physical integrity and dignity of the person”<sup>147</sup>. However, as reports unanimously document, abuses and arbitrary detentions often occur (Oxfam 2016: 28; Amnesty International 2016: 29). Furthermore, the hectic activities of pre-registration carried out after the disembarkation to identify migrants as “undocumented” or “asylum seekers”, have often turned into a “super-summary hyper accelerated form of processing” to determine the refugee status (Guild, Costello, Moreno-Lax 2017:46). Eminent voices have reported practices such as “profiling on grounds of nationality, treating arrivals from non-relocation countries directly as ‘non-refugees’, selectively (mis-)informing them about their options and swiftly expelling them” (Guild, Costello and Moreno-Lax 2017: 47). No legal assistance and no appeal options are provided in these cases, and this exposes Italy to manifold violations of human rights conventions, such as art. 4 Protocol 4 ECHR.

In the absence of individual and accurate assessment, these operations of identification have been regarded as “tantamount to collective expulsion” (Guild, Costello and Moreno-Lax 2017: 47), breaching the principle on *non-refoulement*.

Severe human rights violations take place within Repatriation centres (CPR, former CIE), as documented by reports released by institutional and non-institutional actors, mostly adherent to the *LasciateCIEntrare* campaign<sup>148</sup>. As the last report of the Senate points out, repatriations centres still fail to fulfil the “necessary assistance and full respect of dignity” of the foreigners detained, as required by art. 14 of the Consolidated Law on Immigration. Despite actions undertaken by the Italian government, following the Senate recommendations, high diversification of standards still features the 5 CPR currently operating in Italy. Beyond the poor hygienic standards, limited access to information (*Garante nazionale diritti delle persone detenute* 2016), poor food quality and low material and structural conditions have been observed, with an overall lowering of the quality of the services provided (Senato, Commissione straordinaria diritti umani 2017). Meanwhile, the creation of new CPR has been recently provided by the L. No. 46/2017.

Against this backdrop, national and supranational Courts intervened several times to address and restrain the weaknesses of the Italian migration system and its failures to protect and promote migrants’ fundamental rights. Domestic courts (both lower courts and the

<sup>146</sup> Indeed, following the signature of the readmission agreements with Sudan, after an accelerated identification procedure, a group of Sudanese nationals, allegedly belonging to a minority persecuted, has been forcibly repatriated in the country by Italian authorities. The recourse has been supported by ASGI.

<sup>147</sup> See note 60

<sup>148</sup> For more details and a collection of available reports see the webpage of the *LasciateCIEntrare* campaign (the national campaign against the detention of migrants): <http://www.lasciatecientrare.it/j25/>

Constitutional Court) have played a pivotal role to align Italian legislations and practices to the respect of human rights obligations. And also the ECHR contributed in this process: in the case of *Tarackhel vs. Switzerland* (2014) the guarantees of the Italian reception system have been questioned by the ECHR, which suspended the transfer of an Afghan family of asylum seekers back to Italy<sup>149</sup>. More recently, in 2016, in the case of *Khlaifia and Others v. Italy*, the ECHR found that Italy violated art. 5 of the Convention for having arbitrarily detained some irregular migrants who arrived in Italy in 2011 following the “Arab Spring”, without informing them of the reasons for deprivation of their liberty and without providing any remedy to reverse the decision<sup>150</sup>.

However, this “salvific role” of the judiciary is increasingly threatened by an overall tendency to enforce migration policies by recurring to informal acts, such as communications, standard operational procedures and circulars, which are subtracted to both judicial and parliament control (Algotino 2018; Gjergji 2016a). As authors points out, the recourse to these informal acts *de facto* neutralize the judicial intervention and contributes to shape and reinforce a “special legal status” of migrants, where basic human rights and procedural guarantees are increasingly replaced by a system of contingent measures and exceptions (Ferrajoli 2010; Caputo 2007; Favilli 2017).

In particular, the numerous readmission agreements signed by Italy represent a good example of this approach (which is mirrored at the EU level by the EU-Turkey agreement). In breach of national and international standards (Favilli 2005)<sup>151</sup>, more than 30 agreements have been signed by Italy between 1990 and 2014 (Algotino 2018; Raffaelli 2017), with the aim of favouring repatriations and externalizing borders. These agreements jeopardize the principle of *non-refoulement* and the right not to be exposed to the real risk of “torture or to inhuman or degrading treatment or punishment” as states by art. 3 of the European Conventions on Human rights.

The “code of conduct for the NGOs operating in the rescue of migrants at sea”, recently issued by the Italian Ministry of the Interior in consultation with the European Commission, goes in the same direction. It aims at regulating the search and rescue operations in the Mediterranean conducted by non-governmental actors, but it has restricted and delegitimized the role of NGOs, which proved to be crucial in saving many lives in the past few years (ASGI 2017a; MSF 2017a).

Parliamentary control has been *de facto* progressively eliminated following the same strategy of bypassing the use of ordinary legislation for ruling over migration. Also the recent Law-Decree No. 47/2017 has been approved *de facto* out of the Parliamentary control, as the cabinet asked a vote of confidence on the bill, thus preventing any possibility for amending it.

<sup>149</sup> *Tarackhel v. Switzerland*, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014, available at: <http://www.refworld.org/cases,ECHR,5458abfd4.html>

<sup>150</sup> *Khlaifia and Others v. Italy*, Application no. 16483/12, Council of Europe: European Court of Human Rights, 15 December 2016, available at: <http://www.refworld.org/cases,ECHR,58529aa04.html>

<sup>151</sup> International agreements in the immigration field raise several concerns about their constitutional legitimacy (with specific reference to arts. 80 and 87(8) of the Constitution. Whereas art. 80 is mentioned below, art. 87(8) on the Presidential Duties stipulates that the President of the Republic “accredits and receives diplomatic representatives, ratifies international treaties once they are authorized by parliament, provided parliamentary approval is necessary”. Furthermore, these international agreements also breach art. 10(2) of the Constitution (for further details see Ch. 3).



In the case of the bilateral agreements, the recent memorandum Italy – Libya has once again excluded Parliament, and a number of MPs lodged a recourse at the Constitutional Court with the allegation of breach of art. 80 of the Italian Constitution, which states that “Parliament shall authorise by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation”<sup>152</sup>.

On another front, as already mentioned<sup>153</sup>, a smaller level of formality also features the judicial procedure for undocumented migrants (International Commission of Jurists 2014).

To conclude, distilling the main themes of this research, what emerges is that after decades of emigration, Italy became the gateway to the European Union and an important focal point for migratory movements. However, statistics provide a more complex framework, which demystifies common myths and traditional perceptions on immigration in Italy.

Indeed, contrarily to the narrative of the “invasion of foreigners”, as already illustrated, the number of foreign resident population in Italy results in line with the European context, representing the 8,32% of the total population, similar to the United Kingdom (8,4%), higher than France (6,6%) but less than Germany (9,3%), Belgium (11,6%), Ireland (11,9%) and Austria (13,2%).

Furthermore, data reveal that the growing presence of foreign population on the Italian territory is not exclusively related to current international conflicts or crisis but also to a slow process of stabilisation of the migratory phenomenon of the last two decades. The increasing number of non-EU citizens acquiring the Italian nationality, with 184.638 new citizens only in 2016, represents a clear evidence of this process. Another important data to understand the Italian migratory experience is the number of permits to stay issued for family reasons, which exceed more than a half the overall amount of permits granted for asylum and humanitarian reasons. This circumstance contributes to qualify migration in Italy as a structural phenomenon. However, at the same time, it marks the closure of other important channels to obtain a permit to stay (in 2016, entry quota for non-seasonal workers was solely 3.600).

Against this backdrop, the analysis of the Italian legal and policy framework has revealed that important safeguards are provided for foreigners, at constitutional and legislative level, in line with international standards on human rights. Concerning the constitutional provision, the personalist principle enshrined in art. 2 of the Italian Constitution recognises the inviolable rights to foreigners. Equally, the principle of anti-discrimination proclaimed by art. 3 of the Constitution is systematically recalled throughout the Consolidated law on Immigration.

However, this high threshold of safeguards is not efficiently implemented. The right of asylum, laid down in art. 10 of the Constitution, still lacks of a comprehensive and organic regulation. Meanwhile, the legal framework on migration remains disharmonised and the Consolidated Law on Immigration is affected by fragmented normative stratifications and lack of effective instruments of migration’s planning and management.

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<sup>152</sup> The recourse has been submitted on the 19 February 2018. Further details can be found on the following page of ASGI: [https://www.asgi.it/wp-content/uploads/2018/02/2018\\_2\\_27\\_ASGI\\_Libia\\_Italia\\_scheda-tecnica.pdf](https://www.asgi.it/wp-content/uploads/2018/02/2018_2_27_ASGI_Libia_Italia_scheda-tecnica.pdf)

<sup>153</sup> See for further details Ch. 5.4

Furthermore, these important safeguards have been increasingly threatened by recent refugee-crisis driven reforms, culminated in the 2017 Minniti Decree. Under the pressure of unprecedented arrivals on the one hand, and the growing “security-demands” on the other, a regressive approach has dominated the recent normative interventions. This reflected a broader European trend, where the emphasis on “the border management” and “security approach” is twined with persistent gaps in term of harmonization and fair burden sharing.

Overall, the absence of solid, structured pathways to systematically manage the migration phenomenon is a constant theme of migration governance in Italy. This can be partially explained with the multiplicity of institutional actors involved in the Italian migration system. As already highlighted, in Italy, the management of asylum and migration does not fall under the responsibility of a single governmental body. Rather, it is scattered among different institutional entities. Each entity (with its own mandate and mission) is competent and responsible for single apparatus of the complex migration machine. The compresence between the Ministry of the Interior and the Ministry of Labour, which share key aspects of the migratory policies, clearly exemplifies this.

The gap of governance at the central level has been filled from time to time by different actors, such as local municipalities (especially in the context of reception), the third sector and the judiciary. On the positive side, this has encouraged progressive legislations at local level and the wide mobilization of civil society in support of foreigners’ integration. Meanwhile, as already mentioned, courts have often questioned regressive national legislation and the Constitutional Court has been crucial in the process of aligning the asylum national legislation to the supranational and constitutional principles.

These interventions nevertheless, the lack of coordination and monitoring at central level, have led to a sheer fragmentation and uncertainty dominates the legal status of foreigners throughout the country. Fundamental social rights are not always granted at the same conditions of Italian citizens and some social welfare allowances can be obtained only through the interventions of the courts. Standards of care and assistance for asylum seekers and refugees vary a lot between the different centres of accommodation and the enjoyment of basic rights becomes “a matter of luck” (Oxfam 2017). As a result, harsh living conditions in overcrowded self-organized settlement, illegal labour and exploitation represent a frequent outcome of the absence of efficient services supporting access to housing, employment, and more broadly integration (Council of Europe, Commissioner for Human Rights 2011; UN Human Rights Council 2014).

## Appendices

### ANNEX I: OVERVIEW OF THE LEGAL FRAMEWORK ON MIGRATION, ASYLUM AND RECEPTION CONDITIONS

Legislation title (original and English) and number	Date	Type of law	Object	Link/PDF
<b>Law No. 47/2017</b> “Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati”  “Provisions on protection measures for unaccompanied foreign minors”	21/04/2017	Law	Unaccompanied foreign minors	<a href="http://www.gazzettaufficiale.it/eli/id/2017/04/21/17G00062/sg">http://www.gazzettaufficiale.it/eli/id/2017/04/21/17G00062/sg</a>
<b>Ministry of the Interior Decree 07.03.2017</b>  “Nuovo schema di capitolato per la fornitura di beni e servizi relativi alla gestione e al finanziamento delle strutture di accoglienza dei migranti”  “New Contract specifications: Supply of good and services for the management and functioning of the reception centres”	07/03/2017	Ministerial Decree	No the only one manager  Batch separation (i.e. cleanliness and hygiene, food, good supply) – however this rule does not apply to centres which can host less than 300 persons  More monitoring and inspection powers	<a href="http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/documentazione/bandi-gara/fornitura-beni-e-servizi-relativi-alle-strutture-dei-centri-accoglienza">http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/documentazione/bandi-gara/fornitura-beni-e-servizi-relativi-alle-strutture-dei-centri-accoglienza</a>
<b>Decree Law No. 13/2017 (converted into Law, after amendments, by Law No. 46/2017)</b>	17/02/2017	Law Decree	Measures for simplifying and speeding-up the	<a href="http://www.gazzettaufficiale.it/eli/id/2017/02/17/17G00026/sg">http://www.gazzettaufficiale.it/eli/id/2017/02/17/17G00026/sg</a>

<p>“Disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonché per il contrasto dell'immigrazione illegale”</p> <p>“Urgent measures for accelerating the proceedings related to the international protection, as well as for fighting against illegal immigration”</p>			<p>procedure of international protection</p> <p>Measures for accelerating the identification and the status determination of non-EU citizens and for fighting against illegal immigration</p>	
<p><b>Circolare del Ministero dell'Interno 11.10.2016</b> “Regole per l'avvio di un sistema di ripartizione graduale e sostenibile dei richiedenti asilo e dei rifugiati su territorio nazionale attraverso lo SPRAR”</p> <p>Ministry of Interior Circular of 11.10.2016 on Rules for starting of a gradual and sustainable distribution system for asylum seekers and refugees on the national territory through the SPRAR "</p>	11/10/2016	Circular of the Ministry of the Interior	Operational plan aimed at realizing a sustainable reception system equally distributed between the regions and local municipalities, with the exemption of local municipalities already involved in the SPRAR network	<a href="http://www.immigrazione.biz/upload/circolare%20ministero interno 11 ottobre 2016 sprar.pdf">http://www.immigrazione.biz/upload/circolare%20ministero interno 11 ottobre 2016 sprar.pdf</a>
<p><b>Ministry of the Interior Decree No. 10.08.2016</b> “Modalita' di accesso da parte degli enti locali ai finanziamenti del Fondo nazionale per le politiche ed i servizi dell'asilo per la predisposizione dei servizi di accoglienza per i richiedenti e i</p>	10/08/2016	Ministerial Decree	Guidelines for the applications to the National Fund for the asylum policies and services	<a href="http://www.gazzettaufficiale.it/eli/id/2016/08/27/16A06366/sq">http://www.gazzettaufficiale.it/eli/id/2016/08/27/16A06366/sq</a>

beneficiari di protezione internazionale e per i titolari del permesso umanitario, nonché approvazione delle linee guida per il funzionamento dello SPRAR”  “Access of municipalities to the National Fund for Asylum (FNSA) for the accommodation of asylum seekers, international and beneficiaries of humanitarian protection; guidelines for SPRAR”			Guidelines concerning the reception services provided by the SPRAR	
<b>Circolare del Servizio Centrale Sprar:</b> Tempi di accoglienza all'interno dello SPRAR  Circular of the Central Service for Sprar: time limits of accommodation in Sprar	07/07/2016	Circular of the SPRAR	Asylum seekers have the right to stay in the SPRAR accommodation until the Territorial Commission releases the decision. In case of positive decision, the refugee can prolongs the stay until 6 months. In case of negative decision, if the asylum seeker lodges an appeal, the staying is extended by the end of the judicial procedure.	<a href="https://www.asgi.it/wp-content/uploads/2016/07/Servizio-centrale-srar-accoglienza-termini-luglio-2016.pdf">https://www.asgi.it/wp-content/uploads/2016/07/Servizio-centrale-srar-accoglienza-termini-luglio-2016.pdf</a>
<b>Circolare del Ministero dell'Interno 06.10. 2015</b> “Decisioni del Consiglio europeo n. 1523 del 14 settembre 2015 e n. 1601 del 22 settembre 2015 per istituire misure	06/10/2015	Circular of the Ministry of the Interior	Launch of the relocation procedure	<a href="https://www.asgi.it/wp-content/uploads/2015/11/2015_Ministero_Interno_14106_6-10_accoglienza.pdf">https://www.asgi.it/wp-content/uploads/2015/11/2015_Ministero_Interno_14106_6-10_accoglienza.pdf</a>

temporanee nel settore della protezione internazionale a beneficio dell'Italia e della Grecia – Avvio della procedura di relocation				
Decision of the European Council No. 1523 of 14 September 2015 and Decision No. 1601 of 22 September 2015 on relocation procedure				
<b>Decreto Legislativo n. 142/2015</b> “Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonché della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale.”  Legislative Decree 142/2015 “Implementation of Directive 2013/33/EU on standards for the reception of asylum applicants and the Directive 2013/32/EU on common procedures for the recognition and revocation of the status of international protection.”	18/08/2015	Legislative Decree	It is the so called “reception-decree”, establishing rules, criteria and standards for the new reception system. After a first phase of first aid and assistance, reception is organised in a two-tier system, with facilities of first line reception, activated by the Ministry of the Interior, and second line reception facilities within the SPRAR network, providing for a longer-term assistance.	<a href="http://www.gazzettaufficiale.it/eli/id/2015/09/15/15G00158/sg">http://www.gazzettaufficiale.it/eli/id/2015/09/15/15G00158/sg</a>
<b>Decreto Legislativo n. 24/2014</b> “Prevenzione e repressione della tratta di esseri umani e protezione delle vittime”, in attuazione alla direttiva 2011/36/UE, relativa alla prevenzione e alla	04/03/2014	Legislative Decree	It addresses the specific situation of vulnerable persons: minors, unaccompanied	<a href="http://www.gazzettaufficiale.it/eli/id/2014/03/13/14G00035/sg">http://www.gazzettaufficiale.it/eli/id/2014/03/13/14G00035/sg</a>





“Norms on public security” (Security Package)				<a href="#">3Dricerca_semplice%26numeroArticolo%3D%26numeroProvvedimento%3D94%26testo%3D%26annoProvvedimento%3D2009%26giornoProvvedimento%3D&amp;currentPage=1</a>
<p><b>Decreto Legislativo n. 25/2008</b>  “Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello status di rifugiato” così come modificato dal Decreto legislativo n. 159/2008 e 142/2015</p> <p>Legislative Decree no. 25/2008  “Implementation of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status” as amended by Legislative Decree No. 159/2008 and 142/2015</p>	28/01/2008	Legislative Decree	<p>It is the so-called “Procedure Decree”</p> <p>Basic principles and guarantees (access to the procedure, the examination of applications, decisions, the personal interview, composition and training of Territorial Commission, legal assistance, guarantees for unaccompanied minors)</p> <p>Procedures at first instance</p> <p>Procedures for the withdrawal of international protection</p> <p>Appeals procedures</p>	<a href="http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2008-02-16&amp;atto.codiceRedazionale=008G0044&amp;queryString=%3FmeseProvvedimento%3D%26formType%3Dricerca_semplice%26numeroArticolo%3D%26numeroProvvedimento%3D25%26testo%3D%26annoProvvedimento%3D2008%26giornoProvvedimento%3D&amp;currentPage=1">http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2008-02-16&amp;atto.codiceRedazionale=008G0044&amp;queryString=%3FmeseProvvedimento%3D%26formType%3Dricerca_semplice%26numeroArticolo%3D%26numeroProvvedimento%3D25%26testo%3D%26annoProvvedimento%3D2008%26giornoProvvedimento%3D&amp;currentPage=1</a>

<p><b>Decreto Legislativo n. 251/2007</b>  “Attuazione della direttiva 2004/83/CE recante norme minime sull'attribuzione, a cittadini di Paesi terzi o apolidi, della qualifica del rifugiato o di persona altrimenti bisognosa di protezione internazionale, nonché norme minime sul contenuto della protezione riconosciuta”, così come modificato dal Decreto Legislativo n. 18/2014 “Attuazione della direttiva 2011/95/UE”</p> <p>“Implementation of Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted” as amended by Legislative Decree No. 18/2014 “Implementation of Directive 2011/95/EU”</p>	19/11/2007	Legislative Decree	<p>It is the so-called “Qualification Decree”</p> <p>Assessment of applications for international protection</p> <p>Refugee status</p> <p>Subsidiary protection</p> <p>Content of international protection</p> <p><u>Main amendments of the Legislative Decree No. 18/2014:</u></p> <p>Beneficiaries of subsidiary protection are equalized to refugees with reference to: family reunification, access to the public sector and housing services  The duration of the residence permit for beneficiaries of subsidiary protection</p>	<a href="http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2008-01-04&amp;atto.codiceRedazionale=007G0259&amp;queryString=%3FmeseProvvedimento%3D%26formType%3Dricerca_semplice%26numeroArticolo%3D%26numeroProvvedimento%3D251%26testo%3D%26giornoProvvedimento%3D2007&amp;currentPage=1">http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2008-01-04&amp;atto.codiceRedazionale=007G0259&amp;queryString=%3FmeseProvvedimento%3D%26formType%3Dricerca_semplice%26numeroArticolo%3D%26numeroProvvedimento%3D251%26testo%3D%26giornoProvvedimento%3D2007&amp;currentPage=1</a>
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			increases from three at five years. A national plan shall be adopted every two years to achieve the effective integration of beneficiaries of international protection	
<b>Decreto del Presidente della Repubblica n. 394/1999</b> "Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero", così come modificato dal Decreto del presidente della Repubblica n. 334/2004 "in materia di immigrazione"  Presidential Decree No. 394/1999 "Regulation on norms implementing the consolidated act on provisions concerning the immigration regulations and foreign national conditions norms" amended by the Presidential Decree No. 334/2004 "on immigration"	31/08/1999	Presidential Decree	Measures for the Consolidated Act implementation  General provisions Entry and stay Expulsion and detention Humanitarian provisions Labour regulation Provisions on health-care, education and social integration	<a href="http://www.gazzettaufficiale.it/eli/id/1999/11/03/099G0265/sg">http://www.gazzettaufficiale.it/eli/id/1999/11/03/099G0265/sg</a>
<b>Decreto Legislativo No. 286/1998</b> "Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero" così come	25/07/1998	Consolidated act	General principles Provisions on entry, stay and exit from Italy Labour regulation	<a href="http://www.altalex.com/documents/codici-altalex/2014/04/09/testo-unico-sull-immigrazione">http://www.altalex.com/documents/codici-altalex/2014/04/09/testo-unico-sull-immigrazione</a>

<p>modificato dalla Legge 30 luglio 2002, n. 189 “Modifica alla normativa in materia di immigrazione e di asilo” o “Legge Bossi-Fini”</p> <p>Legislative Decree No. 286/1998 “Consolidated Act on provisions concerning the Immigration regulations and foreign national conditions norms” as amended by the Law No. 189/2002 “concerning amendments on immigration and asylum laws”</p>			<p>Right to family unity and children protection</p> <p>Provisions on health-care, education, accommodation, participation to the public life and social integration</p>	
<p><b>Legge n. 722/1954</b></p> <p>“Ratifica ed esecuzione della Convenzione relativa allo status dei rifugiati firmata a Ginevra il 28 luglio 1951”</p> <p>Law 722/1954 “ratifying and giving execution to the 1951 Geneva Convention”</p>	24/07/1954	Law	<p>Ratification of the Geneva Convention</p>	

**ANNEX II: LIST OF AUTHORITIES INVOLVED IN THE MIGRATION GOVERNANCE**

<b>Authority</b> (English and original name)	<b>Tier of government</b> (national, regional, local)	<b>Type of organization</b>	<b>Area of competence in the fields of migration and asylum</b>	<b>Link</b>
Ministry of the Interior – Department of Civil liberties and immigration (Ministero dell’Interno)	Central government	The department has to guarantee the civil rights’ protection, including civil rights concerning asylum and immigration, citizenship and religious confessions. The organizational chart is available here: <a href="http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/all egati/organigramma.pdf">http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/all egati/organigramma.pdf</a>	<p>It participate to identify the national policy on immigration and asylum</p> <p>It collect data on disembarked migrants (adults and unaccompanied minors) and on migrants accommodated in reception accommodations</p> <p>It manage integration projects through the European Asylum Migration and Integration Fund (AMIF)</p> <p>It is responsible for the first reception and assistance of asylum seekers</p> <p>It provides first aid when migrants disembark or are intercepted by the authorities in the national territory</p>	<a href="http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/dipartimento">http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/dipartimento</a>
Prefectures (Prefetture)	Local offices, at the provincial level, of the central	The Prefecture has the following responsibilities: guaranteeing the	Identification of reception centres for asylum seekers	<a href="http://www.interno.gov.it/it/ministero/uffici-territorio">http://www.interno.gov.it/it/ministero/uffici-territorio</a>

	government (the Ministry of the Interior)	administrative activity of the national peripheral offices; Providing for relevant functions in the fields of public order and security, immigration, civil protection, relationship with the local municipalities, social mediation and the system of administrative sanctions	It presides over the activity of the Territorial Commission  In each Prefecture, there is an Immigration Office (Sportello Unico per l'Immigrazione), competent to release the entry clearance (nulla-osta) for family reunification, for the recruitment of foreign workers within the 'immigration quotas'. The Sportello Immigrazione is also competent to convert the residence permit for study, training or seasonal work purposes in a residence permit for work purposes.  Coordination of the Territorial Council for Immigration	(each Prefecture has its own web page available here <a href="http://www.prefettura.it/portale/generali/37109.htm">http://www.prefettura.it/portale/generali/37109.htm</a> )
Police Headquarters (Questure)	Local offices, at the provincial level, of the central government (the Ministry of the Interior – Department of Public security)	The Questura has the responsibility to guarantee the public order and security	Identification and fingerprinting of foreign citizens  Registration of the asylum application  Issuance and renewal of residence permits	<a href="http://www.interno.gov.it/it/ministero/uffici-territoriali">http://www.interno.gov.it/it/ministero/uffici-territoriali</a>  (each Police headquarter has its own web page available here <a href="http://questura.poliziadistato.it/">http://questura.poliziadistato.it/</a> )

Board police (polizia di frontiera)	This body is under the responsibility of the Ministry of the Interior – Department of public security	It comprehends offices at seaports, at ground border crossing and at airports.	Check of the travel documents  Registration of the asylum application	<a href="https://www.poliziadistato.it/articolo/23463">https://www.poliziadistato.it/articolo/23463</a>
Territorial Commissions (Commissioni Territoriali)	This authority is under the responsibility of the Ministry of the Interior – Department of civil liberties and immigration	Currently, there are 20 Territorial Commission operating in Italy. Each Territorial Commission is composed of 4 members (a representative of the Prefecture; a representative of the State Police; a representative of the local municipality; a representative of UNHCR). This authority is competent to make a decision on the asylum application at first instance.	Refugee status determination (first instance)	<a href="http://www.interno.gov.it/sites/default/files/allegati/commissioni_e_sezioni_decreto costitutivo situazione aggiornata al 11_09_2017.pdf">http://www.interno.gov.it/sites/default/files/allegati/commissioni_e_sezioni_decreto costitutivo situazione aggiornata al 11_09_2017.pdf</a>
National Commission (Commissione Nazionale)	This authority is under the responsibility of the Ministry of the Interior – Department of civil liberties and immigration	It is composed of representatives of the Ministry of the Interior, the Ministry of Foreign Affairs, the presidency of the Council of ministers and UNHCR.	Coordination and orientation of the Territorial Commissions' activity  Training and updating of the Territorial Commissions' members	<a href="http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/commissione-nazionale-diritto-asilo">http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/commissione-nazionale-diritto-asilo</a>



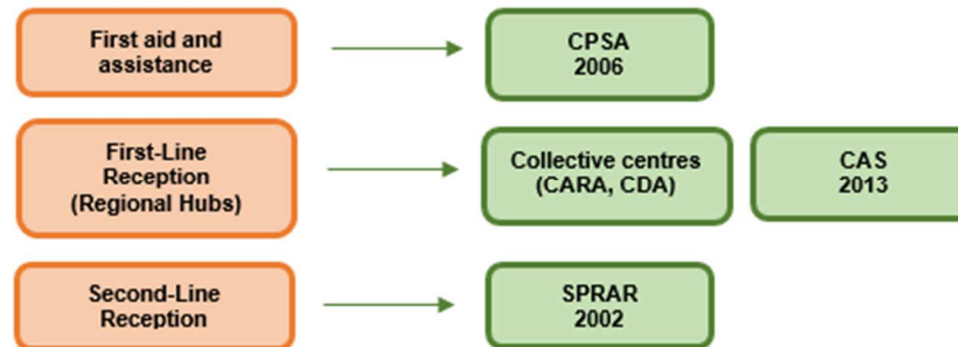
			<p>Collection of statistics on the Territorial Commissions' activity</p> <p>Collection of data on asylum applications and decisions of the Territorial Commissions</p> <p>Refugee status withdrawal and cessation</p> <p>National focal point for the information exchange with the EU Commission and the competent authorities of other EU member states</p>	
Dublin Unit (Unità Dublino)	This authority is under the responsibility of the Ministry of the Interior – Department of civil liberties and immigration	Since 2014 the Dublin Unit have been collaborated with EASO	<p>It is competent to determine the EU member state responsible for examining an asylum application lodged in one of the EU member states by a non-EU citizen</p> <p>It is responsible to implement the relocation Programme</p>	<a href="http://www.liberta.civiliimmigrazione.dlci.interno.gov.it/it/unita-dublino">http://www.liberta.civiliimmigrazione.dlci.interno.gov.it/it/unita-dublino</a>
General Directorate of Immigration and Integration Policies at the Ministry of Labour and Social Policies (Direzione Generale dell'Immigrazione presso il	This authority is under the responsibility of the Ministry of Labour	It is composed of 3 divisions: 1) general affairs and management of the financial resources; 2) integration policies and foreign minors protection; 3) migration policies	<p>Planning, management and monitoring of migration quotas</p> <p>Coordination of the social integration policies</p>	<a href="http://www.lavoro.gov.it/ministro-e-ministero/II-ministero/Organizzazione/Pagine/DG-immigrazione-e-delle-politiche">http://www.lavoro.gov.it/ministro-e-ministero/II-ministero/Organizzazione/Pagine/DG-immigrazione-e-delle-politiche</a>

Ministero del Lavoro e delle Politiche sociali)			<p>Management of the financial resources for migration policies</p> <p>Coordination of the protection policies for unaccompanied foreign minors: It is responsible for the census of unaccompanied intercepted at the border or inland It is competent to promote the family tracing of unaccompanied foreign minors in the country of origin or in a third country, with the collaboration It releases an opinion about the social integration of unaccompanied foreign minors which is necessary to convert the residence permit It is competent for the assisted-return of unaccompanied foreign minors</p>	<a href="#">di-integrazione.aspx</a>
Local municipalities	Local government		Together with non-profit organizations, on a voluntary basis, local municipalities participate to the SPRAR network which cater for high-qualified reception services	See ANCI (Association of Italian local municipalities) which involves around 7,300 Italian local

			Local municipalities are responsible for taking unaccompanied foreign minors in charge and providing them with accommodation in a safe place	municipalities representing about the 90% of the entire Italian population: <a href="http://www.anci.it/">http://www.anci.it/</a>
Juvenile Court (Tribunale dei minorenni)	Judicial authority	It is a specialized court responsible to deal with civil, criminal and administrative cases relating to children. It is composed of 2 professional judges and 2 lay judges	It is responsible to give authorizations when particularly relevant actions should be put in place by guardians  It is the authority responsible for the assisted return to the country of origin of unaccompanied foreign minors	<a href="https://giustizia.it/giustizia/it/mg_14_3_1.page?sessionId=bRU5Kf2LD8nKnNVCZUwJRiGw?contentId=GLO52985&amp;previousPage=mg_14_3">https://giustizia.it/giustizia/it/mg_14_3_1.page?sessionId=bRU5Kf2LD8nKnNVCZUwJRiGw?contentId=GLO52985&amp;previousPage=mg_14_3</a>
Guardianship Judge (Giudice tutelare)	Judicial authority	He is a magistrate present in any Tribunal with the competence to supervise guardianship and curatorship	He appoints the guardian and is the authority responsible for the guardianship of unaccompanied foreign minors. He has monitoring powers on the guardian's	
Public Prosecutor of the Juvenile Court (Procura della Repubblica presso il Tribunale dei Minorenni)	Judicial authority	He performs the public prosecutor's functions in any Juvenile Court	It has inspective powers on the reception conditions of unaccompanied foreign minors and it is responsible to ratify the reception measures provided to them  It is the authority responsible to activate the age	<a href="https://giustizia.it/giustizia/it/mg_14_3_1.page?contentId=GLO112225&amp;previousPage=mg_14_3">https://giustizia.it/giustizia/it/mg_14_3_1.page?contentId=GLO112225&amp;previousPage=mg_14_3</a>

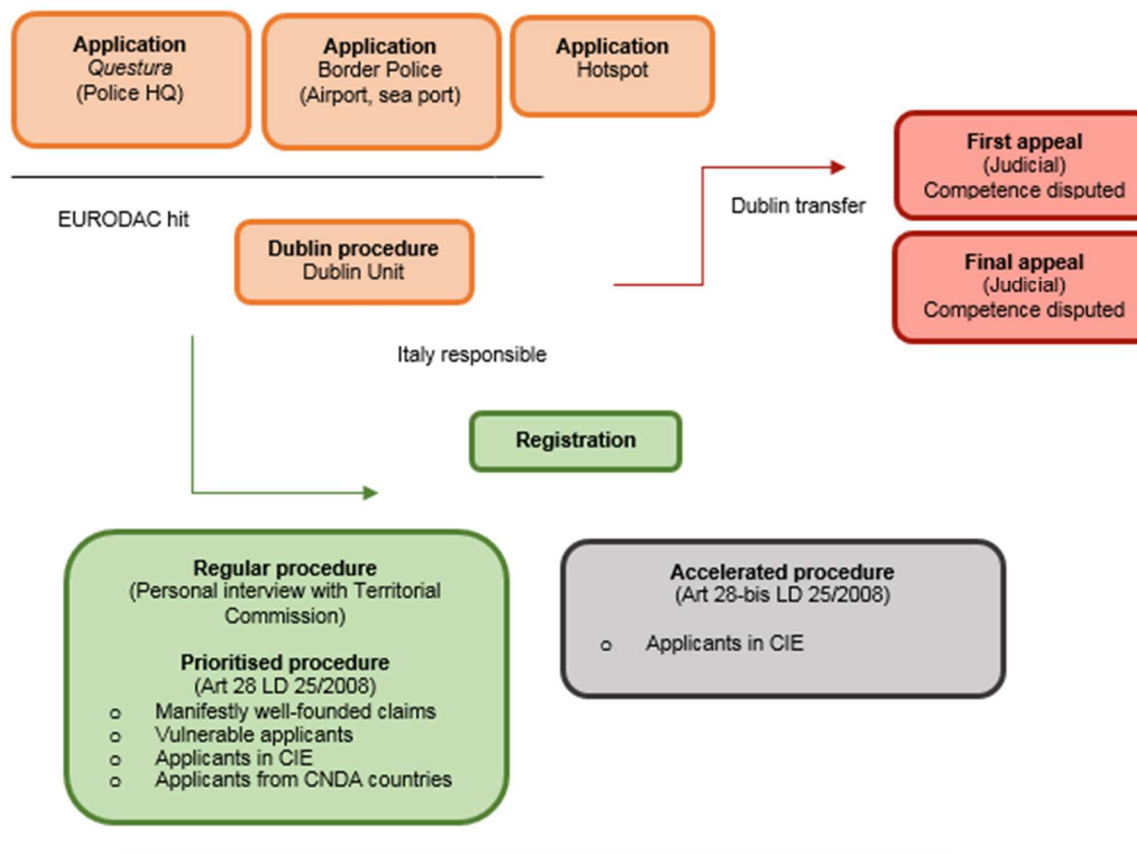
			assessment procedure when there is a founded doubt about the child's age	
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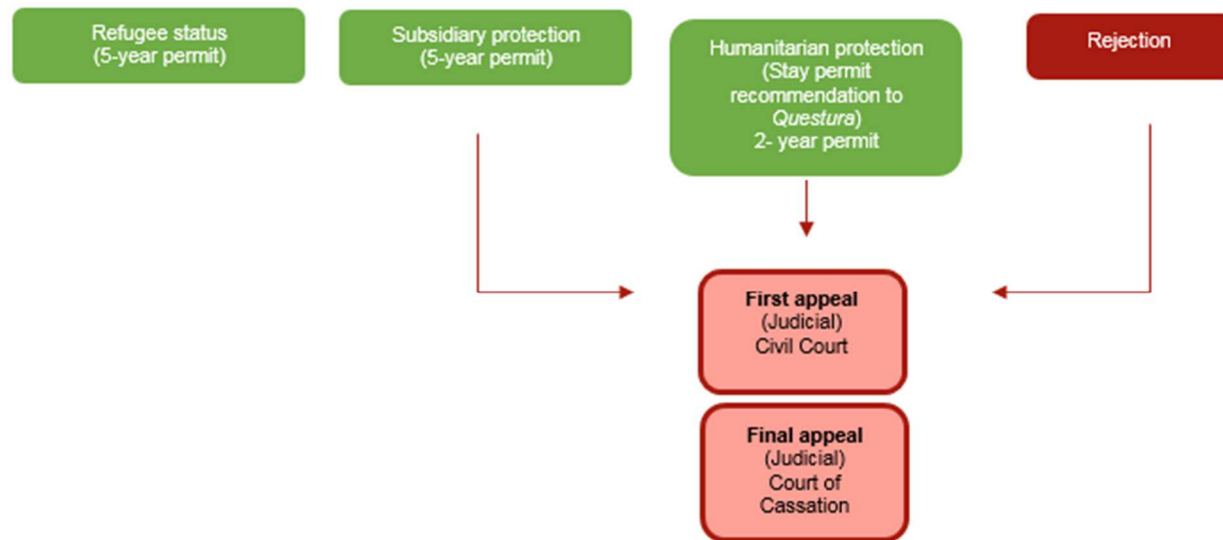
## ANNEX III: FLOW CHART OF THE NATIONAL RECEPTION SYSTEM



Source: AIDA, Asylum Information Database, Italy: Country Report, 2017, p. 59, available at <http://www.asylumineurope.org/reports/country/italy/reception-conditions/short-overview-italian-reception-system>

## ANNEX IV: FLOW CHART OF THE INTERNATIONAL PROTECTION PROCEDURE





Source: AIDA, Asylum Information Database, Italy: Country Report, 2017, p. 15, available at <http://www.asylumineurope.org/reports/country/italy/asylum-procedure/general/flow-chart>



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- *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09
- *Tarakhel v. Switzerland*, Application no. 29217/12
- *Khlaifia and Others v. Italy*, Application no. 16483/12

# **RESPOND**

## **Lebanon**

### **Country Report**

**D1.2 – June 2018**

**Amreesha Jagarnathsingh – Lebanon Support**

Horizon 2020  
RESPOND: Multilevel Governance  
of Mass Migration in Europe and  
Beyond (770564)



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## Abstract

This report aims to provide a contextual understanding of migration governance in the Lebanese context, as well as its implications for refugees and migrants. Towards this end, this report provides an overview of the legal and policy framework in Lebanon, notably within the context of the Syrian refugee crisis erupting in 2011. Moreover, the report critically evaluates the legal statuses – if any – pertaining to ‘asylum seekers’, ‘refugees’, and ‘migrants’ on the one hand, and the role of state and non-state actors on the other. Lastly, the report highlights a tendency to increased securitization of migration in the country. This report is part of RESPOND, a Horizon 2020 project studying multi-level migration governance from 2011-2017 through cross-country comparative research in source, transit, and destination countries in 11 different countries. It is the first in a series of five in the Lebanese context.

## 1. Introduction<sup>1</sup>

In 2015, the total number of people seeking asylum in the European Union, consisting of 28 countries, amounted to around 1,3 million in total (Eurostat, 2018). Around the same time, at the end of 2014, around 1.2 million refugees from Syria alone were registered in Lebanon (UNHCR, 2018a). In fact, Lebanon, since its establishment, has been considered a 'land of refuge', and has historically been providing shelter to Armenians, Palestinians, Iraqis, and Syrians, as well as to a great number of unregistered refugees from other countries.<sup>2</sup> Today, although formal statistics adhere to a total of approximately 1.1 to 1.8 million refugees (ECHO, 2018; LCRP, 2018:8), the total figure of refugees residing in the country informally is estimated to be around 2, or even 2.5 million.<sup>3</sup> This discrepancy can be mainly explained due to a long history of unrestricted – and mainly informal and unregistered – migration between Syria and Lebanon (Chalcraft 2009:9).

Thus, it may not come as a surprise that Lebanon, a country of approximately 4.5 million inhabitants before the Syrian crisis erupted (UNDESA, 2017), has the highest per capita concentration of refugees worldwide (ECHO, 2018), hosting around 10% of the world's total refugee population,<sup>4</sup> residing on a small territory of 10,452 km<sup>2</sup> – a size comparable to a quarter of countries such as the Netherlands, Switzerland, or Denmark. The waves of refugees arrived in a fragile and politically unstable context already shaken by recurring war, invasions, political violence, as well as foreign interventions, leading *inter alia* to shrinking resources and increasing public debts (see section 3 of this report).

Large influxes and protracted presence of (forced) migrants have only added extra layers to the multitude of challenges Lebanon is facing. Fear of altering demographic and sectarian balances following the arrival of refugees, and of terrorism 'spilling over' to Lebanon have contributed to a variety of ever-changing discourses on the refugee crisis. Uncorroborated by facts, these discourses have implicated the refugee issue as being highly politicized (Janmyr, 2016:60), and enhanced the 'securitization' of migration into the country. This has resulted in increasingly restrictive policies regulating the entry to and residency of different populations in Lebanon, oftentimes prioritising security over access to basic human rights. As a result, a large proportion of the migration population remains deprived of their rights and opportunities to lawfully access asylum and protection, furthering their precariousness and vulnerability.

This report aims to provide a contextual understanding of migration governance in the Lebanese context, as well as its implications for refugees and migrants. Towards this end, this report provides a – non-exhaustive – overview of the legal framework on asylum in Lebanon, notably within the context of the Syrian refugee crisis erupting in 2011. Moreover, it critically

<sup>1</sup> This report is mainly based on desk research, conducted between December 2017 and May 2018. Additionally, some fieldwork was conducted, consisting of a total of three interviews: one interview was held with a lawyer/researcher specialised in migration governance in Lebanon, one interview with a lawyer related to the UNHCR, and one interview with two representatives (director and programme manager) of a human rights organisation. Discussions were held in English in March and April 2018 and took place in Beirut. All discussants provided oral informed consent to participate and were assured that their identity would remain anonymous.

<sup>2</sup> For more information, see the statistical section of the report.

<sup>3</sup> For example, the Head of General Security, Major General Abbas Ibrahim estimates the total number of refugees to exceed 2.5 million (Daily Star, 2017a).

<sup>4</sup> In 2018, UNHCR estimates the world's total number of refugees at 25,4 million. (UNHCR, 2017a).

evaluates the legal statuses – if any – pertaining to ‘asylum seekers’, ‘refugees’, and ‘migrants’ on the one hand, and the role of state and non-state actors on the other.

As the following sections will illustrate, differentiating between different legal categories - be it refugees, guests, asylum seekers, migrants - appears rather complex, and renders the governance of migration by a variety of (formal, but also informal) actors more difficult.

## 2. A long tradition of migration, mobility, and circulation

The geographical area of what is modern-day Lebanon has experienced several waves of migration inflow, outflow, and circulation (Tabar, 2010). As such, Lebanon, the Arab country with the longest history of migration, is traditionally characterized by highly fluctuating migration rates (MPC, 2013).

Under Ottoman rule (sixteenth to twentieth century), a number of emigration waves from Lebanon can be distinguished, mainly driven by economic prosperity, political motives, and the eruption of national and international conflicts (Tabar, 2010). In the late nineteenth century, Christian-Muslim communal conflicts (MPC, 2013), long periods of drought and famine (AUB, n.d.),<sup>5</sup> the economic crisis triggered by the collapse of the silk industry, the emergence of a middle class, increased urbanisation, and the fear of military conscription into the Ottoman imperial army drove many – particularly Christian – individuals to resettle. Emigration rates were high to the extent that by the end of World War I (1914-1919), a third of the population in Lebanon had emigrated (Tabar, 2010).<sup>6</sup> Following World War II, another wave of Lebanese emigration started in 1945, and would last until 1975.<sup>7</sup>

Emigration waves until then were characterized by the low-skilled profiles of emigrants (Bel-Air, 2017). The outbreak of the Lebanese Civil War (1975-1990) – including sectarian violence, Israeli and US led military invasions, social conflicts, militia strifes, Palestinian factions' participation to the civil conflict, Syrian military occupation, various massacres – as well as harsh economic consequences - not only led to large-scale internal displacement ranging from 50,000 to 600,000 individuals (Global IDP, 2004), but also spurred another wave of emigration, leading an estimate 990,000 people – all with greatly varying socio-economic profiles (MPC, 2013) – to leave Lebanese territories (Tabar 2010).<sup>8</sup>

In the post-war period after the 1990s, Lebanon has been witnessing an increase in skilled emigration, defined as individuals with over 10 years of education – often referred to as 'the brain drain' (Bendek et al., 2011). In 2015, 32% of emigration rates were comprised of a high proportion of individuals with high-skilled profiles; twice the rate of other categories of emigration (Ajluni and Kwar, 2015).<sup>9</sup>

<sup>5</sup> The Great Famine of Mount Lebanon (1915-1918) resulted from a blockade by the Allies and the Ottoman Empire, locust plagues, and long periods of drought. It led around 150,000 to 200,000 people to die of malnutrition, and cholera and typhoid epidemics; an estimated 20-30% of Mount Lebanon's population.

<sup>6</sup> Emigration was mainly concentrated in North and South America (Bel Air, 2017). Khater (2001, cited in Tabar, 2010) argues that the returning migrants brought along economic and social capital, that significantly contributed to 'the development of the tertiary sector (i.e. tourism, trading, and construction) and the building of the modern Lebanese state' by a dynamic, mainly Christian middle class (Tabar, 2010:4).

<sup>7</sup> Emigration initially centered around Australia, New Zealand, and France for permanent settlement, and around West-Africa for temporary settlement (MPC, 2013). In addition, threats to political stability and the economy following the 1967 Six-Day Arab-Israeli war intensified Lebanese emigration to newly emerging oil producing Gulf states (Bel-Air, 2017; MPC, 2013; Labaki, 1992, cited in Tabar, 2010).

<sup>8</sup> Mainly to Australia, Canada, United States, France, Germany, and the Gulf States.

<sup>9</sup> This can be explained by increasing levels of education, notably among women and men, whereas labour market opportunities are mainly concentrated in low productivity and low-paid sectors, oftentimes in informal working conditions (Bel-Air, 2017). Ongoing political instability, and an increased demand for tertiary-educated workforce in receiving countries compelled many to seek job opportunities abroad, mainly to Western countries and the Gulf States (Tabar, 2010:8).

Nowadays, the size of the Lebanese diaspora is estimated between four and 14 million, spanning all continents (Jaulin, 2006; The National Archives, 2007).<sup>10</sup> As a consequence, remittances are one of the major sources of income for the country: they make up for over 14% of Lebanon's GDP, with a total of 7.31 billion USD dollars at the end of 2016 (Credit Libanais Economic Research Unit, 2017).<sup>11</sup>

Historically, Lebanon has not only been characterised by its emigration waves, but also its immigration waves. Unique for its religious diversity with 18 recognized sects and rather liberal political and social realms, the area of present-day Lebanon has always been home to persecuted groups: its mountains mythically were a land of refuge to the persecuted Maronite christians since the fifth century. This immigration character did not change after the establishment of the state. Fleeing the massacres following the 'homogenization plan' of the Turkish nationalist party Union Committee and Progress to 'cleanse' Turkey's non-muslim populations (Sfeir, 2017), Armenian refugees arrived to Lebanon in three waves, in 1918, 1922, and 1939, respectively (Bel-Air, 2017). Between World War I and World War II, Kurds from Turkey and Christian Syrians and Assyrians from Iraq settled in Lebanon (Lebanon Support, 2015:11). During the '50s, economic migrants, as well as political refugees, both from Syria and Egypt, settled in Lebanon (Lebanon Support, 2015:11). Palestinians arrived in Lebanon following the Nakba, in 1948, 1967, and the 1990s, heralded notably by Arab-Israeli conflicts, the two-state partition and the Six Day war (1967). During the 80's, the Saddam Hussein regime, as well as United States' interventions starting in 2003, spurred the influx of Iraqi refugees into Lebanon. More recently, despite a long and undocumented<sup>12</sup> history of Syrian circular labour migration (Chalcraft, 2009), following the eruption of the Syrian crisis in 2011, Lebanon has experienced a sharp increase in Syrian refugees' presence, as well. The next section provides an overview of Lebanon's demographics over the period 2011 - 2017.

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<sup>10</sup> It is important to note, however, that official migration statistics are lacking, and at times rely on census data in countries of destination (Tabar, 2010; MPC, 2013). In addition, it remains unclear whether the children and grandchildren of Lebanese male citizens (who are entitled to Lebanese citizenship, which is passed down through paternal lines) are taken into consideration in such data (MPC, 2013).

<sup>11</sup> Lebanon ranks among the top twenty receivers of remittances in the world. On a per capita basis, Lebanon ranks the highest in the world, with Saudi Arabia as the main source (20% in 2015). Interestingly, remittance inflows exceed capital and financial inflows (\$6.27 billion in 2015), and even the combined level of foreign direct investment (FDI) and official development assistance (ODA) (\$3.35 billion in 2015). Remittances show a relatively stable pattern of inflow, and are generally not earmarked for specific purposes. In 2017, the inflow did not seem to be influenced by decreasing oil prices (An-nahar, 2017a). There are ongoing efforts to strengthen ties with the widespread diaspora. For example, the enactment of the 2008 parliamentary elections law allowed Lebanese residing abroad to vote, which spurred a debate on the political impact of an altered sectarian balance (Kechichian, 2017 cited in Bel-Air, 2017). Yet, concrete policies to strengthen ties with the diaspora, and prevent large numbers of emigration are yet to be developed (MPC, 2013).

<sup>12</sup> Estimates indicate that prior to the eruption of the Syrian crisis (2011) approximately 300.000 to 600.000 Syrians resided in Lebanon (World Bank, 2013:83; Syria Needs Analysis 2013:4) and traditionally worked in 'informal, low-paid, low-skilled, and low-protected structures' (Lebanon Support 2016b; Chalcraft, 2009).

### 3. Lebanon: a socio-political overview

Lebanon is a consociational democracy (Lijphart 1969; Picard, 2002), combining ‘republican, representative, parliamentary, democratic liberal and confessional characteristics’ (Majzoub 2002: 250-256 cited in Hamd, n.d), instilled by the 1943 National Pact, and reapportioned by the Tai’f Agreement at the end of the Civil War that shook the country between 1975 and 1990. Until today, political representation in Lebanon is divided along a power-sharing structure, that ensures ‘equal’ representation among the countries’ biggest sects, based on the 1932 census.

#### Distribution of powers

Article 17 of the Lebanese Constitution entrusts the executive power to the (confessionally-mixed) Council of Ministers, headed by the Prime Minister. The Prime Minister, in turn, is appointed by the President, in consultation with the Parliament. The president is appointed by the Parliament. By custom, the President must be Maronite Christian, the Prime Minister Sunni, and the speaker of Parliament Shi’ite.

Article 16 of the Lebanese Constitution stipulates the Parliament as the legislative power. In total, the Lebanese Parliament consists of 128 seats. Both the Council of Ministers and Chamber of Deputies have the right to propose laws (Article 18). The constitutionality of laws is supervised by a Constitutional Council.

Lastly, Article 20 states that the judicial power ‘shall be exercised by courts or various degrees and jurisdictions’, and should consist of independent judges and litigants. In practice, the judicial structure consists of regular, religious and exceptional/special courts.

In addition, the Lebanese constitution, as stipulated by the *Tai’f* Agreement that formally ended the Civil War (1975-1990), includes the principle of ‘extensive administrative decentralisation’ in order to stimulate local development and encourage citizen participation. As such, Lebanon, a unitary state, consists of a higher deconcentrated tier, consisting of eight governorates, and a lower deconcentrated tier of 25 districts. The decentralised tier consists of 1108 municipalities – a relatively high number compared to other countries - and 56 municipal federations (Democracy Reporting International, 2017). Although ‘by law, [they are] granted a significant level of autonomy and a wide array of functions, municipalities are in reality hindered by conflicting legislative texts, the absence of a viable accountability mechanism, administrative and fiscal bottlenecks, and heavy central government control’ (Democracy Reporting International, 2017).

The massive influx of Syrian refugees since 2011 – at times even doubling town population sizes (Oxfam, 2015) have led local authorities – without proper capacities – to assume increased responsibility, notably for the implementation of security measures (Oxfam, 2013:15).

#### Socio-economic, political, and cultural context

Lebanon’s ‘merchant republic’ (Gates, 1998) and economic system have historically been based on liberalism and ‘*laissez faire*’ aiming at reaching immediate economic growth, rather than seeking long-term development goals. In the same logic, after the end of the Civil War (1990), reconstruction efforts focused on rebuilding infrastructure, and promoting economic growth, rather than prioritising social and economic reforms (AbiYaghi & Catusse, 2011). The foundation for political and economic reforms spanned from implementing a schedular system

of taxation, mainly levied on corporates, profits, payroll, and movable capital (IDAL, 2016), to a full-fledged free market system complying with the neoliberal doxa (Dibeh, 2005), whereas the development of the social (or welfare) system has never moved beyond ‘embryonic’ stages (Nasr, 2017). For example, over 52% of employees in Lebanon are not enrolled in any social security scheme (Nasnas, 2007).

The context of the post-war period is characterised by a predominant idea of an ‘absent’ or ‘weak’ state in which Lebanon is facing multi-layered social, social, and political challenges. Twenty five years after the end of the Civil War, Lebanon, a country with an already fragile governance system and substandard infrastructure, did not succeeded to provide its population with ‘efficient public and affordable public services’ (Apprioual, 2016:1). Until the present day, Lebanese cities and regions experience daily power cuts, water shortages, a faulty healthcare system, and an absence of public transportation (ibid).

In addition, the Lebanese labour market is characterized by high levels of informality, with around 50% of the population in Lebanon working in informal settings (Ajluni & Kawar, 2015). Although the Syrian crisis compounded this situation, unemployment rates had already been rising prior to 2011. Unemployment rates oscillate from 6% to 25%<sup>13</sup>, reaching up to 34% among Lebanese youth (Lebanon Support, 2016b). With the third highest worldwide public debt of 156,1% of GDP (IMF, 2018), projected to increase to 180% in 2023 (Reuters, 2018), and an account deficit of around 20% (World Bank, n.d.)<sup>14</sup>, Lebanon is seeking billions of dollars to stimulate the economy (El Koury & Agence France Presse, 2018).<sup>15</sup>

Today, Lebanon has been experiencing a waste management crisis, access to water and electricity has been rationed, and the infrastructure needs ongoing development. In 2016, it ranked 76th out of 188 countries in the Human Development Index (2016).

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<sup>13</sup> A Central Administration of Statistics (CAS) study of 2011 sets unemployment rates in Lebanon at 6%. A World Bank report of 2012 found a rate of 11% and other governmental institutions including the Ministry of Labour and the National Employment Office (NEO) estimate it to be between 20 and 25% (European Training Foundation, 2015; Longuenesse, 2011).

<sup>14</sup> Lebanon’s account deficit is estimated at 19,8%.

<sup>15</sup> For example, during the CEDRE conference on 6 April 2018 in Paris, over 11 billion USD in soft loans and grants from the international community were pledged to the Lebanese delegation (Daily Star, 2018a).

## 4. The power of data: scarcity of figures safeguarding a delicate sectarian balance

As mentioned above, the last official census in Lebanon was conducted in 1932 is still considered as a reference until today. Although the Central Administration of Statistics (CAS) is a public administration within the Council of Ministers, set up to ‘produce relevant and accurate statistics that are comparable over time’, the most recent demographic surveys were conducted in 2009, 2007, and 2004. Due to its political implications, statistical data on religious-sectarian affiliations is not collected by the CAS.

Moreover, grounds for entry, residency, and exit are generally not available (for example, asylum based on religious grounds, political grounds, family reunification, economic purposes; students; tourists), and information on the number of rejected (or de-registered) persons is unavailable. Finally, data on asylum is lacking and numbers on migration are inconclusive despite their availability – as will be demonstrated in this section.

Therefore, the most recent statistical information on Lebanon mainly relies on indicators and analyses provided by semi-independent agencies and organizations at the local, national or international levels, such as the UN and EU humanitarian, relief and development agencies. However, it is worth noting that data collected by UN relief agencies and organizations concerned with vulnerable populations, such as refugees, migrants, and asylum seekers, can slightly vary in reports and factsheets by the same agency or across different organizations within the same timeframe. This can be attributed to differences in reporting times between beginning, middle or end of year statistical reading or different methodologies and approaches used. In addition, although some UN statistics and databases are in open-access, they are often archived imprecise and/or inconsistently, making them hard to locate.

Consequently, Lebanon’s demographic changes remain an ‘enigma’ (Verdeil, E. and Dewailly, 2016 cited De Bel-Air, 2017) and numbers are, at best, ‘educated guesses’ (De Bel-Air, 2017), as they are generally not available, outdated, incomplete, or even contradictory. As a result, the numbers used throughout the report, herein, remain mere indications. More importantly, they do not take into account illegality and informality.

**Table 1: Estimates of the Lebanese population from 2011-2017:**

	Estimate s by	2011	2012	2013	2014	2015	2016	2017
Lebanese Population <sup>16</sup>	UNDESA (2017)	4,588,368	4,916,404	5,276,102	5,603,279	5,851,479	6,006,668	6,082,357
	CIA Factbook (2017)	-	-	-	-	-	-	6,229,794

Lebanon currently hosts approximately 1.1 to 1.8 million registered refugees, notably from Syria, Palestine, Palestinian refugees from Syria, and Iraq (UNHCR, 2018a; ECHO, 2018;

<sup>16</sup> The Lebanese population is diverse in terms of ethnicity and religion. According to the CIA World Factbook, 95% of the Lebanese citizens living are considered Arabs, approximately 4% are Arminians and 1% are of diverse origins (2018).



LCRP, 2018:8). The following table presents the estimates for the biggest refugee communities in Lebanon; from Syria, Iraq, and Palestine. It should be noted, however, that although UNHCR and UNRWA estimates are used as the main sources for numbers on Lebanon's refugee population, little information is available on whether or not these databases are frequently updated,<sup>17</sup> especially taking into consideration that registration with these agencies occurs on a voluntary basis,<sup>18</sup> and that UN agencies can be requested to suspend registration for refugees – or even de-register them- by the Lebanese authorities. This was the case for UNHCR, that – upon governmental request – has been requested to 'temporarily' stop registering Syrian refugees (or, 'displaced' persons) as of May 2015: a decision that is still in place at the time of writing this report.<sup>19</sup>

**Table 2: Estimates of refugees by origin in Lebanon from 2011 - 2017:**

	Estimate s by	2011	2012	2013	2014	2015	2016	2017
Palestinian Refugees	UNRWA (2011, 2012a, 2012b, 2013, 2014, 2015, 2016a, 2016b, 2017)	433,000 - 455,373 (in figures)	436,154	441,543	449,957	452,669	458,369 - 504,000	463,664
	UNICEF (2014)	-	474,053	-	-	-	-	-
	Others	-	-	-	-	-	-	174,422 Lebanese Central Administra- tion of Statistics and the Lebanese & Palestinian

<sup>17</sup> De-registration (voluntarily or not) can, amongst others, occur upon departure from Lebanon, after death, or in case someone does no longer meet criteria for registration. It should be noted that the total number of registered refugees at UNRWA not necessarily reside in Lebanon. For example, in 2010, 'of the 425,000 refugees registered with UNRWA since 1948, only 260,000-280,000 [...] reside[d] in Lebanon'. (Chaaban et al., 2010). Similarly, although in 2017, the number of Palestinians registered at UNRWA amounts to 463,664 (UNRWA 2017), a census conducted by the Lebanese authorities indicated that the number of 174,422 was currently residing in the country.

<sup>18</sup> For example, those who are persecuted by the regime in their host country may deliberately avoid official documentation with any authority.

<sup>19</sup> As of then, Syrians registered at UNHCR are recorded as 'persons of concern'.

								Dialogue Committee (An-Nahar, 2017b) <sup>20</sup>  277,985 (LCRP, 2018:8)
Iraqis refugees	UNHCR Global Appeal, (2011, 2013, 2015) and UNHCR (2017b, 2018b) <sup>21</sup>	35,600 (including asylum seekers)	7,300 (including asylum seekers)	7,800 (including asylum seekers)	8,600 (including asylum seekers)	9,100 (including asylum seekers)	6,800	6,200
	Others	-	6,516 (UNICEF, 2014)	-	-	-	-	6000 (ECHO, 2018)
Palestinian refugees from Syria	UNRWA (2012c, 2012d, 2013, 2015, 2014, 2017)	-	7500-11,000	37,000	44,000	42,284 - 42,500	32,000 - 41,413	-
	Others	-	-	-	-	-	53,000 (DIIS, 2016)	30,675 (ECHO, 2018)  34,000 (LCRP, 2018:8)  45,000 (ANERA, 2018)

<sup>20</sup> In 2017, an official census was conducted by the Lebanese authorities in 12 Palestinian camps, and 156 informal settlements across the country. Statistics from this census show big discrepancies with UNRWA's numbers, which can be explained by large numbers of Palestinians that may have left Lebanon without de-registering from UNRWA (Chaaban et al., 2010).

<sup>21</sup> It is worth noting that the numbers cited in the Global Appeal Report are 'planning numbers', in other words, they may not be the exact numbers, rather numbers that help the UNHCR to plan their responses and interventions in Lebanon.

Syrian Refugees <sup>22</sup>	UNHCR - Syria Regional Refugee Response Lebanon (2012, 2018a)	-	26,074 (May)	576,463	1,120,518	1,172,753	1,033,513	1,001,051
	Others	3,800 (UNHCR cited in Holmes, 2011)	126,939 (December) (UNICEF, 2014)	-	-	-	-	-
Sudanese Refugees	UNHCR Global Appeal (2012, 2013a, 2013b, 2015)	490 (asylum seekers only)	220 (asylum seekers only)	600 (asylum seekers only)	-	470 (including asylum seekers)	-	-
		-	-	-	-	800 (Sawt alNiswa, 2015)	-	-

Additionally, according to the records of the Ministry of Labour in 2017, Lebanon has 252,317 officially registered migrant workers (See Table 3). Around 80% of this number are migrant domestic workers (The General Security, 2016:16). Combined together, refugees and migrant workers make up for approximately 25% - 30% of Lebanon's population (Al Jazeera 2017; ECHO, 2018).

<sup>22</sup> Among the Syrian refugees, there are several ethnic minorities that fled the war in Syria such as the Syrian Kurds. There are no consistent records of the ethnic composition of the Syrian refugees in Lebanon. According to news sources, Kurdish refugees took refuge in the areas of Bourj Hammoud, Nabaa, and Bourj El-Barajneh camp, as well as other areas (Weppi, 2016).

**Table 3: Registered migrant workers in Lebanon from 2011-2017 by the Ministry of Labour (2018):<sup>23</sup>**

Nationality	2011	2012	2013	2014	2015	2016	2017
Sinhala (Sri Lanka)	14,053	11,803	8,733	9,823	8,867	8,184	7,230
Egyptians	23,167	21,461	17,545	917	18,457	19,008	20,005
Ethiopians	45,707	62,654	57,418	65,961	73,419	105,360	138,682
Bangladeshi	40,380	41,360	32,571	44,677	49,136	48,355	41,993
Filippino	29,141	24,479	19,266	5,382	23,606	22,068	20,818
Nepalese	9,542	5,657	3,357	3,368	2,668	-	1,306
Kenya	1,000	-	-	7,395	8,372	-	1,639
India	7,367	7,074	6,064	7,572	7,414	7,596	7,484
Total of migrant workers <sup>24</sup> (including other nationalities)	184,962	189,373	158,216	198,445	209,674	232,330	252,317

<sup>23</sup> The numbers in the table are totals of workers who were given new work permits or had their permits renewed for that given year. These numbers understate the actual number of migrant workers because they ignore unregistered workers, such as the majority of Syrian workers who have been working in Lebanon before the outbreak of the conflict. Especially the sectors agriculture and construction are characterised by high rates of informality (Ajluni & Kavar, 2015).

<sup>24</sup> This total is the sum of the nationalities detailed in the table, as well as the unmentioned numbers of other nationalities.

## 5. Asylum in Lebanon: between rights and praxis

The legal framework on refugee protection in Lebanon is composed of various provisions stipulated in the Lebanese constitution, international treaties, immigration legislation, and policies and decrees, that provide for access to asylum, as well as basic temporary protection for refugees, and prohibit *refoulement*.

### The 1951 United Nations Convention relating to the Status of Refugees

Despite its active role in the establishment of international refugee legislation and drafting the Universal Declaration of Human Rights, Lebanon, like many countries in the Middle East hosting large numbers of Palestinian refugees, has not ratified the 1951 United Nations Convention relating to the Status of Refugees (the ‘Geneva Convention’), and its 1967 Protocol,<sup>25</sup> which defines the term ‘refugees’, outlines their rights and freedoms, and specifies legal and protection obligations of host states.<sup>26</sup>

In the context of the Syrian crisis, the Lebanese government has adopted a dissociation policy in the context of the Syrian crisis, using a variety of terms (‘displaced persons’, ‘guests’) to refer to those who, under international law, would be classified as refugees.<sup>27</sup>

### The Lebanese Constitution

Still, although Lebanon is a non-party to the 1951 Convention and its 1967 protocol, it is constitutionally committed to provide basic temporary protection to individuals with well-founded fears of persecution. First of all, the preamble of the Lebanese constitution describes Lebanon as ‘a founding and active member of the United Nations Organization’ that abides by the 1948 Universal Declaration of Human Rights, emphasising that ‘the Government shall embody these principles in all fields and areas without exception’. Thus, this includes Article 14:1 of the Declaration of Human Rights, which provides that ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution’. Second, constitutional court decisions (for example, decision no. 2 of 1999; decision no. 4 of 2001; see Appendix II) provide that the preamble of the Lebanese constitution, as well as the human rights conventions it refers to – namely the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – form a ‘constitutional block’, which has acquired the legal force of a constitutional norm (Frontiers-Ruwad & EMHRN, 2015).<sup>28</sup> At the same time, *‘tawtīn’* – a

<sup>25</sup> In addition, Lebanon is not a party to the 1954 Convention relating to the Status of Stateless Persons, nor the 1961 Convention on the Reduction of Statelessness.

<sup>26</sup> Janmyr (2017) gives four plausible explanations why Lebanon has been rejecting to ratify the 1951 Convention on the Status of Refugees, or its 1967 protocol. In sum, she refers to the uncertainty regarding the implications (and obligations) for Lebanon of such ratification, the benefits of shifting responsibilities to third parties (such as UNHCR), the unwillingness to violate ‘good neighbourliness’ principles between Arab countries that might occur from such recognition, and lastly, the redundancy of it, given that Lebanon already applies provisions of the Convention and its Protocol on a voluntary basis, is bound by human rights principles, and due to general (international) criticism regarding the Convention and its Protocol.

<sup>27</sup> Although the word ‘refugee’ is used in some legal provisions, these mainly refer to Palestinian refugees.

<sup>28</sup> As confirmed by a lawyer/researcher specialised in migration governance during a interview, Beirut, April, 2018.

concept allowing for multiple interpretations, which roughly can be translated as permanent settlement of foreigners – is explicitly prohibited in the preamble of the constitution (as amended in 1990).

### **International treaties and *non-refoulement***

In addition, Lebanon is bound by international treaties to which it is a party to provide basic temporary protection to asylum seekers and refugees, notably without imposed time limits or discriminations based on nationality or ethnicity (for an overview of international human rights instruments, see Appendix I). Moreover, by means of customary international law, as well as by peremptory norms under international law (ALEF, 2013), and by virtue of having ratified the United Nations Convention Against Torture and the International Covenant on Civil and Political Rights (Frontiers Center, 2013) Lebanon is committed to, amongst others, the principle of *non-refoulement*<sup>29</sup> (UNHCR, 1977).

### **Bilateral agreements**

Other international agreements, notably between Syria and Lebanon, rationalising an open border policy between the two countries after the end of the Lebanese Civil War, include three bilateral treaties facilitating (i) the free movement of goods and people,<sup>30</sup> (ii) the freedom to reside, work, and practice economic activity,<sup>31</sup> and (iii) the right for nationals from both countries to enjoy the other state's treatment, rights, and obligations in compliance with prevailing national laws and regulations (CLDH, 2013; Syrian Lebanese Higher Council, 1991c). Until today, these bilateral agreements, together with the 1992 Treaty of Brotherhood, Cooperation and Coordination governing foreign policy between Lebanon and Syria and the 1993 Agreement for Economic and Social Cooperation and Coordination, that was developed to regulate Lebanese-Syrian relations during the period of Syrian occupation, govern Syrian nationals' presence, as well as their access to the labour market in Lebanon, facilitating a long history of migration and circulation, characterised by an 'uncharacteristically free' labour market between Syria and Lebanon (Chalcraft, 2009; CLDH, 2013).<sup>32</sup>

### **Domestic legislation**

Despite aforementioned provisions stipulated in constitutional principles and international agreements, at the national level, a formal and comprehensive refugee legislation framework remains embryonic in Lebanon. Asylum seekers are subjected to immigration laws monitoring the entry, residency, and departure of foreigners, which include some provisions pertaining to the concept of asylum. Foreign presence in Lebanon is mainly governed by provisions of the

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<sup>29</sup> The principle of *non-refoulement* is considered to be one of the most essential components of international refugee law, and prohibits the forcible expulsion of those whose life, or freedoms, would be under threat. Despite the fact that Lebanon is not a signatory to the 1951 Convention, this principle has nevertheless been articulated in some provisions in domestic legislation, as will become apparent in this section.

<sup>30</sup> Article 2 of the Bilateral Agreement on the Regulation of Transport of Persons and Goods (Syrian Lebanese Higher Council, 1991a).

<sup>31</sup> Article 1 of the Bilateral Agreement for Economic and Social Cooperation and Coordination (Syrian Lebanese Higher Council, 1991b).

<sup>32</sup> Policies adopted in 2014 and implemented in 2015 strictly limited the entry and residency of Syrian nationals wishing to enter to or reside in Lebanon.

1962 Law Regulating the Entry and Stay of Foreigners in Lebanon and their Exit from the Country (Lebanon Migration Law, 1962).

Chapter VIII includes six articles related to - political - asylum. First of all, Article 26 stipulates that 'any foreign national who is the subject of a prosecution or a conviction by an authority that is not Lebanese for a political crime or whose life or freedom is threatened, also for political reasons, may request political asylum in Lebanon.'<sup>33</sup> It is noteworthy that provisions in Article 27 stipulate some basic asylum procedures, including refugee registration procedures (Article 28),<sup>34</sup> the right to reject asylum (Article 29),<sup>35</sup> and requirements to refrain from all political activity after asylum has been granted (Article 30). Ironically, while article 27 provides for a Committee, consisting of the Minister of Interior, and The Director-Generals of the Ministries of Justice, Foreign Affairs, and General Directorate of General Security, it explicitly denounces the right to appeal asylum adjudication, even in the case of abuse of power.<sup>36</sup> Importantly, Article 31 provides for the *non-refoulement* of former political refugees: 'In the event that a former political refugee is deported, he or she may not be removed to the territory of a country where his or her life or freedom is threatened'.

However, none of these articles include details on the application procedure (length, steps, interviews, questionnaires, fingerprints, photos, health checks), different actors and their respective responsibilities, or procedures and timeframes following rejection of the asylum application. As such, these asylum procedures are to be further developed, not in the least because the provisions only apply to those who seek refuge on political grounds, although in reality, individuals seeking refuge do so for a variety of motives that may change overtime (Koser and Martin 2011). What is more, is this asylum mechanism appears non-functioning: asylum has only been recorded once since its establishment (Kyodo, 2003).<sup>37</sup> Consequently, in the absence of a comprehensive domestic legal framework that is able to absorb refugees and asylum seekers, they are often considered irregular migrants.

## Irregular migration

Whereas asylum procedures are left relatively implicit in the current legal framework, irregular migration is explicit denounced. Chapter IX of the Law of Entry and Exit contains provisions on penalization of illegal entry or presence. Article 32 dictates a penalty (one to three months imprisonment and/or a fine), upon entry that is not in compliance with provisions stated in the Law. For non-Lebanese, these provisions include holding valid documentation, a visa, and

<sup>33</sup> In addition, the article stipulates that 'The definition of political crime contained in articles 196 and 197 of the Penal Code shall be taken into consideration. The provisions of articles 30 to 36 of the Penal Code respecting extradition shall remain applicable'.

<sup>34</sup> Article 28 states that 'A special card shall be issued by the General Directory of General Security to a political refugee. This card shall contain all the information concerning the identity of the refugee and the conditions to which the refugee shall be subject'.

<sup>35</sup> That is, 'The committee may refuse to grant asylum or may cancel it at any time or limit it by requiring the person, for example, to remain in a specific place'.

<sup>36</sup> Article 27 states that 'Asylum shall be granted pursuant to an order made by a committee the membership of which is as follows: Ministry of Interior, President; The Directors of Justice, Foreign Affairs and the General Directorate of General Security, Members. [...] The decision issued by this Commission is absolute and may not be challenged, even for abuse of power'.

<sup>37</sup> Asylum was granted in 2001 to a member of the Japanese Red Army who helped carrying out a massacre killing 26 people and injuring 76 at an Israeli airport; as such, the case was considered highly controversial. That is not to say, of course, that asylum seekers and refugees did not enter to and reside on Lebanese territories under other categories.

legal entry through one of the posts of General Directorate of General Security. Lastly, Article 17 requires that ‘a foreign national shall be deported from Lebanon if the presence of that foreign national is considered to be a threat to public security.’<sup>38</sup>

As such, foreigners – as per the 1962 Law of Entry and Exit, as well as per the Lebanese Constitution, the Lebanese Penal Code, and the Criminal Procedural Code (Sahin-Mencutek, forthcoming) – are liable to arrest, penalties, and deportation by the General Directorate of General Security (GSO). UNHCR’s attempt to exempt refugees and asylum seekers from criminalization of illegal entry in 2010, did not materialize (Frontiers-Ruwad & EMHRN, 2015). As will be argued in following sections, arrest and (arbitrary) detention based on illegal entry or residency are systematically used in Lebanon (Frontiers-Ruwad & EMHRN, 2015).

Lastly, under Lebanese law, human trafficking is prohibited. Anti-trafficking law no. 164 (2011) prescribes penalties varying from five to fifteen years of imprisonment for sex trafficking and forced labour (Shaheen, 2016).<sup>39</sup> Lebanon has entered the readmission agreements, bilateral agreements, and international agreements that regulate the readmission of illegal migrants, and prescribe cooperation to prevent and control irregular migration (CARIM, 2009a; 2009b; 2009c; 2009d; 2009e; 2009f; Council of the European Union, 2002; United Nations, 2000a; 2000b; 2001).

Still, although the right to asylum and basic temporary protection is entrenched in the Lebanese Constitution, and provided under international conventions signed and ratified by Lebanon, Lebanon has refused to abide by them, which can be traced back to the prolonged Palestinian displacement (Stevens, 2014), that clearly determined how refugees in Lebanon are treated nowadays. Although these international instruments constitutionally take precedence over the national legal framework governing access to asylum, in reality, this principle is rarely adhered to (ALEF 2013; Janmyr 2017; Stevens, 2016), despite court rulings, as will be argued in the next sections in this report.

Since the onset of the Syrian crisis in 2011, the already fragile domestic legal framework for refugees and asylum seekers has been placed under significant strain, and was unable to absorb the mass influx of refugees. As such, it has failed to provide a pathway to guarantee access territories, to rights and to protection of refugees and asylum seekers.

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<sup>38</sup> The Director of the General Directorate of General Security (GSO) is required immediately to submit to the Ministry of Interior a copy of his or her decision. Deportation shall be effected either by notification of the person affected of the order to leave Lebanon within the time set by the Director of GSO or by having the person deported taken to the border by the Internal Security Forces (ISF).

<sup>39</sup> A prostitution network consisting of 75 Syrian women was discovered in April 2016 by the Lebanese police. Under the guise of working for legitimate jobs, for example as waitress, agents recruited the women, only to hold them captive as sexual slaves (The Daily Star, 2016). Similarly, in April 2017, over 60 suspects were arrested from a prostitution network consisting mainly of (former) domestic workers (Daily Star, 2017b).



## 6. The legal status of asylum seekers, refugees, and migrants in Lebanon

In the absence of comprehensive national refugee law, a Memorandum of Understanding (MoU) – signed in September 2003 by UNHCR and Lebanon’s security agency General Directorate of General Security (GSO) – was the first step towards formal recognition and regulation of refugee presence, for the first time explicitly acknowledging the right to asylum on Lebanese territories for individuals with well-founded fear of returning to their home countries. Still, as argued in this section, many refugees are unable to regularise their status through this instrument. Contrastingly, migrant workers generally have legal papers, although in a precarious way, with high risks of losing their legal status at any moment.

### The UNHCR ‘refugee status’

The 2003 MoU clearly defines respective obligations of UNHCR and the Lebanese authorities regarding the rights of asylum seekers, Refugee Status Determination and finding durable solutions (UNHCR, 2004). The MoU was developed in the light of the Iraqi refugee crisis, following increased numbers of detention and deportation by GSO rendering the Gentlemen’s agreement between UNHCR and the Lebanese authorities since 1963 ineffective. Although it was regarded as an unprecedented step, its implications highly impacted the legal status of refugees and asylum seekers.

First of all, the MoU reiterates Lebanon’s position as a transit country, and peculiarly defines the term asylum seeker: ‘Whereas Lebanon is not an asylum country [...] the term ‘asylum seeker’ shall mean, for the purpose of this Memorandum, ‘a person seeking asylum in a country other than Lebanon’. Article 1 narrows this definition down to those who register at UNHCR after 2003 within two months of illegally entering Lebanese territories, and who apply to UNHCR for refugee status within two months of their arrival in the country (Trad & Frangieh, 2007), thus excluding those who entered on legal grounds, before 2003, or those not registered or rejected by UNHCR.<sup>40</sup>

Second, Article 8 of the MoU assigns UNHCR in specific cases with the conduction of refugee status determination (Article 8, MoU). As such, it provided for the issuing of temporary residence – or circulation – permits by GSO for asylum seekers, normally valid up to 3 months, allowing UNHCR to adjudicate individual asylum claims (Article 4 and 5, MoU). Upon recognition, the circulation permit can be extended for 6 to 9 months by the GSO (Article 9, MoU). Still, the MoU has been met with vast criticism: although UNHCR is administered with refugee status determinations, such determinations are not per definition formally recognised by the Lebanese authorities (and thus do not per se result in legal status of refugees). Moreover, the MoU does not explicitly recognize the principle of *non-refoulement*. Although *non-refoulement* is respected for a period of one year, during which refugees are to be resettled, refugees again face the risk of deportation in case resettlement attempts fail (Frontiers-Ruwad & EMHRN, 2015).

Furthermore, during this limited period, UNHCR bound itself to find a durable solution for refugees. The MoU emphasized that ‘the only viable durable solution for refugees recognized under the mandate of UNHCR is the resettlement in a third country’. Given that UNHCR lacks authority or the capacity to guarantee acceptance in resettlement states (Frangieh, 2016;

<sup>40</sup> The majority of Iraqi refugees entered Lebanon on illegal grounds from Syria, that, at the time, was one the largest receivers of Iraqi refugees as it had no visa restrictions for citizens from Arab countries.

Janmyr 2018:395), and lengthy bureaucratic processes for resettlement can take up to years, this has significantly hampered UNHCR's resettlement efforts. Indeed, refugee registration, refugee status determination and resettlement rarely occurred within the twelve-month period (Human Rights Watch, 2007). A legal expert explains:

UNHCR doesn't have a mandate to find a durable solution: it has a mandate to advocate for durable solution but not to provide them. Durable solutions are state solutions, for example local integration, resettlement, voluntary return. [This MoU] puts the advocator of durable solutions in charge and responsible to find the durable solutions, which is impossible. We call this obligation *de moyens*<sup>41</sup> : an obligation to put all the effort into finding that solution. It's not an obligation of result, because they cannot guarantee the result.<sup>42</sup>

Importantly, the MoU – unlike MoUs signed, for example, in Jordan – was not designed for mass influx of refugees (Frangieh, 2016; Frontiers-Ruwad & EMHRN, 2015). Five months before signing the MoU, UNHCR declared a temporary protection regime (TPR)<sup>43</sup> for Iraqi refugees residing in Jordan, Syria, and Lebanon. Under the TPR, which anticipated large-scale Iraqi displacement, refugees should be admitted to safety, human rights ought to be respected, *non-refoulement* should be respected, and safe repatriation can be considered – conditions permitting (Frontiers-Ruwad, 2007). Moreover, it provided that Iraqi nationals should not be individually interviewed for refugee status determination, with the exception of extremely vulnerable individuals (UNHCR, 2007). As a result, by the end of 2006, a mere 561 Iraqi nationals were recognized as refugees under the MoU, whereas 2,356 individuals only received UNHCR asylum seeker certificates under the TPR (Danish Refugee Council, 2005). Yet, the TPR was implemented by UNHCR without any formal agreement by the Lebanese state (Frontiers-Ruwad, 2007); UNHCR asylum seeker certificates were not acknowledged by the Lebanese authorities, subjecting refugees under the TPR to be considered as illegal migrants, liable to arrest and detention. In addition, the lack of formal recognition as refugees, combined with the fact that under the TPR, claims for refugee status were not assessed, contributed to a 'state of limbo' for Iraqi refugees (Trad and Frangieh, 2007:11). In reality, for those recognised under the MoU – as opposed to those with the TPR status – little significance was given to their UNHCR's refugee status determination by Lebanese authorities either (Kagan, 2012) and residency permits were not issued in a systematic or timely manner (Frontiers-Ruwad & EMHRN, 2015). These examples demonstrate a divergence between UNHCR refugee status determination and formal refugee status acknowledgement by the Lebanese authorities.

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<sup>41</sup> *Obligation de moyens*, or obligation of means, is a legal term that obliges parties to achieve the intended purpose to their best extent, whereas the *obligation of result* provides for a concrete result.

<sup>42</sup> Interview with lawyer/researcher specialised in migration governance, Beirut, April, 2018.

<sup>43</sup> 'Temporary protection' refers to arrangements developed by the international community, offering protection of a temporary nature in response to large-scale displacement, and includes those who do not meet the refugee definition, or fall outside the 1951 Convention (UNHCR, 2018b). 'The rationale of the temporary protection regime is to avoid the overwhelming of refugee status procedures and to maintain the possibility of return once there is a political settlement of the conflict in the country of origin.' (Trad & Frangieh, 2007). Opposed to the temporary protection regime under the European Union, applicable up to three years, UNHCR's notion of temporary protection is not constrained by time specifications, adding to the uncertain nature of this 'temporary' status.

In addition, the number of Iraqi refugees saw a significant rise, almost doubling between 2006 and 2007.<sup>44</sup> In this vein, UNHCR granted a *prima facie* status<sup>45</sup> to all Iraqi nationals from central and southern Iraq as of January 2007. However, similar to UNHCR's TPR status determination, the *prima facie* status was virtually not acknowledged by Lebanese authorities, either.

If in 2007, the influx of 2600 Iraqi refugees into Lebanon was considered unprecedented, the mass influx of Syrian refugees as of 2011 reached new peaks. With 1,1 million – a significantly higher number than the number of Iraqi refugees – the MoU in its current state was unable to regulate mass influx of refugees who, moreover, entered lawfully following the open border policy constituted by bilateral agreements between Syria and Lebanon.

Although UNHCR has not formally declared a *prima facie* status, nor established a temporary protection regime for Syrian refugees, it appears to apply 'what could be considered a *de facto prima facie* refugee status determination' (Janmyr, 2018:400), and regards Syrian presence as a 'refugee movement', considering that 'these Syrians are seeking international protection and are likely to meet the refugee definition' (LCRP, 2018). This includes persons displaced from Syria,<sup>46</sup> Syrian nationals registered – or seeking registration – as refugees by UNHCR, and Syrian *de facto* refugees (ibid).

As such, Syrians in Lebanon are unable to legalize their presence through the MoU, at least those arriving after 2011. In this light, UNHCR has attempted to renegotiate a new MoU, in 2013, to '[address] key protection gaps identified in the 2003 MoU, and include[s] issues such as *non-refoulement*, refugee status determination, registration, detention and the right of refugees to work as well as durable solutions' (Janmyr, 2018:5). Despite lengthy negotiations, these discussions never materialized. Nowadays, the MoU is used for non-Syrian and non-Palestinian refugees.<sup>47</sup> The status of refugees and asylum seekers who are recognized by UNHCR, but fall outside the MoU – for example those who entered on legal grounds, *prima facie* refugees, or those under the complementary or temporary protection regime – is not legalized.

In fine, the current legal landscape in Lebanon does not offer a strong framework to uphold the rights the rights of refugees and asylum seekers, or to legalize their presence. Adding to this is the fact that, as of June 2012, Lebanese authorities have adopted a disassociation policy for Syrian refugees, using the term '(temporarily) displaced' persons, rather than 'refugees'. Although Palestinian refugees are referred to as 'refugees', those displaced in other contexts are not; scholars argue that the use of the term 'refugee' would encourage permanent settlement, and oblige Lebanese authorities to uphold any extra protection that is – arguably – believed to be inherent to this term. That is not to say that refugees and asylum seekers have not found refuge in Lebanon; yet, they may have done so under other formal categories of entry and residency.

However, a type of migration that is favoured under certain premises, is migration for economic purposes (Stevens, 2016).

<sup>44</sup> See the statistical section of this report.

<sup>45</sup> *Prima facie* status is used during mass displacements, as it legalizes the status of a group of refugees fleeing under the same circumstances. It also grants international protection in accordance to the 1951 Refugee Convention – in this sense, it differs from the temporary protection regime (Trad & Frangieh, 2007).

<sup>46</sup> Which can include Palestinian Refugees from Syria, Lebanese returnees, and (un)registered Syrian nationals.

<sup>47</sup> Since 2009, the MoU is in place again for Iraqi refugees.

## The Lebanese labour market & economic migration

Decree no. 17561 (September 1964, see Appendix II) regulates foreign labour in Lebanon. Besides attributing roles (depending on different categories of workers) to either the Ministry of Labour, or General Directorate of General Security, it adopts three principles restricting foreigners' right to work in Lebanon. The Lebanese government adopts the principle of preference of nationals, allowing foreigners to work in those professions that are not eligible for Lebanese (Longuenesse & Hachem, 2013; UNDP, n.d.a).<sup>48</sup> In this vein, the Ministry of Labour has the authority to enumerate a list of professions reserved only to Lebanese nationally, usually updated on an annual basis (for example: Decision no. 1/29 of 2018 Regarding the Professions exclusive to Lebanese Nationals). In reality, 'liberal' professions<sup>49</sup> are excluded for foreign labour, whereas manual and clerical jobs remain freely available.<sup>50</sup> Syrians generally are constrained to work in three sectors: construction, agriculture, and 'environment'.<sup>51</sup>

Second, it stipulates that foreigners in Lebanon are to obtain a work permit. In practice, this requires foreigners wishing to enter Lebanon to obtain pre-approval from the Ministry of Labour before entering the Lebanese territories, allowing for a temporary residency permit. A work permit can be obtained within ten days of arrival.<sup>52</sup> After granting a work permit, the process of applying for a residency permit can start through GSO (IDAL, n.d.).

Third, it incorporates the principle of reciprocity, mutually allowing foreigners and locals from two respective states to enjoy the same rights and privileges in each others' country.<sup>53</sup>

However, it should be noted that the agricultural and domestic workers, who traditionally consist of large numbers of foreign workers, are excluded – and therefore do not enjoy protection – from the Lebanese Labour Law. The vast majority of foreign workers (80%) are migrant domestic workers (The General Directorate of General Security, 2016:16), mainly from Asian or African countries. For them, Lebanon – like many countries in the Middle East – operates versions of the kafala ('sponsorship') system, which 'is comprised of various customary practices, administrative regulations, and legal requirements' (Kafa (enough) Violence and Exploitation, 2012) and is implemented by the General Directorate for General

<sup>48</sup> For example, employers should post vacancies available in local newspapers, during the process of applying for a work permit for foreigners. Work permits are granted to foreigners only in the case when no Lebanese responds to the advertisement. Otherwise, the employer must justify his preference for a foreign worker.

<sup>49</sup> Skilled, syndicated professions, for example in law, medicine, engineering or pharmacy sectors.

<sup>50</sup> Ministerial decision no. 67/1 (June 27, 2005) allowed Palestinians born on Lebanese soil and officially registered at both the Lebanese Ministry of Interior and UNRWA access to 70 professions and occupations, that had previously been reserved to Lebanese citizens only (see Appendix II).

<sup>51</sup> It should be noted that Decision no. 1/29 of 2018 Regarding the Professions exclusive to Lebanese Nationals does no longer explicitly mention Syrians being restricted to work within the 3 sectors - despite the fact that during the past years, the sectors appeared to have expanded (for example: the 'cleaning' sector was expanded to 'environment', which includes cleaning and maintenance, amongst others). However, the Ministry of Labour later clarified that the decision implicitly allows Syrians to work within these sectors (as was confirmed by Memorandum illustrating decision no. 1/29 on 21 March 2018 (see Appendix II)).

<sup>52</sup> As per the bilateral agreements, different rules should apply to Syrians; they should be able to enter Lebanon with an ID, have a temporary residency for 6 months, and then apply for a work permit within 6 months.

<sup>53</sup> Law no. 129 amending Article 59 of the Labour Code no. 13955 for the year 1946 exempted Palestinians living in Lebanon from the reciprocity of treatment condition, and lifted fees for work permits. However, liberal professions still remained reserved for Lebanese (see Appendix II).

Security. Sponsors, who can be Lebanese individual nationals<sup>54</sup> or employers, are held responsible for a workers' legal acts through a notarised pledge that ties a migrant domestic workers' residence permit to a sponsor. Importantly, the sponsor can withdraw his sponsorship at any time: migrant workers immediately lose their legal status upon termination of employment. This dependency leaves migrant domestic workers, employed on annual contracts, in an extremely vulnerable situation, as sponsors exercise considerable control over workers' legal status, freedom of movement, and employment opportunities (Kafa (enough) Violence and Exploitation, 2012:11).

Although Lebanon has not ratified the 1949 Migration for Employment Convention, or the 1975 Migrant Workers Convention, constitutional principles bind Lebanon to apply the Universal Declaration of Human Rights<sup>55</sup>, as well as other international treaties signed and ratified by Lebanon.<sup>56</sup> In reality, however, migrant workers are often unable to access the rights enshrined in these instruments. Critics of the kafala system state that '[u]npaid wages, the confiscation of passports, extensive working hours and heavy workload approximating slavery, limited communication possibilities with fellow workers or families at home as well as psychological, physical or sexual abuse are only some of the violations of rights MDWs have to face regularly' (Benedek, et al., 2011:53). Worryingly, migrant workers are often unable to resign without a notarized release waiver signed by the employer and approved by the authorities. Although foreign workers, in general, have relatively easy access to legal status, it should be noted that without up to date sponsorship, migrant domestic workers in Lebanon are liable to penalties, imprisonment, and deportation under the 1962 Law regulating the entry and residency of foreign nationals (Jones, 2015). Despite heavy criticism from human rights advocates, the kafala system has been applied for Syrians since 2015, as well.

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<sup>54</sup> It is noteworthy that during the time of writing this report, it was confirmed during an informal interview at the General Directorate of General Security (Beirut, May, 2018), that it is no longer possible for Lebanese individuals to become a *kafeel* (sponsor) for those already residing in Lebanon, unless the foreigners are 'transferred' from one *kafeel* to another, and have legal residency. Those residing illegally in the country, or those who do not have a former *kafeel*, have to leave the country before entering the *kafala* system – and risk not being able to enter the Lebanese territories again.

<sup>55</sup> For example, article 23 stipulates the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Article 24 provides for the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. Article 5 prohibits torture or cruel, inhuman or degrading treatment or punishment.

<sup>56</sup> International Convention on Economic, Social and Cultural Rights, The International Convention on Civil and Political Rights, The Convention on the Elimination of all Forms of Discrimination against Women. ILO treaties signed and ratified by Lebanon that provide for the protection of migrant workers include the Abolition of Forced Labour Convention, 1957 and the Discrimination (Employment and Occupation) Convention of 1958.

## 7. Many actors, limited mandates, and the predominance of the security apparatus

Migration flows in Lebanon, in reality, are governed by decree, by a set of formal and informal policies that are formulated on an *ad hoc* basis and differentiate between different nationalities. Moreover, migration governance is characterized by a disparity between law and practice, and involves a variety of formal and informal actors (for an overview of the main actors in migration governance, see Appendix III).

Indeed, Article 27 of the 1962 Law on Entry and Exit calls for the establishment of a committee consisting of Minister of the Interior and the Directors of the Ministries of Justice and Foreign Affairs, and the General Directorate of General Security, adjudicated to grant asylum. In reality, this inter-ministerial committee – not to be confused with a comprehensive body for refugee status determination – appears to be cosmetic (Kyodo, 2003): the committee is *ad hoc* and not operational.<sup>57</sup> In this context, and in the absence of comprehensive refugee legislation, UNRWA and UNHCR, notably, have adopted important roles, and share some state responsibilities,<sup>58</sup> although the legal effect of UN involvement is confined.

### UNRWA, the Lebanese authorities, and the Palestinian refugees: service provision with limited rights

The Department of Political and Refugee Affairs (DPRA) – nested within the Ministry of Interior is administered, amongst others, with the task to register Palestinian refugees, review requests for identity cards and *laissez passer* travel documents before transferring them to the General Directorate of General Security, and the registration or approval of civil matters (birth, marriage, divorce, death, change of residence, change of sect) for Palestinian refugees.<sup>59</sup>

Importantly, the Department is to work closely with UNRWA Lebanon to provide social services for Palestinian refugees. Established in 1948 following the Arab-Israeli conflict,<sup>60</sup> UNRWA, a subsidiary organ of the United Nations General Assembly without protection mandate, is unique in its 'long-standing commitment to one group of refugees'. However, UNRWA's mandate is not stated in one place<sup>61</sup> but rather comprised of resolutions and requests passed by the General Assembly on a yearly basis (Bartholomeusz, 2010). It's contemporary mandate focuses on providing human development and protection services to Palestinian refugees – including those from Syria – in UNRWA areas of operation, although budgetary constraints significantly render UNRWA's work more difficult (Harris, G. & Gladstone, R., 2018; UNRWA, n.d.).

As such, Palestinians in Lebanon can be divided into three categories:<sup>62</sup> those registered with UNRWA and the Lebanese authorities (estimatedly 460.000), those registered with the

<sup>57</sup> Asylum was granted only once since its establishment. See footnote 45.

<sup>58</sup> For example, Slaughter & Crisp (2009) analyse UNHCR's role as a 'surrogate state', as does Kagan (2012).

<sup>59</sup> Decree no. 42 of 31 March 1959. See Shafie (2008), as well as Appendix I.

<sup>60</sup> Palestinian refugees are defined as 'persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict'. The descendants of Palestine refugee males, including legally adopted children, are also eligible for registration.

<sup>61</sup> UNRWA operates in five areas: Lebanon, Syria, Jordan and the West Bank and Gaza Strip. United Nations General Assembly Resolution 302 (IV) of 8 December 1949 (UNRWA, 1949).

<sup>62</sup> It should be noted that, as argued in the statistical section of this report, the total number of Palestinians residing in Lebanon remains unclear, and varies between 174,422 (An-nahar, 2017b) and 463,664 (UNRWA, 2017).

Lebanese authorities (between 10,000 - 40,000), and those who are registered at neither: 'Non-ID Palestinian refugees' (varying between 3,000 – 16,000) (Amnesty International, 2003 cited in Shafie, 2008).<sup>63</sup> Around 53% of the Palestinian refugees resides in one of the 12 Palestinian refugee camps, which are characterized by substandard housing standards, overcrowding, high rates of poverty,<sup>64</sup> poor levels of sanitation, and limited access to electricity and water, and are often considered 'pockets of criminality', with minimal access to them by state security apparatuses. In 2015, Palestinian's unemployment rate amounted to 23.2% (Chaaban et al., 2015:2).

Although initially welcomed, notably during periods of rising Arab nationalist sentiments during the 1950s and 1960s (Sfeir, 2017), protracted Palestinian presence for over four generations, in addition to the participation to Palestinian faction to the Lebanese civil conflict, have led to a set of restrictive measures and policies. Although Palestinians' access to basic rights is enshrined in international treaties signed by Lebanon, notably the 1965 Protocol for the Treatment of Palestinians in Arab States ('Casablanca Protocol'; see Appendix I), Palestinian refugees are treated by Lebanese law as a 'special category of foreigners' (Refugee Studies Centre, 2010), not in the least because the principle of reciprocity, which allows foreigners to claim the same rights and privileges as local citizens in their respective states, a priori does not apply to Palestinians, in the absence of a formally recognized Palestinian state.

For example, although Palestinians are allowed to work in some clerical jobs, highly skilled 'liberal' professions remain restricted, which include law, medicine, engineering, pharmacy, etc (Decision no. 1/29, 2018 Regarding the occupations exclusive to Lebanese Nationals: see Appendix II). At the same time, several amendments in 2005 and 2010 have improved registered Palestinians' access to work and social protection mechanisms, allowing for work permits to be extended up to three years,<sup>65</sup> lifting fees to obtain work permits, granting end of service compensation,<sup>66</sup> and access to the National Social Security Fund, although only partially.<sup>67</sup> However, it is noteworthy that conditions are formulated ambiguously, allowing for multiple interpretations of these provisions (Saghieh & Nammour, 2017).

Additionally, as non-Lebanese, Palestinians in Lebanon are prevented from owning or inheriting immovable property or real estate (law no. 296, April 2001: see Appendix II). Palestinian refugees have no access to Lebanese public medical services, and are therefore dependent on UNRWA and NGO services. Although Palestinians in general have access to public schools and universities, their access to public secondary schools is limited to 10% of total places, provided these places are not used by Lebanese (Refugee Studies Centre, 2010).

Based on the Casablanca Protocol, most Palestinians that are registered with UNRWA or the Lebanese Department of Palestinian Refugee Affairs, are eligible for for an identity card and a renewable special travel document. Although Palestinian refugees' right to residency and travel is subject to arbitrary implementation and changes the majority of registered

<sup>63</sup> 'The International Federation for Human Rights (FIDH) in March 2003 issued a report estimating there to be 10,000 of them; the US Committee for Refugees estimated 16,000; and the Danish Refugee Council, who carried out a survey in 2005, estimated the number at 3,000 people' (Shafie, 2008).

<sup>64</sup> Palestinian refugees in Lebanon have the highest poverty rates of all UNRWA areas of work, with an estimated 65% living under the poverty line (UNRWA, 2017).

<sup>65</sup> Decree no.14268 for 2005 (see Appendix II).

<sup>66</sup> Law no. 128 to amend Article 9 of the Social Security Law (SSL) (see Appendix II).

<sup>67</sup> Law no. 129 to amend Article 59 of the Labour Code no. 13955 for 1946 (see Appendix II).



Palestinians has legalized their presence (Refugee Studies Centre, 2010). As such, their freedom of movement is in general not restricted to (certain areas in) Lebanon (Sfeir, 2017).

As argued in this section, Palestinians, notably non-ID Palestinian refugees, face substantial challenges to enjoy human rights. Critics denounce this ‘manufactured vulnerability’ (Saghieh, 2015), which can be traced back to 70 years of Palestinian presence. As such, rather than preventing it, laws and policies facilitate *de jure* discrimination. Palestinian refugees from Syria (PRS) even face a more worrying situation due to their intersecting displacement profile.

### UNHCR: a larger mandate, with limited prerogatives

In 1963, the United Nations High Commissioner for Refugees (UNHCR) has been established in Lebanon,<sup>68</sup> with the primary responsibility to support the Lebanese Government in providing protection and assistance to individual non-Palestinian asylum seekers and refugees, for whom a ‘non-camp’ policy applies. UNHCR – unlike UNRWA – does have a protection mandate, and has been delegated with refugee status determination, and finding durable solutions, notably.

However, as argued in the previous chapter, little legal significance is given to UNHCR’s refugee status determination, notably for those that do not fall within the 2003 MoU – which is the case for the majority of refugees. As such, refugees and asylum seekers are not guaranteed access to territories, nor protected against *refoulement*. UNHCR’s and UNRWA’s role is ‘strictly circumscribed by the Lebanese authorities’ (Janmyr and Mourad, 2018). For example, this is visible in the fact that UNHCR saw a significant increase in budget from 49 million USD in 2012 to almost 465 million in 2017 (UNHCR Key Figures, n.d.). As such, certain positions within ministries, for example the Ministry of Social Affairs and the Ministry of Interior, are funded by UNHCR.<sup>69</sup> Similarly, UNHCR funds projects with the General Directorate for General Security, for example to facilitate registration processes with biometric scans (The Daily Star, 2014).

UNHCR’s growing influence does not result in policy changes (Janmyr, 2018), on the contrary, since May 2015, UNHCR has been requested to ‘temporarily’ suspend registration of Syrian refugees, and to deregister those who had returned to Syria – for example to receive medical aid that was unavailable or unaccessible in Lebanon (Lebanon Support, 2016c) or in order to vote (Stevens, 2016). In October 2014, at the peak of the refugee crisis and after years of apathy, alleged mounting strain on Lebanon’s economy and infrastructure moved the Council of Ministers – consisting of the Prime Minister, the Minister of Interior and Municipalities, the Minister of Social Affairs, and the Minister of Foreign Affairs and Immigrants<sup>70</sup> – to adopt the ‘October policies’. This series of policies, introduced under the heading ‘reducing the numbers’ was adopted in an attempt to halt the Syrian refugees’ influx at the Lebanese Syrian borders, to encourage Syrians who were already in Lebanon to return to Syria, and to formalize and control the presence of those who stayed (Lebanon Support, 2016a). The agency attributed with the task to implement these policies, was the General Directorate of General Security.

<sup>68</sup> Responsible for protection and assistance (non-Palestinian) refugees in UNRWA’s areas of operation, and all refugees (including Palestinian refugees) outside UNRWA’s areas of operation.

<sup>69</sup> As confirmed during an interview with a legal representative of UNHCR, Beirut, April 2018.

<sup>70</sup> For more information regarding the role of respective ministries, see Appendix III.



## Formal and informal measures: the role of security actors in migration governance

The General Directorate of General Security is the authority attributed with the task to regulate foreigner's entry and residency, which is done through administrative directives – that are often unpublished – and with minimal political or judicial oversight in the process, and in accordance with the 1962 law of Entry and Exit (Saghieh, N. & Frangieh, 2018).

Examples of the scope of the power of the General Security are the kafala system – that is implemented for migrant workers – and the 'administrative detention' of refugees. A representative of UNHCR illustrates:

The 1962 Law on Entry and Residency grants the GSO the right to deport people who might be a threat to public security and safety. [...] Until deportation, GSO has the right to detain this person in 'administrative detention'. However, administrative detention is not specified by law; so there is no duration or limit for.<sup>71</sup>

Arbitrary prolonged detention after the expiry of judicially imposed sentences, occurred extensively notably in the light of the Iraqi refugee crisis as a 'policy of deterrence' (Frontiers-Ruwad, 2008:6). Iraqi refugees were detained in large numbers<sup>72</sup> and presented with the option to sign release forms justifying the 'voluntary' nature of their departure, or to stay imprisoned, awaiting trial.<sup>73</sup> As such, unlawful detention coerced refugees to return, and thus can be regarded *de facto refoulement* (Frontiers-Ruwad, 2008:7).

More recently, the General Directorate of General Security's (GSO) role is visible through the analysis of a series of policies adopted by the Council of Ministers, and implemented for Syrian refugees by GSO. On the 31st of December 2014, new visa requirements based on a variety of 'categories' were introduced to regulate Syrian entry into Lebanon, although violating the open door policy constituted by bilateral agreements between Syria and Lebanon.

The introduction of these categories significantly prevented Syrians in Lebanon to maintain or obtain a legal status, marking a clear distinction between short-term visa's for purposes of tourism, business, shopping, property owners or tenants, study, transits, medical treatment, and appointments with embassies (Lebanon Support, 2016a), and long-term residencies (accompanied by a visa indicating the purpose of stay).

For long-term presence, the introduction of the new policy clearly distinguished between 'displaced' individuals and migrant workers. Most importantly, although a newly introduced 'humanitarian exception' category suggested entry for displaced Syrians, a refugee category was still lacking. In reality, the 'humanitarian exception' category only applies to 'unaccompanied and/or separated children with a parent already registered in Lebanon, persons living with disabilities with a relative already registered in Lebanon, persons with urgent medical needs for whom treatment in Syria is unavailable, and persons who will be resettled in third countries' (Amnesty International, 2015:11). Additionally, human rights activists arguably contest the Ministry of Social Affairs' presence at the borders, that is attributed with the task to screen Syrian entries for complying with the 'humanitarian exceptions' criteria. Although in the light of the Syrian crisis, no cases of *refoulement* are

<sup>71</sup> Interview with legal representative of UNHCR, Beirut, April 2018.

<sup>72</sup> For example, the 2003 MoU was developed in a context of significant rise in the detention and deportation of – mainly Iraqi and Sudanese – refugees since 1999 (Frontiers-Ruwad, 2008; Frangieh, 2016). During this period, General Security saw major reforms, invigorating its role as a security agency.

<sup>73</sup> Interview with a lawyer/researcher specialised in migration governance, Beirut, April 2018.

registered in Lebanon, lawyers and human rights activists emphasize that people rejected at border entry points wishing to (re)enter Lebanon are not included in these numbers.<sup>74</sup> A UNHCR representative illustrates:

Due to the current regulations, this could have happened many times. However the government would tell you that refugees are applying in the wrong category. For example, if I'm Syrian and I apply under the tourism category – because I have to – although I'm coming because I fear for my life and I am technically a refugee, this can be rejected. For the Lebanese government, I am then a tourist, because I applied for tourism. But at the same time, there is not a refugee category or humanitarian category at the border.<sup>75</sup>

The 'persons of concern' already registered at UNHCR were unable to regularize their status at General Directorate of General Security, and, moreover, were requested to sign a 'pledge to not work', prohibiting their access to the Lebanese labour market. For Syrian workers, in order to implement the October policies, the kafala system, highly contested by human rights advocates, was extended. In addition, Syrian labour in Lebanon was restricted to the sectors construction, agriculture, and 'environment' – all of which traditionally host large numbers of foreign, notably Syrian, workers.

Yet, the influx of Syrian refugees should be viewed in a context characterised by continuous waves of Syrian migration towards Lebanon. Chalcraft (2009) distinguishes a clear pattern of migration and return, to the extent that Lebanon, long before the eruption of the Syrian crisis in 2011, has been hosting an estimate 300 000 to 600 000 Syrians, who were mainly involved in seasonal and menial work (SNAP, 2013; World Bank, 2013). This renders a clear categorization of 'refugees' as opposed to 'migrants' more difficult as of 2011. A representative of a human rights organisation explains: 'We used to have Syrians who [...] were here [in Lebanon] as economic migrants, who were registered as refugees at UNHCR and then were resettled to other countries. At the same time, there are Syrians who were actually coming from Syria, who were in very vulnerable positions but couldn't show or prove their vulnerability to UNHCR, and were not registered [or resettled] because of that'.<sup>76</sup>

Lastly, residency renewal fees, although previously free of charge, were raised to a biannual fee of 200 USD – a significant amount for Syrian refugees, of whom 91% is currently estimated to be in debt and 71% of whom falls under the poverty line of 3.84 USD per day – and included administrative requirements (valid passport, entry slip) that many Syrians were not able to meet (LCRP, 2017; UNICEF, UNHCR & WFP, 2016). Still, even for those who met all criteria, and could meet all administrative and financial requirements, rules were applied in an arbitrary manner (Lebanon Support, 2016a).

In fine, the October policies meant a significant change for Syrian presence. Syrian refugees, over a million of whom are registered at UNHCR, generally were unable to enter Lebanon, or renew their residency at General Directorate of General Security. The consequences of illegality have been tremendous, severely restricting Syrians' freedom of movement – notably of men, who are more prone to arrest and arbitrary detention when

<sup>74</sup> Interviews lawyer/researcher specialised in migration governance, and the director and programme manager of a human rights organisation, Beirut, April 2018.

<sup>75</sup> Interview with legal representative of UNHCR, Beirut, April 2018.

<sup>76</sup> Interview with Programme Manager and Director of a human rights organisation, Beirut, April 2018.

passing Lebanon's many checkpoints. Yet, while sidestepping state institutions, refugees often find themselves unable to access work, school, social services, or healthcare services (Lebanon Support, 2016c). Being without legal status, prohibited or unable to enter the labour market while at the same time not receiving sufficient social services, led to large-scale deprivation of rights of Syrian refugees, children being born stateless, exposure to exploitation, and/or (sexual) abuse. Ironically, although measures initially were adopted in an attempt to regularize Syrian presence in Lebanon, conditions appear to have reinforced the existence of a black market (Lebanon Support 2016a; 2016b).

In this vein, and in a context where approximately 74% of Syrians is estimated to be without legal status (VaSyr 2017; p.13) and a mere 7% is approximately resettled<sup>77</sup>, regularising legal status through labour migration has also been used as a coping strategy by Syrians, at times even required General Directorate of General Security (Lebanon Support, 2016a).<sup>78</sup> the 'worker' category is used as – often the only – possibility towards lawful presence in the country. Yet, after the introduction of the kafala system, also referred to as 'modern slavery', the 'positive' effect of such a choice, often coincided with exorbitant amounts of money to be paid to emerging 'middleman' figures, should be critically evaluated.

The policy has seen minor amendments after 2015. In July 2016, following the London Conference and negotiations at the national and international level, the pledge not to work has been replaced by 'a pledge to abide by Lebanese laws' (Brussels Conference, 2017a) – which requires a work permit granted by the Minister of Labour himself. Given that around 3% of Syrians has applied to obtain a work permit in previous years (IRC, 2015), and 'few Lebanese companies want to take on this difficult, bureaucratic and expensive responsibility', (Faek, 2017) Syrians only have work permits in highly exceptional cases (Lebanon Support 2016b:11).

In addition, in February and March 2017, General Directorate of General Security announced to waive the hefty 200 USD fee imposed on Syrians wishing to regularize their status (The General Security, n.d.). As of then, Syrians were granted a six month residency permit – renewable for multiple times – free of charge. Yet, it should be noted that requirements (i) included UNHCR registration prior to 1 January 2015, and (ii) excluded those who has previously renewed their residency on tourism, sponsorship, property owner, or tenant grounds, in 2015 or 2016, regardless of whether or not this context was still applicable to them (WGPASDCL, 2017:11). Especially in a context where UNHCR, since January 2015, was requested to suspend registration of refugees, large numbers of vulnerable refugees are unable to benefit from the fee waiver (Human Rights Watch, 2017). Moreover, General Security offices (37%) have been reported to apply the waiver in an unsystematic way, or not to apply it, at all (WGPASDCL, 2017). Those registered under the kafala system, are still subject to the same fees (Alef Legal Safety 2017:12). Lastly, in exceptional conditions, individuals were able to change their kafeel between September 2017 to March 2018 (Frangieh, 2017).

In April 2018, Syrian children without valid national passport or identity who turned ages 15 to 18 after entering Lebanon, can obtain a temporary residency card via the General Directorate of General Security by presenting their Syrian individual status record, provided

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<sup>77</sup> From 2013 to 2018, 71,688 Syrian nationals in Lebanon have been resettled to third countries (UNHCR Resettlement Data Finder, n.d.).

<sup>78</sup> For example, Syrians who were caught working, have at times been required to deregister at UNHCR.

that it is not older than two years (Human Rights Watch, 2018a). Not only may this be problematic for some, the policy also excludes those who already turned 19.

In sum, in reality, little has changed improving the legal status and living conditions of Syrian refugees, since the policies have been implemented as of January 2015. Furthermore, notably following counterterrorism clashes in Aarsal between the Lebanese Army and Syrian Islamist militants in 2014, 'security raids on refugee settlements and arrests of refugees without legal status have frequented' and retaliatory measures have increased, to the extent that in June 2017, during a series of raids by the Lebanese Armed Forces, 5041 and 35042 refugees were arrested (WGPASDCL, 2017).<sup>79</sup>

Adding to this is the fact that some local municipalities and vigilante groups have emerged as security actors, by implementing night-time curfews and street patrols – which follow an unpredictable pattern – for refugees, (Lebanon Support, 2016d). In addition, approximately 3,664 Syrian nationals have been reported to be evicted from around 13 municipalities between early 2016 to early 2018, and 'almost 42,000 Syrian refugees remained at risk of eviction in 2017' (Human Rights Watch, 2018b). Despite being 'illegal and unjustified as they are not enforced by relevant security authorities for valid security reasons' (The Araby Weekly, 2016). Still, no fair, effective, independent monitoring and accountability mechanisms have been established (WGPASDCL, 2017). On the contrary, literature indicates how Lebanese state security agencies not only tolerate the emergence of informal actors and/or measures, but sometimes even rely on them (Lebanon Support, 2016d), severely restricting refugees to access basic human rights, enshrined in the constitution.

Combined with a lack of legal redress measures have created a constant atmosphere of fear among Syrians, going to extremes in order to seek refuge.<sup>80</sup> As opposed to prolonged arbitrary detention, a lack of legal status and precarious living conditions now appear to be used to encourage refugees to return, circumventing the principle of *non-refoulement* (Frangieh, 2014).

Indeed, increasing numbers of Syrians are reported to have returned in convoys organised by General Security to Syria<sup>81</sup> although perspectives on whether or not the necessary conditions for voluntary return to Syria have been met differ vastly within the international community (The Daily Star, 2018b; Foreign Affairs & International Relations, 2018).<sup>82</sup> UNHCR, that has been focusing on the resettlement and return of Syrian refugees since the eruption of the crisis in 2011, denied to have had a leading role in these returns, emphasising its role in

<sup>79</sup> By August 2017, 7,000 Syrians in the Aarsal area returned to Syria (Enders, 2017).

<sup>80</sup> In January 2018, 15 refugees were found frozen to death while trying to cross the mountainous border into Lebanon (BBC, 2018).

<sup>81</sup> For example, in April 2018, around 500 Syrians have returned Chebaa (Southern Lebanon) to Bait Jan, Syria (The Daily Star, 2018f). In June 2018, some 400 Syrians are reported to have returned to Syrian territories from Aarsal (Northern Lebanon), whereas around 3,000 refugees in Aarsal have submitted their names to the Lebanese authorities to return Syria (Perry & Creidi, 2018). In July 2018, around 720 people have returned (The Daily Star, 2018g). Following the Helsinki conference, in which Russian president Putin encouraged the return of Syrian refugees in Lebanon, Turkey, and Jordan, Russia has proposed to facilitate the return of 890,000 Syrian refugees from Lebanon (Al Jazeera, 2018) – a proposal that was embraced by Lebanese Forces leader Samir Geagea (The Daily Star, 2018e).

<sup>82</sup> Whereas president Aoun appealed to the Arab countries (United Arab Emirates, Egypt and Saudi Arabia) for assistance in the return of refugees (The Daily Star, 2018b), the United Nations and European Union share the opinion that 'conditions for returns, as defined by the UNHCR and according to international refugee law standards, are not yet fulfilled' (Brussels Conference, 2017b).

assessing refugees' intentions, as well as conditions under which these returns took place (Refugees Lebanon, 2018).<sup>83</sup> In this vein, UNHCR investigates, amongst others, whether all family members have the wish to return, whether or not they possess property in Syria and whether this property is still intact after war violence, as it aims to prevent 'secondary' (internal) displacement in Syria. Moreover, UNHCR representatives emphasised that UNHCR has no access to areas where Syrians returned to, limiting UNHCR's protection role.<sup>84</sup> This standard UNHCR policy<sup>85</sup> was condemned by Foreign Minister Gebran Bassil, as it would discourage Syrian refugees from returning (The Daily Star, 2018c). As a result, Bassil ordered a freeze on the renewal of UNHCR staff residency permits in June, 2018 (The Daily Star, 2018d).

Contrastingly, although statistics are generally unavailable, it is noteworthy that Lebanon also hosts western, often highly-skilled 'expatriates' (UNDP, n.d.). Although their access to the labour market, too, is restricted to particular professions, and they require a work permit as well, anecdotal evidence suggests their lawful presence in Lebanon is constituted by tourism purposes, leading them to leave the country on a three monthly basis. Those who reside illegally in the country in most cases do not have to fear punitive measures,<sup>86</sup> and they generally are not subject to arbitrary arrests, or curfews: 'When asked whether French people are required to respect the curfew, one municipal representative found the question a bit provocative and argued that they don't bother with "these types of foreigners", because they do not cause any problems like the migrant workers do' (El Helou, 2014).

### The Lebanese judiciary: a voice unheard

Although the Lebanese judiciary, as well as the international community, have long condemned practices violating the constitution, international treaties – including bilateral agreements – and domestic legislation, refugees and migrants too often find themselves deprived from access to basic human rights.

Refugees, asylum seekers, and migrant workers, notably after the expiry of their judicial sentences, are held in administrative detention and/or without being referred to a judge (Frontiers-Ruwad, 2010). Moreover, many fear to come forward to go to trial. The director of a human rights organisation explains: 'That is the problem: because you have people who are vulnerable, they would not present charges themselves.'<sup>87</sup> Yet, even in case they do present charges, they are reported to be tried in swift, mass hearings, oftentimes without being able to express their motives for seeking refuge (Frontiers-Ruwad, 2008).

Still, despite explicit condemnations by the judiciary, the General Directorate for General Security has 'contested judges' competence and jurisdiction, evaded the receipt of

<sup>83</sup> Ministry of Foreign Affairs demanded UNHCR to refrain in the future from issuing statements on refugee return (The Daily Star, 2018b).

<sup>84</sup> Confirmed during a meeting with UNHCR senior management and representatives of civil society and academia, Beirut, June, 2018.

<sup>85</sup> Given that settlement in Lebanon is prohibited, and resettlement occurs only in a limited number of cases, UNHCR Lebanon has always considered refugees' return as a viable option, conditions permitting. Confirmed during a meeting with UNHCR senior management and representatives of civil society and academia, Beirut, June, 2018.

<sup>86</sup> As was confirmed during an informal interview with several officers of the General Directorate of General Security (GSO), Beirut, March, 2018.

<sup>87</sup> Interview with the director and programme manager of a human rights organisation, conducted in April 2018.

judicial orders, and refused to execute them once received. It has deported detainees in spite of rulings blocking their deportation and ordering their release' (Frontiers-Ruwad, 2010:X).

Had judicial institutions, notably the Cassation Public Prosecution, had played a more active role, the forcible return of refugees and asylum seekers would have been prohibited more often (Saghieh and Frangieh, 2018). Although the Lebanese law includes 'clear remedies for those who have experienced abuse at the hands of the state, creating actionable rights and clear civil and criminal penalties', these are rarely put forward in court, and are virtually never effective in safeguarding the safety, dignity and liberty of refugees and asylum seekers (Frontiers-Ruwad, 2008:7).

At the same time, some positive developments can be witnessed. In February 2018, the State Council – Lebanon's High Administrative Court – issued a decision clarifying that the competent authority to amend conditions for Syrian entry and residency is the Council of Ministers, whereas General Security's role is confined to applying these conditions. In this vein, the restrictive measures, imposed fees, and other requirements introduced by General Security affecting Syrian's legal entry and residency, were annulled. It also stated that 'Any amendment to the conditions of Syrians' entry and residence in Lebanon must respect the international agreements signed with Syria, which guarantee freedom of movement of people between the two countries and freedom of residence and work' (Saghieh and Frangieh, 2018).

The State Council's decision is welcomed as a positive step towards ensuring the rights of all citizens – whether local, foreign, refugee, migrant, or 'expat' – on Lebanese territories, as it clearly outlines the role of the Council of Ministers as the only suitable, and accountable organ to adjust policies, correcting the General Security when 'overstepping' its power (Saghieh and Frangieh, 2018). In reality, however, little progress has been made since January 2018: neither did General Security announce the annulment of the – legally invalid – 2015 implementations, nor did the Council of Ministers issue a new – more appropriate – decision regulating the conditions of Syrians' entry and residence in Lebanon.

## 8. Conclusion

Lebanon has been historically characterized by continuous circulation of people: waves of immigrants leaving the country to flee national and international conflicts, natural disasters, and economic crises, as well as influxes of persons seeking refuge in the country. Lebanon was a land of refuge for Armenians in the nineteenth century, and in the twentieth to waves of Palestinian, Iraqi, and Sudanese refugees. More recently, more than a million Syrian refugees have put considerable strain on Lebanon's already weak infrastructure, and political and social stability.

Despite its contributions to the establishment of international refugee law, Lebanon has not ratified the 1951 Geneva Convention or its 1967 Protocol. Moreover, a coherent domestic framework constituting the right to asylum has not been established. Indeed, although some provisions in immigration law stipulate the access to asylum, these date back to '60s, and although considered progressive and welcoming at the time, they have seen minor amendments and do not offer a strong legal framework to protect asylum seekers and refugees.

Governmental responses were characterized by a '*laissez-faire*' approach and an absence of strategic decision-making, notably by an *ad hoc* and non-operational inter-ministerial committee adjudicated to grant asylum. Depending on nationality and displacement context, refugees are able – or not – to regularize their status. In addition, the variety of displacement profile of asylum seekers, refugees, and migrants, who – as is especially the case with Syrians – often have been residing in Lebanon long before being classified as 'refugee', adds to the difficulty to differentiate among refugee, asylum seeker, and migrant labels and classifications, and renders migration governance fragmented and cumbersome.

Whereas a directorate was established to regularize the status of refugees for Palestinian refugees by the Lebanese authorities, the main responsibilities of refugee status determination of non-Palestinians has been transmitted to UNHCR. In reality, however, little significance is given to UN refugee statuses by Lebanese authorities. The absence of a clear mandate for actors governing and regulating migration in Lebanon appears to add to a constant state of emergency; asylum seekers and refugees mainly seem to depend on the discretionary power of security apparatus the General Directorate of General Security. Moreover, in the absence of a coherent policy on migration, a policy of intimidation and arbitrariness, notably for those without legal status, appears to be in place.

Furthermore, protracted displacement is rendering aid more difficult. As the crisis endures, what was initiated as a short-term humanitarian and emergency intervention has transformed into a medium-term operation which has lead, seven years into the crisis, to a donor fatigue.

In a context of withering national and international assistance, precarious living conditions, scapegoating discourses by the media and political figures, increased securitization of refugee presence, and minimal resettlement to richer countries, refugees and asylum seekers appear to be presented with the option to endure significant hardships in Lebanon, or to return to their home country. Waves of 'voluntary returns' are on the rise, despite limited access to information on the ongoing conflict or inherent risks in Syria, undermining the mere principle of *non-refoulement*.



## 9. Appendices

### Appendix I: Human Rights Instruments

#### Human rights instruments

Lebanon is party to a number of international and regional human rights instruments that include stipulations and provisions guaranteeing the right to asylum, and protection from persecution, and prohibiting involuntary return (OHCHR, 2015). Some of those instruments have been signed only or signed and ratified which binds Lebanon legally to commit to them. Among them are the following:

1. **The 1948 Universal Declaration for Human Rights (UDHR):** On 10 December 1948, Lebanon voted in favor of the UDHR. Although, the UDHR is not a treaty, it is a foundational document of the UN and for international law as it has become part of customary international law. In 1990, the preamble of Lebanese Constitution included clauses that recognize Lebanon's commitments to the UDHR and other UN conventions (Anon, 2004). The UDHR grants in articles 13, 14 and 23 freedom of movement, the right to asylum from persecution, and the right to work in favourable conditions and without any discrimination (United Nations General Assembly, n.d.).
2. **The 1984 Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT):** On 5 October 2000, Lebanon ratified, by accession, the Convention against Torture (OHCHR, 2015). Article (3:1) of the convention stipulates that: 'No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture' (OHCHR, 2013a). Also, on 22 December 2008, Lebanon also ratified, by accession, the Optional Protocol of the Convention against Torture (United Nations, n.d.a). Although the principle of *refoulement* has also been defined in the 1951 Convention on the Status of Refugees (that Lebanon did not ratify), this agreement includes a number of exclusion clauses for the recognition of refugees. The CAT, however, does not entail exclusion criteria, and thus can be applied to a wider variety of people. Still, it should be noted that the CAT cannot be applied to those who do *not* risk being tortured, or persecuted.
3. **The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD):** On 12 November 1971, Lebanon acceded to the CERD without recognising the provisions of article 22 which give the option of referral to the International Court of Justice, in the event of a disagreement on the interpretation or the implementation of the convention (OHCHR, 2015; United Nations, n.d.b). The CERD includes in articles 1-5 the right to equal treatment before the law irrespective of 'race, colour, descent, or national or ethnic origin', the right to freedom of movement and residence, and the right to leave and return to any country (OHCHR, 2013b).



4. **The 1965 Casablanca Protocol for the Treatment of Palestinians in Arab States:** On 3 August 1966, Lebanon has signed the Protocol by the League of Arab States, with reservations on the Protocol's five articles (MPC, 2013; United Nations, 2018). These reservations included:
  - a. Modifying article 1 to be: 'Palestinians residing at the moment in Lebanon are granted the right of employment, together with the right of keeping their Palestinian nationality, in accordance with prevailing social and economic conditions in the Republic of Lebanon'.
  - b. Adding the phrase 'on equal terms with the Lebanese citizens and in accordance with the laws and regulations in operation' to article 2.
  - c. Adding the phrases '(whenever their interests demand it)' and 'allowing Palestinians into Lebanon is conditional upon their obtaining an entry visa issued by the concerned Lebanese authorities' to article 3.
  - d. The entirety of article 4 'Palestinians who are at the moment in ..., as well as those who were residing and left to the Diaspora, are given, upon request, valid travel documents. The concerned authorities must, wherever they be, issue these documents or renew them without delay'.
  - e. The entirety of article 5 'Bearers of these travel documents residing in LAS states receive the same treatment as all other LAS state citizens, regarding visa, and residency applications'
5. **The 1966 International Covenant on Civil and Political Rights (ICCPR):** On 3 November 1972, Lebanon acceded to the ICCPR (OHCHR, 2015). Article 12 of the covenant obliges Lebanon to grant everyone with lawful presence on its territory the right to 'liberty of movement' and freedom to choose 'residence' (OHCHR, 2018a). Whereas, article 13 limits the conditions of expulsion of an alien with lawful presence in the territory of a state, party to the convention, to 'compelling reasons of national security' while giving him the right to 'submit reasons against his expulsion' to the authority designated to examine such cases (ibid).
6. **The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR):** On 3 November 1972, Lebanon ratified, by accession, the ICESCR (OHCHR, 2015). The covenant mandates states, party to the covenant, to 'ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant' (article 3) (OHCHR, 2018b). It also obliges them to recognize 'the right to work', and the 'right of everyone to social security, including social insurance' (articles 6 and 9) (ibid).
7. **The 2006 Convention for the Protection of All Persons from Enforced Disappearance (CED):** On 6 February 2007, Lebanon signed the CED. Although this convention legally binds states, party to the convention, not to 'expel, return ('refouler'), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance' (article 16:1) (OHCHR, 2015; OHCHR, 2018c), Lebanon did not (yet) ratify this Convention, and is therefore not bound by it.

8. **The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW):** On 16 April 1997, the Lebanese state ratified the 1981 CEDAW, which lays down women's social, economic, political, and civil rights, and stipulates non-discrimination and equality for all women (OHCHR, 2015; United Nations, 2009). However, Lebanon has several reservations against article (9:2), which seeks to give men and women equal rights with regards to the power to pass on their nationality to their children (Anon, 2007). Other reservations were against article (16:1c, 1d, 1f, and 1g), which addresses the eradication of discrimination against women in family and marriage matters, such as the rights and responsibilities in marriage, guardianship, and personal rights, including choosing a 'family name and a profession' (ibid). Additionally, the Lebanese state decreed that it does not commit to article (29:1) which gives the options of referral to a) arbitration or b) the International Court of Justice, in the event of a disagreement on the interpretation of CEDAW clauses (ibid).
  
9. **The 1990 Convention on the Rights of the Child (CRC):** Lebanon signed the CRC on 26 Jan 1990 and ratified it on 14 May 1991 (OHCHR, 2015). The convention mandates signatory states, in article 27, to 'recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development' (OHCHR, 2018d). This article though refers to the generic wellbeing of a child in his/her family, resettlement can also be considered a threat such wellbeing. Additionally, the convention obliges states to provide protection and care to 'children who are affected by an armed conflict' (article 38:4) (ibid). Lastly, article 39 of the convention requires states to:
 

Promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.
  
10. **The 2006 Convention on the Rights of Persons with Disabilities (CRPD):** On 14 June 2007, the Lebanese state signed the CRPD (OHCHR, 2015). The convention stipulates, in article 11, the obligations of signatory states to 'to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters' (United Nations, n.d.c). It also grants, in article 18, persons with disabilities freedom of movement, of choosing their 'residence and to a nationality, on an equal basis with others'. Given that Lebanon did not ratify the CRPD, it is not bound to abide by it.

## Appendix II: Main legal Provisions on Migration, Asylum and Reception of Asylum Seekers, Refugees and Migrants in Lebanon

Legislation title	Date	Type of law	Object	Link/PDF	Notes
<p>قرار المفوض السامي رقم 15 للعام 1925 بخصوص التابعية اللبنانية</p> <p><b>High commissioner's decision No.15 for 1925 Regarding the Lebanese Nationality</b></p>	19 January 1925	High Commissioner's Decision	Who is considered Lebanese and who has the right to a Lebanese nationality	Original text of the law is unavailable	This decision laid down the conditions for acquiring the Lebanese nationality.
<p>مرسوم رقم 11657 للعام 1948 لتشكيل لجان مركزية وإقليمية للاهتمام بشؤون القادمين من فلسطين الى لبنان</p> <p><b>Decree No. 11657 for 1948 to establish the central and regional committees for the affairs of those coming from Palestine</b></p>	26 April 1948	Decree	Palestinian Refugees	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=171630">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=171630</a>	This was the first decree to be issued by the Lebanese state to regulate the status of Palestinians in Lebanon. It stipulated the creation of central and regional committees for the affairs of those coming from Palestine. The main central committee was under the supervision of the Council of Ministers. The institutional structure under the central committee included regional committees in Lebanese governorates. The committees were mandated to count those arriving to Lebanon, secure their shelters and sustenance, and take care of their health conditions.
<p>مرسوم رقم 13070 للعام 1948 فيما يتعلق بشؤون اللاجئين الفلسطينيين</p> <p><b>Decree No. 13070 for 1948 regarding the</b></p>	18 September 1948	Decree	Palestinian Refugees	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=189338">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=189338</a>	Building on decree No. 11657 for 1948, decree No. 13070 detailed how the financial expenses, costs, and subsidies of Palestinian refugees in Lebanon should be managed. Hence, the membership of the central and regional committees for the affairs of those coming from Palestine (created through decree No. 11657) was to include general directors of public

<b>affairs of Palestinian Refugees</b>					finance whose task was to regulate and supervise those expenses, costs, and subsidies.
<p>مرسوم اشتراعي رقم 42 احداث إدارة لشؤون اللاجئين الفلسطينيين في وزارة الداخلية</p> <p><b>Decree No. 42 Regarding establishing the Department of Palestinian Refugee Affairs at the Ministry of Interior and Municipalities</b></p>	31 March 1959	Legislative Decree	Palestinian Refugees	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=168894">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=168894</a>	This legislative decree mandated the Ministry of Interior and Municipalities to establish the Department of Palestinian Refugee Affairs.
<p>مرسوم رقم 927 للعام 1959 لتحديد مهام إدارة شؤون اللاجئين الفلسطينيين في وزارة الداخلية</p> <p><b>Decree No. 927 for 1959 regarding the tasks of the Department of Palestinian Refugee Affairs at the Ministry of Interior and Municipalities</b></p>	31 March 1959	Decree	The Department of Palestinian Refugee Affairs	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=168895">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=168895</a>	<p>This decree detailed the tasks and duties of the Department of Palestinian Refugee Affairs among which were:</p> <ul style="list-style-type: none"> <li>• Communicating with the UNRWA to secure the subsidies and shelter, and provide healthcare for Palestinian refugees.</li> <li>• Receiving and evaluating passport applications for travelling outside Lebanon.</li> <li>• Registering birth, marriage, divorce, annulment, death certificates, change of residency, and conversion of religion or sect.</li> <li>• Approving family reunification requests in accordance with the stipulations of the Arab League.</li> <li>• Allocating lands for camps and undertaking land lease and acquisition.</li> </ul>

قانون رقم صفر للعام 1960 يختص بالتابعة اللبنانية  <b>Law No. 0 for the year 1960</b>	11 January 1960	Law	Who is considered Lebanese and who has the right to a Lebanese nationality	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=172156">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=172156</a>	Law No. 0 for 1960 amended Article 5 of the High Commissioner's Decision No. 15 for 1925 to allow foreign women married to Lebanese men to acquire the Lebanese nationality.
مرسوم رقم 3909 للعام 1960 لإنشاء هيئة عليا للشؤون الفلسطينية  <b>Decree No. 3909 for 1960 to establish the Higher Committee for Palestinian Affairs</b>	26 April 1960	Decree	Palestinian Refugees	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=172293">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=172293</a>  <a href="http://www.aidon.org/en/wp-content/uploads/2014/01/No-ID-E.pdf">http://www.aidon.org/en/wp-content/uploads/2014/01/No-ID-E.pdf</a>	This decree stipulated the creation of the Higher Committee for Palestinian Affairs under the supervision of the Minister of Foreign Affairs and Emigrants. The committee was of 'political nature rather an administrative one'. Its members were the directors of the Civil Chamber in the Lebanese Presidency, the Department of Palestinian Refugee Affairs, the head of the Palestine Department at the Ministry of Foreign Affairs and Emigrants, among others. The committee's mandate was to manage all matters related to the Palestinian plight whether political, economic, and military-related, etc. It was also mandated to follow Zionist activities abroad and prepare effective measures to combat them. The decree highlighted that the mandate of the committee shall be separate from the mandate of the Department of Palestinian Refugee Affairs.
قانون رقم صفر لعام 1962 الدخول الى لبنان والاقامة فيه والخروج منه  <b>1962 Law No. 0 for regulating the entry of foreigners into Lebanon, their stay and exit</b>	10 July 1962	Law	Foreigners (any person who does not have the Lebanese nationality)	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=179943">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=179943</a>	In 40 articles, this law regulates the entry, the stay and the exit of foreigners in Lebanon. One of the most important articles is: <ul style="list-style-type: none"> <li>Article 27 which stipulates that the right to asylum is granted to individuals through an administrative committee that is composed of the Minister of Interior (who serves as the chairman of the committee), the directors at the Departments of Justice, Foreign Affairs, and the General Security (who serve as members). In case of a tie, the chairman shall have a casting vote.</li> </ul>

<p>مرسوم 10188 تطبيق قانون رقم صفر لعام 1962 المتعلق بالدخول الى لبنان والاقامة فيه والخروج منه</p> <p><b>Decree No. 10188 Regarding the implementation of Law No. 0 for 1962 regulating the entry of foreigners into Lebanon, their stay and exit</b></p>	28 July 1962	Decree	<p>Foreigners (any person who does not have the Lebanese nationality)</p>	<p><a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=183411">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=183411</a></p>	<p>In 28 provisions, this decree lays down the conditions and requirements (documents and permits), foreigners need to have in order to enter, stay or leave Lebanon. Some of the most significant articles are:</p> <ul style="list-style-type: none"> <li>• Article 6 which stipulates that consulates are able to grant visas, without referring back to central authorities, to all individuals except those who are on the list of people declared persona non grata, foreign artists who need work permission by the Ministry of Labour, foreign workers, holders of transit passports, and other categories designated by the Ministry of Foreign Affairs and Migrants.</li> <li>• Article 21 which was amended four times states that the following categories of individuals can be granted courtesy residence permit: the Arab or foreign children of a Lebanese mother (as long as they do not work), the Arab or foreign wife of a Lebanese (as long as she does not work), the Arab or foreign who is born in Lebanon for non-Lebanese parents (as long as s/he is studying), the Arab or foreign from Lebanese origin who holds another nationality which requires him/her to obtain the Lebanese residency, and diplomats who have worked in Lebanon and desired to live in it after their retirement.</li> <li>• Article 28 which allows the Minister of Interior to issue a decision that exempts the following individuals from using their passports: Palestinian refugees in Lebanon or Syria when travelling between the two countries, foreigners residing in Lebanon or Syria when travelling between the two countries, travellers by air or sea who wish to visit the country during transiting in Lebanon, tourists, students, and sportsmen/women when travelling with a delegation or an organised group, air and naval navigators and their assistants who enter Lebanon or Syria with their ships,</li> </ul>
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					aircrafts or place of residence, members of foreign armies and international emergency forces (when visiting for tourism), and others.
مرسوم رقم 4186 لعام 2010 لتعديل المرسوم رقم 10188 <b>Decree No. 4186 for 2010 to amend decree No. 10188</b>	31 May 2010	Decree	Foreign husbands of Lebanese women and children of Lebanese women from a foreign husband	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=225926">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=225926</a>	Decree No. 10188 was amended several times in 1967, 2001, 2003 and 2010. The last amendment in 2010 by Decree No.4186 which added a provision to Article 21 regarding the stay of the foreign husbands and children of Lebanese women from foreign husbands. The amendment granted the foreign husbands (after a year of marriage) and children of Lebanese women from a foreign husband the right to have a three-year courtesy residence permit ( <i>ikamet mojamala</i> ).
قرار رقم 320 بخصوص ضبط الدخول والخروج من مراكز الحدود اللبنانية <b>Decision No. 320 Regarding the control of entry and exit from Lebanese border posts</b>	02 August 1962	Decision	Anyone entering or exiting the Lebanese border posts	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=184976">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=184976</a>	This law stipulates the conditions for entering and exiting the Lebanese border posts for foreigners and Lebanese persons. It has special stipulations for Palestinians and Syrians who wish to enter or exit Lebanon to neighbouring countries such as Syria and Jordan.
قرار رقم 1 لعام 1970 لتعديل المادة السابعة من القرار رقم 320 لعام 1962 <b>Decision No. 1 for 1970 to amend Article 7 of Decision No. 320 for 1962</b>	06 January 1970	Decision	Palestinian Refugees	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=181324">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=181324</a>	The decision amended Article 7 of Decision No. 320 and allowed Palestinian refugees in Lebanon to go to Syria with their IDs and without a special permission.
مرسوم رقم 17561 لعام 1964 لتنظيم عمل الأجانب <b>Decree No. 17561 for 1964 Regulating the</b>	18 September 1964	Decree	Foreign Workers (in general)	<a href="https://goo.gl/HdxaFJ">https://goo.gl/HdxaFJ</a>	This law regulates foreign labour in Lebanon and distinguishes between the authority of the Ministry of Labour and the General Security in dealing with foreign workers (depending on their profession type).



<b>Work of Foreigners in Lebanon</b>					
مرسوم رقم 1582 لعام 1984 لتعديل المرسوم رقم 17561	25 April 1984	Decree	Foreign Workers (in general)	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=167114">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=167114</a>	The decree replaced Articles 11, 12 and 13 of Decree No. 17561 with new provisions that delineated the authorities of the Ministry of Labour in granting and approving work permits and the period required for their issuance.
<b>Decree No. 1582 for 1984 to amend decree No. 17561</b>					
مرسوم رقم 14268 لعام 2005 لتعديل المرسوم رقم 17561	4 March 2005	Decree	Foreign Workers (in general)	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=207086">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=207086</a>	The decree replaced Article 14 with a new provision that allows the extension of foreigners' work permits up to three years (at the max). It also requires foreigners to renew their work permits at least a month before their expiration date.
<b>Decree No.14268 for 2005 to amend decree No. 17561</b>					
مرسوم 11614 اكتساب غير اللبنانيين الحقوق العينية العقارية في لبنان	4 January 1969	Decree	Non-Lebanese persons - foreigners (including Palestinian refugees)	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=173180">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=173180</a>  <a href="http://www.lpd.gov.lb/property-ownership/the-palestinian-refugee-and-the-property-ownership/56/en">http://www.lpd.gov.lb/property-ownership/the-palestinian-refugee-and-the-property-ownership/56/en</a>	This decree allowed foreigners and non-Lebanese persons to own already built real estate or real estate to be constructed. The surface allowed for ownership by foreigners ranged from a maximum of 3,000 square meters in Beirut, to a maximum of 5,000 square meters in the remaining governorates ( <i>muhafazat</i> ).
<b>Decree No. 11614 regarding Non-Lebanese acquisition of real property rights in Lebanon</b>					



<p>قانون رقم 296 لعام 2001 لتعديل بعض مواد مرسوم رقم 11614</p> <p><b>Law No. 296 for 2001 to amend some provisions in Decree No. 11614</b></p>	3 April 2001	Law	Non-Lebanese persons - foreigners (including Palestinian refugees)	<p><a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=169617">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=169617</a></p> <p><a href="http://www.lpd.gov.lb/property-ownership/the-palestinian-refugee-and-the-property-ownership/56/en">http://www.lpd.gov.lb/property-ownership/the-palestinian-refugee-and-the-property-ownership/56/en</a></p>	<p>The decree amended Articles 1, 3, 5, 7, 8, 11, 13 and 19. These amendments restricted property rights for non-Lebanese persons in Lebanon. For example, Article 1 after the amendment states that, “No non-Lebanese person, whether natural or legal, and no Lebanese person deemed by this law as foreigner, shall be allowed to acquire, by contract or any other legal act, any real estate right on Lebanese territory or any other of the real rights specified by the present law, before obtaining a prior authorization issued by the Council of Ministers upon motion of the Minister of Finance. No exceptions shall be made to this law, unless in specific situations explicitly provided for by this law or in a specific text.</p> <p>All forms of real estate rights are forbidden to any person who is not holding a nationality of a recognized state, or any person in general – should the ownership be nonconforming to the provisions of the Constitution in terms of rejecting permanent settlement (<i>Tawteen</i>).”</p>
<p>قرار رقم 4 لعام 2001 الصادر عن المجلس الدستوري</p> <p><b>Decision No. 4 for 2001 issued by the Constitutional Council</b></p>	29 September 2001	Decision	Amendment of some articles of the Code of Criminal Procedure	<p><a href="http://www.cc.gov.lb/ar/node/2586">http://www.cc.gov.lb/ar/node/2586</a></p>	<p>Although this decision is not directly related to the regulation of refugee presence and rights in Lebanon, it was issued to amend some articles of the Code of Criminal Procedure based on the provisions of the Universal Declaration of Human Rights (UDHR) and the Lebanese Constitution. The decision is of significance for its reference to the UDHR. It can be considered among the first legal precedents in Lebanon to use international charters and treaties to amend national and domestic codes.</p>
<p>قانون 128 لعام 2010 لتعديل المادة التاسعة من قانون الضمان الاجتماعي</p>	24 August 2010	Law	Palestinian Refugees registered at Political Affairs and Refugees directorate at	<p><a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID</a></p>	<p>The law amended Article 9 of the Social Security Code granting registered Palestinian refugee workers, registered at Political Affairs and Refugees at the Ministry of Interior and</p>

<b>Law No. 128 for 2010 to amend Article 9 of the Social Security Law (SSL)</b>			the Ministry of Interior and Municipalities	<a href="#">=227509</a>	Municipalities, end-of-service compensation (in other words to be treated like Lebanese workers).
<p>قانون 129 لعام 2010 لتعديل المادة 59 من قانون العمل اللبناني الصادر بمرسوم رقم 13955 لعام 1946</p> <p><b>Law No. 129 for 2010 to amend Article 59 of the Labour Code No. 13955 for the year 1946</b></p>	24 August 2010	Law	Palestinian Refugees registered at the General Directorate for Political Affairs and Refugees (DPA) at the Ministry of Interior and Municipalities	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=227510">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=227510</a>	<p>This amendment exempted Palestinian refugees living in Lebanon from the reciprocity condition imposed on non-Lebanese persons, which had prevented them from receiving end of service gratuity and National Social Security Fund benefits. It also exempted them from the fees that foreigners must normally pay to obtain work permits.</p> <p>Hence, while the third paragraph of Article 59 of the previous version of the Labour Code stipulated that “upon dismissal, foreign wage earners shall enjoy the same rights that Lebanese workers enjoy, provided that the condition of reciprocity is met and they possess a work permit from the Ministry of Labour”, law 129 introduced affirmative action for Palestinians. It added a new clause stating that “Palestinian refugee wage earners duly registered in the records of the Ministry of Interior and Municipalities – Directorate of Political Affairs and Refugees – shall exclusively be exempted from the conditions of reciprocity and the fee for work permits issued by the Ministry of Labour”.</p> <p>Although these amendments improved Palestinian refugee workers’ access to employment and social protection plans, they are still required to acquire an annual work permit which remains dependent on the willingness of employers and a lengthy bureaucratic process.</p>
<p>قانون 164 لعام 2011 بخصوص معاقبة جريمة الاتجار بالأشخاص</p> <p><b>Law No. 164 for 2011 Regarding trafficking in persons crimes</b></p>	24 August 2011	Law	Trafficked persons including women and children	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=228905">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=228905</a>	The law penalizes the crime of trafficking in persons. It has implications for forced labour in Lebanon of which women constitute a sizeable population.

<p>القرار 19 للعام 2013 بخصوص المهن الواجب حصرها باللبنانيين فقط</p> <p><b>Decision No. 19 for 2013 Regarding the professions exclusive to Lebanese nationals</b></p>	2 February 2013	Decision	<ul style="list-style-type: none"> <li>Lebanese Nationals</li> <li>Palestinian refugees born in Lebanon and registered at the General Directorate for Political Affairs and Refugees (DPAR) at the Ministry of Interior and Municipalities</li> <li>Syrian refugee workers</li> </ul>	<a href="http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=234511">http://www.legalaw.ul.edu.lb/LawView.aspx?opt=view&amp;LawID=234511</a>	<p>This decision reserved the access of some professions to Lebanese nationals only with the exception of Palestinian refugees born in Lebanon and registered at the General Directorate for Political Affairs and Refugees (DPAR) under the Ministry of Interior and Municipalities (they can take up these professions).</p> <p>Also, the decision restricted Syrian refugee workers to professions such as those involving construction, electricity, and sales. However, some workers can take up the professions reserved to Lebanese nationals if they were qualified to those occupations (according to the laws regulating the work of foreigners - Decree No. 17561).</p>
<p>ورقة أكتوبر 2014 بخصوص سياسة النزوح السوري الى لبنان</p> <p><b>October 2014 Policy paper on Syrian Refugee Displacement</b></p>	23 October 2014	Policy Paper	Syrian refugees	<a href="http://www.pcm.gov.lb/arabic/subpg.aspx?pagid=6118">http://www.pcm.gov.lb/arabic/subpg.aspx?pagid=6118</a>	<p>In session No. 23 on 23 October 2014, the Council of Ministers approved the October 2014 Policy Paper on Syrian Refugee Displacement. The paper aimed at:</p> <ul style="list-style-type: none"> <li>Reducing the number of Syrian refugees arriving to Lebanon by restricting their entry into the country excluding exceptional cases, as well as requesting the UNHCR to stop registering Syrian refugees. without the approval of the Ministry of Social Affairs.</li> <li>Encouraging Syrian refugees to return to their country or to other countries.</li> <li>Increasing regulations regarding displaced Syrians and mandating the municipalities to conduct a regular statistical survey of the displaced.</li> <li>Relieving the burdens on the Lebanese employment and labour.</li> </ul>
<p>قرار الأمن العام بشأن تنظيم دخول السوريين الى لبنان والإقامة فيه</p>	1 January 2015	Decision	Syrian refugees	<a href="http://general-security.gov.lb/ar/posts/33">http://general-security.gov.lb/ar/posts/33</a>	<p>Shortly after the Lebanese Council of Ministers passed the October 2014 Policy paper on Syrian refugee Displacement, the General Directorate of General Security issued a decision</p>

<b>Decision by the General Directorate of General Security regulating the entry and residence for Syrian Refugees in Lebanon</b>					regulating and restricting the entry and residence for Syrian refugees in Lebanon. The decision detailed the measures needed to implement the policy paper goals.
<p>تعميم رقم 2072 للعام 2016 المتعلق بتدابير متصلة بحفظ الاستقرار العام، الصادر عن محافظ جبل لبنان</p> <p><b>Circular No. 2072 for 2016 concerning procedures in connection with maintaining public stability, issued by the governor of Mount Lebanon</b></p>	July 5, 2016	Circular	Municipalities	<p>Original text of the circular is unavailable.</p> <p>A reference to it could be found in: <a href="http://legal-agenda.com/en/article.php?id=3174">http://legal-agenda.com/en/article.php?id=3174</a></p>	This circular was issued by the governor of Mount Lebanon on the occasion of hosting summer art festivals in various regions in Lebanon. The circular required festival organisers to use modern searching equipment at the doors and exits of locations where art festivals are held. It also mandated the municipalities to “complete paperwork for the displaced Syrian people, update it periodically, and to inform owners of rented buildings that they are required to register their rental contracts in accordance with procedure.” This circular is one among many others issued by municipal authorities. The issuance of such circulars is deemed, by legal analysts, a breach of the legal mandate municipalities have regarding the regulation of the presence of Syrian refugees in Lebanon.
<p>القرار ٤٢١/٢٠١٧ للعام ٢٠١٨ بخصوص قرار الأمن بتعديل شروط دخول وإقامة السوريين في لبنان</p> <p><b>Decision 421/2017 for 2018 regarding the General Security’s decision to amend the conditions of entry and residence for Syrian Refugees in Lebanon</b></p>	8 February 2018	Decision/Ruling	Syrian refugees	<a href="http://legal-agenda.com/uploads/20%قرارجلسةشورى%20الدولة20.pdf">http://legal-agenda.com/uploads/20%قرارجلسةشورى%20الدولة20.pdf</a>	The State Council, Lebanon’s high administrative court, issued a ruling abrogating a 2015 decision by the General Directorate of General Security that amended the conditions of entry and residence for Syrian refugees in Lebanon. The ruling reserved the right to amend these conditions to the authority of the Council of Ministers; in other words the General Security does not have the mandate to make such amendments anymore.
<p>القرار 29/1 للعام 2018 بخصوص المهن الواجب حصرها باللبنانيين فقط</p>	15 February 2018	Decision	<ul style="list-style-type: none"> <li>Lebanese Nationals</li> <li>Palestinian refugees born</li> </ul>	<a href="https://goo.gl/wHD4Kr">https://goo.gl/wHD4Kr</a>	This decision restricted some professions to Lebanese nationals only with the exception of Palestinian refugees born

<b>Decision No. 1/29 for 2018 Regarding the professions exclusive to Lebanese nationals</b>			in Lebanon and registered at the General Directorate for Political Affairs and Refugees (DPAR) at the Ministry of Interior and Municipalities		in Lebanon and registered at the General Directorate for Political Affairs and Refugees (DPAR) at the Ministry of Interior and Municipalities (they can take up these professions). Unlike every year, the 2018 decision did not specify professions allowed for Syrian workers.
كتاب توضيحي حول القرار 29/1 للعام 2018  <b>Memorandum illustrating decision 1/29 for 2018</b>	21 March 2018	Memorandum	<ul style="list-style-type: none"> <li>Syrian Workers</li> </ul>	<a href="https://bit.ly/2BFT3QX">https://bit.ly/2BFT3QX</a>	In response to inquiries raised by the International Labour Organisation concerning decision 1/29 for 2018 which did not explicitly mention the professions allowed for Syrian workers, the Ministry of Labour issued this memorandum stating the following: 'Any profession that was not mentioned in the decision [1/29] are allowed to be taken up by foreigners in accordance to the laws regulating the work of foreigners.' It also stated that 'construction, cleaning, and agriculture work and any other profession that was not mentioned in the decision [1/29] are allowed for Syrian workers.'
تسوية أوضاع الرعايا السوريين والفلسطينيين  <b>Reconciling the status of Syrian and Palestinian nationals</b>	August 2018	Rules and regulations	<ul style="list-style-type: none"> <li>Syrian nationals and Palestinian refugees from Syria</li> </ul>	<a href="http://www.conditional-security.gov.lb/ar/posts/36">http://www.conditional-security.gov.lb/ar/posts/36</a>	The Directorate of General Security in Lebanon has been issuing rules and regulation to reconcile the status of Syrian nationals and Palestinian refugees from Syria in Lebanon (particularly in the bordering cities and districts). The last updated version of these rules was issued in July/August 2018. It stipulated the fines to paid when existing Lebanon and the conditions for paying them, including the date of legal entry whether before or after May 1, 2015, illegal entry, and the status of registration with UNHCR. It also set forth the conditions for granting temporary residency permits for Syrian workers, minors, and those with expired Syrian passports, and the conditions for extending temporary residency for Palestinian refugees from Syria.

## Appendix III: List of Main Authorities on Migration Governance in Lebanon

Authority (English and original name)	Tier of government	General Function	Area of competence in the field of migration and asylum	Link
مجلس الوزراء <b>The Council of Ministers</b>	National government	Sets public policies for the Lebanese State, drafts bills, regulatory decrees and decisions. It appoints, dismisses, and accepts the resignation of public office employees, and has the power to dissolve the Parliament upon the request of the president of the republic.	Is the authority competent to amend the conditions of foreigners' entry and residence.	<a href="http://www.pcm.gov.lb/arabic/index.aspx?pageid=5">http://www.pcm.gov.lb/arabic/index.aspx?pageid=5</a>
وزارة الداخلية والمحليات <b>The Ministry of Interior and Municipalities</b>	National government	Sets and executes internal policies pertaining to Lebanon's public security and order. It also oversees the affairs of governorates ( <i>mohafazzat</i> ), districts, municipalities and their councils, and local elected officials of neighbourhoods ( <i>mokhtars</i> ) and their councils. It has several directorates among which is the General Directorate of Personal Status, the General Directorate of Political Affairs and Refugee (DPAR), and the General Directorate of General Security.	The sub-directorates of the ministry, namely the General Directorate of Political Affairs and Refugees, and the General Directorate of General Security regulate and oversee the affairs of foreigners and refugees (their entry, registration, residence, permits, exit, and others).	<a href="http://www.interior.gov.lb/">http://www.interior.gov.lb/</a>
المديرية العامة للشؤون السياسية واللاجئين <b>The General Directorate of Political Affairs and Refugee (DPAR)</b>	National government	Formerly established in 1959 and known as the Department of Palestinian Refugee Affairs, in 2000, the Directorate of Political Affairs and Refugees was created with two subdivisions. The first is the Department of Political Affairs, Parties and Associations which grants licences to political parties,	It a) processes requests to reunite separated families, requests for custom exemptions for the purpose of families reunification, b) determines the locations of camps and the necessary land lease and acquisition transactions, c) communicates and coordinates with the the UNRWA to ensure the welfare of refugees and the provision of shelter,	<a href="http://www.legalaw.ul.edu.lb/LawArticles.aspx?LawTreeSectionID=271281&amp;LawID=244">http://www.legalaw.ul.edu.lb/LawArticles.aspx?LawTreeSectionID=271281&amp;LawID=244</a>

		clubs, and associations/ It also issues permissions for protests among others. The second is the Directorate of Refugees which manages the affairs of refugees.  For more on the authority of the directorate please see: <a href="http://www.legallaw.ul.edu.lb/LawArticles.aspx?LawTreeSectionID=271281&amp;LawID=244764&amp;language=ar">http://www.legallaw.ul.edu.lb/LawArticles.aspx?LawTreeSectionID=271281&amp;LawID=244764&amp;language=ar</a>	education, and healthcare for them, d) grants permission to transfer the place of residence from one camp to another, and e) looks into requests for marriage of refugees.	<a href="#">764&amp;language=ar</a>
الإدارة العامة للأمن العام <b>The General Directorate of General Security</b>	Local government	Collects social, economic and political data and information for the Lebanese government, contributes to the investigations of violations against interior and exterior state security, oversees security measures and coordination, combats secret associations, contributes to controlling and monitoring land, sea and air borders, and monitors media, broadcast and print platforms. Also, it manages the entry, residence, exist of foreigners in Lebanon, coordinates relations with foreign delegations in Lebanon, protects the security of foreigners in Lebanon, controls the mobility of travelers from and to Lebanon, issues passports, temporary and permanent residence permits, travel documents for Palestinian refugees in Lebanon or coming from abroad, and finally it processes naturalisation requests. For more on the tasks and powers of the directorate, please see: <a href="http://www.general-security.gov.lb/ar/posts/3">http://www.general-security.gov.lb/ar/posts/3</a>	General Security's role is limited to applying conditions of entry, residency and exit of foreigners coming to Lebanon. It has no right to amend them or impose new fees.  General Security decisions pertaining to the conditions of foreigners' entry and residence are subject to judicial oversight.	<a href="http://www.general-security.gov.lb/en/posts/2">http://www.general-security.gov.lb/en/posts/2</a>
وزارة المهجرين والصندوق المركزي للمهجرين <b>Ministry of the</b>	National government	Is concerned with the affairs of all internally displaced persons in the Lebanese regions as a result of the Lebanese Civil War, the Israeli invasions of 1996 and 2006. The ministry	Together with the Central Fund for the Displaced (CFD), the ministry seeks to improve the social and economic conditions of the displaced through providing subsidised loans and funds to help the	<a href="http://www.ministryofdisplaced.gov.lb/Cultures/ar-">http://www.ministryofdisplaced.gov.lb/Cultures/ar-</a>



<b>Displaced and the Central Fund for the Displaced (CFD)</b>		works to ensure the return of the internally displaced to their regions and villages.	'victims of displacement to restore or rebuild their homes'.	<a href="http://www.cfd.gov.lb/Compensations/JulyAllowance.aspx?PID=1">lb/Pages/default.aspx</a>  <a href="http://www.cfd.gov.lb/Compensations/JulyAllowance.aspx?PID=1">http://www.cfd.gov.lb/Compensations/JulyAllowance.aspx?PID=1</a>
<b>Ministry of Labour</b> وزارة العمل	National government	Regulates and organises labour related affairs for workers in Lebanon through the issuance of legal codes, bylaws and regulations.  Organisational structure of the ministry is available at: <a href="http://www.labor.gov.lb/layouts/MOL_Application/AboutUsPage.aspx?type=3&amp;lang=ar">http://www.labor.gov.lb/layouts/MOL_Application/AboutUsPage.aspx?type=3&amp;lang=ar</a>	Drafts, approves and issues labour-related administrative and legal decisions, laws, decrees, and treaties in regards to regulating the conditions and requirements of work permits for foreigners (non-Lebanese persons including refugees). This includes designating professions exclusive to Lebanese nationals and professions to be taken up by foreigners.	<a href="http://www.labor.gov.lb/layouts/MOL_Application/default.aspx">http://www.labor.gov.lb/layouts/MOL_Application/default.aspx</a>
<b>Ministry of Social Affairs</b> وزارة الشؤون الاجتماعية	National government	Develops a social development plan for the country and supervises its implementation, oversees the implementation of the state's social projects, provides assistance to family affairs, persons with disabilities, war victims, the wounded, and orphans and orphanages, monitors population movements and the causes behind them, and coordinates with other state institutions emergency and relief efforts.  For more information about the organisational structure of the ministry, please see: <a href="http://www.socialaffairs.gov.lb/admin/Uploads/107_6.pdf">http://www.socialaffairs.gov.lb/admin/Uploads/107_6.pdf</a>	Coordinates and manages relief and volunteer efforts in emergency situations particularly in cases of displacement.  Since October 2014, The Lebanese Government adopted a policy paper providing direction for how to manage the displacement of Syrian refugees on Lebanese territories. As a result of a series of international meetings, the Lebanon Crisis Response Plan (LCRP) was devised to respond to the displacement crisis. The main goals of the plan is to a) "ensure humanitarian assistance and protection for the most vulnerable among the displaced from Syria and poorest Lebanese"; b) "strengthen the capacity of national and local service delivery systems to expand access to and quality of basic public services"; and c) "reinforce	<a href="http://www.socialaffairs.gov.lb/MSASubPage.aspx?parm=106&amp;parentID=97">http://www.socialaffairs.gov.lb/MSASubPage.aspx?parm=106&amp;parentID=97</a>  For more information about LCRP (2015-2016) <a href="https://data2.unhcr.org/en/documents/download/42701">https://data2.unhcr.org/en/documents/download/42701</a>



			<p>Lebanon's economic, social, environmental, and institutional stability.</p> <p>The Ministry of Social Affairs became the steering ministry for the LCRP in partnership with the UN, other line ministries, national and international NGOs in Lebanon. The LCRP is being carried out over two periods from 2015 to 2016 and from 2017 to 2020.</p>	<p>For more information on LCRP (2017-2020)</p> <p><a href="https://data2.unhcr.org/en/documents/details/53061">https://data2.unhcr.org/en/documents/details/53061</a></p>
<p>وزارة الخارجية والمغتربين</p> <p><b>Ministry of Foreign Affairs and Emigrants</b></p>	National government	<p>Sustains links with the Lebanese emigrants and their home country and encourages cooperation between them in all fields. The main structure inside the ministry responsible for serving emigrants and emigration is the General Directorate of Emigrants.</p> <p>For more information about the structure of the ministry see: <a href="https://bit.ly/2C1lLeW">https://bit.ly/2C1lLeW</a></p>	<p>The General Directorate of Emigrants has several sub departments specialized in serving the interests of emigrants and emigration. For example, the Department of Emigrants provides, studies, and reports on the status of emigrant communities in countries of emigration. It also offers information about the economic sectors where emigrants can invest in Lebanon. Finally, it studies the causes of emigration, its conditions, stages, trends, the regulations and requirements of emigrant-receiving countries, and challenges and the hurdles Lebanese emigrants face in their emigration countries.</p> <p>The General Directorate provides other services such as registration of property, establishment of union, clubs and associations, handling political and cultural affairs of the emigrants, and organization of conferences and conventions.</p>	<p><a href="https://bit.ly/2C1lLeW">https://bit.ly/2C1lLeW</a></p> <p><a href="http://www.migrationpolicycentre.eu/docs/migration_profiles/Lebanon.pdf">http://www.migrationpolicycentre.eu/docs/migration_profiles/Lebanon.pdf</a></p>
<p>الأمم المتحدة لإغاثة وتشغيل اللاجئين الفلسطينيين</p> <p><b>United Nations Relief and Works Agency for Palestine Refugees in</b></p>	International relief agency (UN agency)	<p>Established in 1949 in response to the plight of Palestinian refugees, the UNRWA has a mandate to provide assistance and devise protection plans for approximately 5 million Palestinian refugees (registered under the UNRWA). The agency manages the affairs of</p>	<p>In Lebanon, the UNRWA manages the affairs of registered Palestinian Refugees in Lebanon, and Palestinian Refugees from Syria (PRS). Its services range from the provision of education, health care, infrastructure, to emergency assistance.</p>	<p><a href="https://www.unrwa.org/">https://www.unrwa.org/</a></p> <p><a href="http://www.refworld.org/pdfid/56cc95484.pdf">http://www.refworld.org/pdfid/56cc95484.pdf</a></p>

the Near East (UNRWA)		Palestinian refugees registered in the following geographic areas; Jordan, Lebanon, Syria, West Bank and the Gaza Strip.		<a href="https://www.unrwa.org/userfiles/201006109359.pdf">https://www.unrwa.org/userfiles/201006109359.pdf</a>
المفوضية السامية للأمم المتحدة لشؤون اللاجئين <b>United Nations High Commissioner for Refugees (UNHCR)</b>	International agency (UN agency)	Established in 1951, the UNHCR became the lead agency for the 'protection, shelter and camp maintenance for conflict-induced' refugees and internally displaced persons all over the world. It operates under the provisions of the 1951 UN Refugee Convention which stipulate two main principles guiding its mandate. The first is to collaborate with states to secure refugees' access to protection from prosecution and access to durable solutions such as '(1) voluntary repatriation to their countries of origin; (2) local integration in a new host country; or (3) resettlement to a third country'.	In Lebanon, the UNHCR, is responsible for the provision and coordination of humanitarian aid with other humanitarian organizations for refugees and asylum seekers from all countries, primarily Syria. They help with birth registration, providing cash assistance, food, shelter, education, water and sanitation, healthcare and community services, resettlement, offering legal information, and with intervention in sexual and gender-based violence.  In 2015, the registration of Syrian refugees with the UNHCR was temporarily suspended based on instructions by the Government of Lebanon.	<a href="http://www.unhcr.org/lb/">http://www.unhcr.org/lb/</a> <a href="https://bit.ly/2wuq3FF">https://bit.ly/2wuq3FF</a> <a href="https://bit.ly/2wso8lg">https://bit.ly/2wso8lg</a>
لجنة الحوار اللبناني الفلسطيني <b>The Lebanese Palestinian Dialogue Committee</b>	Official committee	In 2005, the Lebanese government issued a decision to create the Lebanese Palestinian Dialogue Committee under the auspices of the Presidency of the Council of Ministers.	The committee became responsible for coordinating between the different ministries and the general directorates to improve the living conditions of Palestinian refugees in Lebanon in collaboration with the UNRWA. Among its tasks is to establish mechanisms to eliminate the presence of Palestinian arms outside refugee camps, regulate and control the possession of arms inside the camps, and to study the possibility of establishing diplomatic relations between Lebanon and Palestine.	<a href="http://www.lpdc.gov.lb/?lang=en">http://www.lpdc.gov.lb/?lang=en</a>

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# **RESPOND**

## **Poland**

### **Country report**

**D1.2 – June 2018**

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## Abstract

The history of immigration to and emigration from contemporary Poland as a social phenomenon dates back to 1989. Geopolitical changes in the region brought the 'opening' of Poland's borders, which in turn contributed to the growing scale of mobility both from and to Poland. Moreover, Poland, as a country on the way from the East to the West also became a transit country both for migrants travelling due to economic reasons and also to asylum seekers. This report presents the socio-economic, political, legal, institutional and policy context of migration governance in Poland.

By analysing legal acts, official documents and available statistical data, we try to analyse macro level factors determining migration management in Poland. The report is divided into seven parts. In the first part, on the basis of statistical data, we conclude that the population of asylum seekers and refugees in Poland is strictly determined by the region of origin of foreigners seeking protection. For more than two decades, refugees have mostly originated from the Caucasus region (formally part of the Soviet Union). Moreover, the available statistics show that the number of asylum seekers is stable and not influenced by the so-called 'migration crisis'. Rather than a 'migration crisis', military conflicts and political and economic disturbances in countries along Poland's Eastern borders have largely shaped the structure of immigration to Poland and the population of persons seeking protection. The distinctive feature of migration control instruments in the context of Polish asylum policies is a relatively high number of refusals of entry, which raises concerns about access to asylum procedures.

In the analysis of the legal, socio-economic, political and cultural context, which is described in parts two and four, we can observe that during the past 25 years the situation has improved. Therefore, Poland became more and more attractive for foreigners, especially in terms of its labour market. The attractiveness of Poland as a country of destination increased along with its accession to the European Union and joining the Schengen area. Simultaneously, EU accession also contributed significantly to the outflow of Polish nationals to EU labour markets. The growing frequency of immigration to Poland and Polish labour migration within the EU precipitated the formulation of new migration policies and legislation aimed at managing these migration flows in ways most profitable for the Polish state and its economy.

In part three, we focus on the constitutional organisation of the state and the constitutional entrenchment of the principle of asylum. We argue that the ongoing constitutional and judiciary crisis mentioned in this part may constitute threats to the rule of law and protection of human rights. Since 2015, the Polish government has been refusing to implement relocation and resettlement schemes proposed by the European Commission within the framework of the European Agenda on Migration. Nonetheless, the Constitution refers to the protection of refugees, and the execution of this right is regulated by the Law on Protection of 2003, which is the main act regulating access to the asylum procedure and the proceedings and form of protection granted to foreigners. Part five of this report describes the details of various statuses, ranging from asylum seekers (with a focus on the reception system), beneficiaries of international protection to regular migrants and undocumented migrants. This part describes the conditions for gaining certain statuses, rights and obligations linked to certain statuses as well as the circumstances in which a given status may be revoked. The last, seventh part, of the report discusses the planned amendments to the law driven by the refugee crisis. We argue that in the case of Poland the changes or reform proposals are rather linked



to challenges observed in the context of inflow from the Caucasus than in the context of inflow from the Middle East or Africa, associated with the 'refugee crisis'. This part also provides supplemental information on the development of migration and asylum policies presented in part four.

# 1. Statistics and data overview

## Introductory remarks

At the national level, statistical data in the field of migration and international protection<sup>1</sup> are gathered by two institutions that are also involved in procedures linked to processing applications for international protection. The first institution is the Office for Foreigners (OF), a governmental institution. Its work is supervised by the Ministry of the Interior. The second institution is the Border Guard (BG), a uniformed service responsible for border protection and control of legality of stay and work of foreigners on the territory of Poland. The BG collects information on applications submitted for international protection, since it is the institution responsible for reception of applications both at the border and also within Polish territory. The applications received are directly transferred to the Office for Foreigners, which is responsible for processing applications and for the issuance of decisions. Therefore, the Office for Foreigners collects data on decisions issued. This office also gathers information on all residence cards issued to foreigners, regardless of the type of permit possessed by the foreigner. Since the Office is responsible for providing asylum seekers with social assistance, it also collects data on the beneficiaries of this assistance and the types of assistance provided. Thus, data collected and published by the Office for Foreigners allow one to distinguish voluntary migratory movements (i.e. for work or study purposes) from those that could be considered forced (i.e. those related to foreigners seeking international or national protection in Poland and granted one of the forms of protection).

Data on refusals of entry and on the issuing of return orders (related to both voluntary and forced returns) are collected by the BG, however they are also aggregated by the Office for Foreigners. This stems from the fact that the BG is responsible for the issuing of these decisions and also uses the intelligence maintained by the Office for Foreigners, including a database of all administrative decisions issued<sup>2</sup>. In practice, there are sometimes discrepancies between the numbers presented by BG and OF, especially if it regards data on activities performed by the BG, such as refusals of entry. If not every decision of this kind is entered into the database coordinated by OF (electronic database and system of information called POBYT), then the number of activities performed by BG is higher than the numbers presented by OF in the regular statistics that are published on their website. Also, it can happen that there are different units in the presented statistics. Whereas the Office for Foreigners counts decisions issued towards foreigners and thus counts foreigners, the Border

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<sup>1</sup> Data described in this report come mostly from two institutions responsible for migration management, i.e. the Office for Foreigners and the Border Guard. However, one must remember that data on migration and asylum are also gathered by other institutions. The Ministry of Family, Labour and Social Policy collects data on work permits and other documents authorising foreigners to work. It also collects information on integration programmes for refugees and foreigners granted international protection. Also, unemployment and social assistance provided to foreigners is reflected in data gathered by this Ministry. In turn, the Ministry of Foreign Affairs collects data on the issuing of visas or Polish Cards (special document accessible for persons with Polish origin or involved in activities for the Polish community; facilitating obtaining visas or permanent residence permits).

<sup>2</sup> Data processed by the Office for Foreigners are available on the interactive website, [www.migracje.gov.pl](http://www.migracje.gov.pl), aimed at providing data on residence permits and other administrative decisions issued to foreigners. Data available on this website are up-to-date and can be presented in the form of tables or maps for the whole country or for selected voivodeships.

Guard often refers to actions performed, such as border crossings or refusals issued. The data collected by these two institutions and presented in tables 1-10 below, are publicly accessible on their respective institutional websites.

On national level, the publicly available data do not include information on age or sex. Data on migration are also collected and processed by the Central Statistical Office and international statistical bodies, such as EUROSTAT, UNHCR and IOM.

## Main statistics

### Arrivals of non-EU citizens

Since Poland is part of the Schengen zone (since December 2007) and there are no regular border controls at Poland's land borders with Slovakia, the Czech Republic, Germany, and Lithuania, arrivals through these internal borders are not registered. This means that both the number and structure of foreigners crossing internal borders is unknown. In turn, this raises questions as to the extent of mobility across internal borders linked to asylum migration along the Balkan route heading for Germany or Austria since 2015.

Taking into account the above-mentioned reservation, *Table* presents the absolute number of arrivals of non-EU citizens to Poland in the years 2011–2017. On the basis of the statistics provided by the Border Guard, it is impossible to determine age groups and the sex of incoming foreigners. Importantly, the available data include only information on arrivals through Poland's external border.

**Table 1. Arrivals of non-EU citizens to Poland**

	2011	2012	2013	2014	2015	2016	2017
Non-EU nationals	na	na	na	na	14.675.74 2	15.362.24 3	16.426.32 4
All foreigners	10.763.87 0	12.442.60 7	14.123.35 7	14.863.01 2	15.890.35 2	16.942.10 0	18.202.45 0
na – not available							

Source: own elaboration based on Border Guard statistics (2011-2017).

The available data show the direction of border crossing (entry or exit). They do not show for how long foreigners come to Poland, which means that they do not allow us to distinguish short-term visitors from migrants. Data presented with reference to particular parts of the external border, depending on the neighbouring country, allow one to determine from which countries foreigners arrive and their citizenship. As in the case of other statistics on foreigners in Poland, Ukrainian citizens take the lead, and they are followed by the citizens of other neighbouring countries – Belarus and Russia as well as more distant ex-USSR republics, such as Moldova, Georgia and Armenia. Citizens of neighbouring countries usually enter through

Poland's land border. At the border with Ukraine, about 10 million entry-direction border crossings are recorded annually, with roughly 4 million more entering through the border with Belarus and about one million via the border with Russia (the Kaliningrad Oblast). Most of these foreigners come to Poland to work or to join their families. As far as the Polish and Ukrainian border is concerned, a significant share of these border crossings is performed within the so called local (small) border traffic regime<sup>3</sup>, with the purpose of shopping or running a business in border areas. Among the Russian and Tajik citizens arriving in Poland, there are those who are potential applicants for international protection in Poland. Among the top 10 nationalities of non-EU citizens arriving to Poland, there are also citizens of the U.S., Israel, Canada, China, Japan and Australia. Citizens from these countries usually come to Poland by planes, through the air border.

## Refusals of entry

The available statistics on refusals of entry reflect not only the scale of cases when foreigners appear at the border without valid documents, such as visas or documents confirming the reasons of their entry and stay in Poland. In particular, since 2015, they also reflect the situation of potential asylum applicants at the Belarusian and Polish border (see *Table 2*). They come to Poland with no valid documents authorising them to enter the country, with the intent to apply for international protection, but in the majority of cases they are sent back to Belarus or, less often, to Ukraine. Those turned away at the border with Belarus concern in particular citizens of Russia and Tajikistan (see also Chrzanowska et al., 2016). In 2015, citizens of Russia constituted almost 26% of foreigners who were refused entry. Their share grew to 62% in 2016 before decreasing again in 2017 to 42%. Importantly the absolute number of foreigners refused entry was also visibly lower in comparison to 2016. Potential asylum applicants are allowed to enter Poland and to submit applications for international protection only after many attempts at crossing the border (Helsinki Foundation for Human Rights – HFHR, 2018: 14). Therefore, the push-backs observed contribute to a certain extent to the increase in the number of refusals, especially in 2016 and 2017.

The domination of Ukrainian citizens among foreigners who were not allowed to enter Poland remained stable over time. The number of Ukrainians stem from their intensive cross border mobility as they mostly come to Poland for work or study purposes. In a majority of cases, they are refused entry due to possessing improper documents or lacking required documents confirming the purpose of their entry and stay in Poland.

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<sup>3</sup> Local border traffic between Poland and Ukraine is based on the bilateral agreement between these countries and it assumes that inhabitants of the border areas (30 kilometres from border line) may obtain permits for border crossings within the local border traffic and do not need visas (or since 2017 also biometric passports) to cross the border. However, the permitted period of stay within the local border traffic scheme is limited to 90 days and restricted to border areas. The agreement has been implemented since 2009. In summer 2016 the local border traffic was suspended for a month due to NATO summit in Poland. Whereas the local border traffic with Ukraine has been continued, the suspended local border traffic between Poland and the Kaliningrad Oblast (part of the Russian Federation), implemented since 2012, was not re-established after the NATO summit. Crossing the border and staying in Poland (in border areas) based on obtaining a permit for local border traffic is regulated in part III, chapter 2 of the Law on Foreigners of 2013.

**Table 2. Number of non-EU citizens refused entry at the external borders**

Year	2011	2012	2013	2014	2015	2016	2017
<b>Total</b>	<b>21.657</b>	<b>32.138</b>	<b>33.887</b>	<b>24.519</b>	<b>41.580</b>	<b>103.986</b>	<b>72.140</b>
Women	7.472	10.383	13.142	8.986	15.509	45.481	26.661
Men	14.185	21.755	20.745	15.533	26.071	58.505	45.479
Top 5 countries	Ukraine	Ukraine	Ukraine	Ukraine	Ukraine	Russia	Russia
	Belarus	Georgia	Russia	Russia	Russia	Ukraine	Ukraine
	Russia	Russia	Georgia	Belarus	Belarus	Tajikistan	Belarus
	Georgia	Belarus	Belarus	Georgia	Georgia	Belarus	Moldova
	Armenia	Armenia	Armenia	Armenia	Tajikistan	Armenia	Armenia / Tajikistan

Source: own elaboration based on yearly statistics published by the Office for Foreigners (2018d).

## Migratory balance

In 2016, for the first time in Poland's post-war history, the migratory balance was positive (see *Table 3*), which contributed to a decrease in the negative population balance observed in Poland in the second decade of the 21<sup>st</sup> century. Importantly, the Central Statistical Office (CSO) in Poland bases their data on persons who registered their stay in Poland (immigrants) and those who deregistered from permanent residence in Poland (emigrants)<sup>4</sup>. However, the number of emigrants (i.e. persons who deregistered from permanent residence) is rather underestimated. In the framework of freedom of movement within the EU, Polish people do not need any permits to leave Poland or to enter other EU states, which leads to omission of the formal requirement of deregistering from permanent residence. Also, the statistics for migratory balance do not include immigrants, whose stay is short-term or temporary.

**Table 3. Migratory balance in Poland**

Year	2011	2012	2013	2014	2015	2016	2017
Difference between number of emigrants and immigrants	-4.334	-6.617	-19.904	-15.750	-15.750	1.500	1.400

Source: Central Statistical Office 2011-2017<sup>5</sup>.

The transformation of Poland into an immigration country became visible not only in the statistical data. It could also be observed in the labour market (with a growing number of

<sup>4</sup> See definition of migration for permanent residence at CSO's website (CSO, 2018).

<sup>5</sup> Information included in the table comes from Demographic Yearbooks of Poland for 2011-2017, (CSO, 2011; CSO, 2012; CSO, 2013; CSO, 2014; CSO, 2015a; CSO, 2016; CSO, 2017).

employers dependent on foreign labour), at Polish universities and schools as well as in public spaces. However, the growing visibility of immigrants in Poland is mostly linked to the presence of foreigners in the Polish economy, not to asylum seekers and refugees.

### **Presence of non-EU citizens in Poland<sup>6</sup>**

It is not possible to fully present the number of non-EU citizens in the territory of Poland. First, the available data only account for those foreigners with valid residence cards living in Poland. These cards constitute ID documents for foreigners and confirm the foreigner's permits or refugee status and the subsidiary protection they have obtained<sup>7</sup>. To fully reflect the presence of non-EU citizens in Poland also visa holders should be considered. For instance, in 2017 Polish consulates issued almost 800 thousand Schengen visas, which was a lower number than in 2016 (approx. 1 million) (Schengen Visa Info, 2018). In 2016, the number of all visas (both Schengen and national) issued by Polish consulates amounted to approximately 1.8 million (MFA, 2017a: 18). This means that more than 1.5 million visa holders come to Poland each year, but the duration of their stay might be relatively short. One should take into account the fact that the majority of visas are issued in source countries for economic migrants to Poland, mostly Ukrainian, and that foreigners from neighbouring countries keep coming to Poland with visas for a couple of years before they apply for long-term residence permits. This means that visa holders are not only short-term visitors in the Polish context. They are rather temporary immigrants, who either choose the strategy of staying and working in Poland with visas, because they consider this solution cheaper and more available, or they do not fulfil the necessary requirements to apply for residence permits (more in Szulecka, 2017). Visa holders constitute a much larger group than holders of valid residence cards in Poland, which means that any discussion of the presence of non-EU nationals in the territory of Poland must also include at least foreigners coming to Poland with national visas (valid for at most 12 months)<sup>8</sup>. There are also foreigners who come to Poland within the visa free regime, especially from Ukraine, whose citizens began benefitting from this opportunity (if they have biometric passports) since June 2017.

Apart from valid residence card holders and holders of visas or foreigners enjoying the visa free regime, one must also consider the presence of two other groups. The first are those non-EU nationals who are travelling across Poland to another destination who enter the country clandestinely and stay for some time. The second group is those who possess permits for local border traffic (between Poland and Ukraine). Both of these groups' presences are rather short-term, which means that they are not seen as residents (even temporary residents) of Poland and are not addressed with any special policies.

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<sup>6</sup> To complete the picture of foreigners' presence in Poland one should also consider also foreigners having EU citizenship or members of their families. On 1<sup>st</sup> January 2018 there were eighty thousand such foreigners with valid residence cards in Poland, which constituted one fourth of all valid residence cards possessed by foreigners in Poland. However, data presented in this report refer to non-EU nationals.

<sup>7</sup> The forms of international and national protection foreigners may obtain in Poland are described in part 5.

<sup>8</sup> E.g. Eurostat counts national visas issued by Poland as first residence permits, see e.g. European Migration Network for methodological comment (EMN, n.d.), or the European Commission briefing regarding first time residence permits issued in the EU (Juchno, 2017).

## Non-EU citizens with valid residence permits in Poland

As far as holders of valid residence cards are concerned, the citizens of neighbouring countries are the most numerous, with Ukrainian citizens taking the lead. Other important countries of origin of residence-card holders are: Vietnam, China, Armenia, India, Turkey.

**Table 4. Non-EU citizens with valid residence cards in Poland**

Year	Dec 31 <sup>st</sup> , 2011	Dec. 31 <sup>st</sup> , 2012	Dec. 9 <sup>th</sup> , 2013	Jan. 1 <sup>st</sup> , 2015	Jan. 1 <sup>st</sup> , 2016	Jan. 1 <sup>st</sup> , 2017	Jan. 1 <sup>st</sup> , 2018
<b>Total number</b>	<b>100.298</b>	<b>111.971</b>	<b>121.218</b>	<b>112.159</b>	<b>140.630</b>	<b>187.316</b>	<b>244.876</b>
with refugee status	1.170	849	888	1.408	1.359	1.306	1.351
% of all resident cards	1.17%	0.76%	0.73%	1.26%	0.97%	0.7%	0.55%
with subsidiary protection	3.012	2.369	2.446	3.160	2.058	1.911	2.042
% of all resident cards	3%	2.12%	2.02%	2.82%	1.46%	1.02%	0.83%
with permit for tolerated stay	738	620	1.838	384	334	308	303
% of all resident cards	0.74%	0.55%	1.52%	0.34%	0.24%	0.16%	0.12%
with permit for stay due to humanitarian reasons	<sup>9</sup>	-	-	445	1.798	1.837	1.949
% of all resident cards	-	-	-	0.4%	1.28%	0.98%	0.8%
with permit for temporary stay	41.647	54.503	57.529	49.649	77.623	120.148	166.907
% of all resident cards	41.52%	48.68%	47.46%	44.27%	55.20%	64.14%	68.16%
with permit for permanent residence	47.999	47.908	51.027	48.186	47.989	51.208	60.360
% of all resident cards	47.86%	42.79%	42.10%	42.96%	34.12%	27.34%	24.65%
with long-term resident's EU residence permit	7.732	5.722	7.490	8.927	9.469	10.598	11.964
% of all resident cards	7.71%	5.11%	6.18%	7.96%	6.73%	5.66%	4.89%

Source: own elaboration based on yearly statistics published by the Office for Foreigners (2018d).

According to available statistics (*Table 4*), the majority of holders of residence cards are either non-EU citizens with temporary residence permits (68% at the beginning of 2018) or foreigners with a permit for permanent stay (almost 25% in at the beginning of 2018). Foreigners who obtained international protection constitute only a marginal part of holders of residence cards issued by Polish authorities (nearly 1,4% of all resident cards at the beginning of 2018). More

<sup>9</sup> Permit for stay due to humanitarian reasons has been granted since 2014. Its aim was similar to the permit for tolerated stay before 2014.

detailed data on the citizenship of holders of temporary or permanent residence permits in Poland show that immigrants from Ukraine, Belarus and Russia predominate (see *Table 5*).

*Table 5* presents those national groups that were the most numerous (more than one thousand cards) among holders of valid documents as of January 1<sup>st</sup>, 2018. Persons with a form of international protection (refugee status or subsidiary protection) or national protection (permit for tolerated stay or permit for stay due to humanitarian reasons) are the citizens of non-EU neighbouring countries, with Russia (as a country of citizenship; and Chechnya as a region of origin) predominating. Syrian citizens constitute a significant share of the total number of foreigners granted refugee status. Although Iraqi citizens make up a smaller number in this group, their proportion is still sizeable relative to the overall refugee population structure in Poland.

**Table 5. Non-EU citizens with valid residence cards in Poland by type of permit and main countries of origin (as of January 1st, 2018)**

Country of origin	Permit for permanent stay	Long-term resident's EU residence permit	Temporary residence permit	Refugee status	Subsidiary protection	Permit for tolerated stay	Permit for stay due to humanitarian reasons	Total
<b>Ukraine</b>	<b>29.969</b>	<b>3.712</b>	<b>110.626</b>	<b>88</b>	<b>277</b>	<b>8</b>	<b>380</b>	<b>145.060</b>
<b>Belarus</b>	<b>10.746</b>	<b>528</b>	<b>3.864</b>	<b>108</b>	<b>5</b>	<b>2</b>	<b>46</b>	<b>15.299</b>
Vietnam	2.405	2.484	6.518	2	1	217	82	11.709
<b>Russia</b>	<b>3.851</b>	<b>543</b>	<b>4.276</b>	<b>446</b>	<b>1.484</b>	<b>3</b>	<b>712</b>	<b>11.315</b>
China	632	1.106	7.025	14	-	3	4	8.784
India	478	539	5.876	-	-	-	9	6.902
Turkey	622	574	2.653	4	2	1	10	3.866
Armenia	857	565	1.733	3	4	12	293	3.467
USA	797	132	1.434	-	-	-	3	2.366
South Korea	79	317	1.554	-	-	-	-	1.950
Uzbekistan	202	43	1.488	6	4	1	14	1.758
Georgia	147	52	1.190	-	7	2	151	1.549
Pakistan	132	38	1.110	12	2	6	10	1.310
Kazakhstan	651	44	563	17	22	-	10	1.307
Egypt	384	39	780	40	2	-	5	1.250
Moldova	242	83	849	-	-	-	6	1.180
Nepal	47	236	871	2	1	2	5	1.164
<b>Iraq</b>	<b>108</b>	<b>13</b>	<b>820</b>	<b>55</b>	<b>61</b>	<b>-</b>	<b>4</b>	<b>1.061</b>
<b>Syria</b>	<b>162</b>	<b>54</b>	<b>501</b>	<b>286</b>	<b>40</b>	<b>-</b>	<b>4</b>	<b>1.047</b>
Japan	213	34	772	-	-	-	1	1.020

Source: own elaboration based on yearly statistics published by the Office for Foreigners (2018d).



## Number of applications for international protection

According to Eurostat data (*Table 7*), Poland is characterised by a significant share of minors (at least one third of all applicants) coming with their parents to seek international protection. As the data on sex indicate, women constitute at least 40% of all applicants (see *Table 6*).

**Table 6. Number of applicants for international protection**

Year		2011	2012	2013	2014	2015	2016	2017	Total (2011-2017)
<b>Total number</b>		6.887	10.753	15.253	8.193	12.325	12.319	5.078	70.808
Incl. women		3.233	4.849	7.407	3.922	6.088	5.948	2.335	33.782
TOP countries of origin	Russia	4.305	6.084	12.849	4.112	7.989	8.992	3.550	47.881
	Georgia	1.735	3.234	1.245	726	394	124	70	7.528
	Ukraine	67	72	46	2.318	2.305	1.306	671	6.785
	Tajikistan	0	9	5	107	541	882	154	1.698
	Armenia	216	413	206	135	195	344	85	1.594
	Syria	12	107	255	114	295	47	44	874
	Kirgizstan	43	41	67	125	147	72	51	546
	Kazakhstan	26	121	95	83	31	46	8	410
	Vietnam	31	57	41	56	56	84	30	355
	Belarus	81	69	41	26	25	46	41	329
	Afghanistan	36	103	50	37	19	22	25	292
	Iraq	28	25	29	27	62	42	41	254
	Pakistan	20	43	36	49	26	28	28	230
	Turkey	17	9	16	3	15	65	56	181

Source: own elaboration based on yearly statistics published by the Office for Foreigners (2018d).

Between 2011-2017, the highest number of applications were submitted in 2013 when 15.253 were received. In the peak years of the refugee crisis in Europe (2015-2016), the numbers were lower and amounted to about 13.000. The lowest number of applications (about 5.000) were recorded in Poland in 2017. In each year analysed, Russia was the main country of origin for asylum applicants, in particular, Chechens. Georgians constituted the most important group of applicants in 2011-2013 (they submitted at least 1.2 thousand applications yearly) with more than 3.2. thousand in 2012. In 2017, they submitted only 70 applications. In turn,

the number of Ukrainian applicants jumped up sharply since 2014 (from 46 applications in 2013 to 2.318 in 2014), which was directly linked to the military conflict in Eastern Ukraine. Syrians submitted the most applications in 2015 with a total number of 295 applications.

**Table 7. Applicants for international protection by age group**

Year		2011	2012	2013	2014	2015	2016	2017
Under 18 years old – total		1.955	3.550	6.975	2.145	4.780	4.810	1.385
Under 18 years old	Under 14	1.745	3.160	6.405	1.885	4.325	4.385	1.230
	14-17	210	390	565	255	455	425	150
18-64 years old	18-34	1.925	3.705	4.595	1.930	3.370	3.175	1.010
	35-64	1.050	1.850	2.330	1.470	2.015	1.740	590
65 and more years old		55	70	70	65	90	55	20

Source: Eurostat database, n.d.

## Decisions on applications for international protection

Decisions to grant protection are made by the Office for Foreigners in the first instance and by the Refugee Board in the second instance. The Refugee Board is a separate institution from the Office for Foreigners. However, it is also part of the government. Its composition includes experts in administrative law and social sciences (some of them are academics). The composition of the Board changes every five years, but some of the members participate in the work of the Refugee Board for more than one term<sup>10</sup>. The asylum procedure is unified, which means that a person seeking protection applies for international protection and the proceeding regarding this application may end with granting either refugee status or subsidiary protection. If the Office for Foreigners (in the first instance) or the Refugee Board (in the second instance) do not find a basis for granting refugee status, but asylum seekers are still deemed deserving of international protection, they obtain subsidiary protection.

The vast majority of decisions issued in the first instance involve the discontinuance of the procedure<sup>11</sup> or the leaving of the application without any examination (see *Table 8*). This is mostly because applicants are no longer present in Poland, are no longer interested in continuing their asylum procedure or do not register at reception centres where they are supposed to appear shortly after submitting their application. The rate of positive decisions depends on the country of origin. In the case of citizens from Syria, all decisions are either positive or left unprocessed (which is partially due to the absence of applicants in Poland), whereas in cases involving Russian citizens (of mostly Chechen origin), the vast majority of

<sup>10</sup> The Refugee Board's website: <http://rada-ds-uchodzcow.gov.pl/> (Accessed 07 June 2018).

<sup>11</sup> 'Discontinuance' or 'discontinuation' is the term used to describe the decision on cancelling the proceeding due to the fact that the person who initiated the proceeding (here: the foreigner applying for international protection) is no longer interested in being a part of the proceeding or cannot be reached by Polish authorities (e.g. because of a lack of valid address of the applicant).

decisions are negative or the proceedings are discontinued. However, due to the scale of the inflow, the small share of positive decisions issued in the case of Russian citizens still gives this group the first position among foreigners granted refugee status and subsidiary protection. Between January 1, 2007 and March 1, 2018, 589 Russian citizens were granted refugee status. In comparison, in the same time period, 446 Syrian citizens and 107 Iraqi citizens obtained this form of protection. Since 2008, subsidiary protection was granted to 4,173 Russian citizens, 309 Ukrainian citizens and 107 Iraqi citizens (Office for Foreigners, 2018c).

**Table 8. Decisions issued by the Office for Foreigners (first instance)**

Year	2011	2012	2013	2014	2015	2016	2017
<b>Refugee status</b>	<b>153</b>	<b>87</b>	<b>208</b>	<b>262</b>	<b>348</b>	<b>108</b>	<b>150</b>
women in absolute numbers	64	35	82	80	138	47	57
% of women	42%	40%	39%	31%	40%	44%	38%
<b>Subsidiary protection</b>	<b>155</b>	<b>140</b>	<b>146</b>	<b>170</b>	<b>167</b>	<b>150</b>	<b>340</b>
women in absolute numbers	66	60	66	77	83	73	173
% of women	43%	43%	45%	45%	50%	49%	51%
<b>Tolerated stay</b>	<b>170</b>	<b>292</b>	<b>405</b>	<b>300</b>	<b>122</b>	<b>49</b>	<b>19</b>
women in absolute numbers	87	137	212	170	65	22	9
% of women	51%	47%	52%	57%	53%	45%	47%
<b>Total: positive decisions</b>	<b>478</b>	<b>519</b>	<b>759</b>	<b>732</b>	<b>637</b>	<b>307</b>	<b>509</b>
women in absolute numbers	217	232	360	327	286	142	239
% of women	45%	45%	47%	45%	45%	46%	47%

Source: own elaboration based on yearly statistics published by the Office for Foreigners (2018d).

The Refugee Board, which is the institution responsible for processing applications for international protection in the majority of cases in the second instance, confirms the decision issued by the Office for Foreigners (see Table 9). In case of some nationalities, they may, however, change the approach to granting international protection, which was the case for many Ukrainians who began coming to Poland as asylum seekers in 2014 (due to the military conflict in the Eastern part of Ukraine). Primarily they were not perceived by the relevant authorities as persons deserving international protection in Poland. This was explained as due to the fact that there was the possibility of their seeking protection internally, in other parts of Ukraine. This trend was changed by several positive decisions issued by the Refugee Board in 2015, and then also by the Office for Foreigners in 2016 and 2017. In June 2018, 88 citizens of Ukraine had residence cards based on refugee status, 355 – based on subsidiary protection. However, this is a marginal number, if we compare it to the numbers of temporary and permanent residence permits issued to citizens of Ukraine (see also Górny, 2017).

**Table 9. Decisions issued by the Refugee Board (second instance)**

Year	2011	2012	2013	2014	2015	2016	2017
<b>Refugee status</b>	<b>4</b>	<b>29</b>	<b>5</b>	<b>5</b>	<b>12</b>	<b>20</b>	<b>1</b>
Subsidiary protection	52	24	22	11	30	46	29
Tolerated stay	41	27	22	2	11	17	19
<b>Maintenance<sup>12</sup></b>	<b>1.216</b>	<b>899</b>	<b>940</b>	<b>1.306</b>	<b>1.783</b>	<b>1.978</b>	<b>2.118</b>
Discontinuance / leaving unprocessed	200	112	174	104	391	174	166 <sup>13</sup>

Source: own elaboration based on yearly statistics published by the Office for Foreigners (2018d).

## Expulsions

Due to the growing scale of immigration and the Polish state's attendant attempts to more carefully control migration, the number of return orders and effective returns has been noticeably increasing since 2014 (see *Table 10*). Since much of the tightening state control has involved checks on the legality of employment (and being found in unlawful employment, which constitutes a basis for a return order), many of these return orders have been linked to economic migration.

**Table 10. Foreigners ordered to return and returned following return order**

Year	2011	2012	2013	2014	2015	2016	2017
Persons ordered to leave	7.750	7.995	9.215	10.160	13.635	20.010	24.825
Persons returned following return order	7.050	6.845	8.465	9.280	12.930	18.575	22.210

Source: Eurostat database, n.d.

## Transfers under Dublin regulation or within readmission agreements

Data on transfers of foreigners to and from Poland, based on the Dublin regulation<sup>14</sup> or readmission agreements reflect an important issue in the managing the flow of asylum seekers from the perspective of not only Poland, but also of other countries. This data confirm that Poland is rather a transit country for asylum seekers in the EU. According to Border Guard data, in 2017, 1.011 Russian citizens were transferred to Poland, out of 1.838 of all non-EU

<sup>12</sup> Decision of the Refugee Board confirming the decision issued by the Office for Foreigners in the first instance.

<sup>13</sup> The data for 2017 reflect cases transferred for re-examination.

<sup>14</sup> *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, Official Journal of the European Union L180/60.

citizens transferred to Poland under Dublin regulation or within readmission agreements. Most transfers were conducted through the border with Germany and Slovakia. A similar number of Russian citizens transferred to Poland from other countries was recorded in 2016, whereas in 2015, approximately 500 Russian citizens were transferred to Poland. In the case of Ukrainian citizens, about 350 persons were transferred to Poland yearly between 2015 and 2017, and most of these transfers were executed at the border with Germany and the Czech Republic (Border Guard Statistics, 2011-2017).

All in all, in 2017, Poland received 1.433 asylum seekers under the Dublin regime from other EU countries (mostly from Germany, Austria and France). In the same year, Poland requested the transfer of asylum seekers to other countries in 165 cases, but only approx. 10% were implemented (AIDA, 2018). Poland remains the country to which asylum seekers submit their first applications for international protection and then move to other countries to apply for international protection again. And this fact is often referred to when changes in law or practice assume reduced access to asylum procedures: if asylum seekers do not stay in Poland and do not wait for decisions, it is interpreted to mean that they are seeking better economic conditions rather than protection. Such an interpretation leads the authorities to the conclusion that asylum seeking in Poland is associated with irregular migration (see e.g. Szulecka, 2016: 228).

## 2. The socio-economic, political and cultural context

### A brief history of immigration and migration policy development

Poland experienced significant migratory movements immediately after the Second World War as a result of changes in the Polish state's borders and the forced displacement of people to and from the country's territory. However, the beginning of the Cold War and the announcement of the Iron Curtain doctrine in 1948 made it almost impossible for migrants to enter Poland. Between 1949 and 1990, on average, from one to three thousand immigrants were registered annually. A majority of these immigrants were Polish citizens. Among the few arriving foreigners were mostly citizens of the USSR and other communist states, often spouses of Polish citizens; there were also cases of students from the USSR, Bulgaria and Vietnam who decided to settle in Poland after a marriage; and finally, pro-communist asylum seekers (e.g. over 13 thousand refugees from Greece in 1948-1950, also Chilean political forced migrants who fled their country in 1973) or Palestinians. In general, the period of the Polish People's Republic was not conducive to large scale immigration, the various forms of which were blocked and kept to a minimum, including foreign workers and tourists (Okólski, 2010: 34-36). This situation was due to the post-war reality, when the late 1940s brought repressive regimes to Central and Eastern Europe, and the countries of the region found themselves within the Soviet sphere of influence. Consequently, public authorities sought to take control of every aspect of inhabitants' lives, thereby overriding basic human rights, including the right to free movement. This limited both the inflow and outflow of the population. It also applied to Poland.

In the CEE region, however, there were periodic political and economic upheavals, which often resulted in large waves of migrants, including refugees. In the case of Poland, these waves happened especially in the years 1980-1981. The year 1980 brought a sharp political and economic crisis that contributed to mass strikes across the country and to the beginning of changes triggered by the increasing activity of trade unions and the Solidarity movement. However, on December 13, 1981, Martial Law was imposed in Poland, which on the one hand led to a wave of arrests and repressions, and on the other hand to a large-scale emigration, often of a refugee character (Slany, 1995: 74-85; see more: Stola, 2010). It is worth adding that according to the statistics of target countries, between the years 1951-1989, the U.S. registered immigration from Poland at a level of 177.6 thousand and Canada at a level of 117.4 thousand persons, while Australia registered about 30 thousand people (Slany, 1995: 150-151).

The transition from a centrally planned to a free market economy that attended Poland's shift from communism to democracy at the turn of the 1980s and 1990s ushered in a new phase in the modern history of migration in Poland. It was a breakthrough point for shaping the state's migration status. Only after 1989, one can observe both qualitative and quantitative changes in international migratory movements to and from Poland. However, Poland is not unique here, because a similar situation occurred in some of the other CEE countries – the communist ones from the Eastern Bloc who had been under the Soviet sphere of influence. They also gradually opened their borders to population flows.

The next key migration phases occurred during the time of preparations for Poland's membership to the European Union, its joining in May 2004 followed by accession to the

Schengen zone in December 2007 (for air and sea border crossings since March 2008). Both the period preceding these events and the first years of membership resulted in significant legal, institutional and political changes for Poland, but also practical ones. As EU citizens, Poles were able to move and reside freely within the territory of the EU. Thus, some international migration evolved into so-called intra-EU mobility. In addition, the Eastern Polish borders became the Eastern borders of the EU, encompassing the Polish border with three non-EU countries: Ukraine, Belarus and the Kaliningrad Oblast of Russia.

The accession of Poland to the EU in 2004 made international migration a much more significant force shaping its demographic situation. It has become not only a state of net emigration (many Poles left for Western European countries, including Germany, the United Kingdom and Ireland), but – due to the improvement of its socio-economic conditions – also a target country of economic immigration, especially for migrants from Eastern European countries, including Ukraine. In the last few years, immigration from this part of Europe has steadily increased, and its character has been evolving. Already in 2014, the Russian Federation's annexation of Crimea followed by the armed conflict in Eastern Ukraine in the Donetsk and Luhansk regions stimulated a sharp increase in the number of Ukrainian immigrants to Poland, for not only economic but also political and humanitarian reasons. This contributed to growing political and socio-economic destabilization of the country. Some Ukrainians were internally displaced to western Ukrainian districts, while others decided to migrate beyond the state's borders, including to Poland.

The developments observed after the late 1980s have had a great impact not only on migration movements but also on Polish migration policy. The relevant literature identifies three main periods in the evolution of the abovementioned policy after 1989: a phase of institutionalization (1989-2001), a phase of Europeanisation (2001-2004) and a phase of stabilization (2004-2010) (Lesińska, Stefańska, Szulecka, 2010: 262-264). The key national strategic policy document in the area of migration *Migration policy of Poland – the current state and recommended actions* was developed and adopted by the Council of Ministers in 2012. In 2015, the Law and Justice party – which can be characterized as a nationalist and socially conservative party (Prawo i Sprawiedliwość – PiS, 2014; PiS, 2016, p. 4) – came to power. It cancelled the abovementioned strategic policy document in 2016. In the light of new national circumstances (the new ruling party and the consequences of its decisions, including crises having to do with democracy, the independence of the judiciary system and the rule of law) and new regional circumstances (the migration and refugee crises in the EU and increasing political and military instability in the Eastern Partnership countries induced by Russia), a closing date for the stabilization phase was set for 2015-2016. It was followed by an ongoing phase of revision (see more in part 4).

In 2016, the new government defined its list of Poland's priorities in the field of migration management broadly in the European context, including: 1. the protection of the EU's external borders, which meant full acceptance of the European Border and Coast Guard (Frontex after its reform of 2016); 2. greater assistance to refugees outside the EU (e.g. in Lebanon, Jordan or Turkey); and 3. total opposition to an automatic relocation scheme perceived as undermining the sovereignty of EU countries. In addition, as part of the government's approach, the response to Poland's demographic challenges would be to support women's fertility and a reasonably conducted migration policy, based on migration from 'the East near our borders', in other words, mainly from Ukraine, and not the Middle East (Skiba, 2016: 4).

The issue of priorities in the government's migration policy appeared again in 2018 when the Council of Ministers adopted a strategic policy document titled 'Socio-economic priorities of migration policy'. The publication of detailed solutions resulting from socio-economic priorities was planned for the second half of 2018. Generally, according to the document, the new migration policy of Poland must: be adapted to the priorities of the labour market; focus on supplementing labour resources with foreigners in sectors/occupations characterized by competency gaps (including protection of the national labour market); respond to the needs of foreigners and Polish citizens living abroad, including repatriates, so as to encourage them to return to the country and establish in or transfer to Poland their business activities; prevent further emigration and ensure an increase in return migration (MID, 2018).

At this point, it is worth adding that Poland's position on the solutions proposed by the EU in the face of the refugee and migration crisis has evolved in recent years. In May 2015, the European Commission announced, 'The European Agenda on Migration', which was supposed to be an attempt to provide a comprehensive response to the crisis in Europe. As part of immediate actions, an emergency relocation scheme and a resettlement mechanism were proposed. In July 2015, the Polish government of political party called Civic Platform confirmed its readiness to accept 2.000 refugees (about 1.100 persons from Greece and Italy under relocation and 900 under resettlement, mostly from Syria and Eritrea) and in September an additional 5.000 people. In September 2015, Poland voted for two Council decisions that involved the transfer of up to 160 thousand asylum seekers from Italy and Greece to other EU member states over a period of two years, until September 2017. After the elections in 2015, Poland withdrew from the declared number of asylum seekers to be accepted and has not yet implemented either a relocation or a resettlement scheme (Pachocka, 2016b). One has to remember that relocation was launched in accordance with Art. 78 (3) of the Treaty on the Functioning of the European Union (TFEU), which is devoted to EU asylum policy. It stipulates that: 'In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament'. Thus, Poland is not fulfilling its obligations under EU law.

## **The 'geography' of migrants' presence on national territory**

A precise discussion of the presence and distribution of immigrants in Poland is difficult for a number of reasons, including the fact that various entities collect slightly different data on foreigners, including the Central Statistical Office, the Border Guard, the Office for Foreigners, the Ministry of Family, the Labour and Social Policy and the National Labour Inspectorate; the methodological framework used in Polish public statistics distinguishes between temporary and long-term migrants; migration in Poland is circular and incomplete; and there is a high mobility of non-EU migrants. One of the basic sources of information on the distribution of immigrants in Poland is the National Census. The last such census was carried out in 2011, and its results were published in subsequent years. The next census is planned for 2021.

For the purposes of the 2011 National Census, data on immigrants were collected from a representative sample and from the data on immigrants living in collective accommodation places (e.g. centres for asylum seekers or student dormitories). These data mainly concern



short-term immigrants who were understood to be foreigners staying in Poland without the right to permanent residence. Immigrants who have been granted permanent residence were considered inhabitants of Poland (Kostrzewska and Szałtys, 2013: 25-26). According to the 2011 National Census, the number of immigrants temporarily staying in Poland was 56.3 thousand people (Kostrzewska and Szałtys, 2013: 28), including 40.1 thousand temporary immigrants staying more than 3 months in Poland (Kostrzewska and Szałtys, 2013: 96-97).

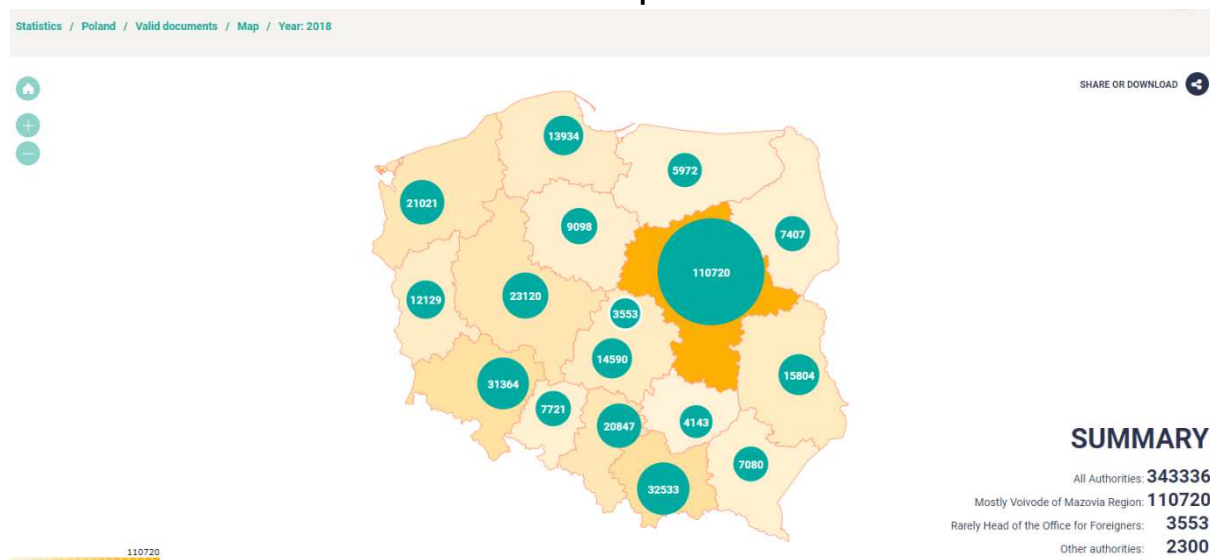
In 2011, the distribution of immigrants temporarily living in Poland for more than 3 months was uneven, characterized by the largest concentration in four voivodships – Masovian with Warsaw as the capital (27.1%), Lesser Poland with Krakow as the capital (8.7%), Lower Silesia with Wrocław as the capital (8.9%) and Silesia with Katowice as the capital (8.4%). A clear correlation was observed between the voivodship of residence of immigrants and the level of socio-economic development of the province measured by both unemployment and employment rates. In this respect, in 2011, the highest employment rate was recorded in Greater Poland, the Masovian region and Lesser Poland, of which the last two voivodships belonged to those most inhabited by temporary migrants. In 2011, over 81% of immigrants stayed in cities (Kostrzewska and Szałtys, 2013: 30-31).

An understanding of the distribution of what can broadly be understood as the immigrant population of Poland can be provided by an analysis of the number of valid resident cards issued for different categories of migrants, including such documents as temporary residence, permanent residence, registered residence of an EU citizen, EU long-term resident stay, permanent residence right of an EU citizen, residence of a family member of an EU citizen, permanent residence of a family member of an EU citizen as well as refugee status, subsidiary protection, residence due to humanitarian reasons and tolerated stay. One has to remember that these documents refer both to EU citizens and TCNs. In addition, they were provided by different authorities, for example, the 16 regional Voivodes<sup>15</sup> and the head of the Office for Foreigners. As of May 18, 2018, there were 343.336 different types of valid documents issued for immigrants in Poland. The Masovian voivodship predominated, accounting for 32% of all valid documents. However, holders of residence cards also lived in other provinces of Poland (*Figure 1*).

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<sup>15</sup> As of the beginning of 2018, Poland is administratively divided into 16 voivodships (*województwo*), 380 poviats (*powiat*) and 2.478 communes (*gmina*). The largest voivodship is a Mazovian one, where the capital city – Warsaw – is located. The administrative division of Poland into 16 voivodeships was introduced by the administrative reform in 1999.

**Figure 1: The number of all the valid documents for immigrants in 2018 in Poland by voivodeships**



Source:

<https://migracje.gov.pl/en/statistics/scope/poland/type/statuses/view/map/year/2018/?x=0.7876&y=1.2391&level=1> (Accessed 18 May 2018).

## A brief description of the society of the hosting country

The most comprehensive and cross-sectional data on the national, ethnic, linguistic and religious structure of the Polish population is provided by the National Census of 2011. Based on these results, the image of Polish society that we see is very homogeneous. Of Poland's 38.5 million inhabitants, 94.83% declared an exclusively Polish national and ethnic identity, while over 871 thousand persons (2.26%) declared both Polish and non-Polish national and ethnic identity (CSO, 2015c: 29). Examining the percentage of all individual/double national-ethnic identities during the census, in addition to a Polish one (98.5%), Silesian (1%), German (0.1%), Belarusian (0.1%), and Ukrainian (0.1%) identities were also indicated (CSO, 2015c: 36). Based on the results of the census from 2011, it can be stated that the vast majority of Polish people use Polish to communicate at home. The use of this language at home was indicated by 98.2% of the total population, and for 96.2% of people it was the only language used at home. Other languages spoken at home were Silesian, Kashubian, English and German (CSO, 2015c: 69). In 2011, for the first time in the post-war history of censuses, the Polish population was asked about their mother tongue. In 2011, Polish was the mother tongue for 97.78% of population, followed by Silesian (0.36%), German (0.15%), Ukrainian (0.07%), Belarusian (0.05%), Russian (0.04%), Kashubian (0.04%), Roma language (0.02%), English (0.01%), Lithuanian (0.01%), Lemko language (0.01%), French (0.01%) and Vietnamese (0.01%) (CSO, 2015c: 81).

In 2011, when asked about religious affiliation, 7.1% of respondents did not answer the question and 88.86% declared that they belong to a Christian denomination, including 87.58% belonging to the Roman Catholic Church, 0.41% to the Orthodox church, 0.36% to Jehovah's Witnesses and 0.18% to the Evangelical-Augsburg church. In other words, 88.8% of the population are broadly understood to be Christians. In addition, in 2011, a small percentage calculated in hundredth parts of the total population were: Buddhists (6 thousand persons)

and Muslims (5.1 thousand persons). Followers of Judaism and other religions accounted for 0.8 thousand (CSO, 2015c: 92-95). In 2015, on the occasion of CSO research on social cohesion in Poland, 92.8% people aged 16 years and over declared their belonging to the Roman Catholic church, 3.1% claimed to lack any denominational affiliation, and 2.2% refused to answer the question (CSO, 2015b).

Since late 2015, after parliamentary elections, Poland has been ruled by the Law and Justice Party (PiS) whose ideology can be characterized as right-wing, conservative, traditional, Eurosceptic and populist. PiS received 37.58% of the total votes in 2015. The second highest vote-receiving party was the Civic Platform (PO), leading the former government, with 24.09% votes (PKW, 2015). PO can be described as a Christian democratic, liberal conservative and pro-European party in terms of ideology.

Beginning in 1990, Poland has been showing a steadily growing trend in terms of the Human Development Index (HDI)<sup>16</sup>. In 1990, Poland belonged to high human development countries (UNDP, 1990: 185). According to the most recent data, in 2015, in terms of its HDI value, Poland was ranked 36<sup>th</sup> out of 188 countries and territories covered, placing it in the group of countries with very high levels human development. However, compared to 2010, its position in the HDI rank fell by 3 in 2015. Among EU countries, and especially from the CEE region, Poland overtook, among others, Slovakia and Hungary, but it was, for example, lower than the Czech Republic (ranked 28<sup>th</sup>) (UNDP, 2016: 198, 202).

According to data provided by Eurostat, in 2017, the employment rate<sup>17</sup> was 70.9% in Poland in comparison to 72.2% for the EU. In 2011, figures were 64.5% and 68.6% for Poland and the EU, respectively. This means that employment increased in 2011-2017 both at the national and at the EU level, however, the rate for Poland was slightly below the EU average (Eurostat, 2018a). At the same time, the unemployment rate<sup>18</sup> fell in Poland from 9.7% in 2011 to 4.9% in 2017. In the case of the EU, it diminished from 9.7% to 7.6% (Eurostat, 2018b). This means that the labour market situation in Poland was more favourable than the EU average in 2017.

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<sup>16</sup> The Human Development Index is a synthetic measure that allows constant monitoring and assessment of the progress made in different countries in the three areas of human life that directly contribute to increasing human capabilities, i.e. a long and healthy life, access to knowledge and a decent standard of living. The calculation methodology was changed in 2010.

<sup>17</sup> According to Eurostat, the employment rate of the total population is calculated by dividing the number of person aged 20 to 64 in employment by the total population of the same age group. The indicators are based on the EU Labour Force Survey.

<sup>18</sup> According to Eurostat, the unemployment rate represents unemployed persons as a percentage of the labour force. The labour force is the total number of people employed and unemployed. Unemployed persons comprise persons aged 15 to 74 who were: i) without work during the reference week, ii) currently available for work, i.e. were available for paid employment or self-employment before the end of the two weeks following the reference week, iii) actively seeking work, i.e. had taken specific steps in the four weeks period ending with the reference week to seek paid employment or self-employment or who found a job to start later, i.e. within a period of, at most, three months. The indicator is based on the EU Labour Force Survey.

### 3. The constitutional organisation of the state and constitutional principles on immigration and asylum

#### Political system

Since 1989, Poland has been a democratic country based on the rule of law with a tripartite division of power as stated in the Constitution of the Republic of Poland<sup>19</sup>, passed in 1997. The provisions of the Constitution are applied directly and all other laws and ordinances, international agreements and regulations implemented by Poland must be in compliance with the Constitution. The Constitutional Tribunal is responsible for judging whether proposed or passed legislation is compliant with the Constitution and for reviewing the constitutionality of international agreements and regulations. In theory, the body is independent from the legislative and executive branches, and it occupies a separate position from common courts, the Supreme Court and the Supreme Administrative Court. In practice, since 2016, two laws regulating the work of the Constitutional Tribunal (*Law on Organisation and Proceedings at the Constitutional Tribunal of 2016*<sup>20</sup>) and the status of constitutional judges (*Law on the Status of Judges of the Constitutional Tribunal of 2016*)<sup>21</sup>, in force since January 2017, have reigned in some of this independence. They introduced new regulations that increased the authority of the executive branch (including the General Prosecutor) over the work of the Tribunal. Moreover, since new laws have also reduced the practice of publishing the Tribunal's verdicts and restricted the media's presence during Tribunal hearings, these changes can be interpreted as reducing the transparency of the Tribunal's work (see also Wolny, 2018).

Both daily observations and media reports as well as experts' analyses (see e.g. Kunstra, 2016) indicate that since the end of 2015, the state has been experiencing a constitutional and judicial crisis. This crisis has to do with the selection of judges and their appointment and the disputable successive reforms of the *Law on the Constitutional Tribunal*<sup>22</sup> and other reforms in the judiciary. In particular, the changes in the Constitutional Tribunal paralysed the work of this institution, lowered trust towards this body and promoted the belief that elected judges are not in fact independent<sup>23</sup>. The number of cases referred to the Constitutional Tribunal and processed there has become very low, which is perceived as a sign of the dependence of this body on political decisions. The proposed and passed changes to the *Law on the Constitutional Tribunal* did not lead to improvement. All of these facts have led to the escalation of social disappointment, since the crisis has been associated with threats to the rule of law and protection of human rights (Szuleka, Wolny and Szwed, 2016). Also, other reforms implemented since 2016 (i.e. the reform of the election of the Supreme Judges and the National Council of Judges) raised concerns about the possible political dependence of

<sup>19</sup> The contents of the Constitution of the Republic of Poland are available on the website of Constitutional Tribunal (Constitutional Tribunal, 2018).

<sup>20</sup> Journal of Laws of 2016 item 2072.

<sup>21</sup> Journal of Laws of 2016 item 2073.

<sup>22</sup> *The Law of 22 July 2016 on the Constitutional Tribunal* (Journal of Laws of 2016, item 1157) was withdrawn in December 2016.

<sup>23</sup> The crisis started when in 2015 judges for the vacant positions were selected twice, firstly by the parliament dominated by the Civic Platform party, which lost their position in October 2015, and then were replaced by the Law and Justice party who determined that the previous selection was invalid.

judges and threats to the rule of law. This in turn attracted the attention of the international audience as well as the EU Commission<sup>24</sup>.

Matters related to asylum seekers and migrants fall mostly under the jurisdiction of the administrative courts. The acts on foreigners and granting international protection constitute a part of administrative law, which means that the Supreme Administrative Court has the highest rank in this respect. In the first instance, these are regional administrative courts that process foreigners' appeals, after decisions are issued by competent bodies (mainly the Office for Foreigners). Apart from administrative courts, there are also common courts competent in criminal, civil, economic, labour and family law. They operate on different levels, as regional courts, district courts and appellate courts. And, the Supreme Court occupies the highest authority in this branch of the judiciary.

Legislative power is executed by the parliament, which consists of the Sejm and the Senate. The Sejm is the lower chamber of the parliament and proposes laws or works on the law proposals that have been prepared, among others, by relevant ministries. The Senate controls the work of this lower chamber.

The executive power is wielded by the President of the Republic of Poland, and the government, which is led by the Prime Minister. The main ministers responsible for migration and asylum issues are those who head the Ministry of the Interior and Administration, the Ministry of Family, Labour and Social Policy, and the Ministry of Foreign Affairs. The Ministry of the Interior and Administration supervises the Border Guard, which is responsible for receiving applications for international protection, border control, running the guarded centres for foreigners (including asylum seekers) and executing the decisions issued by courts in the cases of foreigners and asylum seekers. The Office for Foreigners, responsible for proceedings regarding applications for international protection and for securing the social needs of asylum seekers in Poland, also belongs to the group of institutions that are supervised by the Ministry of the Interior and Administration. The Office for Foreigners is also responsible for processing appeals to decisions on residence permits issued by voivodes, who govern at the regional level.

The Ministry of Family, Labour and Social Policy is responsible for providing social assistance to all citizens of Poland, as well as to foreigners who fulfil certain conditions. For example, it coordinates and supervises the functioning of the local family support centres and local centres of social assistance, which are public bodies, part of the local government. The local family support centres are involved in providing the beneficiaries of international protection with assistance as part of individual integration programmes (IPI). This Ministry is also responsible for proposing and implementing laws concerning the employment of foreigners. It supervises local and regional labour offices and departments of regional offices (*urzędy wojewódzkie*) involved in the issuing of work permits and seasonal work permits, in the registering of declarations of hiring foreigners and in conducting labour market testing and the listing of professions that are deficit in Poland.

The Ministry of Foreign Affairs has competencies related to the supervision of consular offices as well as implementing laws related to visa issuance. Its role seems more important from the perspective of the mobility of visa holders or beneficiaries of bilateral agreements

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<sup>24</sup> See more in e.g. the series of EU Observer reports on the communication on judicial reform in Poland between Polish government and the EU bodies (Zalan, 2018a; 2018b; 2018c).

related to mobility. Additionally, as far as asylum issues are concerned, it should be mentioned that the Ministry represents Poland in proceedings conducted by the European Court of Human Rights, which is of significance in the light of numerous claims submitted at ECHR against Poland with regard to asylum-related issues<sup>25</sup>.

The territorial structure of Poland assures the decentralisation of public authority in Poland (article 15 of the Constitution of Poland). Laws and policies are elaborated at a central level, with some level of freedom in creating local policies given to the regional (*województwo*) and local (*powiat*) territorial units in Poland. The implementation of laws and policies is coordinated by regional (*wojewoda* – voivode) or local (*starosta*) governors. As far as migration and asylum issues are concerned, the process of granting residence permits takes place at the regional level, but the institutions responsible for these procedures are only executing the policy and rules established by the government. Voivodes (through relevant departments of their offices) process applications for either temporary or permanent residence permits. They also issue work permits. Local governors are responsible for issuing short-term permits for seasonal work. Both at regional and also at local levels social assistance is provided, which is of importance for foreigners who obtain international protection. They can take advantage of the support in integration offered by local family support centres. Policies in this respect are often elaborated at central or regional levels. However, there are also elements of migration and asylum governance that are centralised. This applies especially to the processing of applications for international protection – they are processed by the central unit, the Office for Foreigners. Appeals to decisions on asylum are processed by the Refugee Board. Also, control activities linked to migration governance are coordinated at central levels (the Headquarters of the Border Guard), but in practice, the tasks are performed by local units (including border controls) and regional branches.

## **The main legal basis for migration and asylum**

According to the Polish Constitution, all people under the authority of the Polish State shall enjoy the freedoms and rights ensured by the Constitution (article 37 para 1), and exemptions<sup>26</sup> from this principle regarding foreigners should be specified by statute (article 37 para 2). Thus, other laws than the Constitution state, for instance, who can work in Poland and on what basis, who can access public healthcare, who can be supported in integration processes, etc. As far as asylum and migration are concerned, the Constitution of Poland states only a general protection of rights and access to international protection (article 56), indicating that the details are specified in the relevant laws. To be more precise, paragraph 1 of this articles stipulates that: 'Foreigners shall have the right of asylum in the Republic of Poland in accordance with principles specified by statute', and is followed by the paragraph 2 stating that: 'Foreigners who seek protection from persecution in the Republic of Poland, may be granted the status of a refugee in accordance with international agreements to which the Republic of Poland is a party' (The Constitution of the Republic of Poland of 1997, article 56).

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<sup>25</sup> See for instance information on MFA answer to claims regarding disrespect for ECHR order regarding the access of a potential asylum applicant to Polish territory and possibility to ask for international protection (MFA, 2017b; HFHR, 2017a).

<sup>26</sup> The exemptions are described in part 5 of the report, which summarizes the rights and obligations attached to various legal statuses of non-citizens in Poland.

The Constitution does not refer to the division of competences between ministries and the details of local governance, which means that the institutions involved in managing migration are not mentioned in this act. The execution of this right is regulated in the Law on Protection described below. One should remember, however, that this constitutional provision concerning asylum (para 1 of article 56) refers to a national form of protection, *azyl* (see more in part 5).

Of importance are also other constitutional provisions, such as article 32 stating that all people are equal before the law and that no one shall be discriminated against in political, social or economic life for any reason. These provisions do not pertain exclusively to citizens; they address all people, which means also foreigners. The provisions of the Constitution are of a very general nature, and this law does not distinguish foreigners of different statuses.

In general, in the context of implementing migration policies, the following provisions of the Constitution should be mentioned:

- Article 40: ‘No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment’;
- Article 41 (1): ‘Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute’ – it refers to the issue of detention of foreigners;
- Article 47: ‘Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and shall be able to make decisions about his personal life’ – it refers to the right to legal protection of private and family life (important in the context of issuance of return orders and their execution);
- Article 70: the right to education; compulsory education for children under 18; education free of charge in public schools (important in the context of detention of children).

As far as access to healthcare is concerned, the general provision states that everyone has the right to protection of their health. However, the state is responsible for providing health care only to citizens (regardless of their financial condition), although special attention is paid to vulnerable groups (children, pregnant women, the disabled and the elderly; article 68 of the Constitution). The provision of obligation to provide healthcare for vulnerable groups and to prevent contagious diseases does not refer to citizenship, which make it possible to conclude that foreigners, regardless of their legal status, should also be offered access to public healthcare, if they are members of the mentioned groups.

## 4. The relevant legislative framework in the fields of migration and asylum

### The national legislation on immigration and asylum

Migration and asylum issues are addressed by both primary and secondary laws. There are two main acts that govern migration and asylum:

1. The *Law on Foreigners of 12 December 2013* (in short: Law on Foreigners)<sup>27</sup>,
2. The *Law on granting protection in the territory of Poland of 13 June 2003* (in short: Law on Protection).

These two laws are supplemented by a number of other acts and ordinances that establish the details for processing migrants, asylum seekers, and refugees<sup>28</sup>. In general, these laws regulate two different spheres, but the Law on Foreigners may be treated as more general, since it applies to all foreigners, i.e. non-Polish citizens on Polish territory. However, specific rules regarding certain categories of foreigners (such as EU citizens and members of their families as well as asylum seekers and beneficiaries of international protection) are included in other acts. The conditions for admitting asylum seekers, granting international protection and for executing asylum procedures are specified in the Law on Protection of 2003. It guarantees foreigners who submit applications for international protection additional rights and poses other obligations than in the case of third country nationals coming to Poland (e.g. with visas for work or study purposes). For instance, foreigners applying for international protection cannot leave the territory of Poland before their decision is issued (unless they decide to return to their country of origin). They should attend the hearing as well as register in a specified time (2 days) and place (reception centre) after submitting the application to become eligible to obtain social assistance. Whereas other categories of foreigners do not have access to public health care, asylum applicants can access the health professionals hired by the Office for Foreigners, which is responsible for asylum procedures (see more on rights for asylum applicants in part 5).

In the migration and asylum legislative framework, other acts set procedures and rules that apply to foreigners and other actors involved in foreigners' adaptation or migration control in Poland (e.g. employers, border guards)<sup>29</sup>. In the context of asylum seekers and refugees of special importance are the provisions of the Law on Social Assistance of 2004<sup>30</sup>. With regard to economic migration the Law on Promotion of Employment and Labour Market Institutions of 2004<sup>31</sup> should be mentioned.

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<sup>27</sup> In case there is a need to refer to previous acts concerning foreigners, the name of the act is given with the year of its enacting, e.g. *Law on Foreigners of 1997*.

<sup>28</sup> Ordinances are referred to in parts 5 and 6. They are also included in the Annex I.

<sup>29</sup> See more in Annex I.

<sup>30</sup> Journal of Laws of 2017, item 1769 (consolidated text).

<sup>31</sup> Journal of Laws of 2017, item 1065 (consolidated text).



## The development of migration and asylum law and their institutional frameworks

The beginning of the development of national legislation on immigration and asylum can be traced to the beginning of the political transition in Poland in 1989. In fact, before this year Poland was a country restricting both foreign immigration and Polish emigration. Only liberalisation of border control and passport policies along with political reforms in neighbouring countries contributed to the process of Poland becoming a country of immigration. However, until 2014, especially after Poland's accession to the EU in 2004, the most visible trends were emigration of Polish nationals and foreigners transiting through the territory of Poland, either seeking international protection or looking for better economic opportunities. Since 2015, an increased inflow of foreigners (but not asylum seekers) has been observed. Considering the scale and character of mobility and changing regulations, one can identify four distinct stages<sup>32</sup> in the development of the Polish migration and asylum legislative framework<sup>33</sup>:

- Opening of the borders,
- Regulation of migration,
- Controlled openness and attempts to create a migration strategy,
- Revision of policy and laws.

The Ministry of the Interior and Administration significantly influenced the development of both Poland's national migration legislation and state policy (especially the document summarising migration policy accepted by the government in 2012<sup>34</sup>). The activity of this ministry in proposing laws and influencing policy was mostly linked to the fact that after the transition, Poland needed new institutions and regulations to address inflows from other countries on either a long-term or short-term basis as well to address the claims of other states regarding foreigners traversing Poland and entering other countries, such as Germany or Sweden (also for the purpose of applying for refugee status). For this reason, the first and second phases of migration policy development were dominated by working on policies and practices aimed at: the introduction of control mechanisms (at the border and within the territory of Poland), establishing a legal, institutional and reception system for persons seeking asylum and the creation of rules and institutions to legally administer foreigners' stay on Polish territory. This stage was also characterised by the establishment of international cooperation and bilateral agreements for managing cross-border mobility and reacting to irregular flows.

Only after Poland's accession to the EU, along with the significant outflow of Polish citizens from the Polish labour market and the possibility to use EU funds, can one observe

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<sup>32</sup> The three main phases in migration policy development described in part 2 were linked to the institutional framework and the Europeanisation process. The phases proposed in this part focus more on the development of asylum policies.

<sup>33</sup> The division (as far as the first three phases are concerned) is based on the summary of migration policy development presented by Renata Stefańska and Monika Szulecka (2014) and then updated for analytical needs. A similar description of phases of migration policy development was proposed by Sławomir Łodziński and Marek Szonert (2016).

<sup>34</sup> *Polska polityka migracyjna – stan obecny i postulowane działania (Migration policy of Poland – the current state and recommended actions)*, accepted by the Polish government in July 2012 (MIA, 2012). In 2014, the government accepted the plan to implement its recommendations.

the development of new migration and asylum laws and practices aimed at facilitating access to the labour market and attempts to elaborate integration policies and practices. This phase can be called ‘controlled openness’. It was characterized by the creation of a number of policy tools for facilitating foreigners’ access to the Polish labour market.

The most recognised example of liberalisation of foreigners’ access to the labour market was the introduction in 2006 of an employers’ declaration of intent to employ a foreigner. It allowed employers to hire a foreigner for at most 3 months within 6 months, and since 2008 – for 6 months within a 12 month period without an obligation to obtain a work permit. Between mid-2006 and mid-2007 the employment on such basis was possible only in agriculture. Since August 2007 the regulation was addressed to employers in all sectors of the economy willing to hire a citizen of one of the countries mentioned in the regulation: Belarus, Russia, Ukraine. In the next years citizens of three other countries could benefit from this procedure (Moldova since 2009, Georgia since 2010, Armenia since 2014).

Registering declarations was free of charge, whereas obtaining a work permit costs from 12 to 45 EUR, depending on the type of permit. Importantly, the process of obtaining a work permit was more complicated and time-consuming. It took about a month to get such a permit. Since 2007, getting work permits was easier, but still required waiting time and costs (although they were lower in comparison to costs in the past – even 200 euro for a work permit). The declaration registered at the local labour offices allowed the employer to hire the foreigner immediately, without waiting for the decision. Due to the increasing scale of immigration of foreigners working on the basis of such a declaration, the procedure of registering declarations eventually also became less automatic, and employers had to wait about a week for the possibility of hiring a foreigner in 2016 and 2017<sup>35</sup>. In January 2018, the system of employing foreigners became more restrictive and complex due to the introduction of amendments implementing the EU Seasonal Work Directive<sup>36</sup> and specifying the conditions of refusal of work permits or declarations. Still, the declaration procedure remains a simplified way of accessing the labour market in Poland for the citizens of one of the mentioned 6 countries<sup>37</sup>.

The period following Poland’s accession to the EU was also characterised by the state’s openness to foreigners and to cooperating with social service organizations dedicated to running integration initiatives and offering social and legal advice free of charge. This openness could be supported by relevant EU funds (see more in Table 11). And yet, the Polish state’s openness was ‘controlled’ in the sense that these efforts aimed at protecting Poland’s external borders and improving immigration services.

Poland’s change of government in October 2015 and the beginning of the European refugee crisis brought about the onset of the fourth phase of Polish migration legislation, which

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<sup>35</sup> This information comes from an ongoing study on the procedures for employing foreigners in Poland. See more at: <http://www.migracje.uw.edu.pl/projects/quality-assesment-of-public-employment-services-in-terms-of-the-simplified-employment-procedure-for-foreigners-po-wer/> (Accessed 7 June 2018).

<sup>36</sup> *Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers*, Official Journal of the European Union, L 94/375.

<sup>37</sup> More details on the conditions of employment of third country nationals in Poland are in the amended *Law on Promotion of Employment and Labour Market Institutions of 20 April 2004*, Journal of Laws of 2017, item 1065 (consolidated text).

can be characterized in terms of a revision of previous laws and policies. Within a year, Poland's new government annulled the strategic document on migration policy that had been accepted by the previous government. During this period, state security became one of the greatest priorities in terms of migration policy and responding to refugee crisis in the EU and its neighbourhood. As immigration continued to grow in scale, repressive measures (such as refusals of entry, tighter controls of migrants' work and residence permits and more heavy reliance on return orders) became more and more common. This shift in policy is in part the result of the fact that immigration during this period continued to increase in scale, but it also reflects the new priority placed on state security in migration policy. This period has also seen a reduction in the government's openness to collaborating with social service organizations dedicated to providing legal and integration support to immigrants and refugees.

Table 11 presents the development of migration and asylum law and policy (including institutional development). The introduced laws and changes reflect the state's emphasis on certain aspects, such as integration or public safety at particular moments. The changes also reflect the influence of external factors linked to Poland's accession to the European Union and the Schengen zone or decisions taken at the EU level concerning responses to the migratory or refugee crisis. The development of migration policies was also aimed at liberalisation or specification of provisions related to foreigners' access to the labour market (described also in Table 11).

**Table 11 Development of migration and asylum laws and policies**

<b>Year</b>	<b>Introduction of laws/changes in the law</b>	<b>Institutional and political changes</b>
<b>1989</b>	Introduction of a work permit for foreigners (along with the provisions of employing foreigners)	'Opening of the borders' linked to the beginning of political transition (liberalisation of passport policy)
<b>1991</b>	The signing of the Geneva Convention of 1951 and the New York Protocol of 1967 and introduction of the possibility to apply for refugee status to the Law on Foreigners of 1963 (The law amending the Law on Foreigners of 1963, 1991, article 1(3)); refugee status was granted by the minister of the interior in consultation with the minister of foreign affairs.	The signing of an agreement on readmission with Schengen countries: the introduction of a visa-free regime between Poland and the Schengen countries
<b>1993</b>		Establishment of the Office for Migration and Refugees at the Ministry of the Interior (in 1997 changed into the Department of Migration and Refugee Issues at this Ministry)
<b>1993</b>		The signing of an agreement with Germany on cooperation around the consequences of migration, including financial aid for Poland linked to the asylum situation
<b>1996</b>	Granting foreigners with refugee status the right to social assistance (The Law amending the Law on	

	Social Assistance and other laws, 1996, article 1(2)).	
<b>1997</b>	Introduction of a new Law on Foreigners <sup>38</sup> (it replaced the Law on Foreigners of 1963). The changes included, among others, additional requirements from incoming foreigners, including visitors and tourists.	Establishment of a Refugee Board (it started its activity in 1999)
<b>2001</b>	Introduction of an amendment to the Law on Foreigners <sup>39</sup> . Changes included, among others, the establishment of the Office for Repatriation and Foreigners and introduction of temporary protection.	Establishment of the Office for Repatriation and Foreigners (changed in 2007 to Office for Foreigners). The Office served as the institution issuing decisions in asylum proceedings in the first instance (previously this competence was performed by the Ministry of the Interior).
<b>2001</b>	Implementation of the ordinance of the Minister of Labour and Social Policy of 13 December 2001 regarding individual integration programmes for refugees (IPI), coordinated by local family support centres <sup>40</sup> .	
<b>2003</b>	Introduction of a new Law on Foreigners of 2003 <sup>41</sup> , including, among others, restrictions in provisions of visas.	
<b>2003</b>	Introduction of Law on granting protection to foreigners in the territory of Poland of 2003 <sup>42</sup> , including among others the introduction of a permit for tolerated stay (a national form of protection).	
<b>2003</b>	First regularisation programme for foreigners, lasting from September to December 2003 (among other provisions it included the possibility to leave Poland without consequences despite unlawful stay; requirement to stay in Poland at least since 1997).	
<b>2004</b>	Introduction of Law on Social Assistance <sup>43</sup> , which included, among others, developed provisions on integration programmes for refugees.	
<b>2004</b>	Introduction of Law on the promotion of employment and labour market institutions <sup>44</sup> including provisions specifying conditions of issuing work permits for foreigners	

<sup>38</sup> Journal of Laws of 1997, no 114, item 739.

<sup>39</sup> Journal of Laws of 2001, no 42, item 475.

<sup>40</sup> See more on the development of legal basis for integration of refugees in Cegielka et al (2008: 9).

<sup>41</sup> Journal of Laws of 2003, no 128, item 1175.

<sup>42</sup> Journal of Laws of 2003, no 128, item 1176.

<sup>43</sup> Journal of Laws of 2004, no 64, item 593.

<sup>44</sup> Journal of Laws of 2004, no 99, item 1001.

<b>2006</b>	Introduction of simplified procedure of employing foreigners on a short-term basis in agriculture (the procedure has been developed in the following years)	
<b>2007</b>	Second regularisation programme for foreigners (it lasted from July 2007 until January 2008; the required period of stay amounted to 10 years, and it was dedicated to foreigners who could not benefit in the first regularisation programme)	Mobilising of EU funds linked to the SOLID programme – Solidarity and management of migration flows (including the European Fund for Refugees started already in 2006, and European Fund on Integration).
<b>2007</b>	Introduction of facilitations in the system of admitting foreigners to the labour market: lower cost of obtaining a work permit and simplified procedures for issuing a work permit. Additionally, the simplified procedure related to short-term work became available in all the sectors of the economy (citizens of Belarus, Russia, Ukraine could benefit from it; in 2009, Moldova, in 2010, Georgia and in 2014, Armenia joined the group of countries, whose citizens could benefit from the facilitation)	
<b>2008</b>	Amendment to the Law on Protection, including, among others, introduction of subsidiary protection. Amendment to the Law on Social Assistance, including, among others, giving access to individual integration programmes to foreigners with subsidiary protection status	
<b>2010</b>	Introduction of an amendment to the Law on Education, enabling foreigners to attend Polish secondary schools until foreigners are 18 years old (the same access as Polish citizens)	
<b>2011</b>	Amendment to the Law on Protection, including, among others, the possibility of relocation and resettlement of foreigners to Poland; specification of conditions for providing social assistance and medical aid to asylum applicants and providing assistance in voluntary returns; specifying of the conditions of apprehension and detention of asylum seekers <sup>45</sup>	
<b>2012</b>	Introduction of Law on regularisation of stay of particular foreigners on the territory of Poland <sup>46</sup> (passed in 2011, lasted for the first half of 2012; included provisions on the possibility of obtaining a residence permit by failed asylum seekers (who got negative decisions and were ordered to leave before Jan. 1 <sup>st</sup> , 2010 and were staying irregularly	Acceptance by the Polish government of a strategic document on migration policy ('Polish migration policy – the current state and recommended activities')

<sup>45</sup> Journal of Laws of 2011 no 191, item 1133.

<sup>46</sup> Ibidem.

	in Poland) or asylum seekers applying for international protection several times (being in the course of a subsequent procedure after Jan. 1 <sup>st</sup> , 2010)	
<b>2014</b>	Introduction of a new Law on Foreigners of 2013 <sup>47</sup> , implementing, among others, the EU directive on single permits, prolonging the maximum period of stay in the territory of Poland based on the temporary residence permit from 2 to 3 years, the introduction of a permit for stay due to humanitarian reasons and modifying the permit for tolerated stay	Acceptance by the Polish government of the plan of implementation of the strategic document on migration policy accepted in 2012
<b>2014</b>	Introduction of an amendment to the Law on Protection, implementing the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)	
<b>2015</b>	Introduction of amendments to the Law on Protection, including, among others, provisions on the relocation to Poland of persons with international protection granted by other EU countries and the introduction of provisions of access to free of charge legal aid for asylum seekers	A decision on relocation to Poland of asylum seekers from other countries, withdrawn after the change of government in October 2015
<b>2016</b>	An introduction to an amendment to the Law on Protection including reference to issues linked to state security in the context of the relocation of foreigners	Annulment of the strategic document on migration policy accepted in 2012; the beginning of work on new migration policies responding to changed migratory challenges Declaration of Visegrad countries (V4) on the establishment of Migratory Crisis Mechanisms for the coordination of assistance to asylum seekers in regions of origin and improvement of information exchange <sup>48</sup> .
<b>2017</b>	The announcement of a proposal for amending the Law on Protection, including the introduction of border procedures, lists of safe countries of origin and safe third countries and a change of the appeal body in asylum procedures.	Establishment of Migration Crisis Response Mechanism by V4 countries; initiative aimed at providing support for EU countries experiencing the highest inflow of asylum seekers, addressing root causes in regions of origin and improvement of information

<sup>47</sup> Journal of Laws of 2013, item 1650.

<sup>48</sup> For details see: MIA (2016).

		exchange between different countries and institutions
<b>2018</b>	Introduction of amendments to the Law on the Promotion of Employment and Labour Market Institutions aimed at implementing the Seasonal Worker EU directive and the specification of conditions of issuance and refusals to issue work permits for foreigners and registering declarations on hiring of foreigners	
<b>2018</b>	Introduction of an amendment to the Law on Protection and the Law on Foreigners linked to the reform of laws on entrepreneurship and the implementation of EU directives on mobility in the framework of an intra-corporate transfer.	

Source: own elaboration based on the table prepared by Stefańska Renata and Szulecka Monika (2014: 4-5).

## Sub-national legislation

Since granting international protection and support for beneficiaries of international protection is regulated at the national level, at the sub-national level we can rather talk about policies and practices, instead of specific legislation. Local authorities may work out solutions aimed at improving conditions for refugees' adaptation. Most of the initiatives have been carried out in Warsaw, where for example, the City Office decided to establish a Multicultural Centre open for initiatives either authored by refugees or asylum seekers or addressed to them. The sub-national measures (local initiatives) are often based on collaboration with NGOs offering legal advice or integration support to asylum seekers, migrants and refugees. Another example of active local authorities regards Lublin in the eastern part of Poland and Gdansk in the northern part of Poland (see also Pawlak, 2018). For instance, in Lublin and Warsaw, there are the so-called sheltered flats<sup>49</sup>, which are reserved for persons with international protection status (Chrzanowska and Czerniejewska, 2015: 3). The sheltered flats are allocated to persons who are not independent enough to live on their own and need support to improve their conditions and become more independent. It is dedicated to, for instance, mentally ill persons, persons leaving foster care and disabled persons. Also, foreigners who obtained international protection in Poland and who cannot find accommodation on their own, but express readiness to improve their situation, may be offered sheltered housing. The number of such flats offered to beneficiaries of international protection is, however, limited. Also, the time of stay in such a flat should not exceed 24 months. The flats are funded by municipalities.

<sup>49</sup> For more about sheltered housing see e.g.: MFLSP, n.d.

## 5. The legal status of foreigners<sup>50</sup>

### Asylum seekers

In formal terms asylum seekers are all those who submit applications for international protection either at the border or within the territory of Poland, at one of the Border Guard units. There is no legislative definition of asylum seeker in Poland. Polish legislation uses the term 'a person applying for international protection' to describe persons who submitted applications for such protection (Law on Protection).

Applications are submitted to the Office for Foreigners through the Border Guard (article 24 of the Law on Protection). The Border Guard is responsible only for receiving applications and providing asylum seekers with necessary medical aid and information on further steps. The merits of each application are then examined by the Office for Foreigners. Applications for international protection may also be lodged by foreigners staying in guarded centres for foreigners, in a pre-trial facility or in prison. In such a case, the application is submitted through the Border Guard from the unit located in the territory of the applicant's detention centre (article 24 of the Law on Protection).

Applications for international protection should be lodged personally. If the person seeking to apply cannot reach the BG unit (e.g. because he or she is disabled, a pregnant woman, an older person, a single parent or a person staying in a detention centre or a hospital), it is possible to submit a declaration of intent to apply for international protection in writing by post (snail mail or electronic post). Such a declaration confirmed in written protocol may also be submitted to a Border Guard officer at the BG unit where the applicant came personally, but BG could not receive the full application on that day. The potential applicant should be informed about the place where and the date upon which they can submit their application. In cases when a declaration of intent to apply for international protection is submitted, the application should be received within three days. In the event of a mass inflow of asylum seekers, the provisions permit the extension of this period to up to ten days (article 28 of the Law on Protection).

To become an applicant for international protection in formal terms, the person must submit an application at a Border Guard unit and get a temporary confirmation of their identity. This document is further used in administrative procedures following the submission of an application. It confirms the identity and the status of an applicant for international protection. It does not allow foreigners to enter other countries. According to the law, applicants for international protection cannot cross the border based on the temporary identity document they get upon submitting an application. This rule is included in the information asylum applicants receive after lodging an application. They also receive instructions about how to register at the reception centre to gain social assistance, such as accommodation at centres for asylum seekers or a financial allowance to cover expenses linked to accommodation and meals.

Applications for international protection may also be lodged on behalf of spouses and minors for whom the applicant is legally responsible (biological or adopted children), provided

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<sup>50</sup> The provisions described in this part are compliant with the law in force as of April 30<sup>th</sup>, 2018.



that the minor is not married (article 25 of the Law on Protection). The spouse of the applicant should be informed by the Border Guard about the consequences of lodging an application together or separately if doing so would better address the real causes of fleeing from their country of origin (article 27 of the Law on Protection)<sup>51</sup>.

Foreigners lodging applications at the border may be assisted by an international or non-governmental organisation providing aid to foreigners upon request or with the applicant's consent to be assisted by representatives of these organisations (article 29 of the Law on Protection). The assistance of these organisations is free of charge.

Confirming the identity of an applicant is the task of the Border Guard that receives the application. The procedure for receiving an application includes checking a person's identity documents and documents authorising them to cross the border and stay on the territory of Poland, checking whether the applicant has these documents (possessing them is not necessary), taking photos of a person and taking fingerprints. The BG is responsible for guaranteeing the presence of an interpreter (if needed) at the moment of submitting an application. Only vulnerable groups are transported to reception centres by the BG or with the use of transport organised by the BG. A detailed search of the person and his or her belongings may be performed when this is necessary for security reasons. Both the submission of an application and the search should be performed in a room guaranteeing the comfort of the applicant insofar as other people who are not authorized to assist in either of these procedures are not present. The search should be conducted by a person of the same sex as the applicant. If the BG receiving the application has doubts regarding the age of an applicant who claims to be a minor, BG officers inform the applicant that their age can be checked by medical examination and they inform them about the consequences of this procedure. If there is no possibility to determine whether the person is an adult or a minor, he or she is considered to be a minor. In cases in which the person refuses to undergo a medical examination, they are considered to be an adult (The Law on Protection, 2003. article 32).

The applicant should be informed in writing, in a language they understand, about the procedure (what it looks like, who is responsible for issuing the decision), the applicant's rights and obligations (including the consequences of withdrawing their application), and about procedures linked to Dublin regulations (the possibility of exchanging data with other countries potentially responsible for proceedings linked to an application for international protection and potential transfer to other responsible countries). Applicants should further be provided with a list of NGOs offering support for foreigners and information on the conditions for obtaining free legal support as well as the scope of social assistance and medical aid, including accommodation at reception centres and the possibility of getting a financial allowances for accommodation outside the centres. The Border Guard should talk to applicants individually about the consequences of applying for international protection in different countries and applicants' obligation to remain in the territory of Poland until a decision is issued (article 30 of the Law on Protection).

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<sup>51</sup> Apart from crucial information about the circumstances and reasons for their leaving their country of origin, reasons for seeking protection and getting to the country where the application for international protection is submitted, the application contains, among others, the preferred language to be used in the procedure (e.g. for hearing purposes) as well as information on applicants' health condition. The application also contains information on previous proceedings in which the foreigner and persons covered by the application took part.

After the application is received, the BG transfers it to the Office for Foreigners within 48 hours. The Office checks whether Poland is responsible for processing the application of the foreigner (and also whether the applicant has lodged applications in other countries).

Asylum seekers have no right to family reunion during the proceedings. If the procedure lasts longer than 6 months, and the delay is not the result of the applicant's behaviour, the applicant is issued a document confirming the on-going proceeding and authorising them to work in Poland without a work permit until a final decision is reached (article 35 of the Law on Protection).

Applicants for international protection are entitled to (chapter 4-5 of the Law on Protection):

- social aid (accommodation in centres or elsewhere, financial allowance to satisfy basic needs) and medical assistance (the scope of medical services is the same as for Polish citizens, but spa treatment is excluded; medical services are provided by health care units contracted by the Office for Foreigners, which creates a parallel healthcare system for asylum seekers<sup>52</sup>);
- free Polish language lessons;
- education for children;
- assistance in voluntary return to the country, if they are able to return there (e.g. the country will admit the foreigner);
- free communication with representatives of UNHCR, representatives of international organizations, and non-governmental organizations ensuring assistance to foreigners, including legal assistance,
- the possibility of giving consent to UNHCR to convey information on the course of proceedings, on granting international protection and for making notes or copies of the files,
- free of charge legal information given through the course of the proceedings in the 1st instance and about the granting of international protection by the employees of the Office for Foreigners;
- free of charge legal assistance available on the basis of the Law on Protection<sup>53</sup>.

The free legal assistance provided to asylum seekers covers the grounds for drawing up an appeal to all of the decisions issued after an application's examination. Grounds for appeal include negative decisions on an application, the transfer of an applicant to another member state, the discontinuance of the procedure, the refusal to consider a foreigners' declaration of intent to apply for international protection, the treatment of an application as inadmissible and

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<sup>52</sup> See more: Chrzanowska and Klaus (eds., 2011); M. Szczepanik (2017).

<sup>53</sup> The free legal assistance is available to an applicant for international protection and to a foreigner who has been issued a decision depriving them of international protection who act on their own, without an attorney at law. In case a foreigner deprived of international protection has income equal or higher than the social minimum, they cannot benefit from free legal assistance based on the legal provisions of the Law on Protection.

the deprivation of international protection. Making use of free legal assistance requires that foreigners give power of attorney in writing.

The reception system for asylum applicants is coordinated by the Office for Foreigners, which is the central institution with a branch office in Biała Podlaska, 30 kilometres from the border with Belarus and the BCP in Brest/Terespol. The office is responsible for providing social assistance, and it runs reception centres and centres for asylum seekers. There are two reception centres in Poland: in Biała Podlaska, 30 kilometres from the border crossing point in Brest-Terespol, and in Podkowa Leśna-Dębak, in the suburbs of the capital city of Warsaw. The reception centres serve as the first places where asylum seekers are accommodated and registered, before they are moved to centres for asylum applicants in other parts of Poland. The reception centre in Biała Podlaska is for first-time asylum applicants. The reception centre in Dębak Podkowa Leśna serves mostly as a reception centre for asylum seekers sent to Poland as Dublin transfers. There are nine centres for applicants for international protection where foreigners are accommodated after the initial stage of processing them upon their arrival. Those who do not benefit from accommodation in the centres visit the contact points for foreigners who benefit from assistance outside the centres, either in Warsaw or Lublin.

Material assistance, accommodation and medical care are provided to all asylum seekers during the entire period of the procedure and up to two months after the final decision on their case. If, however, an application is discontinued, assistance is offered for up to 14 days after that decision becomes final. If applicants receive a negative decision, they must leave the territory of Poland within 30 days (in general), which means that in practice they may not take advantage of social assistance for more than 30 days. The timeframe for providing asylum seekers with material assistance may change according to the phase of the appeal procedure and the decision of the Voivodship Administrative Court. According to a national report on the asylum system in Poland, since 2016, the Court has mostly refused to suspend the enforcement of a negative decision on an international protection application for the duration of the applicant's appeal process. Since the negative decision on their application ends the social benefits to which applicants had been entitled while awaiting a decision, those asylum seekers appealing a negative decision are left without support. However, some asylum seekers have reported good practices on the part of the centres, which have allowed them to continue staying there despite no longer being entitled to assistance (HFHR, 2018: 40).

Regardless of the stage of the procedure, all asylum seekers are entitled to material reception conditions. To obtain them, they must however register at one of the reception centres<sup>54</sup> within two days of submitting the application for international protection (article 30 of the Law on Protection). If they do not get to the centres within this time, their asylum proceedings are discontinued<sup>55</sup>. The material assistance provided to asylum seekers includes accommodation and financial means to satisfy basic needs. Asylum seekers may be accommodated either in the centres run by the OF, or independently. In the case that they refuse accommodation in the centres run by OF, they are granted a financial allowance for

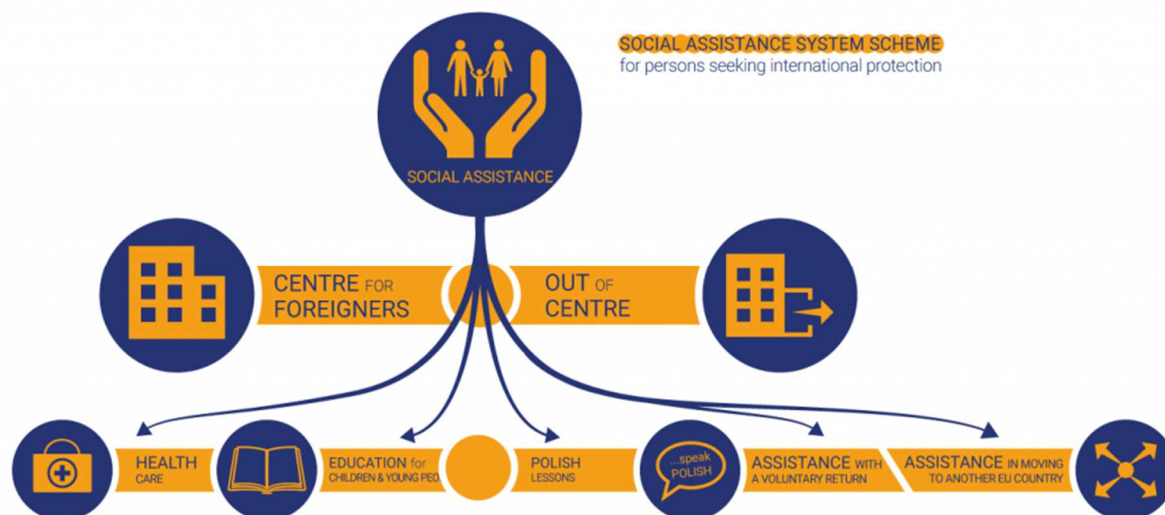
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<sup>54</sup> See map of the centres at: The Office for Foreigners (2018e).

<sup>55</sup> Nonappearances at the reception centre usually stem from the fact that asylum seekers, often assisted by members of their families based in Western countries, try to travel across Poland to get to other countries, where they also apply for international protection.

accommodation outside of the centres. *Figure 2* below shows the types of assistance provided to applicants for international protection in Poland.

**Figure 2: Social assistance for applicants for international protection in Poland**



Source: The Office for Foreigners (2018a).

Medical aid is provided to all asylum seekers. And, upon submitting an application, asylum seekers with life-threatening health problems receive emergency health care either at the border, on the way to a reception centre or after registering at a reception centre. The Office for Foreigners signs a contract with a service provider, which is then responsible for delivering medical assistance. As of April 2018, the private healthcare company 'Petra Medica' provides medical services for asylum seekers. It covers both specialised treatment and medical stations providing medical assistance by doctors and nurses at the centres<sup>56</sup>.

Asylum seekers who are not entitled to material reception conditions include the following individuals:

- beneficiaries of subsidiary protection applying for refugee status again;
- holders of permits for stay due to humanitarian reasons or for tolerated stay;
- foreigners staying in Poland based on a temporary stay permit, a permanent stay permit or an long-term resident's EU residence permit;
- foreigners staying in youth care facilities or detention centres or who are in pre-trial custody or detention for criminal purposes.

Since 12<sup>th</sup> February 2018, the Border Guard is obliged to provide some categories of returned asylum seekers (within the Dublin procedure) with transport to the reception centre and in justified cases also with food. These categories of foreigners include: single parents, pregnant women, the elderly and disabled persons who declare that they want the procedures

<sup>56</sup> See more on the types of social assistance on webpage of the Office for Foreigners (2018a).

following their applications for international protection submitted in Poland to be continued (HFHR, 2018: 41).

As far as asylum seekers who should leave Poland according to the Dublin procedure are concerned, they may be provided with social assistance upon request (submitted no later than 30 days after the decision to transfer them to another EU country is delivered). This support may cover travel costs, the cost of food and medical assistance during travel and administrative costs of documents such as visas and permits. The assistance may be provided until the transfer is executed (HFHR, 2018: 41).

According to a report prepared by HFHR (2018), asylum seekers can apply to change assistance granted in the centre to assistance granted outside of the centre. However, due to the schedule of payments and the content of decisions issued by the Office for Foreigners, foreigners may have to leave the facility for asylum seekers at the end of one month and have to wait for financial resources until the middle of the following month (HFHR, 2018: 40-41). According to the OF's interpretation, foreigners may stay in the facilities until the first payment, but in practice asylum seekers decide to leave the centres earlier, since staying there would decrease the allowance they would receive. In some instances, asylum seekers who are in the midst of appealing their procedures are not provided with social assistance at the Office that is responsible for delivering this because the OF's databases are not updated to reflect that these asylum seekers have in fact lodged their appeals. According to practitioners, after a negative decision on their application becomes final, some asylum seekers living outside of the centres have been afraid to go to the Office or to the centre to access the benefits to which they are entitled for fear of being controlled and potentially apprehended by the BG on the days when benefits are distributed (HFHR, 2018: 41).

## **Beneficiaries of protection**

### **Beneficiaries of international protection**

Decisions to grant protection are made by the Office for Foreigners in the first instance and by the Refugee Board in the second instance. The procedure is unified, which means that a person seeking protection applies for international protection, and the proceeding regarding this application may end with granting either refugee status or subsidiary protection<sup>57</sup>. If the Office for Foreigners or the Refugee Board do not find a basis for granting refugee status, but asylum seekers are still deemed deserving of international protection, they obtain subsidiary protection. As far as rights and obligations are concerned, both statuses create almost the same opportunity structure.

According to article 13 of the Law on Protection, to get refugee status, the foreigner must experience a justified fear of persecution in the country of origin due to race, religion, nationality or political beliefs or belonging to a particular social group, and they cannot or do not want to benefit from the protection provided by the country of origin. The character of

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<sup>57</sup> The third form of international protection is temporary protection. This status is granted to groups and in fact this legal tool has never been used by Polish authorities. It was introduced into the Polish law in 2001, by the Law amending the *Law on foreigners of 1997*, Journal of Laws of 2001 no 42 item 475, article 1.

persecution should constitute a serious threat to human rights. It cannot be a single action, but rather must involve an accumulation of activities constituting a threat to the person's human rights. The persecution may take the form of physical, psychological or sexual violence, a discriminatory way of applying legal, administrative, court or police measures towards the foreigner, disproportional or discriminatory punishment or proceedings, lack of possibility to appeal against the disproportional or discriminatory punishments and punishment for refusal to serve in the army when the army is engaged in criminal activity.

While assessing the reasons for persecution, the following issues are considered (article 14 of the Law on Protection):

- the term 'race' covers skin colour, origin and belonging to a particular ethnic group;
- the term 'religion' refers to any beliefs and behaviours linked to theism or atheism, participation or avoiding participation in religious services conducted publicly or privately, on an individual or collective basis;
- the term 'nationality' includes not only citizenship, but also cultural, ethnic and language identity, originating from a certain region or political system or links to communities living in other states;
- the term 'political beliefs' relates to opinions on state institutions involved in activities contributing to the fear of persecution, regardless of whether or not the asylum applicant respected priorities of these institutions;
- the term 'group' is understood as a particular social group, especially if it has a separate identity in the country of origin and if members of the group have features that are unchangeable, inborn or if they have a common history or consciousness that implies that none of the members of the group can be forced to change their identity (e.g. this may be a group of people with a certain sexual orientation, provided that the group's activity does not violate the laws of the European Union or Poland).

Importantly, the reasons for persecution may only be associated with the person and may not constitute an actual feature of that person. This means that if bodies involved in persecutory activity consider the person to be, for instance, Jewish, and persecute them on these grounds, although the person is not, in fact, Jewish, the fear of persecution is justified. The fear of persecution or serious harm may also be justified if it concerns past events, and there is no proof that the risk of persecution or serious harm in the country of origin has ceased to exist.

Asylum seekers deemed not deserving of refugee status, but still seen as facing a real risk of being seriously harmed if they are returned to their country of origin are granted subsidiary protection (article 15 of the Law on Protection). The risks taken into account when deciding about this form of protection include possibly being executed or sentenced to capital punishment, tortured or treated in an inhumane way, or experiencing a serious individual threat to their life and health due to international or internal military conflicts in which civilians are attacked (in the country of origin).

The fact that the reasons for persecution may appear after a foreigner leaves the territory of the country of origin is recognised by Polish authorities. This means that not only asylum seekers just arriving to Poland may be considered deserving of international protection, but also those who are already in Poland even for a longer time period, especially if their actions

constitute behaviour that would not be acceptable by persecuting powers in their country of origin.

The provision saying that asylum seekers should seek to gain protection in another region of their own country of origin when there is no reason to fear persecution, meant that for asylum seekers from Ukraine, who were the second-largest national group that applied for international protection in Poland in 2014, there was basically no chance of receiving a positive decision (see part 1 for details). Only part of Ukraine faced direct threats and the risk of persecution so it was believed that affected individuals could move to another part of the country. Assessment of the possibility to move to a safe part of the country of origin is conducted on an individual basis, considering the personal situation of the foreigner (article 18 of the Law on Protection).

According to article 19 of the Law on Protection, granting refugee status is refused if there is no justified fear of persecution in the country of origin or if the foreigner benefits from protection (other than that provided by UNHCR) in another country, where they can safely return to continue benefitting from that protection. If foreigners lodge a subsequent application and there are reasons to suspect that the circumstances linked to persecution were provoked by the foreigner to create the basis for an application, the application will be denied. There are a number of reasons for issuing negative decisions, such as serious suspicions of the applicant having committed a crime against peace, a war crime or a crime against humanity, as defined in international instruments. Other reasons for issuing a negative decision include the applicant being guilty of behaviour not compliant with the aims and rules of the United Nations (linked to peace) or the applicant having committed other non-political crimes outside of Poland before submitting the application for international protection. If the person is considered to have encouraged others to commit crimes against peace or humanity or to have taken part in such crimes, this may also constitute a basis for denying refugee status. Negative decisions on refugee applicants are also issued if the Polish authorities determine that the applicant is eligible for Polish citizenship and can enjoy the benefits and fulfil the obligations of citizenship.

In sum, subsidiary protection is not granted if there is no risk of suffering from serious harm. Aside from foreigners accused of crimes against peace and humanity (or encouragement to commit them), foreigners who have committed other crimes, either in Poland or in other countries, are also refused this form of protection. Importantly, if a person is deemed a threat to state security and society, they are denied subsidiary protection. Finally, if someone's application for protection is seen as an attempt to avoid punishment for crimes committed abroad, their application for international protection will be met with a negative decision (article 20 of the Law on Protection).

Depriving foreigners of refugee status may be a consequence of a voluntary acceptance of protection provided by the country of their citizenship (citizenship possessed so far or regained, or citizenship of another country that provides protection to a foreigner). Refugee status may also be revoked if a foreigner voluntarily returns to the country, which they left due to fear of persecution. If the fear of persecution is no longer justified and the foreigner can benefit from the protection provided by the state of origin or a previous residence, refugee status will also be withdrawn. Perpetrating criminal acts against peace and humanity or acts not compliant with UN objectives, or providing false information or documents in their application for refugee status will also result in the revocation of refugee status. However, if

the foreigner who provided false or incomplete information still meets the requirements for obtaining refugee status, which means that despite false information provided, the person experiences justified fear of persecution, this form of protection is not withdrawn (article 21 of the Law on Protection).

Analogous conditions lead to the withdrawal of subsidiary protection. It is not withdrawn if the foreigner can demonstrate that the harm he or she experienced in the past may reoccur in the future upon their return to their country of origin. And, subsidiary protection may also be withdrawn if a person commits a crime, either in Poland or outside of it (article 22 of the Law on Protection).

Following the submission of an application for international protection, the duration of the application process can last from 6 months to fifteen months, depending on how complicated the case is, how many applications were submitted at the same time during that period, and whether or not the applicant performs their obligations in following asylum procedures (article 34 of the Law on Protection). In practice, this period is always much longer, and the proceeding takes usually about one and a half years.

In the course of evaluating an application, if the Office for Foreigners finds that another country is responsible for processing the application, it contacts the competent bodies of that country with a request to take responsibility for processing the application (concerning the applicant, and if relevant, the other persons covered by the application). If the applicant is to be transferred to another country, the foreigner may be escorted to the border by the Border Guard (article 37 of the Law on Protection).

According to article 38 of the Law on Protection, an application for international protection may be considered inadmissible if:

- the potential applicant has already obtained international protection in another country;
- a third country is considered to be the first safe country for the potential applicant and the potential applicant may benefit from the protection provided there;
- the potential applicant submits a subsequent application for international protection with no new proof or arguments relevant to their application for international protection;
- the spouse of an applicant submits a separate application, but there are no reasons to process the application of spouses separately.

The authorities can accelerate the proceedings following the submission of an application for international protection when the applicant's reasons for seeking protection are not due to fear of persecution because of features stated in the law (e.g. race, religion and others mentioned above) or the risk of suffering serious harm caused by conflict or military actions. The proceeding may also be accelerated if information or documents provided by the applicant are false, confusing or not probable (i.e. when they are in contradiction to the facts as determined by the responsible institutions). It is also accelerated if an applicant submits an application for the sole purpose of avoiding the execution of a return order issued to them, or if they constitute a threat to state security or public order (or were expelled from Poland for these reasons in the past) (article 29 of the Law on Protection). The duration of these accelerated procedures is limited to 30 days, and there is a seven-day time period for appealing the decision. In practice, the conditions for accelerated processing of a given application are often not ascertained until long after the 30-day window has already lapsed, which results in the



procedure lasting the same amount of time as a standard application. So far, there has been no border procedure in the Polish legislation, although there are plans to introduce such in the future (see more in part 6).

Due to the high share of decisions of discontinuance in asylum procedures (see part 1), the reasons for issuing such a decision should be mentioned. The following situations are reasons to discontinue an asylum procedure (article 40 of the Law on Protection):

- the applicant withdraws the application;
- it may be supposed that the applicant withdrew the application in the following circumstances: if the applicant did not come to the reception centre within two days after submitting an application or being released from a detention centre, and they did not provide any address, at which to reach them in Poland or they left the reception centre for more than seven days without a justified reason; if they left the place where they were ordered to stay during the procedure or did not report to the institution where they were ordered to report in the specified period of time; if they did not come to the hearing and did not present justification for this within seven days, or if they left the territory of Poland;
- children who became adults during application processing or the spouses of the applicant (covered by the same application) who do not agree to take part in the procedure and who leave Poland or the reception centre without justification. In this case, the discontinuance regards only the part of the application concerning the spouse or children.

The procedure may be continued again if the applicant declares his or her interest in continuation within nine months from the decision to discontinue the procedure. Such a declaration may be submitted only once and is submitted through Border Guard officers to the Office for Foreigners. The procedure is continued after OF receives this declaration (article 40 of the Law on Protection). In February 2018, an amendment to the Law on Protection obligated the Border Guard to guarantee food and transport to the reception centre for vulnerable groups who declare their will to continue their procedure after they are transferred within Dublin procedures from other countries (article 40a).

In deciding about granting international protection, the fact of whether the foreigner applied for protection as early as possible is also taken into account (article 42 of the Law on Protection). In practice, submitting an application after an extended stay in the country is considered comparable to those who submit an application to avoid execution of return orders (see e.g. Szulecka 2016). Since 2014, due to the introduction of the new Law of Foreigners of 2013, the authority issuing a return order is obliged to inform foreigners about the possibility of applying for international protection. Submitting such an application causes the suspension of the procedure of issuing a return order. However, the issuing of a return order, in this case, will not be suspended if the applicant has already previously lodged applications for international protection status (articles 304 and 305 of the Law on Foreigners).

Applicants for international protection are obliged to participate in the procedure in the sense that they provide the required information, especially about the circumstances for determining a fear of persecution or suffering from serious harm. They must also react to the

requests of the Office for Foreigners to take part in the hearing or to provide clarifications (article 41 of the Law on Protection).

The hearing takes place without the presence of other persons, even if they are covered in the same application, unless their presence is important for determining the circumstances relevant to the decision. The hearing should be conducted by competent personnel, with expertise in the situation of the applicants' countries of origin and with the presence of an interpreter. Upon the request of the applicant, both the official conducting the hearing and the interpreter should be the same sex as the applicant, if this allows for determining the details of the case. The hearing may be recorded (audio and video recording), if the applicant is informed about this beforehand. No hearing will be held if there is no need to collect additional information, and all information necessary to make the decision was in the application. And, no hearing will be held if the foreigner's health does not allow for conducting the hearing within 6 months (article 44 of the Law on Protection).

Before issuing the decision on granting international protection, the Office for Foreigners turns to the Border Guard, the head of the regional Police unit and the head of the Agency of Internal Security (and other institutions, if necessary) to get information on potential criminal activity that the applicant might be or might have been involved in or threats to state security and public order that the applicant may constitute. This information should be obtained by the Office within 30 days or three months, if the case is complicated. The information is not collected for applicants below 13 years of age (article 45 of the Law on Protection).

If the application covers other persons assisting the applicant and the decision on granting refugee status to the applicant is positive, the positive decision covers also another person concerned in the application (regardless of their experiences with fear of persecution). Children of foreigners granted refugee status born in the territory of Poland obtain refugee status automatically. And, in cases in which one of the persons covered by the application is considered deserving of refugee status, this status is granted to all persons considered in the application, including the applicant. The decision will only be negative in cases in which the person covered by the application is responsible for committing acts against peace and humanity, they already benefit from protection in other countries or they may obtain protection due to links with Polish citizenship (article 48 of the Law on Protection). The same aforementioned norms apply to the granting of subsidiary protection. A positive decision is issued to all persons included in the application, even if the justified risk of suffering from serious harm concerns only one person, provided that these persons are, for instance, not involved in criminal activities (article 51 of the Law on Protection).

The decision issued to foreigners, including negative ones and decisions about transferring a person to another country must be rendered in a language the foreigner understands, and must include details on how he or she can access free legal aid. Withdrawal of refugee status or subsidiary protection is initiated by the Office or it follows upon the request of the Border Guard, the Police, the Internal Security Agency or the Ministry of Justice. In cases of withdrawal, a hearing is held at which the foreigner may present information important to the decision about withdrawal of international protection status. The UNHCR may have access to the foreigner's case if they are to be deprived of international protection. The foreigner should be informed about the possibility of benefitting from free legal aid after the decision of withdrawal is issued (article 54a and 54b, 54d, 54e, 54f of the Law on Protection).

Foreigners granted refugee status and subsidiary protection have access to:

- the labour market (the possibility to work on the same basis as Polish citizens<sup>58</sup>);
- social assistance on the same basis as Polish citizens;
- individual integration programmes (IPI)<sup>59</sup>;
- health care financed by the state;
- housing sponsored by the state<sup>60</sup> (in practice access to this housing is not exclusively for beneficiaries of international protection, it is available to all residents in difficult situations);
- public education (compulsory for children);
- professional training financed by the state, within programmes of professional development;
- family reunion.

Foreigners granted international protection are entitled to an individual integration programme (IPI) that is based on an agreement between the beneficiary and the local family support centre. The scope of support depends on the condition of the foreigner and his or her family. The family support centre should provide assistance in enabling the foreigner to establish contacts with the local community and contacting the local centre for social assistance. The centre should also provide assistance in finding housing (preferably a shelter flat). The programme at the individual level is coordinated by a particular employee of the family support centre. It is assumed that during the programme beneficiaries are registered at local labour offices and actively look for jobs and take part in language courses (to learn Polish if they do not know it already). They should contact the person responsible for the programme at least twice a month. The programme is financed by the voivodes, but its realisation is delegated to family support offices at local levels. The cost of the programme is paid for on an individual basis (article 93 of the Law on Social Assistance<sup>61</sup>).

## Beneficiaries of national forms of protection

According to the Law on Protection (article 3), the forms of protection granted to foreigners in Poland include the above-mentioned refugee status and subsidiary protection, temporary protection<sup>62</sup> and asylum. Asylum is a form of national protection granted when the foreigner's stay in Poland is important due to the interests of the country (article 90 of the Law on Protection). The provision specifies only that there should be 'a good interest to the Republic of Poland', leaving the precise interpretation to decision-makers. For years, asylum was not

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<sup>58</sup> Article 87 of the *Law on Promotion of Employment and Labour Market Institutions*, Journal of Laws of 2017 item 1065 (consolidated text).

<sup>59</sup> Described in part 6.

<sup>60</sup> According to available data, the city of Warsaw offers five flats sponsored by the state to refugees yearly, and the city of Lublin offers yearly one such flat to persons who have obtained international protection.

<sup>61</sup> Journal of Laws of 2017, item 1769 (consolidated text).

<sup>62</sup> Never applied by the Polish authorities.

granted at all or in just a few cases annually. Only in 2014 did Polish authorities begin granting asylum more frequently to Ukrainian nationals fleeing the military conflict in Western Ukraine, which was part of an effort to specifically support persons of Polish roots fleeing that conflict. Because their families did not always fulfil the conditions to obtain a residence permit in Poland, they were granted asylum, which reflects recognition by the Polish authorities of the fact that the stay of a particular foreigner in Poland is important to the interests of the Republic of Poland (Klaus, 2017).

If foreigners do not meet the conditions for granting international protection, but still cannot be returned to their countries of origin, they are granted special permits, which are in fact not mentioned as a form of protection in the Law on Protection, but the reason of their issuance is rooted, among others, in a previous national form of protection, namely the permit for tolerated stay (see details in *Table 11*). It is for this reason that the permit for stay due to humanitarian reasons or permit for tolerated stay are perceived as national forms of protection. However, they are regulated in the Law on Foreigners. These permits are issued by the Border Guard as part of the procedure for issuing return orders. Since 2014, it is obligatory for the Border Guard to check whether a person who is to be ordered to leave should be granted protection. Grounds for granting this kind of protection include situations in which a person's return would infringe either on their human rights and/or their children's rights, the return is impossible due to technical reasons, or situations in which returning to a given country of origin are such that granting this type of protection is merited.

A permit for stay due to **humanitarian reasons** is issued in the course of deciding about a return order. It is issued by the Border Guard to foreigners whose return is impossible due to humanitarian reasons (i.e. due to family issues, children's rights, the risk of being tortured or forced to work, the potential of being deprived of the right to a fair trial after return). Foreigners with this permit have access to social assistance that covers shelter, food, necessary clothing and financial benefits. The permit is not issued if the foreigner committed a serious crime in Poland or another country or if he or she constitutes a threat to state security or public order. It may be withdrawn if it is discovered that the documents upon which the decision to issue the permit was based were false or if other grounds that would normally disqualify a candidate from receiving this kind of permit are discovered after the permit has already been issued (chapter 3 of part VIII of the Law on Foreigners).

A permit for **tolerated stay** is also issued in the course of the procedure for deciding about a return order. It is issued by the Border Guard in the following situations:

- if it is impossible to execute a return order (e.g. because there are no technical possibilities to organise a return flight or it is not possible to get travel documents for the foreigner, or the court issued a decision on ban of removal of a foreigner to a particular country);
- if in the country where the foreigner would be sent, he or she would experience threats to their lives, torture or being forced to work.

It is assumed that holders of these permits committed crimes or constitute a threat to state security or public order, which causes that granting them for stay due to humanitarian reasons is impossible. Foreigners with a permit for tolerated stay have access to social assistance in terms of shelter, food, necessary clothing and financial (goal-oriented) benefits (chapter 3 of part VIII of the Law on Foreigners).

As compared to national forms of protection, holders of the above-mentioned permits have reduced access to social assistance. They may work in Poland or run their own business, but they cannot access any support in terms of integration or adaptation to the Polish labour market, from which the beneficiaries of international protection may benefit. The permits are valid for 2 years. They may be prolonged, if there are still reasons to protect the foreigner from being returned to his or her country of origin. Whereas the permit for stay due humanitarian reasons allows the holder to cross borders, crossing borders is not possible with a permit for tolerated stay. The protective dimension of these permits should be mostly understood as preventing foreigners from having to return to their country of origin, since their return could cause harm to their family rights or their children's rights.

## Regular migrants

Since 2014, the residence permit system in Poland has become quite complex. It has been changing along with implementation of EU directives or reforms of national laws (see more in *Table 11*). A description of the system for issuing residence permits must be preceded by an explanation about visa types. Due to Poland's policy of admitting foreigners to the labour market as well as due to its geopolitical context (neighbouring an important migration source country, Ukraine), the dominant category of documents authorising foreigners to cross the border or to stay in the territory of Poland are either the Schengen visa or national visas (see part 1 for basic data on these two visas). They allow for a short term stay of up to 3 months or up to 12 months, respectively, but for migrants who travel between Poland and their home countries obtaining a visa valid for several years is a common strategy. Visas are typically issued by Polish consulates abroad (supervised by the Ministry of Foreign Affairs), but they can be also issued by voivodes and in exceptional cases by the Border Guard. Since these visas are in fact issued in countries of origin, and they are separate instruments for authorising foreigners to stay for up to one year in Poland, they may be treated as a kind of residence permit issued in countries of origin (see also IOM, 2009: 36). The main category of residence permits are issued in the territory of Poland by voivodes, and they are valid for either up to 3 years (in the case of temporary residence permits) or permanently. Particular types of residence permits, the conditions of obtaining them and the rights attached to them are described below.

As far as **visas**<sup>63</sup> are concerned, they may be issued for:

- work (based on a declaration of intending to hire foreigners, a seasonal work permit or a work permit);
- business;
- higher education or other forms of education;
- research or participation in conferences;
- visit;
- tourism;

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<sup>63</sup> Visas are regulated in part IV, chapter 1 (issuance of visas), chapter 2 (the prolongation of visas) and chapter 3 (the annulment and withdrawal of visas) of the *Law on Foreigners of 2013*.

- medical treatment;
- repatriation;
- other purposes.

Schengen visas and national visas are issued by consular offices abroad (in exceptional cases on the territory of Poland by BG or voivodes). Applications for visas require documents confirming the purpose of stay (e.g. work or studies). Entering Poland with a visa is possible if a foreigner possesses medical insurance and financial means sufficient for the purpose of the planned stay in Poland. There are exceptions for some categories of visa holders, for example, repatriation visas or visas issued for work purposes.

A visa is not issued, among other reasons, if the foreigner does not confirm the purpose of his or her stay, if there are doubts about whether or not the declared purpose is the real one if he or she is on the list of foreigners whose stay is undesirable in the territory of Poland or if his or her data is in the Schengen Information System (SIS) due to a previous refusal of entry.

A stay based on a national visa may be prolonged for the same amount of time as the original visa was issued for. Foreigners apply to voivodes to prolong visas. Visas may be annulled or withdrawn by the consul or by the Border Guard. The reasons for visa withdrawal or annulment are the same as those for refusal of issuance: among other things, reasons include concerns about the purpose of the stay being for a purpose other than the one declared, a lack of medical insurance, the data entered into SIS indicates the visa should be refused or the person is on a list of foreigners whose stay is undesirable in the territory of Poland.

**A temporary residence permit<sup>64</sup>** may be linked to:

- the performance of work based on a single stay and work permit;
- the performance of work as a highly skilled worker (EU blue card);
- the performance of work within an intra-company mobility framework;
- the performance of posted work;
- the performance of seasonal work;
- the performance of business activities;
- studies and research;
- family reunification;
- victims of trafficking in human beings;
- other circumstances (also for foreigners staying unlawfully)<sup>65</sup>.

The validity depends on the purpose of stay in Poland; in general, it is between three months and three years. The permit is granted only to those foreigners who have justified their motives

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<sup>64</sup> Temporary residence permits are regulated in part V of the Law on Foreigners. The catalogue of temporary residence permits is complex and depends on the purpose of stay. The conditions of issuance of particular types of temporary residence permits may differ.

<sup>65</sup> This kind of permit is seen as a regularisation mechanism and it is described in the part focused on undocumented migrants.

for staying in the territory of Poland for more than three months. This means that very short periods of stay due to tourism or for business purposes, not exceeding three months, are not covered by the temporary residence permit. Persons applying for international protection and persons granted either international protection, a permit for a tolerated stay, a stay due to humanitarian reasons or asylum cannot apply for temporary residence permits – their applications will be dismissed.

Refusing to deliver one's fingerprints results in the inadmissibility of one's application for a temporary residence permit. Negative decisions are issued to foreigners who, among other reasons, deliver false documents, do not provide documents confirming their reasons for staying in Poland, are listed in the register of foreigners whose stay is undesirable in Poland, whose data are in SIS for purposes of refusal of entry or who are considered undesirable in the territory of Poland for security reasons.

A permit may be withdrawn if the reason of stay is no longer valid or if the foreigner does not fulfil the conditions for the granting of this permit any more. Also, if there are security issues in place or if the person is considered undesirable, the permit may be withdrawn. Decisions on issuance or withdrawal are made by the voivode. Applications should be submitted personally (this does not include children under 6). Applications for minors are submitted by their parents or legal guardians.

The procedure should take 1 month or at most 2 months in complicated cases (due to the obligation to consult security services before the permit is issued). In practice, it takes about half a year or even more, and the queues to submit an application result in prolongations of the waiting period. The application must be submitted on the last day of legal residence at the latest. The stay of a foreigner is considered lawful until the decision is issued (if the application for residence permit was complete in formal terms).

**Permanent stay permit and long-term resident's EU residence permit<sup>66</sup>** are issued by voivodes within 3 months. If the negative decision is issued, the appeal procedure is processed by the Office for Foreigners which has 2 months for issuing a decision. In practice the issuance may take much longer, and foreigners wait for the permits half a year or even more (the length of the procedure is linked to the increase in immigrant inflows in a relatively short time period). Foreigners with these permits have unlimited access to the labour market and social assistance. The only right that holders of the mentioned permits lack is the right to vote in public elections. A permanent stay permit is granted to, among others, foreign children whose parents have this status and victims of trafficking if they previously stayed in Poland on a temporary residence permit for victims of this crime. Also, persons granted international protection after 5 years of stay based on a positive decision or based on a permit for stay due to humanitarian reasons may apply for permanent residence permits. In the case of holders of permits for a tolerated stay, the required period of stay amounts to 10 years. In turn, the long-term resident's EU residence permit is issued to those foreigners who can prove that they have stayed in Poland legally for at least 5 years before applying for this permit. The foreigner has to prove that they are in possession of regular income (which translates into having regular, registered work, from which taxes and other required contributions are paid), health insurance and knowledge of the Polish language.

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<sup>66</sup> The permits are regulated in part VI of the Law of Foreigners.

Negative decisions are issued to foreigners whose stay is illegal, who overstay in terms of the documents authorising their stay and who are married to Polish citizens, but for whom the relationship is considered to be a marriage of convenience. In the case foreigners whose stay is undesirable or who are seen as a threat to state security, a negative decision will be issued. The same applies to cases of people who have financial commitments towards the state (e.g. unpaid taxes or unpaid execution of a return order). The permit is withdrawn if the foreigner constitutes a threat to state security or if it is otherwise necessary due to Poland's interests. Also, if the foreigner used false documents to get this permit, it may be withdrawn. Similarly, withdrawal of a permit will ensue if the foreigner stays for more than 6 years outside of Poland. The same conditions of withdrawal are applied to cases of a long-term resident's EU residence permit. All foreigners, who previously stayed in Poland and who can prove they had authorised work in Poland for at least 5 years may apply for a long-term resident's EU residence permit.

## Undocumented migrants

There is no legal definition for an undocumented migrant in Polish legislation. The definition may be based on the prerequisite of a return order having been issued. The reasons for this are numerous, but can be summarised as: possessing no valid documents authorising a stay in Poland, working without authorisation or in breach of the law, infringement of conditions for visas or residence permits that have been issued (e.g. working during a visa issued for a tourist stay; details are specified in article 302 of the Law on Foreigners).

Observing what happens in practice, we can conclude that foreigners may become undocumented (without valid documents authorising them to stay in Poland) if:

- they cross the border in an unlawful way (with false documents or with documents fraudulently obtained or they cross through the green border—between border crossing points);
- they come to Poland with valid visas, permits or other documents authorising them to stay in Poland and overstay the term of validity of these documents without any attempts to apply for the required documents;
- they stay in Poland despite obtaining a return order with a specified term of execution.

In general, those who enter Poland irregularly become undocumented due to their manner of entering the country. Overstaying may relate to various situations. First, foreigners may overstay the terms of validity of the documents authorising them to stay. Without any initiative on their part to prolong the permitted period of stay, they just 'lose' their regular status and become undocumented. This fact may only be detected by the relevant authority, which is the Border Guard or Police or the Office for Foreigners, when their documents are checked. As a consequence of this, the foreigner will be ordered to leave Poland (a return order). Forced returns are executed immediately, whereas voluntary returns must occur within a specified period of 15 to 30 days. In the case of a foreigner being ordered to return but not leaving Poland, he or she remains undocumented in the territory of the country, and if detected by authorities, the foreigner will be issued a return order that law enforcement will execute. In such cases, a foreigner may be detained, and law enforcement will force them to comply with the return order. Detention is applied in cases in which there is a risk that the foreigner will not



leave the territory of Poland voluntarily or that the foreigner constitutes a threat to state security and public order. Also, if it is impossible to confirm the identity of a foreigner immediately upon apprehension, the person may be detained for the time necessary to confirm his or her identity and acquire the necessary documents (provisions of apprehension and detention are included in articles 394-407 of the Law on Foreigners).

Undocumented foreigners may also benefit from voluntary return programmes. In Poland, this is facilitated by the International Organisation for Migration, which offers support for those wishing to return to their countries. Also, the Office for Foreigners offers assistance and support in voluntary returns. In specific circumstances, undocumented migrants may be granted authorisation to stay in Poland. Polish legislation includes provisions that can be seen as regularisation mechanisms. For example, there is the possibility of getting a temporary residence permit if the foreigner stays in Poland illegally, but there are important reasons justifying the stay in Poland, such as waiting for remuneration from an employer who hired the foreigner, but who did not pay for work performed, or if the foreigner is staying with members of his or her family, especially children (separation from children will constitute an infringement of children's rights; more on this category of permits is in article 187 points 5-7 of the Law on Foreigners).

Also, permits issued in the course of return procedures, namely permits for tolerated stay and permits for humanitarian stay, may be treated as a kind of regularisation mechanism. However, the difference between these permits and the temporary residence permit described above concerns the initiator of the procedure. The return procedure is initiated by the Border Guard, who decides about possible barriers to issuing a return order. The application for a temporary residence permit is submitted to the voivodship office by a foreigner staying in Poland without valid documents.

Moreover, regularisation programmes allow foreigners to apply for a residence permit, even if they were staying unlawfully at the moment the programme was introduced. Until 2018, there were three regularisation programmes in Poland (see *Table 11* above), but only the last one, implemented in 2012, provided conditions for the regularisation of 'failed' asylum seekers, which means asylum applicants who received negative decisions or who were in the midst of a subsequent procedure. A very small number of asylum seekers benefitted from this law. Out of 9.5 thousand applications that were submitted during the programme, which took place during the first half of 2012, only 147 applications were submitted by 'failed' asylum seekers or those who had applied several times for international protection. The very low interest in regularising their status in the course of this special programme could be associated with lack of knowledge about the programme or fear that the application will be rejected and then followed by a return order. This can be also linked to a lack of incentives for gaining a residence permit, whereas being an asylum applicant is linked to receiving social assistance. For asylum seekers, repeating their application for refugee status and thus benefitting from assistance seemed to be the best way to manage in the host country (Dąbrowski, 2012: 39). However, after introduction of restrictions for getting social assistance by asylum seekers who submitted subsequent applications, this way became less attractive.

Undocumented migrants are not entitled to work legally in Poland. They also do not receive housing from public resources or social assistance. Health care is accessible for them on a paid basis, but they can also receive emergency medical aid via all healthcare facilities, be they private or public. However, the foreigner is usually requested to pay for the services

provided. If their condition does not allow for this, problems with payment are solved through publicly collected money or money offered by local authorities or social organisations. It often happens that the cost of treatment is not covered by the patient or by any other organisation or public body, and this contributes to hospital debt.

According to Polish legislation, all children (under age 18), are obliged to attend schools and to participate in education in some way. This obligation means that foreigners, regardless of their status, are eligible to attend public schools on the same basis as Polish citizens.

The rights of undocumented migrants are limited to the general framework of human rights, since there are no separate provisions for persons who are undocumented. The laws referring directly to undocumented migrants in general use the term foreigners staying in the country in breach of the law. This phrasing allows them to distinguish foreigners who have no documents authorising them to stay in the country from foreigners who possess documents authorising them to stay and perform income-earning without proper permits or contracts. The latter is seen as semi-legality, and such a status is much more common in the Polish context. The concept of semi-legality or semi-compliance (see e.g. Kubal, 2013, Ruhs and Anderson, 2010) means, among other meanings, authorised stay and informal employment of the migrant. Importantly, for state authorities, semi-compliance means the same as non-compliance when it is revealed that the foreigner's activities are not lawful. For instance, if a migrant with a valid visa with a right to work for a particular employer performs for profit activities at another workplace, without authorisation, this means semi-compliance on the part of the migrant. For the Border Guard, who controls the legality of work and who finds that work for another employer is not authorised, this means infringement of the conditions of the issued visa, which results in the issuance of a return order. If there is no detection of unlawful activities during the authorised stay, however, semi-compliance has important, often positive, implications for the migrants' sense of security and stability, as well as an impact on the economic decisions they take. From the authorities' perspective, the lack of detection still means compliance – migrants are seen as respecting immigrations laws, at least apparently (Stefańska and Szulecka, 2013: 98; Szulecka, 2017)

Criminal law includes provisions of punishment for all those who enable or facilitate unlawful stays in Poland or for those who willing assist foreigners in irregular border crossing (Articles 264 and 264a of the Penal Code of 1997<sup>67</sup>). Persons hiring a foreigner who stays in Poland unlawfully can also face prosecution. It is the obligation of an employer to check a foreigner's authorisation to stay before commissioning their work<sup>68</sup>.

## Unaccompanied foreign minors

The definition of an unaccompanied minor was introduced into the Law on Protection (article 2 point 9a) in 2008. It defined an unaccompanied minor as underage foreigners who come to Poland or who stay on its territory without the assistance of responsible adults, and it authorised the law to take care of this child. In 2014, it was specified (Journal of Laws of 2014 item 1004, article 1) that the documents confirming the responsibility of the adult should be

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<sup>67</sup> Journal of Laws of 2017, item 2204 (consolidated text).

<sup>68</sup> More details on this can be found in the *Law on the results of hiring foreigners illegally staying on the territory of Poland of 15 June 2012*; Journal of Laws of 2012, item 769).

compliant with the law binding in Poland. Such a change was certainly the consequence of doubts emerging at different stages about the movement of underage foreigners, especially during border controls. According to Polish law the responsibility of an adult over a minor needs a special form (a document respected by Polish law).

Unaccompanied minors have priority as far as receiving their declaration of intent to apply for international protection is concerned. Such a declaration initiates a special procedure adjusted to the needs of underage foreigners. Border Guard employees who receive a declaration from an unaccompanied minor are obliged to register this declaration, to immediately turn to the regional custodial court to establish a legal representative for the underage applicant (a special guardian – *kurator*) (article 61 of the Law on Protection) and to place the applicant in foster care. Within three days from the moment of receiving the motion from the BG, the Court should appoint a legal representative for the minor<sup>69</sup>. The legal representative is responsible for representing the minor's interests on behalf of the minor in applying for international protection and the for following procedures, which can include transferring to another Member State based on the Dublin Regulation, getting social assistance, participating in the individual integration programme, as well as getting support for voluntary return to the country of origin (Article 61 of the Law on Protection).

The Border Guard also turns to the custodial court in cases of unaccompanied minors being transferred from other Members States based on Dublin regulations, having no legal representative or having not been placed in foster care previously. In these mentioned cases, the actions of the Border Guard involve both designating a legal representative and placing the unaccompanied child in foster care.

During the proceeding that follows a submitted application for international protection, if it turns out that the person covered by the application is an unaccompanied minor, the authority responsible for processing these applications, which is the Office for Foreigners, submits a motion to the custodial court to place the minor in foster care. A decision on foster care should be made by the court within ten days from the moment of receiving the motion from the Border Guard or from the Office for Foreigners.

If a minor is assisted by a relative who is not responsible for the minor according to Polish law at the moment of declaring their will to apply for international protection, the Border Guard officer may designate the relative as a legal representative provided that the relative consents to this. The BG may also apply to regulate the responsibility of the relative towards the foreign child until he or she is placed in foster care<sup>70</sup>. The Border Guard uses a list of NGOs whose representatives are willing to become guardians for unaccompanied minors, since the law requires that such guardians have experience working with unaccompanied minors (HFHR, 2018).

The Office for Foreigners responsible for processing the application for international protection received from an unaccompanied minor informs the applicant about the possibility

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<sup>69</sup> According to HFHR's report accessible on AIDA website, the process of designating the legal representative may take much longer, even two months (HFHR, 2018). However, according to the law, the decision should be made immediately, not later than within three days.

<sup>70</sup> The provision has been introduced to the Polish law in 2017 and is in force since February 12<sup>th</sup>, 2018. Article 2 para 2 letter b of the Law amending the Law on Protection – Journal of Laws 2018 no 107.

to search for relatives with the help of international organisations and he or she provides assistance in this search.

After receiving either a declaration of intent to apply for international protection or an application, the Border Guard takes the unaccompanied minor to emergency foster care units or emergency centres for education and care. The child remains under the care of the foster family or the care centre until a decision on foster care is issued by the custodial court (article 62 of the Law on Protection). Both foster care and also medical care are covered by the state until the final decision is issued (article 63 of the Law on Protection).

The proceeding is accelerated only in instances in which the unaccompanied minor constitutes a threat to public safety and order or if he or she was previously expelled from Poland due to these reasons (article 63a of the Law on Protection). This provision was introduced to Polish law in 2015<sup>71</sup>. Similar reasons, namely constituting a threat to public safety and order, may be a reason for entering a minor's personal data into the register of persons whose stay is undesirable in the territory of Poland (article 436 para 2 of the Law on Foreigners). In general, though, minors' data are not entered into that register.

An unaccompanied minor should be informed at least seven days before the hearing set by the Office for Foreigners about the date and place of the hearing and about how to prepare for this part of the proceeding. Information is passed to the minor by the legal representative. The hearing may be performed within the presence of an adult indicated by the minor. It should be conducted in a language and manner understandable to the minor and adjusted according to his or her age. The guardian should be present at the hearing. Also, a psychologist or education specialist should take part in the hearing with the aim of preparing an assessment of the child's physical and psychological condition (Article 65 of the Law on Protection).

If an unaccompanied minor's application for international protection is unsuccessful, he or she is left in foster care until the child can be transferred to competent bodies (in minors' issues) or relevant organisations in the child's country of origin. The cost of a stay in foster care and medical aid is covered by the state.

During the administrative procedure, unaccompanied minors must be represented by a legal representative, a guardian. This applies also to foreign children without a care provider who are not applying for international protection. There are some privileges provided for unaccompanied minors in the general provisions on foreigners. Among others, unaccompanied minors may get support for their voluntary return without waiting for two years from the previous return with support (article 334 para 6 of the Law on Foreigners). Unaccompanied foreign minors born in Poland may be granted a permit for temporary stay due to other reasons (article 187 para 2 of the Law on Foreigners), which means that even if they lack valid documents authorising them to stay in Poland they may benefit from regularisation mechanisms.

If an unaccompanied minor is apprehended in the territory of Poland by the Police, the child is referred to the Border Guard, which applies to the court with a motion to place the foreigner in a centre of care and education or in a guarded centre for foreigners (run by the Border Guard). The court deciding on placing an unaccompanied minor in a guarded detention centre should consider the following factors: the level of development of the minor in physical

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<sup>71</sup> Journal of Laws of 2015 item 1607, article 1.

and psychological terms, the personal features and condition of the minor as well as the circumstances of apprehension which have influenced the decision to place the minor in detention. Minors under 15 cannot be placed in guarded centres or in pre-trial facilities.

In cases in which there are doubts about the age of the foreigner applying for international protection and if that person either declares themselves to be minor or is identified as such by the BG authority, the person may be referred to a medical specialist for a detailed medical examination. However, the foreigner must give his or her consent to undergo the examination. Lack of consent results in treating the applicant as an adult<sup>72</sup>. In cases in which an unaccompanied minor has been apprehended and is to be placed in a guarded centre, if there are doubts about the person's age, the minor or their legal representative are asked to consent to a medical examination. If they do not consent to such an examination, the foreigner is treated as an adult (article 397 of the Law on Foreigners). The interests of minors accompanied by adults who were apprehended and will be placed in guarded centres for foreigners should also be taken into account by the courts deciding on the detention of the adult foreigner (article 401 para 4 of the Law on Foreigners). Unaccompanied minors in guarded centres should be in a separated space, whereas minors with their parents or guardians placed in detention should share the same room (article 414 para 3 and 4 of the Law on Foreigners).

A return order that is issued to a minor is executed if this foreigner has responsible adult persons to take care of him or her in the country to which they will return. Moreover, the minor should be assisted by a legal representative or they should be referred to a legal representative in the country to which the foreigner is to be returned (article 332 of the Law on Foreigners). All minors staying in detention are entitled to participate in educational and sports activities appropriate for their age and period of stay (article 416 para 2 of the Law on Foreigners).

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<sup>72</sup> This information available is on the website of The Office for Foreigners (2018b).

## 6. The refugee crisis driven reforms (or reform proposals)

In the period of study, political changes and changes in implementation of laws could be observed rather than changes in the legal framework. Moreover, not all the changes were directly linked to the refugee crisis, if we consider the refugee crisis to be directly associated with the inflow of asylum seekers from the Middle East and Africa through the South of Europe since 2011, reaching a peak of inflow in 2015. However, the crisis contributed to the broad political debate in Poland on the required solutions either addressing the results of refugee crisis in the EU, or preventing future mass inflow of migrants and asylum seekers to Poland.

As it was already mentioned in part 2 and part 4, the years between 2015 and 2018 were characterised by changes in Poland's government. This means that not only external factors such as the refugee crisis affecting some of the EU states or the terrorist attacks in France, Belgium or Germany contributed to the shift in migration policy. This was also the change of the government that influenced the direction of migration policy, especially the instruments aimed at managing flows of asylum seekers. Only the priorities linked to economic migration remained almost the same: preferences for foreigners from non-EU countries neighbouring Poland and efforts to maintain the complimentary position of foreigners on the labour market in Poland. In turn, political decisions on participating in EU relocation and settlement mechanism changed along with the change of the government in October 2015. The preliminary preparations to admit asylum seekers have been cancelled short after elections. In July 2015, Polish government led by Civic Platform decided to relocate 1.100 refugees from Italy and Greece, and to resettle 900 asylum seekers indicated by UNHCR from Lebanon. Office for Foreigners elaborated a plan of implementing this decision, including instruments of verification and reception conditions (MIA, 2015). The government led by the Law and Justice party emphasised the issue of state security and explained the decision not to participate in relocation mechanism with the threats to security stemming from the fact that it is impossible to verify the identity of persons to be relocated. And if such a security issue emerges, the state can refuse to relocate foreigners. Thus, pointing to the will to guarantee safety of Polish citizens and state security, the government in fact withdrew from the decision on relocation within EU mechanism (MIA, 2017).

There were several changes to the Law on Protection, but it seems that only the law proposal concerning the introduction of border procedure (described below) may be treated as driven by refugee crisis and potential future mass inflow of similar character. At least the proposal was justified with these arguments. It is worth noting that some of the reforms in Polish asylum law were driven by phenomena linked to asylum seekers from the Caucasus applying for international protection in Poland or due to the obligation to implement EU directives, rather than the consequences of military conflicts and instability in South- and South Eastern Europe. Nevertheless, the new changes to asylum procedures and social assistance for asylum seekers mostly aimed to prevent foreigners from applying for international protection just to legalise their entry into the territory of the EU and to benefit from social assistance on the way to other countries perceived as more attractive for asylum seekers.

Between 2011 and 2017 the following changes to the Law on Protection and related ordinances were introduced<sup>73</sup>:

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<sup>73</sup> The changes are described chronologically in *Table 11* above.

1. the introduction of relocation and resettlement mechanisms, as well as the category of ‘mandatory refugee’, extending the conditions for withdrawing someone’s international protection status (related to the improvement of the situation in the country of origin and protection being accessible there) – in force since 2012<sup>74</sup>,
2. an amendment to the ordinance regarding guarded centres for foreigners (in force since November 2017).

Despite lack of significant changes in the law, the reality of crossing Belarussian and Polish border by asylum seekers has changed significantly. As it was already stated, in the Polish case this is Border Guard which receives applications for international protection. It is also responsible for border control and issuing refusals of entry. In the Polish case, especially since 2015, submitting an application at the border has been quite difficult, as foreigners without valid visas or residence permits have simply been refused entry (Chrzanowska et al., 2016; Górczyńska and Szczepanik, 2016; Commissioner for Human Rights, 2016). The problem is especially visible at the Polish-Belarussian border and the main BCP through which potential applicants for international protection come to Poland. The majority of them come from Caucasus countries and hold Russian citizenship (see more in part 1). They cross Belarus on the way to Poland and are very often refused entry into Poland and sent back to Belarus. It happens that the same person is sent back to Belarus over a dozen of times<sup>75</sup> before they are let into the territory of Poland and their application for international protection is received by the Border Guard. Those foreigners who are refused entry stay at the railway station in Brest (a border town in Belarus) and try to enter the territory of Poland repeatedly. The situation at the border with Belarus, especially at the railway BCP in the Brest/Terespol crossing point, has attracted the attention of both national and international organisations and public bodies, such as the Polish Ombudsman. Official visits to the border and initiatives undertaken by social service organisations have brought the situation of persons who declare that they seek protection but experience barriers in accessing the procedure brought to public attention (Chrzanowska et al. 2016; Górczyńska and Szczepanik, 2016; HFHR, 2018)<sup>76</sup>. At the same time, the Border Guard has explained their refusals by saying applicants did not declare that they were seeking protection and instead gave other reasons for wishing to enter Poland (e.g. to get medical treatment or to join family in Germany etc.; Szulecka 2016).

Already in the 1900s, asylum seekers coming to Poland were associated with so-called ‘false’ asylum seekers, which meant persons using the asylum channel to enter Poland or other EU countries (see e.g. Okólski, 2010: 41). The issue of ‘false’ asylum seekers remained present in public debates in Poland after 2000 and after Poland accessed the EU and the Schengen zone (e.g. Szulecka, 2016: 230). Thus, the phenomena observed in Poland are not connected with asylum seekers meant while discussing the refugee crisis in the EU with its peak in 2015. However, border practices can be attached to the consequences of this crisis

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<sup>74</sup> Amendments were introduced by the *Law on legalisation of stay of some foreigners in the territory of Poland and on the change of the Law on granting protection to foreigners in the territory of Poland and on the Law on Foreigners*, of 28 July 2011; Journal of Laws of 2011 no 191 item 1133.

<sup>75</sup> Examples of asylum seekers who tried to cross the border in Brest/Terespol to submit application for international protection over a dozen of times are reflected in the report prepared by NGOs monitoring the access to asylum procedure at the border with Belarus (e.g. Chrzanowska et al., 2016: 40).

<sup>76</sup> See also the information published after Ombudsman’s office representatives at the BCP in Terespol: (Commissioner for Human Rights, 2016).

and the shift in Police: putting the emphasis on security issues and preventing irregular migration (associated with ‘false’ asylum seeking). The problem in fact relates to the way declarations are received. After potential applicants cross the border and are not in possession of a visa, they are all questioned in the public sphere of the BCP about the circumstances and purpose of their entry to Poland. This preliminary stage of receiving declarations is treated by the BG as part of border control so that a significant number of travellers without visas are issued refusals of entry and sent back to Belarus. However, social service organisations, the Ombudsman and lawyers offering legal aid to potential applicants for asylum point out that these events should instead be seen as a first step in receiving an application for international protection, particularly because the Border Guard is only responsible for receiving applications, not for assessing them (see e.g. Klaus, 2017).

Overall, the above mentioned problems should be treated as reduced access to the procedure itself. By not being given the possibility to lodge an application for international protection, a person cannot become an asylum seeker in formal terms, and consequently cannot access the rights attached to this status (including the right to social assistance or medical aid). In practice, refusal of entry also means denied access to the procedure.

On 30<sup>th</sup> January 2017, the Ministry of the Interior and Administration proposed amendments to the Law on granting international protection in the territory of Poland. The proposal introduced a new institution, namely the border procedure, which simplified the procedure for processing applications for international protection given that the applicant stays in detention before the decision is issued. The proposal also mandated that the decision should be issued within 20 days and established a list of safe countries of origin and safe third countries to be used in deciding cases in which the border procedure would be applied. The proposal was also aimed at reshaping the appeal body responsible for processing appeals of decisions on applications for international protection.

The proposal raised many concerns, especially among NGO representatives experienced in providing legal advice to asylum seekers. After holding public consultations and discussions in relevant legislative circles, the proposal was amended and published in June 2017, and then sent to further legislative proceedings and consultations between ministries. As of April 2018, the proposal was still under consideration at the legal commission of the governmental centre of legislation (the last version of the proposal is dated January 9<sup>th</sup>, 2018). The latest version of the proposal includes crucial elements, which reform the law on granting protection (criticised by different bodies in the first half of 2017); it introduces the border procedure; it establishes the list of safe countries of origin and safe third countries, and it reduces the possibility to appeal in cases in which the decision is taken within the border procedure mode, because the negative decision causes an immediate obligation to return<sup>77</sup>. The main critics about the proposal were linked to its relevance to the real problems observed at the border, which is the reduced access to apply for international protection (described above).

Controversies were also raised by a proposal to build housing containers for asylum seekers at the border. In fact, if the border procedure is introduced, it may mean almost automatic detention for the majority of asylum seekers, especially if they come from a country on the accepted list of safe third countries and safe countries of origin. Nevertheless, given the features of the population of asylum seekers arriving in Poland (many families with

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<sup>77</sup> See the proposal and the legislative history of the proposal at: RCL (2018).



children), the idea of containers and improved security in existing centres seems to be a very disproportional response to the challenges observed. Contrary to other EU states experiencing huge inflows, trends observed in Poland are rather stable<sup>78</sup>. In the end, the possibility of accommodating detained foreigners in containers<sup>79</sup>, if there are no rooms for foreigners in the existing buildings was introduced by the law amending the Ordinance on guarded centres for foreigners (article 3a added)<sup>80</sup>. The containers should be equipped with sanitary facilities.

The legal reform associated – often without justification – with the refugee crisis is the law regarding counterterrorism actions. In Poland, it was enacted in 2016<sup>81</sup>. The necessity of introducing this law was explained by rising concerns about terrorist threats based on events observed in other EU countries. Despite a lack of confirmed threats in Poland, the authors of the counterterrorism act convinced the public of the need to establish a legal basis for the activity of security services to prevent terrorist events in the future. Although all commentators agreed that preparing for such an eventuality was important, the details of the enacted law sparked controversy. Some criticized the law for discriminatory measures that would be applied if a foreigner was suspected of terrorist activity. Others pointed out that the law did not provide a precise definition of what ‘being suspected’ means, which can lead to abuse of powers by the police and security forces. As far as foreigners are concerned, the law allows for operational control to be applied by the Internal Security Agency towards foreigners for three months without the consent of any external body. Moreover, the circumstances when such control may be conducted are not specified sufficiently (see e.g. Buczkowski, 2016: 26-27). The Polish Ombudsman, international organizations, and Polish NGOs have also criticized the law for infringing on foreigners’ privacy, and they have questioned other general provisions of the act<sup>82</sup>. Although the law does not directly refer to migration or asylum governance, it should be considered a related reform because it has had direct ramifications on migration governance, and the law was in large part a reaction to mounting media and policy-maker concerns about a possible nexus of terrorism due to the refugee crisis. The specific timing of the legislation’s introduction, however, was also partially determined by the need to allay security concerns prior to two large international events that took place in Poland in the summer of 2016, the NATO summit and World Youth Days.

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<sup>78</sup> See also the comment on the proposal published by Helsinki Foundation for Human Rights (HFHR, 2017b).

<sup>79</sup> The existing centres for foreigners consist of buildings with surrounded yards. There are 6 guarded centres for foreigners in Poland. They are supervised and administrated by the Border Guard.

<sup>80</sup> *The ordinance amending the ordinance on guarded centres for foreigners and pre-trial custody of 3 November 2017*, Journal of Laws of 2017, item 2113.

<sup>81</sup> *The Law on counterterrorism actions of 10 June 2016*, Journal of Laws of 2016, item 904.

<sup>82</sup> Already in 2016 the claim of the Polish Ombudsman was sent to the Constitutional Tribunal. The trial was supposed to take place in May 2018. However, because the planned panel of judges was considered by the Polish Ombudsman to be inadequate (not full and some judges should not take part in trials), the claim was withdrawn at the end of April 2018 to avoid a further ‘legal mess’. (See more: Commissioner for Human Rights, 2018). See also the report of Amnesty International on the counter-terrorist law (Amnesty International, 2017).

## Conclusion

The development of Poland's migration and asylum policies and laws date back to 1989 when political and socio-economic transformations began. At this time, the whole region of Central and Eastern Europe (CEE) experienced important changes, ranging from the collapse of the USSR and the establishment of new states and governments to the economic development and progressive integration of some post-communist states within Western Europe. The geopolitical changes in the region brought an 'opening' of borders in Poland. Waiving restrictions in passport policy, in turn, contributed to a growing scale of mobility both from and to Poland. Importantly, Poland as a country on the way from the East to the West also became a transit country for economic migrants and asylum seekers. The attractiveness of Poland as a country of destination increased along with its accession to the European Union and its joining the Schengen zone. And, EU accession contributed significantly to the outflow of Polish nationals to EU labour markets. At the same time, however, it also influenced the development of migration policies and laws, which became necessary not only to react to observed phenomena (a reactive policy characterised the 1990s in particular), but also to manage external migration in the way most profitable to the country and its economy while attracting desirable migrant workers to the Polish labour market.

The history of asylum seekers and refugees in Poland is strictly determined by the region of origin of foreigners seeking protection in Poland. For more than two decades, foreigners applying at the Polish-Belarusian border (usually at railway BCP in Brest-Terespol) for refugee status have been mostly from the Caucasus region (formally Russian territory). The migration and refugee crisis experienced by Europe in 2015 and in the following years (Pachocka 2016a and 2017) did not influence the demographics of arriving migrants and asylum seekers in Poland. It was rather conflicts or political and economic disturbances in countries to the east of Poland that shaped the demographics of asylum seekers and foreigners granted international protection. The consequences of the so-called 'Arab Spring' or problems encountered by countries in the Middle East were to some extent reflected in Poland's experiences of admitting asylum seekers. One example is the very high rate of recognition of applications for international protection submitted by citizens of Syria. However, asylum proceedings linked to inflows from the Middle East did not dominate in terms of the overall administration of asylum applications submitted in Poland.

Since 2015, new intensive debates about possible solutions to the so-called 'refugee crisis' have prompted Polish policy-makers to introduce reforms to both international protection and immigration law. Due to the need to avoid problems with masses of asylum seekers and conflicts related to differences in culture and religion, the new Polish government of October 2015 has been refusing to implement both relocation and resettlement schemes proposed by the European Commission within the framework of the European Agenda on Migration (EAM) issued in May 2015. Instead, it emphasises the involvement of the Polish government in offering help in the regions of origin (and considers this kind of assistance to be the most effective solution). The government has also been working on legal amendments aimed at accelerating asylum proceedings in circumstances where there has been a potential misuse of asylum procedures, such as cases in which the foreigner's intention was to get into Poland in order to enjoy the possibility of moving freely, although not always lawfully, to countries perceived as more attractive and more supportive of asylum seekers. The direction of changes in law reflects the emphasis placed on internal state security, whereas the practice

observed since late 2015 raises concerns about respect for human rights, particularly in cases of arbitrarily denied or restricted access to asylum procedure and push-backs of potential applicants.

## Appendices

### ANNEX I: OVERVIEW OF THE LEGAL FRAMEWORK ON MIGRATION, ASYLUM AND RECEPTION CONDITIONS

• Legislation title and number (original English)	• Date	• Type of law (i.e. legislative Law, regulation, etc...)	• Object	• Link/PDF
<p>Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. uchwalona przez Zgromadzenie Narodowe w dniu 2 kwietnia 1997 r., przyjęta przez Naród w referendum konstytucyjnym w dniu 25 maja 1997 r., podpisana przez Prezydenta Rzeczypospolitej Polskiej w dniu 16 lipca 1997 r. (Dz.U. 1997, nr 78, poz. 483 z późn. zm.).</p> <p>Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997 no 78, item 483 with amendments</p>	2 April 1997	Constitution	General regulation of the political system, civic rights and human rights	<a href="http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970780483/U/D19970483Lj.pdf">http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970780483/U/D19970483Lj.pdf</a>
<p>Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej (Dz.U. 2018 poz. 51, tekst jednolity)</p> <p>Law of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (Journal of Laws of 2018 item 51, consolidated text).</p>	13 June 2003	Law	Granting international protection to foreigners; conditions of reception, details of asylum procedures	<a href="http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20031281176/U/D20031176Lj.pdf">http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20031281176/U/D20031176Lj.pdf</a>
<p>Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach (Dz.U. 2017 poz. 2206, tekst jednolity)</p> <p>Law on Foreigners of 12 December 2013 (Journal of Laws of 2017, item 2206, consolidated text)</p>	12 December 2013	Law	Rules of issuing and withdrawing visas and residence permits; regulation of administrative procedures regarding foreigners' stay and control activities; rules of issuing and executing return orders	<a href="http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20130001650/U/D20131650Lj.pdf">http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20130001650/U/D20131650Lj.pdf</a>
<p>Ustawa z dnia 14 czerwca 1960 r. Kodeks Postępowania Administracyjnego (Dz.U.</p>	14 June 1960	Law	Administrative procedures: terms, rules of appeal procedures	<a href="http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19600300168/U/D19600168Lj.pdf">http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19600300168/U/D19600168Lj.pdf</a>

2017 poz. 1257, tekst jednolity)  Law of 14 June 1960 Code of administrative proceedings (Journal of Laws of 2017, item 1257, consolidated text)				
Ustawa z 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy (Dz.U. 2017, poz. 1065, tekst jednolity)  Law on Promotion of Employment and Labour Market Institutions of 20 April 2004 (Journal of Laws of 2017, item 1065, consolidated text)	20 April 2014	Law	Rules of admitting foreigners to the labour market in Poland, issuing work permits and registering declarations of hiring foreigners, functioning of labour agencies	<a href="http://prawo.sejm.gov.pl/isap.nsf/download.xsp/W DU20040991001/U/D20041001Lj.pdf">http://prawo.sejm.gov.pl/isap.nsf/download.xsp/W DU20040991001/U/D20041001Lj.pdf</a>
Ustawa z 12 marca 2004 r. o pomocy społecznej (Dz.U. 2017 poz. 1769, tekst jednolity)  The Law on Social Assistance, Journal of Laws of 2017, item 1769, consolidated text)	12 March 2004	Law	Rules of granting social assistance, including integration programmes for beneficiaries of international protection	<a href="http://isap.sejm.gov.pl/isap.nsf/download.xsp/WD U20040640593/U/D20040593Lj.pdf">http://isap.sejm.gov.pl/isap.nsf/download.xsp/WD U20040640593/U/D20040593Lj.pdf</a>
Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 19 lutego 2016 r. w sprawie wysokości pomocy dla cudzoziemców ubiegających się o udzielenie ochrony międzynarodowej (Dz.U. 2016 poz.311)  Ordinance of the Minister of the Interior and Administration of 19 February 2016 on the amount of assistance for foreigners seeking international protection (Journal of Laws of 201, item 311).	19 February 2016	Regulation	Amount of assistance for asylum seekers	<a href="http://prawo.sejm.gov.pl/isap.nsf/download.xsp/W DU20160000311/O/D20160311.pdf">http://prawo.sejm.gov.pl/isap.nsf/download.xsp/W DU20160000311/O/D20160311.pdf</a>
Rozporządzenie Ministra Spraw Wewnętrznych z dnia 23 października 2015 r. w sprawie regulaminu pobytu w ośrodku dla cudzoziemców (Dz. U. 2015 poz. 1828)  Ordinance of the Minister of the Interior of 23 October 2015 on the rules of stay in the centre for foreigners (Journal of Laws of 2015, item 1828)	23 October 2015	Regulation	Rules of stay in the centre for asylum seekers	<a href="http://prawo.sejm.gov.pl/isap.nsf/download.xsp/W DU20150001828/O/D20151828.pdf">http://prawo.sejm.gov.pl/isap.nsf/download.xsp/W DU20150001828/O/D20151828.pdf</a>
Rozporządzenie Ministra Spraw Wewnętrznych i	24 April 2015	Regulation	Detention centres for foreigners	<a href="http://prawo.sejm.gov.pl/isap.nsf/download.xsp/W">http://prawo.sejm.gov.pl/isap.nsf/download.xsp/W</a>

<p>Administracji z dnia 24 kwietnia 2015 r. w sprawie strzeżonych ośrodków i aresztów dla cudzoziemców (Dz.U. 2015 poz. 596 z późn zm. )</p> <p>Ordinance of the Ministry of the Interior and Administration of 24 April 2015 on the guarded centres and detention centres for foreigners (Journal of Laws 2015 pos. 596 with amendments)</p>				<p>DU20150000596/O/D20150596.pdf</p>
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Source: Own elaboration.

## ANNEX II: LIST OF AUTHORITIES INVOLVED IN THE MIGRATION GOVERNANCE

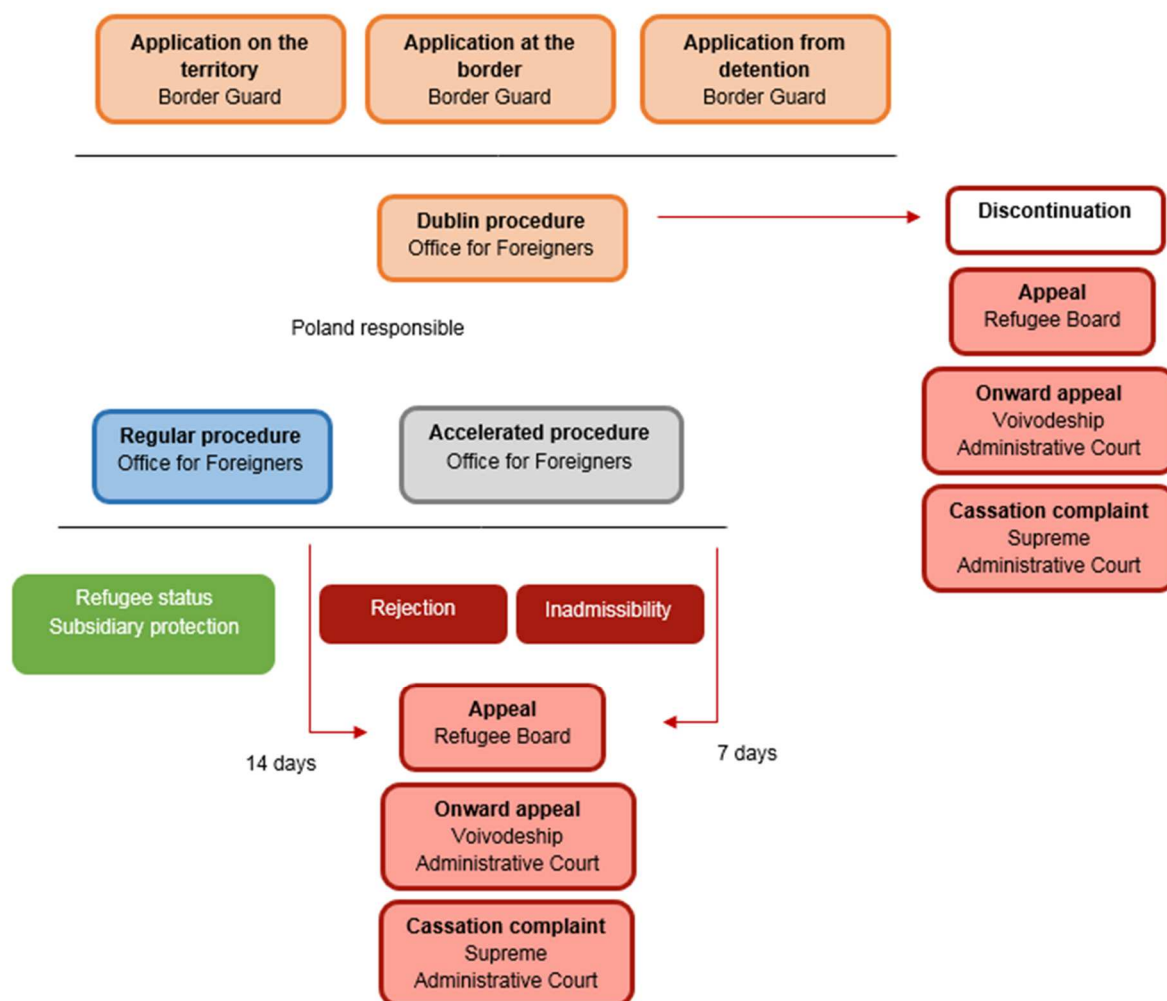
<ul style="list-style-type: none"> <li>• Authority (English and original name)</li> </ul>	<ul style="list-style-type: none"> <li>• Tier of government (national, regional, local)</li> </ul>	<ul style="list-style-type: none"> <li>• Type of organization</li> </ul>	<ul style="list-style-type: none"> <li>• Area of competence in the fields of migration and asylum</li> </ul>	<ul style="list-style-type: none"> <li>• Link</li> </ul>
Ministry of the Interior and Administration Ministerstwo Spraw Wewnętrznych i Administracji	National (implementation of laws at the level of governmental administration in regions – voivodeships)	Government	Supervision of the Border Guard; elaboration of migration policies, proposing laws linked to migration and asylum, supervising departments of voivodeship offices in the area of issuance of residence permits and work permits	<a href="https://www.mswia.gov.pl/">https://www.mswia.gov.pl/</a>
Ministry of Foreign Affairs Ministerstwo Spraw Zagranicznych	National	Government	Elaboration and implementation of visa policies, supervision of Polish consulates	<a href="https://www.msz.gov.pl/pl/">https://www.msz.gov.pl/pl/</a>
Ministry of Family, Labour and Social Policy Ministerstwo Rodziny, Pracy i Polityki Społecznej	National (implementation of laws at the local level)	Government	Elaboration and implementation of policies concerning the integration of foreigners, social assistance and employment of foreigners, supervision of regional and local labour offices responsible for issuing short term permits for foreigners' work; coordinates work of local family support centres and local centres of social assistance	<a href="https://www.mpips.gov.pl/">https://www.mpips.gov.pl/</a>
Office for Foreigners Urząd do Spraw Cudzoziemców	National with local branches	Governmental administration	Processing applications for international protection in the first instance, processing appeals to decisions on residence permits in the second instance, coordinating social assistance for asylum seekers	<a href="https://udsc.gov.pl/">https://udsc.gov.pl/</a>
Refugee Board Rada ds. Uchodźców	National	Public administration	Processing of appeals to a decision on granting international protection in the second instance	<a href="http://rada-ds-uchodzcow.gov.pl/">http://rada-ds-uchodzcow.gov.pl/</a>
Straż Graniczna Border Guard	National with regional and local units	Public administration	Protection of state border, border control, control of legality of	<a href="https://www.strazgraniczna.pl/">https://www.strazgraniczna.pl/</a>

			stay and employment of foreigners, receiving of applications for international protection, running detention centres for foreigners, issuing return orders and (if applicable) permits for stay due to humanitarian reasons and permits for tolerated stay	
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Source: Own elaboration based on various sources.



## ANNEX III: FLOW CHART OF THE INTERNATIONAL PROTECTION PROCEDURE



Source: Helsinki Foundation for Human Rights,  
<http://www.asylumineurope.org/reports/country/poland/asylum-procedure/general/flow-chart>  
 (Accessed 24 April 2018).

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## **Glossary and list of abbreviations**

BCP – border crossing point

BG – Border Guard

OF – Office for Foreigners

MIA – Ministry of the Interior and Administration

MID – Ministry of Investment and Development

MFA – Ministry of Foreign Affairs

MFLSP – Ministry of Family, Labour and Social Policy

HFHR – Helsinki Foundation for Human Rights (NGO involved in providing asylum seekers and refugees with legal and social advice)

CSO – Central Statistical Office

SIS – Schengen Information System

# **RESPOND**

## **Sweden**

### **Country Report**

**D1.2 – May 2018**

**Mudar Shakra, Jenni Wirman and Justyna Szalanska**

**Uppsala University- Department of Theology**

Horizon 2020  
RESPOND: Multilevel Governance  
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## Executive Summary

The report aims to present the legal and policy framework of migration in Sweden in a period between 2011 and 2017. In the mentioned time Sweden witnessed a U-turn in migration governance linked with an unprecedented influx of asylum seekers in 2015 when more than 160,000 asylum applications were submitted, and introduction of a new temporary law on asylum in 2016. Since 2016, Sweden has been reshaping its image of a country open to refugees through new restrictive legislative measures which are a response not only to the mass migration, but also to lack of solidarity within the European Union on the matter of refugees acceptance.

Although the issue of asylum provokes the biggest controversies, in fact the highest number of migrants who received a residency permit in Sweden in the given period – 286,578 - are those who applied for the residency due to family reunification. Residency due to asylum was granted to 239,518 people, with the peak in 2016 when 71,571 such permits were given.

After the World War II Sweden, due to its level of economic development, the state model (welfare state) and the political system (established democracy), has become a desired destination for migrants and refugees. Until 2017 the biggest migratory group in the country were Finns, who were then replaced by Syrian refugees. This change is directly linked with the Syrian Civil War and the influx of Syrian asylum seekers to Sweden.

The constitutional entrenchment of the asylum principle in Sweden is derived from its international and European commitments, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1951 Geneva Convention for Refugees and other international human rights instruments. Despite its absence in the Swedish Constitution, responsibility to protect principle was transposed to the Swedish law through the Aliens Act and other related laws.

The migration governance system in Sweden consists of several legislative acts dealing with different aspects of migration and asylum, such as asylum judicial procedures, reception, detention, health case, allowance, citizenship and borders control. The acts are as follows: Aliens Act (2005), Aliens Act Ordinance (2006), Law on Temporary Limitations to The Possibility of Being Granted a Residence Permit in Sweden (2016), Law on Reception of Asylum Seekers and Others (1994), Amendment to the law on Reception of Asylum Seekers and Others (2016), and Ordinance on the Act on Reception of Asylum Seekers (1994). Additionally, an integral part of the system are different European Union directives on migration.

Considering migration management structure, the responsibility to enact and coordinate the various judicial, legislative, administrative and financial aspects related to migration and asylum rests in hands of the Ministry of Justice and is performed through its three divisions: Division for Migration Law (L7), Division for Migration and Asylum Policy (EMA) and Division for Management of Migration Affairs (SIM). Under the Ministry of Justice operates also the Swedish Migration Agency of which main tasks are to evaluate and decide on applications from people who want to seek a temporary residence permit, acquire permanent residence or citizenship in Sweden.

After the record number of migrants coming to Sweden in 2015 and, as a result, the highest number of application for residence permit in the same year, the government introduced in 2016 restrictions to granting residence permit. Some of the main changes were to take away the possibility of permanent residency permit and tightened the family reunification possibility in order to reach the minimum level in comparison to an international and European level or to what the family reunification process in Sweden used to be before July 2016.

In the section 'Legal Status of Foreigners' the report presents the legal process of granting an asylum in Sweden, including requirements for submitting an application, steps of the procedures of application, registration and reception, identification process of an asylum seeker, rights to information and legal counselling, and other rights given to an asylum seeker such as access to housing, labour market, professional trainings and health care system. Once being granted international protection status, a refugee in Sweden is entitled to almost the same rights and duties as Swedish nationals, except from right to vote in the national and local elections. In addition, reports aims to illustrate the legal situation of irregular (undocumented) migrants and unaccompanied foreigner minors. Sweden acknowledges rights of irregular migrants as the ones derived from the human rights regime, ex. United Nations Universal Declaration on Human Rights and other international conventions. With regard to unaccompanied foreigner minors, they need to prove their age with documents or medical age assessment is conducted.

With respect to refugee crisis driven reforms, the government presented the following proposals: a prolongation of the temporary asylum law until July 2019, a revision of the asylum seekers right to arrange an own housing within the asylum seekers reception act, and a possibility for more unaccompanied minors to receive a temporary residence permit on the study ground. The projected changes herald the direction of more restrictive asylum policy, and as a result Sweden may lose its title of a country open to asylum seekers and forced migrants in light of the direction for the on-going legal and political changes.

## 1. STATISTICS AND DATA OVERVIEW

Until 2015, Sweden was a country relatively open to immigrants, including asylum seekers and those looking for better living and working conditions. Being placed 7<sup>th</sup> on the list of EU Member states with regard to number of asylum seekers Eurostat. (n.d.b), Sweden has been a hospitable receiving country, considering the number of her population (nearly 10 million people). However, the trend has been changed recently, after the government took more restrictive measures on immigration. It also has affected the asylum policy, since the ruling Social Democrats promised to halve refugee numbers to 14,000 – 15,000, if they win the next elections which are due September 2018 (Expressen, 2018).

According to the Swedish Statistics,<sup>1</sup> 884,071 people arrived to Sweden between 2011-2017. Considering only citizens of non-EU and non-EEA countries,<sup>2</sup> there were 579,427 newly arrivals in the mentioned period. In 2011-2017 immigrants who came to Sweden on the basis of family reunification or on other family-related grounds, and those who arrived for protection reasons (asylum) constituted the largest two categories of immigrants. The other two groups were labour immigrants and international students from third countries. (Swedish Migration Agency).

### 1.1 Residence Permits

Regarding residence permits, in the period 2011-2017, a total of 737,796 residence permits was granted to citizens of countries other than members of the European Union and the European Economic Area. 286,578 permits were granted due to family ties. The second numerous group – a total of 239,518 people - where those who were granted protection in Sweden after seeking asylum. The number included 16,522 permits granted to quota refugees to come to the country as part of the annual refugee quota.

Labour immigrants (employment reasons) and international students from third countries constituted the third and fourth largest categories of immigrants in the mentioned period, with a total of 146,955 permits granted based on employment and a total of 64,745 residence permits granted for visiting students.

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<sup>1</sup> The Swedish Migration Agency publishes monthly statistical reports on migration, including asylum applications and first instance decisions. These include a breakdown per nationality, sex, age group, as well as statistics specifically relating to unaccompanied children. The oldest accessible data are for 2010. The older statistics are available only in an overall, aggregated tables which lack many details, including breakdowns of nationality, gender and age groups.

<sup>2</sup> The European Economic Area (EEA) is the area in which the Agreement on the EEA provides for the free movement of persons, goods, services and capital within the European Single Market, including the freedom to choose residence in any country within this area. Currently, there are three members of EEA: Norway, Iceland and Liechtenstein. Switzerland is also a signatory, but has not ratified yet the EEA treaty.

**Table 1. First-time residence permits granted in Sweden in 2011-2017**

Category/Year	2011	2012	2013	2014	2015	2016	2017	Total 2011-2017
Family reunification	32,469	41,156	40,026	42,435	43,414	39,032	48,046	<b>286,578</b>
Asylum	12,726	17,405	28,998	35,642	36,645	71,571	36,531	<b>239,518</b>
<i>Refugee quota</i>	<i>1,896</i>	<i>1,853</i>	<i>2,187</i>	<i>1,971</i>	<i>1,880</i>	<i>1,889</i>	<i>4,846</i>	<b>16,522</b>
Work	17,877	19,936	19,292	15,872	16,975	24,709	32,294	<b>146,955</b>
Study	6,836	7,092	7,559	9,267	9,410	10,896	13,685	<b>64,745</b>
<b>Total</b>	<b>69,908</b>	<b>85,589</b>	<b>95,875</b>	<b>10,3216</b>	<b>106,444</b>	<b>146,208</b>	<b>130,556</b>	<b>737,796</b>

Source Compilation from: Swedish Migration Agency (2017 r) (2018 s)

## 1.2 Asylum Seekers

The number of asylum seekers who submitted for protection in Sweden was increasing from 29,648 in 2011 up to the highest level of 162,877 in 2015. In 2016 the number decreased by over 82% comparing to the previous year. In 2016 only 28,939 people applied for asylum, and in 2017 even fewer – 25,666 (Swedish Migration Agency). The reasons behind such a significant drop were threefold: the agreement between EU and Turkey which reduce the asylum seekers in the whole Europe (European Commission 2017 a) , introduction of temporary border ID controls and eventually the stricter measures taken after the adoption of the new law on temporary residence in the late 2015.<sup>3</sup> In total, in the period 2011-2017 there were 426,577 applications for asylum. Out of these, 283,980 (66%) were submitted by men and 142,597 (34%) by women.

**Table 2. Applications for asylum received in 2011-2017**

Group/Year	2011	2012	2013	2014	2015	2016	2017	Total 2011-2017
Women (including children)	10,708	16,142	19,496	26,484	48,149	11,587	10,031	142,597
Men (including children)	18,940	27,745	34,763	54,817	114,728	17,352	15,635	283,980
Children	9,699	1,411	1,642	2,310	70,384	1,099	8,507	153,212
Of which unaccompanied minors	2,657	3,578	3,852	7,049	35,369	2,199	1,336	56,040
<b>TOTAL</b>	<b>29,648</b>	<b>43,887</b>	<b>54,259</b>	<b>81,301</b>	<b>162,877</b>	<b>28,939</b>	<b>25,666</b>	<b>426,577</b>

Source Compilation from: Swedish Migration Agency (2012 a) (2012 b) (2013 n,a,c) (2014b) (2015b) (2016e) (2017p) (2017q)

<sup>3</sup> For more information please see the coming sections 3.4 and 5.3.3 regarding the legislative changes in 2016 and family reunification new regulation.

Most asylum seekers in 2011-2017 came from the following ten countries: Syria (27%), Afghanistan (14%), Iraq (8%), Eritrea (7%), Somalia (6%), Iran (3%), Serbia (2%), Albania (2%), Kosovo (2%) and Russia (1%).

**Table 3. Top ten countries of origin of asylum seekers in Sweden in 2011-2017**

Country	Number of asylum applications by year							Total number 2011-2017
	2011	2012	2013	2014	2015	2016	2017	
Syria	640	7,814	16,317	30,583	51,338	5,459	4,718	<b>116,869</b>
Afghanistan	4,122	4,755	3,011	3,104	41,564	2,969	1,681	<b>61,206</b>
Iraq	1,633	1,322	1,476	2,666	20,858	2,758	1,887	<b>32,600</b>
Eritrea	1,647	2,356	4,844	11,499	7,233	1,151	1,691	<b>30,421</b>
Somalia	3,981	5,644	3,901	4,831	5,465	1,646	780	<b>26,248</b>
Iran	1,120	1,529	1,172	997	4,560	1,279	1,090	<b>11,747</b>
Serbia	2,699	2,696	1,669	1,512	1,053	451	309	<b>10,389</b>
Albania	263	1,490	1,156	1,699	2,615	785	760	<b>8,768</b>
Kosovo	1,210	942	1,209	1,474	1,779	355	293	<b>7,262</b>
Russia	933	941	1,036	879	658	414	471	<b>5,332</b>

Source: Statistics Sweden (SCN n,d,a)

In the period 2011-2017 Sweden granted asylum to 239,518 people. In 2015, the country witnessed a very significant increase in the number of people seeking protection. In total, Sweden registered nearly 163,000 new asylum applicants, which more than doubled comparing to the previous year. Considering the average processing time for asylum applications (approx. 328 days), this situation led to a huge backlog of pending applications in the next year. Out of 112,000 decisions on granting asylum taken in 2016, 71,571 were positive.

**Table 4. Positive asylum decisions taken in 2011-2017**

Legal basis for asylum	2011	2012	2013	2014	2015	2016	2017
Geneva Convention	2,870	4,617	7,646	11,341	13,552	17,913	*
Subsidiary protection	6,148	9,095	17,227	20,023	18,690	48,587	*
Humanitarian reasons	1,345	1,328	1,378	1,685	1,588	2,112	*
Quota refugees	1,896	1,853	2,187	1,971	1,880	1,889	4,846
Temporary law							
Others	467	512	560	622	935	1,070	*
<b>Total</b>	<b>12,726</b>	<b>17,405</b>	<b>28,998</b>	<b>35,642</b>	<b>36,645</b>	<b>71,571</b>	<b>36,531</b>

Source: Compilation from Swedish Migration Agency (2016e) (2017p) (2017q) Eurostat (2017a) \*Lack of data (as of 4 March 2018)

### 1.3 Undocumented Immigrants Statistics

According to a report published by the Swedish Red Cross and Stadsmissionen organization in 2015 concerning the shadow society in Sweden the statistics on undocumented immigrants in Sweden are not revealed and the number is only an estimated one since there are no registry for them in Sweden (Stadsmissionen 2015). However, the Swedish National Board of Health and Welfare (Socialstyrelsen)<sup>4</sup> report in 2010 estimated the number of the undocumented immigrants in Sweden between 10000 and 50000 with 2000 to 3000 children (Stadsmissionen 2015)(Socialstyrelsen 2010). According to news reports, an estimated 8,000 undocumented persons are registered as taxpayers with the Swedish Tax Authority (SVD, 2018). Reports from Swedish media and the Swedish police indicate that as a result of the 2015 shift in policy, whereby fewer persons are granted residence permits, more asylum seekers are staying as undocumented in Sweden, waiting for the four-year statute of limitations to run (Sverigesradio 2017). Swedish state media reports that a smaller percentage of persons reapplying for asylum are having their original denials overturned. In 2011, 61% of those who reapplied were successful, that number had fallen to 5% by the first six months of 2017 (Sverigesradio 2018 a). According to news reports, the Swedish Police are worried that the number of undocumented persons living in Sweden will rise (Sverigesradio 2018 b).

### 1.4 Expulsion and deportation cases in Sweden

When it comes to the expulsion and deportation cases and their numbers in Sweden, the Swedish police authority usually provides statistics which are a summary of figures reported from regional polices through the police case management system. However, the police authority affirms the fact that a large part of their statistics compilation is done manually. This means that there may be quality shortcomings (Swedish Police Authority (n.d.).

<sup>4</sup> The National Board of Health and Welfare is a state authority working under the Ministry of Social Affairs with a wide range of tasks related social services and health services. One of these tasks is to develop statistics, rules, knowledge and support within the areas of mental health, elderly, disability and children and young people. For more information visit : <https://www.socialstyrelsen.se/omsocialstyrelsen>

The Swedish Prison and Probation Service (Kriminalvården) usually sends cases for foreigner, who should be expelled due to criminal acts, to the police authority that is in charge for the expulsion enforcement. Between 2012 and 2017 the police authority received more than 4000 cases from the Swedish Prison and Probation Service as it shows in the table 5 (Swedish Police Agency (n.d.).

After the application to the Swedish Migration Agency has been submitted and exhausted all the appeal stages the Migration Agency send these cases to the police authority that will execute the deportation when it is estimated that compulsion is required or the person in question has deviated. In table 5, box 2 shows that the number of refused residence permit related applications that were handed over to the police authority by the Migration Agency for enforcement exceeded 60000 cases between 2012 and 2017 (Swedish Police Agency (n.d.). This group is dominated by those who have previously applied for asylum but may also contain persons who applied for a residence permit for other reasons (Swedish Police Authority (n.d.).

The police authority can also itself take rejection decisions at the border as well as inside the territory. The number of these rejection decisions taken by the police varies and increases from 2012 until 2017 as shown in box 3 in the table 5 (Swedish Police Authority (n.d.).

**Table 5. Number of cases received by the police authority for enforcement:**

Category/Year	2012	2013	2014	2015	2016	2017	Total
1.Cases to be executed, Received cases from the Swedish Prison and Probation Service (Kriminalenvård)	774	788	833	675	681	639	4,390
2.Cases to be executed, received from the Migration Agency (Migrationsverket)	12,261	12,964	11,500	10,846	8,232	8,343	64,146
3. Decisions on rejections taken by the police	853	1,017	993	1,377	2,939	N/A	N/A
Total	13,888	14,769	13,326	12,898	11,852	N/A	N/A

Source: Swedish Police Authority (n.d.)

Table 6 shows that the number of executed cases by the police authority for cases sent by the courts due to criminal acts committed in Sweden was around 4000 between 2012 and 2017 (Swedish Police Authority (n.d.). It also shows that number of executed cases concerning persons whose residence permit application have been rejected by the Migration Agency and handed over to the Swedish Police Authority was more than 26 000 cases between 2012 and 2017. Number of executed decisions on rejection taken by the police authority was approximately 14 000 during the same period (Swedish Police Authority (n.d.).

**Table 6. Number of enforcement and execution cases by the police authority**

Category/Year	2012	2013	2014	2015	2016	2017	Total
1. Executed cases from court	616	671	663	640	648	717	3,955
2. Executed cases from the Migration Agency	5,754	5,114	4,165	3,414	3,728	4,165	26,340
3. Executed cases from police expulsions <sup>5</sup>	644	740	993	1,227	2,886	7,595	14,085
Total	7,014	6,525	5,821	5,281	7,267	12,477	44,380

Source: Swedish Police Authority (n.d.)

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<sup>5</sup> Number of executed decisions on rejection taken by the police authority.



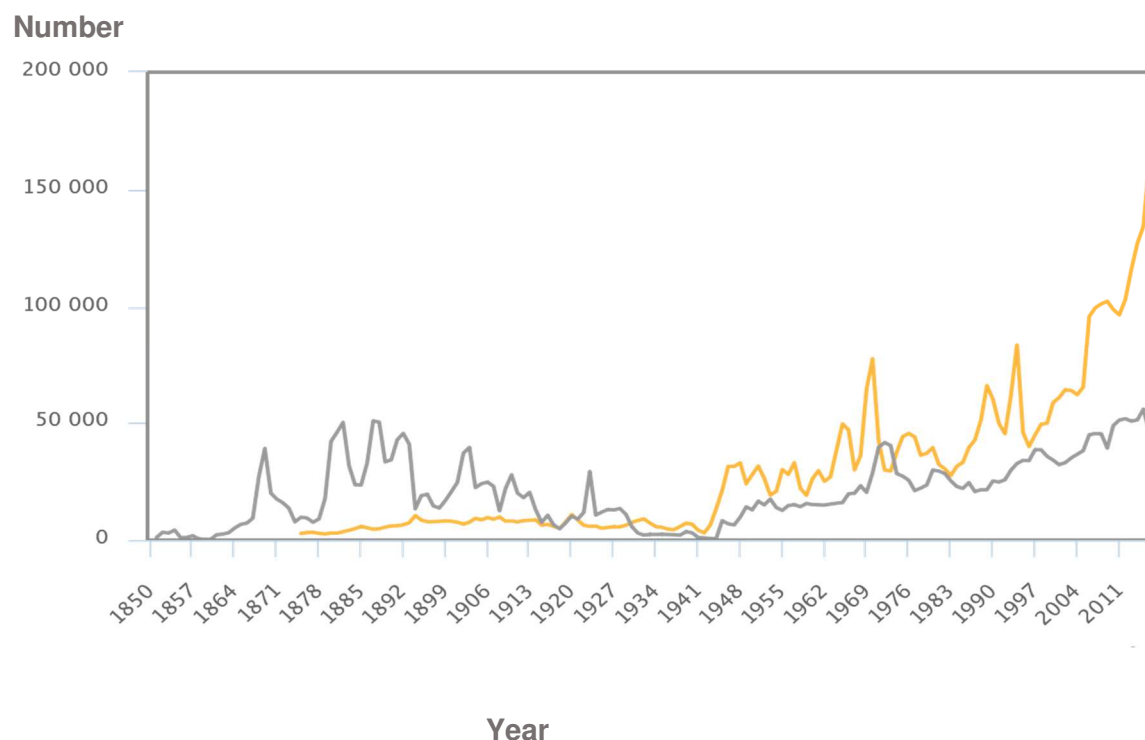
## 2. THE SOCIO-ECONOMIC, POLITICAL AND CULTURAL CONTEXT

### 2.1 Brief Migration History for Sweden

Sweden has a long history of being both a source and destination country to people seeking for a better life and future. Over the course of 100 years during 1820-1920 over 1.3 million people emigrated from Sweden to North America in *the Great Emigration*. Consequently, the large-scale emigration was a considerable social issue in Sweden until the World War II, after which Sweden for the greatest part has continuously had a positive net migration due to extensive labour-, asylum-, and later refugee migration from the neighbouring Nordic countries, Germany and the Baltics (Swedish Migration Agency, 2018 a.). Ever since the World War II, Finnish immigrants constituted the biggest single migratory group in Sweden, until in 2017 replaced by groups of Syrian-born. Most of them arriving as asylum seekers following the Syrian Crisis which began in 2011 (Swedish Migration Agency, 2018 b.).

During the 20th Century, the number of asylum applications peaked in 1992 during the Baltic War when Sweden received a record of 84 000 asylum applications (Swedish Migration Agency, 2018c.). Two decades later, from 2011 until 2015, a growing migration stream was documented again, culminating by the end of 2015 when 162 877 people sought an asylum in Sweden. The year after, due to changes in Swedish migration laws, the number of asylum seekers fell dramatically and has since been on a continuously low level of approximately 25-29 000 people annually (Swedish Migration Agency, 2017 a.).

**Figure 1. Number of immigrants (yellow graph) and emigrants (grey graph) in Sweden 1850–2011 (Statistics Sweden (SCN),n.d.b)**



## 2.2 Contemporary Swedish Society

With a Human Development Index of 0.913 out of 1.0, Sweden ranks 14 globally as of 2016 (UNDP, n.d.). Sweden has historically followed the so called Swedish Model combining high taxes, collective bargaining and a fairly open economy. The state holds a central position in guaranteeing public welfare services, constituting a primary social and economic safety net for all citizens (Ministry of Finance, n.d.). Accordingly, the Swedish national identity is intimately linked with a strong welfare state, as well as humanitarian commitments such as altruistic migration policies and a foreign aid corresponding to 1 % of the annual GDP (Sida, 2017).

Also in the OECD Tolerance Chart, Sweden ranks as one of the most tolerant countries, and has always been multicultural and multilingual as the languages and cultures of the Sami, the Swedish Finns, the Tornedalers, the Roma and the Jews have existed in Sweden for a long time and are a part of the society and common cultural heritage (County Administrative Board of Sweden, n.d,h). As to other cultures and religions, a broad diversity is being represented in the society by a growing number of supporters (Sutherland, 2018). Both Catholic, Muslim and Jewish communities document an increased number of supporters, although exact numbers are not available as religious beliefs are not to be registered according to Swedish law. Only 19% of Swedes claim to be religious, ranking Sweden as one of the least religious countries globally. Although 66% of the population are still members of the Evangelical Lutheran Church of Sweden, a steep decline in members has been noted in the last decennium. Still, religion plays an important ritual and cultural role in the society mainly through Christian holidays celebrated by both religious and non-religious Swedes (Sutherland, 2018).

Nevertheless, there is a contradictory to this picture of a tolerant contemporary Sweden, as recent studies such as the annual Diversity Barometer (Mångfaldsbarometern, 2016) suggest that certain aspects of religion such as religious schools are widely regarded with scepticism by the public, and that the common attitude toward multicultural societies is increasingly negative (Drevinger, 2016). In 2016, 64% of Swedes were positive to multiculturalism, a 10% drop since 2014, which possibly coincide with the politician's rhetoric's and government measures on migration taken in the midst of the so called migration situation in 2015 (Diversity Barometer, 2016; Drevinger, 2016).

During the electoral period 2014-2018, the Swedish Social Democratic Party (Sveriges socialdemokratiska arbetareparti, SAP), Sweden's historically and currently biggest political party, form the government together with the Green Party (Miljöpartiet de gröna, MP) (Government Offices of Sweden, n.d.a). As of the General Elections 2014, the far-right Sweden Democratic Party (Sverigedemokraterna, SD) with an outspoken anti-immigration agenda holds 49 seats (12%) in the parliament (Riksdagen, n.d.a). Today the party has grown to be the third biggest, and are active debaters of immigration and security issues, whereupon segregation and integration, as well as fast scale urbanization are among their most burning contemporary political issues (The Sweden Democratic Party, n.d.).

As of 2017, Sweden's unemployment rate was 6.7%. For all age groups (15-74 years), the labour market is more challenging for non-natives, as 69.4% of natives and 61.9% of non-natives are in active employment (Statistics Sweden, 2017). Most notable is the youth (15-24 years old) unemployment rate of 20.8 %, or 7.2% for youth neither in school nor in employment (UNDP, n.d.).

Rural communities outside major cities, especially in the Northern Sweden are shrinking regarding both population and basic services as many young people move in to the cities and state agencies and other service providers are moved due to efforts of centralization. Many of the asylum seekers that arrived in 2015 were placed in rural communities and cities, making up an important although challenging part in populating and integrating into these areas (Lilja & Pemer, 2010:16). In the cities, the ethnic diaspora is often located in the suburbs and the residential segregation tangible (Lilja and Pemer, 2010:3). This cleavage is meaningful for the

discourse on migration, as fewer job opportunities constitute an integration challenge for non-natives.

Finally, the Swedish Contingencies Agency (Myndigheten för Samhällsskydd och Beredskap, MSB) estimates that arson constitutes a third of all fires reported for asylum accommodations (Swedish Contingencies Agency, 2016). It is reasonable to suggest, that the arsons constitute one example of the increased public criticism against migration.

### 3. THE CONSTITUTIONAL ORGANIZATION OF THE STATE AND CONSTITUTIONAL PRINCIPLES ON IMMIGRATION AND ASYLUM

#### 3.1 System of Government in Sweden

Sweden is a constitutional monarchy and parliamentary democracy. This means all public powers, which also includes the migration governance, proceed from the people through the Swedish parliament (Riksdag) (Kungrörelse, 1974:152, Ch. 1, para1). The king is the official head of the state with some symbolic and representative missions, but lacks any kind of political power (Kungrörelse, 1974:152, Ch. 5). The system of government in Sweden is regulated by the fundamental four laws (Sveriges grundlagar) in a similar way to the constitutions in some other countries (Government Offices of Sweden, 2015 a). These fundamental four laws consists of the Fundamental Law on Freedom of Expression (Yttrandefrihetsgrundlagen), the Act of Succession (Successionsordningen), the Freedom of the Press Act (Tryckfrihetsförordningen) and the Instrument of Government (Regeringsformen) (Government Offices of Sweden, 2015a). The system of government in Sweden, how it functions, its basic principles and the parliamentary election application for example are described in the Instrument of Government (Government Offices of Sweden, 2015a).

The parliamentarians, who all are required to be Swedish citizens, are elected every four years by the Swedish citizen voters, any above 18 years and citizen of Sweden (Kungrörelse, 1974:152, Ch. 3, para4,). In Sweden the general elections are held on national (Riksdag), regional (Landsting) and local municipal (Kommun) levels respectively (Government Offices of Sweden, 2015 b). Nevertheless, the above 18 years old residents of the EU citizens, Norway and Iceland states' citizens, who are registered living in Sweden, have the right to vote in county council and municipal levels, whereas nationals can vote in all three elections (Government Offices of Sweden, 2015 b). Once the 349 Swedish parliamentarians are elected the prime minister can be appointed by the Swedish parliament. Subsequently, the prime minister can commence the government formation and choosing the ministers including the minister of migration (Regeringskansliet, 2015 a).

The administration of the government in Sweden is being conducted nationally, regionally and locally and in some cases on European level (Government Offices of Sweden, 2015 c). On a national level the Swedish parliament ratifies and decides new laws and amendments to the old laws and sometime initiates motions including the migration and asylum regulations and policies (Riksdagen, 2018 b). The government is assigned to initiate new laws and suggests amendments to the old ones and also executes and implements parliamentary decisions (Riksdagen, 2018 b). Around 200 legislative proposals are annually submitted by the Swedish government to the Swedish parliament (Government Offices of Sweden, 2015 d). According to the Swedish parliament released information: "in simple term, one can say that the government suggests and the parliament decides" (Riksdagen, 2018 b). That means the Swedish government governs Sweden by initiating laws, amendments to the old ones but it still needs the parliament's approval. Nevertheless, the Swedish government is authorized by the Instrument of Government to issue ordinances which are applicable all over Sweden (Riksdagen, 2018 b). Sweden has 21 counties (Landsting) including the regions Gotland, Halland, Skåne and Västra Götaland and each county has its own elected county council (Landstingsfullmäktige) (Government Offices of Sweden, 2015 d). The county councils take decisions in regional level within their territories in accordance with the county's tasks which are mainly related to the collective transportation, health and dental care services and regional planning and development (Swedish Association of Local Authorities and Regions (SKL), 2017a). There are 290 municipalities (Kommuner) in the 21 counties and regions in Sweden

and each municipality has its own elected municipal council (Kommunfullmäktige) which takes decisions in relation with the municipalities' task and work (SKL, 2017b). These tasks are mainly related to the elementary schools, other types of schools, social services and elderly care on local level (SKL, 2017c).

**The Swedish government** (Regeringen) governs the country with the assistance of the government offices (Regeringskansliet) and about 220 other governmental authorities (Regeringskansliet, 2015 b). According to the governmental released information “the governmental offices form a single, integrated public authority comprising the Prime Minister's Office, the government ministries and the Office for Administrative Affairs” (Government Offices of Sweden, n.d.b).

**Ministry of Justice and Internal Affairs** (Justitiedepartementet) in the Swedish government is in charge to manage the Swedish judicial system including migration courts, asylum emergency preparation and the other migration and asylum related issues. In addition, the Ministry of Justice is also responsible to execute and implement different legislations such as those within the field of migration and asylum (Government Offices of Sweden, 2017b). The Swedish minister of migration works at the ministry of Justice and internal affairs dealing with all the migration, asylum and citizenship matters and simultaneously occupies the position of the minister of Justice Deputy (Government Offices of Sweden, 2017 b). In addition, the ministry of justice has 19 divisions with different types of responsibilities but three of them only manage with different migration and asylum related issues, namely Division for Migration Law (L7); Division for Migration and Asylum Policy (EMA); Division for Management of Migration Affairs (SIM) (Regeringskansliet, 2017a).

**The Swedish Migration Agency** (Migrationsverket) functions according to instructions drafted in an ordinance (2007:996) by Division for Migration Law (Regeringskansliet, 2017a). According to the first paragraph in this ordinance the Swedish Migration Agency is the administrative authority for all issues related to residence permits, work permits, visas, reception of asylum seekers, citizenship, instructions for municipalities on the new arrivals, the returning or deportation process, and returnees.

### 3.2 Constitutional Entrenchment of The Principle of Asylum

The four fundamental laws, which form the Swedish constitutions, do not explicitly mention the asylum right, however, paragraph seven in chapter ten of the Instrument of Government (Kungörelse, 1974:152) states that Sweden cooperates with other countries and inter-governmental organizations such as United Nations and European Union. Thus, the constitutional entrenchment of the asylum principle in Sweden could be seen as derived from its international and European commitments. Sweden joined the European Union in 1995 after negotiation for the accession agreement (Government Offices of Sweden, 2013,p6). According to the governmental published information:

*“One important condition for transferring decision-making powers to EC bodies was that the Communities had safeguards for rights and freedoms corresponding to those enshrined in the instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms”* (Government offices in Sweden, 2013, p8).

In addition, Swedish judicial system comes under the EU *acquis communautaire* which means the superiority of the laws ratified on the EU level over the EU state members' domestic laws (Government Offices of Sweden, 2015 e). Accordingly all EU member states including Sweden have to have common regulations in certain areas (Riksdagen, 2017a) such as the EU asylum regulations which consider the 1951 convention and its 1967 protocol are cornerstone for the asylum regime (Qualification Directive, 2011/95/EU, Para 4). Sweden is a signatory of the 1951 Geneva Convention for Refugees and other international human rights

instruments.<sup>6</sup> Sweden has integrated the 1951 Geneva Convention refugee definition and other related rules in its Aliens Act (2005:716).

### 3.3 Structure of The Migration Judiciary in Sweden

According to the Swedish courts (Sveriges domstolar) there are three types of courts in Sweden which are as follows (Domstolarna, 2017a):

1. The General Courts namely the District Courts (Tingsrätterna), the Court of Appeal (Hovrätt) and the Supreme Court (Högsta domstolen);
2. The General Administrative Courts namely the Administrative Court (Förvaltningsdomstol), the Administrative Court of Appeal (Kammarrätten) and the Supreme Administrative Court (Högsta förvaltningsdomstolen);
3. The specialized courts that can settle disputes in various special areas, such as the Labour Court and the Swedish Arbitration Tribunal.

The administrative courts are twelve in Sweden and the Migration Courts exist in four administrative courts in Sweden, Stockholm, Malmö, Göteborg and Luleå (Government officer in Sweden, 2015 f). One main task of the General Administrative Courts amongst other ones is to look into any dispute between the Swedish authorities and private persons (Domstolarna, 2017b). Migration Courts and Migration Supreme Court form main parts of the migration chain in Sweden which starts when the Swedish Migration Agency has rejected the citizenship, work, asylum or other related applications (Domstolarna, 2017b). The Migration Courts examine all the decisions taken by the Swedish Migration Agency. So the Swedish judiciary including the migration judicial process has three instances; the first one starts with the Migration Agency; then it moves to the second stance court that is the Migration court in one of the four above-mentioned administrative courts. The third and final instance is at the Supreme Migration Court where the unsatisfied applicants with the migration court's decision can make an appeal (Domstolarna, 2017c). However, the appeal to the Supreme Migration Court needs an initial permission or what is called leave to appeal to review (Prövningstillstånd) by Supreme Migration Court itself in order for it to start examining the appeal decision of Migration courts (Domstolarna, 2017d).

### 3.4 Independence of the Swedish Judiciary

According to the chapter 12 in the instrument of government which is part of the fundamental laws in Sweden, neither the government nor the parliament can influence the public authorities' decision that applies for an individual case or person, nevertheless, the public authorities are in their turn obliged to follow the ratified law by the parliament. This means that, as it is explained in the Swedish parliament paper on facts about the parliamentary control, no ministry or minister has the power to intervene in the governmental agencies' daily decisions, activities, conducts and actions that are under its supervision or mandate (Riksdagen, 2017b). This rule applies also to the steering relations between the government on one side and Swedish Migration Agency as well as the Migration courts and the Migration Supreme Court on the other side. Nevertheless, the Swedish parliament exercises its controls over the operations at the courts by so-called "means of legislations" which means initiating new laws or amending old ones (Domstolarna, 2017 f). Although the Swedish government cannot influence the daily decisions of the public agency however it plays still a substantial role in the management of its governmental agencies that includes the migration agency and migration courts. This is usually done through- so called the annual terms of reference letter or appropriation directives (in Swedish "Regleringsbrev") (Domstolarna, 2017 g). In addition, the government can use and issue ordinances through its government offices in order to control

<sup>6</sup> For example Article 14 of the Universal Declaration of Human Rights (1948), which Sweden has adopted, states that "Everyone has the right to seek and to enjoy in other countries asylum from persecution."



the governmental agencies' powers, obligations and budget (Government Offices of Sweden, 2015 g). There has been no indication or any report by any internal or external actor or evaluator that can confirm that the Swedish government has been breaching this ministerial rule principle in any way. Simultaneously, the Swedish parliament is the observer and protector of the application of the ministerial rule prohibition principle (Government Offices of Sweden, 2015 g). The only remedy, which the Swedish government has when the governmental agency has not correctly applied the law in the letter of the terms, is to seek to amend the relevant legislation (Government Offices of Sweden, 2015 g).

### **3.5 Role of the Judiciary in The Interpretation and Definition of Laws and Policies on Asylum**

The Migration Supreme court can only grant this initial permission or leave to appeal if one out of two conditions are met. According to the chapter 54, paragraph 10 in the Swedish code of judicial procedure (1998:605) the first one is if the case is of importance for the guidance of the law application. Or alternatively in more seldom cases, due to exceptional reasons such as that grounds exist for relief for substantive defects or that a grave procedural error has occurred or that the result in the court of appeal is obviously due to gross oversight or to gross mistake (Government Offices of Sweden, 1998). In fact, a great number of appeal applications are received by the Supreme Migration court but the number of given initial permission is very limited (Domstolarna, 2017d). This is because the main task of Supreme Administrative Court is only to establish precedents through its concert decisions that provide guidance and guidelines to the courts and other involved individuals in the legal process (Domstolarna, 2017 d). Accordingly, the importance of the case for the individual is not enough for the Supreme Migration Court to give the leave to appeal if it is not of importance for other cases with similar circumstances (Domstolarna, 2017 d).

### **3.6 Case-Law on Asylum**

The Swedish judiciary belongs to the civil law tradition similarly to many European Countries, where case-law does not play the same role as in countries with the common law traditions. As a result the case-law does not have the binding force in the Swedish judiciary system in the same way as in the United Kingdom for example, nevertheless it has some guidance and precedent influence (Well , E. 2018). For example recently in the end of 2017, the Supreme Migration Court in Stockholm issued two judgments relating to employment conditions (AG v Migrationsverket, MIG 2017: 24) (Domstolarna, 2017 e) and (DM v Migrationsverket, MIG 2017: 25) (Swedish Migration Agency, 2017 b). The Migration Supreme Court accepted the appeal in the two cases and granted the applicants extended work permits and permanent residence permits. Those two judgements will eventually provide precedent and guidance after they will be analysed by the Swedish Migration Agency in order to decide how it will work with similar cases in the future (Swedish Migration Agency, 2017b). In the first judgment the applicant received a lower salary than the collective bargaining salary standard during a part of the previous licensed period which is not allowed in Sweden since it gives less protection to the workers. Thus, the question was if he or she will be granted extended work permit or not. The issue in the second judgment was if the applicant's terms of employment, where occupational pension and sickness insurance were not provided during the previous licensed period, can be regarded as worse than the Swedish collective bargaining standard or not (Swedish Migration Agency, 2017b).

## 4. THE RELEVANT LEGISLATIVE AND INSTITUTIONAL FRAMEWORK IN THE FIELDS OF MIGRATION AND ASYLUM

### 4.1 Migration and Asylum Policy of the Swedish Government

The current Swedish government has announced through various channels, such as its homepage, its national migration and asylum roadmap, action plan and policy for its mandate period between 2014 and 2018 (Government Offices of Sweden, 2018 b). In this road map the government emphasizes in the goals of its policy on the importance of the long term planning, sustainability and the developmental effects of the migration to the Swedish progress. Therefore, the government states in its plan that it will work to promote for demand-driven labour-immigration and to facilitate cross-border mobility within the frame of regulated immigration as well as to maintain the right to seek asylum. Furthermore, this government policy highlights the importance and role of the deepening of the European and International cooperation to achieve these goals through the United Nations organizations and European Union institutions. The government in the same roadmap states that Sweden should be an active member in the European Union institutions in order to protect and promote for the asylum right and rights of other vulnerable groups. This will be, as it is stated in the government same publication, through a European Common sustainable humanitarian Asylum System which is built on shared responsibility and solidarity in distributing the asylum seekers between the European member states. This government road map confirms also the significance of the effective and constructive cooperation between the relevant authorities, municipalities and civil societies.

### 4.2 Migration Management in Sweden

The Ministry of Justice is the responsible ministry in the Swedish government to enact and coordinate the various judicial, legislative, administrative and financial related aspects to migration and asylum. According to the Ministry of justice information (Regeringskansliet, 2017b) the ministry governs the different aspects of the migration and asylum process through the three following divisions that have different responsibilities as follows:

***Division for Migration Law (L7):*** Under this division's responsibility comes the legislative issues in relation to migration law, Swedish citizenship and certain border control matters. Thus, this division is responsible for the application of following acts:

The Aliens Act, the Asylum Seekers Reception Act, the Asylum Seekers Health Care Act, the Act of Loan and other compensation for job performed by a foreigner who is not permitted to reside in Sweden, the Passenger Registration Act, the Transit of Third Country Citizen Act and the Swedish Citizenship Act ( Regeringskansliet, 2017 b).

***Division for Migration and Asylum Policy (EMA):*** Under the responsibilities of this division come the international cooperation in relation with the migration policy, all issues concerning refugee and migration policy inside Sweden and the other grounds concerning the foreigners' right to stay in Sweden in addition to all the Swedish citizenship issues as well (Regeringskansliet, 2017 b).

***Division for Management of Migration Affairs (SIM):*** This division is responsible for economic governance and follow-up in the field of migration. This makes SIM division responsible for coordinating the budget work for Migration and asylum in Sweden. Furthermore, under SIM responsibilities come all the matters concerning the Migration Agency (Migrationsverket) as well as the reception of asylum seekers (Regeringskansliet, 2017b).



In Sweden several authorities and actors are involved in the different aspect of the migration and asylum chain before the asylum seeker is granted the refugee status or the foreigner is permitted to work and given the residency permit and after. The Swedish Migration Agency presents them as follows (Swedish Migration Agency, 2018 f):

1. The Swedish embassies and consulates abroad receive applications for visas, residency permit and job permit;
2. The Swedish police is responsible for border control and deportation.
3. Migration Supreme Court and Migration Courts where the Migration Agency's decisions can be appealed;
4. The county administrative boards (Länstyrelsen) are in charge of distributing the asylum seekers, who have been granted a residency permit, and engaging them with introduction program in their respective region after coordination with the municipality;
5. The municipalities are responsible for receiving asylum seekers who have been granted residence permits;
6. The county council (Landstinget) is in charge when it comes the asylum seekers' health care, NGOs and aid agencies, which can support asylum seekers;
7. The Children's Ombudsman, the county administrative boards, the National Board of Social Affairs and Sweden's municipalities and the county councils are together cooperating for the reception of unaccompanied minor asylum seekers.

The Swedish Migration Agency describes its role as the link for the whole asylum and migration chain in Sweden as well as the maintainer who holds this chain's different parts together (Swedish Migration Agency, 2018 f). The Migration Agency assigns the newly arrivals, who are covered by the resettlement Act (Lag om etableringsinsatser för vissa nyalända invandrare, 2010:197), to the different municipalities besides it decides over the governmental compensation for each municipality (Swedish Migration Agency, 2018 f). Then the role of the Swedish municipalities as it will be explained thoroughly in the coming sections county councils (Landstingen), the county administrative boards (Länstyrelserna), the Swedish National Insurance Agency (Försäkringkassan), the Swedish Board of Student Finance (CSN), along with the Swedish Public Employment Services (Arbetsförmedlingen) starts in order to provide the newly arrivals the good reception in the Swedish society (Swedish Migration Agency, 2018 f). The Swedish government decides how many newly arrivals will be distributed to 290 municipalities in 21 country councils and regions in Sweden within the framework of the Settlement Act. Before that the government uses the Migration Agency's forecast to decide that (Swedish Migration Agency, 2018 g). The Swedish Migration Agency works according to an annual plan which is an estimating to the number of newly arrivals who each municipality is going to receive every month during a year (Swedish Migration Agency, 2018 g).

According to the Swedish report for the Asylum, Migration and Integration Fund National program (AMIF) (Swedish Migration Agency 2017, s p7) the cooperation between the different authorities and actors involved in the migration and asylum process was not clearly coordinated before 2013 in Sweden. As a result the individual used averagely to contact around ten different authorities and had about forty conversations with different governmental officials during the asylum process and after (Swedish Migration Agency, 2017, s p7). In 2013 the Swedish Migration Agency with other authorities in Sweden were therefore asked to sit together and conduct a study concerning the process for the asylum seeking from the application point to the settlement and self-sufficiency point in order to come with different proposals and solutions. The proposed solutions after the task were as follows (Swedish Migration Agency, 2017 s p7):

1. To improve the cooperation between authorities by setting up cross-professional teams from different involved actors and authorities;
2. To adjust the delivered information by the different authorities to asylum seekers;

### 3. To conduct survey about the educational and vocational background for the asylum seekers

In 2014 the Swedish Migration Agency signed also a memorandum of understanding with all the involved actors within the migration and integration process in Sweden such as the Swedish public employment service (Arbetsförmedlingen) and the Swedish National Insurance Company (Försäkringskassan). This was in order to strengthen the cooperation dialog between them with purpose to support the asylum seekers, newly arrivals and other migrants with the needs to make their integration easier in the Swedish society and market (Swedish Migration Agency, 2014 n,a).

## 4.3 National Legislation on Immigration and Asylum

Sweden has several legislative acts governing the migration and asylum different aspects from asylum judicial procedures, reception, detention, health case, allowance, citizenship and to borders control etc. These are to a large extent based on international asylum law and EU legislation as will be elaborated below. The main national legislatives are as follows:

1. Aliens Act (Utlänningslagen 2005:716)
2. Aliens Act Ordinance (Utlänningsförordningen 2006:97)
3. Law on Temporary Limitations to The Possibility of Being Granted a Residence Permit in Sweden (Lag om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige 2016:752)
4. Law on Reception of Asylum Seekers and Others (LMA) (Lag om mottagande av asylsökande 1994:137)

The Aliens Act (2005:716) is the main legislation in the Swedish national legal system that regulates foreigner's right to enter, stay and work in Sweden. The law also stipulates under which conditions a foreigner can be rejected or expelled from the country. Aliens Act (2005:716) has for example twenty three chapters which contains all the different migration and asylum related definitions and provisions. Some of those provisions are concerning refugee and subsidiary protection definition (chapter 4), residence permits (chapter 5), work permit (chapter 6), the right of residency (chapter 3), expulsion and rejection (chapter 8), the Migration Courts and Migration Supreme Court (chapter 16) etc.

This law does not cover all parts of migrant law applicable in the country. Beside the EU legislation there are also specific other laws affect Sweden such as the so called anti-terrorist laws, or specific laws aimed at undocumented migrants something that will be mentioned further in the sections below. Thus, in Sweden there is no one consolidated Immigration law to deal with all the migration and asylum aspects. The different legislative acts including the European Union Directives complete each other and have created one consolidated immigration and asylum legislative system. There are several examples on how these different legislative acts are forming this immigration system. For example when it comes to the security issues and public order the Aliens Act (2005:716) and the special Aliens Control Act (Lagen om särskild utlänningskontroll 1991:572) covers two different types of security situations. In light of paragraph seven in chapter one in the Aliens Act (2005:716) the security cases are the ones where the Swedish Security service, for reasons relating to the security of the kingdom or of great importance for the public security, is ordering that a foreigner to be deported or expelled or alternatively to withdraw or reject the residency permit or job permit application. While the Special Aliens Control Act (1991:572) focuses on the security and terrorist offenses (1991:572, para 1) and the expulsion application according to this act can only be taken by the Swedish Security service (1991:572, para 2).

Furthermore, the Swedish legislative immigration system has been adjusted to the fundamental principle of freedom of movement and residence for persons within the European

Union as well as Union citizenship and Schengen agreement. The right for free movement of EU citizens and their family members is embedded in the Aliens Act (2005:716, cha 1 § para4) that refers to EU directive (2004/38/EG) of the European Parliament and Commission (European Parliament, 2018). Even the Swedish courts has emphasised on the fact that many of the provisions of the Aliens Act have been introduced by an EU directive and when such legislation is unclear, the interpretation should be loyally in accordance with the wording and purpose of the Directive (M v Migrationsverket, MIG 2007: 14).

In short it can be said that the ever-globalised world the migration laws are to an increased degree affected by other phenomenon related to migration. This of course makes the legal context more complex and interconnected to other areas of law, may it be anti-terrorist laws or human rights legislation.

#### **4.4 Gradual Harmonization to EU Legislation**

Since 1 January 1995 Sweden has a member of the European Union (European Parliament, 2015). Due to the entry into the Union Sweden is also a part of the European Union's specific rules and legislation within the area of asylum and protection of migrants. According to article 189 in the Rome accord it is stipulated that a regulation shall have general application on all Member States. As migration has become a crucial issue in European Union and anything that is decided in their institutions has direct application in Sweden regardless of the previous national legislation through the different directives which are domestically applicable in Sweden after they are enacted in the EU level. The Swedish parliament approved in 1998 the succession to the Schengen agreement (Riksdagen, n.d). As of 25 March 2001 Sweden has been a full member of the operational of the Schengen agreement. In addition, the European Union have developed a number of Directives that set out minimum norms when it comes to the issue of asylum and asylum seekers. The said goal for them is to ensure that asylum seekers are treated equally wherever they might apply inside the EU. In total there are currently five such directives; the revised Asylum Procedures Directive, The revised Reception Conditions Directive, The revised Qualification Directive, The revised Dublin Regulation and The revised EURODAC Regulation (European Commission, 2018 c).

#### **4.5 Legislative Changes in 2016**

The European Union, including Sweden, have generally experienced one of the most critical challenges and crisis since its foundation due to the unprecedented refugee influx in 2015 after the Syrian crisis (The European Commission, 2017 b). The number of asylum seekers who arrived in Sweden and sought asylum reached to a record peak in November 2015 (Swedish Migration Agency, 2018 d). This has forced the Swedish government to amend its rhetoric and eventually its action plan from calling not to build walls in Europe to introduce border checks in its border after receiving asylum seekers more per capita than any other European countries (BBC, 2016). On 24 November 2015 the Swedish government proposed several measures aiming, as the government declares, to reduce significantly the number of asylum seekers and improve the asylum reception and integration system (Regeringskansliet, 2016 a). A new restrictive temporary law in 2016 (2016:752) was proposed and introduce these measures. This was due to the fear and doubts, as the Social Democrat ruling party expresses it (SD, 2018), about the Swedish system ability to cope with continuous increase or similar number of asylum seekers which exceeded ten thousands per week in end of year 2015. Although the Swedish government confirmed that the system in Sweden can still manage (Regeringskansliet, 2016 a). Some of the main changes, that the temporary limitations law (2016:752) in Sweden has made, were to take away the possibility of permanent residency permit, tightened the family reunification possibility for the beneficiaries

of international protection and adding maintenance requirement.<sup>7</sup> This is, as the government indicates in its bill, in order to reach the minimum level in comparison to an international and European level (Regeringskansliet, 2016 a) or to what the family reunification process in Sweden used to be before July 2016 (Swedish Migration Agency, 2018 e).

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<sup>7</sup> Please for more details see the family reunification section (5.3.3) below.

## 5. THE LEGAL STATUS OF FOREIGNERS

Existing as a foreigner in a foreigner country requires a legal status which is naturally granted by the national authorities inside that country or sometimes outside its territory through its embassy in a form of visa or residency permit. This legal status has a reason or ground which varies from job, business, tourism, family bond or visits, and international protection since the home country cannot provide it etc. In this section the different legal statuses of foreigners, including the status of irregular (undocumented) persons, in Sweden and their entitlements and consequences are going to be discussed and analysed. This will be in light of the ongoing rapid changes in the social, political and legal realm inside Sweden.

### 5.1 International Protection

#### 5.1.1 International Protection Grounds:

Granting the asylum seekers international protection requires recognition and declaration of the status of being refugee or a beneficiary of subsidiary protection or other protections. Sweden is a signatory of the 1951 Geneva Convention on refugees and its 1967 protocol that form the cornerstone of the international as well as European legal regime for protection of the refugees ( Qualification Directive 2011/95/EU, para4).<sup>8</sup> According to the Swedish Aliens Act (2005:716, Ch.4, para1), European law and international law **a refugee (flykting)** is “*a person owning to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality or of habitual residence in case he or she was stateless and is unable or, owing to such fear is unwilling to avail himself or herself of the protection of that country.*”

This is, according to the same paragraph, regardless if the fear of persecution from the state side or if the state, other parties or organizations controlling the territory fails to provide effective and not temporary protection to that person. Granting the refugee status to the Asylum seeker will entitle him or her to three years residence permit after the new law on temporary limitations (2016:752) entered into force in Sweden in 2016 before it used to be a permanent. According to the European law (Qualification Directive 2011/95/EU, para6) the refugee status should be complemented by measures on subsidiary forms for protection, offering an appropriate status to any person in need of such protection. The Aliens Act (2005:716, ch4, para2) defines **the subsidiary protection beneficiary (alternativt skyddbehövande)** as a foreigner, who the refugee definition in this act does not apply to his or her case, is outside his or her country or nationality or habitual residency because of a clear ground to assume that this person will face a risk by his return:

1. To be penalized by death or
2. To be subjected to psychical penalty, torture or other inhuman or humiliating treatment or punishment;
3. To be harmed in serious and personal way as a civilian because of armed conflict.

The beneficiary of the subsidiary protection gets 13 months residence permit.

#### Other Protection grounds under International commitments.

According to paragraph 2a in chapter 4 of the Swedish Aliens Act (2005:716) there are other grounds for the international protection when Sweden can risk preaching its commitments and obligations in light of the international law by denying the residence permit. The asylum

<sup>8</sup> Directive 2011/95/EU on standards for the qualification of third - country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (hereafter the "recast Qualification Directive). It is available at [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/refugee-status\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/refugee-status_en)

seekers whose circumstance do not meet the conditions of the refugee definition or the subsidiary protection beneficiary can still be granted a residence permit in some extraordinary personal situations as follows:

1. If the asylum seeker is outside the country of nationality or habitual residency in case of the stateless person;
2. If the asylum seeker risks being subjected to human trafficking or environment disaster or very serious health issues. In fact, Swedish courts have not interpreted this provision yet (Commissioner for Human Rights, 2018 ).

### **The possibility for permanent residence**

The new law on temporary limitations (2016:752) makes the possibility of permanent residency an exception. The general rule is temporary residency for either 13 months or 3 years. After the expiration of this time it is stated if the need for protection is still present this temporary status can be extended for another temporary period. The easiest road to permanent residency in this legal structure is if the person is able to secure an employment that would fulfil the requirement for work permit. Thus, the quickest way for a person initially deemed in need of protection to get a permanent residency under the new legislation is to change from protection into employment (Regeringskansliet, 2016 a).

### **5.1.2 Dublin System**

European member states before starting conducting the refugee status determination process look into the possibility for Dublin regulations application (604/2013). The Dublin regulations are a part of the European Union's quest for a common system in regards to asylum in all member states. The aim of the Dublin ordinance is to assure that (Dublin regulation, 604/2013):

- One member state is to be responsible for assessing a claim for asylum.
- Every individual applicant should be guaranteed an asylum procedure according to rule of law.
- Which country that bears the responsibility in the union to process a claim for asylum should be decided as soon as it is possible.
- Prevent that the institution of asylum is being abused by having several applications submitted in more than one country.
- Safeguard the principle of family unity, meaning keeping family together as much as possible

**Responsible member state:** The principle of the first member state means that the country that has first received an application for asylum should, as a main rule, finish the procedure. This does also mean that this country is responsible to return people that have been denied asylum, this in accordance to article 18 in the regulation (Dublin regulation, 604/2013). Since 2003 that European Union has used Eurodoc, a central database with fingerprints from all asylum seekers as well as foreigners that has passed one, or more of the external borders of the Union (European Commission, 2018,a). This database registered every single individual in these categories that are above the age of 14 years old (Dublin convention, 604/2013, article17 ). In addition to this system, the EU member states have used since 2008, Visa Information System (VIS) that is also created in order to have a uniform visa system



throughout the Union, and to enable deciding the responsible member state (European Commission , 2018 b).

The basic rule in light of Dublin regulation (Dublin convention, 604/2013, article 9-13) that decides if transference should take place is when:

1. The family of the individual is in another member state where they either already have applied for, or granted residency.
2. The individual has been granted residency or asylum in another member state (and it as expired less than 2 years or in the latter case six months)
3. Travelled into another member state, regardless if it regards illegal or legal state. This expires after 12 months.

This can be executed if there has been what it is called an “accept” from the other member state. In these circumstances a silent or implicit “accept” is also valid, i.e if the country does not respond negatively, it can be assumed that they accept (Dublin convention, 604/2013, article 22). The transference shall be performed within the time limit, depending on the circumstances in the case, either 6 months, 12 months or 18 months. The date from which this time is counted is from the final decision or when the “accept” took place, whichever is the latest. During this procedure the member states are expected to exchange information about certain aspects of the case and individual, such as the health state, contact information to family, and an assessment of age if applicable (Dublin convention, 604/2013).

**Procedural procedure and assessment:** In all these cases the communication must be clear and coherent to the applicant regarding the steps taken (Swedish Migration Agency, 2017 c). The appealing of the initial decision by the Migration board can be done in the same way as regular asylum cases, first to the Migration court, and then to the Migration Supreme Court (Swedish Migration Agency, 2017 c).

Unaccompanied minors involved in Dublin procedure are in principle always awarded a legal public counsel by the state, where as applicants considered as adults are not (Swedish Migration Agency, 2017d). The transfer can take place directly after a decision is taken, unless an applicant appeals the decision and then the executive process can become what is so called “inhibited”. There are additional regulations when it comes to unaccompanied minors, article 6 protection for minors and article 8 for individuals that are considered under age (Dublin convention 604:2013). They may be transferred to another member state where parents or siblings already reside. Another possibility for this is if there is another member state where a more distant family member outside the nuclear family resides. These regulations may be enforced under the circumstance that it is in the best interest of the child (Dublin convention, 604:2013, article 15-16).

**Exception to the rule of transference** (Dublin convention 604:2013, article 17): If there are systematic problems in the asylum system in a country that might risk inhuman and degrading treatment (Dublin convention 604:2013, article 3.2) the Union can decide a general stop of transferring asylum seeker back as in the case of Greece (A.F Ali. v. MIG 2010:21) in accordance to the case law created by *M.S.S. v. Belgium & Greece (2011)*. Other reasons for not transferring a person to another member state may occur if there are so called strong humanitarian grounds against it (in Swedish “*starka humanitära skäl att inte överföra*”) (Swedish Migration Agency, 2015 a).

This has a few examples from the Swedish standpoint. In the case with number (IAA.v. Migrationsverket, MIG 2016:16) that dealt with possible transfer of a family with children to Hungary where there was a high risk that they might be further replaced to Serbia and detention. Another case (MIG 2007:32) dealt with a possible transference to France from Sweden for one adult with a child. In this case the court decided that it was not enough to cancel the transfer. According to the possibility of an exception in article 3.1 in Dublin convention (604:2013) there is a possibility for each member state to make an exception to the rule of transference and process the claim instead of sending the person back.

**Detention according to Dublin:** At any point during the Dublin process the member states have the right to detain a person, if there is a high risk that this person otherwise might disappear (Dublin Convention, 604:2013, article 28). However, there are certain criterion that need to be met in order for this to be allowed and this is regulated in article 28 (Dublin Convention, 604:2013). There are also certain described time limits that is the same for all member states bound by Dublin regulation as follows:

- Request for reception to another member state must be sent within one month from asylum application have been submitted.
- The member state receptive must answer within two weeks.
- Transfer must take place within six weeks from that the member state accepted or within six weeks from the final decision from the court.
- The minimum conditions in detention are regulated in article 9,10 and 11 in directive 2013/33/EU.

## 5.2 Asylum Seekers in Sweden

### 5.2.1 Legal Grounds for Seeking Asylum in Sweden

Granting a foreigner a residency permit because he or she is a refugee or foreign beneficiary of subsidiary protection is how the Swedish Aliens Act (2005:716, ch 1, para 3) defines asylum. Fear of persecution or inhuman treatment claim is enough for a foreign to seek an asylum in Sweden if he or she expresses their needs for protection for their life or freedom because of persecution against their human rights in their home countries (Swedish Migration Agency, 2017 e). According to Swedish Alien Act, that has its foundation in this section in international and EU laws, refugees and others in need of protection are given the right to residency (2005:716, ch5, para1).

The asylum application can take place only inside Sweden or on the Swedish border (Aliens Act, 2005:716, Ch5, Para1). Thus, there is no possibility to seek asylum in any Swedish embassy outside the Swedish territory. (Swedish Migration Agency, 2017 f). However, residency is also possible to be given to a foreigner deemed to have serious protection needs that through UNHCR: s resettlement program is sent to Sweden. This group is sometimes referred to as quota refugees<sup>9</sup>, as the government in close cooperation with UNHCR decides upon them. These refugees are, in the same way as refugees that managed to get to Sweden to apply for asylum given residency. This is a much smaller fraction of the overall group of

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<sup>9</sup> According to UNHCR resettlement guidelines (UNHCR,2011) one of the three duable solutions for refugees situation, that ends the cycle of displacement, is a resettlement in which refugees are selected and transferred from the country of refuge to a third state which has agreed to admit them as refugees with permanent residence status.



refugees, and was also a group that was especially mentioned in the temporary law. They are one of the few where the right to permanent residency still remains. Sweden received the total of 3400 quota refugees during 2017 (Swedish Migration Agency, 2017 g). Sweden undertook in the migration policy agreement signed in the end of 2015 to gradually increase the refugee quota number to reach 5,000 (Swedish migration Agency, 2017 g).

Asylum seeker status in the Swedish context is a legal status granted to persons seeking protection before the refugee status determination and legal assessment for their asylum claim is made in light of the Aliens Act (2005:714). This Aliens Act embeds the 1951 Geneva Convention's refugee definition. This legal status entitles its holder the asylum seeker to certain rights and duties in Sweden in light of the Geneva Convention and its protocol as it is going to be explained in the coming sections.

### **5.2.2 Asylum Reception**

The Swedish Migration Agency has according the paragraph 2 in the reception law (LMA,1994:137) the responsibility for the asylum seeker reception and for this purpose the Migration Agency can run itself different accommodations, camps and facilities and it can instruct others to run them. According to The Swedish Migration Agency its reception units has several tasks such as the following (Swedish Migration Agency, 2017 h):

- To register asylum seekers and hand out all the relevant information and details of different stages regarding the asylum process and get their questions answered and their concerns heard;
- To distribute asylum seekers to the different available accommodation by the Migration Agency;
- To keep the contact with the asylum seekers during the waiting period and after the decision is being taken by the Swedish Migration Agency inside the Migration centre, facilities, camps .etcetera;
- To determine over the right to the daily allowance for the asylum seekers if they do not have the financial capacity to manage their lives;
- To inform them about the Migration Agency or courts' decision;
- To provide the returnees with the needed support to return.

From February 2018 the asylum application for the first time can only be submitted in three places in Sweden namely Stockholm, Malmö and Gothenburg. This is because the decreasing number of asylum applications and that has made it more effective to centralise the asylum applications in these three places according the Migration Agency available information (Swedish Migration Agency, 2018 h).

### **5.2.3 Asylum Procedures**

The asylum process starts when the asylum seekers arrive at the reception in the Migration Agency centre and fill in a registration form. In fact, the asylum seeker fills this registration form with assistance of the interpreter during a short registration interview. During this registration interview the asylum seekers will answer in this form few open questions for example regarding the reasons for leaving the country of origin and not being able to return there and how he/she arrived in Sweden (Swedish Migration Agency, 2017 i). The European law (Article 5.1-2 EU Asylum Procedure Directive) stipulates that each asylum application and interview should be conducted in an individual way for each asylum seeker. The asylum process in Sweden had another model before when the asylum application would be submitted by a public legal counsel before the investigation interview where the asylum grounds and circumstances should be explained in advance. This has changed and nowadays it is not required to submit all these details by the public counsel before the investigation interview (UNHCR, 2011 a p25). The Migration Agency will assign a migration caseworker who will

review and prepare the asylum application for the investigation interview and check the applicability of Dublin regulation (Swedish Migration Agency, 2017 i). There is no fixed time for the waiting period between the registration interview and investigation one. Thus, Migration Agency queues have very long waiting period and it is different from one person to another (Swedish Migration Agency, 2017 i). According to the Swedish Migration Agency annual report the Migration Agency received in 2016 bigger budget (Swedish Migration Agency annual report 2016 a para5.2.1) with a purpose to shorten the waiting time for the asylum decision. However, the result was that average residency period within the Migration Agency reception system increased from 257 days to 500 days during 2016. With accordance to the same report several factors contributed to this situation such as the record number of open cases from 2015 and the Migration Agency's limited capacity to handle the asylum cases and take a decision, even though the Migration agency has recruited 2394 persons under 2016 (Swedish Migration Agency annual report, 2016 a para 4.2.4).

#### **5.2.4 Identification Process**

The asylum seekers leave their passport or other identification document which can prove who they are during the registration interview after they fill in the registration form (Swedish migration agency, 2018 h). Swedish Aliens act (2005:716, ch9, S8) obliges the asylum seekers to be photographed and their fingerprints to be taken regardless if the application is related to asylum or job. This obligation does not apply for the asylum seekers under 14-year-old. The Migration Agency will use the asylum seekers' figure prints in order to investigate if the asylum seeker has sought asylum somewhere else within the Schengen zone and then if Dublin regulation can apply in the asylum seeker case (Swedish migration, 2018 i). The asylum seeker is legally obliged to inform the Swedish authorities including the Migration Agency who he or she is, name, citizenship and the country of origin (Swedish Migration Agency, 2018 i). In fact, the Aliens Act (2005:714), Swedish citizenship Act (2001:82), and Swedish Pass Act (1978:302) do not have a definition for the identity. However, some of citizenship related case law have indicated that identity consists of applicant's name, date of birth, and citizenship (Dominika Borg, 2014, p337).

#### **5.2.5 Information about the Asylum Process**

Para 10, section f in chapter 8 of the Aliens Act Ordinance (2006:97) instructs the Migration Agency to inform the asylum seeker about their rights and duties and the consequences of non-compliance or non-cooperation with the authorities. Accordingly the Migration Agency should provide asylum seekers with all the relevant information regarding the organizations or group of persons who offers legal counselling and other information concerning the housing's conditions and health care system. This information should be in written and in a language which asylum seekers can understand and it could be oral if there is a need in some cases (section 2 ordinance on the reception of asylum seekers). The Swedish Migration Agency usually organizes information group sessions for the asylum seekers where they get all relevant information about Swedish laws, authorities and non-governmental organisations that can support them for free (Swedish Migration Agency, 2017 i).

#### **5.2.6 Public Legal Counsel for Asylum seekers**

The Aliens Act (Cha18, para 1) provides the asylum seekers with Public legal counsel unless it is assumed that there is no need for the legal assistance. The Migration caseworker usually assesses the asylum seekers' need for a Public legal counsel (Swedish Migration Agency, 2017 i).

### 5.2.7 Housing for Asylum Seekers

The Migration Agency is in charge to provide temporarily accommodation to the asylum seekers during the waiting period through its accommodation centres (LMA, 1994:97, para 2). Thus, the Migration Agency offers and pays for the accommodations if the asylum seekers cannot manage theirs and this is their right in light of section 14 in the reception law (LMA, 1994:137). In case asylum seekers have somewhere else to live than the Migration Agency accommodation such as at their relatives or friends' places, they have the possibility to live with them or anywhere else however they should just register their current address at the Migration Agency to keep the contact (Swedish Migration Agency, 2017j). However, the asylum seeker cannot choose or pick the type of accommodation provided by the Migration Agency that places them where it is available (Swedish Migration Agency, 2017 j). Safety atmosphere maintenance guides the Migration Agency's accommodation policy (Swedish Migration Agency, 2017 j). Single asylum seekers may share a room with other asylum seekers of the same sex while the family usually get a separate room. In addition, person with special needs and LGBTI person's request can be taken in to consideration for the accommodation (Swedish Migration Agency, 2017 j). One of the changes in the provisions in the reception law (LMA, 1994:137) entered into force in June 2016 and targeted the right of accommodation support for the asylum seekers after the negative asylum decision. As a result the right for the Migration Agency's accommodation ceases when the asylum application is determined and negative decision is taken and it cannot be appealed anymore and voluntary return period has run out and the asylum seeker is not a part of a nuclear family with children under 18 year (Regeringskansliet, 2015 c).

### 5.2.8 Access to the Labour Market

Asylum seeker did not have the right to work in Sweden before 1992 unless their asylum application and claim had been assessed, a positive decision was taken and their residency permit was granted. However, it was argued by several governmental propositions directed to the Swedish parliament to make it possible to the asylum seeker to work while waiting the decision for their asylum application in order to avoid passive waiting and unnecessary costs to the society (Borg Jansson, D.2015p 333).

Asylum seekers have the right to work in Sweden although they cannot meet the job permit requirements if they meet certain conditions. Thus, they are exempted from the general requirements which a foreigner is usually requested to have in order to obtain a permission to work in Sweden such as a valid passport or minimum salary at least 13,000 Swedish Kronor monthly before the taxes. This exemption from the job permit is called (AT-UND) and it is usually written in the asylum seeker card (LMA Kort) (Swedish Migration Agency, 2017 k). According to para four in chapter five of Aliens Act Ordinance (2006:97) the required conditions for an asylum seeker to obtain this exemption are as follows:

- If the asylum seekers have submitted an acceptable identification documents or he or she has been able to identify themselves in other ways, and;
- If the asylum application is going to be processed in Sweden. This means that the Dublin Regulation is unlikely to apply and there is no possibility for the asylum seeker transferring to another European Union state member in light of the European Parliament and Council (EU) ordinance (604/2013), and;
- If the asylum seekers have well-founded asylum claim and it is unlikely to be deported or expelled with immediate enforcement. In light of section 19 in chapter nine of the aliens act (2005:716) in some cases for example the Migration Agency can decide to reject some asylum claim with immediate execution force because it is not well-

founded. This can happen if it is apparent that there are no asylum ground or other types of legal grounds of a residency permit (Swedish Migration Agency, 2016c).

### 5.2.9 Asylum Seekers' Activities and Professional Training

While waiting for the Swedish Migration Agency's decision regarding the refugee status the asylum seeker has the right to participate in different meaningful activities (LMA, 1994:137, Para 4). The Migration Agency used to be responsible to provide such activities that could be Swedish language learning and education, management of the Migration housing or any other types of activities which can make their waiting period meaningful (LMA, 1994:137, Para 4). However, in December 2016 the Swedish government proposed to the parliament several regulations concerning what is so called the early actions (Tidiga insatser) for these activities provided to the asylum seekers and persons granted the residency permit but still live in the Migration Agency housing ( Regeringskansliet ,2017 c). On 1th February 2017 the ordinance (2016:1363) about the county administrative boards' mission regarding the actions for the asylum seekers and newly arrivals entered into force. As a result the County administration authorities (Länsstyrelserna)<sup>10</sup> have been given by the Swedish government the mission instead of the Migration Agency to run and coordinate these early actions (Regeringskansliet, 2017 d). The County Administration Authorities defines these early actions as activities and undertakings that have as a goal to promote the targeted group's knowledge in Swedish language and knowledge about the Swedish society and job market and health care system (länsstyrelsen, n,d,a). The County administration authorities can grant and decide over the governmental grant to these activities and undertakings for the asylum seekers (länsstyrelsen, n,d,a). The county administrative authorities have 149 million Swedish Kronor as a budget for 2018 (länsstyrelsen,n,d,a). These grants can be only given to support the previous taken actions in promoting above-mentioned goals related to the knowledge in Swedish language, Swedish society, job market, and health care system (länsstyrelsen,n,d,a). However, this budget cannot be used to activities and undertakings related to vocational training (länsstyrelsen, n,d,a). Therefore there has been not clear if the vocational training places have disappeared for the asylum seekers.

The Swedish Migration Agency, Swedish public employment service (Arbetsförmedlingen), Folk Education Council (Folkbildningsrådet) have a central role in the given mission to the county administration authority as follows:

Swedish Public Employment Service has a task to map the asylum seekers' competences as a part of newly arrivals' competence mapping process that starts from asylum seeking period (arbetsförmedlingen, 2017 a). Swedish Public Employment Service has launched a new digital tool for competence mapping and to provide information about the Swedish society for this purpose. The asylum seeker him or herself can use this tool in their one language to write their curriculum vitae (CV) and automatically translate it (arbetsförmedlingen, 2017 a).

**The Migration Agency's task** here is to facilitate the asylum seekers participation in the activities and undertakings which are taking place under the early actions (Tidiga insatser) organized by the county administrative authorities through providing information regarding these activities and undertakings to the asylum seekers and at the same time subsidize their travel to attend and participate in these early actions (länsstyrelsen, n,d,a).

**Folk Education Board** is in charge in this context to strengthen the asylum seekers' Swedish language level and knowledge about the Swedish society. This will be through distributing the

<sup>10</sup> According to paragraph 1 and 2 of the ordinance (förordning med länsstyrelseinstruktion 2017:868) "on instruction for the the County administration authorities": in each county there is a county administrative board (länsstyrelse) responsible for the governmental administration in the county which will work towards achieving national goals in the county and promote the development of the county...etc

subsidiaries between the folk high schools (Folkhögskolor) and Sweden's ten study associations (studieförbund) (studieforbunden, 2017).

### **5.2.10 Health Care for Asylum Seekers**

Sweden has a special legislation designated to deal with the asylum seeker health care service (Lag om hälsa och sjukvård asylsökande SFS, 2008:344). According the paragraph eight of this law the asylum seekers have the right to the health care services in Sweden. However it is limited to the emergency situation which cannot wait and this includes general health care and dental care. When it comes to the health care for asylum seekers the county council (Landstinget) plays the central role in Sweden. Each county council is only responsible to provide health care services to the asylum seeker residents in its region (SFS, 2008:344, Para 3). Sweden offers all asylum seekers a free of charge health assessment after they apply to an asylum in Sweden(SFS, 2008:344, para 7).

The asylum seekers can get patient transportation compensation for their travel cost to and from the healthcare centre and the only thing needed to receive the healthcare is to show the asylum seek LMA card (Swedish Migration Agency, 2017 l). The adult asylum seekers pay symbolic fees for the healthcare services in comparison to the real costs paid by the state to the county council and municipalities that include interpretation services and travel compensation too (Ordinance on the governmental compensation for asylum seekers health care,1996:1357). According to the Migration Agency's information the asylum seeker pays only 50 Swedish Kronor (SEK) for each visit for example to the doctor at health care or dental centre. In case the health or dental care costs exceed 400 SEK during six months the asylum seeker is entitled for a special allowance by the Migration Agency if he or she can only provide the receipts as a proof. The cost for the health care and medicines in emergency cases are not included in the 400 SEK and the asylum seekers have the right to apply for a special allowance for this part. In addition the asylum seekers can still apply for compensation if the cost for the prescribed medicines exceeds 50 Swedish kronor (Swedish Migration Agency, 2017 m).

### **5.2.11 Daily Allowance for Asylum Seekers (Dagersättningen)**

The same rule applies when it comes to the daily allowance, if the asylum seekers do not have their own money they have right to apply for a financial support at the migration centre where they get a bank card and information about the daily and other special allowances (Ordinance on asylum seeker reception, 1994:361, para 5).

The asylum seekers can lose their economic support and right to stay in the migration agency accommodations in light of the temporary limitations law (2016:752) in Sweden if they receive a negative decision regarding their asylum claim and deportation decision which cannot be appealed anymore and the deadline for the voluntary return expires (Swedish Migration Agency, 2018 j).

## **5.3 Next Steps After International Protection is Granted**

According to the county council (länsstyrelsen) in Stockholm the asylum applicants are called newly arrivals after they have been granted a residency permit in Sweden and registered in a municipality regardless of the legal status for their residence permit if they have been granted refugee status or subsidiary protection one (länsstyrelsen,n.d.b) .

### **5.3.1 Housing and Municipality Reception for Newly Arrivals**

When it comes to the housing and reception arrangements for the newly arrivals after they



have been granted the residence permit in Sweden, there are several authorities involved in different ways. In fact, these arrangements for the newly arrivals have changed after the record number of the asylum applications in the end of 2015. The Swedish government suggested a new law in November 2015 to deal with the crisis. Therefor all municipalities have become obliged to receive newly arrivals and offer them housing in contrast to the pervious situation when the municipalities had the power to accept to do that or not before this law. This law (Lag om mottagande av vissa nyanlända invandrare för bosättning, 2016:38) has been applicable since March 2016 after the parliament's approval. The Swedish government has also issued several ordinances with instructions concerning a better mechanism and function of the newly arrival distribution, reception as well as the municipality reporting of the available accommodation from all over Sweden ( Regeringskansliet, 2016 b). From 2017 the Swedish government has begun using the Swedish Migration Agency's prognosis to decide in advance over the distribution plan to the newly arrivals to the different parts of the country and quotas for each region (Länstal) (Regeringskansliet, 2016 b).

This governmental plan and quota are based on three parameters, namely population's size in each region, the job market and needs there and the total number of asylum seekers and newly arrivals (lansstyrelsen, 2017 a). According the ordinance (Förordning om mottagande av visa nyanlända invandrare för bosättning, 2016:39, para2) the Swedish Migration Agency provides prognoses regarding the newly arrivals' need for accommodation for each year in advance. Then the county administration authorities (Länsstyrelserna) in their turn decide in their regions the newly arrival number or quota (Kommunal) for each municipality (newly arrival reception ordinance, 2016:39, S5). The newly arrival quota for each municipality is similarly based on the above-mentioned three parameters. In addition, the county administration authority takes also into its consideration the housing situation for each municipality in its region (lansstyrelsen, 2017 a). Newly arrivals, who arrange their housing on their own and move independently to certain municipalities, are not counted in this assigned quota by the county administration authority. In fact, a big number of newly arrivals usually arrange their own housing through their own contacts. Accordingly, the Migration Agency prepares its annual plan for each municipality after the county administration authorities have decided the newly arrivals quota (Kommunal) for each municipality in its region (lansstyrelsen, 2017a). According to the ordinance (2016:39) the Swedish Migration Agency has become the referral authority from 1th January 2017 and is responsible for assigning an accommodation in certain municipality for the newly arrivals and sending them there. The Migration Agency used to share this responsibility with the Swedish public employment services before (Regeringskansliet, 2016 b). In 2017, 23 600 newly arrivals were assigned to the different regions of county administration authorities and these authorities have distributed in their turn the newly arrivals to different municipalities in their regions (Länsstyrelsen, 2017 b).

### 5.3.2 Education, Access to Labour Market and Professional Training towards Integration

Sweden has a special legislation ( Lag om etableringsinsatser för vissa nyanlända invandrare, 2010:197) governing the resettlement issues for migrant newly arrivals between 20 and 65 years old. This law specifies the main involved governmental actors in the resettlement process for the newly arrivals in Sweden although these actors vary between governmental and non-governmental. According to this law **The Swedish Public Employment Service** is the main governmental authority in Sweden (2010:197, para 6). *The Swedish Public Employment Service* is guided by instructions in a governmental ordinance (2007:1030, para 6) which affirms its responsibility to provide the necessary support and actions and promote a quick and effective integrating possibilities for the newly arrivals in the job market. The newly arrivals has a right after their reception in the municipality to get an individual introduction plan ( in Swedish etableringsplan) which is offered by *Arbetsförmedlingen* with different actions in order to facilitate and speed up the integration process (2010:197, para 15). The newly arrivals

used to design this plan together with respective municipality and relevant companies or organizations (2010:197, para 7). This plan should include the following (2010:197, para 6):

1. The Swedish language education offered by the municipality to the adults or the equivalent education under the school law (2010:800);
2. Information program about the Swedish society;
3. Different activities which can facilitate and speed up the newly arrival's integration in the job life in Sweden.

In 2017 the Swedish government has introduced a new labour market policy through new regulations with numbers (2017:584) (2017:820) in relation with the integration plan (etableringsplan) (Regeringskansliet, 2017 d) <sup>11</sup>which is applicable from 1 January 2018 for those who start after January 2018. The new regulations aims to put a demand on the newly arrival side but simultaneously provide more suitable conditions for the SPES to achieve its mission (Regeringskansliet, 2017 d). According to the government released information these changes, reforms and stricter regulations are justified by the motivation of making the SPES's mission more effective and eventually newly arrivals can come faster into the job market or education programs in Sweden (Regeringskansliet, 2017 d). The same source emphasises that this approach reduces the SPES's time and effort on the administration and enable the SPES to focus more on actions which are more suitable to the newly arrival's different individual needs (Regeringskansliet, 2017d).

According to the same released information by the Swedish government the enrolled newly arrival in the introduction plan under these new regulations will from January 2018 experience several changes in comparison to the previous situation, as follows (Regeringskansliet, 2017d):

1. He or she will be subjected to the same measures system as in the unemployed person case. This means that they can be warned to lose their allowance in short or long time for example if they do not cooperate to set up the action plan or do not submit the activities monthly report, etc (Regeringskansliet, 2017d).
2. The right to an integration plan (etableringsplan) will be replaced by the right to labour market policy program (arbetsmarknadspolitiskt program) and introduction program. This means the Arbetsförmedlingen will have more power to design and change the suitable action plan for each newly arrival in this program in the same way as in the case of any job seekers in Sweden (Regeringskansliet, 2017 d).
3. The integration plan used to last maximum for two years and it should have corresponded to full-time employment working hours unless otherwise specified (law about the integration actions for certain newly arrival migrants, 2010:197,S7). Under the new regulations the labour market policy program can last for 24 months full-time schedule or 36 months part-time schedule according to the designed action plan between the Arbetsförmedlingen and the participant in the program. The old system was problematic because there were wasted time and resources during the two years program because of the inflexibility in the 24 months schedule (Regeringskansliet, 2017d).
4. There is no longer any need for an assessment of the performance ability by the case worker at the SPES for the participant as it used to be the case under the previous regulations. The situation under the previous regulations had shown different problematic aspects. Accordingly all newly arrivals can participate in the integration program as long as they can make full use of some of the actions provided in the program. For example rehabilitation

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<sup>11</sup> Law about the responsibility for the integration actions for certain newly arrivals migrants (2017:584), ordinance about the integration actions for certain newly arrivals migrants (2017:820), ordinance about the compensation for the participants in the job market policy actions (2017:819). More information available <http://www.regeringen.se/artiklar/2017/11/fragor-och-svar-om-inforandet-av-detta-regelverket-for-etableringsinsatser-for-vissa-nyanlanda-invandrare/>

actions and activities can be from now on considered as part of the program as long as they correspond to the individual needs (Regeringskansliet, 2017 d).

5. The newly arrival participants in the introduction program under the new regulations have the duty to initiate and pursue certain education (utbildningsplikt) which is assessed as needed to get a job which was not the case before. The SEFS is responsible to conduct the need assessment in this regard. As a result the education that comes after the high school level (eftergymnasial utbildning) is also considered to be a part of the SEFS's actions from January 2018 (Regeringskansliet, 2017 d).

6. The Arbetsförmedlingen used handle the integration contributions or allowances and deliver them to the newly arrivals but this has changed from 1th January 2018 and **the Swedish National Insurance Company (Försäkringskassan)** is instead responsible for that (Regeringskansliet, 2017 d).

Försäkringskassan plays a central role in the integration process in general in Sweden and particularly in the introduction program from January 2018. The newly arrival participant in the introduction program has a right to get different establishment or integration contributions such as introduction benefit (etableringsersättning) and under certain conditions supplementary introduction benefit (etableringsinlägg) and introduction benefit for housing (bostadsersättning) (law about the integration actions for certain newly arrival migrants, 2010:197, para 15).

According to Försäkringskassan's released information ( Försäkningskassan,2018,a) the newly arrivals, who start their introduction program after January 2018, receive 308 Swedish Kronor (SEK) per day for full time participation and 231 SEK before the program starts from Försäkringskassan. This amount is tax-free and it could be less if the participation is part time or if the participant receive a salary or another type of allowance during the same day. The participants, who have children under 20 year and still live and register with them in the same address and do not provide for themselves, are entitled for supplementary introduction benefit (etableringsinlägg). This benefit is 800 SEK for the family with under 11 year child and 1500 SEK for the family and this benefit is limited up to three children only. If the participant is single and rent an apartment alone he or she will be entitled for the housing benefit (Bostadsersättning). The number of the participants in the introduction program has reached to 69 519 with 54 % men and 46 % women in February 2018 ( Arbetsförmedlingen, 2018 a).

One of the Swedish government's several initiatives to make use of the newly arrival skills and competences and integrate them initially in the job market and eventually in Swedish society is so-called fast track (Snabbspår). The idea of snabbspår was first introduced by the Swedish government during a round of tripartite talks in March 2015. The purpose of this talk was mainly to bring together the Arbetsförmedlingen, other job market's partners and other governmental authorities in order to find the best form and actions to utilize the newly arrivals' competences and skills where there was shortage and needs in quick and efficient way (Regeringskansliet, 2017 e). The Arbetsförmedlingen offers under the snabbspår various activities and actions such as different vocational and language training, apprenticeship, validation of previous home education and supplementary education in a coherent process (Arbetsförmedlingen, n,d,a). According to the *Arbetsförmedlingen's* follow-up report in December 2017 there were about 5300 newly arrival participants in the snabbspår and there were 14 identified fast tracks within the Swedish industries and job market where there were shortage of labour (Arbetsförmedlingen, 2017 b ).

The newly arrivals have the choice after the introduction program to continue their studies or even not follow the introduction program and pursue their studies which is not under this program and benefit from **the Swedish Board of Student Finance (CSN)**. CSN is the public authority that manages student aid and home equipment loans (CSN, 2018). The newly arrivals can receive a grant and borrow money for their studies from the CSN which is called student finance and this includes borrowing money to buy furniture for the apartment (CSN,



2018).

### **5.3.3 Family Reunification<sup>12</sup>**

One of the main changes in the migration system in Sweden, which was proposed to tighten by the new amendments in 2016 in order to decrease the number of asylum seekers (Regeringskansliet, 2016 a), was the possibility for the family reunification for the different international protection beneficiaries. In fact, the possibility for the family reunification depends on a number of factors namely the legal status and the asylum application's date (Swedish Migration Agency, 2018 k). First, the newly arrival can be reunited with the unclear family members if he or she has been granted a permanent or a temporary residence permit on the basis of refugee status. The newly arrivals with refugee status have only three months to apply for the family reunification if they applied after 24<sup>th</sup> November 2015 which starts after status is granted. Second, if this newly arrival sought asylum in Sweden before 24 November 2015 and was granted a subsidiary protection status, can still apply for family reunification. However, if a newly arrival sought asylum in Sweden after 24 November 2015 and was granted a subsidiary protection status, the family members cannot be reunited unless the maintenance requirements are met (Swedish Migration Agency, 2018 r). There are some exceptional situations, i.e. serious health condition, human trafficking or if the Swedish obligation under international law can be considered as violated which the judiciary system in Sweden has not interpreted yet in light of the European Commissioner for human rights report, (Commissioer for Human Rights, 2018, p12). Newly arrival refugees, who arrived in Sweden as a part of UNHCR refugee quota, can be reunited with their family members if they apply also within three months regardless if they have applied after November 2015. Thus this means that the new limitation on residence permit regulation (2016: 752) does not apply in their case when it comes to the date of application and the maintenance requirement which apply in the case of asylum seekers who applied inside Sweden and its boarder after 24 November 2015. (Swedish Migration Agency, 2018 k).

## **5.4 Regular Migration**

One of the principles that the Swedish Aliens Act (2005:716) originally sets is that it is only the Swedish citizens that have the absolute right to work and live in the country. This can be noted all the way back to the law of migration from 1950s in which the citizen is the main rights bearer (Wikren& Sandesjö, 2006 a p45). However, by the time this has extended to certain groups of foreigners that have been granted more or less absolute right to reside in the county with a permanent residency (Wikren&Sandesjö, 2006 b p45). A typical historical example of this is the situation for refugees and other migrants in need of protection where they were granted permanent residency for the most part of recent modern history. This however has changed to limited residency due to the temporary bill introduced in 2016 (Law on temporary limitation 2016:752). In order to reside lawfully in Sweden a person, whom is not a national, must have either a visa or a residency, and both of these may be either short- or long term.

### **5.4.1 Visa application**

The regulations for visas are stipulated in the second chapter, third section of the Alien Act (2005:716). The visas are, according to the law, to be temporary, it may be as short as 7 days up to years depending on what is the legal basis for the visa and from which country the applicant comes from. This latter condition depends on what individual agreement Sweden may have with a country. In addition to the duration of the visa, depending on the original

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<sup>12</sup> According to the Swedish Aliens Act (2005:716, ch5, para3) family members who can be reunited with their family in Sweden, are the spouse or registered cohabitant, the unmarried under 18 child and parents in case the applicant is under 18 years old. (Swedish Migration Agency, 2018 r)

country it might differ in how the individual process is performed. In some individual countries the visa might be granted upon arrival, due to certain bilateral agreement such as that between the United States and the European Union, whereas in most situations the applicant must apply for visa on beforehand. A visa may be given for several different reasons, however these categories are fixed for all nations, such as visa for study, for tourism, for business, for visiting close family member etc. The abovementioned paragraph also underlines the fact that a foreigner that is traveling into or will reside in Sweden shall have a visa. The exceptions are if he or she does not already have a residency, is a citizen of another European Union or considered as a long term resident. This latter legal term is used for third-country nationals that previously have been lived with a residency within the European Union during a minimum of five years and have the status in accordance to EU legislation (EU directive 2003/109/EG). A person that is with this status is considered equal to any other citizen and is protected under the same rights.

There are other few exceptions to the visa rule, for example citizens of the Nordic countries are not in need of visas to enter Sweden. In the second chapter also in the Aliens Act, Section 8 states that citizens of Denmark, Finland, Norway and Iceland are exempted from the visa requirement. The same applies as explained above to EU-citizens that already have long-term resident status.

Because of Sweden's membership in the EU and in particular the operational part of the Schengen agreement there is a fundamental principle of *uniformed issuing of visas*, as it is considered to be a part of a uniform visa system throughout the European Union. This idea was laid down as a general goal for the European Union, already in 1995 by the council of ministers (Regulation (EG), Nr 2317/95). It was commonly decided which countries in the world from where their citizens need apply for visas before entering any of the member states.

Historically Sweden started requesting visas from foreign nationals during the Second World War (Wikren& Sandesjö, 2006 c p67). After the end of this war the process was reversed and an increasing number of foreign nationals did not require visas to enter the county. This development was however halted already in 1976, when Turkish citizens that previously did not need visas, was required to apply before entering the country (Wikren& Sandesjö, 2006 d p67). The reason for this legislation was, already at this time, to limit the amount of migrants coming. Because of the very same reasoning, the obligation to have a visa for entering Sweden has extended to most countries in the continents of Africa and Asia (Wikren&Sandesjö, 2006 e p67). Furthermore, the latest temporary law in the area of migration have explicitly mention the sole reason for its creating is to limiting the number of migrants being able to enter Sweden (Regeringskansliet , 2016 f). Another reason given to this more stern and restrictive legislation is that it will also create some space in the Swedish refugee system (Regeringskansliet, 2016 a). The action had thus had two main reasons, to with force limit the number of asylum seekers, and two at the same time to improve the capacity in reception and establishment of the migrants. The Swedish government seeks for a more even distribution of asylum seekers in EU, this as the legislation previously have been more generous compared to that what had been demanded by the EU. In order to encourage more asylum seekers to seek refuge in other member countries the lawmakers, have temporary adjusted to the minimum standard according to EU and international conventions (Regeringskansliet, 2016 a). This is a clear downsizing in the standard and rights traditionally given by Sweden to migrants and people in need of protection.

The Swedish policies around visas as well as the recent change are not uncontroversial. During several occasions during both recent times as in the past, it has been pointed out that the usage of visas have as a consequence that individuals in need of international protection

are hindered from applying for asylum. As the refugee definition clearly states that a person need to be in the country of asylum in order to apply for it, meaning that a person cannot apply for asylum outside Sweden. This means in reality that the right to apply for asylum, can be argued that for most people remain an illusion (Wikren& Sandesjö, 2006 f p67).

#### **5.4.2 Residence Permit based on Protection grounds**

When it comes to residence permits there are those that are temporary and those that are permanent. With the introduction of the temporary limitation legislation from 2016, (2016:752) there are now a higher number of temporary residences with limited application. Sweden grants, as it was above-noted, two types of temporary residences namely 13 months residence permit for beneficiaries of the international protection and 3 years residence permit for those with 1951 refugee status. Quota refugees, who are sent to Sweden through UNHCR's resettlement program, are the only asylum seeker group still being granted a permanent residency after the introduction of the temporary limitation law in 2016. In general it can be stated that Sweden has gradually moved from issuing permanent residence toward an increased use of temporary residence permits. The temporary law from 2016 solidifies this new direction which has now been turned into a general rule.

If a foreign national has a residency there is no need for a visa entering or leaving Sweden. As in the case of visas, citizens of the Nordic countries do not need a residence permit (Aliens Act, 2005:716, ch 2, para2).

#### **5.4.3 Family Reunification Based on Newly Established Family Relationships**

There is a principle in Swedish law that entails a temporary residency, not permanent, is given for newly established relationships (Wikren& Sandesjö, 2006 g p71). The principle means that a foreigner can be given a temporary residency due to marriage or common law marriage to Swedish citizen or permanent resident in Sweden at the first decision in order for them to live together in Sweden. Permanent residence can then be applied for, and given after two years from the initial decision, in case the relationship is still a reality (G,Wikren&H, Sandesjö, 2006 h p71). This legislation has in some cases proved to be challenging when for example individuals have stayed in domestic violence relationships in order to be able to attain a permanent residency since if the relationship is ending before the stipulated two year the person must directly leave the country. This has been an on-going discourse on how to best protect individual's rights during this regulation (Riksdagen, 2005).

#### **5.4.4 Work Permit Application**

As visas, are required to enter Sweden a residence permit is needed to enter and to stay in the country, a work permit is further needed if a person outside the EU legal framework wishes to work inside the EU. This requirement for a work permit when working in Sweden is needed regardless if the work is based on employment inside the country or from abroad (Wikren& Sandesjö, 2006 i p46). Historically, Sweden has had as a guiding principle aimed to control the number of foreign labour that enters the Swedish labour market (Wikren&Sandesjö, 2006 j p46 ). This control aimed to, among other things, protect the need of Swedish workers and of the foreign worker already working in the country. Another important principle is to maintain the principle that foreign workers entering the country should be protected and given the same conditions as the workers that are already here. In short it is also a way to protect the Swedish model on the labour market where collective bargaining is an essential part (Wikren& Sandesjö, 2006 k p46). It is clearly stated in the background papers to the law that it is not only related to the conditions of the actually work, but also the overall living conditions as such

should be acceptable and in comparison to the conditions under which the Swedish nationals working in the same way are subjected to (Wikren& Sandesjö, 2006 l p46).

As a general rule, to qualify for a work permit you need to already have been offered a job before entering Sweden. There are exceptions to this rule when it comes to for example asylum seekers, EU-citizens and citizens of other Nordic countries. For most other groups of migrants it is not possible to get a work permit in order to come to Sweden to look for work, there has to be a concrete job offer before entry. In general a permit is issued for two years, and is tied to the specific work and employer that is offering you the work (Swedish Migration Agency, 2018 l).

There is challenge in relation to this regulation as the employee is in a weak position and then very depended on the employer for any possibility of a continuation after the initial two years have passed. There are a certain conditions that need to be met when applying for a work permit. Initially, the first condition is that the applicant needs to have a valid passport. This is in order to be sure of the identity of the person and its possibility to actually travel to Sweden, but also to leave the country (Swedish Migration Agency, 2018 l). The work that is offered must contain condition similar to that which is the norm in the profession or, in accordance with collective bargaining agreement (Swedish Migration Agency, 2018 l). The employment must offer enough salary for survival and it must, regardless of which area, be at least 13 000 Swedish Kronors (Swedish Migration Agency, 2018 l). Lastly, the employer in Sweden must provide all the needed insurance when the employment starts. Lastly, these conditions must all be meet in one single job, it is not possible to add several position together in order to reach the other requirements (Swedish Migration Agency, 2018 l). After the first two years have passed it is possible to request extension. During this process the Migration agency will make sure that all the above-mentioned criteria have been met over the two years. The individual employee must therefore submit all needed documentation to show the actual size of salary to have been paid, together with the insurances etc (Swedish Migration Agency, 2018 l). As is clear, this regulation, similar to that of newly established family reunification, put the individual migrant often in a rather vulnerable position, and there are risks of exploitations.

#### **5.4.5 Residence Permit Based on Educational grounds**

According to the Swedish Aliens Act (Ch 5, para 10) education can be a ground for temporary residence permit and later on it can become a reason for permanent residence permit (ch5, para 5). This can happen if a foreigner has been given a study residence permit for doctoral study at PhD level for four year in total during the last seven years.

Any type of study in Sweden for more than three months requires a residence permit for a foreigner before being able to travel and enter Sweden otherwise a study for less than three months requires only visa (Swedish Migration Agency, 2018 y). Obtaining a study residence permit requires a valid passport, admission into full-time study course at a Swedish university or college, financial maintenance requirement along with comprehensive insurance during the residence period in Sweden. In addition, this study residence permit entitles for family reunification. (Swedish Migration Agency, 2018 t). In addition, a foreign student can still apply for six months residence permit after finishing his or her study in order to look for job or start his or her own company in Sweden. This six months residence permit requires the above-mentioned requirements besides staying and not leaving Sweden after finishing all the required courses within that study program at university or college which has been at least two semesters (Swedish Migration Agency, 2018 u).

#### **5.4.6 Reasons for Rejection or Withdrawal of the Residence Permit**

According to the chapter seven in the Swedish Aliens Act (2005:716) any permit, may it be residency, right to work or a visa or asylum claim, may be revoked if a foreigner knowingly

gives wrong information about their identity or other important parts of their claim, or if the foreigner knowingly does not disclose information that may have been of importance when they were given their permit. This regulation, in which a foreigner knowingly given wrong information or omitted important information essential to the case, have existed in several different laws regulating different migration aspects. The fact that a foreigner has given wrong information or not disclosed the truth can in many cases be assumed to be intentionally done with the purpose to get the application approved (Wikren&Sandesjö, 2006 m ,p265). Naturally there are cases where wrong information may be given because of other reasons without that the individual actually understand or can be expected to understand that this may affect the outcome of the application (Wikren& Sandesjö, 2006 n p266).

## **5.5 Irregular Migration**

### **5.5.1 Definition of an Undocumented Migrant**

The term of undocumented migrants is rather complex. In the Swedish debate, terms to describe the same group of migrants have ranged from rather politically charged illegal migrants, to “papperslös” a term literally translated in the French language e,i ”sans paper” meaning without papers (Stadsmissionen,2015).

A human being can never be illegal for why the term illegal nowadays is seldom used in the mainstream discussion in Sweden. Still, the term “without papers” does not always show the complexity of things. Using this terminology it may sound as if the person have no identity, which is not the intending meaning. Often this group of individuals have many different documents, but just not the right one when it comes to residency or visas as described above.

The word currently used, “undocumented” is not either completely accurate as certain parts of this group actually, to a certain degree, are documented by the government in which they reside, this even if they don’t have all the documents needed for residency. A term to be used could be is a migrant without legal residency as this describes the current situation of the individual. This is also the way the government in most cases choose to describe the group. There are many different ways to become undocumented and in some cases the individual is previously documented, in some not (Stadsmissionen, 2015).

An undocumented migrant may refer to a person that has been rejected on their application for asylum, but still chooses to remain in the country. It may also be individuals that stay in Sweden after their visas or other type of permit have expired. These groups have at one point been registered in the country because they have approached the government before they became undocumented. This has usually been done either as an asylum seeker or a person that had been granted the right to stay for a limited time for some other reason.

Then there is another group of migrants that truly has never been documented by the authorities. This is a group that on unconventional ways, without the deduction of the authorities, entered the country, it may be by smuggling or as a victim to human trafficking trade. Another group that may or may not be known by the government in the country is children born in Sweden to already undocumented parents (Stadsmissionen, 2015).

Regardless to the reason of the irregular legal situation of this group one thing is fundamental, they are all in principle in the same vulnerable situation as they are in constant danger of deportation, but also many other forms of exploitation while still in the country. It is also vital to emphasise that when the term without papers (Papperslös in Swedish and sans pairs in



French) is used for this group it does not mean that the person necessarily does not have a valid passport or ID from their own country.

### 5.5.2 Human Rights Regime in the Case of Undocumented Migrant in Sweden

United Nations Universal Declaration on Human Rights states that “all human beings are born free and equal in dignity and rights”. These fundamental premise human rights applies to all human beings regardless of Citizenship, independently of what specific status a person has, or if that person is living with a legal residency or not i.e. is considered to be undocumented. Sweden has ratified the vast majority of these international conventions and accepted the responsibility to respect and safeguard the human rights laid down therein.

The United Nations has during several occasions criticized Sweden when it comes to the human rights of undocumented migrants. For example, the UN child rights commission<sup>13</sup>, UN Special Rapporteur on violence against women (2007, A/ HRC/4/34/Add)<sup>14</sup> and UN Special Rapporteur on the right of health (2007, A/HRC/4/28/Add.2).<sup>15</sup> The latter report emphasises the fact that undocumented migrants are a particularly vulnerable group in Sweden and that their rights are not sufficiently protected.

After this criticism as well as after pressure from the civil society, there were some moves to safeguard some of the undocumented migrants' rights. In 2013 it was decided to increase the certain rights of this group, in particular the right to health and the right to education.<sup>16</sup>

### 5.5.3 Right to Health Care for Irregular Migrants

Sweden has a special regulation regarding the health care for certain foreigner who their asylum applications have been rejected but still resides in Sweden without the required residency (2013:407, 2013). According to this Swedish law Undocumented children and youth under 18 years have the right to health care and it is free of any fees. They are entitled healthcare and dent care on exactly the same conditions as other children and youth residing in the same local governorate. Undocumented adults, meaning individuals above 18 years, have , according to the same law that apply for asylum seekers, right to subsidized health care and dentistry that, according to individual medical assessment, cannot wait (2013:407, 2013). What exactly constitute the meaning of health care that cannot wait is not defined but up to the individual medical stand in each separate case in light of the National Board of Health and Welfare (Socialstyrelsen) report concerning the undocumented persons' right to health care

<sup>13</sup> UN Committee on the rights of the child (2011), Consideration of reports submitted by States parties under article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography Concluding observations: Sweden, 23 January 2012CRC/C/OPSC/SWE/CO/1

<sup>14</sup> UN Human rights Council (2007), Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk Addendum MISSION TO SWEDEN. Mission to Sweden, 6 February 2007, A/ HRC/4/34/Add.) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/103/04/PDF/G0710304.pdf?OpenElement>

<sup>15</sup> UN Human rights council (2007), Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mission to Sweden, 28 <http://www.refworld.org/docid/461fa3f42.html>

<sup>16</sup> (Skolgång för barn som ska avvisas eller utvisas, SOU 2007:34, 2007) school access for children who will be rejected and deported. (Skolgång för alla barn, (SOU) 2010:5 ,2010) school access for all children , and the law about the health care for certain foreigners who reside in Sweden without the required residency (lag om hälso- och sjukvård till vissa utlänningar som vistas i Sverige utan nödvändiga tillstånd.2013:407, 2013)

(2014). Some of the cases, which can be legally considered health care that cannot wait, can include the maternal care, family planning and medical advice with abortion is included. Any medications that are connection to this and recommended by physicians are also subsidized (Socialstyrelsen, 2014).

#### 5.5.4 Right to Education for Irregular Migrants

When it comes to the right for education and access to school Sweden has a special legislation for Children who are in the process to be rejected and deported (Skolgång för barn som ska avvisas eller utvisas SOU, 2007:34, 2007) and another one for all children (Skolgång för alla barn, SOU, 2010:5, 2010). According to these two legislations the children of asylum seekers as well as undocumented parents have the right to education and access to school. This means that any children to undocumented between the age of 6 and 18 years have legal right to access the education system. However, this right does not mean that the children are under legal obligation to do so. This means that when a child turns six years they can access the introduction to school (in Swedish sexårsamverksaheten), and if a child starts high School (in Swedish gymnasiet ) before the age of 18 years, they also have the right to complete their education, even if that person might turn 18 during the period in school.

### 5.6 Unaccompanied and Separated Seeking Asylum Children “Unaccompanied Minors”

The unaccompanied minors have been one of the biggest asylum seeker groups that has drawn much attention during the latest years in Sweden. This has been particularly apparent since 2015 when more than 34 000 unaccompanied minors arrived in Sweden which is 36 % of the 96 000 arrived in EU and sought asylum in 2015 (Eurostat, n.d). According to the Swedish law an unaccompanied minor asylum seeker (ensamkommandebarn) is a under 18 year age who has arrived in Sweden after he or she has been separated from both parents or from any other adult persons who may have been in the parents' position or the separation took place after the arrival in Sweden (LMA, 1994:137, ch1, para b).

Figure 3. Number of five biggest groups of unaccompanied minors sought asylum in Sweden 2011–2017 (Statistics Sweden, n.d.b.)

Number of children by sex, age, country of citizenship and year

sex	age	country of citizenship	2011	2012	2013	2014	2015	2016	2017
boys and girls	total	Afghanistan	1693	1940	1247	1547	23480	665	222
boys and girls	total	Somalia	251	452	576	1118	2058	421	159
boys and girls	total	Syrian Arab Republic	..	120	364	1233	3777	180	159
boys and girls	total	Eritrea	64	105	345	1456	1939	74	52
boys and girls	total	Iraq	64	50	48	84	1097	93	52

### 5.6.1 Unaccompanied Minors Identification as a challenge in Sweden

Although the asylum seeker can be minor and unaccompanied, the Migration Agency still needs to know who the asylum seeker is, his/ her name, date of birth, where he/she come from, and the parents' names (Swedish Migration Agency, 2017 n). According to the Aliens Act the Swedish Migration Agency shall take the identification documents from the asylum applicants and preserve them during the waiting period before the final decision (2005:716, ch9, S4-5). Some of the biggest challenges Sweden has faced in relation to the asylum unaccompanied minor seekers are related to the identification and age assessment for different reasons. As the above table shows the biggest group among the unaccompanied minors comes from Afghanistan. The latest report of the centre for country of origin and analysis in the migration area (LIFOS), published on 24 January 2018, affirms the existence of substantial deficiencies in the population registry system in Afghanistan including the issuance system of the identification card which is called TAZKIRAH (Swedish Migration Agency, 2018 m). According to this report this Afghani ID card is of low value as evidence since it is very easy to forge and it has low level of security features and the issuance process is not clear (Swedish Migration Agency, 2018 m). According to the Migration Agency (2018 m):

*“The lack of reliable population registration and methods of issuing identity documents continues to mean that Afghan identity documents are unable to support the holder’s identity to the extent required in cases concerning Swedish citizenship”*

Furthermore, birth registration process in Afghanistan does not seem to have been accurate when it comes to the date of birth and place (Swedish Migration Agency, 2018n). In addition, the generous advantages of being unaccompanied minor asylum seekers in Sweden because their parents or caregiver did not follow them as well as the lack of knowledge and accuracy regarding the date and place of birth have encouraged a number of adults to claim that they are underage.

On 11 February 2014 the Supreme Migration court took a key decision in a case of minor asylum seekers from Afghanistan concerning the proof burden of the unaccompanied minors' asylum claim and identity. In this judgement the Supreme Migration court confirmed its previous one (A v Migrationsverket, MIG 2007:11) stating that the minor asylum seeker has the burden to prove his/her identity and this also includes the underage status. It also added that a written evidence should be taken first as a relevant evidence while oral information can be supplement to the written evidence or in case it is not missing. In addition, the court in the same judgement stated that it was meaningless to carry out an authenticity check of the Tazkirah since the basis for these Tazkira's issuance cannot be controlled (LIFOS, n,d,a). Thus, the hot debate has been ongoing in Sweden about the most reliable way to assess the real age of the unaccompanied minor applicants.

### 5.6.2 Medical Age Assessment for Unaccompanied Minors

As a result to the above-mentioned challenging situation medical age assessment was presented as an alternative and solution for the identification and burden of proof questions. The Swedish government has given the National Board of Forensic Medicine the mission to conduct the age medical assessment in the asylum cases (Rättsmedicinalverket (rmv), 2018). The National Board has clarified how the medical assessment is being conducted and its accuracy when it comes to the legal assessment. So according to the National Board there is no medical methods which can ensure the exact age of a person but there are several methods which can estimate the older (rmv, 2018). This medical assessment consists of X-ray to the wisdom teeth at a dental clinic and to one of the two knee joints with a MRI scanner (rmv, 2018). According to paragraph 18 in the chapter 13 of the Aliens Act (2005:716) the medical age assessment is not obligatory and the unaccompanied minors can choose to do it



voluntarily and it needs also a written consent from the side of the unaccompanied minor. However, according to paragraph 10, section h in chapter 8 of the same act the unaccompanied minor's refusal to conduct the medical age assessment without a reasonable explanation can lead to the assumption that the age of unaccompanied minor is 18 years old or older. The Swedish government suggested to make changes in the Aliens Act concerning the age assessment of the unaccompanied minors who could not provide any kind of identity documents before the investigation interview date. The motivation for these changes is to keep the safe and consistent environment for the migration accommodation where adults are not mixed with children in the same place. In addition the allocated resources for children are only used for children (Regeringskansliet, 2017f). These changes have been applicable from the first of May 2017 and retroactively to the asylum applications submitted from 1 February 2107 (Swedish Migration Agency, 2018 o). These changes have been added to chapter 12 paragraph 17§18 in the Swedish Aliens Act (2005:716). Thus, according to these paragraphs the Migration Agency shall initiate an early but temporary age assessment process before the asylum investigation interview. The Migration Agency used to register the given age by the unaccompanied minor if he or she did not have any identification document and wait until the investigation interview to conduct simultaneously the age assessment. After these changes the agency has the power to assess the unaccompanied minor age if it is not clearly apparent that she or he is a child or adult (Swedish Migration Agency, 2018 o). The agency can conclude this assessment through a short age investigation interview where different questions can be asked regarding the date of birth or through a medical age assessment offered by the Migration Agency if the unaccompanied minors cannot prove their underage status. The Migration agency's age assessment is of temporary nature which means that there is still the final assessment during the asylum investigation interview at the end (Swedish Migration Agency, 2018 o).

The legal department and the quality department in the Swedish Migration Agency have conducted a common thematic follow-up report (2016 d) concerning the quality of the initial age registration for 145 cases during the period between 1 January and 1 July 2016. According to this report of these two departments the age was not sufficiently investigated in 60 % of the cases. In addition, 43% of the asylum applicants in the investigated cases were not informed by the Swedish Migration Agency that they have not been able to prove likelihood of their underage status before the decision has been taken their cases in order to do more efforts to prove it (Swedish Migration Agency, 2017o).

### **5.6.3 Human Rights Regime in Sweden for Unaccompanied Minor**

Sweden has been a signatory of the UN Convention on the rights of the child since 1990 which has been applicable and consistent with the Swedish law since then (Regeringskansliet, 2017 g). However, according to the Swedish government's released information several have showed that the children rights in Sweden have not been effectively embedded or implemented in the legal system. As a result the Swedish government has proposed to incorporate this convention as a part of the Swedish law as a forward step to strengthen these rights effectively and this will therefore come into force in January 2021(Regeringskansliet, 2017 g). Accordingly, all children in Sweden have the same rights and value (Child UN convention, 1990, article 2) regardless of their legal status in Sweden or if they have the Swedish citizenship or not.

### **5.6.4 Guardianship (Godman)**

Sweden has a special legislation dealing with the guardianship (in Swedish *Godman*) for the foreign child after arrival in Sweden without one of the parents, both of them or any adult

person who can be considered in the parent's position to take care of the child (Lag om god man för ensamkommande barn, 2005:429, para 1). According to this law the *Godman* can be assigned by the Migration Agency or the social services at the municipality where the child is residing and this should be as soon as possible (2005:429, para 2). In addition, the *Godman* represents the unaccompanied minor and takes the role and place of the guardian and trustee and this means take the responsibility for all the child's personal and legal matters in Sweden (2005:429, para 2).

According to the Swedish Association of Local Authorities and Regions (SKL) (2017,a), the *Godman* is not responsible for providing for the accompanied minors or for the actual care. In addition, the social Services Act (SoL, 2001:453) is applicable in the case of the unaccompanied minor in the same way as in the case of other Swedish children who lost their parents or the guardian who replaces their position. Accordingly, the responsible person in the unaccompanied child accommodation is in charge for the financial support and actual care and eventually the Swedish Migration Agency supplies the accommodation and the municipality and its social service costs (SKL,2017,b). The social secretary in the municipality has ultimately the main responsibility for the well-being of the unaccompanied minor in this accommodation (SKL, 2017, c). Some of the concrete services provided by the *Godman* to the unaccompanied minors can be accompanying and presenting him or her in relation to the contact with the Migration Agency, namely during the investigation interview, meeting with the legal public counsel or general health check-up (SKL,2017,d). The *Godman* will also manage the daily allowance and finance and everything related to school and health care (SKL, 2017e).

This guardianship ends automatically when the child turns 18 years or when he or she is granted an asylum in Sweden and then the court is responsible to assign a special guardian for him or her. The *godman* is a person with long experience and knowledge about the Swedish society, language, Aliens Act and asylum process beside appropriate characteristics to such assignment with children in vulnerable position (SKL, 2017 f).

### **5.6.5 Health Care Right for Unaccompanied Minors**

The unaccompanied minors have right for complete health care, dental care and psycho-social services in Sweden in the same way as all Swedish children. In addition, these health care and dental care services are also free of charge (Swedish Migration Agency, 2018 q). Different psychological problems have been reported as a common problem among the unaccompanied minors in Sweden (Barnombudsmannen, 2017, c) such as suicide attempts (Commissioner for Human rights, 2017, p12). Swedish government has invested a big budget in order to deal with these problems since this psychological health has also been reported as problem among the Swedish youth and children (Regeringskansliet, 2017 h).

### **5.6.7 Summer Job for Unaccompanied Minors**

According the Migration Agency the asylum seeker children have right to do a summer job under certain conditions as follows (Swedish Migration Agency, 2017 t):

- 1) The unaccompanied minor should be 16 years old or older;
- 2) Exception from the job permit (AT-UND), which requires identification document by the unaccompanied minors, is needed too.

Unaccompanied minors under 16 years old do not need this exception (AL-UND) in order to start a vocational training, easy tasks and single assignments. However they still need their parents or their *godman*'s consent (Swedish Migration Agency, 2017 t).

### **5.6.8 Child Asylum Seekers Detention and Supervision**

According the chapters 10 and 11 in the Aliens Act (2005:716) in some cases the Swedish Migration Agency may consider putting asylum seekers, who are under or above 18 years old

under supervision or even keep them in detention. A child asylum seeker may be put under supervision or kept in detention in light of the Aliens Act in the following situations (2005:716, ch10, para2-7):

1. If this child's entry application is likely to be rejected by the police authority, to be rejected with immediate enforcement by the Migration Agency or it is a matter of preparation and execution of such a decision;
2. If this child is not kept under detention, there will be an obvious risk that the child will hide or go underground and thereby the enforcement of the decision, which should not be delayed, is jeopardized;
3. If having this child under a supervision is not enough.

The supervision means in this context the foreigner's obligation to report about themselves to the police authority or the Migration agency at certain times and a decision on supervision shall specify the place where the notification obligation is to be fulfilled (2005:716, ch10, para 8). The Aliens Act does not permit to detain a child more than 72 hours unless there are specified grounds (2005:716, ch10, para5). According to the Migration Agency decisions to keep children in detention are almost never made (Swedish Migration Agency, 2018 p).

## 6. REFUGEE CRISIS DRIVEN REFORMS

### 6.1 Reform Proposal Targeting Unaccompanied Minors

Responding up on the effects of the temporary measures taken by the government in late 2015, the most recent government reform proposal, presented 27 November 2017, encompasses three key elements: a prolongation of the temporary asylum law until July 2019, a revision of the asylum seekers right to arrange an own housing within the asylum seekers reception act, and a possibility for more unaccompanied minors to receive a temporary residence permit. These proposed changes mainly target the group of unaccompanied minors arrived in Sweden until 24 November 2015 (Government Offices of Sweden, 2017 a). The two following paragraphs will present the political background and the content of the reforms proposals in their current form.

### 6.2 Political Background

Until the end of 2015, a total of 35,693 unaccompanied minors had applied for asylum in Sweden, the highest notion ever recorded (Table 2). Until 27 November 2017, almost two years later, 28,400 had received a first instance decision from the Swedish Migration Agency.

The long wait for an asylum decision was a consequence of the large overall numbers of asylum seekers in 2014-2015 and a prioritisation of certain groups of asylum seekers (recognised refugees under the Geneva Convention) resulting in a long wait for the many unaccompanied children. Those who on arrival were registered as minors by the Swedish Migration Agency, but have due to long asylum investigation procedure turned 18 years old have been treated as adults and as a result of this, experienced difficulties in attaining residence permit (The Government Offices of Sweden, 2017a). Estimations show that the proposal will target between 8,000 and 9,000 young asylum seekers, although the exact number have not yet been established (TT, 2018).

The situation for the many young asylum seekers have received much attention in the public due to demonstrations against the continued deportations to Afghanistan, criticism against medical age assessment of asylum seekers and the high numbers of mental health issues reported among unaccompanied minors (The Ombudsman for Children in Sweden, 2017 d; Grill & Ohlin, 2017; Holmgren, 2018). Furthermore, many organisations and networks have been founded by professionals and volunteers encountering young asylum seekers in their everyday lives. Among others, the *Vi står inte ut* (We can't stand it) network aim to pressure the government to prioritise and grant the unaccompanied minors a fair asylum procedure ( *Vi står inte*, n.d.).

The reform proposal is the result of a negotiation settlement between the two coalition government parties, the Green party and the Social Democratic Party. It was reportedly initiated by the Green party, who has plead for a review of the temporary law for the unaccompanied children since its initiation, as opposed to the Social Democrats who have sought to keep the law in its current format until its final year 2019 (Lindholm, 2017) . The Green party has long had internal discussions concerning the group of unaccompanied minors, many party members advocating for the reinstatement of the right to full family reunion (Abdukani, n.d.).

The Social Democratic majority party have during their time in the government opposed an adjustment, consistently putting emphasis on increasing the control of the migration flows to Sweden and promoting a prolongation of the temporary law until its third and final year in July 2019 (The Swedish Social Democratic Party, n.d.). The asylum seekers right to arrange an own housing has long been met with internal criticism within the Social Democrats, many district representatives calling for a revision or a dismantling of the legislation (Watz & Köse, 2017; Delby & Wrede, 2016).

Additionally, the reform proposal has met criticism from the other five parties in the parliament and the Council on Legislation (Lagrådet) that scrutinizes draft bills sent by the government. The criticism is mainly concerned of the reform proposal harming the continuity and resilience of Swedish migration policies (Council on Legislation, 2018). The opposition coalition *The Alliance* (Alliansen) consisting of the Moderate Party, the Centre Party, The Liberals and the Christian Democratic Party has pleaded to vote against the bill, with an exception for the Centre Party (Swedish Institute, 2018; The Centre Party, 2018). The Centre Party's announcement to support the reform proposal is in line with prior party statements calling for a political solution for the unaccompanied minors affected by the time-consuming asylum investigations (The Centre Party, 2018).

Furthermore, the Sweden Democrats with an outspoken migration agenda have announced to rule against the reform proposal (Lindhe & Marmorstein, 2018). As a result of the Centre Party statement to vote in favour of the government proposal, the Sweden Democrats, demanded the Moderate Party to leave the Alliance in a press release (The Sweden Democrats, 2018). The Moderate party leader Ulf Kristersson has replied to this demand, that the Moderate Party is not to leave the Alliance, although regrets that the reform proposal would lead to "irresponsible migration politics" (Kristersson, 2018).

The final decision to realise the proposal has not yet been passed through in the parliament, meaning that some changes in the requirements and limitations concerning the target group might still take place. However, as the Centre Party and the Left Party has pleaded to support the government's bill in the parliamentary voting 4 June 2018, the bill is likely to pass. And if it does pass, the government expects the legislation to be in place by 1 July 2018 (Government Offices of Sweden, 2017a).

### 6.3 Proposal Content

The proposal as presented by the government encompasses the following key requirements for unaccompanied minors:

- Registered their asylum application with the Swedish Migration Agency latest 24 November 2015
- Have waited for a Migration Agency decision for at least 15 months
- Have had their asylum application tried according to the temporary law (after 20 July 2016)
- Were registered as children on arrival
- Are currently undertaking or planning on pursuing studies on upper secondary level
- Are currently residing in Sweden
- Have not committed any crimes in Sweden (Government Offices of Sweden, 2017a)

The proposal encompasses a limited possibility for the individual asylum seeker to independently find accommodation in favour of a “dignified personal accommodation”-model (Watz & Köse, 2017; Government Offices of Sweden, 2017 a). The revision seeks to address the overcrowded and segregated housing situation that has been noted in a number of municipalities and districts (Swedish Social Democratic Party, n.d.).

## 7. CONCLUSION

Sweden has been known for its openness and solidarity for humanitarian causes on both the European and global level, particularly when it comes to the question of refugees. The Swedish generous model for migration and refugee management had until 2015 contributed to its classification as a destination country for asylum seekers. Sweden was rather unique until 2016 as it would grant a permanent residence for recognized refugees and to the beneficiaries of international protection. Sweden used also to keep supporting financially the asylum seekers even after the exhausting of all appeal stages until 2016. In addition, Sweden until today has never requested any maintenance requirement or certain language level for granting the Swedish citizenship as it is being done in other EU countries. This generous attitude, openness and solidarity in the migration and asylum management, which has been welcomed by the majority of Swedish population, has woken the opposite attitude in growing portion of the Swedes driven by fear and unknowingness for the next after the 2015 unprecedented refugee crisis. Massive political pressure on the minority government has forced it to change completely its asylum policy. This was not the first time a record increase in asylum seekers number in Sweden had led to more restrictive asylum practices and policies. A similar leaning was observed during the refugee influx following the conflict in the former Yugoslavia in 1992 (Human Rights Watch [HRW], 1996). However, the difference today with comparison to the 1992 situation is that this orientation of more restrictive policy has become stronger and permanent. The temporary restrictive measures in 2016 was supposedly temporary but they are likely to be extended. In light of the lack of solidarity and cooperation among European countries when it comes to the refugee matter and the increase popularity of the anti-migration party in Sweden different political parties have started competing in hardening the already restrictive measures before the general election in September 2018.

The different aspects of the Swedish Migration system, particularly after 2016, have remained positive, with some critic raised by some international humanitarian organizations and institutions in relation with Sweden's compliance with the European Convention on Human Rights and with the 1951 Geneva Convention.

In 2016 The United Nations High Commissioner for Refugee (UNHCR) was invited by the Swedish government to deliver its observations concerning the draft law proposal on restrictions of the possibility to obtain a residence permit in Sweden. UNHCR expressed its deep regrets and concern in its general observations stating (UNHCR, 2016, para 9):

*“instead of implementing- in a spirit of solidarity and equal sharing of responsibility- the various decisions made by the EU in 2015, European States rather appear to be competing to restrict their national asylum systems in a race to the bottom”*

UNHCR acknowledged in its same observations that Sweden has received the biggest number of asylum seekers during 2015 and 2016 since the Second World War and this number is one of the biggest in the European level (UNHCR, 2016, para 5-7). UNHCR also stated that the ongoing inability of the European countries and the lack of unity and solidarity in respond to the current refugee situation, has put Sweden in a position to restrict its asylum laws and policies to the lowest common standards permissible by the EU acquis on asylum (UNHCR, 2016 c para 10). Nevertheless, UNHCR expressed also its concern regarding the sent signal of the proposed restrictions as well as the Swedish ID controls on the border, to other states, especially the major refugee hosting countries in the world and European states that need to strengthen their asylum and integration capacity in order to receive higher numbers of refugees (UNHCR, 2016 para11). Several international human rights organizations' reports (Sveriges Radio , 2015 a), sensate a report by the commissioner for



Human Rights of The Council of Europe after his visit to Sweden in October 2017 (Commissinoer for Human Rights, 2018), have expressed generally their concern regarding the family reunification limited possibility regulations in the new law (2016:752). In this report the commissioner shares the concern expressed by UNHCR that this temporary limitation law (2016:752) will significantly hamper the access to the family reunification (Commissinoer for Human Rights, 2018). For example 85 % of the Syrian asylum seekers were recognized as beneficiaries of subsidiary protection or other forms of international protection and only five percent were granted a refugee status (Commissinoer for Human Rights, 2018). This makes the possibility for the family reunification for those who applied asylum after 24 November 2015, depend on the maintenance requirements. This means it depends on their ability to be financially sufficient and to have a suitable accommodation to the family member's number (Sveriges Radio, 2017 a) which seems even difficult for the local residences in Sweden in light of the current housing situation.

Sweden has a long history of rule of law and very few breaches between the formal legislation and practice. For example, one of the few instances Sweden has received criticism in this area, is by Amnesty International which accused Sweden of using bureaucratic hurdles to halt the family reunification application and to stop Syrians from bring their relative to Sweden in order to decrease the number of newly arrivals (Sveriges Radio, 2017 b). Syrians who have the right to be reunited with their family members, had only the option to apply for family reunification in the Swedish embassies in five countries where Syrians can hardly get a visa to reach those embassies. However, in January 2017 the Swedish embassy in Sudan opened its doors for Syrians to apply for family reunification where they do not need a visa to travel and reach the embassy (Sveriges Radio, 2017 b).

Another concern has been expressed in relation to three month period limit to apply for the family reunification in the temporary limitation law (2016:752) (Sveriges Radio, 2015 b). The commissioner in the above-mentioned report (2018) indicates other practical impediments to family reunification, beside the legal obstacles, such as the strict ID/passport as an identity proof and long processing times with 21-month waiting period on average.

When it comes to the age assessment in the case of asylum seeker children, there is considerable legal uncertainty in the current regulation concerning age revisions as the Swedish Barnombudsman for Children described it in its annual report (2017a p24). In addition it is added in this report that this view is shared by the Swedish Bar Association and the Swedish Migration agency in an internal report on age assessments. According to the UNHCR observations on the draft law proposal "Age Assessment Earlier in the Asylum Procedure" in Sweden UNHCR states that it prefers a holistic assessment of capacity, vulnerability and needs that reflects the actual situation of a young person to estimate the chronological age and it does not use the medical age assessments in its operations due to the uncertainty factor within it. However UNHCR in the same observations expresses its appreciations for the measures taken by the Swedish government which has ensured the reliability and safety, and ethical application to the medical age assessment method (UNHCR, 2017 a).

Another problem facing the Swedish migration system is the unaccompanied minors disappearing from Sweden. The Swedish government has assigned the task for the governmental agency for child care Barnombudsman<sup>17</sup> to investigate the reasons behind this

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<sup>17</sup> According the Ombudsman's homepage the ombudsman for Children in Sweden is a government agency tasked with representing children regarding their rights and interests on the basis of the UN Convention on the Rights of the Child (CRC). For more information see <https://www.barnombudsmannen.se/om-webbplatsen/english/>



phenomenon. There have been about 1736 unaccompanied minors who had disappeared between January 2014 and October 2017. The Barnombudsman has conducted several interviews with several unaccompanied minors and they explained different reasons for the disappearing phenomenon. For example the trauma from the wars in their home country, the fear of the migration agency's negative decision when they turn 18 year old and the possibility to live nearby those who means a lot for the unaccompanied minors were some explanations and answers by them (Ombudsmannen, 2017 a).

When it comes to Sweden's commitments in relation with the European Convention on Human Rights and with the 1951 Geneva Convention and international community outside Sweden, UNHCR has stated in 2016 that Sweden has a long tradition of providing sanctuary to persons in need of international protection, and is a strong supporter of the international protection regime and the work of UNHCR (2016 para 5-7). The Commissioner after his visit in October 2017 to Sweden has welcomed Sweden's commitment to increase resettlement up to 5,000 in 2018 more than doubling its programme in two years. In addition he also acknowledges that Sweden was UNHCR's third largest contributor per capita with a total contribution of SEK 1.2 billion (Commissioner for Human rights, 2018).

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## ANNEX I: Overview of the Main Legal Framework on Migration, Asylum and Reception Conditions

Legislation title and number	Date	number	Link/PDF
Aliens Act (Utlänningslagen)	2005	716	<a href="https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utlanningslag-2005716_sfs-2005-716">https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utlanningslag-2005716_sfs-2005-716</a>
Aliens Act Ordinance (Utlänningsförfordningen)	2006	97	<a href="https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utlanningsforordning-200697_sfs-2006-97">https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utlanningsforordning-200697_sfs-2006-97</a>
Law on Temporary Limitations to The Possibility of Being Granted a Residence Permit (Lag om tillfälliga begränsningar av möjligheten att få uppehållstillstånd)	2016	752	<a href="https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2016752-om-tillfalliga-begransningar-av_sfs-2016-752">https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2016752-om-tillfalliga-begransningar-av_sfs-2016-752</a>
Act on Reception of Asylum Seekers and Others (LMA) (Lag om mottagande av asylsökande)	1994	137	<a href="https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1994137-om-mottagande-av-asylsokande-mfl_sfs-1994-137">https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1994137-om-mottagande-av-asylsokande-mfl_sfs-1994-137</a>
Ordinance on the Act on Reception of Asylum Seekers (Förordning om lagen om mottagande av asylsökande)	1994	361	<a href="http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-1994361-om-mottagande-av_sfs-1994-361">http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-1994361-om-mottagande-av_sfs-1994-361</a>
Act on the guardianship (Godman) for the unaccompanied children (Lag om god man för ensamkommande barn)	2005	429	<a href="http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Lag-2005429-om-god-man-for-_sfs-2005-429/?bet=2005:429">http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Lag-2005429-om-god-man-for-_sfs-2005-429/?bet=2005:429</a>
Law on health care for asylum seekers (Lag om hälso- och sjukvård åt asylsökande)	2008	344	<a href="http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Lag-2008344-om-halso--och-s_sfs-2008-344/?bet=2008:344">http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Lag-2008344-om-halso--och-s_sfs-2008-344/?bet=2008:344</a>
Ordinance about the state compensation for asylum seekers, etc. (Förordning om statlig ersättning för asylsökande m.fl)	2017	193	<a href="http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-2017193-om-statlig-ersattning-for_sfs-2017-193">http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-2017193-om-statlig-ersattning-for_sfs-2017-193</a>
Act on the reception and housing for the certain newly arrival migrants (Lag om mottagande av visa nyanlända invandrare för bosättning)	2016	38	<a href="http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Lag-201638-om-mottagande-av_sfs-2016-38/?bet=2016:38">http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Lag-201638-om-mottagande-av_sfs-2016-38/?bet=2016:38</a>
Act on the introduction actions for certain newly arrival migrants (Lag om etableringsinsatser för visa nyanlända invandrare)	2010	197	<a href="http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Lag-2010197-om-etableringsi_sfs-2010-197/?bet=2010:197">http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Lag-2010197-om-etableringsi_sfs-2010-197/?bet=2010:197</a>

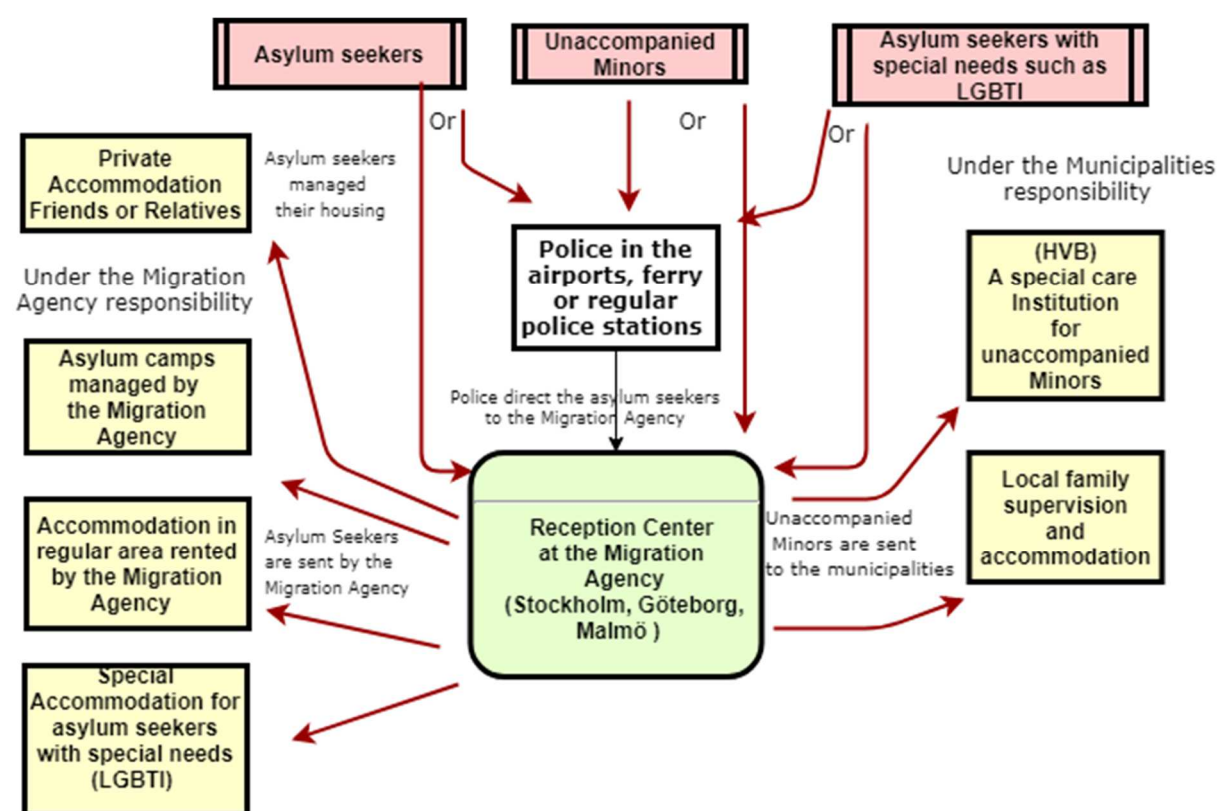


## ANNEX II: List of Authorities Involved in the Migration Governance

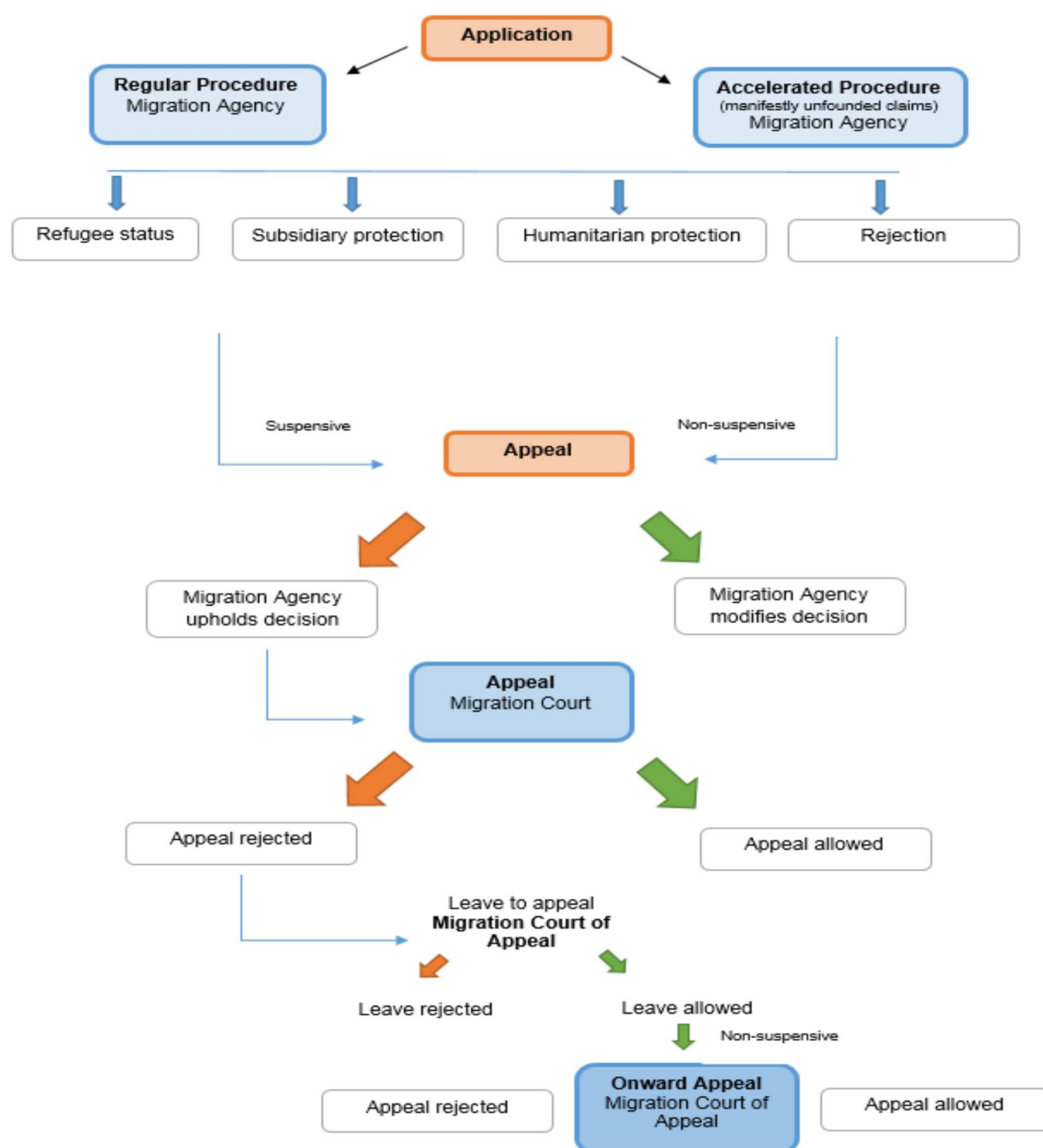
Authority (English and original name)	Tier of government (national, regional, local)	Area of competence in the fields of migration and asylum	Link
Ministry of Justice and Internal Affairs (Justitiedepartementet)	National Ministry	The different aspects of the migration and asylum process	<a href="https://www.regeringen.se/sveriges-regering/justitiedepartementet/">https://www.regeringen.se/sveriges-regering/justitiedepartementet/</a>
Division for Migration Law (L7) (Enheten för migrationsrätt)	National Agency	The legislative issues in relation to migration law, Swedish citizenship and certain border control matters	<a href="https://www.regeringen.se/sveriges-regering/justitiedepartementet/justitiedepartementets-organisation/">https://www.regeringen.se/sveriges-regering/justitiedepartementet/justitiedepartementets-organisation/</a>
Division for Migration and Asylum Policy (EMA) (Enheten för migration och asylpolitik)	National Agency	The international cooperation in relation with the migration policy	<a href="https://www.regeringen.se/sveriges-regering/justitiedepartementet/justitiedepartementets-organisation/">https://www.regeringen.se/sveriges-regering/justitiedepartementet/justitiedepartementets-organisation/</a>
Division for Management of Migration Affairs (SIM) Enheten för styrning inom migrationsområdet	National Agency	Economic governance and follow-up in the field of migration	<a href="https://www.regeringen.se/sveriges-regering/justitiedepartementet/justitiedepartementets-organisation/">https://www.regeringen.se/sveriges-regering/justitiedepartementet/justitiedepartementets-organisation/</a>
Swedish Migration Agency (Migrationsverket)	National Agency	The administrative authority for all issues related to residence permits, work permits, visas, reception of asylum seekers, citizenship etc.	<a href="https://www.migrationsverket.se/English/Startpage.html">https://www.migrationsverket.se/English/Startpage.html</a>
Swedish embassies and consulates	National Agency	receive applications for visas, residency permit and job permit	<a href="https://www.swedenabroad.se/en/">https://www.swedenabroad.se/en/</a>
Migration Courts (Sveriges Domstolar)	National Agency	The Migration Agency's decisions can be appealed there.	<a href="http://www.domstol.se/">http://www.domstol.se/</a>
The county administrative boards (Länstyrelsen)	Regional Agency	the governmental administration in the county which will work towards achieving national goals in the county and promote the development of the county including the newly arrival reception	<a href="https://www.lansstyrelsen.se/stockholm/om-lansstyrelsen-stockholm/om-oss.html">https://www.lansstyrelsen.se/stockholm/om-lansstyrelsen-stockholm/om-oss.html</a>
The county council (Landstinget)	Regional Agency	The asylum seekers' health	<a href="https://www.landstingsarkivet.sll.se/kontakta-oss/om-oss.html">https://www.landstingsarkivet.sll.se/kontakta-oss/om-oss.html</a>

		care, NGOs and aid agencies, which can support asylum seekers	
Municipalities (Kommunerna)	Local Agency	Reception of asylum seekers who have been granted residence permits	<a href="https://skl.se/tjanster/kommunerlandsting/faktakommunerochlandsting.432.html">https://skl.se/tjanster/kommunerlandsting/faktakommunerochlandsting.432.html</a>
The Swedish National Insurance Agency (Försäkringskassan)	National Agency	handling the integration contributions or introduction program allowances	<a href="https://www.forsakringskassan.se/">https://www.forsakringskassan.se/</a>
The Swedish Public Employment Services (Arbetsförmedlingen)	National Agency	The necessary support and actions and promote a quick and effective integrating possibilities for the newly arrivals in the job market	<a href="https://www.arbetsformedlingen.se/">https://www.arbetsformedlingen.se/</a>
The Swedish Board of Student Finance (CSN)	National Agency	Study loan and allowance for newly arrivals	<a href="https://www.csn.se/languages.html#h-WelcometoCSN">https://www.csn.se/languages.html#h-WelcometoCSN</a>
The Children's Ombudsman	National Agency	Unaccompanied Minors care and reception	<a href="https://www.barnombudsmannen.se/om-webbplatsen/english/">https://www.barnombudsmannen.se/om-webbplatsen/english/</a>

## ANNEX III: Flow Chart of the National Reception for asylum seekers



## ANNEX IV: Flow Chart of the International Protection Procedure



Source: AIDA, Asylum Information Database, Country Report Swede 2015 (update 2015), p. 10,  
<http://www.asylumineurope.org/reports/country/sweden>

## Glossary and List of Abbreviations

UNHCR	United Nations High Commissioner for Refugee
ECHR	European Convention on Human Rights
CSN	Centrala Studiestödsnämnden
LMA	Law on the Reception of Asylum Seekers
LGBTI	Lesbian, gay, bisexual, transsexual and intersex
SIDA	Swedish International Development Cooperation Agency
UNDP	United Nations Development Program

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# **RESPOND**

## **Turkey**

### **Country Report**

**D1.2 – April 2018**

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Horizon 2020  
RESPOND: Multilevel Governance  
of Mass Migration in Europe and  
Beyond (770564)



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## List of abbreviations

AFAD	Disaster and Emergency Management Authority
AIDA	Asylum Information Database
BSECA	Black Sea Economic Cooperation Area
CIP	Circular on International Protection
CL	Citizenship Law
Const.	Constitution
DGMM	Directorate-General for Migration Management
EC	European Commission
EU	European Union
FRONTEX	European Border and Coast Guard Agency
GDI	Gender Development Index
HDI	Human Development Index
ILF	International Labour Force Law
IOM	International Organization for Migration
IR	Implementation Regulation
LFIP	Law on Foreigners and International Protection
LWPF	Law on Work Permits for Foreigners
MFSP	Ministry of Family and Social Policies
MFA	Ministry of Foreign Affairs
Mol	Ministry of Interior
OECD	Organization for Economic Co-operation and Development
PDMM	Provincial Directorate of Migration Management
RA	Readmission Agreement
RESPOND	Multilevel Governance of Migration in Europe and Beyond
RSD	Refugee Status Determination
TGNA	The Turkish Grand National Assembly
THEC	Turkish Higher Education Council
TOKİ	Toplu Konut İdaresi Başkanlığı (Directorate of Public Housing Administration)
TPR	Temporary Protection Regulation
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees

WP1

Work Package 1



## Executive summary

This country report focuses on developments that took place during the period of 2011-2017 in the field of migration in Turkey. Traditionally a country of emigration, starting from the early 1990s, it has also become an important country of immigration, asylum and transit. Most recently, the increasing pressure of the refugee challenge, particularly given the high number of arrivals from Syria, has put the country once again under international spotlights.

This report provides relevant migration statistics that are available as open source data. It briefly reviews the socio-economic, political and cultural characteristic of the country as well as its brief migration history. The report also delves into a detailed analysis of the constitutional, legal and institutional framework of Turkey's national migration management system, which has gone through significant transition in the last few years. The report points out that due to Turkey's geographical limitation to the 1951 Geneva Convention Relating to the Status of Refugees (1951 Convention), and its associated 1967 Protocol; Turkey does not grant refugee status to people fleeing from conflicts and persecution in non-European countries. But it does provide 'conditional refugee status' along with 'refugee' and 'subsidiary' protection. The introduction of new sets of legislation, including the Law on Foreigners and International Protection (LFIP) in 2013, and Temporary Protection Regulation (TPR) in 2014, together with the development of new state agency to deal with migration affairs, the Directorate General of Migration Management (DGMM), paved the way for a more centrally organised national migration governance system. Moreover, the legal framework created with the LFIP and the TPR also established clearly defined migration categories such as regular migrant, irregular migrant, forced migrant and it set the criteria for granting temporary protection status.

The report reveals a key duality regarding European and non-European asylum seekers to be an important characteristic of Turkey's asylum system. The first group can obtain 'refugee' status'; while the second group can only obtain 'conditional refugee status'. However, regardless of their nationality, due to the Syrian mass migration, Syrian refugees<sup>1</sup> are given another international protection status, which is called 'temporary protection'. Thus, together the LFIP and the TPR created a legal basis for asylum seekers from Syria and those from other countries to be the subject of two different asylum regimes in Turkey, with distinct sets of procedural rules, reception provisions and detention considerations (Refugee Rights Turkey, 2015, p.11).

The report concludes by highlighting that part of Turkey's recent migration policy efforts are tied to encouragement coming from the EU for Turkey to improve conditions regarding access to the asylum process and status determination as well as enhancement of its facilities for

---

<sup>1</sup> Although different terminologies have been used to refer to Syrian refugees, such as 'guests' and 'temporary protection status'; throughout this report the term 'Syrian refugees' will be used. When the Syrian mass migration to Turkey started in 2011, Syrians were called 'guests' not as legal refugees. This classification derives from the fact that Turkey still maintains the geographical limitation on the 1951 Geneva Convention for the refugee definition, thus it claims no obligation to recognize Syrians' refugee status. It is important to highlight that the term 'guest', however, has no place in international refugee law. From October 2011 onwards, Turkey granted Syrians 'temporary protection status' by referring to the European Council's Directive on 'Temporary Protection' of 2001 and the adoption of its own Regulation on Temporary Protection in 2014.

asylum-seekers' protection. Although these developments bring Turkey closer to satisfying the EU demands on migration and asylum policy, Turkey is still expected to abolish the geographical limitation of the 1951 Convention to create a full-fledged asylum system and to solve remaining implementation problems. Ensuring equal and fair access to asylum procedures and facilitating the full access of asylum-seekers to legal aid remain priorities still to be achieved.

# 1- Statistics and data overview

## Explanatory note on available statistical data

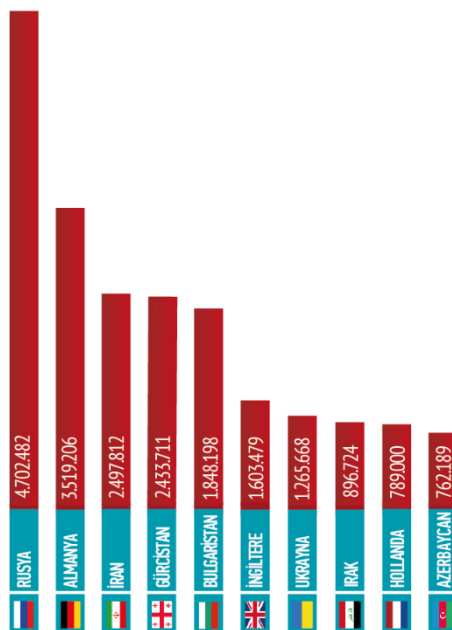
This report starts with providing statistics and overview data<sup>2</sup> on the immigration to Turkey in order to lay the ground for examination of legal and policy framework. As the emphasis of the RESPOND Project is on mass migration, a specific attention is given to relevant statistics.

## Arrivals

Figure 1 shows the highest numbers of arrivals to Turkey from non-EU countries occurred during 2017. The total is over 32,000. The open source data provided by the DGMM refers to the total number of arrivals, including from both EU and non-EU countries. It should be noted that arrivals from countries such as Germany and the Netherlands, where Turks emigrated in significant numbers in the past, constitute a significant part of the overall numbers of arrivals to Turkey. Moreover, the DGMM data are not broken down by sex, age, migratory status or routes. Migration statistics about residence permits are relatively more detailed, as can be seen in the next sub-section of this report, and this data gives the reader a better idea about the percentage of different types of migrants living in Turkey.

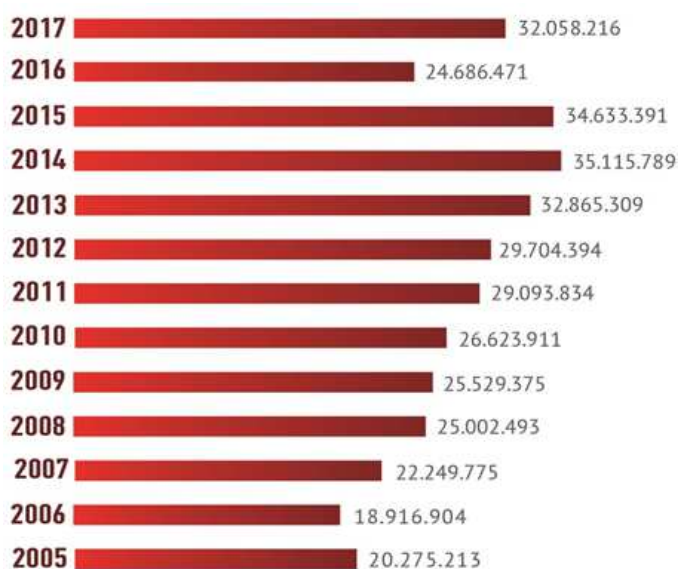
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<sup>2</sup> The compilation of data presented below is primarily based on open source statistical data. One of the main sources of these data is the Directorate General of Migration Management (DGMM), which was established under the Ministry of Interior by Law 04/04/2013 No. 6458 on Foreigners and International Protection as the competent authority for migration management (LFIP, Article 103). In addition to the DGMM, the Asylum Information Database is another important provider of relevant open source data. AIDA is the database managed by the European Council on Refugees and Exiles, and contains information on asylum procedures, reception conditions, detention and content of international protection across 23 EU and non-EU countries, including Turkey.<sup>2</sup> While compiling its data, AIDA draws on the publicly available data provided by Disaster and Emergency Management Authority of Turkey and the DGMM, as well as statistical data obtained by Refugee Rights Turkey, the United Nations High Commissioner for Refugees, Turkey and the International Organization for Migration.

**Figure 1: Arrivals of non-EU citizens in 2017**

Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/giris-cikis\\_363\\_378\\_4708\\_icerik](http://www.goc.gov.tr/icerik6/giris-cikis_363_378_4708_icerik) [Accessed 14 April 2018].

The following figure (2) displays the changes in terms of entrances by years. Numbers of entries to Turkey has steadily increased since 2007, except in 2016, the year of the attempted coup in July. Although an increase over time, in particular 2017, is clear, no details about nationalities are available. Also, these entrance figures do not explain the reason or purpose of arrivals to Turkey.

**Figure 2: Entrance to Turkey by years (2005-2017)**

Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/giris-cikis\\_363\\_378\\_4708\\_icerik](http://www.goc.gov.tr/icerik6/giris-cikis_363_378_4708_icerik) [Accessed 14 April 2018].

## Number of residence permits

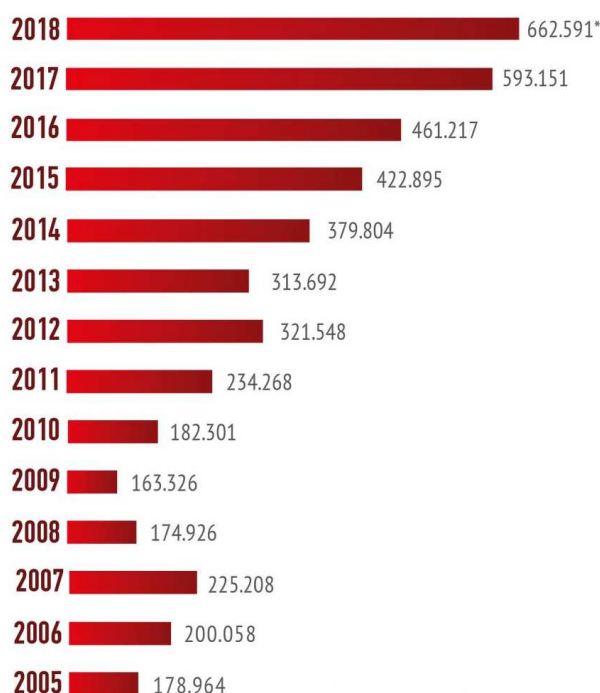
The Law of Foreigners and International Protection (LFIP) creates the requirement that foreigners who would like to stay in Turkey longer than ninety days must apply for a residence permit, unless they are exempted from obtaining one.<sup>3</sup> The types of residence permits are enlisted in Article 30 of the LFIP as:

### Types of residence permits

- a) short-term residence permit;
- b) family residence permit;
- c) student residence permit;
- d) long-term residence permit;
- e) humanitarian residence permit;
- f) victim of human trafficking residence permit.

One can transfer between different types of residence permits if the initial conditions under which a specific type of residence permit was once issued, no longer apply or 'a different reason appears' (LFIP, Article 29).

**Figure 3: Number of residence permits granted (2005-2016)**



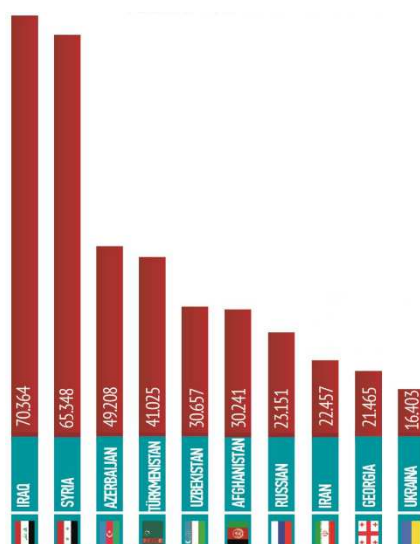
\*by the date of 05.04.2018

Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/residence-permits\\_915\\_1024\\_4745\\_icerik](http://www.goc.gov.tr/icerik6/residence-permits_915_1024_4745_icerik) [Accessed 14 April 2018].

<sup>3</sup> Exemptions from residence permits have been specified under Article 20 of the LFIP. It is also noted that 'in cases where these foreigners wish to stay in Turkey, after the end of the status that entitled them to an exemption from a residence permit, they must apply to the governorates within ten days to obtain a residence permit', Available at [http://www.goc.gov.tr/files/files/eng\\_minikanun\\_5\\_son.pdf](http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf) [Accessed 17 April 2018].

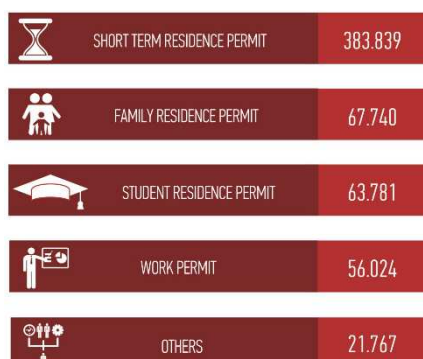
Figure 3 shows the most up-to-date data available about the total number of residence permits issued by the DGMM between 2005 to 2016. From 2013 onwards, the numbers of residence permits granted have gradually increased. The worsening situation in Syria seems to be an important cause leading to such increases as in 2016, those arriving from Syria constituted the second largest group of foreigners who applied for a residence permit. It should be noted that Syrians do not reside in Turkey only as a part of the TPR; but also apply for short-term or different types of resident permits. Thus, this table excludes Syrians, who are under the TPR. As Figure 4 indicates, nationals from neighbouring countries have been granted the most of residence permits during 2017. A breakdown of these cumulative figures, as provided on the DGMM website, reveals that a considerable part of these residence permits are short-term residence permits. These are followed by family residence permits, student residence permits, work permits, and other types of residence permits (i.e. humanitarian residence permit, and residence permits for the victims of human trafficking).

**Figure 4: Residence permits granted in 2017 (Top ten nationalities)**



Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/residence-permits\\_915\\_1024\\_4745\\_icerik](http://www.goc.gov.tr/icerik6/residence-permits_915_1024_4745_icerik) [Accessed 14 April 2018].

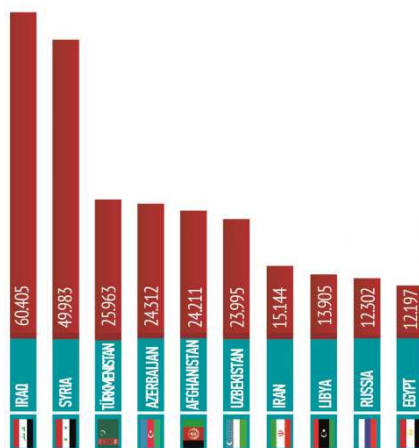
**Figure 5: Types of residence permits issued in 2017**



Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/residence-permits\\_915\\_1024\\_4745\\_icerik](http://www.goc.gov.tr/icerik6/residence-permits_915_1024_4745_icerik) [Accessed 14 April 2018].

As noted in Article 31 of the LFIP, a short-term residence permit might be granted to those foreigners who arrive to conduct scientific research, attend educational and training programs, pursue trade activities, receive medical treatment, and for tourism and other short-term stay purposes.

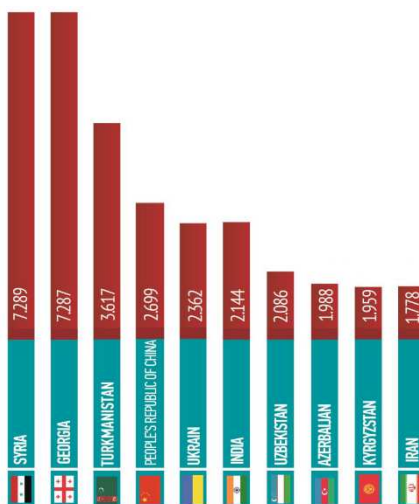
**Figure 6: Short-term residence permits issued in 2017 (Top ten nationalities)**



Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/residence-permits\\_915\\_1024\\_4745\\_icerik](http://www.goc.gov.tr/icerik6/residence-permits_915_1024_4745_icerik) [Accessed 14 April 2018].

Article 34 of the LFIP indicates that ‘a family residence permit for a maximum duration of two years at a time’ may be granted to the foreign spouse; foreign children or foreign minor children of their spouse; dependent foreign children or dependent foreign children of their spouse; of Turkish citizens’, persons within the scope of Article 28 of the Turkish Citizenship Law (Law No. 5901) or, foreigners holding one of the residence permits as well as refugees and subsidiary protection beneficiaries.

**Figure 7: Family related residence permits issued in 2017 (Top ten nationalities)**

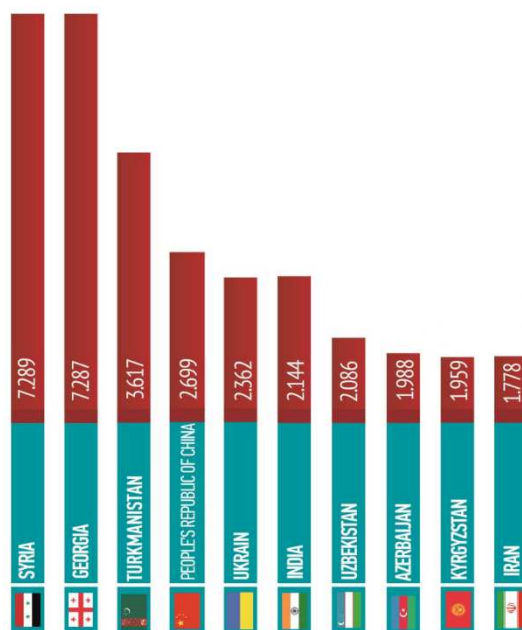


Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/residence-permits\\_915\\_1024\\_4745\\_icerik](http://www.goc.gov.tr/icerik6/residence-permits_915_1024_4745_icerik) [Accessed 14 April 2018].

Regarding the conditions that relate to foreigners who would like to apply for a family residence permit to stay with a sponsor in Turkey, in Article 35 (3), it has been noted that these people should not have entered into the marriage for the purpose of obtaining a family residence permit, should be over the age of eighteen, and should not fall within the scope of Article 7 of LFIP, which enlists those conditions for refusing the entry of a foreigner into Turkey.<sup>4</sup>

In addition to family related reasons, a portion of those foreigners who are legally in Turkey have work related residence permits. Under the International Labour Force Law (ILF), which is the main source for the procedures and the substance of the work permit related matters, there are two main categories under which work permits are broadly classified as: (1) working permission for a definite period; and (2) working permission for an indefinite period. Working permission for a definite period is valid ‘for at most one year’ and might be extended ‘up to three years, on condition of working in the same workplace or enterprise and in the same job’ (ILF, Article 10). Working permission for a definite period may be given also to the ‘spouses and dependent children, who have come together with the foreigner or afterwards, on condition that they have resided with the foreigner legally and uninterruptedly for at least five years’ (Ibid.).

**Figure 8: Work related residence permits issued in 2017 (Top ten nationalities)**



Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/residence-permits\\_915\\_1024\\_4745\\_icerik](http://www.goc.gov.tr/icerik6/residence-permits_915_1024_4745_icerik) [Accessed 14 April 2018].

Foreigners holding a work permit for an indefinite period are also legally entitled to benefit from the same rights as long-term residence permit holders (LFIP, Article 6).

<sup>4</sup> According to the LFIP, those foreigners who do not hold a passport, a travel document, a visa or, a residence or a work permit or, whose documents or permits are not genuine; 'whose passport or travel document expires sixty days prior to the expiry date of the visa, visa exemption or the residence permit' should not be allowed entry into Turkey [Article 7(1)].

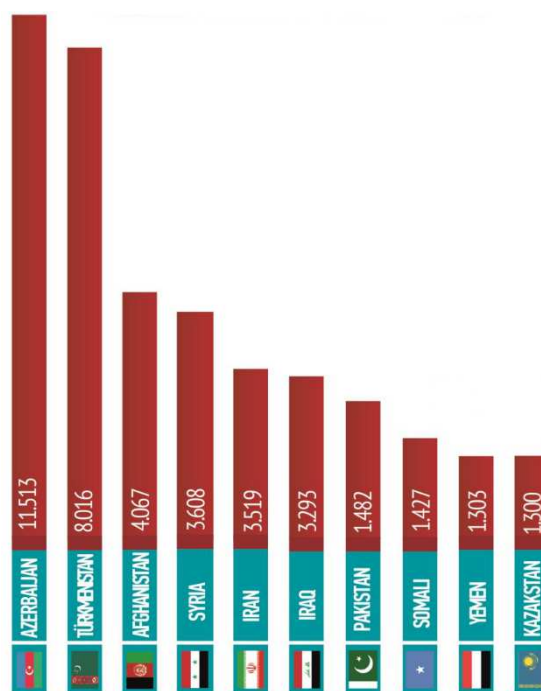


Apart from these, as mentioned at the outset of this section, other types of residence permit include student residence permit, humanitarian residence permit, and residence permit for victims of human trafficking. Among these, student residence permit is granted to those foreigners who would like to pursue primary, secondary or higher education (undergraduate, graduate or postgraduate education) in Turkey. Foreign students can also work in Turkey, if they hold a work permit but they can apply for one only after the first year of their studies, and their weekly working hours cannot exceed twenty-four hours (LFIP, Article 41). Humanitarian residence permit with a maximum duration of one year can be granted under the following conditions as described in the law (LFIP, Article 46).

Finally, victims of human trafficking can also be granted residence permits that will be valid for thirty days by the governorates to ‘allow them to break from the impact of their (negative) experience and reflect on whether to cooperate with the competent authorities’ (LFIP, Article 48). Residence permits of such kinds can be ‘renewed for six months periods for reasons of safety, health or special circumstances of the victim’, up to a maximum period of three years (ibid.).

Among these other types of visas, as seen in Figure 9, the DGMM provides open source data only about the number of student residence permits for 2017, and about the top ten nationalities that were granted this type of visa.

**Figure 9: Student residence permits issued in 2017 (Top ten nationalities)**



Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/residence-permits\\_915\\_1024\\_4745\\_icerik](http://www.goc.gov.tr/icerik6/residence-permits_915_1024_4745_icerik) [Accessed 14 April 2018].

Data on the number of humanitarian residence permits and residence permits granted to victims of human trafficking are not disaggregated. Instead, cumulative figures for all types of

residence permits issued in 2017 are available on the DGMM's web site, as seen in Figure 10.

**Figure 10: Distribution of foreigners with residence permit (as of 05.04.2018)**

PROVINCE NO	PROVINCE	TOTAL	PROVINCE NO	İLLER	TOTAL*
	GRAND TOTAL	662.591		GRAND TOTAL	662.591
1	ADANA	5.766	42	KAHRAMANMARAŞ	1.376
2	ADIYAMAN	357	43	KARABÜK	2.540
3	AFYONKARAHİSAR	1.118	44	KARAMAN	214
4	AĞRI	422	45	KARS	861
5	AKSARAY	2.075	46	KASTAMONU	2.151
6	AMASYA	419	47	KAYSERİ	3.586
7	ANKARA	55.017	48	KIRIKKALE	781
8	ANTALYA	55.572	49	KIRKLARELİ	1.187
9	ARDAHAN	352	50	KIRŞEHİR	340
10	ARTVİN	452	51	KİLİS	689
11	AYDIN	5.337	52	KOCAELİ	6.385
12	BALIKESİR	2.431	53	KONYA	6.463
13	BARTIN	300	54	KÜTAHYA	1.928
14	BATMAN	258	55	MALATYA	1.544
15	BAYBURT	147	56	MANİSA	2.141
16	BİLECİK	606	57	MARDİN	558
17	BİNGÖL	85	58	MERSİN	15.032
18	BİTLİS	106	59	MUĞLA	13.188
19	BOLU	1.388	60	MUŞ	78
20	BURDUR	546	61	NEVŞEHİR	653
21	BURSA	21.442	62	NİĞDE	852
22	ÇANAKKALE	3.985	63	ORDU	1.185
23	ÇANKIRI	230	64	OSMANIYE	400
24	ÇORUM	1.232	65	RİZE	924
25	DENİZLİ	2.872	66	SAKARYA	7.039
26	DIYARBAKIR	597	67	SAMSUN	8.800
27	DÜZCE	916	68	SİİRT	296
28	EDİRNE	2.444	69	SİNOP	384
29	ELAZIĞ	655	70	SİVAS	548
30	ERZİNCAN	440	71	ŞANLIURFA	3.028
31	ERZURUM	1.240	72	ŞİRNAK	317
32	ESKİŞEHİR	4.167	73	TEKİRDAĞ	3.066
33	GAZİANTEP	12.832	74	TOKAT	629
34	GİRESUN	1.291	75	TRABZON	3.589
35	GÜMÜŞHANE	86	76	TUNCELİ	28
36	HAKKARİ	403	77	UŞAK	2.780
37	HATAY	2.505	78	VAN	1.036
38	İĞDIR	300	79	YALOVA	8.752
39	ISPARTA	1.623	80	YOZGAT	565
40	İSTANBUL	344.585	81	ZONGULDAK	1.364
41	İZMİR	18.655			

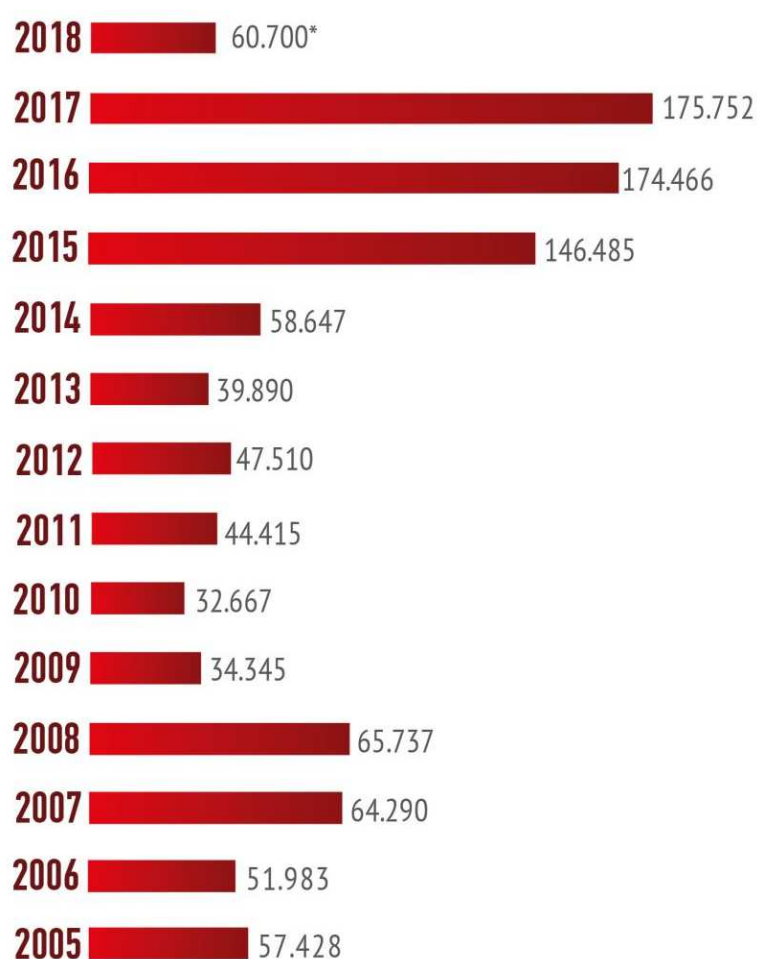
Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/residence-permits\\_915\\_1024\\_4745\\_icerik](http://www.goc.gov.tr/icerik6/residence-permits_915_1024_4745_icerik) [Accessed 15 April 2018].

## Irregular migration

Irregular migration is defined as ‘migration whereby foreigners enter into, stay in or exit from Turkey through illegal channels and work in Turkey without a permit or international protection status’ (LFIP, Article 3).

As Figure 11 shows, the number of irregular migrants apprehended at Turkish borders increased considerably in 2015. The fact that both in 2016 and in 2017, the majority of those who were apprehended at Turkish borders while trying to enter irregularly were of Syrian nationality demonstrates the connection between the deepening of the conflict in Syria and the rise in numbers of those who try to reach Turkey through irregular ways.

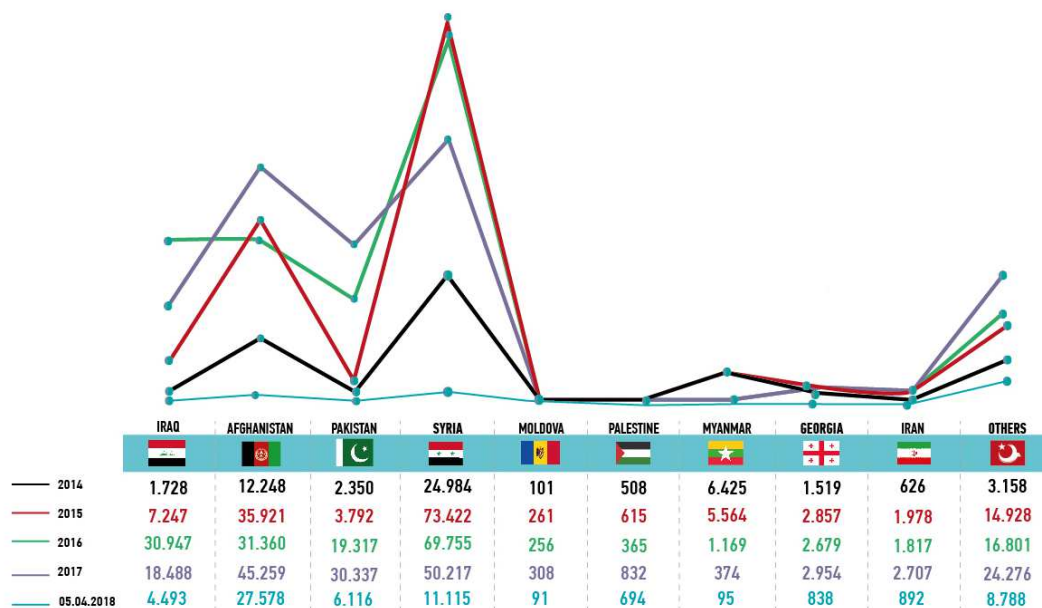
**Figure 11: Numbers of irregular migrants apprehended**



Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/irregular-migration\\_915\\_1024\\_4746\\_icerik](http://www.goc.gov.tr/icerik6/irregular-migration_915_1024_4746_icerik) [Accessed 14 April 2018]. Note: Data about 2018 covers till 14 April.

As can be seen from Figure 12, the top nationalities in terms of irregular migration are Syrians (50,127), Afghans (45,259) and Pakistanis (30,337). The sharp increase in the number of Syrians reflects the nexus between irregular and forced migration as will be discussed below in the section titled *Irregular Migration*.

**Figure 12: Distribution of nationalities of irregular migrants who were caught at the Turkish border**



Source: Directorate General of Migration Management, Available at <http://www.goc.gov.tr/icerik6/irregular-migration> 915 1024 4746 icerik [Accessed 14 April 2018].

In terms of spatial distribution, border cities observe higher apprehensions of irregular migrants.

**Figure 13: Distribution of the apprehended irregular migrants across different provinces in Turkey in 2017**

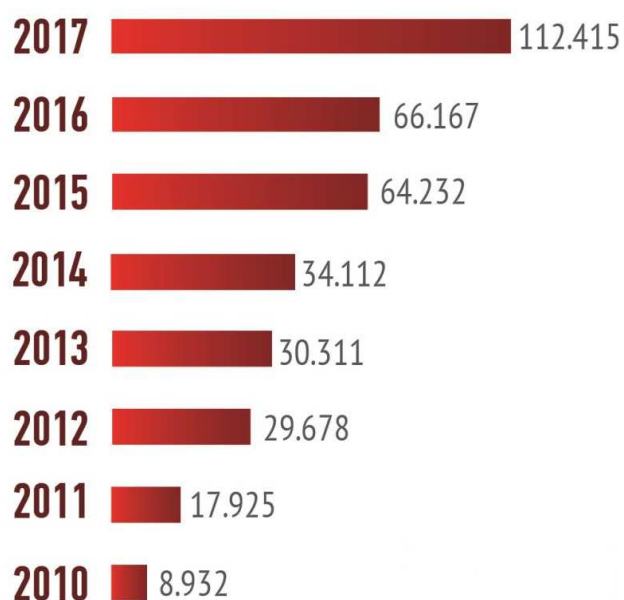


Source: Directorate General of Migration Management, Available at <http://www.goc.gov.tr/icerik6/duzensiz-goc> 363 378 4710 icerik [Accessed 14 April 2018].

## Number of applications for international protection

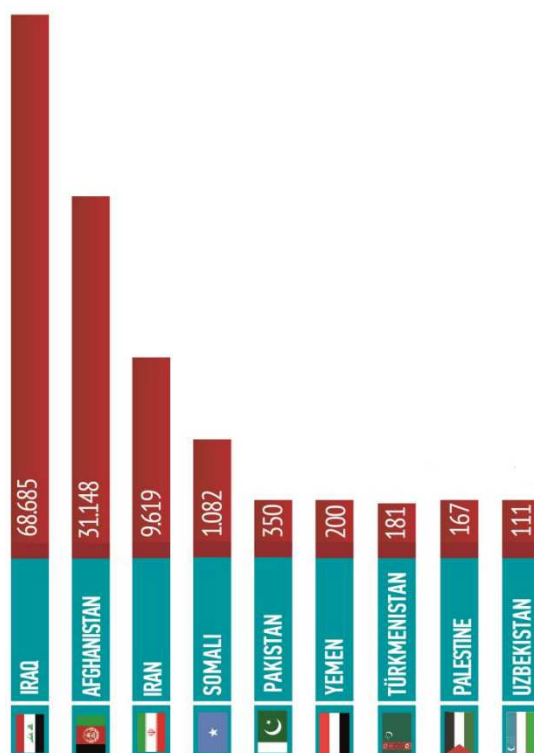
In the LFIP, international protection is defined as the status granted to ‘refugees, conditional refugees, and those needing subsidiary protection’ [Article 3(1)-r]. While a detailed account of the beneficiaries of international protection is provided under section 5 of this report, for purposes of some initial clarifications, a brief explanation of the different categories of migrants who fall under the terms of international protection is given below after the presentation of the figures. As can be seen from Figure 14, applications since 2017 doubled compared to previous years; while 2015 and 2016 figures moderate. It should be noted that the below figures do not reflect the high numbers of Syrian refugees, since they are not part of the international protection system, instead falling under the ‘temporary protection regime’ in Turkey. The percentages of acceptances and rejections are as important as the number of international protections. In 2016, out of 66,167 applications, 23,886 were resulted in positive decisions (DGMM, 2016, p.74)

**Figure 14: International protection applications by year**



Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/international-protection\\_915\\_1024\\_4747\\_icerik](http://www.goc.gov.tr/icerik6/international-protection_915_1024_4747_icerik) [Accessed 14 April 2018].

**Figure 15: Nationalities of major groups of international protection applicants in 2017**



Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/international-protection\\_915\\_1024\\_4747\\_icerik](http://www.goc.gov.tr/icerik6/international-protection_915_1024_4747_icerik) [Accessed 15 April 2018]).

As will explained under *International Protection* section, in Turkey there are three different international protection statuses, including ‘refugee status’, ‘conditional refugee status’ and ‘subsidiary protection status’. Syrian refugees are under ‘temporary protection’. The above-given Figure 15 only displays ‘international protection’, but not ‘temporary protection’, and thus Syrians are not included in these figures.

When compared with statistics on the arrivals of non-EU citizens to Turkey, more detailed data regarding the country and gender/age details of applicants international protection are available via UNHCR Turkey as summed up in Table 1. Out of the total number of 356,000 people that are registered with UNHCR (as of 30 November 2017), most are of Afghanistan nationals (44%) followed by Iraqis (43%), then Iranians (9%), Somalis (1%) and others (3%) (UNHCR, 2017). In total, out of 3.7 million people that are of concern for the UNHCR, some 3.3 million are Syrians. Yet, as persons who have fled Syria, they are subject to a separate asylum procedure as specified in the Temporary Protection Regulation (2014).



**Table 1. Breakdown by countries of origin and gender/age of the total numbers of international protection applicants (percentages) (as of 30 November 2017)**

	Total number	Children	Female	Male
• Afghanistan	157,000	29%	17%	54%
Iraq	152,000	41%	24%	35%
Iran	33,000	20%	31%	49%
Somalia	4,000	26%	38%	36%
Other Nationalities	10,000	22%	34%	44%
<b>Total</b>	<b>356,000</b>	<b>33%</b>	<b>22%</b>	<b>45%</b>

Source: UNHCR Türkiye: Kilit Veriler ve Sayılar (Kasım 2017), Available at <http://www.unhcr.org/tr/unhcr-turkiye-istatistikleri> [Accessed 15 April 2018].

In this table, countries of origin and gender/age distributions show the numbers of international protection applicants coming from Afghanistan and Iraq are quite similar. But, the majority of international protection applicants from Afghanistan are men and children, while for Iraqis, the number of children is higher than male and female applicants. In the case of Iranians and Somalis, the numbers of these groups are more balanced.

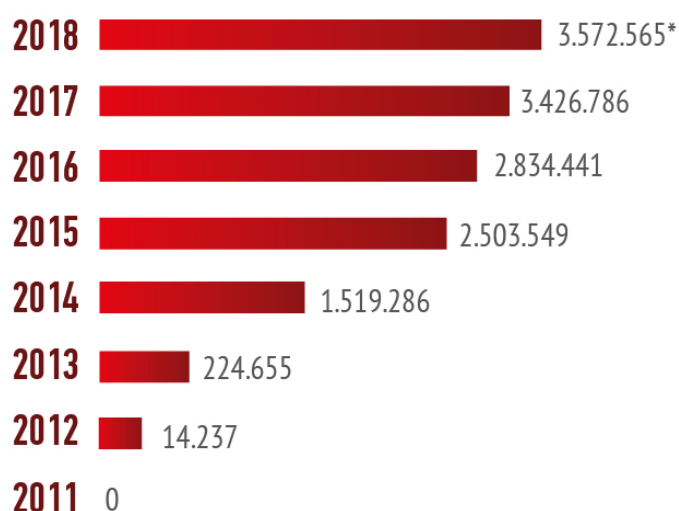
## Temporary protection

According to Article 91 of the LFIP, 'temporary protection may be provided for foreigners who have been forced to leave their country, cannot return to the country that they have left, and who have arrived at or crossed the borders of Turkey in a mass influx situation seeking immediate and temporary protection'.<sup>5</sup> As of April 2018, Syrians are the only nationals granted temporary protection status, thus the statistics will be about this nationality.

As Figure 16 displays, the difference between 2014 and 2015 is twice as large. This is due to not only to the increasing numbers of Syrians but also to the increasingly important role of registering Syrians. In April 2014, the DGMM started a new campaign with the motto 'Register and Benefit from Rights and Services' and recorded 1,097,740 Syrians both in camps and in urban areas.<sup>6</sup> This can be seen as an important factor explaining the increase in the number of Syrians under temporary protection.

<sup>5</sup> Available at [http://www.goc.gov.tr/files/files/eng\\_minikanun\\_5\\_son.pdf](http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf) [Accessed 2 March 2018].

<sup>6</sup> The statement of the Director of the DGMM at the First National Migration Research Workshop on 19th Dec. 2014, Ankara; HUGO (2014). Türkiye'deki Suriyeliler: Toplumsal Kabul ve Uyum Araştırması", Available at <http://www.hugo.hacettepe.edu.tr/HUGORAPOR-TurkiyedekiSuriyeliler.pdf> [Accessed 17 April 2018].

**Figure 16: Number of Syrians under temporary protection by year**

Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/temporary-protection\\_915\\_1024\\_4748\\_icerik](http://www.goc.gov.tr/icerik6/temporary-protection_915_1024_4748_icerik) [Accessed 15th April 2018].

In Turkey, the majority of the Syrian refugees reside in cities rather than in temporary shelters as can be seen from Figure 17.

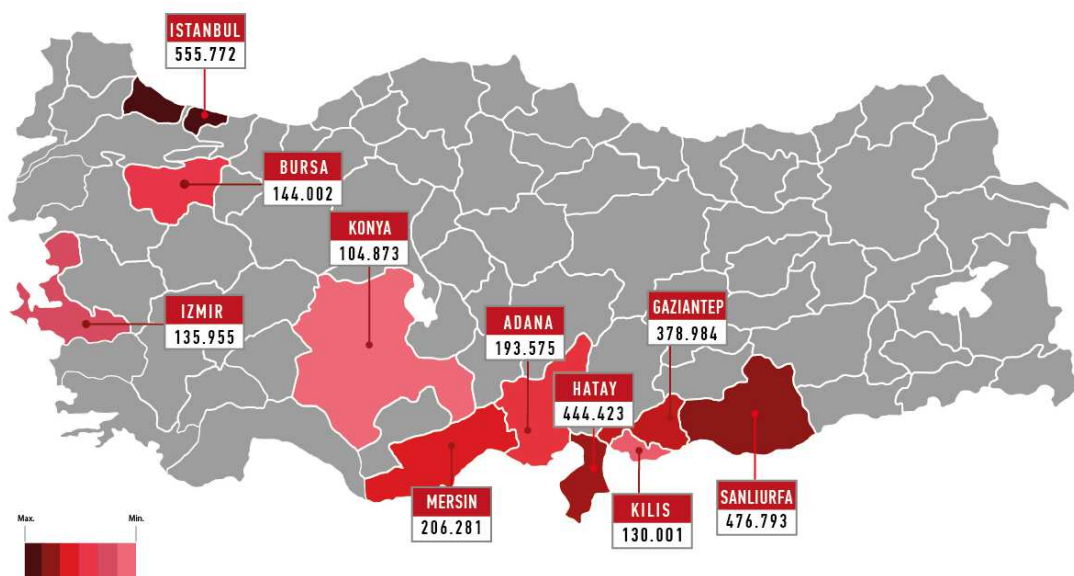
**Figure 17: Sheltered and unsheltered Syrian refugees by temporary shelter centres**

Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/temporary-protection\\_915\\_1024\\_4748\\_icerik](http://www.goc.gov.tr/icerik6/temporary-protection_915_1024_4748_icerik) [Accessed 15th April 2018].

Figure 18 displays the spatial distribution of Syrian refugees across the country. The majority reside in Istanbul, while the main border cities between Syria and Turkey (Şanlıurfa, Hatay, Gaziantep) follow it. The cities with the highest percentage of refugees, and in particular Syrians, living in temporary accommodation centres, or in other words, camps are Şanlıurfa, Kilis, Gaziantep, Kahramanmaraş, Hatay, Adana, Adıyaman, Osmaniye, Mardin and Malatya (DGMM, 2018).



**Figure 18: Distribution of Syrian refugees in the scope of temporary protection by top ten province**



Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/temporary-protection\\_915\\_1024\\_4748\\_icerik](http://www.goc.gov.tr/icerik6/temporary-protection_915_1024_4748_icerik) [Accessed 15th April 2018].

The highest numbers both of migrant with international protection and temporary protection status appear in Istanbul. However, since February 2018, refugees arriving from Syria are no longer allowed to register in Istanbul. The DGMM explained the reasoning behind this decision as a concern for ensuring that services offered to Syrians will be continued to be provided in an 'efficient and sustainable' manner, and it was noted those Syrians who had registered before the ban decision was taken, will not be affected by this recent development (Sözcü, 2018). The province of Hatay has also been suspended registration of temporary protection beneficiaries due to the high number of persons already registered as it is the case for Istanbul (AIDA, 2018, p.16)

**Table 2. Distribution of Syrian refugees in the scope of temporary protection by temporary shelters centres (as of 5 April 2018)**

TEMPORARY SHELTER CENTERS	TOPLAM
SANLIURFA	79.492
GAZIANTEP	24.042
KILIS	24.790
KAHRAMANMARAS	17.147
MARDIN	2.739
HATAY	17.265
ADANA	25.644
ADYAMAN	9.080
OSMANIYE	14.672
MALATYA	9.453
<b>TOTAL</b>	<b>224.334</b>
<b>UNSHeltered SYRIAN REFUGEE POPULATION BY CENTERS</b>	<b>3.348.231</b>
<b>TOTAL SYRIAN REFUGEE POPULATION IN COUNTRY</b>	<b>3.572.565</b>

Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/temporary-protection\\_915\\_1024\\_4748\\_icerik](http://www.goc.gov.tr/icerik6/temporary-protection_915_1024_4748_icerik) [Accessed 15 April 2018].

In terms of gender distribution, the Syrian refugee population in Turkey appears as quite balanced with a slightly higher male population. In terms of age distribution, the highest age group is 19-24, which followed by 0-4 and 5-9 as displayed in Table 3.

**Table 3. Distribution by age and gender of registered Syrian refugees recorded by taking biometric data**

AGE	MALE	FEMALE	TOTAL
<b>TOTAL</b>	<b>1.937.722</b>	<b>1.634.843</b>	<b>3.572.565</b>
<b>0-4</b>	251.662	234.892	486.554
<b>5-9</b>	247.849	232.375	480.224
<b>10-14</b>	197.488	181.967	379.455
<b>15-18</b>	159.779	129.432	289.211
<b>19-24</b>	319.126	227.281	546.407
<b>25-29</b>	200.711	145.409	346.120
<b>30-34</b>	167.824	125.022	292.846
<b>35-39</b>	117.903	92.946	210.849
<b>40-44</b>	79.020	71.365	150.385
<b>45-49</b>	59.623	55.517	115.140
<b>50-54</b>	48.134	46.052	94.186
<b>55-59</b>	32.234	32.214	64.448
<b>60-64</b>	23.225	23.809	47.034
<b>65-69</b>	15.082	15.220	30.302
<b>70-74</b>	8.402	9.347	17.749
<b>75-79</b>	4.793	5.775	10.568
<b>80-84</b>	2.703	3.481	6.184
<b>85-89</b>	1.419	1.768	3.187
<b>90+</b>	745	971	1.716

by the date of 05.04.2018

Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/temporary-protection\\_915\\_1024\\_4748\\_icerik](http://www.goc.gov.tr/icerik6/temporary-protection_915_1024_4748_icerik) [Accessed 15 April 2018].

Finally, Table 4 displays the impact of the EU-Turkey Statement of 18 March, 2016.<sup>7</sup> On this date, Turkey agreed to accept the rapid return of all migrants not in need of international protection who had crossed from Turkey into Greece and to take back all irregular migrants intercepted in Turkish waters (Article 1). With the ‘one-to-one’ formula, the Statement also foresaw that for every Syrian returned to Turkey from the Greek islands, another Syrian would be resettled in EU (Article 2). Both sides agreed that all new irregular migrants crossing from Turkey to the Greek islands as of 20 March 2016 would be returned to Turkey. The below given figure displays the number of Syrians who have left the country and resettled EU member states.

**Table 4. Number of Syrians who left to the country in the scope of the one-to-one policy**

COUNTRY	TOTAL
GERMANY	4.653
HOLLAND	2.609
FRANCE	1.552
FINLAND	1.002
BELGIUM	823
SWEDEN	742
SPAIN	429
ITALY	332
AUSTRIA	213
LUXEMBOURG	206
PORTUGAL	123
LITHUANIA	84
LATVIA	76
CROATIA	59
ESTONIA	46
MALTA	17
<b>GRAND TOTAL</b>	<b>12.966</b>

Source: Directorate General of Migration Management, Available at [http://www.goc.gov.tr/icerik6/temporary-protection\\_915\\_1024\\_4748\\_icerik](http://www.goc.gov.tr/icerik6/temporary-protection_915_1024_4748_icerik) [Accessed 15 April 2018].

<sup>7</sup> The EU-Turkey Statement, 18 March 2016, Available at <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf> [Accessed 15 April 2018].

## 2- The socio-economic, political and cultural context

### A Brief description of Turkish society

As the end of 2017, Turkey's population was recorded as 80,811,000. Turkey has a young population cohort. 23.6 percent of the population is between 1-14 years old, while 67.9 percent is between 14-65 years old. The percent of those over 65 years old is 8.5. The population growth rate is estimated to be 12.4 percent. The life expectancy at birth is 78 years old (TÜİK, 2018). Almost 74 percent of population live in urban areas (Statista 2018).

In terms of its population composition, Turkey is a multi-ethnic, multi-cultural and multi-denominational country, housing dozens of different Muslim and/or non-Muslim ethnic groups. It is often said that nearly 80 percent of the country's population is Turkish, and that, more than 90 percent is Muslim. However, there are no exact figures for the population size of non-Turkish ethnic groups as ethnic identity is not asked on national census including international surveys such as the World Values Survey due to political sensitivities in the country. After Turks, the largest ethnic group in Turkey is Kurds who have a distinct mother tongue. Other ethnic minorities include Romas, Arabs (Sunni Arabs, Alevi Arabs or Nusayri and Christian Arab), Caucasus groups, Albanians, Pomaks, Circassians and Azari Turks. Religious minorities include Alevis (Muslims), Armenians (Christians), Jews, Greeks (Christians) and Assyrians (Christians). Linguistic minorities include Zazas and Laz. Historically, many of these minority groups have gone through a Turkification process, whereby they have assimilated into Turkish culture and language (Karimova and Devereil, 2001; Mutlu, 1995).

The results of the World Values Survey's 6<sup>th</sup> Wave (2010-2014) can provide insights about the cultural map of the country and common perceptions about foreigners and immigrants. According to the Survey, 92.7 percent of survey respondents in Turkey (N=1605) reported that religion is 'very important' or 'rather important' in their life. Only 47.4% reported politics to be important in the same way. 99 percent expressed their religion as Muslim. While 97.8 percent believe in God, 83.5 percent perceived themselves to be religious people. Not only religious values but also nationalist and patriotic values are very strong in the country. While 91.3 percent are very and quite proud of their nationality, 77.5 percent would be willing to fight for their country if there is a war (WVSW 6, 2010-2014).

The same survey also gives insights about the native population's perceptions of foreigners and immigrants. It should be noted among 1605 survey respondents, only 32 are immigrants (2%) and only 4 do not have Turkish citizenship, while some have an immigrant mother (124) or father (140). In this context, 35.8 percent of them stated that they would not like to have people of a different race as neighbours, similarly 36.8 percent do not want people of different religion as their neighbours. 30.5 percent noted that they would not like to have immigrants and foreign workers as neighbours. In a similar vein, 30 percent do not feel comfortable with neighbours speaking another language (WVSW 6, 2010-2014).

In terms of developments statistics, according to the 2016 Report of the United Nations Development Program (UNDP), Turkey's Human Development Index (HDI) value is 0.767, which puts the country in the high human development group, placing it at 71 out of 188

countries and territories.<sup>8</sup> The UNDP data point out that while between 1990 and 2015, Turkey's HDI value has increased by 33.2 percent (from 0.576 to 0.767), during the same time period its gross national income per capita increased by 78.2 percent (UNDP, 2017). When compared with European and Central Asian countries, Turkey's 2016 HDI of 0.767 is above the average of 0.746 for countries in the high human development group and above the average of 0.756 for countries in Europe and Central Asia. The total labour force participation of the country was recorded as 31,643,000 in 2017, making 52.8 percent. However, unemployment in Turkey has been on an upward trajectory since 2012 and reached to the 10.9 percent in early 2018 which is much higher than the average of the members of Organization for Economic Co-operation and Development (OECD) (OECD 2017; TÜİK İşgücü, 2018).

In terms of its Gender Development Index (GDI), the female HDI value for Turkey is 0.724 in contrast with 0.797 for males, resulting in a GDI value of 0.908. Turkey has a Gender Inequality Index value of 0.328, ranking it 69 out of 159 countries in the 2015 index. Female participation in the labour market is 30.4 percent compared to 71.4 for men. Apart from that, for every 100,000 live births, 16 women die from pregnancy related causes; and the adolescent birth rate is 27.6 births per 1,000 women of ages 15-19 (UNDP, 2017).

The details of the political system will be elaborated below in the section on *Organization of the State*. Here it is important to note that Turkey has a multiparty system. The main political cleavage has been between the laicist and conservative-Islamist cleavage (Özbudun, 2014). However, neither this cleavage nor the less intense right-left cleavage traditionally reflect on discourse on migration as the topic has not been considered a politically pressing issue. The mass migration of Syrians since 2011, which is a unique experience in Turkey's immigration history due to the sheer numbers and protracted stay, can expect to make the migration a politically salient issue for political parties, challenging the previous undifferentiation across the political spectrum.

The Justice and Development Party (AKP-AK Party) has been the ruling party since 2002. As the party has controlled an absolute majority in the parliament, it has a dominant legislative power. The opposition parties holding seats in the parliament include Republican People's Party (CHP), Nationalist Action Party (MHP) and the People's Democracy Party (HDP). In 2014, for the first time president, Recep Tayyip Erdoğan was elected president with the popular vote for five-year term. In April 2017, Turkish citizens approved a change to the political system in which the substantial power of the parliament is transferred to the president. The next presidential election and parliamentary elections are scheduled for 2019; however, they are called earlier than expected as on 24 June, 2018. The Turkish political system is on the eve of transition from a parliamentary system to a presidential system that with unique characteristics as it will be discussed in the Section 3 (Musil and Demirkol, 2018).

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<sup>8</sup> UNDP, 'Turkey ranks 71st by Human Development Index', published on 21 March 2017, Available at <http://www.tr.undp.org/content/turkey/en/home/presscenter/pressreleases/2017/03/turkey-ranks-71st-by-human-development-index.html> [Accessed 7 March 2018].

## Brief migration history

Turkey plays a part in the migratory routes of Europe, Asia, the Middle East and North Africa. The country was categorized as country of emigration in the early Republican era; however, since its establishment, Turkey has experienced different phases and diverse migratory movements as a country of emigration, immigration and asylum (Erdoğan and Kaya 2015). Taking ‘time and space’ into consideration as well as the major political, economic and social changes in the history of Turkey, İçduygu (2010, p.2) argues that the migration history of Turkey can be studied in four periods as follows:

1. From 1923 to 1950: The early Republican period during which the nation state was being constructed under the one party rule;
2. From 1950 to 1980: The period of the multi-party regime and the strengthening of the nation state;
3. From 1980 to 2000: The period of democratic consolidation and economic liberalization;
4. From 2000 to present days: The period in which the EU candidacy and its effects are becoming more significant.

According to İçduygu (2010) Turkey’s immigration history starts with its status as a successor state of the Ottoman Empire in 1923 and this government-supported period lasted until the 1950s. During this period, the space dimension was mainly Balkans and mainly immigrants were welcomed with a Turkish identity as a consequence of the homogenization of population policies (Ibid). In this framework, the Exchange of Greek and Turkish Populations regulation of the Lausanne Treaty (1923) resulted with emigration of its non-Muslim population in response to the immigration of Muslims from the Balkans (Baldwin-Edwards, 2006). At least 1.3 million Greeks were expelled from Turkey and some 500,000 Muslims from Greece were received (Ibid., p.2).

During the period of 1950-1980, both time and space dimensions were changing and emigration characteristics were getting notable as Turkey sent labour migrants to Europe for the solution (EUMAGINE, 2010, p.3). This emigration largely began with the arrival of nearly 800,000 labourers in Germany, the Netherlands, and France between 1961 and 1974. The regulated labour migration has combined with family reunification, illegal entries and high numbers of refugees and asylum seekers from Turkey in the 1980s and 1990s. As a result, more than 5 million emigrants from Turkey live abroad, and almost 4 million of them concentrated in Western European countries (Sahin-Mencutek and Baser 2017, p.2). Emigration flows have an impact on Turkey’s citizenship legislation, as Turkey accepted dual and multiple citizenships in 1981 (Law Number 403) with an amendment to the Turkish Citizenship Law of 1964, Article 2383 (Ibid. p.8). However, the emigration does not necessarily led to changes in immigration law.

Relations with the European Economic Community started with the signature of the Ankara Agreement (1963). Following the oil crisis in the 1970s and decreasing demand regarding Turkish labour migrants, new destinations for labour immigration appeared in Middle Eastern, North African, as well as the Commonwealth of Independent States countries, which created a ‘space’ change in terms of migration movements from Turkey. During this period, special bilateral agreements on labour recruitment had been signed with several destination countries.<sup>9</sup> Thus, the European labour migration process after the Second World War can be

<sup>9</sup> Available at <http://www.abgs.gov.tr/index.php?p=117&l=2> [Accessed 15 April 2018].



seen as the blue-print for this period. In the post-1980 period, the country hosted a sizable number of asylum seekers and mass migration, movements mainly from Asian, Middle East and African countries. In addition, during this period, Turkey became a source country for asylum with the period predominated by the Kurdish population and asylum, mainly in Europe (İçduygu, 2010, 2012).

Due to the specific focus of RESPOND and this report, mass migration from the Middle East will be discussed in details. Starting from 1980s, the country experienced an influx of refugees and irregular and transit migrants, particularly from the Middle East as well as from Africa and Asia. The period started with an immigration flow from Afghanistan in 1979 and continued with mass influxes from the Middle East. The first mass influx from the Middle East started with the Iranians fleeing from the new regime in Iran after 1979. As similar to the case of Syrians, Turkey adopted an open-door policy, enabling Iranians to enter the country without a visa and stay temporarily. According to some informal data, from 1980 to 1991, a total of 1.5 million Iranians benefited from this policy (Latif, 2002, p.9). The following three major influxes came from Iraq in 1988 and 1991. Due to the war between Iraq and Iran, 51,542 Iraqis asked for asylum in Turkey (Kaynak, 1992, p.25). In the same period, another population movement came to Turkey due to the population exchange between Turkey and Bulgaria in 1989. Between 1992 and 1994 Turkey became a destination country for some Bosnian Muslims who sought temporary refuge in Turkey and Kosovo Albanians in 1999 (UNHCR, 2003, p.2).

The second flow from Iraq was the consequence of the First Gulf War and in March 1991, 460,000 Iraqis, most of whom were Kurds or Turkmens arrived at the border.<sup>10</sup> But they were not allowed into the country and Turkey did not grant *de jure* refugee status, but considered them to be *de facto* refugees (Gökalp Aras and Şahin Mencütek, 2015). The year 2011 marked another mass migration towards Turkey from the Middle East, namely from Syria as this report describes in detail. In the same time period (post 1980), after the dissolution of the Soviet Union in 1991 into 15 post-Soviet states; Turkey emerged as a destination for migrants from Eastern Europe and the former Soviet Union, as these new migrants envisage Turkey as a gateway to a new job, a new life, and a stepping stone to employment in the West (IOM, 2008, p.11).

Due to the changing country profile of Turkey and increasing importance of migration and asylum as well as the accession process with the EU, since 2000 Turkey has faced a new period. The EU dimension officially started in Turkey with the Helsinki Summit of the European Council in December 1999 and since then has been changing dynamically. Except for the early changes in asylum policies in the mid-1990s, the EU has played the central role in reforming Turkey's immigration and asylum policy (among others; Lavenex, 2002; İçduygu, 2011a; Tolay, 2012). The main issues in terms of migration and mobility in EU-Turkey relations have always been irregular transit migration of third-country nationals through Turkey en route to Europe (among others; İçduygu 2003 and 2011b; Kirişçi, 2003; Gökalp Aras 2013; Aydın Düzgit and Tocci, 2015; İçduygu and Köşer Akçapar, 2016).

Today, Turkey's migration history is continuing with mixed migratory flows and the diverse migration categories with a complex migration system composed of several different migrant

<sup>10</sup> This figure is available at <https://www.revolv.com/main/index.php?s=iraqis+in+Turkey> [Accessed 29 April 2018].

groups, including irregular migrants, transit migrants, asylum-seekers, refugees and regular migrants (İçduygu, 2011, p.4).



### **3- The Constitutional Organisation of the state and constitutional principles on immigration and asylum**

This section reviews the legal and political structure of the Turkish state. It briefly maps its organizational structure, fundamental characteristics, constitutional principles, administration of immigration and asylum, and the role of judiciary in order to lay the groundwork for examining the relevant legislative and institutional frameworks in the following section.

#### **Organizational structure and fundamental characteristics of the Turkish State**

Turkey's current organizational structure and fundamental principles are derived from its Constitution dated 1982. Being the third constitution of the Turkish Republic since its establishment in 1923, the 1982 version of Constitution was created after the 1980 coup d'état and reflected a somewhat restrictive perspective especially towards personal freedoms (Bayraktar, 2012, p.314). However, the Constitution was amended several times to enhance its organizational structure as well as to improve the dimension of the rights and freedoms of individuals.

On April 16, 2017, Turkish citizens voted in a constitutional referendum that brought about substantial alterations to the existing system by transforming the current parliamentary structure into a quasi-presidential one. Although the structural change is anticipated to take place in 2019, certain amendments have already been implemented. The following information is based on the currently enforceable provisions of the Constitution.

#### **Organization of the State**

To understand immigration and asylum, it is of importance to understand how separation of powers and general policy-making occurs in Turkey. The following subsection provides basics on the general organization of state organs and principles in policy making.

##### **General organization**

Pursuant to the Constitution of Turkey, the state organs are formulated to act by according to the principle of separation of powers. Legislative power is vested in the Grand National Assembly (Const., Article 7), executive power is exercised by the President and the Council of Ministers (Const., Article 8) and finally judicial power is carried out by the independent and impartial courts (Const., Article 9).

The Turkish Grand National Assembly (TGNA-Parliament) consist of 550 members (of parliament-MPs) who are designated in elections that are held every four years.<sup>11</sup> Significant duties of the TGNA include; enactment, amendment and repeal of laws, approval of budget proposals and the proposal of the final accounts, decisions on printing currency, declaration of war, marital law or state of emergency, ratification of international agreements, supervision

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<sup>11</sup> The scope and the period of elections for TGNA is subject to the amendment of 16.04.2017; Act. No. 6771. According to the amendment (which is not currently enforceable), elections of TGNA and Presidential elections will be held every five years on the same date.

of the Board of Ministers and ministers, authorizing the Board of Ministers to issue decrees with the force of law.

Given that it is controlled by the President and the Council of Ministers, currently the executive power in the Turkish state has a dual structure.<sup>12</sup> The President is the head of state and represents the Republic of Turkey and the unity of the Turkish nation. The Council of Ministers; however, is composed by the Prime Minister who is designated by the President among the members of the TGNA, and by the ministers who are nominated by the Prime Minister and appointed by the President.

The independence of the courts and the security of tenure for judges and prosecutors are two main principles established by the Constitution for the functioning of judicial power (Const., Article 138 and 139). Legislative and executive organs and the administrations should comply with court decisions; these organs and the administration should neither alter them in any respect, nor delay their execution (Const., Article 138).

### **Organizational structure of the administration**

According to the Turkish Constitution, the administration should be considered as a whole with its formation and functions and should be regulated by law (Const. Article 123). The organization and functions of the administration are based on the principles of centralization and decentralization, affecting the organic and functional aspects of administration (Günday, 2013, p.65).

In terms of central administrative structure, Turkey is divided into provinces by geographical location, economic conditions, and public service requirements; provinces are further divided into lower levels of administrative districts.<sup>13</sup> The administration of the provinces is based on the principle of devolution of powers. The central administrative authority is composed mainly of ministries, each of which is responsible for conducting and providing certain public services. Policies, funding and the processes of conduction of public services are planned by the ministries at a central level. The provincial authorities on the other hand serve as extensions of the central authorities. The responsibility of these authorities solely consists in following the orders of the central authority (Gözler and Kaplan, 2012, p.754).

The decentralization in Turkish administration, however, consists of two main divisions. There is territorial decentralization and service-based decentralization. Under territorial decentralization, there is a tripartite system dedicated to local administrations. Local administrations subject to decentralization are public corporate bodies established to meet the common local needs of the inhabitants of three geographical areas; provinces, municipal districts and villages. Their principles of constitution and decision-making organs are elected by the electorate and determined by law (Const., Article 127). Apart from these local administrative bodies, some public legal entities are established to carry on certain public

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<sup>12</sup> This dual structure is subject to change according to the amendment of 16.04.2017; Act No. 6771. The amendment regulates the President as the sole body to use the executive power. However, it is not currently enforceable and stipulated to come into force when the President starts his/her term following an election which covers both the President and the Parliament (see supra note 12).

<sup>13</sup> Turkey is divided into 81 provinces and, under these, 892 districts, Available at <https://portal.cor.europa.eu/divisionpowers/countries/Candidates/Turkey/Pages/default.aspx> [Accessed 3 March 2018].

services which require technical knowledge and expertise. These entities are the ones which constitute the service-based decentralized structure of the administration.

## **Fundamental characteristics of the State**

According to the Constitution, the Republic of Turkey is a democratic, secular and social state governed by rule of law, with notions of public peace, national solidarity and justice, respecting human rights and, loyalty to the nationalism of Atatürk, the founder of the Republic (Const., Article 2). The preamble of the Constitution further refers to the existence of the Turkish state as an honourable member with equal rights in the family of world nations and highlights the determination of the Turkish state to attain the highest standards of contemporary civilization.<sup>14</sup>

## **Constitutional principles related to immigration and asylum**

By stating that '[e]veryone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable' (Const. Article 12) and that '[e]veryone is equal before the law (...)', the Turkish Constitution, refers to the principle of equality between foreigners and citizens in terms of fundamental rights. The majority of rights under the Constitution are designated for 'everyone', including foreigners. However, there are a few rights which are exclusively safeguarded only for the citizens, such as the right to vote, to be elected and to engage in political activities.

The rights which fall into the majority of the constitutional scope in terms of being attributed to foreigners as well as citizens, may also be limited under some circumstances. However, limitation of the fundamental rights of foreigners is considered an "exception" in Turkish law and should be explicitly designated by law. Hence, the Constitution (Article 16) sets two conditions for the application of the aforementioned exception. First, the restriction must be made by a 'law' (an act of the Parliament), and second, the restriction must be 'compatible with international law'.

Although the right to asylum is not regulated under the Constitution, the right to life and prohibition of torture is guaranteed for 'everyone' (Const., Article 17) enabling a constitutional protection from *refoulement* for foreigners.

The Constitution also provides a legal safeguard for the application of international treaties to which Turkey is a signatory party. International agreements duly put into effect have the force of law (Const., Article 90). (Const., Article 90). However a major difference between laws that are enacted through Parliament (domestic laws) and the international agreements that are duly put into effect is that, international agreements cannot be challenged before the Constitutional Court on the ground of unconstitutionality whereas domestic laws can (Const., Article 90). In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements prevail (Const., Article 90).

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<sup>14</sup> Preamble of the Turkish Constitution (as amended on July 23, 1995; Act No. 4121), para. 2.

## Organizational structure of the Administration of Immigration and Asylum

In 2013, with the introduction of LFIP, Turkey's first law on foreigners and international Protection, which directly deals with immigration and asylum, Turkish asylum law entered into a new era.<sup>15</sup> One of the most significant reflections of this era is the establishment of the Directorate General of Migration Management (DGMM) which is a civil public institution responsible for immigration and asylum issues. The DGMM was established under the Ministry of Interior (MoI) to carry out migration policies and strategies, ensure coordination among relevant agencies and organisations, and carry-out functions and actions related to the entry into, stay in and exit from Turkey for foreigners as well as their removal, international protection, temporary protection and the protection of victims of human trafficking (LFIP, Article 103). Hence, the governance of the immigration and asylum area, is mainly subject to centralization.

On the other hand, local administrations are able to contribute to the conveyance of certain services to asylum seekers and immigrants which do not fall within the exclusive jurisdictional scope of the central authority. Services which are carried out by local administrations are mainly related to integration issues (LFIP, Article 96). Hence, in practice some municipalities actively take part in such activities, where some are passive.<sup>16</sup>

## Constitutionality review of the applicable legislation on immigration and asylum

Turkey is a signatory party to the 1951 Convention and its additional protocol in 1967. However, Turkey has a geographical limitation on the refugee definition of the Convention and recognizes the refugee status only for those who meet the criteria of the Convention definition due to events happening in European countries.<sup>17</sup> Pursuant to article 90 of the Turkish Constitution, the 1951 Convention is considered to be part of Turkish law and is directly applicable in domestic law without being subject to constitutionality review. This is also the case for other (human rights) conventions such as the European Convention on Human Rights.

In addition to the 1951 Convention and other relevant (human rights) conventions, the main piece of legislation which drives the area of immigration and asylum is the LFIP. The

<sup>15</sup> For a comparison between Turkey's past practices and the developments in the new era, see Öztürk, N.Ö.: 'Reflections of the Past, Expectations for the Future: a Legal Analysis on the Development of Asylum Law in Turkey', *Research and Policy on Turkey*, (2017) 2:2, pp. 192-209 (Reflections).

<sup>16</sup> Article 13 of the Law on Municipalities (Law Nr. 5393), enables the municipalities to provide services to enhance social and cultural coherence among all local residents. Pursuant to the aforementioned provision, all residents also have the right to utilize the aids supplied by the municipalities. Given that this provision does not make any distinction between foreigners and citizens, immigrants and asylum seekers are also considered to be eligible to enjoy such services and aids. For a detailed study on the responsibilities of municipalities related to this matter, specifically for the Syrian refugees in the city of İzmir, see, Çamur, A.: "Suriyeli Mülteciler ve Belediyelerin Sorumluluğu: İzmir Örneği", *Bitlis Eren Üniversitesi Sosyal Bilimler Enstitüsü Dergisi*, (2017), 6: 2, pp. 113-129.

<sup>17</sup> LFIP [Art. 3(1)(b)] defines the term European countries as follows: "[m]ember States of the Council of Europe as well as other countries to be determined by the Council of Ministers."

LFIP came into force in 2014, following its enactment in 2013. It regulates provisions for foreigners in general as well as for applicants and beneficiaries of international protection. Issues which are directly or indirectly related to the area of immigration and asylum are also designated by dispersed laws.<sup>18</sup> All laws enacted by Parliament are subject to constitutional review. This review may be conducted either through the process of action for annulment or by way of contention of unconstitutionality.<sup>19</sup> Action for annulment can be requested before the Constitutional Court by the President of the Republic, parliamentary groups of the party in power and of the main opposition party and a minimum of one-fifth of the total members of the TGNA. Contention of unconstitutionality on the other hand, is initiated by general administrative courts and any party involved in a case being under scrutiny before a court. Some provisions of the LFIP were brought before the Constitutional Court on several occasions by administrative courts to be challenged on the basis of unconstitutionality, however, none of these applications resulted in the annulment of the relevant provisions.<sup>20</sup>

Secondary administrative regulations (by-laws) constitute the second tier of main legal instruments in the area of immigration and asylum. Implementation by-laws of relevant laws fall within this category. The Temporary Protection By-law is the most significant of these instruments issued by the Council of Ministers to specifically govern essential matters of temporary protection. Pursuant to the Constitution, the secondary regulations (by-laws) should ground the laws (*secundum legem*) and should not be contrary to them (*intra legem*) (Const. Art. 124). By-laws which are not consist with these two principles would be subject to annulment by the Council of State (*Danıştay*).

Since the mid-2016, some amendments and additions were made in some legislation on immigration and asylum through state of emergency decrees issued by the Council of Ministers. Although some of these amendments were questioned on the basis of unconstitutionality especially in terms of the right of effective remedy and the effective application of *non-refoulement*<sup>21</sup>, they cannot be reviewed by the Constitutional Court, due to the fact that the Court had rejected applications for the review of the unconstitutionality of such decrees, based on the lack of jurisdiction.<sup>22</sup> In addition, while some Administrative Courts have

<sup>18</sup> E.g., issues related right to work for foreigners is mainly regulated under International Labour Force Law (Law Nr. 6735), some issues related to entry into country are regulated under Passport Law (Law Nr. 5682).

<sup>19</sup> For more information about the constitutionality review process, see, The Constitutional Court of the Republic of Turkey, Available at <http://www.constitutionalcourt.gov.tr/inlinepages/proceedings/ConstitutionalityReview.html> [Accessed 18 April 2018].

<sup>20</sup> See; Case No (E). 2015/36, Decision No.(K) 2015/87, Date (T) 18.10.2015; E. 2016/29, K. 2016/134, T. 14.07.2016; E. 2016/38, K. 2016/34, T. 05.05.2016; E. 2016/37, K. 2016/135, T. 14.07.2016. Decisions are accessible in Turkish, Available at [www.anayasa.gov.tr/icsayfalar/kararlar/kbb.html](http://www.anayasa.gov.tr/icsayfalar/kararlar/kbb.html) [Accessed 18 April 2018].

<sup>21</sup> See; Görendağ, V.: 676 Sayılı KHK ile Mülteci Hukukunun Temel İlkeleri Askıya Alınıyor, Uluslararası Af Örgütü/Blog 2016, Available at <https://www.amnesty.org.tr/icerik/116/2011/676-sayili-khk-ile-multeci-hukukununtemel-ilkeleri-askiya-aliniyor> [Accessed 18 April 2018] and Öztürk, N.Ö.: “Geçici Korumanın Uluslararası Koruma Rejimine Uyumu Üzerine Bir Değerlendirme”, AÜHFD, (2017), 66:1, pp. 246, 247.

<sup>22</sup> See; the summary of the rationale of the Court's decision, available at <http://www.anayasa.gov.tr/icsayfalar/basin/kararlarailiskinbasinduyurulari/genelkurul/detay/21.html> (Accessed 18 April 2018).



halted deportations in some cases<sup>23</sup>, the non-refoulement principle is not uniformly applied in Administrative Court reviews (AIDA, 2016, p.15). Also, the Constitutional Court has issued interim measures to prevent deportations where a risk of refoulement has been identified (Ibid.).

## Role of judiciary in the interpretation and definition of applicable legislation

The Turkish Constitution enables and safeguards the recourse to judicial review against all actions and acts of administration (Const., Article 125). Therefore, all administrative decisions about the area of immigration and asylum are subject to judicial review by administrative courts. Since the coming into force of the LFIP, administrative courts have rendered some decisions which enlightened certain concepts or procedures, especially related to the area of asylum law in terms of definition and interpretation.<sup>24</sup> However, considering the lack of specialized immigration and/or asylum courts and the fact that the current asylum system in Turkey is quite new, courts do not have concrete experience in reviewing cases related to asylum. Considerable time is needed to meet a more mature case-law.<sup>25</sup>

Individual applications are allowed to be made to the Constitutional Court since 23 September 2012<sup>26</sup> for the violation of fundamental rights and freedoms secured under the Constitution, which fall into the scope of the European Convention on Human Rights.<sup>27</sup> Foreigners are eligible to file applications as long as the fundamental rights in question are

<sup>23</sup> See AIDA Report 2018 for the cases of Administrative Court of Istanbul, Decision 2016/2765, 29 December 2016. See also Decision 2016/2646, 21 December 2016; Decision 2016/2593, 16 December 2016; Decision 2016/2535, 7 December 2016; Decision 2016/2542; Decision 2016/2344, 24 November 2016; Decision 2017/233, 15 February 2017, Available at <http://www.asylumineurope.org/reports/country/turkey> [Accessed 27 April 2018].

<sup>24</sup> Some examples include the interpretation of the standard of proof for the subsidiary protection determination and clarifications on the assessment of country of origin information for international protection applicants. For further information on this matter see; Öztürk, Reflections, p.200.

<sup>25</sup> Ibid.

<sup>26</sup> In 2010, an amendment was made to the Constitution to enable individual applications to be submitted to the Constitutional Court on human rights violations caused by natural persons or institutions that execute public power. In order to apply to Constitutional Court on such grounds, the decisions or actions that are claimed to be in violation, should be finalized. Therefore the applicant should have sought all judicial remedies available against these actions or decisions before applying to the Constitutional Court. Further, in 30.03.2011, The Law on Establishment and the Judicial Procedure of the Constitutional Court (Law No. 6215) was enacted. According to the Provisional Article 1 of this Law, The Constitutional Court is authorized to hear individual applications that are based on violation claims due to the actions or decisions finalized as of 23 September 2012. Accordingly, as of 23 September 2012, everyone can apply to the Constitutional Court for alleged violations of the fundamental rights and freedoms guaranteed by the Constitution that fall within the scope of European Convention on Human Rights caused by individuals or institutions executing the public power. Available at <http://www.anayasa.gov.tr/icsayfalar/gorevyetki/bireyselbasvuru.html> [Accessed 19 May 2018].

<sup>27</sup> For further information about the scope and the procedure of the individual application to the Constitutional Court, Available at <http://www.constitutionalcourt.gov.tr/inlinepages/IndividualApplication/WhoMayApply.html> [Accessed 18 April 2018] and Şirin, T.: Türkiye’de Anayasa Şikayeti (Bireysel Başvuru), İstanbul 2013. General statistics related to individual applications, Available at <http://www.constitutionalcourt.gov.tr/inlinepages/IndividualApplication/statistic-12022018.pdf> [Accessed 18 April 2018].

safeguarded for “everyone” under the Constitution. There have been several applications made to the Constitutional Court by asylum seekers especially for the alleged violation of non-refoulement, right to liberty and security, and effective remedy.<sup>28</sup> The Constitutional Court also reviews applications for interim measures to immediately and temporarily halt deportation decisions since 2013.<sup>29</sup>

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<sup>28</sup> For an example of a decision which concluded the existence of violation of aforementioned rights see; K.A. Application, App. No. 2014/13044, 11 November 2015.

<sup>29</sup> For further information and examples from the Court’s case-law related to immigrants/asylum seekers see; Erol, G.: *Anayasa Mahkemesine Bireysel Başvuruda Tedbir*, TBB Dergisi, (2017), 130, pp. 55-88.

## 4- The relevant legislative and institutional framework in the field of international protection

### Legal framework

The existing legal framework on international protection can be divided into primary and secondary law, which are composed by international conventions duly put into effect, laws (acts of the Parliament), by-laws<sup>30</sup>, directives, circulars, communiques and the Council of Minister decisions.

Pursuant to Turkish law, secondary sources such as by-laws, directives, circulars or any kind of sources which are regulated by administration should be consistent with the primary sources (Const. Article 124).<sup>31</sup> Secondary sources, in principle should serve as guidelines for the administration to comprehensively designate the procedures of certain duties and obligations assigned to the administration by the primary sources.

### Primary law

Turkey's first regulatory document on migrants, refugees and asylum-seekers was the Law on Settlement, (*İskan Kanunu*), which dates from 14 June 1934, and it was replaced in 2006 with the Law No. 5543. The Settlement Law was adopted with respect to the arrival of ethnic Turks in the early years of Republic (Kaiser and Kaya 2015, p.101). The Law states that 'only migrants of Turkish ethnicity and culture, with an objective of settling in Turkey, can obtain immigrant status (Article 3), and that those of non-Turkish origin will not be accepted as immigrants in Turkey, as well as 'anarchists, spies, nomadic Romas [*göçebe çingeneler*], and those that had been previously exiled'.<sup>32</sup> With regards to immigration policies, the definition of 'migrant' before the LFIP is also important. Between 1934 and 2006, Turkey's Law on Settlement, Law No. 2510, regulated the formal settlement of foreigners in Turkey, '[restricting] the right of asylum and immigration only to the persons of "Turkish descent and culture."' Article 3(d) of Settlement Law of 1934 defines both the refugee and migrant but yet does not explicitly regulate the right of asylum and 'restricting the definition of migrant only to cover the persons of Turkish descent and culture'. '[restricting] the right of asylum and immigration only to the persons of 'Turkish descent and culture.' [Article 3(d)]. When a new Law on Settlement was adopted in 2006, the emphasis on that background was retained, and so 'it is understood that in Turkey, the channel of facilitated formal settlement, which also leads to citizenship in a short period of time, is still reserved for the individuals of such groups'.<sup>33</sup>

<sup>30</sup> The terms by-law and regulation may be interchangeable used.

<sup>31</sup> See page 42.

<sup>32</sup> *İskan Kanunu* (Settlement Law), Law No. 2510, of 1934, provides that (Law No. 2510, Available at <http://www.resmigazete.gov.tr/arsiv/2733.pdf> [Accessed 8 March 2018]. This Law has been changed in 2006 and yet its main interpretation regarding who should be considered as an immigrant has remained primarily untouched (See Law No. 5534 on Settlement of 26 September 2006, Available at <http://www.resmigazete.gov.tr/eskiler/2006/09/20060926-1.htm> [Accessed 8 March 2018].

<sup>33</sup> Law No. 5543, Sept. 19, 2006, available at <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5543.pdf>, archived at <https://perma.cc/D89G-GT6N> and *İskan Kanunu Uygulama Yönetmeliği* (Implementation Regulations of the Settlement Law), Available at



Turkey ratified the 1951 Geneva Convention Relating to the Status of Refugees on 30 March 1962 and accessed its Additional Protocol (1967) on 31 July 1968 (UNHCR, 2015). However, ‘Turkey expressly maintained its declaration of geographical limitation upon acceding to the 1967 Protocol’ (Ibid.). This means that Turkey recognizes the Convention’s refugee status for those who meet the Convention criteria due to events happening in Europe. This limitation is ‘only partially implemented as Turkey allows UNHCR to operate and conduct refugee status determination procedures whereby refugee status is jointly granted by the UNHCR and the MoI with the underlying condition that accepted refugees do not locally integrate but instead resettle in a third country’ (Ibid.). Turkey’s geographical limitation disqualifies a vast number of asylum-seekers and refugees seeking permanent protection from the Turkish state’ (Ibid., 7).

Historically, two main legislation dealing with Turkish immigration and asylum law were the Passport Law (Law No: 5682, Dated 15.07.1950)<sup>34</sup>, which was substantially amended in 2013, and still in force, and the Law on Residence and Travel of Foreigners in Turkey (Law No: 5683, Dated 15.07.1950)<sup>35</sup> which was later abrogated by LFIP, and no longer in force. The former law stipulates that all travellers require a valid passport or travel document whenever they leave or enter the country. The law also regulated visa-related issues however the provisions of the Passport Law pursuant to visa issuance were later abrogated and re-regulated by LFIP. Due to the currently available legal framework regulated by LFIP, with some exceptions, a visa is needed to enter Turkey and for certain countries nationals, it is possible to obtain visas at border gates. In case of asylum or mass migration, those groups are excluded from punishment when violating entry rules, as long as they report to the Turkish government ‘within a reasonable time’.

Regarding citizenship, Turkey had two different pieces of legislation which substantially served for the regulation of acquisition and loss of citizenship until the enactment of the current Citizenship Law of 2009 (Law No. 5901)<sup>36</sup>. The first one was dated 27.11.1928 (Law No: 1312) and the second one was dated 1964 (Law No: 403)<sup>37</sup>. The currently enforceable Citizenship Law (CL) is the main legal source that regulates acquisition of Turkish citizenship. Accordingly, Turkish citizenship may be obtained by birth or derivatively (CL, Article 5). Acquisition by birth has two forms; acquisition by kinship or acquisition by place of birth. As a rule, which was also regulated under the Constitution (Article 66), ‘[e]veryone bound to the Turkish State through the bond of citizenship is Turkish. The child of a Turkish father or a Turkish mother is Turkish.’ Although place of birth regulated to be effective for the acquisition, birth within the territory of Turkey does not automatically confer citizenship. This way of acquisition is designated to prevent statelessness and therefore is applicable merely for situations where a child, who was born in Turkey does not obtain a citizenship through his father or mother. Derivative acquisition on the other hand has three main forms, namely as; acquisition by the

<http://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=7.5.11748&MevzuatIliski=0&sourceXmlSearch> [Accessed 15 April 2018].

<sup>34</sup> Available at [http://www.goc.gov.tr/files/files/2\(1\).pdf](http://www.goc.gov.tr/files/files/2(1).pdf) [Accessed 15 April 2018].

<sup>35</sup> Available at <http://kanun.hukukokulu.com/tag/yabancilarin-seyahatlari-kanunu> [Accessed 15 April 2018].

<sup>36</sup> Available at <http://www.tbmm.gov.tr/kanunlar/k5901.html> [Accessed 16 April 2018].

<sup>37</sup> Available at [http://www.nvi.gov.tr/Files/File/Mevzuat/Yururlukten\\_Kaldirilanlar/Kanun/pdf/turk\\_vatandasligi\\_kanunu.pdf](http://www.nvi.gov.tr/Files/File/Mevzuat/Yururlukten_Kaldirilanlar/Kanun/pdf/turk_vatandasligi_kanunu.pdf) [Accessed 6 April 2018].

decision of competent authority, acquisition by adoption and acquisition by right of choice. Acquisition by the decision of competent authority is also divided into four different sub-forms. They are; the general way of acquisition, exceptional acquisition, re-acquisition and acquisition by marriage. For the general way of acquisition, the Law states that an alien who has resided in Turkey for at least five years, shown an intent to remain in the country, familiarity with the Turkish language, has adequate means of self-support, good moral character and has no illness that may pose a threat to the public may obtain Turkish citizenship (Article 11, 12). This rule mainly related to regular migration. Provisions related to acquisition by marriage which constitutes another frequently used form of acquisition related to regular migration, stipulate three years of marriage as the pre-condition of application (Article 16). In this way, the law aims to avoid sham marriages undertaken by people wishing to stay in the country and eliminates a method of bringing people into the country used by human smugglers and traffickers.

Moreover, to understand legal framework in Turkey, it is of importance to briefly review the process in which Turkey has attempted to meet the EU's pre-accession requirements. Turkey has begun to 'significantly harmonise its migration and asylum related legislation in areas identified in the EU accession partnership document (İçduygu, 2015, p.10). One of the 'most important steps towards achieving the necessary harmonization of Turkey's national legislation with the EU *acquis*' was made in Turkey's adoption of a 'National Action Plan for the Adoption of EU *acquis* in the Field of Asylum and Migration' in March 2005 together with the '2008 National Programme of Turkey for the Adoption of the EU *Acquis*' (Yıldız, 2016, p.109). The action plan set out a detailed timeline listing the steps that Turkey had committed itself to in adjusting its policies to those of the EU relating to 'infrastructure and legislation in terms of three main areas: legal arrangements, institutional capacity building and training facilities' (Ibid., p.110).

The most recent and detailed normative framework about 'international protection' is created with the Law on Foreigners and International Protection (LFIP) (Law No.6458) as of 11 April, 2013. With the LFIP, Turkey finally has a legal framework extending protection to asylum seekers and refugees together with an accompanying physical as well as administrative infrastructure, which represent a major break from past practices (Kirişçi, 2012, p.63). It is the first law, which covers both international protection and the statuses and rights of foreigners in the country. The LFIP also marks the end of a period in which laws relating to foreigners, particularly asylum law, has been regulated by secondary legislation. The scope of this all-encompassing law is:

to regulate the principles and procedures with regard to foreigners' entry into, stay in and exit from Turkey, and the scope and implementation of the protection to be provided for foreigners to seek protection from Turkey, and the establishment, duties, mandate and responsibilities of the Directorate General of Migration Management under the Ministry of Interior.' (Law No. 6458, Article 1)

In determining the criteria for legal entry and stay, the LFIP clearly distinguishes between voluntary versus forced, and regular versus irregular migrants. The LFIP also supplies a comprehensive approach in that, in contrast to the previous legal documents. It defines not only, who is entitled to international protection (refugee, conditional refugee or people who are under subsidiary protection), but also recognizes the existence of such categories as human trafficking victim, unaccompanied minor, stateless person etc.

The Law regulates the entry, exit and partly the visa policy of Turkey. The LFIP abolished the Law on Residence and the Travel of Foreign Nationals in Turkey and invalidated the relevant articles of the Passport Law under Articles 5- 18. Also regarding residency, in Articles 19- 49, quite detailed categories as well as specific application procedures about these categories are given. Concerning to the RESPOND as well as this report, the legal status of foreigners, in particular international protection will be analysed in details later.

## Secondary law

Although the 1951 Convention provides the main guidelines for ‘international protection’, due to the geographical limitation, there was a gap in asylum law in relation to individuals who do not fall within the scope of the Convention. This gap was tried to be filled with a secondary administrative regulation (a By-law) in 1994, which is referred as 1994 Council of Ministers Regulation.<sup>38</sup> As a main legal source on the area which served for almost 20 years, this regulation can be seen as the response of Turkey to the 1990s’ large influxes of refugees and asylum seekers as well as to increasingly restrictive European immigration policies. The 1994 Regulation included the procedures and the principles related to population movements and aliens arriving in Turkey either as individuals or in groups wishing to seek asylum either from Turkey or to request residence permission in order to seek asylum from another country. This Regulation was abrogated by the entry into force of Temporary Protection Regulation (TPR) on 22 October 2014 which was issued on the basis of Article 91 of the LFIP.

Prior to the TPR, temporary was not defined in domestic law. In fact, the LFIP does not provide the principles and procedures for such a regime and does not specify the framework of reception, stay, rights and obligations under temporary protection in details. But, the TPR with specified in Article 1 gives the objective of the regulation as:

to determine the procedures and principles pertaining to temporary protection proceedings that may be provided to foreigners, who were forced to leave their countries and are unable to return to the countries they left and arrived at or crossed our borders in masses to seek urgent and temporary protection and whose international protection requests cannot be taken under individual assessment ; to determine proceedings to be carried out related to their reception to Turkey, their stay in Turkey, their rights and obligations and their exits from Turkey, to regulate the measures to be taken against mass movements, and the provisions related to the cooperation between national and international organizations under Article 91 of the Law No. 6458 on Foreigners and International Protection of 4/4/2013.

The TPR became the second milestone in Turkey's regularization of immigration in general, and mass migration governance in particular. The TPR builds upon three main pillars: a) unconditional admission under an open-door policy, b) implementation of non-refoulment principle without any exceptions, c) addressing the basic needs and access to rights (TPR-Changes, 2017). The scope of TPR covers those foreigners who arrive at Turkish borders as a result of forced migration as can be seen below.

<sup>38</sup> By-law of 14/09/1994 on the Principles and Procedures concerning Possible Population Movements and Foreigners Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum from another Country, No: 94/6169, the Official Gazette, No. 22127, 30 November, 1994, Available at <http://www.goc.gov.tr/files/files/temptemp.pdf> [Accessed on 18 April 2018]

**Foreigners who shall be granted temporary protection**

ARTICLE 7 - (1) Temporary protection shall be granted to foreigners who were forced to leave their countries and are unable to return to the countries they left and who arrived at or crossed our borders in masses to seek urgent and temporary protection and whose international protection requests cannot be taken under individual assessment.

(2) Temporary protection shall not cover persons who arrived our country from the country or region, where events constituting a basis for the temporary protection announcement take place, prior to the effective date of temporary protection announcement, unless the Council of Ministers decides otherwise.

(3) Persons benefiting from temporary protection shall not be deemed as having been directly acquired one of the international protection statuses as defined in the Law.

Temporary protection decisions are taken by the Council of Ministers upon the Mol's proposal [Article 9(1)]. It is the DGMM's responsibility to 'take individual decisions concerning persons benefiting from temporary protection following Council of Ministers' temporary protection decision' [Article 10(2)]. An access to international protection status is hindered during the application of temporary protection as Article 16 of the TPR explicitly states that: '[i]ndividual international protection applications filed by foreigners under this regulation shall not be processed in order to ensure the effective implementation of temporary protection measures during the period of the implementation of temporary protection'. Although the said provision refers to the 'period of the implementation', an upper time limit is not determined by the TPR. Pursuant to Article 10 of TPR, determining a certain period for which the temporary protection would be available is subject to the discretion of the Council of Ministers. If Council of Ministers deems necessary, a certain duration could be indicated within the temporary protection decision. The current temporary protection decision however, does not involve a certain duration.

TPR also regulates the termination of temporary protection. Accordingly, the Mol 'may propose to the Council of Ministers to terminate "temporary protection" and by a Council of Ministers decision, temporary protection would be terminated' [Article 11(1)]. Along with a decision to terminate temporary protection, the Council of Ministers can also decide to:

- a) To fully suspend temporary protection and to return of persons benefiting from temporary protection to their countries;
- b) To collectively grant the status, the conditions of which are satisfied by persons benefiting from temporary protection, or to assess the applications of those who applied for international protection on an individual basis;
- c) To allow persons benefiting from temporary protection to stay in Turkey subject to conditions to be determined within the scope of the Law.' (Article 11-2).

Article 11 does not unequivocally provide temporary protection beneficiaries with a right to apply for international protection, as is the case under the EU Temporary Protection Directive. The same risk of exclusion from accessing international protection exists when a temporary protection regime is limited or suspended under Article 15.

According to TPR, illegal entry into or stay in Turkey of individuals who fall under the scope of the Regulation will not be made subject to any administrative fines [Article 5-(1)] or will not face the risk of *refoulement* [Article 6-(1)]. In other terms, in the TPR, the international legal obligation of *non-refoulement*, not returning any refugees to their country of origin or to any place where they risk facing persecution, is clearly acknowledged.

The Regulation on Work Permits of Foreigners under Temporary Protection<sup>39</sup>, which is also categorized as ‘by-law’ was adopted by the Council of Ministers as a supportive secondary law for the TPR. As Syrians are the only group under temporary protection status, this regulation targets them. Pursuant to this Regulation, following the signing of a job contract, the employer needs to apply for work permit on behalf of the Syrian employee via an online portal of the Ministry of Labour and Social Security [Article 5(2)]. Yet, before submitting a work permit application, the employer should wait for four weeks during which the same employer has to document that there is no Turkish citizen with an equal skillset who could be employed for the particular job under concern [Article 8(3)]. 8(3)]. The number of Syrians under temporary protection cannot exceed 10 percent of the total workforce in any workplace [Article 8(1)]. Third, they need to be paid at least the minimum wage. They are allowed to work only in the provinces they are registered in (Article 7). Finally, the employers of Syrians under temporary protection who hire them to work in seasonal jobs (agriculture and animal husbandry) are exempt from applying for work permits [Article 5(5)].

There are also several circulars related to the procedure of temporary protection. However, as it is not compulsory for the administration to publish these circulars on Official Gazette or through any means especially when they are of critical nature in terms of public order and security, most of them are not publicly accessible. As it is indicated by DGMM, major circulars related to temporary protection deal with the following issues<sup>40</sup>; determination of the identification, registration, encouragement for registration, limitation of the rights (excluding access to emergency health services) of those who had not registered, access to services, procedures for the exit to third countries, procedures need to be taken for those who are considered to be a threat to public order and security, procedures need to be followed for requests to change provinces of residence.

Apart from temporary protection, there are also effective sources in relation to international protection and/or migration in general, which are of the nature of secondary law. One significant source of this kind is the Implementation Regulation (IR) of the LFIP.<sup>41</sup> The IR is sourced from LFIP and provides a comprehensive guideline for the provisions under the LFIP both for international protection and for migration related issues. Another important secondary regulation derived from the LFIP is the Regulation on the Labour of Applicants and Beneficiaries of International Protection.<sup>42</sup> This Regulation reiterates the right to work for beneficiaries of refugee status and subsidiary protection status without having to apply for a work permit provided that their international protection identification documents substitute for work permit.

Another significant secondary legal source is a circular related to the access to education for foreigners in general. This circular dated 2014<sup>43</sup>, enables establishment of temporary

<sup>39</sup> Available at <http://www.refworld.org/docid/582c71464.html> [Accessed 18 April 2018].

<sup>40</sup> Available at [http://www.goc.gov.tr/files/files/gecici\\_koruma\\_alaninda\\_yapilan\\_calismalarimiz\\_ek3%281%29.pdf](http://www.goc.gov.tr/files/files/gecici_koruma_alaninda_yapilan_calismalarimiz_ek3%281%29.pdf) [Accessed 26 April 2018].

<sup>41</sup> Available at <http://www.goc.gov.tr/files/dokuman5.pdf> [Accessed 26 April 2018].

<sup>42</sup> Available at <http://www.resmigazete.gov.tr/eskiler/2016/04/20160426-1.htm> [Accessed 26 April 2018].

<sup>43</sup> Available at <http://www.edirnebarosu.org.tr/wp-content/uploads/2016/07/Yabancılara-Yönelik-Eğitim-Öğretim-Hizmetleri.pdf> [Accessed on 26 April 2018].

education centres for individuals subject to mass influx and also provides procedures for referral of foreigners who do not obtain residence permit, to relevant educational institutions.

## Institutional framework

Concerning the institutional aspect, in Turkey, two major ministries are in charge of dealing with migration matters: the MoI and the Ministry of Foreign Affairs (MFA). In addition, some other government institutions, councils and commissions also assume specific responsibilities in migration affairs. The LFIP defines the MFA responsibility as ‘upon receiving the opinion of relevant public institutions and organizations, may call upon other States and international sharing in order to ensure provision of services to the foreigners under this Regulation’ [Article 47 (1)].

The MoI serves as the main ministry dealing with migration issues and has extensive responsibilities. The DGMM was established by the LFIP under the MoI. The LFIP transferred the authority for receiving and registering applications for international protection (on Turkish territory or at border gates) from the Foreigners Department of the National Police (which is also under to the MoI) to the newly established DGMM. The DGMM’s duties and mandate, as specified by Article 104 of LFIP, involves:

### **Role of the Directorate General of Migration Management**

- a) develop legislation and administrative capacity and carry-out work developing policies and strategies in the field of migration as well as monitor and coordinate the implementation of policies and strategies determined by the Council of Ministers;
- b) provide secretariat services for the Migration Policies Board and follow up on the implementation of the decisions of the Board;
- c) carry-out activities and actions related to migration;
- d) carry-out activities and actions for the protection of victims of human trafficking;
- e) determine stateless persons in Turkey and carry-out activities and actions related to such persons;
- f) carry-out activities and actions related to harmonization;
- g) carry-out activities and actions related to temporary protection;
- ğ) ensure coordination among law enforcement units and relevant public institutions and agencies, develop measures, and follow up on the implementation of such measures to combat irregular migration.

Persons subject to Turkey’s new ‘international protection’ procedure also register with the UNHCR Turkey, which ‘continues to carry out ‘refugee status determination (RSD)<sup>2</sup> activities, “in tandem” with the DGMM procedure, but on the basis of the UNHCR’s own mandate’ (AIDA, 2015, p.9). Although, the UNHCR mandate RSD decisions do not have any direct binding effect under LFIP, and the DGMM appears as the sole decision maker in asylum applications (AIDA, 2018, p.18), the relationship regarding RSD procedure needs to be redefined.

Article 104 (b) of the LFIP makes reference the Migration Policies Board which, in broad terms, determines Turkey’s migration policies and strategies and follow up on their implementation [Law No. 6458, Article 105-3(a)]. As specified under Article 3 of the LFIP, it is the responsibility of the Migration Policies Board to:

- a) determine Turkey’s migration policies and strategies and follow up on their implementation;
- b) develop strategy documents as well as programme and implementation documents on migration;



- c) identify methods and measures to be employed in case of a mass influx;
- ç) determine principles and procedures concerning foreigners to be admitted en mass to Turkey on humanitarian grounds, as well as the entry into and stay of such foreigners in Turkey;
- d) determine principles concerning the foreign labour force needed in Turkey;
- e) determine conditions of the long-term residence permits to be issued to foreigners;
- f) determine framework for effective cooperation in the field of migration with foreign countries and international organisations and the relevant studies in this field;
- g) make decisions to ensure coordination among public institutions and agencies working in the field of migration.

The ministries and bodies that are part of the Board include: the Ministry of Family and Social Policies (MFSP), the Ministry for EU Affairs, the Ministry of Labour and Social Security, the MFA, the Mol, the Ministry of Culture and Tourism, the Ministry of Finance, the Ministry of National Education, the Ministry of Health, and Ministry of Transport, Maritime and Communications as well as the President of the Presidency of Turks Abroad and Related Communities and the Director General for Migration Management [LFIP, Article 105 (1)]. It has also been noted that 'depending on the agenda of the meeting, representatives from relevant ministries, other national or international agencies and organisations, and non-governmental organisations may be invited to meetings' [LFIP, Article 105(1)].

Moreover, with the LFIP, three permanent boards and committees were also established under the DGMM which are: The Migration Advisory Board; the International Protection Assessment Committee; and the Coordination Board on Combating Irregular Migration. In terms of international protection, the International Protection Assessment Committee is responsible for:

- a) assess and decide on appeals against decisions on international protection claims as well as other decisions concerning applicants and international protection beneficiaries, with the exception of administrative detention decision, decisions related to inadmissible applications, and decisions made as a result of accelerated procedure;
- b) assess and decide on appeals against decisions concerning the cancellation of international protection.' [LFIP, Article 115 (2)- a, b)].

Furthermore, the Asylum-Seekers Committee has been established as a sub-committee of the Human Rights Committee, one of the committees of the Grand National Assembly of Turkey. The Committee has seven members from the major political parties.

The Disaster and Emergency Management Presidency (AFAD) was established in 2009 and functions under the rule of the Prime Ministry, is another agency with key functions in the field of international protection. In fact, AFAD was first established to single-handedly coordinate and exercise legal authority in cases of disaster, emergencies and the coordination of humanitarian assistance abroad.<sup>44</sup> Its role in responding to the mass refugee flow became apparent in 2011 with the start of Syrian refugee arrivals. It was authorized to provide temporary sheltering and to meet the basic needs of Syrians (AFAD, 2014). It also coordinated relevant ministries and agencies such as the MFA, Mol, the Ministry of Health, the Ministry of Education, the Turkish Red Crescent, and others (AFAD, 2014).

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<sup>44</sup> AFAD website, Available at <https://www.afad.gov.tr/en/2572/About-Us> [Accessed 3 March 2018]. As a result of these concerns, AFAD was established by Law No.5902 where those agencies that previously assumed mandate in the field were also abolished by the same Law (Ibid.).

AFAD's responsibilities in the field of migration were re-organized within the LFIP as the DGMM started to take full responsibility in all migration affairs. AFAD's role is became limited to managing international humanitarian assistance distributed to foreigners. Article 47 (2) states that 'assistance and use of in-kind and cash assistance' provided by international organizations and foreign states 'shall be coordinated by AFAD upon receiving the opinion of the Ministry of Foreign Affairs and the Ministry' and (3) 'AFAD may directly cooperate with public institutions and organizations and governorates, particularly the MFSP, the Turkish Red Crescent Association, and social assistance and solidarity foundations regarding the use of these in-kind and cash assistances.'

The management of temporary settlements has remained the responsibility of AFAD; however, by the amendment to the TPR by Regulation 2018/11208 of 16 March 2018, responsibility for the management of Temporary Accommodation Centres and provision of services such as health care lies with DGMM (AIDA, 2018, p.16). Thus, the DGMM also the competent authority for 'temporary protection' (Ibid.).

**Table 5. List the authorities that intervene in each stage of the procedure**

Stage of the procedure	Competent authority (EN)	Competent authority (TR)
Application ❖ At the border ❖ On the territory	Directorate General for Migration Management (DGMM)	Göç İdaresi Genel Müdürlüğü (GİGM)
Refugee status determination	Directorate General for Migration Management (DGMM)	Göç İdaresi Genel Müdürlüğü (GİGM)
Appeal	International Protection Evaluation Commission Administrative Court	Uluslararası Koruma Değerlendirme Komisyonu İdare Mahkemesi
Onward appeal	Regional Administrative Court Council of State	Bölge İdare Mahkemesi Danıştay
Subsequent application	Directorate General for Migration Management (DGMM)	Göç İdaresi Genel Müdürlüğü (GİGM)

Source: AIDA 2018. Country Report: Turkey, Asylum Information Database, Last Updated 30.03.2018, 21, Available at: <http://www.asylumineurope.org/reports/country/turkey> [Accessed 27 April 2018].



## 5- The legal status of foreigners

### Beneficiaries of international protection

International protection status is granted to refugees, conditional refugees, and those under subsidiary protection under the LFIP. The DGMM conducts a detailed assessment to decide whether a person seeking asylum in Turkey fulfils the eligibility criteria listed in Turkish law for benefitting from international protection in Turkey. The LFIP provides the criteria for international protection in Turkey. If the decision is positive, depending on the applicants' country of origin and the reasons why they are in need of international protection, the DGMM will grant them one of the three forms of 'international protection status' defined in Turkish law as follows:

#### International Protection Categories in Turkey's Asylum System:

**Refugee status** is defined under Article 61(1) of the LFIP, those who are deemed as qualifying for a refugee status are listed as:

A person who as a result of events occurring in European countries and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his citizenship and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his former residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it, shall be granted refugee status upon completion of the refugee status determination process.

**Conditional refugee status** is defined under Article 62 (1) as:

A person who as a result of events occurring outside European countries and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it, shall be granted conditional refugee status upon completion of the refugee status determination process. Conditional refugees shall be allowed to reside in Turkey temporarily until they are resettled to a third country.

**Subsidiary protection status** as it is specified under Article 63-(1) as:

A foreigner or a stateless person, who neither could be qualified as a refugee nor as a conditional refugee, shall nevertheless be granted subsidiary protection upon the status determination because if returned to the country of origin or country of [former] habitual residence would:

- a) be sentenced to death or face the execution of the death penalty;
- b) face torture or inhuman or degrading treatment or punishment;
- c) face serious threat to himself or herself by reason of indiscriminate violence in situations of international or nationwide armed conflict and therefore is unable or for the reason of such threat is unwilling, to avail himself or herself of the protection of his country of origin or country of [former] habitual residence.

Among the above-given international protection statuses, ‘conditional refugee’ status is unique to Turkey and the outcome of Turkey’s geographical limitation to the 1951 Convention – in effect ensuring Turkey would not grant refugee status to people fleeing from conflicts and persecution in non-European countries. In this regard, if the refugee status determination (RSD) process for an asylum seeker coming from non-European countries has a positive result, Turkey provides ‘conditional refugee status’ and he/she can stay in Turkey until the resettlement to a third-safe country through the UNHCR. As a matter of fact, the conditional refugee status allows the individual to temporarily reside in Turkey and rules out local integration to be a durable solution<sup>45</sup>. Thus, in any account of Turkey’s asylum regime, the ‘geographical limitation’ clause is its most important feature.

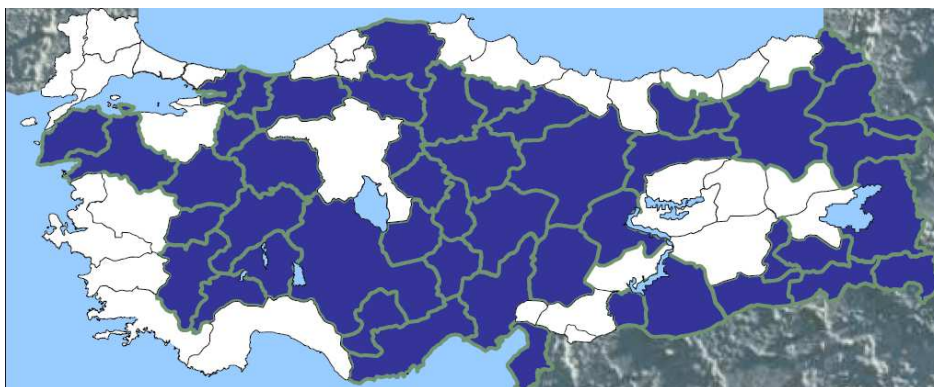
According to the LFIP, if a person has left his/her country for reasons of war, persecution or fear of death penalty or torture, and are afraid to go back, applying for ‘international protection’ to the DGMM will give him/her the opportunity to stay in Turkey legally under the applicant status which is the equivalent of asylum seeker status in international law. As an applicant, the person will be safe from the risk of being deported to his/her own country or any other country where s/he would be at risk.

## Geography of migrants: satellite cities

Before the LFIP, according to the 1994 Regulation and the 2006 Implementation Circular, non-European asylum seekers must register with the police who make an assessment within a reasonable time to decide whether they are asylum seekers rather than migrants. They are required to stay in ‘satellite cities’ determined by the MoI. The historical and legal origins of Turkey’s satellite city practice can be traced back to the 1950s when the Turkish authorities regulated the residence and travel of foreigners via the Law on Residence and Travel of Foreigners (Law No. 5683). Article 17 of the Law No. 5683 indicates that ‘foreigners who seek asylum for political reasons shall reside at places assigned by the Ministry of Interior’.<sup>46</sup> The ‘satellite city’ system where non-European asylum-seekers, ‘upon the completion of registration of their applications, are assigned to reside in certain cities by the MoI, which are currently 51 provinces’.<sup>47</sup> Accordingly, they are required to check in regularly with local authorities and restricted from movement outside of the city without ‘special permission’. Figure 20 partly displays the spatial dimension of migration in Turkey. Provinces colored in blue represents satellite cities, while white represents non-satellite cities.

<sup>45</sup> The term ‘temporary protection’ in that statement was used to refer to the temporariness of the stay, rather than being ‘the temporary protection’ designated as a technical form of protection under TPR (Öztürk, 2017, p.195).

<sup>47</sup> UNHCR, ‘The Practice of “Satellite Cities” in Turkey’, Available at <http://www.unhcr.org/50a607639.pdf> [Accessed 5 April 2018].

**Figure 19. Satellite Cities**

Source: UNCHR, “The Practice of “Satellite Cities” in Turkey “, available at <http://www.unhcr.org/50a607639.pdf> (Accessed 18 April 2014).

In terms of the spatial aspects of the LFIP, persons applying for international protection in Turkey still do not have the right to choose their city of residence, and administrative obligations may be imposed upon the applicants such as ‘to reside in the designated reception and accommodation centres, a specific location or a province as well as to report to authorities in the form and intervals as requested’ (LFIP, Article 71-1). The DGMM officials will assign the city where they will be asked to go and stay until the finalization of their asylum proceedings in Turkey. If there is a city international protection applicants particularly prefer or where their close relatives live, they can express their preference to PDMM and/or UNHCR officials during registration (Refugee Rights Turkey, 2016, p.5).

For person applying for ‘international protection’, it is very important to report to their assigned city of residence within 15 days, or if they are already in their assigned city of residence to refrain from ever leaving the city without a written authorisation from the PDMM (Ibid., 6). If they leave their assigned city of residence without permission, they will be considered to have ‘implicitly withdrawn’ their international protection request, as a result of which they may come under risk of deportation (Ibid.). As of November 2017, the PDMM have taken over the pre-registration phase of temporary protection (AIDA, 2018, p.16).

In Turkey, asylum-seekers are not provided any form of accommodation support. As a matter of general principle, international protection applicants are expected to find their own accommodation in their assigned city of residence and bear the costs of that accommodation by their own means (Refugee Rights Turkey, 2016, p.5). However, under the temporary protection regime, the TPR also provides access to certain services for temporary protection beneficiaries are designated such as; health, education, access to labour market, social assistance and interpretation services (TPR, Articles 26-31 respectively) as they will be explained in details as a part of “Reforms” heading of the report.

Applicants who are deemed particularly vulnerable may be accommodated free of charge in the Reception and Accommodation Centres for Asylum Seekers, located in the cities of Şanlıurfa, Gaziantep, Kilis, Kahramanmaraş, Mardin, Hatay, Adana, Osmaniye, Adıyaman, and Malatya. Furthermore, unaccompanied children seeking international protection in Turkey should be accommodated free of charge in state facilities deemed appropriate by the MFSP, ‘in the care of their adult relatives or, a foster family, taking the opinion of the unaccompanied child into account.

## The situation of ‘international protection’ applicants: arriving from Syria (temporary protection)

Persons who have fled to Turkey from Syria are subject to a separate asylum procedure referred to as ‘temporary protection’ policy. The LFIP defines temporary protection under Article 91-1 and under Article 91-2 notes that the situation concerning these foreigners who arrived to Turkey as a result of forced migration will be regulated later on by a ‘Directive to be issued by the Council of Ministers’. In accordance with this policy, persons arriving from Syria are granted the right to legally stay in Turkey and have access to some rights and services. Refugees from Syria are required to approach DGMM and register to benefit from this policy. Upon registration with the DGMM, they are issued a Temporary Protection Identification Card (İneli-Ciğer 2015, p.32).

In current practice, Syrian nationals, stateless persons from Syria and refugees who were previously resident in Syria, are subject to this arrangement (Lambert, 2017). Since they have the legal right to stay in Turkey and enjoy rights and services as beneficiaries of ‘temporary protection’ policy, Turkish Government does not consider it necessary for them to make an additional application for ‘international protection’. Therefore, persons arriving from Syria are not given the option of making an ‘international protection’ application in Turkey (Refugee Rights Turkey, 2016, p.3). It implies that Syrians under temporary protection cannot approach to the UNHCR and they are not under the part of resettlement mechanism, which differs them from the others who are under the international protection scheme.

That being said, persons from Syria who arrive in Turkey not directly from Syria but from another country which they previously fled to, may not be extended the opportunity to benefit from Turkey’s ‘temporary protection’ policy. In that case, these persons nevertheless ‘have the right to apply for ‘international protection’ in Turkey if they fear being persecuted or otherwise coming in harm’s way if returned to the country from which they arrived to Turkey or if they fear being deported all the way back to Syria if they return to that country’ (Ibid.). These refugees are required to check in regularly with local authorities and also are restricted from movement outside of the city without ‘special permission’ (Leghtas and Sullivan, 2016, p.5).

### **Two Different Sets of ‘International Protection’ in terms of procedural rules, reception provisions and detention considerations:**

Turkey currently hosts both an asylum-seeking population from Syrian mass migration and a surging number of individually arriving asylum seekers of other nationalities. As it was displayed by Figure 16, most principally originating from Iraq, Afghanistan, Iran and Somalia, among others. These two groups are subject to three different sets of ‘international protection’:

1. Asylum seekers from Syria: They are subject to a group-based ‘temporary protection’.
2. Individually arriving asylum seekers from other countries: The newly created DGMM is responsible for registering and processing “international protection” applicants and for granting status pursuant to the criteria established by the Law. For reasons related to Turkey’s unique “geographical limitation” policy on the 1951 Refugee Convention, individual asylum seekers, as following the RSD procedure, asylum seekers from non-Europe countries may get ‘conditional refugees’ status.

The legal basis of the given settings is spelt out in the LFIP, the LFI and the TPR.

## Accelerated procedure

According to Turkish asylum legislation, in certain circumstances the DGMM may decide to process an asylum application within the framework of an ‘accelerated procedure’ as opposed to the regular procedure. This means that the application will be processed and decided much faster. In ‘accelerated processing’, the personal interview with the applicant should be held within 3 days of registration interview, and the decision on the application must be issued within 5 days from the personal interview [LFIP, Article 79 (2)].

If the applicant has made an international protection request after he or she has been placed under administrative detention for the purpose of removal (LFIP, Article 57), then DGMM may also decide to detain an applicant while processing their application in ‘accelerated’ process fashion. The reason why the DGMM chooses to process certain types of application through an ‘accelerated’ procedure is because they believe there are indications that the application may be unfounded, insincere or intended to use the asylum procedure for a reason other than seeking asylum in Turkey (LFIP, Article 57). Applicants processed in ‘accelerated procedure’ must be given the same opportunities to explain and substantiate their reasons for making an asylum application in Turkey as with the applicants processed in the regular procedure, including the right to have a ‘personal interview’ and an interpreter if needed (Ibid.).

Applicants have the right to appeal a negative decision on their international protection application, whether the decision was made in regular procedure or ‘accelerated procedure’. In Turkey, the LFIP provides for an appeal against the first instance decision in the regular asylum procedure. Accordingly, the negative decision must be communicated to applicants by the PDMM officials in their locality in written. In case of a negative decisions, there are two remedies: administrative and judicial remedies. Both types of appeal have automatic suspensive effect (AIDA, 2015, p.24). Negative decisions issued in ‘accelerated procedure’ can be appealed at the competent administrative court within 15 days. The administrative court should finalize their appeal within a maximum of 15 days (Ibid.).

Applicants will be safe from being subjected to a deportation decision for 15 days following the communication of the negative decision to them by the Provincial Directorate of Migration Management (PDMM); and if they choose to file an appeal with the competent court within this time frame, they will be protected from a deportation decision until the finalisation of this appeal application.

If the administrative court rejects applicants’ appeal, the negative decision by the DGMM on their application becomes final. Negative asylum decisions issued within the framework of the ‘accelerated procedure’ may not be appealed onward at a higher court of law. Therefore, if applicants’ appeal with the administrative court is unsuccessful, they will become subject to a deportation decision unless there are other legal grounds that may prove their continued stay in Turkey (Refugee Rights Turkey, 2016, p.21).

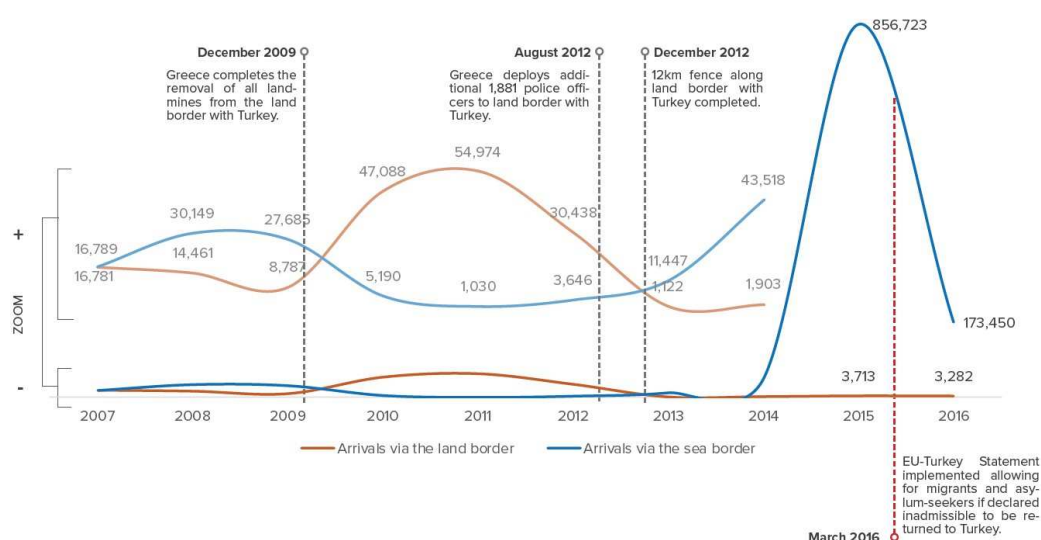
## Irregular migrants

Irregular migration in Turkey can be categorized in three main groups (İçduygu and Aksel, 2012), which are: transit migration (illegal entries), circular migration (overstays), and asylum seekers/refugee movements. Until Syrian mass migration started in 2011, the largest group



had been irregular transit migrants, entering Turkey with the help of smugglers and intending to continue the journey to Europe via sea and land routes (Ibid.). Between 1995 and 2009, the total number of irregular migrants was 796,494; and 461,934 of these were irregular transit migrants (Iraqis being the most numerous)<sup>48</sup>. Except the decline in 2009 (IOM, 2007, p. 308), there has been an increase since 2010 till the 2016 (UTSAM, 2012, p. 12). Both the EU's and Turkey's figures are similar each other as showing that in October 2015, daily crossings were 10,000 in a single day from Turkey to Greece, while on 20 March it declined to 47 on the daily basis as reflecting the EU-Turkey Statement (18<sup>th</sup> March 2016).<sup>49</sup> 175,752 irregular migrants were detected in 2017 (DGMM, 2018, see also Figure 11 ).

**Figure 20: Arrivals in Greece from Turkey Via Land and Sea Borders - 2007 to 2016**



Source: UNHCR, 2017. Desperate Journeys, Available at <http://www.unhcr.org/news/updates/2017/2/58b449f54/desperate-journeys-refugees-migrants-entering-crossing-europe-via-mediterranean.html> [Accessed 19 May 2018].

The second sub-group is circular migrants<sup>50</sup>, who enter Turkey legally but overstay or make multiple trips as irregular workers or traders. These are often circular migrants from Eastern Europe and the former Soviet Union. Despite entering legally, they become irregular as soon as their visas expire or they start work without a permit (İçduygu, 2011a, p.4). The numbers of irregular transit migrants were higher than irregular labour migrants/over-stayers from 1995 to

<sup>49</sup> See Ahmet İçduygu, "The Irregular Migration Corridor between the EU and Turkey: Is it Possible to Block it with a Readmission Agreement?," Migration Research Institute Research Report Case Study EU-US Immigration Systems, No. 2011/14, p.5.

<sup>49</sup> See European Commission, "EU-Turkey Statement One year On", Available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu\\_turkey\\_statement\\_17032017\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf) [Accessed 19 May 2018].

<sup>50</sup> IOM defines circular migration as 'the fluid movement of people between countries, including temporary or long-term movement which may be beneficial to all involved, if occurring voluntarily and linked to the labor needs of countries of origin and destination' IOM, 'Key migration terms', Available at <https://www.iom.int/key-migration-terms#Circular-migration> (Accessed 3 March 2018).

2010, but fluctuations in both overlap, reaching a peak in 2000 and declining afterward (Ibid.). Although, there is no official classification for this group, 334,560 irregular labour migrants were recorded for the 1995–2009 period (Ibid.).

The third group includes asylum seekers and refugees that display characteristics of the ‘migration–asylum’ nexus<sup>51</sup> as it is stated by Castles (2007), which is strengthened by Turkey’s geographical limitation to the 1951 Convention that blurs the distinction between asylum seekers and irregular migrants.

The aforementioned categories and their governance have become more fluid since 2011. The capture this complexity in irregular migration, Gökalp-Aras and Şahin-Mencütek (forthcoming) suggest that Turkey’s legal and policy framework about irregular migration can be analysed within to time periods as 1990–2011 and 2011 to the present. Within the first-time period, legal and institutional framework for irregular migration governance remained highly fragmented<sup>52</sup> until LFIP (Özçürümez and Yetkin, 2014). After 2011, Turkey introduced both ad-hoc responses and new concrete regulations in irregular migration governance. Syrian mass migration and the continuation of the EU externalization mainly drove the direction of responses (Gökalp Aras and Şahin Mencütek, forthcoming). The 2013 LFIP eliminated problems about partiality by defining the irregular migration and the responsible authority to deal with it. It defines irregular migrant as ‘foreigners [who] enter into, stay in or exit from Turkey through illegal channels and work in Turkey without a permit; as well as international protection.’<sup>53</sup> In terms of the institutional structure, the DGMM is assigned ‘to combat irregular migration’ [LFIP, Article 104 (ğ)] and ‘carry-out activities and actions related to irregular migration’ [Article 108 (2)]. In addition, the LFIP established the Coordination Board on Combating Irregular Migration. The responsibilities of the Board have been specified under the LFIP, Article 116 (3):

- a) ensure coordination among law enforcement units and relevant public institutions and agencies to effectively combat irregular migration; b) determine the routes for illegal entry into and exit from Turkey and develop counter measures; c) improve the measures against irregular migration; ç)

<sup>51</sup> Stephen Castles defines the asylum–migration nexus as fluid and blurred, with the terminology about migrants and asylum seekers always heavily politically and legally constructed.

<sup>52</sup> The main legal pieces encompassed the 1) Law on Work Permits for Foreigners (LWPF, Law No. 4817, adopted in 2003) that aimed at preventing irregular labour migration; 2) new articles of the Penal Code introduced in August 2002 that criminalized human smuggling and trafficking, and introduced stricter controls at borders and ports; 3) the amendment in Turkish Citizenship Law (2003) introducing strict measures to prevent irregular migration via ‘fake marriages’ arranged by people smugglers; 4) the Road Transportation Law (2005) stipulating penalties against human smuggling; 5) amendment in the Article 79 of the new Turkish Penal Code (Law No: 5237) in 2005 introducing heavy sanctions for migrant smugglers (Özçürümez and Şenses, 2011). Moreover, to satisfy the EU’s demands as well as to develop a national approach for combating irregular migration, in 2002–2012 Turkey took several initiatives to harmonize its policies to protect external borders (Özçürümez and Yetkin, 2014; Memişoğlu, 2014). These included setting up a Task Force for Asylum, Migration, and Protection of External Borders, preparing a strategy paper in 2003, adopting twinning projects, action plans, establishing a Directorate for Integrated Border Management under the Mol in 2008, which later became the Bureau for Border Management in 2012.



plan the development of legislation related to combating irregular migration and monitor its implementation [LFIP, 116 (3)].

As the Figure 11 displays, the number of apprehended irregular migrants in 2017 are recorded as 175,752 (DGMM, 2018). According to FRONTEX, there were 885,400 irregular border crossings via the Eastern Mediterranean Route in 2015, while 182,537 were recorded in 2016.<sup>54</sup> On the other hand, inside Turkey the number of apprehended irregular migrants increased substantially, from 146,485 in 2015 to 174,466 in 2016 and 175,752 in 2017.<sup>55</sup> These statistics – showing a clear rise in irregular migrants in Turkey, and a decline crossing into the EU – indicate that Turkey is at risk of becoming a de-facto buffer-zone (Gökalp-Aras and Şahin-Mencütek, forthcoming).

The irregular migrants who apprehended by law enforcement units, should immediately be reported to the governorate for a decision to be made concerning their removal (deportation) status [LFIP, Article 57(1)]. Illegal entry or illegal stay in Turkey do not hinder the right to apply to international protection [LFIP, Article 65(4)]. Therefore, at this stage they may apply for asylum. If they lodge an international protection application to law enforcement units, the application should immediately be reported to the governorates [LFIP, Article 65(2)]. According to LFIP Article 57 (1), the duration between apprehension of the irregular migrants and a decision to be rendered whether they would be removed or not, should not exceed 48 hours. If the decision is “removal”, then the governorate may issue administrative detention for those, who bear high risk for disappearing or seen as a threat to public order [LFIP, Article 57 (2)]. The duration of administrative detention cannot exceed six months and it can be extended only a maximum of six additional months [Article 57 (3)]. The person has right to appeal against the detention decision (to the Judge of the Criminal Court of Peace), which should be resulted in five days and this decision will be final [LFIP, Article 57(6)]. The person would have the right to be represented by a lawyer and if does not have the means to cover attorney fees, to enjoy legal aid, pursuant to the Attorneys’ Law (No: 1136). According to Article 58 and 59 of LFIP, foreigners subject to administrative detention are held in removal centres. The working principles of removal centres and basic rights of the person are regulated under article 59 of the LFIP. Accordingly, detainees may have access to emergency and primary healthcare services, may be given opportunity to meet with their relatives, the notary public, their representatives and lawyers, and may have access to telephone services. They may also have contact with consular official of their country of citizenship and officials of the UNHCR. Representatives of the relevant NGOs with expertise in the field of migration may visit the removal centres upon permission of the DGMM. Families and unaccompanied minors should be accommodated in separate areas and in order to enable children to have access to education the Ministry of national Education should take the necessary measures. The person also have the right to challenge the removal decision. The concerning person, legal representative or lawyer may appeal against the removal decision to the administrative court within fifteen days as of the date of the notification of the removal decision [LFIP, Article 53(3)]. The appeals should be decided within fifteen days and the decision of the court on the appeal

<sup>54</sup> ESI, “The Refugee Crisis Through Statistics,” (January 30, 2017), Available at <http://www.esiweb.org/pdf/ESI%20-%20The%20refugee%20crisis%20through%20statistics%20-%2030%20Jan%202017.pdf> [Accessed 27 April 2018]

<sup>55</sup> DGMM, “Number of Irregular Migrants Apprehended in Turkey Per Year (1998 – 2016),” Irregular Migration Statistics, Available [http://www.goc.gov.tr/icerik6/irregular-migration\\_915\\_1024\\_4746\\_icerik](http://www.goc.gov.tr/icerik6/irregular-migration_915_1024_4746_icerik) [Accessed 27 April 2018].

is final (Ibid). Appeal has a suspensive effect; therefore the person should not be removed during the judicial appeal period (Ibid). However there is an exception for the suspensive effect of the appeal for those who are given a removal decision due to being leaders, members or supporters of a terrorist organisation or a benefit oriented criminal organisation; posing a threat to public order or public security or public health and being associated with terrorist organizations which have been defined by international institutions and organization (Ibid). Once the detention period is ended, an individual may be removed to his/her country of origin, a transit country or a third country [LFIP, Article 52(1)]. However before each removal action, an assessment for compatibility with non-refoulement needs to be made [LFIP, Article 4; Implementing Regulation of LFIP, Article 4]. Therefore the removal may take place as long as the destination country is a safe in terms of non-refoulement principle. Persons under detention who are subject to implementation of the removal decision are taken to border gates by law enforcement unit [LFIP, Article 60(1)]. If they are unable cover their travel costs, the full or remaining cost of travel should be covered from the budget of the DGMM [LFIP, Article 60(3)].

In practice however, some deficiencies are reported especially in terms of access to justice under detention. Pursuant to a report concluded by Izmir Bar Association, no legal aid applications are made from removal centres through officials. The report indicates that the reason for this is most likely due to the fact that the detainees are not properly informed about their rights to access a lawyer and legal aid, as the lawyers coincidentally are informed about the legal aid needs. The report also brings about some challenges for the physical access of lawyers to removal centres, given that they are located out of city centres and high security precautions might occasionally be obstructing for lawyers to enter into these centres. Challenges on interpretation services and lack of information on the right to apply international protection are also reported (Izmir Barosu 2017) Similar deficiencies are also indicated in the report of the Union of Turkish Bar Associations (Türkiye Barolar Birliği 2016). Also, according to the data of a project implemented by UNDP for Union of Turkish Bar Associations and for Ministry of Justice General Directorate of Criminal Affairs, on “Support to the Improvement of Legal Aid Practices for Access to Justice for All in Turkey” (SILA Project), only 3% of the total number of legal aid services are provided to foreigners. Language/translation barriers and lack of awareness are shown as first two reasons respectively, for this low ratio (Union of Bar Association 2016).

## Regular migrants

The data on regular migration indicates that the number of foreigners entering Turkey has grown steadily from about 20.2 million in 2005 to 32 million in 2017, representing a 63 percent increase (DGMM, 2018). Some arrivals were tourists, some intended to settle in Turkey temporarily or permanently for work and study purposes, and some were transit travellers intending to move on to stay in a third country.

The number of issued residence permits gives an overall idea of the regular migrants that stay in Turkey more than three months. The DGMM reports that 593,151 residence permits were issued in 2017 alone. Of these, 70,364 were issued to nationals of Iraq, 65,348 to nationals of Syria, 49,208 to Azerbaijanis, and 41,025 to Turkmenistan (DGMM, 2018). By

March 29, 2018; the DGMM is updated the total number of the issued residence permits as 655,599 (DGMM, 2018).

The Law on Work Permits for Foreigners (No. 4817, dated 15 March 2003) and the LFIP regulate the foreigners' participation in the labour market. The total number of work permits issued by the DGMM was recorded as 56,024 in 2017 (DGMM, 2018). However, there is no accurate data about foreigners working without official working permits, but the estimates are around one million (T24, 2016).

There are no exact official figures of the number of foreigners residing in Turkey, in particular of those settled on a long-term basis. In 2016, the number of foreign-born residents were recorded as 1,777,920, making the 2.2 percent of the total population (TÜİK, 2016).

While different types of residence permit and the conditions that apply to the granting of these different types of permits have been covered in detail under the first section of the report, it should also be noted that LFIP regulates the conditions for refusal, cancelation or non-renewal of residence permit applications lodged in Turkey. Accordingly, under Article 25 of LFIP refers to this aspect:

- (1) The refusal of an application lodged in Turkey, non-renewal or cancelation of a residence permit and notification of such actions shall be done by the governorates. The decision on the residence permit may be postponed in consideration of elements such as the foreigner's family ties in Turkey, the duration of residence, situation in the country of origin and the best interest of the child during these actions.
- (2) Refusal, non-renewal or cancelation of the application shall be notified to the foreigner or, to his/her legal representative or lawyer. This notification shall also include information on how foreigners would effectively exercise their right of appeal against the decision as well as other legal rights and obligations applicable in the process.

At this stage regarding 'family reunification', as of 2017, the right to family reunification has been almost entirely suspended in Turkey (AIDA, 2018, p.17). Based on the observations, the most recent AIDA report states that 'PDMM do not allow international and temporary protection beneficiaries to apply for family reunification, unless the sponsor has been accepted for resettlement in another country and the family is to join him or her before departure' (Ibid.).

According to Article 44 of the LFIP, 'without prejudice to acquired rights with respect to social security, and subject to conditions stipulated in applicable legislation governing the enjoyment of rights, foreigners holding a long-term residence permit shall benefit from the same rights as accorded to Turkish citizens with the exception of the provisions in laws regulating specific areas'. They have no right or obligation for compulsory military service, the right of vote and be elected and entering public service while they are exempted from exemption from customs duties when importing vehicles [Article 44 (1)-a,b,c, ç].

## Unaccompanied foreign minors

Turkey is a party to the Convention on the Rights of the Child and domestic child-protection standards are generally in line with international obligations. According to Article 66 of LFIP, from the moment an unaccompanied minor international protection applicant is identified, the best interests of the child principle must be observed and the relevant provisions of Turkey's

Child Protection Law must be implemented. The child applicant must be referred to an appropriate accommodation facility under the care of governmental or private organizations (Juvenile Protection Law, Article 10).

The LFIP refers to unaccompanied minors as ‘ “persons with special needs” under Article 3-1-(I), which also includes elderly, persons with disabilities, pregnant women, single parents with an accompanying child and victims of torture, rape and other serious psychological, physical or sexual violence’ (AIDA, 2015, p.34).

According to Article 67 of the LFIP, ‘persons with special needs’ shall be ‘given priority with respect to all rights and proceedings’ pertaining to the adjudication of international protection applications. This provision requires the DGMM to prioritise applications by persons that fit into this category, yet, as the Provincial DGMM Directorates ‘have not begun to issue status decisions in earnest, there does not appear to be any such “prioritization” of cases on Article 67 grounds’ (Ibid.).

Article 48 of TPR provides that unaccompanied children shall be treated in accordance with relevant child protection legislation and in consideration of the ‘best interest’ principle. The 20 October 2015 dated the Ministry of Family and Social Policies (MFSP) Directive on Unaccompanied Minors provides additional guidance about the rights, protection procedures and implementation of services for unaccompanied children. The Directive designates the Provincial DGMM Directorates as the state institution responsible for the identification, registration and documentation of the unaccompanied children. Provincial DGMM Directorates are also ‘entrusted the responsibility of providing shelter to unaccompanied children until the completion of the age assessment, health checks and registration/documentation procedures upon which the child is referred to the MFSP’ (AIDA, 2015, p.123).

Once the Provincial DGMM Directorate refers the child to the relevant Provincial MFSP Child Protection Directorate, ‘temporary protection’ beneficiary unaccompanied children aged 0-12 are to be transferred to a child protection institution under the authority MFSP (ibid.). Unaccompanied children between the ages of 13-18, who do not have any special needs may be placed in dedicated “child protection units” providing services within the premises of camps under the authority of the Provincial MFSP Child Protection Directorate (AIDA, 2015, p.123).

Unaccompanied minors cannot be detained during the processing of their application ‘under Article 68 of LFIP, since Article 66 of LFIP unambiguously orders that unaccompanied minor applicants shall be referred to an appropriate accommodation facility under the authority of the Ministry for Family and Social Services’ (Ibid., 60). Unaccompanied minor international protection applicants are placed in ‘state care and accommodated in children’s shelters operated by the Ministry of Family and Social Services’ (Ibid., 77).

The Child Protection Law reference in Article 66 of the LFIP is significant. Unaccompanied minors in Turkey identified as such are taken under state care as per the procedures and provisions of the Child Protection Law. Turkish Civil Code makes provisions for the appointment of a legal guardian to all children under state care, regardless of whether they are citizens or non-citizens. According to Turkish Civil Code, all children placed under state care must be assigned a guardian (AIDA, 2015, p.63). Specifically, all children who do not benefit from the custody of parents must be provided guardianship (Ibid.). The assignment of guardians is carried by Peace Courts of Civil Jurisdiction (*Sulh Hukuk Mahkemesi*) and guardianship matters are thereafter overseen by Civil Courts of General Jurisdiction (*Asliye*

*Hukuk Mahkemesi*) (Ibid.). A guardian under Turkish Civil Code should be ‘an adult competent to fulfil the requirements of the task’, not engaged in an ‘immoral life style’ or have ‘significant conflict of interest or hostility with the child in question’. Relatives are to be given priority to be appointed as guardians (Ibid.). Therefore, as far as the legal requirements, qualified NGO staff, the UNHCR staff or the MFSP staff would qualify to be appointed as guardians for unaccompanied minor asylum-seekers (Ibid.).

Guardians are responsible for protecting the personal and material interests of the minors in their responsibility and to represent their interests in legal proceedings. Although not specifically listed in the provisions, asylum proceedings under the LFIP would therefore clearly fall within the mandate of the guardians. As a rule, a guardian is appointed for two years, and then may be reappointed for additional two terms (Ibid., 63-64).

It should be noted that there is very limited up to date publicly available research on unaccompanied minors in Turkey. However, one of the major deficiencies regarding unaccompanied minors is indicated to be on the implementation of guardianship procedure (AIDA, 2018, p.51; Bianet, 2018; Safe Info, 2014, p.31). . Although the law stipulates immediate appointment of guardians to unaccompanied children, due to lack of public guardianship system, the procedure is hindered until a volunteer, usually a social worker, is appointed as a guardian. However it is reported that in recent years, social workers hardly volunteer to be appointed (AIDA, 2018, p.51; Safe Info, 2014, p.31). Another problematic issue in practice is appears to be in relation to age assessment. In practice, bone tests are used to assess the age and if the test results indicate the age to be above 17 or 18, the applicant is deemed as an adult and not granted the benefit of the doubt (AIDA, 2018, p. 49; KOREV, 2017, p.15; Safe Info, 2014 pp.29-30). In terms of access to legally regulated rights, two major problems are indicated to be as the issuance of temporary ID cards and lack of awareness of the rights (KOREV, 2017, pp.11-13). Lack of a systematic coordination between relevant public institutions is also appears to be a challenge for unaccompanied children’s access to legally available treatment KOREV, 2017, p.9). The coordination-related issues usually arise between Ministry of Family and Social Policies and the PDMMs (Ibid.). Lastly, a need of expertised personell especially on post traumatic stress disorder for children is stated to be a major concern (Ibid.).

## 6- Reforms driven from mass migration

Although, the European Refugee Crisis refers the year of 2015, the Syrian mass migration to Turkey started by 2011. Thus, this part covers the reforms and Turkey's policy responses as covering legal and institutional reforms starting from 2011 regarding Turkey's legal and institutional framework in the field of immigration and asylum. Thus, to avoid repetitions, some previously mentioned parts will be briefly touched within this part.

At the time the mass migratory movements originating from Syria towards Turkey emerged in 2011, Turkey was in the process of drafting the LFIP which promised a major reform in the asylum system. Since the Law was not in force yet, 1994 Regulation was the sole legally applicable source. Turkey opened its borders to the newcomers and reassured this policy later when the numbers of individuals reaching Turkey from Syria was around 10.000.<sup>56</sup> Although temporary protection was not explicitly designated at the time, Turkey *de facto* provided this protection without a comprehensive legal basis.<sup>57</sup> The scope of this *de facto* protection involved; admission to country, protection from *refoulement* and access to basic needs.<sup>58</sup> AFAD was in charge to provide temporary accommodation centres (camps) and provide access to basic needs for individuals. To meet this end, a by-law (regulation) was issued in early 2011 for the establishment of management centres for disaster and emergency situations (Regulation on the Management Centres for Disaster and Emergency Situations).<sup>59</sup> The Regulation identified, *inter alia*, 'large-scaled asylum related population movements' as emergency situations and included these situations within the scope of the responsibility of these centres and therefore constituted the legal basis for AFAD's activities in response to the migratory movements originating from Syria. Hence these movements were indeed deemed and treated as an emergency situation by Turkey in 2011.

In the beginning of the mass migration, the forced migratory movements in relation to the situation in Syria was deemed to come to an end in a short period of time and the asylum-seekers were perceived as 'guests'.<sup>60</sup> However, numbers increased dramatically and in 2012 reached over 100.000<sup>61</sup> which was determined as the psychological limit by the government earlier.<sup>62</sup> The same year a directive that is exclusively designed for Syrian refugees was

<sup>56</sup> Available at <http://www.dw.com/tr/türkiye-suriyeli-sığınmacılara-kapımız-açık/a-15155526> [Accessed 29 April 2018].

<sup>57</sup> Statement of Osman Hacıbektaşoğlu, former vice director of DGMM, [http://ailetoplum.aile.gov.tr/data/5429366a369dc32358ee2a92/calistay\\_raporu.pdf](http://ailetoplum.aile.gov.tr/data/5429366a369dc32358ee2a92/calistay_raporu.pdf) [Accessed 27 April 2018].

<sup>58</sup> Ibid.

<sup>59</sup> Official Gazette dated 19.02.2011, No. 27851.

<sup>60</sup> See Report of AFAD, Available at [https://www.afad.gov.tr/upload/Node/17962/xfiles/suriyeli-misafirlerimiz\\_1\\_.pdf](https://www.afad.gov.tr/upload/Node/17962/xfiles/suriyeli-misafirlerimiz_1_.pdf) [Accessed 27 April 2018], see also İçduygu, A.: Türkiye'de Suriyeli Sığınmacılar: Siyasallaşan bir sürecin analizi, Toplum ve Bilim, Vol. 140, April 2017, p.29.

<sup>61</sup> Available at <https://www.sabah.com.tr/gundem/2012/10/16/multeci-sayisi-psikolojik-siniri-asti> [Accessed 27 April 2018].

<sup>62</sup> Available at <https://www.cnnturk.com/2013/dunya/10/26/davutoglu-siginmacilar-konusunda-kirmizi-cizgi-asildi/728654.0/index.html> [Accessed on 27 April 2018].



issued.<sup>63</sup> The directive neither was published nor was publicly available (Kirişçi, 2014, p.14), yet served for the implementation of the *de facto* protection until 2014.

In 2014, the LFIP's relevant provisions came into force, including the first legislative designation about temporary protection. Temporary protection is regulated under Article 91 of the LFIP, as an emergency response to mass-influx situations. Although the provision refers to 'temporary protection' for the first time in Turkish law, it does not provide a comprehensive context relating to the procedures need to be taken during the implementation of the temporary protection. Instead, Article 91 delegated a wide discretion to the Council of Ministers to issue a by-law which would be the main legal source of action for the ongoing situation. According to Article 91 of the LFIP, the scope of this discretion which was delegated to the Council of Ministers included the regulation of the substantial issues and procedures in relation to reception, stay, rights and obligations, exits, measures to be taken to prevent mass influxes, cooperation and coordination among national and international institutions and organisations. Delegation of this wide discretion and intention to manage the ongoing migratory flow through a secondary administrative regulation other than a legislative act, was indeed served for a purpose to provide effective control of the situation at hand by maintaining flexibility in terms of legal actions to be taken by the administration (Öztürk, 2017, p.203). Considering the fact that the Syrian mass migration started by the time LFIP was being drafted post-2011, such a tendency can be deemed to be specific to the ongoing mass migration from Syria.

Against this backdrop, Turkey's most significant legal response to the forced migratory movements originating from Syria; the TPR was issued by the Council of Ministers on October 2014. By the time the Regulation was issued, approximately 1.5 million individuals were subject to temporary protection, majority of which were residing out of the 22 camps in 10 different cities managed by AFAD.<sup>64</sup> TPR authorized AFAD as the responsible institution for providing services to temporarily protected people and stipulated that other institutions would function in coordination with AFAD when distributing these services (TPR, Article 26). Furthermore, following the issuance of the TPR, a circular exclusively designating the scope of AFAD's said responsibility set forth in the TPR was issued.<sup>65</sup> It should be noted though, in March 2018, AFAD's responsibilities were delegated to DGMM, leaving DGMM as the sole operator of services related to temporary protection.<sup>66</sup>

Under TPR, access to certain services for temporary protection beneficiaries are designated such as; health, education, access to labour market, social assistance and interpretation services (TPR, Articles 26-31 respectively). However, access to international

<sup>63</sup> Directive Regarding Reception and Accommodation of Citizens and Stateless Residents of Syrian Arab Republic Who Arrived Turkey in a Mass for Asylum, Available at [http://www.goc.gov.tr/icerik3/turkiye'de-gecici-koruma\\_409\\_558\\_1097](http://www.goc.gov.tr/icerik3/turkiye'de-gecici-koruma_409_558_1097) [Accessed 27 April 2018].

<sup>64</sup> Available at [https://www.afad.gov.tr/upload/Node/17962/xfiles/suriyeli-misafirlerimiz\\_1\\_.pdf](https://www.afad.gov.tr/upload/Node/17962/xfiles/suriyeli-misafirlerimiz_1_.pdf) [Accessed 28 April 2018].

<sup>65</sup> Circular dated 18.12.2014, No. 2014/4, Available at [https://www.afad.gov.tr/upload/Node/2311/files/Gecici-Koruma\\_Altindaki\\_Yabancilara\\_Iliskin\\_Hizmetlerin\\_Yurutulmesi\\_2014-4\\_.pdf](https://www.afad.gov.tr/upload/Node/2311/files/Gecici-Koruma_Altindaki_Yabancilara_Iliskin_Hizmetlerin_Yurutulmesi_2014-4_.pdf) [Accessed 28 April 2018].

<sup>66</sup> See Regulation No. 2018/11208 Amending the TPR, issued by Official Gazette dated 16.02.2018, No. 30362, Available at <http://www.resmigazete.gov.tr/eskiler/2018/03/20180316.htm> (Accessed 28 April 2018).



protection statuses which bring about more comprehensive rights and secure statuses compared to temporary protection<sup>67</sup> was hindered by the TPR (Article 16).

In addition to the TPR, Turkey issued several secondary administrative regulations for the objective of enhancing temporarily protected persons' access to public services. These secondary legal sources mostly focused on health, education and access to labour market. Pursuant to TPR, temporarily protected persons would have access to health services in or out of temporary accommodation centres. A circular dated 12.10.2015<sup>68</sup> and a directive issued the same year<sup>69</sup>, further provided the procedure of these individuals' access to health services, mainly regulating that they would have access to health services provided that these services are being covered by the Social Security Institution. For such services the costs were earlier deducted from AFAD's budget, however due to the delegations of AFAD's responsibilities to DGMM, since March 2018, DGMM's budget has been utilized to cover the expenses.<sup>70</sup>

For access to education, children under temporary protection has the right to equally access to compulsory education with Turkish citizens, given that Turkish Constitution designates right to education equally to everybody (Const. Article 42). However, a specific circular dated 2014 issued by Turkish Ministry of Education, provides the procedures for the access to education for children under temporary protection.<sup>71</sup> Pursuant to the circular, children may have access to both temporary education centres specifically designated for temporarily protected individuals or to public schools. A foreigner identification card or temporary protection identification document, in principle is needed for registration. For higher education on the other hand, procedures for access is determined by Turkish Higher Education Council (THEC). Temporarily protected individuals may register to Turkish universities after the completion of high school, provided that they meet the academic criteria set forth by the THEC and by the specific university they are applying to.<sup>72</sup>

To regulate the access of people under temporary protection to formal labor market, 'Regulation on Work Permit of Refugees Under Temporary Protection'<sup>73</sup> was been issued on 15 January 2016. The criterias and procedures to obtain work permit has been addressed under the section on *Secondary Law* page 49 above.

In parallel to the above-given reforms at national level, also the European Refugee Crises and also the ongoing EU-Turkey relations created impact on the legal framework. At the

<sup>67</sup> For a comparison see; Öztürk, N.Ö.: Geçici Korumanın Uluslararası Koruma Rejimine Uyumuna Üzerine Bir İnceleme, Ankara Üniversitesi Hukuk Fakültesi Dergisi (Journal of Ankara University Faculty of Law), 2017, vol. 66, Issue 1, pp. 201-263.

<sup>68</sup> Available at [https://www.keo.org.tr/dosyalar/Ekim2015/12.10.2015\\_afad\\_genelge.pdf](https://www.keo.org.tr/dosyalar/Ekim2015/12.10.2015_afad_genelge.pdf) [Accessed 29 April 2018].

<sup>69</sup> Available at <https://dosyasb.saglik.gov.tr/Eklenti/1376,saglik-bakanligi-gecici-koruma-yonergesi-25032015pdf.pdf?0> [Accessed 29 April 2018].

<sup>70</sup> See Regulation No. 2018/11208 Amending the TPR, issued by Official Gazette dated 16.02.2018, No. 30362, Available at <http://www.resmigazete.gov.tr/eskiler/2018/03/20180316.htm> [Accessed 28 April 2018].

<sup>71</sup> Circular dated 23.09.2014, No. 2014/21, Available at <http://www.edirnebarosu.org.tr/wp-content/uploads/2016/07/Yabancılara-Yönelik-Eğitim-Öğretim-Hizmetleri.pdf> [Accessed 29 April 2018].

<sup>72</sup> Available at [http://www.yok.gov.tr/documents/10279/58373/yurtdisindan\\_ogrenci\\_kabulune\\_il\\_esas.pdf/e3ded5b2-c26e-46ed-9f05-6b74f302f5e2](http://www.yok.gov.tr/documents/10279/58373/yurtdisindan_ogrenci_kabulune_il_esas.pdf/e3ded5b2-c26e-46ed-9f05-6b74f302f5e2) [Accessed on 29 April 2018].

<sup>73</sup> Available at <http://www.refworld.org/docid/582c71464.html> [Accessed 29 April 2018].

beginning of 2015, the numbers of individuals crossing from Turkey to EU through irregular means have increased up to 880.000 and emerged as a matter of concern.<sup>74</sup> The EU and Turkey had earlier in 2013 signed a Readmission Agreement (RA). The RA came into force on 1 October 2014<sup>75</sup>, however pursuant to Article 24(3) of the Agreement, provisions related to the obligations and procedures for readmission of third country nationals and stateless persons were to come into force three years after the date of entry into force; precisely on 1 October 2017. Therefore, RA was not functional for readmissions from the EU to Turkey at the time when the irregular crossings were taking place intensively in 2015. But, as it will be given later under this part of the report, the EU-Turkey Statement of 18th March<sup>76</sup> accelerated the process and the readmission of TCNs started by the 4th April in 2016.

The legal basis for the readmissions between Greece and Turkey, is a Readmission Protocol (Greece-Turkey Protocol) between these two countries dated 2002. Later on, it was agreed by the Joint Committee of the RA to facilitate the implementation of the Agreement for third country nationals and stateless individuals by pulling the entry into force date from 1 October 2017 to 1 June 2016<sup>77</sup>. The aim was to initiate the RA alongside with Greece-Turkey Protocol for the readmissions. However, due to lack of reconciliations regarding the visa liberalization dialogue between the Union and Turkey which synchronously took place during the drafting and has been taking place during the implementation of the RA, the approval procedure of the decision to expedite the relevant application of the Agreement was halted by Turkish side<sup>78</sup>. Therefore, only the Greece-Turkey Protocol constituted the legal basis for the readmissions at the time. However, the provisions of the RA related to readmission of third country nationals and the stateless persons automatically came into force and is legally enforceable since 1 October 2017 [RA, Art. 24(3)].

Earlier to the Statement, as one of the most recent is the Joint Action Plan (JAP)<sup>79</sup> adopted by the EU and Turkey on 15th October 2016. The Plan focuses on the strengthening cooperation to prevent irregular migration as highlighting the external border controls along with the cooperation for the Syria refugee crisis. As following the JAP, Turkey begun to construct the above-mentioned security wall as a part of integrated border management system. The wall was introduced as an 'Integrated Border Security System', which is backed

<sup>74</sup> Available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/managing\\_the\\_refugee\\_crisis\\_-\\_eu\\_turkey\\_join\\_action\\_plan\\_implementation\\_report\\_20160210\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/managing_the_refugee_crisis_-_eu_turkey_join_action_plan_implementation_report_20160210_en.pdf) [Accessed 28 April 2018].

<sup>75</sup> Published in Official Gazette on 28.06.2014, No. 29044 and Official Gazette dated 02.08.2014, No. 29076; European Commission, Statement of Commissioner on the Entry into Force of the RA between Turkey and the EU, [http://europa.eu/rapid/press-release\\_STATEMENT-14-285\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-14-285_en.htm) (Accessed on 28 April 2018).

<sup>76</sup> The EU-Turkey Statement, Available at <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf> [Accessed 10 April 2018]

<sup>77</sup> For the Council Decision (EU) 2016/551 of 23 March 2016 establishing the position to be taken on behalf of the European Union within the Joint Readmission Committee on a Decision of the Joint Readmission Committee on implementing arrangements for the application of Articles 4 and 6 of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation from 1 June 2016, see <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32016D0551> (Accessed on 28 April 2018).

<sup>78</sup> See [http://www.bbc.com/turkce/haberler/2016/05/160524\\_erdogan\\_ab](http://www.bbc.com/turkce/haberler/2016/05/160524_erdogan_ab) [Accessed 28 April 2018].

<sup>79</sup> The Joint Action Plan (JAP), Available at [http://europa.eu/rapid/press-release MEMO-15-5860\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm) [Accessed 10.04.2016].

up by fibre optic sensors, cameras, observation balloons and unmanned aerial vehicles to make it a total integrated system (Milliyet, 2017).

To meet the mutual objectives of the JAP, the EU and Turkey agreed upon the Statement which are directly related to the area of migration and asylum. In relation with the crisis driven actions, the Statement accelerated the process and the readmission of TCNs according to the below given principles:

All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order (the EU-Turkey Statement, Article 1).

The statement emphasizes both the EU and international law regarding protection in respect of the non-refoulement principle. However, the Statement also mentions Syrians as it follows:

For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly (The Statement Paragraph 2).

In order to be able to provide temporary protection for Syrians who were returned due to the EU-Turkey Statement, Turkey amended the personal scope of TPR, by extending it to 'Syrian citizens who irregularly reached Aegean islands from Turkey after 20 March 2016 but were subsequently readmitted to Turkey'.<sup>80</sup> For every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU from Turkey directly. According to DGMM Statistics, 13,006 Syrians were resettled to the EU from Turkey due to one-to-one resettlement scheme as of 12.04.2018.<sup>81</sup>

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<sup>80</sup> The Regulation No. 2016/8722 Amending the TPR, was published in Official Gazette dated 07.04.2016, No. 29677, Available at <https://www.lexpera.com.tr/resmi-gazete-disindaki-kaynak/metin/RG801Y2016N29677S20168722> [Accessed 28 April 201].

<sup>81</sup> Available at [http://www.goc.gov.tr/icerik6/gecici-koruma\\_363\\_378\\_4713\\_icerik](http://www.goc.gov.tr/icerik6/gecici-koruma_363_378_4713_icerik) [Accessed 28 April 2018].

## 7- Conclusion

Turkey has been taking steps in terms of improving its asylum management capacity where the impact of both the UN and the EU has been instrumental in transforming Turkish asylum policy. The dominant perspective that has been shaping the policy frame has shifted from that of a 'national security' towards the one putting more emphasis on human rights and international refugee law. This signifies a considerable positive transformation in Turkey's asylum policy in terms of both its preparation process, which has been based on open consultation, and its content, which enshrines for asylum seekers the right to access to asylum and judicial appeal procedures, establishes *non-refoulement* principle, improves detention conditions and access to judicial review. In overall, Turkey has improved the level of its compliance with the international standards by adopting comprehensive legal asylum framework with the LFIP and the TPR. These two legislations guarantee Turkey's compliance with the two main building blocs of the international refugee regime, namely the principle of non-refoulement and provision of basic rights (including health, education, working, and social services) to the asylum seekers. Also, the introduction of the number of status such as subsidiary and conditional refugee status as well as the usage of temporary protection status for millions of Syrians can be evaluated as an improvement as it grants a status to the asylum seekers from the neighboring countries rather than not offering them a protection as being observed in the pre-2011 period. Nevertheless, these new laws are subject to create some legal precarity in relation with their implementation on specific areas as it will be discussed in the subsequent paragraphs.

While Turkey's legal and policy framework in the field of migration has been evolving quite dynamically and there has been some progress in that regard, there are also some areas that require further attention and improvement. There is a need for improvements regarding access to the asylum process, status determination, enhanced facilities for asylum-seekers' protection and, most notably, to lift its geographical limitation on the implementation of the 1951 Geneva Convention. Only limited progress has been made in areas such as the 1951 Convention relating to the status of refugees and the related 1967 Protocol, as Turkey's geographical limitation stance still remains unchanged. The absence of a fully-fledged specific asylum system remains a major concern. The most important consequence of this limitation is creating a legal status, which is 'conditional refugee status'. As it is explained in details as under the 'international protection' part within the report, this status provides only a right to stay in Turkey until resettlement in a third-safe country. However, in practice due to the decreasing quotas of the third-safe countries, the ones who applied to international protection in Turkey and who do not come from Europe, stay in Turkey for long years as remaining in limbo. In addition, according to Article 91(2) of the LFIP, 'temporary protection' can be renewed or cancelled by the decision of the Council of Ministers; while the concerning population cannot apply for international protection. Even if they can, it may bring only 'conditional refugee status' if their application is found grounded. As relying on the exiting figures (see Figure 12) of the nationality of irregular migrants, in the light of the above-mentioned facts, it is hard to ignore the nexus between the forced and irregular migration. In response to the above-mentioned 'temporality' situation, it is a fact that the process of granting citizenship had already begun<sup>82</sup>;

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<sup>82</sup> Interior Ministry General Directorate of Population and Citizenship Affairs Manager Sinan Güner stated that 'the citizenship process of a total of 35,000 Syrians has finished now'. He said a further 15,000 applications were being reviewed, mostly children. According to Interior Ministry figures, over

however only a limited population among the Syrians who fulfill certain criteria like having lived in Turkey for at least five years, knowledge of the Turkish language at sufficient level, a clean criminal record and ‘fitting into social harmony and public order’, before they can apply at the DGMM for citizenship<sup>83</sup>. In this regards, it should also be stated that there are right-based differences in terms of legal framework between the ones who are under international protection and temporary protection such as the freedom of mobility within the country<sup>84</sup>. Although the new system brought about by the enactment of LFIP promises a rights-based approach that is consistent with international law, some concerns arise in terms of practice. For instance, the exception on the suspensive effect of appeal for removal decisions regulated for certain cases [LFIP, Article 53(3)] jeopardises the full implementation of the non-refoulment principle which is progressively regulated under the LFIP without any exceptions. Another point of concern is related to the detention of temporarily protected individuals, as the LFIP does not regulate the reasons and the procedure for the detention of these individuals. Therefore, detention practices on the absence of a removal decision for temporarily protected individuals may likely result in violation of right of personal liberty and freedom designated under article 5 of ECHR and article 19 of the Turkish Constitution, given that there is no legal basis for such detention practises. Furthermore, access to justice in removal centres need to be improved as the practice is reported to be challenging for detainees and for the lawyers.

In terms of unaccompanied children, practice on age assessment, appointment of guardians, expertise on children who experienced trauma and better coordination between concerning institutions is required to be enhanced in order to cope with the “best interest of the child” principle that is the corner stone of both international and national legal standards for the treatment of children.

Another issue that needs to be pointed out is the lack of expertise in the judiciary. Turkey does not have specialized courts on immigration and asylum issues. Considering the fact that the LFIP system is quite new and that the judiciary does not have past experience in dealing with cases especially related to asylum procedure, the legal quality of the decisions given by administrative courts or other relevant courts bear the risk of not meeting the standards of international refugee law. Therefore, consideration of the establishment of specialized courts or conducting intensive trainings on immigration and asylum law appear to be a significant need for the efficient and just implementation of the LFIP regime.

The idea of temporality in governing migration affairs still renders in Turkey’s asylum legislation that is reflected on the TPR. The legislation itself generates temporiness and uncertainty due to its design, its coverage of large numbers of refugees currently reside and have potential to arrive to Turkey (from the neighboring countries in the Middle East) in the future. Considering the fact that temporary protection is not the main protection itself but an

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12,000 other Syrians have been given Turkish citizenship so far. Ministry figures also show Turkey hosts around 3 million Syrian refugees (Dailysabah, 2017).

<sup>83</sup> Available at <http://harekact.bordermonitoring.eu/2018/02/02/on-the-issue-of-turkish-citizenship-for-syrians/> [Accessed 28 May 2018].

<sup>84</sup> People who are under the international protection regime of Turkey can reside in the country according to the ‘satellite city’ policy as it was earlier explained within the report (page 53). However, for the Syrians who under temporary protection, this limitation is only valid for Istanbul and Hatay, where due to the high numbers the new registrations have not been taken since the beginning of 2018. In addition, international protection applications have been taken only from Ankara, which creates mobility difficulties for the concerning population.

interim measure provided in emergency situations such as mass-migration movements, it should not be an alternative to international protection. Hence, rights and procedural safeguards attached to temporary protection are lower than the ones attached to international protection. By hindering the access to international protection, temporarily protected individuals face the risk to be subject to an insecure status for an indefinite time, given that TPR the main driver of the temporary protection, is a secondary legal source and enables the administration to use a flexible and wide discretion. Therefore, there is a significant risk of protracted refugee situations where there is no available durable solution other than repatriation. This is also relevant to the fact that the status of temporary protection prevent asylum seekers to approach the UNHCR for resettlement except the very few emergency and vulnerable cases. The UNHCR is often sidelined by the Turkish central state in implementing temporary protection. Moreover, the TPR gives political authority the power of discretion about the repatriation. The political actors may easily present the repatriation as an option with the legitimization of the temporariness of refugees from the very beginning. The solution is to gradually improve the rights of these individuals or to gradually let them have access to international protection statuses.

Briefly, ensuring equal and fair access to asylum procedures and facilitating the full access of asylum-seekers to legal aid remain priorities to be achieved. Therefore, to develop a fully-fledged national asylum management system, including a national status determination process for asylum-seekers coming from outside Europe, to develop secondary law for complementing the LFIP and most importantly to develop practices by ensuring a better protection framework for asylum-seekers in Turkey appear as the most important areas.

Also, the size of the Syrian population in Turkey reached over 3.5 million make it necessary to delve into mechanisms of ‘integration’ of Syrians instead of approaching the issue from the lense of temporality. Integration appears as an important agenda for Turkey before the existing shortcomings and challenges about refugees, asylum seekers and those under temporary protection turning into a ‘minority issue’.



## Appendices

### Annex I: Overview of the legal framework on migration, asylum and reception conditions

Legislation title (original and English) and number	Date	Type of law (i.e. legislative act, regulation s, etc...)	Object	Link/PDF
Passport Law <i>Pasaport Kanunu</i> Law No. 5682	July 15, 1950  (A number of provisions were repealed in 2013. A clause of article 18 was amended on August 1, 2010.)	Legislative act	Regulating passports, documents and entry visa obligations; to determine persons who are forbidden to enter Turkey; regulations about exceptional measurements in war and exceptional circumstances, for foreign persons" sealed passports, and stateless persons; penal sentences for illegal entries and departures.	<a href="http://www.mevzuat.gov.tr/MevzuatMetin/1.3.5682.pdf">http://www.mevzuat.gov.tr/MevzuatMetin/1.3.5682.pdf</a> . [Turkish]  <a href="http://www.legislationline.org/documents/id/8984">http://www.legislationline.org/documents/id/8984</a> . [English]
Foreign Direct Investment Law <i>Doğrudan Yabancı Yatırımlar Kanunu</i> Law No. 4875	June 5, 2003	Legislative Act	Regulating foreign direct investments and the rights of foreign investors	<a href="http://www.goc.gov.tr/files/files/6(1).pdf">http://www.goc.gov.tr/files/files/6(1).pdf</a> [Turkish]  <a href="http://www.invest.gov.tr/en-US/infocenter/publications/Documents/FDI%20Law%20in%20Turkey.pdf">http://www.invest.gov.tr/en-US/infocenter/publications/Documents/FDI%20Law%20in%20Turkey.pdf</a> . [English]
Turkish Criminal Law <i>Türk Ceza Kanunu</i> Law No. 5237	September 26, 2004	Legislative act	Defining the basic principles for criminal responsibility and types of crimes, punishments and security precautions.	<a href="http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5237.pdf">http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5237.pdf</a> . [Turkish]  <a href="http://www.wipo.int/edocs/lexdocs/laws/en/tr/tr171en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/tr/tr171en.pdf</a> . [English]
Law for the Protection of Children (Juvenile Protection Law)	July 3, 2005	Legislative act	Regulating the procedures and principles with regard to protecting juveniles who are in need of protection or who are pushed to crime and ensuring	<a href="http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5395.pdf">http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5395.pdf</a> . [Turkish]



Çocuk Koruma Kanunu Law No. 5395			their rights and well-being.” Art. 1(1).	<a href="http://www.lawsturkey.com/law/juvenile-protection-law-5395">http://www.lawsturkey.com/law/juvenile-protection-law-5395</a> [English]
Social Insurance and General Security Law <i>Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu</i> Law No. 5510	May 31, 2006	Legislative act	Regulating the rights of beneficiaries and provides for general rules for the functioning of the insurance system and funding conditions. Also contains provisions on employers and workplaces, short-term and long-term insurances.	<a href="http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5510.pdf">http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5510.pdf</a> [Turkish] <a href="http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&amp;p_isn=74711">http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&amp;p_isn=74711</a> [English]
Citizenship Law <i>Vatandaşlık Kanunu</i> Law No. 5901	May 29, 2009	Legislative act	Regulating “the principles and procedures regarding the conduct of operations and transactions for acquisition and loss of Turkish citizenship” Art. 1(1).	<a href="http://www.goc.gov.tr/files/files/7(1).pdf">http://www.goc.gov.tr/files/files/7(1).pdf</a> [Turkish] <a href="http://www.refworld.org/pdfid/4a9d204d2.pdf">http://www.refworld.org/pdfid/4a9d204d2.pdf</a> [English]
Settlement Law <i>İskan Kanunu</i> Law. No 5543	September 19, 2006	Legislative act	Regulating the formal settlement of foreigners.	<a href="http://www.resmigazete.gov.tr/eskiler/2006/09/20060926-1.htm">http://www.resmigazete.gov.tr/eskiler/2006/09/20060926-1.htm</a> . [Turkish]
Law on Institutional Framework and Mandate of Disaster and Emergencies Agency (AFAD) <i>Afet ve Acil Durum Yönetimi Başkanlığının Teşkilat ve Görevleri Hakkında Kanun</i> Law No. 5902	May 29, 2009	Legislative act	Forming the Disaster and Emergency Management Authority (AFAD) in order carry out services in cases of disasters and emergencies	<a href="http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5902.pdf">http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5902.pdf</a> [Turkish]
Law on Foreigners and International Protection, LFIP <sup>85</sup> <i>Yabancılar ve Uluslararası Koruma Kanunu</i> Law No. 6458	April 4, 2013 (most provisions entered in to force on April 11, 2014)  Amended by: Emergency	Legislative act	Regulating “the principles and procedures with regard to foreigners’ entry into stay in and exit from Turkey, and the scope and implementation of the protection to be provided for foreigners who seek protection from Turkey, and the establishment, duties, mandate and responsibilities of the Directorate General of Migration	<a href="http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6458.pdf">http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6458.pdf</a> [Turkish]  <a href="http://www.goc.gov.tr/files/files/YUKK_I%CC%87NGI%CC%87LI%CC%87ZCE_BASKI(1)(1).pdf">http://www.goc.gov.tr/files/files/YUKK_I%CC%87NGI%CC%87LI%CC%87ZCE_BASKI(1)(1).pdf</a> . [Official English Translation]

<sup>85</sup> The LFIP abrogated the 1) *Law Regarding Residence and Travel of Foreign Subjects in Turkey*, Law No. 5683, 1950; 2) *Asylum Regulation Law* No. 1994/6169, 1994.

	Decree No 676, 29 October 2016		Management under the Ministry of Interior.” Art. 1(1).	
International Labour Force Law <sup>86</sup> <i>Uluslararası İşgücü Kanunu</i> Law No. 6735	July 28, 2016	Legislative act	Determining policies, implementation and monitoring of international labour force in Turkey; regulates the processes and transactions to be followed on work permits and work permit exemptions granted to foreigners and the rights and obligations in the field of employment of international workforce.	<a href="http://www.resmigazete.gov.tr/eskiler/2016/08/20160813-1.htm">http://www.resmigazete.gov.tr/eskiler/2016/08/20160813-1.htm</a> . [Turkish] <a href="https://turkishlaborlaw.com/international-workforce-law">https://turkishlaborlaw.com/international-workforce-law</a> [English]
Provincial Organisation’s Establishment, Duties and Working Regulation <i>Göç İdaresi Genel Müdürlüğü Taşra Teşkilatı Kuruluş, Görev ve Çalışma Yönetmeliği</i> No.28821 (Official Gazette)	November 14, 2013	Regulation	Determining the protocol principles for establishment and operations of the provincial organization of Directorate General of Migration Management	<a href="http://www.resmigazete.gov.tr/eskiler/2013/11/20131114-4.htm">http://www.resmigazete.gov.tr/eskiler/2013/11/20131114-4.htm</a> .
Circular of the Prime Minister on the Turkey-EU Readmission Agreement <i>Geri Kabul Anlaşması ile İlgili Başbakanlık Genelgesi</i> No. 28974 (Official Gazette)	April 16, 2014	Circular	President Recep Tayyip Erdoğan’s circular addressing DGMM on irregular migration and readmission agreements	<a href="http://www.resmigazete.gov.tr/eskiler/2014/04/20140416-10.htm">http://www.resmigazete.gov.tr/eskiler/2014/04/20140416-10.htm</a> [Turkish]
Regulation on the Establishment and Operations of Reception and Accommodation Centres and Removal Centres <i>Kabul ve Barınma Merkezleri ile Geri</i>	April 22, 2014	Regulation	Determining protocol principles for establishment, management, operation, service provision, outsourcing the operation of and auditing the reception, accommodation and removal centres affiliated to Directorate General for Migration Management.	<a href="http://www.resmigazete.gov.tr/eskiler/2014/04/20140422-5.htm">http://www.resmigazete.gov.tr/eskiler/2014/04/20140422-5.htm</a> . [Turkish]

<sup>86</sup> This Law replaced the Law No 4817 on Work Permits for Foreigners, 27 February 2003.

<i>Gönderme Merkezlerinin Kurulması, Yönetimi, İşletilmesi, İşlettirilmesi ve Denetimi Hakkında Yönetmelik</i> No. 28980 (Official Gazette)				
Information Note on the Documents and Identification Cards issued on the basis of LFIP  <i>YUKK Uyarınca Verilen Belge ve Kimlikler Hakkında , 19/9/2014 tarihli 93 numaralı Genel Yazı</i>	September 19, 2014	Circular	Regulating documents and identification cards issued to foreigners and those under international protection	<a href="http://www.tnb.org.tr/GenelgeDetay.aspx?TURU=GENELYAZI&amp;ULAS=78653&amp;K=&gt;">http://www.tnb.org.tr/GenelgeDetay.aspx?TURU=GENELYAZI&amp;ULAS=78653&amp;K=&gt;</a> [Turkish]
Circular on Educational Activities Targeting Foreigners  <i>Yabancılar Yönelik Eğitim Öğretim Hizmetleri – Genelge</i>	September 23, 2014	Circular	Regulating educational activities of foreigners including refugees, asylum seekers and those under temporary protection regime	<a href="http://mevzuat.meb.gov.tr/dosyalar/1715.pdf">http://mevzuat.meb.gov.tr/dosyalar/1715.pdf</a> . [Turkish]
Temporary Protection Regulation  <i>Geçici Koruma Yönetmeliği</i> No. 2014/6883  Amended by: Regulation 2016/8722, 5 April 2016  Amended by: Regulation 2018/11208, 16 March 2018	October 22, 2014	Regulation	Determining “the procedures and principles pertaining to temporary protection proceedings.” Art. 1(1).	<a href="http://www.goc.gov.tr/files/files/20141022-15-1.pdf">http://www.goc.gov.tr/files/files/20141022-15-1.pdf</a> . [Turkish]  <a href="http://www.goc.gov.tr/files/files/temp-temp.pdf">http://www.goc.gov.tr/files/files/temp-temp.pdf</a> [English] [Official English Translation]
Circular on the Marriage and the Registration of Children of Refugees and Temporary Protection	October 13, 2015	Circular/Note from the Ministry of Interior	Regulating the marriage and the registration of children of refugees and the beneficiaries of temporary protection.	<a href="https://www.nvi.gov.tr/PublishingImages/mevzuat/nufus-mevzuati/talimat-a%C3%A7%C4%B1klay%C4%B1c%C4%B1-%B1-">https://www.nvi.gov.tr/PublishingImages/mevzuat/nufus-mevzuati/talimat-a%C3%A7%C4%B1klay%C4%B1c%C4%B1-%B1-</a>

Beneficiaries <i>Mülteciler ve Geçici Koruma Altına Alınanların Evlenme ve Çocuklarının Tanınması Konulu Yazı</i>  (Document No. 4000496010.07.01-E.88237)				<a href="#">yaz%C4%B1lar/M%C3%BCteciler%20ve%20Ge%C3%A7ici%20Koruma%20Alt%C4%B1na%20Al%C4%B1nanlar%C4%B1n%20Evlenme%20ve%20%C3%87ocuklar%C4%B1n%C4%B1n%20Tan%C4%B1nmas%C4%B1.pdf</a> [Turkish]
Directive on Unaccompanied Children <i>Refakatsiz Çocuklar Yönergesi</i>	October 20, 2015	Directive	Regulating the services provided to the unaccompanied children by the Ministry of Family and Social Affairs.	<a href="http://cocukhizmetleri.aile.gov.tr/data/544e26d9369dc318044059b0/REFAKATS%C4%B0Z%20%C3%87OCUK%20Y%C3%96NERGES%C4%B0.pdf">http://cocukhizmetleri.aile.gov.tr/data/544e26d9369dc318044059b0/REFAKATS%C4%B0Z%20%C3%87OCUK%20Y%C3%96NERGES%C4%B0.pdf</a> . [Turkish]
Circular on Health Benefits for Temporary Protection Beneficiaries <i>Geçici Koruma Altına Alınanlara Verilecek Sağlık Hizmetlerine Dair Esaslar Yönergesi</i>	November 4, 2015	Circular	Regulating the access to public health services by the beneficiaries of temporary protection; regulating the voluntary health services and civil society health services targeting to beneficiaries of temporary protection.	<a href="https://dosyasab.saglik.gov.tr/Eklenti/1376.saglik-bakanligi-gecici-koruma-yonergesi-25032015pdf.pdf?0">https://dosyasab.saglik.gov.tr/Eklenti/1376.saglik-bakanligi-gecici-koruma-yonergesi-25032015pdf.pdf?0</a> . [Turkish]
Regulation on Work Permits of Refugees Under Temporary Protection <i>Geçici Koruma Sağlanan Yabancıların Çalışma İzinlerine dair Yönetmelik</i>  No. 2016/8375 (Council of Ministers)	Jan. 11, 2016	Regulation	Determining “the procedures and principles related to employment of foreigners under temporary protection pursuant to Article 91 of the Law No. 6458 on Foreigners and International Protection dated 4/4/2013.” Art. 1(1).	<a href="http://www.resmigazete.gov.tr/eskiler/2016/01/20160115-23.pdf">http://www.resmigazete.gov.tr/eskiler/2016/01/20160115-23.pdf</a> [Turkish]  <a href="http://www.refworld.org/docid/582c71464.html">http://www.refworld.org/docid/582c71464.html</a> . [English]
Regulation on the Implementation of the Law on Foreigners and International Protection <i>Yabancılar ve Uluslararası Koruma</i>	March 17, 2016	Regulation LFIP Implementing Regulation	Determining “the principles and procedures in the implementation of Law No. 6458 on Foreigners and International Protection dated 4/4/2013.” Art. 1(1).	<a href="http://www.goc.gov.tr/files/dokuman5.pdf">http://www.goc.gov.tr/files/dokuman5.pdf</a> . [Turkish]

<i>Kanunu'nun Uygulanmasına Dair Yönetmelik</i>				
Regulation on the Fight against Human Trafficking and Protection of Victims  <i>İnsan Ticaretiyle Mücadele ve Mağdurların Korunması Hakkında Yönetmelik</i>  No. 29656 (Official Gazette)	March 17, 2016	Regulation	Regulating the fight against human trafficking; the protection of victims, granting residence permits to victims and regulating service provisions	<a href="http://www.resmigazete.gov.tr/eskiler/2016/03/20160317-9.htm">http://www.resmigazete.gov.tr/eskiler/2016/03/20160317-9.htm</a> . [Turkish]
Regulation on Work Permit of Applicants for International Protections and those Granted International Protection  <i>Uluslararası Koruma Başvuru Sahibi ve Uluslararası Koruma Statüsüne Sahip Kişilerin Çalışmasına Dair Yönetmelik</i>  No. 29695 (Official Gazette)	April 26, 2016	Regulation	Determining the procedures and principles governing the employment of the applicants or the beneficiaries of international protection status based LFIP.	<a href="http://www.resmigazete.gov.tr/eskiler/2016/04/20160426-1.htm">http://www.resmigazete.gov.tr/eskiler/2016/04/20160426-1.htm</a> [Turkish]
Circular of the DGMM on Principles and Procedures for Foreigners under Temporary Protection  <i>Geçici Koruma Altındakilere Uygulanacak Prosedürler ve İlkeler Hakkında Genelge</i>	November 29, 2017	Circular	Information about the content of circular has not yet available as of 27 April 2018.	The original document has not yet published on the DGMM web site.

## Annex II: List of authorities involved in the migration governance

Authority	Tier of government (national, regional, local)	Type of organization	Area of competence	Link
Migration Policies Board <i>Göç Politikaları Kurulu</i>	National	Board under the authority of Ministry of Interior <sup>87</sup>	Deciding Turkey's migration policies and strategies and follow up on their implementation	<a href="http://www.goc.gov.tr/icerik/6/migration-policies-board_917_1067_4728_icerik">http://www.goc.gov.tr/icerik/6/migration-policies-board_917_1067_4728_icerik</a>
Directorate General for Migration Management <i>Göç İdaresi Genel Müdürlüğü</i>	National Including directorate general, permanent boards and committees <sup>88</sup> , central organization, service units, 81 provincial branches across Turkey overseas organizations	Directorate under the authority of Ministry of Interior	Implementing policies and strategies related to foreigners, international protection, temporary protection and protection of victims of human trafficking.	<a href="http://www.goc.gov.tr/main/En_3">http://www.goc.gov.tr/main/En_3</a> [English]  For organizational chart see <a href="http://www.goc.gov.tr/icerik/6/organisation-chart_911_925_955_icerik">http://www.goc.gov.tr/icerik/6/organisation-chart_911_925_955_icerik</a>
Disaster and Emergency Management Authority <i>AFAD</i>	National Including Central and 81 provincial branches across Turkey	Agency under the under the Prime Ministry	Managing international humanitarian assistance that will be distributed to foreigners. It is main responsibility is on emergency and disaster management.	<a href="https://www.afad.gov.tr/en/">https://www.afad.gov.tr/en/</a> [English]
United Nations High Commissioner for Refugees in Turkey	International		Supporting Turkey's national refugee governance in terms of capacity building to provide humanitarian aid to	<a href="http://www.unhcr.org/tr/">http://www.unhcr.org/tr/</a> [Turkish]

<sup>87</sup> Migration Policies Board operates under the chairmanship of the Interior Minister and is comprised of the undersecretaries of the Ministry of Family and Social Policies, Ministry for European Affairs, Ministry of Labour and Social Security, Ministry of Foreign Affairs, Ministry of Interior, Ministry of Culture and Tourism, Ministry of Finance, Ministry of National Education, Ministry of Health, Ministry of Transport, Maritime Affairs and Communications as well as the President of the Presidency of the Turks Abroad and Related Communities and the Director General of Migration Management.

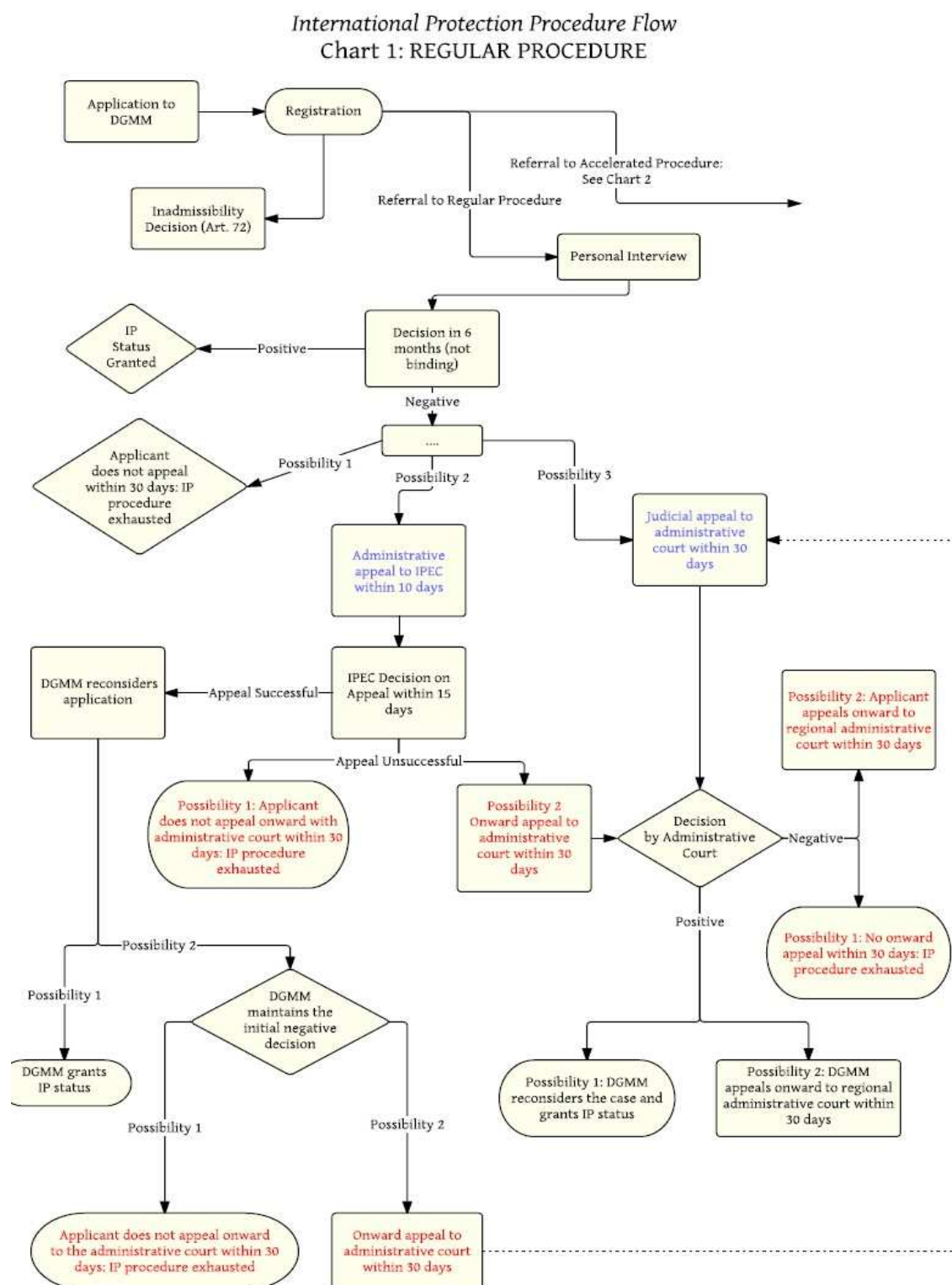
<sup>88</sup> These include Migration Advisory Board; International Protection Assessment Committee; and Coordination Board on Combating Irregular Migration.

			refugees; registration of non-Syrian refugees, conducting RSD <sup>89</sup> and pursue resettlement procedures.	
Sub-Committee for the Rights of Asylum-Seekers <i>Mülteci Hakları Alt Komisyonu</i>	National	Parliamentary Sub-Committee of Human Rights Monitoring Committee at Grand National Assembly of Turkey	Investigation and monitoring of legal and practical problems experienced by asylum seekers, refugees, migrants, irregular migrants, making recommendation for solutions	<a href="https://www.tbmm.gov.tr/komisyon/insanhaklari/altkomisyon/2018_2.htm">https://www.tbmm.gov.tr/komisyon/insanhaklari/altkomisyon/2018_2.htm</a> . [Turkish]

<sup>89</sup> UNHCR mandate RSD decisions do not have any direct binding effect under LFIP as it recognizes the DGMM as the main decision maker in asylum applications.

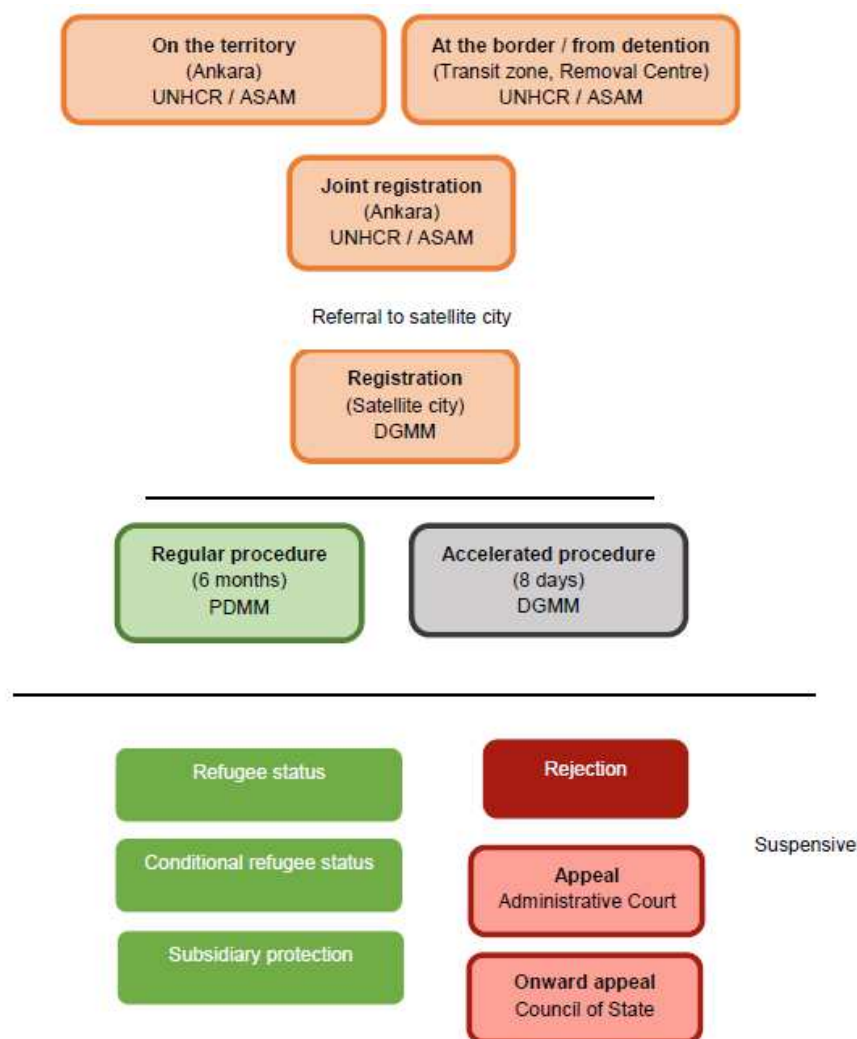


## Annex III: Flow chart of the international protection procedure



Source: AIDA, Asylum Information Database, Turkey: Country Report, p. 26, available at [http://www.asylumineurope.org/sites/default/files/report-download/aida\\_tr\\_update.i.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_tr_update.i.pdf) (Accessed 27 April 2018)

## Annex IV: Flow chart of asylum procedure



Source: AIDA 2018. Country Report: Turkey, Asylum Information Database, Last Updated 30.03.2018. p.20,  
Available at: <http://www.asylumineurope.org/reports/country/turkey> [Accessed 27 April 2018].

## Annex V: List of European Court of Human Rights and European Commission of Human Rights Decisions<sup>90</sup>

A.K. v. TURKEY (Application no. 14401/88, 12/01/1991)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=664978&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

F. ET AL v. TURKEY (Application no. 13624/88, 11/07/1991)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=665086&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

A.G. AND OTHERS v. TURKEY (Application no. 40229/98, 15 June 1999)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=669016&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

JABARI v. TURKEY (Application no. 40035/98, 11/07/2000, Final 11/10/2000)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696777&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>  
[http://www.yargitay.gov.tr/aihm/upload/40035\\_98.pdf](http://www.yargitay.gov.tr/aihm/upload/40035_98.pdf)

G.H.H AND OTHERS v. TURKEY (Application no. 43258/98, 11/07/2000, Final 11/10/2000)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696776&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

MOHAMMED KHADJAWI v. TURKEY (Application no. 52239/99, 6/01/2000)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=669168&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

M.T. AND OTHERS v. TURKEY (Application no. 46765/99, 30/05/2002)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=670768&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

A.E. AND OTHERS v. TURKEY (Application no. 45279/99, 30/05/2002)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=670769&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

AFFAIRE MÜSLİM v. TURKEY (Application no. 53566/99, 26/7/2005)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=755852&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

MAMATKULOV AND ASKAROV v. TURKEY (Applications nos. 46827/99 and 46951/99, 4/02/2005)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=717615&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

D. AND OTHERS v. TURKEY (Application no. 24245/03, 22/06/2006)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=806148&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>  
[http://www.yargitay.gov.tr/aihm/upload/24245\\_03.pdf](http://www.yargitay.gov.tr/aihm/upload/24245_03.pdf)

<sup>90</sup> Available at [http://www.goc.gov.tr/icerik6/list-of-echr-decisions\\_913\\_1001\\_1002\\_icerik](http://www.goc.gov.tr/icerik6/list-of-echr-decisions_913_1001_1002_icerik) [Accessed 27 April 2018].

ROZA TALEGHANI AND OTHERS v. TURKEY (Application no.34202/07, 6/11/2007)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=826892&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

FRAYDUN AHMET KORDIAN v. TURKEY (Application no.6575/06, 4/07/2006)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=807852&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

ANVAR MOHAMMADI v. TURKEY (Application no.3373/06, 30/08/2007)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=823709&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

N.M. v. TURKEY (Application no.42175/05, 18/03/2008)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=833993&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>  
<http://www.yargitay.gov.tr/aihm/upload/42175-05.pdf>

ABDOLKHANI AND KARIMNIA v. TURKEY (Application no.30471/08, 22/09/2009)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=854351&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>  
<http://www.yargitay.gov.tr/aihm/upload/30471-08.pdf>

ABDOLKHANI AND KARIMNIA v. TURKEY (Application no. 50213/08, 27/07/2010)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=871876&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

Z.N.S v. TURKEY (Application no. 21896/08, 19/01/2010)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=861159&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>  
<http://www.yargitay.gov.tr/aihm/upload/21896-08.pdf>

TEHRANI AND OTHERS v. TURKEY (Applications nos. 32940/08, 41626/08, 43616/08, 13/04/2010)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=866319&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>  
<http://www.yargitay.gov.tr/aihm/upload/43616-08.pdf>

KESHMIRI v. TURKEY (Application no. 36370/08, 13/04/2010)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=866321&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>  
<http://www.yargitay.gov.tr/aihm/upload/36370-08.pdf>

CHARAHILI v. TURKEY (Application no. 46605/07, 13/04/2010)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=866317&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>  
<http://www.yargitay.gov.tr/aihm/upload/46605-07.pdf>

RANJBAR AND OTHERS v. TURKEY (Application no.37040/07, 13/04/2010)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=866315&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>  
<http://www.yargitay.gov.tr/aihm/upload/37040-07.pdf>

AHMADPOUR v. TURKEY (Application no. 12717/08, 15/06/2010)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=869911&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

M.B. AND OTHERS v. TURKEY (Application no.36009/08, 15/06/2010)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=869909&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>  
<http://www.yargitay.gov.tr/aihm/upload/36009-08.pdf>

D.B. v. TURKEY (Application no.33526/08, 13/07/2010)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=871173&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>  
<http://www.yargitay.gov.tr/aihm/upload/33526-08.pdf>

DBOUBA v. TURKEY (Application no.15916/09, 13/07/2010)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=871171&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>  
<http://www.yargitay.gov.tr/aihm/upload/15916-09.pdf>

ALIPOUR AND HOSSEINZADGAN v. TURKEY (Applications nos. 6909/08, 12792/08 and 28960/08, 13/07/2010)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=871175&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>  
<http://www.yargitay.gov.tr/aihm/upload/6909-08.pdf>

MOGHADDAS v. TURKEY (Application no.46134/08, 15/02/2011)  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=881526&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

Keshmiri v.TURKEY (No.II) (Application No. 22426/10, 17 Ocak 2012)  
[http://hudoc.echr.coe.int/sites/tur/Pages/search.aspx#{"appno":\["22426/10"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-108627"\]}](http://hudoc.echr.coe.int/sites/tur/Pages/search.aspx#{)

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[http://hudoc.echr.coe.int/sites/tur/Pages/search.aspx#{"appno":\["50372/09"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-115170"\]}](http://hudoc.echr.coe.int/sites/tur/Pages/search.aspx#{)

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[http://hudoc.echr.coe.int/sites/tur/Pages/search.aspx#{"appno":\["28127/09"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-138584"\]}](http://hudoc.echr.coe.int/sites/tur/Pages/search.aspx#{)

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[http://hudoc.echr.coe.int/sites/tur/Pages/search.aspx#{"appno":\["43875/09"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-142399"\]}](http://hudoc.echr.coe.int/sites/tur/Pages/search.aspx#{)

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[http://hudoc.echr.coe.int/sites/tur/Pages/search.aspx#{"appno":\["72710/11"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-145011"\]}](http://hudoc.echr.coe.int/sites/tur/Pages/search.aspx#{)

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[http://hudoc.echr.coe.int/sites/tur/Pages/search.aspx#{"appno":\["22681/09"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-145708"\]}](http://hudoc.echr.coe.int/sites/tur/Pages/search.aspx#{)

## Annex VI: Glossary

This short glossary is prepared as considering the focus of the report. Since the report reflects the national legal and institutional framework for Turkey, thus the items are taken from the Law on Foreigner and International Protection (LFIP).

**Accelerated procedure:** Procedure in which asylum application will be processed and decided much faster than regular asylum procedure. The personal interview with the applicant should be held within 3 days of registration interview, and the decision on the application must be issued within 5 days from the personal interview (LFIP, Article 79 (2)).

**Conditional refugee status:** Status granted to “a person who as a result of events occurring outside European countries and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it, shall be granted conditional refugee status upon completion of the refugee status determination process. Conditional refugees shall be allowed to reside in Turkey temporarily until they are resettled to a third country. (LFIP, Article 62 (1))

**DGMM:** The state agency under the Ministry of Interior which carries out migration policies and strategies, ensure coordination among relevant agencies and organisations, and carry-out functions and actions related to the entry into, stay in and exit from Turkey for foreigners as well as their removal, international protection, temporary protection and the protection of victims of human trafficking (LFIP, Article 103)

**Geographical limitation:** Turkey is the signatory of the 1951 Geneva Convention Relating to the Status of Refugees (1951 Convention), and its associated 1967 Protocol. It recognizes the Convention’s refugee status for those who meet the Convention criteria due to events happening in Europe, but does not grant refugee status to people fleeing from conflicts and persecution in non-European countries

**Irregular migration:** Migration whereby foreigners enter into, stay in or exit from Turkey through illegal channels and work in Turkey without a permit or international protection status (LFIP, Article 3).

**International protection:** The status granted to ‘refugees, conditional refugees, and those needing subsidiary protection’ (LFIP, Article 3(1)-r)

**Persons with special needs:** unaccompanied minors, elderly, persons with disabilities, pregnant women, single parents with an accompanying child and victims of torture, rape and other serious psychological, physical or sexual violence. (LFIP Article 3-1-(I))

**Refugee status:** Status granted to “a person who as a result of events occurring in European countries and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his citizenship and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country



of his former residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it, shall be granted refugee status upon completion of the refugee status determination process.” (LFIP, Article 61(1))

**Satellite cities:** Provinces assigned by the Ministry of Interior for foreigners who seek asylum for political reasons to temporarily reside.

**Subsidiary protection status:** Status granted to “A foreigner or a stateless person, who neither could be qualified as a refugee nor as a conditional refugee, shall nevertheless be granted subsidiary protection upon the status determination because if returned to the country of origin or country of [former] habitual residence would: a) be sentenced to death or face the execution of the death penalty; b) face torture or inhuman or degrading treatment or punishment; c) face serious threat to himself or herself by reason of indiscriminate violence in situations of international or nationwide armed conflict and therefore is unable or for the reason of such threat is unwilling, to avail himself or herself of the protection of his country of origin or country of [former] habitual residence.” (LFIP Article 63-(1))

**Temporary protection:** Protection provided for foreigners who have been forced to leave their country, cannot return to the country that they have left, and who have arrived at or crossed the borders of Turkey in a mass influx situation seeking immediate and temporary protection (LFIP, Article 91).



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# **RESPOND**

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## **United Kingdom**

### **Country Report**

**D1.2 – April 2018**

**Catherine Hirst & Naures Atto**

**University of Cambridge**

Horizon 2020  
RESPOND: Multilevel Governance  
of Mass Migration in Europe and  
Beyond (770564)



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## Executive summary

This report explores the legal and policy framework of migration governance in the United Kingdom (UK). It shows that migration governance is complicated, reactive, and that the needs of immigrants, refugees and asylum seekers have been eroded at the expense of border control overtime. The constitutional organisation of the state has contributed to these features of immigration policy. Evidence of the complexity, reactivity and restrictiveness of migration governance is found in the UK's legislative framework, the legal status of foreigners, the reception system and post-refugee crisis reforms.

Constitutionally there are three tiers of government in the UK – the central UK Government, the devolved governments of Northern Ireland, Scotland and Wales, and local authorities. The central UK Government is responsible for immigration, nationality and asylum policy. However, the devolved legislations and local authorities have a role in providing refugee and asylum seekers support within their constitutional remit, including in the areas of social security, housing and health care. The structure of government contributes to the complexity of migration governance, given the sometimes-difficult task of distinguishing the functions and different objectives of the tiers.

The rights of asylum seekers are in a more precarious position than in other countries for two reasons. First, there is no specific right to asylum enshrined in the UK's uncodified constitution, although the Human Rights Act 1998 plays a significant role in protecting asylum seeker rights. Second, the UK has no entrenched provisions in its constitution, meaning that legislation such as the Human Rights Act 1998 could be amended or replaced simply via an act of parliament<sup>1</sup>.

Despite some historical peculiarities that still persist, the UK has an independent judiciary that has at times been in conflict with the government over the human rights of immigrants, asylum seekers and refugees. However, the principle of parliamentary sovereignty in the UK means that i) the courts cannot invalidate primary legislation on the basis of its incompatibility with the Human Rights Act 1998 ii) the judiciary have tended to be cautious vis-à-vis parliament, not wanting to overstep their role.

Evidence of the complexity, reactivity and restrictive nature of migration governance can be found in the evolution of legislation. With some notable exceptions, the evolution of primary legislation on immigration and asylum has been regressive, with successive restrictions on appeal rights, social benefits and the criminalization of irregular migrants. Legislation has been introduced to circumvent more progressive court decisions and has at times been rushed through without adequate consultation. Legislation has also tended to be reactive, with each wave of immigration throughout the 20<sup>th</sup> century being met with a legislative backlash. Legislation is also complex and rapidly evolving, with 12 Acts of Parliament affecting immigration being passed in the last 20 years.

Routes to live in the UK are incredibly complex, with over 16 different types of work visa, which are being amended, removed and replaced all the time. Conditions are attached to all types of visa, with asylum seekers for example being unable to work unless their claim takes more than one year to process. Although most visa categories are not entitled to access public funds, education for children between the ages of 5 and 16 is compulsory and free at state

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<sup>1</sup> Although the UK is bound in international law by the Convention Relating to the Status of Refugees 1951, and under European Union (EU) law by the EU Common European Asylum System.

schools; while the National Health Service provides free emergency treatment to most migrants (although some must pay a surcharge before they arrive in the UK). Undocumented immigrants have limited pathways to resurface from ‘illegal’ immigration, their access to services is circumscribed and it is a crime for them to be employed.

The reception system for asylum seekers provides another example of the complexity and regressive nature of immigration governance, which fails to meet asylum seekers’ needs. Only destitute and unaccompanied asylum-seeking children have access to the reception system. The weekly allowance given to destitute asylum seekers is barely enough to make ends meet, while reception centre accommodation is not sensitive to the needs of vulnerable asylum seekers. The Government has contracted out the delivery of reception housing to three private companies, which then sub-contract themselves, adding to the complexity.

Since the outbreak of the Syrian war, the Government has set up the Syrian Vulnerable Person Resettlement Scheme (VPRS), the Vulnerable Children Resettlement Scheme and children relocated under the ‘Dubs Amendment’. Advocates have been particularly critical of the implementation of the ‘Dubs Amendment’, with the charity *Help Refugees* challenging the Government’s implementation of the scheme in the High Court in 2017, albeit unsuccessfully (Help Refugees, 2017).

The current immigration landscape notwithstanding, Brexit has generated significant ambiguity as to the future of UK migration governance. Uncertainty surrounds the status of EU citizens who wish to live in the UK in future, as well as the treatment of asylum seekers once the UK is no longer bound by the Common European Asylum System. However, there are significant components of UK migration governance that will remain unaffected – the UK will still need to meet its obligations under the Convention Relating to the Status of Refugees 1951 (Refugee Convention) and the European Convention on Human Rights (ECHR), while Brexit will not directly affect the UK’s export of border controls to France<sup>2</sup> (Gauci, 2017, p.3).

The methodological approach of the report has been to rely on secondary research. Where possible, government documents, policies, legislation and publications have been used in order to gather information about the policy and legal environment directly from the source. This has been supplemented by third sector research reports, text books, academic journal articles, media articles and other public commentary.

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<sup>2</sup> Although France may reconsider the agreement in light of Brexit (Gauci, 2017: 3).

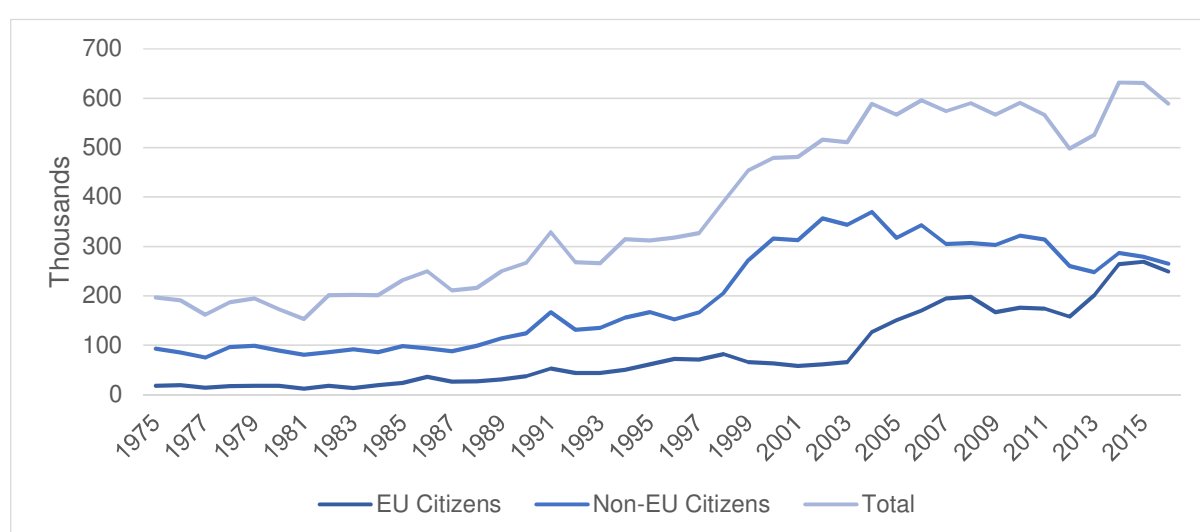


# 1. Statistics and Data Overview<sup>3</sup>

## 1.1. Non-EU Migration to the United Kingdom

Migration<sup>4</sup> to the United Kingdom (UK) has been trending upwards since the mid-1980s, with significant increases from 1998. The majority of immigrants are citizens of countries outside the European Union (EU) (see Figure 1), with 53% of immigrants to the UK since 1975 possessing non-EU citizenship (Office for National Statistics, 2017a). Non-EU immigration peaked in 2004, and has been trending downwards since, almost becoming equal to EU migration<sup>5</sup> in 2015 (Office for National Statistics, 2017a). In 2016, 45% of immigrants to the UK were non-EU citizens, 42% were EU citizens, and 13% were British<sup>6</sup> (Office for National Statistics, 2017a).

**Figure 1: Long-Term International Migration to the UK by Citizenship, 1975-2016**



Source: Office for National Statistics, 2017a.

Net migration<sup>7</sup> to the UK has been positive every year since 1994, with immigration outstripping emigration by more than 100,000 people annually from 1998 (Office for National Statistics, 2016a). In 2016, approximately 588,000 people immigrated to the UK, and 339,000

<sup>3</sup> There are two main sources of immigration data in the UK – Home Office data and the Office for National Statistics (which uses International Passenger Survey data). The two organizations use different methodologies resulting in variances in data, however both are rigorous and coherent, and the data they collect is publicly available. The latest available data from the Office for National Statistics is for the year 2016, whereas the Home Office has data available for 2017.

<sup>4</sup> In this section, migration refers to long-term migration, that is, migration into or out of the UK for a period greater than 12 months. This means that tourists and transit visitors are not included in the data.

<sup>5</sup> EU migration includes the EU15 up until 2003; the EU15, the EU8, Malta and Cyprus from 2004 until 2006; the EU15, the EU8, Malta, Cyprus and the EU2 from 2007; the addition of Croatia from mid-2013.

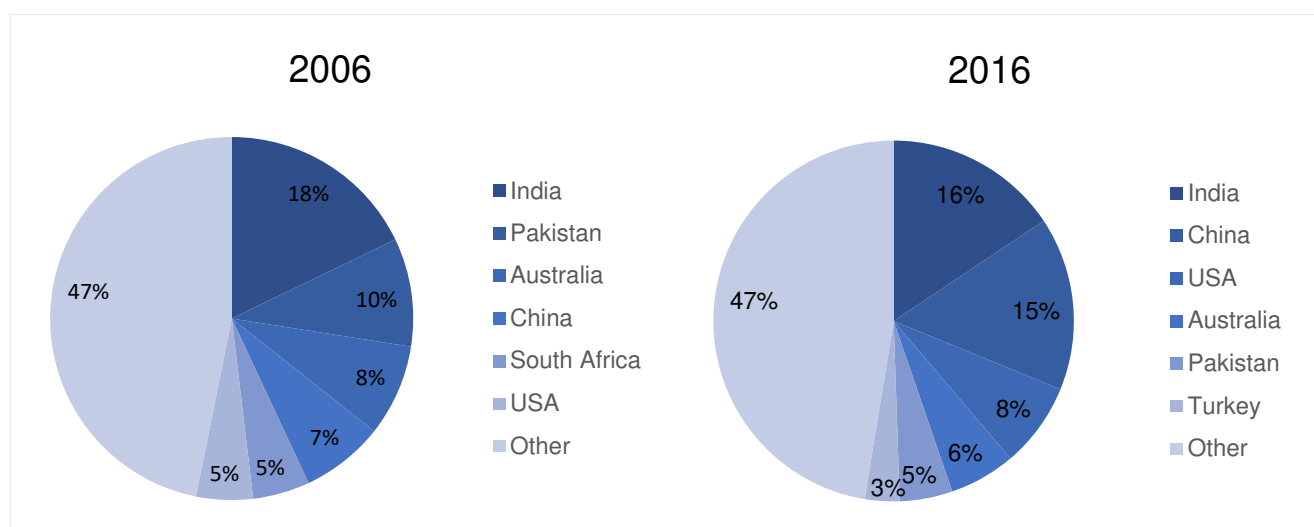
<sup>6</sup> Total migration comprises EU citizen, non-EU citizen and British citizen migration. British migration captures British citizens who are returning to the UK after living overseas, or British citizens who were born in other countries travelling to live in the UK (Office for National Statistics, 2016).

<sup>7</sup> Net migration is the difference between emigration out of the UK for at least one year, and immigration into the UK for at least one year.

people emigrated, creating a net balance of +248,000 (Office for National Statistics, 2017b). This is a statistically significant decrease from the previous year, when net migration was +333,000 (Office for National Statistics, 2017b and 2016b). This change is driven in part by the increased emigration of EU citizens (Office for National Statistics, 2017b). In 2016, net migration of non-EU citizens was +175,000, EU citizens was +133,000, and British citizens was -60,000 (Office for National Statistics, 2017b). Net migration of non-EU citizens has been both positive every year since 1975, and greater than EU-citizen net migration (Office for National Statistics, 2017b). However, over the last 10 years the gap between EU and non-EU net migration has narrowed (Office for National Statistics, 2016a).

There is a high degree of diversity in the nationalities of non-EU migrants to the UK. The most common nationality in both 2006 and 2016 was Indian, however Indian immigrants only made up a small share of the total – 18% in 2006 and 16% in 2016 (see Figure 2). There were over 89 nationalities in the 'Other' category in 2006, and 72 nationalities in 2016 (Office for National Statistics, 2017c).

**Figure 2: Long-Term International Migration to the UK by Non-EU Citizens, 2006 and 2016**



Source: Office for National Statistics, 2017c.

There is a near-even split between male and female immigrants to the UK from outside the EU – between 2006 and 2016, 50.5% of immigrants were male and 49.5% were female (Office for National Statistics, 2017d). Minors comprise a small share of non-EU citizens migrating to the UK – between 2006 and 2016 they made up only 12% of all non-EU migrants (Office for National Statistics, 2017e). The vast majority of non-EU citizens migrating to the UK arrive via air. Between 2006 and 2016, 99% of non-EU citizens arrived via air, with only 1% arriving via the channel tunnel and by sea (Office for National Statistics, 2017f).

The most common reasons for non-EU citizens to migrate to the UK between 2006 and 2016 were for formal study (51%), related to work (22%) and to accompany or join others (20%) (Office for National Statistics, 2017g). In 2017 there were 655,877 entry clearance visa applications<sup>8</sup>, including dependents - the highest number of applications in the last seven

<sup>8</sup> Excluding visitor and transit visas. When visitor and transit visas are included, this figure becomes 3,062,210 (Home Office, 2018a).

years, and an increase of 4% from 2016 (Home Office, 2018a). Of the 655,601 visa applications resolved in 2017, 91% were granted and 9% were refused (Home Office, 2018a).

## 1.2. Non-EU Population in the United Kingdom

In 2016, 4% of the resident population of the UK had a non-EU nationality (Office for National Statistics, 2017h). The most prevalent non-EU citizens were nationals of: India, Pakistan, the United States of America, China, Nigeria, Australia, South Africa, Bangladesh, the Philippines and Canada (Office for National Statistics, 2017i). The percentage of the population that has a non-EU nationality has remained relatively steady since 2006, as both the total UK population and the non-EU citizen population have increased (see Table 1).

**Table 1. Non-EU Resident Population of the UK, 2006-2016**

Year	Total Resident Population	Non-EU Citizen Population	Percentage
2006	60,036	2,207	3.7%
2007	60,522	2,356	3.9%
2008	61,022	2,419	4.0%
2009	61,461	2,473	4.0%
2010	61,958	2,439	3.9%
2011	62,480	2,476	4.0%
2012	62,893	2,515	4.0%
2013	63,270	2,421	3.8%
2014	63,686	2,406	3.8%
2015	64,265	2,408	3.7%
2016	64,727	2,425	3.7%

Source: Office for National Statistics, 2017j.

As a share of the of the non-British population, residents with citizenship from a country outside the EU have been steadily declining between 2006 and 2016 – in 2006, 61% of the non-British population were from outside the EU, whereas by 2016 this had decreased to 40% (Office for National Statistics, 2017h). The main reasons non-EU citizens were resident in the UK in 2016 were for work (40%), to accompany or join others (35%), to study (13%) and other<sup>9</sup> (11%) (Office for National Statistics, 2017k). Of the non-EU nationals residing in Britain in 2016, 52% were female and 48% were male<sup>10</sup> (Office for National Statistics, 2017l).

<sup>9</sup> This category includes reasons for residency such as seeking asylum and marrying or forming a civil partnership.

<sup>10</sup> These figures are for the 39 most common non-EU nationalities residing in Britain, due to data availability.

## 1.3. Humanitarian Protection, Asylum Seekers and Refugees

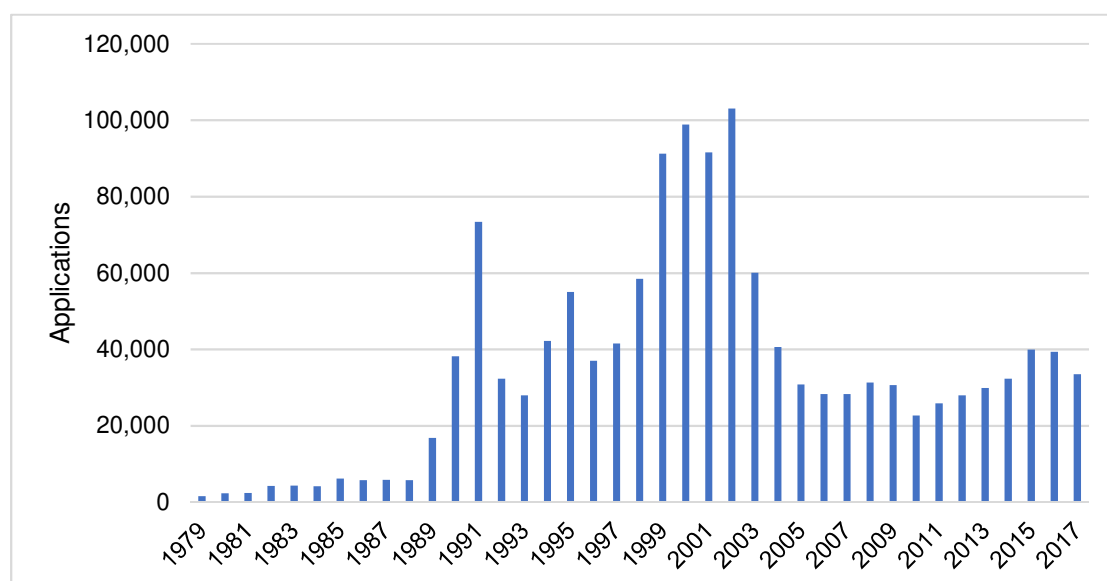
There are two broad categories of refugees in the UK, differentiated according to where they apply:

- i. Asylum seekers granted refugee status (or humanitarian protection: successfully apply for protection once already in the UK, or upon arrival at a UK port;
- ii. Resettled refugees: successfully apply for protection outside the UK to the United Nations High Commissioner for Refugees (UNHCR), who then refer them to the UK for resettlement.

### 1.3.1. Applications for Asylum

Asylum seeker applications to the UK peaked in the early 2000s, with large numbers of applicants and their dependants from Iraq, Afghanistan, Somalia and Zimbabwe<sup>11</sup> (Home Office, 2018b). Every year from 1991 there have been more initial refusals than approvals, peaking at 89% of initial decisions being refusals in 2004 (Home Office, 2018b). However, such a high rate of rejections hasn't always been the case—between 1979 and 1990 only 19% of applications were denied at initial decision, with 81% being favourable to the applicant (Home Office, 2018b).

**Figure 3: Asylum Seeker Applications (including dependants) 1979-2017**



Source: Home Office, 2018b.

In 2017 there were 33,512 applications for asylum made (Home Office, 2018b). Of the 27,814 initial decisions made, 8,555 (31%) were favourable to the applicant (Home Office, 2018b). The majority of successful applicants received asylum status (87%), while smaller

<sup>11</sup> All the data in this section is for main applications and their dependants.

portions were granted humanitarian protection<sup>12</sup> (3%), discretionary leave<sup>13</sup> (2%), or another form of protection status<sup>14</sup> (8%) (Home Office, 2018b). Of the 8,555 people granted asylum or another form of protection, 2,774 (32%) were minors (Home Office 2018c).

In 2017, a significant proportion of asylum seekers applied for protection when they were already in the UK (84%), as opposed to at a UK port (16%) (Home Office, 2018b). This is in keeping with long-term trends – between 2002 and 2016 82% of applicants applied in-country, compared to 18% at a port (Home Office, 2018b).

The greatest number of applications in 2017 were lodged by Iraqis (3,268), Pakistanis (3,130), Iranians (3,057), Bangladeshis (1,982) and Afghans (1,927) (Home Office, 2018b). There was a 49% decrease in the number of Syrians who lodged asylum applications in 2017 – there were 1,569 applicants in 2016 compared to just 793 in 2017 (Home Office, 2018b). There was however an increase in the number of Syrian refugees resettled in the UK (please see the next section below). One can observe a significant variation in the success rates of different nationalities – 84% and 81% of initial decisions were favourable to Syrians and Eritreans respectively, whereas just 19% of Iraqis and 16% of Egyptians were successful (Home Office, 2018b).

### **1.3.2. Resettlement of Refugees**

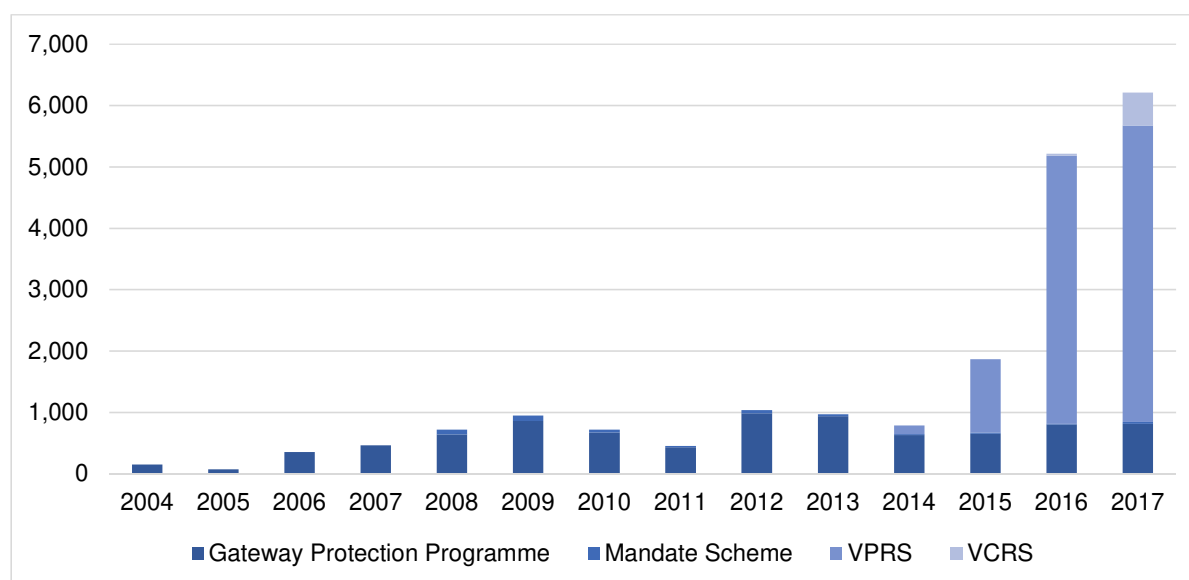
Separately to asylum claims, the UNHCR refers some of those it has granted refugee status to outside the UK to the Home Office for resettlement (Home Office, 2018c). Since 2004, 19,954 refugees and their dependants have been resettled in the UK under the four programmes operating during this period – 8,456 under the Gateway Protection Programme (commenced 2004), 390 under the mandate scheme (commenced 2008), 10,538 under the Vulnerable Persons Resettlement Scheme (commenced 2014) and 570 under the Vulnerable Children Resettlement Scheme (commenced 2016) (Home Office, 2018d). The years 2015, 2016 and 2017 saw a spike in resettlements, coinciding with the launch of the Vulnerable Persons Resettlement Scheme for Syrian refugees (Home Office, 2018d). Aside from Syrians, the most significant number of resettlements have been of nationals from Somalia, the Democratic Republic of Congo and Iraq (Home Office, 2018d).

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<sup>12</sup> Humanitarian protection can be granted where an applicant does not meet the criteria to be deemed a refugee, but who would still be subjected to significant harm if they returned to their home country (Home Office, 2017a).

<sup>13</sup> Discretionary leave can be granted where an applicant does not meet the criteria for asylum or humanitarian protection, but who is affected by exceptional, compassionate circumstances (Home Office, 2015a).

<sup>14</sup> This category can include approvals under the family and private life rules, Leave Outside the Rules and unaccompanied asylum-seeking children who are denied refugee status but who are granted permission to remain until the age of 17.5 years of age (Home Office, 2018b).

**Figure 4: Refugees (and others)<sup>15</sup> resettled, including dependants, 2004-2017**

Source: Home Office, 2018d.

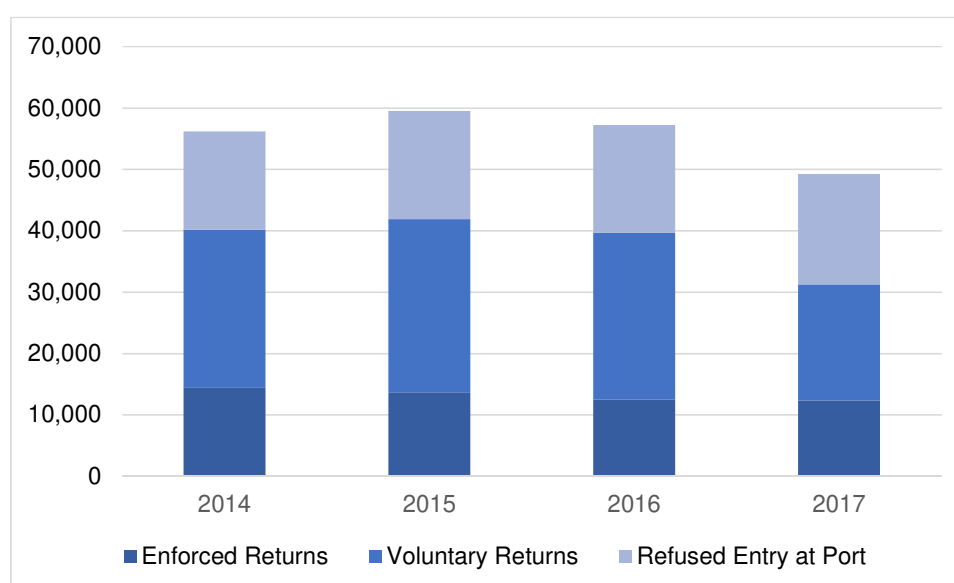
In 2017, 6,212 refugees and their dependants were resettled in the UK under the four operating resettlement schemes (Home Office, 2018c). The majority were Syrians resettled under the Vulnerable Person Resettlement Scheme (4,832 people), with smaller groups resettled under the Gateway Protection Programme (813 people), the Vulnerable Children Resettlement Scheme (539 people), and the Mandate Scheme (28 people). Approximately 50% of those resettled were minors (Home Office, 2018c).

## 1.4. Expulsions and Detention

In 2017 there were 12,321 enforced returns from the UK, which made up 22% of total returns – there were 18,928 (47%) voluntary returns<sup>16</sup> while 17,977 people (31%) were refused entry at a port of entry to the UK (Home Office, 2018e). Just over 58% of forcible returnees were non-EU citizens (7,210 people), while 41% were from the EU (5,111) (Home Office, 2018f). Of those forcibly expelled from the UK, 23% were people who had previously applied for asylum, which was an increase of 12% from 2016 (Home Office, 2018f). The most common nationalities of those forcibly returned after seeking asylum were Pakistani (14%), Albanian (13%), Indian (10%), Bangladeshi (8%) and Nigerian (6%) (Home Office, 2018e).

<sup>15</sup> Including people granted other forms of protection status.

<sup>16</sup> This category includes assisted returns, controlled returns and other verified returns (Home Office, 2018f).

**Figure 5: Returns by type, 2014-2017**

Source: Home Office, 2018e.

There are several reasons a person can be held in immigration detention in the UK – prior to their removal from the country, to establish their identity or the credibility of their claims, or if they are at risk of absconding, harming themselves or harming the public<sup>17</sup> (Silverman, 2017). The UK has one of the largest immigration detention systems in Europe, with between 2,000 and just over 3,500 people being detained at any given time between 2008 and 2017 (Silverman, 2017; Home Office 2018g). The number of people in immigration detention peaked in the period July-September 2015 at 3,531 detainees, declining to 2,545 by the end of 2017 (Home Office, 2018g). In 2017, 27,331 people entered detention, and 28,244 left (Home Office, 2018f). Nearly half (49%) of all detainees released between 2010 and 2017 were held for less than 29 days, with 81% being released within two months (Home Office, 2018h). Just under half (49%) of those who entered detention between 2009 and 2017 had sought asylum in the UK at some stage (Home Office, 2018i). The vast majority of those entering detention between 2009 and 2017 were men (84%) (Home Office, 2018i), and the largest nationality groups were Pakistanis (29,408), Indians (24,722), Nigerians (15,642), Bangladeshis (14,070) and Afghans (13,128)<sup>18</sup> (Home Office, 2018j),

The number of children entering the detention system has been trending downwards since 2009, when 1,119 children were detained (see Figure 6). In 2017, 42 children entered detention and 44 children departed detention, with no children being held at the close of 2017 (Home Office, 2018j, 2018k and 2018l). The sharp drop in the number of children entering detention in 2010 coincides with the Coalition Government's decision to no longer detain

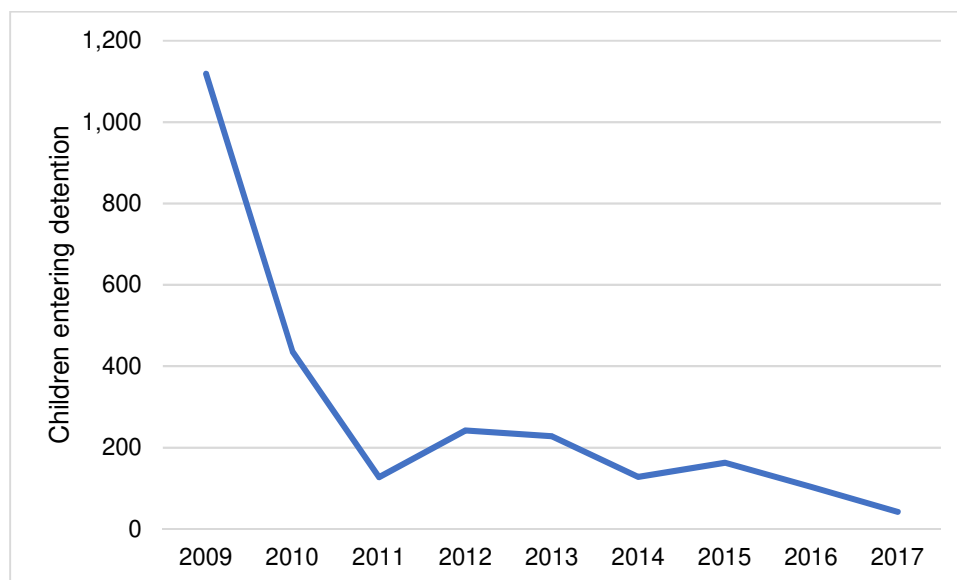
<sup>17</sup> Between 2000 and mid-2015, asylum seekers could also be detained as part of the detained fast-track (DFT) process if their claim for asylum was likely to be resolved quickly (McGuinness and Gower, 2017: 9; Silverman, 2017). The DFT policy was suspended in July 2015 following a High Court ruling that it resulted in procedural unfairness (McGuinness and Gower, 2017:9-10).

<sup>18</sup> The figures in this paragraph include those detained in Her Majesty's Prisons from July 2017. For further information on the implications of this methodological change in data collection, please see Home Office, 2018f.



families with children in Immigration Removal Centres prior to their departure from the UK<sup>19</sup> (McGuinness and Gower, 2017, p.8). Unaccompanied children can only be held in detention if there are exceptional circumstances (as outlined in the Immigration Act 1971, paragraph 18B of schedule 2). The majority of children (72%) who entered detention between 2009 and 2017 were asylum seekers (Home Office, 2018j).

- **Figure 6: Children entering detention, 2009-2017**



Source: Home Office, 2018j.

<sup>19</sup> Families may be held in pre-departure accommodation in rare circumstances (McGuinness and Gower, 2017: 8).

## 2. The Socio-Economic, Political and Cultural Context

### 2.1. A Brief Immigration History

The UK has a long history of immigration – from the arrival of Roman legionnaires in 43 AD, Viking invasions from 793AD, the Norman Conquest in 1066, Huguenot refugees after 1685, and immigration associated with the slave trade and Britain's empire into the 19<sup>th</sup> Century (BBC, 2002; Williams 2012, p.25, p.53; Winder, 2004).

From at least the 20<sup>th</sup> century, a discernible pattern of immigration, public resentment and then legislative restrictions unfolded in various waves<sup>20</sup>. In the decades preceding, and into the first half of the 20<sup>th</sup> century, most immigrants arrived from Ireland and continental Europe – escaping the cruelties of the Tsarist empire, Russian Jewry fleeing pogroms and Irish families pushed by famine (Harper and Constantine, 2011, pp.183-4; Winder, 2004, p.150). Public opinion reacted unforgivingly – the Russian Jews were seen as insular, the Irish as dirty and responsible for the proliferation of slums, while riots broke out against Germans in 1915 against the backdrop of the First World War (Harper and Constantine, 2011, p.206; Williams, 2012, p.167; Winder, 2004, p.148). The British Brothers' League was established in 1901 advocating for greater controls on immigration, with a Royal Commission into Alien Immigration held two years later (Harper and Constantine, 2011, pp.196-7). A barrage of restrictive legislation followed, controlling the movement of foreigners (that is, non-British citizens and subjects). The 1905 Aliens Act regulated the entry of foreigners, with provisions for the deportation of those deemed undesirable or unable to support themselves financially (Harper and Constantine, 2011, pp.196-7; Williams, 2012, pp.166). Further restrictions followed in 1914, 1919 and 1920 (Harper and Constantine, 2011, pp.196-7).

The second wave of immigration coincided with the end of the Second World War. Whereas previous migration had largely been European, the post-World War II era heralded the arrival of significant numbers of people from the Commonwealth<sup>21</sup>. The British Nationality Act was passed in 1948, granting a common nationality to both British nationals as well as British colonial subjects (Hansen, 2000, p.17). This meant that people from across the empire could live and work freely in Britain, with no restrictions<sup>22</sup> (Harper and Constantine, 2011, p.197-8). According to Home Office estimates, between 1955 and 1960, there was positive net migration of 160,000 West Indians, 33,000 Indians and 17,000 Pakistanis (Harper and Constantine, 2011, pp.185-186). During the 1950s, immigrants from the Commonwealth were

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<sup>20</sup> This pattern, while being the prevailing one, obscures secondary, countervailing dynamics. The history of British immigration is not only one of public discontent and ever-tightening restrictions – politicians and bureaucrats have made successful stands against racism (Hansen, 2000: vi), church groups, charities, lawyers and medical associations have championed asylum seeker rights (Winder, 2013: 431-2, 439), and governments have loosened restrictions at various times – granting amnesty to illegal migrants in 1974, raising the quota for Citizens of the United Kingdom and Colonies in 1975, and easing restrictions on spousal visas in 1997 (Hansen, 2000: 225, 233).

<sup>21</sup> There were of course significant arrivals from Europe in the wake of WWII too, with the entry of more than 147,000 Poles and 80,000 displaced people (Harper and Constantine, 2011: 185-186).

<sup>22</sup> Immigrants from the Caribbean who arrived between 1948 and 1971 have been named the Windrush generation, after the ship MV Empire Windrush which brought Caribbean migrants to Tilbury docks in June 1948. There has been recent controversy over the legal status of the Windrush generation, with some people who have lived in the UK for decades being told they are here illegally. Prime Minister Theresa May apologised to Caribbean leaders in April 2018 for deportation threats made to Windrush generation immigrants (BBC, 2018).

drawn to Great Britain by the myriad economic opportunities – demand for labour abounded amidst the formidable task of post-war reconstruction, coupled with low unemployment rates (Hansen, 2000, p.9; Harper and Constantine, 2011, p.186-7). The exceptional openness of the period from 1948 came to a close in 1962, as discontent mounted on the basis of perceived economic competition, fear of cultural domination, and racial prejudices with the influx of ‘non-white’ migrants (Harper and Constantine, 2002, p.204, p.210). There was strong public support for tighter controls on immigration, as recorded since the first Gallup Poll of public opinion in 1958 (Hansen, 2000, p.14). Clashes broke out in Birmingham and London in 1948, 1949 and 1954, culminating in street fighting in Nottingham and Notting Hill in 1958, and in Middlesbrough in 1961 (Clayton, 2016, p.66; Harper and Constantine, 2011, p.206; Phillips, 2013).

A series of legislative restrictions on Commonwealth migration were passed over subsequent decades. In 1962 controls were tightened so that only Commonwealth immigrants with definite employment lined up or enough money to support themselves without a job were permitted entry (Hansen, 2000, p.238; Harper and Constantine, 2011, p.198). Kenyan Asians with British passports were barred from migrating after 1968 legislation; 1971 saw all privileges for Commonwealth citizens abolished except for those with parents or grandparents born in Britain; and in 1988 UK nationals and permanent residents were stripped of their right to have their spouses and families join them in the UK (Hansen, 2000, p.14, 16, 230, 238; Harper and Constantine, 2011, p.198-9). These changes left the UK immigration system as one of the most inaccessible in the West<sup>23</sup> (Hansen, 2000, p.v). The changes to the immigration regime were so successful that migration figures dropped drastically and consistently from their peak in 1961, and by the late 1980s immigration was no longer a key public concern in the UK (Hansen, 2000, pp.21-22; Winder, 2013, p.410).

The third wave of migration commenced with the last decade of the twentieth century, comprising largely asylum seekers. Although asylum seekers were hardly a new phenomenon – for example with exoduses from Kenya in 1968, Uganda in 1972 and Vietnam from 1975 – numbers had remained relatively small, with less than 6,500 applications<sup>24</sup> each year of the 1980s, up until 1989 (Home Office, 2018b). With conflicts<sup>25</sup> in Afghanistan, the Balkans, Colombia, Iraq, Rwanda, Sierra Leone, Somalia and Sri Lanka, asylum applications<sup>26</sup> ballooned from 5,739 in 1988 to 73,400 in 1991. There was another spike between 1999 and 2002, peaking at 103,081 applications in 2002<sup>27</sup>. Since 2004, asylum applications have been fewer, fluctuating within the range of 22,000 and just over 40,000 applications each year<sup>28</sup> (Home Office, 2018b; Winder, 2013, p.411). As in the past, public discontent mounted with the increase in asylum applications. Panic and anger were both whipped up and exploited by the media and some politicians, with much of the public believing that asylum seekers were ingenuine, and were after a free ride (Clayton, 2016, p.13; Winder, 2013, p.419, p.39). The lines became blurred between refugees and asylum seekers specifically, and between asylum

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<sup>23</sup> Instead of being channelled towards creating more open borders, liberalism was instead expended on bringing about anti-discrimination laws – with Race Relations Acts passed in 1965, 1968 and 1979 (BBC, 2014; Hansen, 2000: 26; Harper and Constantine, 2011: 199).

<sup>24</sup> Including dependants.

<sup>25</sup> Several of which the UK was militarily engaged in (Winder, 2013: 411).

<sup>26</sup> Including dependants.

<sup>27</sup> Including dependants

<sup>28</sup> Including dependants.

seekers and immigrants more broadly (Prior and the Centre for Social Justice, 2008, p.10; Winder, 2013, p.433-4, 436). The Government responded to growing voter pressure with several pieces of legislation aimed at curbing the flow of asylum seekers (Hansen, 2000, p.222; Winder, 2013, p.419). Appeal rights were successively eroded under legislation passed in 1993, 1996, 1999, 2002 and 2004 (Hansen, 2000, p.234-5; Home Office, 2018m). Benefits were curbed under the 1996, 1999 and 2002 Acts, with vouchers introduced under the 1999 Act (Hansen, 2000, p.235; Winder, 2013, p.421, p.431). The 1999 Act also pursued a programme of the mandatory diffusion of asylum seekers throughout the UK, resulting in isolated instances of violence in some communities<sup>29</sup> (Hansen, 2000, p.235; Winder, 2013, p.429-31). This period also saw the establishment of several detention centres – in Campsfield, Dover and Oakington in the 1990s, and the opening of Yarl's Wood in 2001 (Winder, 2013, p.420, p.436). Currently there are ten detention centres<sup>30</sup> in operation in the UK, as well as many short-term holding facilities and some secure accommodation facilities for families (Library of Congress, 2016). With the eruption of the 2015 refugee crisis, the UK refused to participate in a scheme with other EU countries to take quotas of refugees. Instead the Government declared it would take 20,000 Syrian refugees over five years (Clayton, 2016, pp.55-6).

The fourth wave of immigration began in the early 2000s, and has been shaped by both Government policies to attract 'super-skilled' workers, and the expanding membership of the EU. While the UK Government has been tightening controls on asylum seekers, it has been making immigration easier for other categories of people deemed good for the economy – that is skilled workers and international students. The Highly Skilled Migrants Programme, which commenced in 2002, was designed to encourage people with certain educational qualifications, work experience, earnings and proven excellence in their field to settle in the UK, exempting them from the usual requirement to have an offer of employment before arrival (Shachar, 2006, p.193). There have been significant increases in the number of skilled-worker visas issued – more than doubling over the last decade (Williams, 2012, p.166). The Government has similarly encouraged the entry of international students, with the Prime Minister's Initiative on International Education announced in 1999, and the second phase instituted in 2006. The International Graduate Student Scheme was launched the same year, permitting non-European Economic Area students to work in the UK for one year after completing specific qualifications (Verbik and Lasanowski, 2007, p.7). Between 2000 and 2014 there was a 92% increase in international, tertiary student enrolments in the UK (OECD, 2017, p.9). A new points-based system (PBS) was rolled out over 2008 and 2009 – including Tier 1 (for highly skilled workers), Tier 2 (for sponsored skilled workers), Tier 5 (for temporary workers) and Tier 4 (for students) (Gower, 2016, p.9). There have been significant changes to the PBS since 2010, largely tightening the visa eligibility criteria, including the imposition of caps<sup>31</sup> (Gower, 2016, pp.10-12). However, restrictions haven't been placed on all immigrant groups. The Tier 1 exceptional talent visa was introduced in 2011, to attract the best and brightest in the humanities, arts, engineering and science, and exempting them from the requirement of sponsorship by an employer (Shachar and Hirschl, 2013, pp.92-93). The binary policy of tightening the eligibility criteria for most immigrant categories, coupled with making it

<sup>29</sup> Stabbing attacks resulted in the deaths of two Afghans in Hull, an Iranian in Sunderland, and a Kurdish child was blinded in one eye by a thrown rock in Hull (Winder, 2004: 330-331).

<sup>30</sup> Referred to as Immigration Removal Centres from 2003 (McGuinness and Gower, 2017: 12)

<sup>31</sup> This coincides with the Coalition Government's promise to cap the number of work permits they grant, and reduce net immigration overall (Winder, 2013: 496).

easier for others, reflects the Government's attempt to lower net immigration, while 'cherry-picking' those deemed most desirable to the UK economy and society, and acceptable to a fatigued voting public<sup>32</sup> (Shachar and Hirschl, 2013, pp.93-4; Winder, 2013, p.497).

Another component of the fourth wave has been immigration from EU countries. Although net migration of non-EU citizens has been greater than EU citizens since the 1980s, there was a significant influx of EU citizens following the enlargement of the EU in 2004<sup>33</sup> (Office for National Statistics, 2015b), and again in 2014, with statistically significant increases in both EU15 and EU2 immigration (Office for National Statistics, 2017a and 2015a). The share of immigrants from EU countries has been steadily growing, comprising 42% of immigrants in 2016 (Office for National Statistics, 2017a). The majority of immigrants from the EU (69%) came to the UK for work-related reasons in 2016; the next most common reason was formal study (14%) (Vargas-Silva, 2017). Whereas other EU countries such as Greece, Italy and France are more worried about non-EU migration than EU migration, the UK recorded similar levels of concern about EU and non-EU migration in the 2014 Transatlantic Trends survey (Blinder and Allen, 2016). In June 2016 the UK voted to leave the EU, with long-term international immigration concerns being a key driver (Office for National Statistics, 2016c).

Brexit leaves a significant question mark hanging over UK migration governance. There has been much speculation over what Brexit could mean for immigration policy (see for example Garavoglia 2016, O'Connor and Viña 2016 and Consterdine 2017). Key questions surround the treatment of EU nationals currently living in the UK, EU nationals who wish to live in the UK after Brexit, the treatment of non-EU nationals from countries who enter into trade deals with the UK (which often come with increased freedom of movement), as well as asylum seekers who currently benefit from the Common European Asylum System. (Consterdine 2017). Although the UK has opted out of some EU asylum policies and legislation, it is currently bound by the original Common European Asylum System instruments that it agreed to in 2005, which would be affected by Brexit (Gauci, 2017, p.1). This includes the Qualification Directive, the Reception Directive, the Procedures Directive and the Dublin System – which provide minimum standards for the treatment of asylum seekers and determine which EU member state is responsible for an asylum seeker's claim (Gauci, 2017, p.2). There may not be certainty regarding the UK's policy direction for some time – the Government is currently developing the detail of an agreement with the EU over the status of EU residents already in the UK, and the repeatedly delayed immigration white paper is now not expected to be available until October 2018 (Wright and Parker, 2018).

## 2.2. Cleavages: Religious, Cultural and Linguistic Context

Ethnically, the majority of the UK population identify as white – in 2011 98.2% in Northern Ireland, 96.0% in Scotland and 86.0% in England and Wales (Office for National Statistics, 2012a; National Records of Scotland, 2014a and 2001; Northern Ireland Statistics and Research Agency, 2014a, p.40; and 2002, p.18). The largest ethnic minorities according to the 2011 censuses were Indian (comprising 2.5% of the English and Welsh populations),

<sup>32</sup> Several surveys have shown that the most negatively viewed categories of immigrants are low-skilled migrants, extended family members and asylum seekers, while high-skilled migrants, students and close family members are less negatively viewed (Blinder and Allen, 2016).

<sup>33</sup> The UK was one of three countries (along with Sweden and Ireland) not to impose work restrictions on the newly acceded EU8 countries (Williams, 2012: 166).

Asian<sup>34</sup> (comprising 2.7% of the Scottish population), and Chinese (comprising 0.4% of the Northern Irish population) (Office for National Statistics, 2012; National Records of Scotland, 2014; Northern Ireland Statistics and Research Agency, 2014a, p.40). The UK is becoming more ethnically diverse, with increases in the proportion of people born outside the UK. In 2011 this group comprised 13.4% of England and Wales, 7.0% of Scotland, and 6.6% of Northern Ireland. Although all areas in England and Wales have experienced increases in the proportion of residents born outside the United Kingdom between the 2001 and 2011 censuses, London and the South East of England have had the most significant increases, with 37% of the population of London being born overseas (Office for National Statistics, 2012b). Of the 20 local authority areas in England and Wales with the greatest proportion of the population born overseas, 19 are in London (Office for National Statistics, 2012b).

The UK is relatively homogenous linguistically, with English being the main language<sup>35</sup> of 96.9% of the Northern Irish population (Northern Ireland Statistics and Research Agency, 2014a, p.66); 92.6% of the Scottish population (National Records of Scotland, 2013b) and 92.3% of the English and Welsh populations<sup>36</sup> (Office for National Statistics, 2013a). Although Polish was the most common other main language used in England, Wales and Northern Ireland, it was the main language of only 1.0% of the population (Office for National Statistics, 2013a; Northern Ireland Statistics and Research Agency, 2014a, p.66).<sup>37</sup>

Similarly, in terms of religion, there is a significant degree of uniformity<sup>38</sup>. Christianity is followed by 82.3% of the Northern Irish population (Northern Ireland Statistics and Research Agency, 2014a, pp.84-85), 59.3% of the English and Welsh populations (Office for National Statistics, 2013b), and 53.8% of the Scottish population (National Records of Scotland, 2013c). Islam is the second biggest religion in England and Wales, with Muslims comprising 4.8% of the population (Office for National Statistics, 2013b), and also in Scotland, where they comprise 1.4% of the Scottish population (National Records of Scotland, 2013c).

## 2.3. Cleavages: Socio-Economic Context

The relative linguistic, religious and ethnic homogeneity of the UK notwithstanding, there are enduring class-based cleavages that have a significant impact on society today. Class is a complex sociological concept, encompassing disparities in economic, cultural and social capital, that are accumulated and reinforced over time (Atkinson, Roberts and Savage, 2013, p.1; Cunningham, Devine and Snee, 2018, p.78). The 'historical baggage' of class shapes the parameters of opportunity, goods and experiences a particular person can have (Atkinson, Roberts and Savage, 2013, p.1; Savage et al., 2015, pp.45-6). Class has a long history in Britain, with the working, middle and upper classes solidifying in the nineteenth century amidst the industrial revolution (France and Roberts, 2017, p.10; Savage et. al, 2015). Although the

<sup>34</sup> This category includes Asian British and Asian Scottish.

<sup>35</sup> There are variations in wording between the different UK censuses: England, Wales and Northern Ireland refer to 'main language', whereas Scotland refers to language used at home.

<sup>36</sup> Including those who speak Welsh in Wales as their main language.

<sup>37</sup> Scots was the most common language other than English used at home in Scotland at 1.09%, closely followed by Polish at 1.06% (National Records of Scotland, 2013b).

<sup>38</sup> Historically, there have been multiple chapters of conflict between Catholics and Protestants in the UK, the most recent being 'the Troubles', the epicentre of which was Northern Ireland between 1968 and 1998.

contours of class in the UK have changed somewhat over time, class is still supremely relevant in today's context<sup>39</sup> (France and Roberts, 2017, p.10; Savage et al., 2015, p.27, p.391). Savage et al., have shown that instead of the previous working, middle and upper-class division, there are now seven classes structuring society in the UK: elite, established middle class, technical middle class, new affluent workers, traditional working class, emergent service workers and the precariat (2015, pp.168-9). Each of these groups possesses different amounts of economic, cultural and social capital.

Although the UK is an affluent country<sup>40</sup> with a strong economy<sup>41</sup>, this prosperity is not felt by everyone. In terms of economic capital, that is income and wealth, inequality is significant in the UK, with the gap expanding (Savage et al., 2015, p.65). The average household income of the 'elite' class, which comprise around 6% of the UK, is almost double that of the next most affluent class; while elite savings are more than two times the savings of any other class (Savage et al., 2015, p.170, p.310). Economic capital also affects education, whether it be university attendance or pre-school education outcomes, as well as health outcomes such as life expectancy (Campbell, 2016; Savage et. al, 2015, p.226; Wilkinson and Pickett, 2010, p.110). Elites also have more cultural capital than other classes (attending museums, galleries, sporting events and classical concerts) with metropolitan centres key hubs of highbrow cultural capital; as well as more social capital, with expansive social networks comprising people of the same status (Savage et al., 2015, p.170; Savage et al., 2018, pp.141-2).

Class also has a geographic dimension in the UK. Historically, the main axis of division was between the working-class North (and Scotland and Wales) and the middle-class South (Savage et al., 2015, pp.264-5). The North – once an industrial and mining powerhouse – began to decline economically and socially along with waning industry as early as the 1930s, and particularly from the 1970s (Bailoni, 2018, p.60, p.62). This neat division between North and South however belies a degree of messiness, which is ever more the case since the 2008 recession (Bailoni, 2018, p.66; Savage et al., 2015, pp.264-5). The structuring logic of the North-South divide has been superseded by two other spatial configurations of class (Savage et al., 2015, p.265). First, there is a rural urban divide, with the wealth elite class occupying central urban zones in all major cities in the UK (an exception being Belfast, as a result of the city's divided history along religio-national lines) (Bailoni, 2018, p.66; Savage et al., 2015, p.265, pp.272-4). The second divide is between London and the rest, with high concentrations of the wealth elite in London and the surrounding South-East (Savage et al., 2015, pp.264-5,

<sup>39</sup> Governments and academics during the 1980s and 1990s challenged the relevance of the concept of class, seeing different outcomes as being the result of individual capabilities, rather than the politico-social context in which people found themselves (Atkinson, Roberts and Savage, 2013: 1, 8; Fée and Kober-Smith, 2018: 3; France and Roberts, 2017: 10; Reay, 2017: 7; Savage et al., 2015: 391).

<sup>40</sup> For 2015, the UK had a Human Development Index rank of 16 out of 188 countries and territories, placing it in the very high human development category with a value of 0.909. This value is above the OECD average of 0.887 and above the average value for countries in the very high human development category, which sits at 0.892 (United Nations Development Programme, 2016).

<sup>41</sup> In terms of unemployment, following a peak of 8.5% in September-November 2011, the unemployment rate has been trending downward, sitting at 4.3% in September-November 2017<sup>41</sup> (Office for National Statistics, 2018). Between 1993 and 2007 the unemployment rate of those born overseas has on average been higher than those born in the UK. Interestingly in subsequent years this gap has disappeared for men, but has remained static for women (Rienzo, 2017: 3). This could be due to more traditional gender roles among those born outside the UK.



295). These geographical inequalities have implications for the UK Government's dispersal policy for housing asylum seekers, with asylum seekers tending to be housed in less affluent areas of the UK where property is cheaper, in communities that can also be experiencing disadvantage (House of Commons Home Affairs Committee, 2017, p.16). Asylum seeker housing is discussed further in Section 6.

## **2.4. Cleavages: Political Context**

### **2.4.1. Polarization of Society**

Commentators<sup>42</sup> and academics have been documenting increased political polarization amongst the British population, with immigration being a key issue. Whereas previously the predominant political divide has been between the economic 'left' and 'right', a new divide has become prominent – that between advocates of an open society versus those advocating a closed society<sup>43</sup>. Between 2015 and 2017, English party supporters became significantly more polarized on the open-closed divide (Wheatley, 2017).

Further, the 2014 British Attitudes Survey, published last year, has shown that the biggest societal cleavages in Great Britain are around Brexit and immigration (Ford, 2017). The population is divided on the topic of immigration along the axes of age, education levels, economic status and heritage, among others – with gaps of between 9% and 30% on most measures between those who are most supportive of immigration and those who are least supportive<sup>44</sup> (Ford, 2017).

### **2.4.2. Polarization of Political Parties**

The dominant political ideology regarding immigration has been one of tightening control, with both Labour and the Conservatives playing a role in the current restrictive legislative environment. For example, the Immigration Act 1971 was passed when the Conservatives were in power, but the Bill was largely drafted by the preceding Labour Government (Abrahámová, 2007, p.52). Further, the perceived incompetence of both Labour and Conservative Home Secretaries has also played a role in the current, rigid climate. Former Labour Home Secretary Charles Clarke stoked public fears about the ineffectiveness of border controls when, in 2006, it was revealed that 1,023 foreign prisoners were released instead of being candidates for deportation. Similarly, 89 foreign criminals were released between 2010 and 2014 when Conservative Theresa May was Home Secretary (BBC, 2006; Hope and Barrett, 2015). Theresa May has had a significant impact on immigration policy during her time as Home Secretary – declaring a 'hostile environment' for irregular migrants, refusing to place a time limit on immigration detention, declining to participate in the EU's refugee resettlement programmes, and pledging to withdraw the UK from the ECHR (Travis, 2016). An interesting question for further research is whether hostile public sentiment has influenced

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<sup>42</sup> See for example the Economist, 2016, which positions this phenomenon in a global context.

<sup>43</sup> The open-closed debate concerns issues such as immigration, EU membership and overseas aid (Wheatley, 2017).

<sup>44</sup> Although there has been a positive shift in views on immigration since the last survey in 2002, a majority of residents still view it negatively (Ford, 2017).

politicians, the hostile attitudes of politicians have influenced public sentiment, or whether both exist in a mutually reinforcing cycle.

Tougher asylum seeker policies have also tended to receive bi-partisan support particularly since the 1990s, with New Labour and the Conservatives showing a striking convergence. Both Labour and the Conservatives have pledged restrictions – with Tony Blair declaring he would cut the number of asylum seekers in half in 2003, Michael Gove pledging to limit refugee numbers in 2005 (Winder, 2013, p.496), and David Cameron initially refusing to take more Syrian refugees even in the throes of the crisis (Wintour, 2015).

This bi-partisan toughness on immigration notwithstanding, there is a greater polarization of views across the whole political spectrum. UKIP, the Conservatives and (to a lesser extent) Labour advocate restrictions on immigration, while the Liberal Democrats and the Greens promote more immigration, not less. UKIP is the most outspoken on the perceived negative impacts of immigration, and proposes the following restrictions: a target of zero net migration over five years, a halt to unskilled and low-skilled migration for five years following Brexit, and testing the social values of potential immigrants to the UK (The Guardian, 2017). The Conservatives have pledged to limit immigration to tens of thousands annually, have proposed more stringent conditions on family visas, and want to reduce claims for asylum being made in the UK (The Guardian, 2017). Although Labour is committed to reviewing inadequate refugee policies to improve the lives of refugees in the UK, it is considering a post-Brexit immigration system based on the following restrictions: work permits, visa regulations and employer sponsorship (The Guardian, 2017; The Labour Party, 2017, pp.28-29). Towards the other end of the spectrum, the Liberal Democrats advocate freedom of movement in Brexit negotiations, want to grow the Syrian Vulnerable Persons Resettlement Scheme to 50,000 people, and take more unaccompanied minors from Europe (The Guardian, 2017). The Green Party similarly advocate for freedom of movement with the EU, does not believe that migrants with wealth and particular skills should be prioritised above others, and that current refugee policy should be overhauled to be more humane to refugees (Greens Party 2017a, p.7 and 2017b; The Guardian, 2017).

### **3. The Constitutional Organization of the State and Constitutional Principles on Immigration and Asylum**

#### **3.1. Powers and Functions of the Different Tiers of Government**

There are three tiers of government in the UK. At the apex sits the central Government of the UK in Westminster, with sovereignty over the entire Kingdom and reserved powers as set out in a series of Acts, including foreign policy, defence, broadcasting, fiscal policy, nuclear energy policy and social security. The UK Government has a bicameral sovereign parliament, comprising the elected House of Commons and the unelected House of Lords (Carroll, 2015, p.35). The House of Commons' authority trumps that of the House of Lords by convention, as well as by the 1911 and 1949 Parliaments Acts (Carroll, 2015, p.35). The UK is a constitutional monarchy, that is, the Monarch's powers are exercised within the parameters of the constitution (Carroll, 2015, p.32). The Monarch still has significant powers under the royal prerogative, including the ability to dissolve Parliament, appoint the Prime Minister, approve legislation and declare war (Carroll, 2015, p.32). However, by convention these powers are usually exercised by, or directed by, the Government (Carroll, 2015, p.32). The UK has a unitary system of Government. This means that Westminster has ultimate authority over the Scottish, Welsh and Northern Irish governments, as well as local government. Unlike a federation, their powers and existence are not protected in the constitution (Carroll, 2015, pp.21-2).

Since the Scottish, Welsh and Northern Ireland devolution legislation of 1998 (as amended), unreserved powers have been asymmetrically devolved to the Northern Irish, Scottish and Welsh executives and legislatures, which comprise the second tier of government (Blackburn, 2015; European Committee of the Regions, 2012). There are twenty areas of responsibility devolved to the Welsh Government, spanning local service delivery, agriculture forestry and fisheries, language and culture, economic development and the environment (UK Government, 2013). There is no specific list of powers delegated to the governments of Northern Ireland and Scotland – their powers extend to everything that has not been reserved by the Government of the UK (European Committee of the Regions, 2012).

The third tier of government in the UK is local government, comprising 353 local authorities in England<sup>45</sup> (Local Government Information Unit, 2017), 11 local authorities in Northern Ireland (Northern Ireland Direct, 2017), 32 local authorities in Scotland (Scottish Government, 2017), and 22 local authorities in Wales (Welsh Government, 2015). The structure and functions of local government are set out in a series of Acts, for example the Local Government Acts of 1972 and 1992, Greater London Authority Act 1999, the Local Government and Public Investment in Health Act 2007 and various other Acts spanning housing, education and highways, for example (Carroll, 2015, pp.10-12, p.21). The functions of local governments

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<sup>45</sup> In some areas of England there are two tiers of local government responsible for different services – an upper tier (county council) and a lower tier (district council). In other areas there is only one authority, responsible for the provision of all local government services (Local Government Information Unit, 2017).

vary according to which country they are in, and whether they are county, district or borough councils.

Powers surrounding immigration, citizenship and nationality are the purview of the UK Government only. The Secretary of State<sup>46</sup> and her department – the Home Office, are responsible for nearly all aspects of immigration, including nationality, asylum, and border control (Library of Congress, 2016). Specifically, within the Home Office, UK Visas and Immigration has responsibility for processing asylum and other applications for entry, Immigration Enforcement monitors and enforces compliance with immigration laws (including deportation), the Border Force implements customs and immigration controls at airports and ports, and HM Passport Office processes British passport applications (Library of Congress, 2016). Support for eligible adult asylum seekers and their dependents waiting for their applications to be processed is provided by the Home Office, via UK Visas and Immigration. Asylum seekers who are eligible for support are those who are either homeless, do not have sufficient funds to buy food, or both. Short-term support can also be granted by UK Visas and Immigration to unsuccessful asylum seekers while they prepare to leave the UK (UK Government, 2017a). The institutional landscape evolves quickly. In 2008 the Border and Immigration Agency, UK Visas and part of HM Revenue and Customs were merged to become the UK Border Agency, which was then subsequently abolished and replaced with UK Visas and Immigration, the UK Border Force and Immigration Enforcement in 2013.

The devolved administrations have four key roles in the provision of immigration and asylum seeker support:

- *Unaccompanied asylum-seeker children*: local authorities are directly responsible for the care and provision of services to unaccompanied asylum-seeker children (please see Section 5.5 for further information).
- *Asylum seeker accommodation*: although accommodation for destitute asylum seekers is administered by the Home Office, local authorities choose whether they will accept asylum seekers to be housed within their boundaries, and approve the use of specific properties (House of Commons Home Affairs Committee, 2017, p.16). (For more information, please see Section 5.1.4).
- *Refused asylum seekers*: if a refused asylum seeker is not eligible for support from the Home Office, the local authority has a statutory duty to provide housing and subsistence payments if they are destitute, or need care because of poor mental and physical health (Asylum Information Database, 2018, p.63; House of Commons Home Affairs Committee, 2017, p.18).
- *Successful asylum seekers and resettled refugees*: if an asylum seeker is successful they will no longer be supported by the Home Office, and move into the mainstream benefits system (House of Commons Home Affairs Committee, 2017, p.18). Refugees (both resettled and successful asylum seekers) receive support and services from the Scottish, Welsh and Northern Irish governments, along with local councils, in line with their constitutional functions.

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<sup>46</sup> Also known as the Home Secretary.

## 3.2. Constitutional Entrenchment of the Principle of Asylum

The UK does not have a codified constitution. Instead, the fundamental principles governing the UK are laid out in a series of Acts of Parliament, court judgments and conventions that have evolved over hundreds of years (Blackburn, 2015; Carroll, 2015, p.4, pp.16-17). There is no specific principle of asylum enshrined in the UK's constitution, however there are several statutes relating to civil liberties and human rights that are relevant to asylum-seekers:

- Habeas Corpus Acts 1640-1862: a person in detention can issue a writ of *habeas corpus*, which triggers judicial review as to whether the justification for their detainment is lawful (McGuinness and Gower, 2017, p.10).
- Human Rights Act 1998: the Act gave effect to the principal provisions of European Convention on Human Rights<sup>47</sup> (ECHR) in domestic UK law (Carroll, 2015, pp.397-8). Some of the relevant articles of the Act are:
  - Article 2: Right to life – may be relevant to those being expelled from the UK who may face death upon return (whether via the death penalty or unlawful killing), although there is very limited domestic case law on the UK Government's obligations under this Article when returning someone who may face death upon their return (UK Visas and Immigration, 2009, pp.15-16).
  - Article 3: Prohibition of torture, inhuman or degrading treatment – relevant to expulsions from the UK where the individual may face such conditions upon return; and the denial of state support such as food and shelter to asylum seekers as a result of late application (as per the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002) (Carroll, 2015, pp.494-5).
  - Article 5: Right to liberty and security of the person – relevant to the detention of individuals prior to deportation as per the Immigration Act 1971 Schedule 3 and the UK Borders Act 2007 (Carroll, 2015, p.497).
  - Article 6: Right to a fair trial – relevant to expulsions from the UK where the individual may be denied a fair trial in the receiving state. It is important to note that asylum hearings fall outside the ambit of Article 6 (which applies to criminal and civil hearings only).
  - Article 8: Right to private and family life – relevant to family reunion, and those with established families in the UK facing deportation (Owers, 2003)
  - Article 9: Right to freedom of thought, conscience and religion – may be relevant to those being expelled who may not be able to practice their religion upon return to their country of origin.
  - Article 14: Protection from discrimination in the application of Convention rights – for example, this could be relevant to those challenging inadequately justified variances in deportation policies based on nationality, where it adversely affected their Article 8 rights (Owers, 2003).

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<sup>47</sup> The Human Rights Act enacts articles 2-12 and 14 of the ECHR, as well as articles 1-3 of Protocol 6 to the Convention.

The UK's constitution has no entrenched provisions<sup>48</sup>. It can be altered via standard processes – legislation, judicial decisions or a shift in conventions (Carroll, 2015, p.20). This means that the principles relevant to asylum as codified in the Human Rights Act 1998 can be repealed or replaced relatively quickly by Parliament at any time, although political and cultural pressures would likely be a restraining force<sup>49</sup> (Carroll, 2015, pp.20-1; Waites, 2008, p.25).

### 3.3. Constitutional Case Law on Asylum

The current body of constitutional case law on asylum focuses on the Human Rights Act 1998, which came into force in 2000. Due to space constraints only Articles 3, 5 and 8 are dealt with. Some landmark cases are highlighted below:

#### 3.3.1. Article 3 ECHR: Prohibition of Ill-treatment

The Article 3 ECHR prohibition of torture, inhuman or degrading treatment has been invoked by those facing expulsion in multiple domestic cases. The Court of Appeal outlined the tests to be applied in determining whether deportation would contravene Article 3 ECHR rights in *J v Secretary of State for the Home Department* [2005] EWCA Civ 629 (Carroll, 2015, p.494). The case of *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 was significant in ruling that fear of ill-treatment on the basis of sexual orientation was protected by Article 3 ECHR, alongside fear of ill-treatment based on political or religious persuasion (Carroll, 2015, p.495). In a case that same year, the Supreme Court clarified that it was not reasonable for a deported person to conceal or avoid disclosing their sexual, religious or political orientations in order to prevent ill-treatment upon return to their country of origin (*RT (Zimbabwe) v Secretary of State for the Home Department* [2010] UKSC 31) (Carroll, 2015, p.495).

The case of *R (Bagdanavicius) v Secretary of State for the Home Department* [2005] 2 AC 668 was important in distinguishing between ill-treatment caused by state and non-state actors. In this instance, a Lithuanian couple were seeking asylum in the UK, as they feared violence perpetrated by the wife's family as a result of the husband being Roma. The appeal was dismissed. The Court found that the protections of Article 3 ECHR only applied to harm caused by non-state actors when it could be shown that the state does not provide victims with an appropriate level of protection against such ill-treatment (Department for Constitutional Affairs, 2006, p.14; Dickson, 2013, pp.146-7). Issues surrounding medical treatment and deportation have been raised in the case of *N v Secretary of State for the Home Department* [2005] 2 AC 296. A failed Ugandan asylum seeker with advanced HIV/AIDS argued that return to her home country would constitute ill-treatment, as there was not adequate medical care available there. The court rejected her appeal, ruling that Article 3 ECHR does not impose a duty on the state to provide medical care to all severely ill people with HIV/AIDS who cannot be appropriately treated in their own countries (Department for Constitutional Affairs, 2006,

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<sup>48</sup> That is, there are no laws in the United Kingdom that require a referendum or a special legislative process in order to be changed or repealed (Carroll, 2015, p.20).

<sup>49</sup> Even if the Human Rights Act were repealed, asylum seekers in the United Kingdom would still have recourse to the European Court of Human Rights in Strasbourg. It is important to note that the ECHR guarantees the rights of those in member countries of the European Council. As the European Council is entirely separate from the European Union, Brexit will not affect the UK's obligations under the Convention (Equality and Human Rights Commission, 2017).



p.14). *GS (India) & Ors v The Secretary of State for the Home Department* [2015] EWCA Civ 40, Article 3 confirmed the high threshold for Article 3 to be breached. The case of *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, [32] was also pivotal, as the House of Lords ruled that articles of the ECHR other than Article 3 ECHR could be used to challenge expulsions or extraditions, such as Article 6 ECHR (Dickson, 2013, pp.144-5). This case also established the ‘Ullah principle’, whereby UK courts are to keep pace with the jurisprudence of the Strasbourg Court (unless extenuating circumstances prevailed)<sup>50</sup> (Dickson, 2013, p.240; Turpin and Tomkins, 2011, p.766).

Article 3 ECHR has also been used to challenge UK Government restrictions on the provision of support to asylum seekers. In *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396 the Court of Appeal held that Article 3 ECHR imposed a duty on the Secretary of State to ensure asylum seekers do not face severe destitution (Department for Constitutional Affairs, 2006, p.14; Dickson, 2013, pp.157-8). This was further reinforced in *R (on application of Adams) v Secretary of State for the Home Department* [2008] UKHL 66, where it was established that Article 3 imposes a duty to prevent ‘serious suffering’ resulting from the denial of basic provisions necessary to live (irrespective of whether an asylum seeker applied for asylum as soon as they entered the country or not)<sup>51</sup> (Carroll, 2015, p.495).

### **3.3.2. Article 5 ECHR: Right to Liberty and Security**

Article 5 ECHR the right to liberty and security of the person has been particularly useful in cases of administrative detention. As per the Immigration Act 1971 people about to be deported from the UK can be detained while the final decision about their fate is made, and until their removal. Similarly, and as per the UK Borders Act 2007, non-British convicted criminals who have served at least one year in prison can be detained upon their release from prison, prior to their automatic deportation (Carroll, 2015, p.497). In the case of *R (Saadi) v Secretary of State for the Home Department* [2002] 1 WLR 3131, the House of Lords ruled that it was within the bounds of Article 5(1) ECHR to detain certain categories of asylum seekers as part of a fast-track process if their asylum claims were expected to be dealt with swiftly. The plaintiff in that case, Mr Saadi later took the case to the European Court of Human Rights in Strasbourg (*Saadi v UK* (2008) 47 EHRR 427), which agreed with the House of Lords’ decision (although the European Court ruled there had been a violation of Article 5(2), given Mr Saadi had not been informed of the true reason for his detention until 76 hours into his detention) (Dickson, 2013, pp.172-3). In the case of *R (on application of Lumba) v Secretary of State for the Home Department* [2011] UKSC 12], the Supreme Court ruled that failed asylum seekers can only be administratively detained if there is an intention to deport them, as per Article 5(1)(f) of the ECHR (Carroll, 2015, p.498).

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<sup>50</sup> This is a significant decision, as previously domestic courts were obliged by section two of the Human Rights Act to take into account Strasbourg court rulings, rather than to abide by them (Turpin and Tomkins, 2011, p.766).

<sup>51</sup> As per the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002, asylum seekers who do not apply for asylum immediately upon arrival in the UK will not receive support from the Government (Carroll, 2015, p.495).



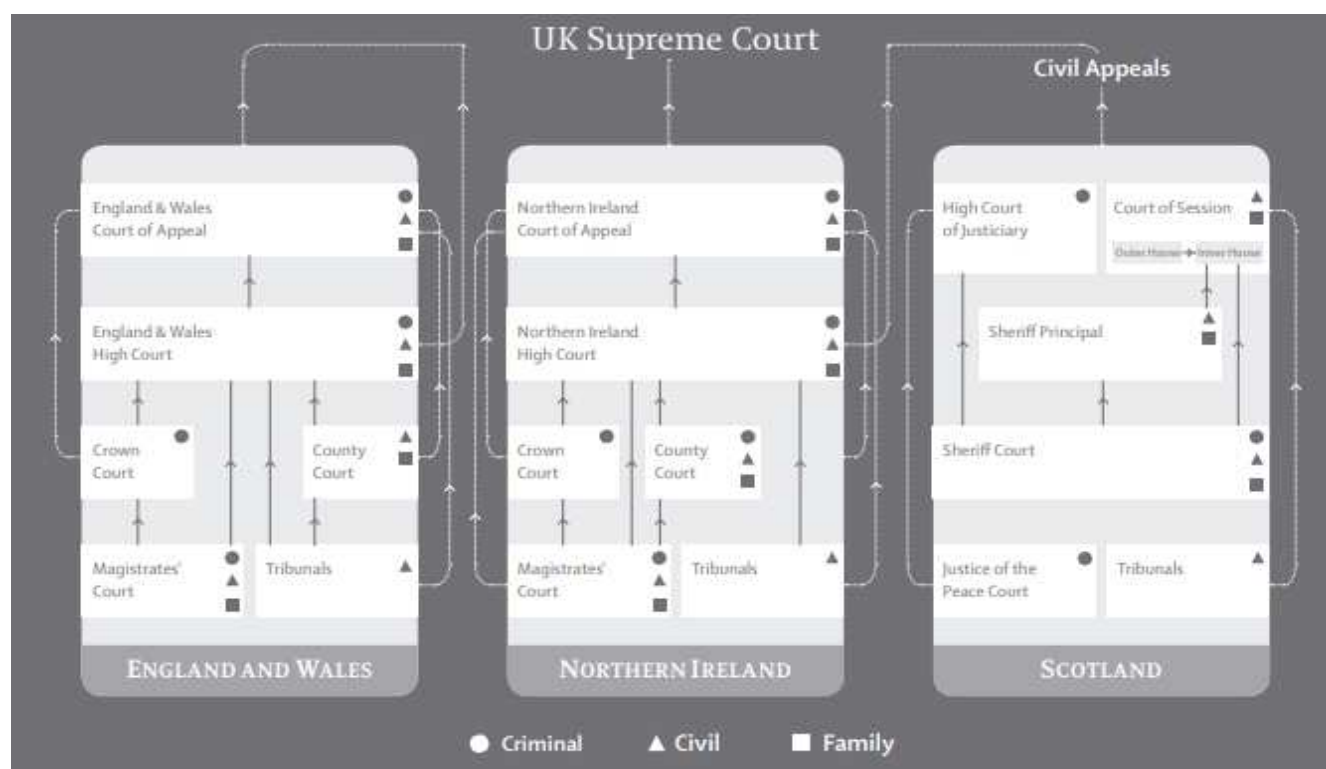
### 3.3.3. Article 8 ECHR: Right to Family and Private Life

The right to family life conferred under Article 8 ECHR has also been used as a basis for challenging the deportation of asylum seekers (failed or otherwise) (Carroll, 2015, p.508). The House of Lords held that the effects of deportation on the deportee's family should be considered, in addition to the effects on the deportee (*R (on application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27) (Carroll, 2015, p.508). In the case of *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5, the Court of Appeal held that the key test for determining whether Article 8 rights of family members would be breached was whether it is reasonable for them to follow a parent or partner to the country to which they had been returned (rather than whether there are insurmountable hurdles preventing them from going to that country) (Carroll, 2015, p.508). Special consideration should be given to the best interests of any children impacted by the deportation of a parent, as per *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, however the interests of children do not automatically trump the interests of the public (Carroll, 2015, p.508). In the case of *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, the House of Lords held that although EM and her son did not meet the criteria to be deemed refugees, their Article 8 rights (read with Article 14 rights) would be abrogated upon return to Lebanon, given that EM's abusive husband would gain custody of the child under Islamic law by virtue of his sex (Carroll, 2015, p.495).

## 3.4. The Judiciary

### 3.4.1. Structure and Role of the Judiciary

The UK has a complex judicial system comprising the English and Welsh, Scottish, and Northern Irish judiciaries, as well as the overarching Supreme Court of the UK (see Figure 1.1 below). Correspondingly there are three legal systems in the UK: the laws of England and Wales, Scotland, and Northern Ireland (European Committee of Regions, 2012). However, as immigration and asylum are areas reserved by Westminster, immigration and asylum tribunals in England and Wales, Northern Ireland and Scotland are all administered centrally by HM Courts and Tribunal Service.

**Figure 7: UK Legal System**

Source: Supreme Court, 2018a.

Since February 2010, immigration and asylum matters have been dealt with through the unified tribunals system – which encompass all areas of law. The unified tribunals system has two tiers – the First-tier Tribunal and the Upper Tribunal<sup>52</sup>. There are Immigration and Asylum Chambers in both tiers (Clayton, 2016, p.242; Courts and Tribunals Judiciary, 2018a). The First-tier Tribunal (Immigration and Asylum Chamber) reviews most decisions made by the Home Office upon appeal, as well as considering applications for immigration detention bail (UK Government, 2018b).

Appeals against decisions made by the First-tier Tribunal (Immigration and Asylum Chamber) are referred to the Upper Tribunal (Immigration and Asylum Chamber) (Courts and Tribunals Judiciary, 2018a). A First-tier Tribunal decision can only be appealed on a point of law (Asylum Information Database, 2018, p.16; Clayton, 2016, p.242). An appellant must first seek permission to appeal the decision to the Upper Tribunal from the First-tier Tribunal, however if they are unsuccessful, they can seek permission straight from the Upper Tribunal (Clayton, 2016, p.242). If the appellant loses the appeal in the Upper Tribunal, they can appeal to a higher court if the appeal raises an important point of principle or practice, or if there is another persuasive reason: the Court of Appeal in England and Wales, the Court of Appeal in Northern Ireland, and the Court of Session in Scotland (Clayton, 2016, p.243; UK Government, 2018a). The appellant must seek permission to appeal from the Upper Tribunal first, and if unsuccessful, can then seek permission from the relevant Court of Appeal or Session themselves (UK Government, 2018a).

<sup>52</sup> A two-tier immigration tribunal system existed until 2005, when it was replaced with the single tier Asylum and Immigration Tribunal, before being separated back into two tiers in 2010.

Permission to appeal a decision made by the Court of Appeal (England and Wales, Northern Ireland) or Inner House of the Court of Session (Scotland) must first be sought from those courts themselves. If permission to appeal is denied, permission can then be sought directly from the Supreme Court (Registry of the Supreme Court, 2016, pp.2-3). The Supreme Court, as the final court of appeal in the UK, will only preside over appeals on ‘arguable points of law of general public importance’ (Supreme Court, 2018c). Twelve independently appointed judges sit on the Supreme Court.

The role of the judiciary is circumscribed in the UK compared to other countries as a result of parliamentary sovereignty. The judiciary does not wield the power to ‘strike down’ primary legislation, because it is inconsistent with other statutes, treaties or the constitution (Supreme Court, 2018d). Instead the judiciary’s role is to interpret legislation and advise of incompatibilities, rather than to decisively act upon them (Hansen, 2000, p.239; Supreme Court, 2018d). For example, in the event that primary legislation is deemed to be in conflict with the Human Rights Acts 1998, the High Court, Courts of Appeal and Session and the Supreme Court can issue a ‘declaration of incompatibility’. Although such a declaration does not affect the validity or operation of the legislation, it will influence the Government’s decision whether to take remedial action or not – either via the fast-track Remedial Orders procedure, or by reintroducing amended legislation through parliament<sup>53</sup> (Carroll, 2015, pp.479-80). Secondary legislation however can be struck down by the courts on the basis that it is incompatible with the Act (Carroll, 2015, p.479).

It has been lamented that the UK judiciary have as a result not had the impact that judiciaries in Germany, France and the United States have in curbing the regressive immigration policies of Parliaments (Hansen, 2000, pp.241-2). In the UK, power over immigration and asylum falls squarely within the ambit of the executive (Clayton, 2016, p.26).

### **3.4.2. Independence of the Judiciary**

There are two aspects of judicial independence: first, separation of the arms of government, which are the executive, legislature and judicial arms, and second: the independent decision-making of judges. Both elements will be dealt with separately below.

#### **Independence from the Executive and the Legislature**

The peculiarity of the UK not having a codified constitution has meant that executive, legislature and judiciary have not always been clearly delineated constitutionally. For example, judges could be elected as Members of Parliament up until the late 1800s, and there has even been an instance of a judge also being a member of Cabinet (Carroll, 2015, pp.41-2; UK Judiciary, 2018b). The judiciary and legislature were fused, with judges on the UK’s final court of appeal also being members of the House of Lords, with the ability to vote and deliberate on legislation (Carroll, 2015, p.42). The office of the Lord Chancellor combined executive, legislative and judicial functions – being a senior Cabinet Minister, a judge and head of the judiciary, and a member of the legislature through the House of Lords (Carroll, 2015, p.42; UK Judiciary, 2018b). There have been several recent Acts and reforms strengthening the

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<sup>53</sup> An important example of this is *A v Secretary of State for the Home Department* [2004] UKHL 56, also referred to as the Belmarsh Case. The House of Lords declared that the Anti-Terrorism, Crime and Security Act 2001 Part 4 s 23 (which had allowed for the indefinite detention of foreign terror suspects without trial) was incompatible with Articles 5 and 14 of the Human Rights Act 1998. Parliament subsequently repealed Part 4 of the Security Act 2001.

independence of the Judiciary in the UK. These changes have redistributed power away from the office of Lord Chancellor to other bodies and institutions:

- Constitutional Reform Act 2005 – served to separate the House of Lords from the judiciary, by circumscribing the judicial powers of the Lord Chancellor, making provisions for the establishment of a Supreme Court, mandating the creation of a Judicial Appointments Commission and bestowing a statutory duty upon ministers to maintain judicial independence (Carroll, 2015, p.46; UK Judiciary, 2018b).
- Judicial Appointments Commission established in 2006 – recommends judicial appointments to English and Welsh courts, and some Scottish and Northern Irish tribunals based on the principles of merit, diversity, and free and fair competition (Judicial Appointments Commission, 2018; UK Judiciary, 2018a).<sup>54</sup> The Queen makes the judicial appointments, upon the recommendation of the Lord Chancellor, whose guidance must be consistent with the advice of the Judicial Appointments Commission (Carroll, 2015, p.47).
- The Establishment of the Ministry of Justice in 2007 – responsible for criminal justice, prisons and penal policy, as well as the courts and legal aid. These functions previously fell within the remit of the Secretary of State for the Home Department, and the Lord Chancellor (UK Judiciary, 2018b).
- Establishment of the UK Supreme Court in 2009 – ended the judicial powers of Parliament, with the Law Lords (senior judges) in the House of Lords becoming Justices of the Supreme Court (Supreme Court, 2018b). Supreme Court Justices are barred from being members of the House of Commons, as well as voting or sitting in the House of Lords (Carroll, 2015, p.47). Supreme Court Justices are appointed by the Queen upon the recommendation of the Prime Minister, following the convening of an ad hoc Selection Commission and consideration of the nominee by the Lord Chancellor (Carroll, 2015, p.47).

There have also been concerns about the powers of each branch of government vis-à-vis the others. Especially in the years since the Human Rights Act 1998 came into force, there have been significant tensions between the executive and the judiciary, with the executive often critical of the judiciary's application of the Act to asylum and immigration cases (Clayton, 2016, p.15). Although ultimately unsuccessful, the Government went as far as trying to eliminate court review of asylum and immigration matters, via an ouster clause in the Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003 (Clayton, 2016, p.15). Immigration Rules introduced by the Government in 2012 circumscribe the power of the courts to interpret and apply human rights, while the Immigration Act 2014 limits the application of Article 8 (Clayton, 2016, p.15).

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<sup>54</sup> The Justice (Northern Ireland) Acts of 2002 and 2004 prescribed the establishment of the Northern Ireland Judicial Appointments Commission, which was set up in 2005 to appoint judges solely based on merit (McCaffrey and O'Connell, 2012, p.3). Similarly, as per the Judiciary and Courts (Scotland) Act 2008, the Judicial Appointments Board became an advisory Non-Departmental Public Body (NDPB) in 2009, recommending appointments based on merit, and cognisant of the need to encourage diversity (Judicial Appointments Board for Scotland, 2017).

## Independent Judicial Decision-Making

Beyond the institutional separation of the different arms of government, judicial independence is also maintained through independent and impartial decision-making by individual judges. There are several protections afforded to judges – judges have security of tenure subject to good behaviour, with High Court, Court of Appeal, and Supreme Court judges only being able to be dismissed via resolutions of both Houses (Carroll, 2015, p.47). Judges in lower courts can ostensibly be removed by the Lord Chancellor, although this power is rarely exercised (Carroll, 2015, p.45). Further, judicial salaries are set upon the advice of the independent Senior Salaries Review Body, rather than at the determination of the executive (Carroll, 2015, p.45). In the performance of their duties judges are immune from all civil liability, including protection against defamation proceedings during the course of hearings (Carroll, 2015, pp.45-6; Courts and Tribunals Judiciary, 2018b). Finally, Government Ministers, including the Lord Chancellor are required to uphold judicial independence by not using their position to influence judicial outcomes (Carroll, 2015, p.48). While Ministers are not barred from speaking about cases and airing their views on judicial decisions, they should not mount *ad hominem* attacks on the judges themselves for making those decisions (Carroll, 2015, pp.45-6; Clayton, 2016, p.63)

Obligations are also imposed on judges – as per convention, judges do not voice political opinions or participate in political events or activities, while the reasonable reporting of judicial proceedings is covered by the defence of qualified privilege (Carroll, 2015, p.46).

Despite these protections, there is ongoing tension between the judiciary and the executive on immigration and asylum cases. For example, in several instances judges have been personally criticized for decisions, with Ministers even suggesting that judicial rulings favourable to immigrants and asylum seekers are undemocratic (Carroll, 2015, pp.45-6; Clayton, 2016, p.63). Similarly, senior judges have broken convention commenting on policy, with several current and former judges denouncing the ouster clause<sup>55</sup> in the Asylum and Immigration (Treatment of Claimants etc.) Bill 2003 (Clayton, 2016, p.64). Within constitutional constraints, the judiciary have generally played a significant role in protecting the freedoms of asylum seekers against the regressive decisions of Parliament. (Winder, 2013, p.421).

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<sup>55</sup> An ouster clause is a clause in an Act of Parliament that removes judicial review.

## 4. The Relevant Legislative Framework in the Fields of Migration and Asylum

### 4.1. National Legislation on Immigration and Asylum

#### 4.1.1. Evolution and Main Stages of Immigration and Asylum Law

##### Primary Legislation

There is no consolidated immigration law in the UK, which is instead set out in a series of Acts<sup>56</sup>. The backbone of the present-day immigration system is the Immigration Act 1971, which was the last of three Acts passed in the decade from 1962 to restrict immigration in response to growing public concern about the influx of foreigners post-World War II (for more information, see Section 2.1). The Immigration Act 1971 was expansive, replacing all existing immigration laws and amending contemporary citizenship laws. The general trend since 1971 has been ever greater immigration restrictions – along the themes of eroding appeal rights, expanding the surveillance apparatus, limiting social benefits, and depriving asylum seekers of a thorough review of their claim if they are deemed to be ingenuine at the outset. Key Acts are listed below:

- *Asylum and Immigration Appeals Act 1993* – established the category of an asylum claim ‘without foundation’ (Sch 2 para 5), which means curtailed appeal rights. This was based on the premise that the asylum seeker was ingenuine and could be identified as such early on in the process, so their application could be dealt with more swiftly.
- *Asylum and Immigration Act 1996* – expanded the designation of ingenuine claims to encompass those from particular countries, where it was deemed that residents were at low risk of persecution. New offences were established for facilitating unauthorized entry of immigrants into the UK (s 5), and for individuals gaining leave to remain in the UK using false claims (s 4). Further, employers became co-opted into the monitoring apparatus, being obliged to check the immigration status of their employees (s8, s9).
- *Immigration and Asylum Act 1999* – included significant new provisions: asylum seekers and their dependants were removed from the standard benefits system in the UK, instead becoming part of the asylum benefits scheme, while support was taken away from failed asylum seekers without dependents (Part VI); asylum seekers receiving support would now be dispersed around the UK to prevent concentration in the south-east of England (Part VI); to address the significant backlog of cases and removals, the appeal rights of those in contravention of immigration law were circumscribed (Part IV); asylum claims deemed to be ingenuine now fell into a category termed ‘manifestly unfounded’; fines for transporting undocumented passengers were expanded to trains, buses, coaches, car and lorry drivers (Part II), while registrars of births, marriages and deaths now had a duty to report suspicious marriages (s 24).

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<sup>56</sup> In 2008, the government attempted to amalgamate all immigration Acts into the one for the purpose of simplification. A ‘Draft Partial Simplification Bill’ was released in July 2008, however it was met with much criticism as it was far from simple and very difficult to read and comprehend, and was subsequently withdrawn (Clayton, 2016, pp.23-4).

- *Nationality Immigration and Asylum Act 2002* – also contained significant new provisions: if a person is due to be deported but cannot (for example because of the threat of human rights abuses in the country of return), the Secretary of State can deprive them of their right to work and claim benefits (s 76); allowed the Secretary of State to strip people of British citizenship, as long as it wouldn't render them stateless (s 4); set the foundations for the export of immigration control to other countries, which later took effect at French ports (s 141); ingenuine asylum cases now termed 'clearly unfounded', and decided by the Secretary of State on the basis of safe country lists (s 94); asylum seekers who do not lodge their claim 'as soon as reasonably practicable' could be deprived of housing and subsistence support (s 55).
- *The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* – conflated the two-tier immigration appeals system into one tier, required people subject to immigration control to get approval from the Home Office in order to marry (ss 19-25), while successful asylum seekers could no longer backdate their welfare support claims to their date of entry into the UK. Further, failed asylum seekers with dependents could now be deprived of support (s 9).
- *Immigration, Asylum and Nationality Act 2006* – mainly concerned the expansion of enforcement powers, for example, the Act meant employers could be fined if they employed people without the right to work, while immigration officers received expanded powers of arrest. The points-based system (PBS) was introduced under this Act; as well as the denial of appeal rights if entry clearance was denied (except on discrimination or human rights grounds, and in some family visitor and dependant cases).
- *UK Borders Act 2007* – gave immigration officers expanded powers of detention, enabled the routine removal of people convicted of specific crimes (ss 32-39), and removed appeal rights for those facing deportation (except if their deportation would abrogate their rights) Biometric identification was also introduced under the 2007 Act.
- *Borders, Citizenship and Immigration Act 2009* – allowed the UK Border Agency to perform the functions of Her Majesty's Revenue and Customs, a step towards the creation of a unified border agency.
- *Legal Aid Sentencing and Punishment Offenders Act 2012* – legal aid no longer awarded in some immigration and human rights cases.
- *Immigration Act 2014* – appeal rights removed for all migrants and replaced with administrative review (the exception being those appealing on asylum or human rights grounds). Further, the Act stipulates certain factors that the courts must consider when dealing with Article 8 ECHR and the Human Rights Act 1998 appeals<sup>57</sup>. Other provisions concern removal powers, the 'deport first, appeal later' policy (which has since been ruled unlawful by the Supreme Court), and the removal of British citizenship.
- *Immigration Act 2016* – included measures targeting unauthorized migrants – employing or renting accommodation to those without permission to work or rent is now a criminal offence, while immigrants without permission to be in the UK can have their

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<sup>57</sup> Article 8 concerns the right to family life. The courts must not give much weight to a private life that was established when the person's immigration status was uncertain, and must consider the 'public interest' in all Article 8 appeals (Clayton, 2016, p.25).



bank accounts frozen and driver's license confiscated . The Act also allows for the withdrawal of support from refused asylum seeking families.

It would be an oversimplification however to say that legislation has been unidirectional – some notable exceptions to the generally regressive trend are: i) the Asylum and Immigration Appeals Act 1993, which established the right of appeal for asylum seekers ii) the watershed Human Rights Act 1998, which has been critical in protecting the rights of asylum seekers and other immigrants iii) the Immigration and Asylum Act 1999, which established the right of immigration appeal on human rights grounds, as well as restoring partial appeal rights for family visitors iv) the Borders, Citizenship and Immigration Act 2009 obliged the Secretary of State to work to protect the welfare of children in the carrying out all immigration, asylum and nationality duties (s 55) v) the Immigration Act 2014 prohibits the detention of unaccompanied minors, unless in short-term holding facilities or the (now-closed) Cedars facility, designed for families with children vi) the Immigration Act 2016 s 60 stops pregnant women from being detained for more than 72 hours unless permission to do so is granted by a Government Minister; s 67 provides for the relocation of unaccompanied refugee children to the UK from Europe as soon as possible vii) the Refugees (Family Reunion) Bill passed its second reading in the House of Commons on 16 March 2018, which expands the definition of family member for the purposes of reunification<sup>58</sup> and reinstates legal aid for refugee family reunion cases.

There are certain other features of the UK's immigration and asylum legislation that go beyond the generally ever-restrictive content of the Acts. First, UK immigration and asylum legislation has evolved swiftly over the years, with twelve new Acts affecting immigration policy being passed in the last 20 years, in addition to rapidly changing secondary legislation (Willman and Knafler, 2009, p.4). This adds to the complexity and difficulty of navigating immigration and asylum law. Second, legislation has often been introduced to circumvent court decisions, reflecting tensions between the executive and the judiciary. For example, regulations stripping virtually everyone subject to immigration control of benefits was ruled *ultra vires* by the Court of Appeal in 1996, however shortly after s 11 of the Asylum and Immigration Act 1996 thwarted the ruling (Clayton, 2016, p.14). Third, a lack of consultation and the introduction of late amendments to Bills has also been a feature of immigration and asylum legislation. Recently, late amendments plagued the 2002, 2004 and 2014 Acts, limiting parliamentary scrutiny, however this practice goes as far back as the passage of the *Immigration (Appeals) Act 1969* (Clayton, 2016; 19-20, 22). The 2003 Asylum and Immigration (Treatment of Claimants etc.) Bill 2003 was introduced with negligible consultation towards the end of the year, while the Commonwealth Immigrants Act 1968 was expedited through Parliament in a frenetic five days (Clayton, 2016; 20).

## Secondary Legislation

The Immigration Act 1971 s 1(4) empowers the Secretary of State to make 'Immigration Rules' – the rules that govern when a person is permitted to enter or stay in the UK. There are thousands of Immigration Rules, which are produced at least once a month on average

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<sup>58</sup> Currently, as per rr.352A, 352AA and 352D of the Immigration Rules, only the spouse, partner or child (under the age of 18) of a refugee or holder of humanitarian protection, who formed a family unit prior to fleeing their country of origin, are exempted from the maintenance and English language requirements for family reunion purposes. The Refugees (Family Reunion) Bill clause 1 expands the definition of family to include grandchildren, siblings, nieces and nephews under the age of 18, unmarried children who are at least 18 years of age and parents (or aunts/uncles in some circumstances).

(Clayton, 2016, pp.31-2). New rules are created via the issuing of a 'Statement of Changes to Immigration Rules' which are placed before Parliament for 40 days, pursuant to the Immigration Act 1971, s 3(2). The changes will become law after the 40 days without debate unless objections are raised by either House (known as the negative resolution procedure) (UK Council for International Student Affairs, 2015, p.17; UK Parliament, 2018). The Immigration Rules have only been rejected by Parliament a handful of times, and are rarely the subject of Parliamentary debate (Clayton, 2016, p.32). The Immigration Rules have not been consolidated in hard copy since Order Paper HC 395 in 1994, although they are available on the Home Office website with all Statements of Changes since 1994 (UK Council for International Student Affairs, 2015, p.18; Willman and Knafler, 2009, p.4).

A feature of primary immigration legislation throughout the twentieth century and beyond is that it has tended to be high-level, enabling legislation, with wide discretion therefore allowed in the development of more detailed immigration rules and procedures, which are subject to less parliamentary scrutiny (Clayton, 2016, p.17). For example, the export of immigration controls to overseas jurisdictions was scarcely mentioned in the 2002 Act, save for one general enabling section (s 141). It was in the secondary legislation and administrative arrangements that the fine detail of UK immigration control operating in France was mapped and implemented (Clayton, 2016, pp.17-18).

#### **4.1.2. Principles Informing Asylum and Immigration Legislation**

As discussed above, factors shaping immigration and asylum legislation have included a perception of asylum seeker exploitation of welfare benefits, disingenuous asylum seekers creating backlogs in the assessment and appeals system, as well as 'racketeers' benefiting from employing, housing and facilitating the entry of people without state permission. This has led to legislation that reduces appeal and benefit rights, sanctions employers, transportation carriers and landlords, and legislative mechanisms for supposedly determining if an asylum claim is unfounded early on, and therefore subject to less thorough review. Security has been another critical issue informing immigration and asylum legislation

Even before 11 September 2001 there had been growing concerns surrounding security in the UK, which the attacks only served to intensify (Clayton, 2016, p.15, p.50). Immigration, asylum and terrorism have become increasingly fused in public discourse, policy formulation and in legislative terms (Clayton, 2016, p.50, p.516). Variations on the term 'security' have permeated immigration policy documents and legislation, for example the publication of the White Paper *Secure Borders, Safe Haven; Integration with Diversity in Modern Britain* in 2002, references to 'national security' in the 2002 and 2014 Acts, and a section on 'border security' appearing in the 2016 Act. Legislation relating to terrorism and security has impacted asylum seekers, refugees and other immigrants. The Anti-terrorism, Crime and Security Act 2001 included a section on immigration and asylum (Part IV), whereby suspected terrorists may not have their asylum claims substantively reviewed if their deportation would be in the public interest; refugee status can be revoked on the basis of national security, as per the UK's interpretation of the Refugee Convention article 1(f) and 33(2); while fingerprints taken in asylum and some immigration procedures can be held for up to 10 years. Further, the Crime and Courts Act 2013 limited appeals against national security deportations (s 54).

Although terrorism is rarely mentioned explicitly in immigration and asylum Acts, the security discourse has pervaded such legislation nonetheless (Clayton, 2016, p.18). The Immigration, Asylum and Nationality Act 2006 circumscribed appeal rights for those facing

national security deportations (s 7). Sections 54 and 55 of the Act made terrorism-related activities grounds for exclusion from refugee status (with reference to the Refugee Convention Article 1(F)(c)). The Immigration Act 2014 allows the Secretary of State to revoke the citizenship of anyone who behaves contrary to the key interests of the UK, even if they do not possess dual citizenship (s 66). The stringent surveillance and monitoring regime of asylum seekers and other immigrants, expanded through successive Acts, is in keeping with the securitized landscape (Clayton, 2016; 18). Another thread of the security discourse is the interweaving of immigrants and criminals more broadly. The UK Borders Act 2007 provided for the automatic deportation of foreigners convicted of criminal offences (s 32), with some exceptions (outlined in s 33). This link between immigration and criminality can also be seen as making the detention of asylum seekers and other immigrants more acceptable (Clayton, 2016, p.50).

### **4.1.3. Entry, Residence and Resurfacing from Undocumented Immigration**

British nationals, Commonwealth nationals with the right of abode and European Economic Area nationals generally do not require permission to enter the UK (leave to enter), as per the 1971 Immigration Act s 2(1) as amended, the Immigration Act 1988 s 7 and the Immigration Rules. All other nationals do require leave to enter<sup>59</sup> (Home Office, 2018n). Pursuant to the Immigration Rules (Part I, paragraphs 7 to 39E), this permission can be granted upon arrival at a UK port or border, or prior to arrival, usually at a UK consulate or high commission in the applicant's country of residence<sup>60</sup> Advanced permission is usually granted in the form of a visa (entry clearance), and is a requirement for citizens of specific countries as outlined in the Immigration Rules ('visa nationals'), for non-visa nationals if the length of stay will be for more than six months, as well as if entry is for specific purposes, such as setting up a business or studying.

Asylum seekers and established refugees both require leave to enter the UK (Clayton, 2016, p.196). Asylum seekers are not granted leave to enter until their asylum claim has been processed, and so they are usually granted 'temporary admission'<sup>61</sup> (Immigration Act 1971 Sch 2 para 21). Refugees require leave to enter in the form of entry clearance since 2003 when the UK suspended its duties under the 1959 Council of Europe Agreement on the Abolition of Visas for Refugees (Clayton, 2016, p.197).

Estimating the number of unauthorized immigrants in the UK is by necessity a difficult task – in 2007 it was estimated there were between 417,000 and 863,000 unauthorized migrants (among the highest estimates among EU countries), while in 2017 the former Home Office head of immigration enforcement speculated that there were as many as 1.2 million unauthorized migrants (Library of Congress, 2017; McCann, 2017; Vollmer, 2011). Although the usual path for detected undocumented immigrants is deportation and/or prosecution

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<sup>59</sup> Exceptions include air and sea crews, service people, diplomats and people arriving from another part of the Common Travel Area (comprising the United Kingdom, the Republic of Ireland, the Channel Islands and the Isle of Man) Immigration Act 1971 ss 1(3) and 8.

<sup>60</sup> The Gulf Cooperation Council states (Oman, Qatar, the United Arab Emirates) can apply for an electronic visa waiver online prior to arrival.

<sup>61</sup> Replaced by 'immigration bail' under the Immigration Act 2016.

(Library of Congress, 2017), there are some pathways to regularization as outlined in the Immigration Rules:

- A person born in the UK who unlawfully resides there for the first ten years of their life may apply for British citizenship from the age of ten (British Nationality Act 1981; Borders, Citizenship and Immigration Act 2009, ss. 42(5) and 58)
- A child born in the UK who has unlawfully resided there for at least seven years can apply for leave to remain on the basis of their right to a private life, as long as it would be 'unreasonable' to return them to their home country. If successful, the child will be granted permission to stay for two-and-a-half -years, at which point they can apply to renew their leave. After ten years they can then apply for citizenship (Article 8 of the ECHR and the Human Rights Act 1998; Immigration Rules).
- A person brought to the UK as a child, who has unlawfully resided there for at least half their life can apply for leave to remain on the basis of their right to private life. They must be between the ages of 18 and 24 when they apply. Leave to remain will be granted in two-and-a-half-year intervals, with the ability to lodge an application for citizenship after 10 years (Article 8 of the ECHR and the Human Rights Act 1998; Immigration Rules).
- A person who has lived in the UK for at least 20 years, when some or all of this period was unlawful, can apply for leave to remain on the basis of their right to private life. As above, the person can apply for leave to remain every two-and-a-half-years, and then for citizenship after 10 years (Article 8 of the ECHR and the Human Rights Act 1998; Immigration Rules) (Library of Congress, 2017).

## 4.2. Sub-National Legislation on Immigration and Asylum

The devolved governments of Scotland, Wales and Northern Ireland cannot legislate directly on issues of immigration, asylum and nationality, as these are powers reserved by the central Westminster Government. However, some devolved powers are relevant to immigration and asylum, particularly housing<sup>62</sup>, local government, legal aid, health care, education, children's services, policing and social welfare (Harper, 2016, p.1; Mooney and Williams, 2006, p.620). Some examples of devolved legislation relevant to immigration and asylum are below:

- *Children and Young People (Scotland) Act 2014* – the objective of the Act is to improve the well-being of children and ensure young people and their families have access to the services they need, including young refugees, asylum seekers and their families. The Act also stipulates the provision of services to unaccompanied asylum-seeking children (Scottish Government, 2018).
- *Housing Act (Wales) 2014* – the Act provides that local authorities make available to homeless people accommodation that meets all health and safety standards. This Act also applies to refugees – ensuring that they have access to accommodation that is of a reasonable standard (Welsh Government, 2016, p.7).

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<sup>62</sup> Housing support for destitute asylum seekers is a reserved matter, while housing support for unaccompanied asylum-seeking children is devolved.

- *Northern Ireland Act (1998) s 75* – confers a duty on public authorities to support equality of opportunity irrespective of religion, race, political persuasion, marital status or sexual orientation. The Act has provided the enabling environment for the Racial Equality Strategy which highlights the importance of co-ordinated service provision to meet asylum seeker needs (Office of the First Minister and Deputy First Minister, 2005, pp.29-30).

Distinctions between reserved and devolved powers can be particularly blurry in the case of immigration and asylum legislation. For example, there have been several conflicts between the central UK Government and Scotland, which tends to take a more progressive stance on asylum and immigration issues than the rest of the UK (Scottish Detainee Visitors, 2017, p.5; Scottish Refugee Council, 2016, p.5). There has been conflict between the devolved Children (Scotland) Act 1995 and three pieces of UK legislation which provide for the detention of people liable to deportation and removal: the Immigration Act 1971 (as amended), the Nationality, Immigration and Asylum Act 2002 and the UK Borders Act 2007 (McGuinness and Gower, 2017, p.5). Asylum seekers, including children, were taken in dawn raids and detained at Dungavel detention centre in 2004 (the only detention centre in Scotland), under central Government powers. The Scottish Children's Commissioner argued that the detention of children contravened the Children (Scotland) Act 1995, stating 'Immigration may well be a reserved issue, but the children aren't. My job is to promote and safeguard the rights of all children and people in Scotland' (BBC, 2004; Mooney and Williams, 2006, p.620).

The role of municipalities in relation to asylum seekers and immigration is discussed in Sections 3.1 and 5.

There is a significant role for non-government-organizations and the third sector in plugging the legislative gaps in helping asylum seekers, immigrants and refugees in the UK. The role of the third sector spans three areas: i) support services, ii) integration and iii) legal advice and advocacy. First, many asylum seekers and refugees face significant financial hardship and poverty. Asylum seekers are not allowed to work while their claim is being processed. They can receive housing support and up to £37.75 per person per week if they meet the stringent destitution test: they are homeless and/or do not have enough money to buy food (UK Government, 2017a). The weekly allowance must cover everything from food, and toiletries, to clothes and transportation costs. People that receive permission to remain in the UK<sup>63</sup> have access to the same benefits that British citizens have access to, with any benefits they are entitled to depending on their employment status, income, disability status and dependants (Department for Work and Pensions and the Home Office, 2018). Irregular migrants have no access to government support or services. The third sector plays a significant role in supplementing asylum support, the benefits received by those granted leave to remain, as well as helping those that do not qualify for any support (Refugee Council, 2018). Services offered include emergency provisions, advice on accessing government support, help entering the private housing market, and collecting and distributing donations from the community for example bicycles, clothing, microwaves and toys (Cambridge Refugee Resettlement Campaign, 2017; Refugee Council, 2018).

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<sup>63</sup> This includes successful asylum seekers, resettled refugees, and those granted humanitarian protection and discretionary leave to remain (Willis, 2010).

The third sector also plays an important role in providing integration services, for example mentoring, home visits, homework support, English language classes, training and education, and the organization of social groups and events (Cambridge Refugee Resettlement Campaign, 2017; Community Action for Refugees and Asylum Seekers, 2018).

Finally, the third sector also provides legal services, including legal advice, representation, drop-in legal clinics, pamphlets and other information. This is invaluable given the complexity of immigration and asylum law in the UK (Community Action for Refugees and Asylum Seekers, 2018; Rights in Exile Programme, 2017).



## 5. The Legal Status of Foreigners

There are four broad categories of migrants to the UK i) asylum seekers, who may be granted refugee status, humanitarian protection, discretionary leave to remain or restricted leave. Unaccompanied asylum-seeking children (UASC) may also be granted UASC leave ii) resettled refugees, who have either been granted refugee status or humanitarian protection prior to their arrival in the UK iii) regular migrants, who are granted work, study or family visas iii) irregular migrants, such as visa overstayers and those who enter the UK without permission.

### 5.1. Asylum Seekers

Applicants can apply for asylum upon arrival at a UK port (with the Home Office UK Border Force), after arrival at the Asylum Screening Unit in Croydon<sup>64</sup> (with UK Visas and Immigration), or in a detention centre if detained (with Home Office Immigration Enforcement) (Asylum Information Database, 2018, pp.14-15; Clayton, 2016, p.390; Home Office, 2017b; Willman and Knafler, 2009, p.23). There are three different procedural pathways depending on the circumstances of the applicant: standard procedure, accelerated procedure, and the third country procedure (Asylum Information Database, 2018, pp.13-15). The first step in all cases is a screening interview with an immigration officer, where the applicant registers their asylum claim, and the interviewer determines if they will be detained or admitted temporarily (Clayton, 2016c, p.390; UK Government, 2018c). The applicant must bring their passport or travel documents, police registration certificates and identity documents with them to the interview (UK Government, 2018c). Arriving at the interview without a current immigration document that confirms their identity and nationality can be a criminal offence, as per the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 s2. This offence is punishable by a prison sentence of up to two years<sup>65</sup>. The interview determines which procedural pathway the case will follow.

#### 5.1.1. Standard pathway

Shortly after the screening interview, the applicant will attend an asylum interview where they provide the evidence upon which their claim will be assessed to the caseworker that has been allocated to them (UK Government, 2018c; Immigration Rules, Part 11, Para 339NA). The initial decision is usually made within six months if the case is straightforward (UK Government, 2018c). Refugee status, humanitarian protection and discretionary leave may be granted. If the applicant is not granted leave to remain they will need to leave the UK either voluntarily or by compulsion. The decision not to grant refugee or any other protection status can be appealed, as outlined in Section 3.4.1 above (UK Government, 2018c).

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<sup>64</sup> Recently renamed the Asylum Intake Unit, although this name change doesn't appear in all official information (Asylum Information Database, 2018, p.15).

<sup>65</sup> It is not an offence to attend an interview without the requisite documentation if the interview takes place after the applicant has already entered the UK, and the applicant is able to produce the required document within three days of the interview (s 2(3)). There are certain defences permitted as outlined in ss 2(4-5) of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004. In the first six months since s2 of the Act came in to force, at least 230 asylum seekers were arrested, and 134 convicted of this new offence (Taylor and Muir, 2005). Multiple asylum seekers have received jail sentences (BBC, 2015).



### 5.1.2. Accelerated procedure

If an application is deemed to be ‘clearly’ unfounded by the Secretary of State (as per the Nationality, Immigration and Asylum Act 2002), the claim will be refused and the person removed from the UK. The applicant is prohibited from appealing within the UK in such cases (non-suspensive appeal), and can only do so via judicial review (Asylum Information Database, 2018, p.15; Clayton, 2016, p.400). A case can be certified as ‘clearly unfounded’ on the basis of individual circumstances, as well as if they are on a list of countries designated as safe (Nationality, Immigration and Asylum Act 2002 s 94). A second accelerated procedure – Detained Fast Track (DFT) – was suspended in July 2015 following multiple successful legal challenges brought by *Detention Action*<sup>66</sup>. DFT allowed applicants to be detained while their claim was being processed if the Home Office determined a decision could be reached quickly (Asylum Information Database, 2018, p.15; McGuinness and Gower, 2017, p.9).

### 5.1.3. Third Country Pathway

If it is determined at the initial screening interview that the applicant passed through a safe third country en route to the UK, their case will be referred to the Third Country Unit within the Home Office (Asylum Information Database, 2018, p.15). An asylum claim will not be substantively considered in the UK if another EU state has granted that person protection, if a non-EU member state is deemed to be the first country of asylum, if a non-EU member state is deemed to be a safe third country, and if the Dublin Regulation applies (for further details see Immigration Rules Part 11, Paras 345A-345E). The Dublin III Regulation permits detention of a person if there is a significant risk of absconding (Article 28(2)), however detention cannot exceed six weeks (Article 28(3)). The Home Office detains most people subject to the Dublin III Regulations according to its determination that most people are at high risk of absconding (Right to Remain, 2017a, p.2). The UK must issue the transfer request within one month if the applicant is detained (Article 28(3)). If the EU member state accepts the transfer request the UK has six months to transfer the applicant (Article 29(1)), with some exceptions (Article 29(2)). Applicants cannot appeal a removal decision in third country instances, with their only avenue being judicial review by the Upper Tribunal (Tribunals Courts and Enforcement Act 2007 s 16).

### 5.1.4. Rights and Duties

The Home Office administers support provided to destitute asylum seekers who have not been detained. If an asylum seeker and their dependents demonstrate that they are destitute at the time they lodge their asylum application, they will be eligible for temporary ‘Section 98’ support while they wait for their application for longer term support to be processed (‘Section 95’

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<sup>66</sup> Various elements of the DFT process were ruled unlawful in *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin), *R (Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1634 and *Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber) & Ors* [2015] EWHC 1689 (Admin). The unlawful elements were the delayed allocation of lawyers to detainees; the detention of all asylum seekers who meet the quick processing criteria while they are appealing their refused asylum seekers claim for reasons of clarity and transparency; and the DFT procedural appeals rules on the grounds of the unfairness of the short timeframes involved, respectively.

support)<sup>67</sup>. Beneficiaries of Section 98 support are usually housed in reception centres, which the Home Office has contracted to three private providers to operate since 2012: Serco, G4S and Clearsprings Group (House of Commons Home Affairs Committee, 2017, p.3). The contracted providers must supply three meals a day, bedding, and toiletries (House of Commons Home Affairs Committee, 2017, p.12). Section 98 beneficiaries are not entitled to financial support, so anything beyond meals and board can only be provided by non-governmental organizations and charities (House of Commons Home Affairs Committee, 2017, p.13). Section 98 support can be withdrawn once the asylum seeker starts receiving Section 95 support, or if their Section 95 application fails (Asylum Support Appeals Project, 2017, p.2). Reception policies are not tailored to the needs of vulnerable asylum seekers, such as trafficking victims, torture survivors and people with mental illnesses and disabilities. There is no formal process in law for identifying vulnerable asylum seekers, and limited support available if their needs do become known.

Section 95 support gives housing and a monetary allowance to asylum seekers and their families who pass the destitution test while their asylum claim is being processed<sup>68</sup>. The monetary allowance is currently £37.75 per family member per week (Asylum Information Database, 2017, p.62; UK Government, 2017a). A pregnant woman or a parent with a child between the ages of one and three gets an additional £3 per week to buy healthy food, while a parent with a child under five years of age gets an additional £5. There are additional one-off maternity payments available as well (UK Government, 2017a). The weekly allowance is only 52% of what a British benefit recipient receives and leaves many asylum seekers struggling to make ends meet (Asylum Information Database, 2018, p.65). As with accommodation provided under Section 98 support, Section 95 support housing has been contracted to the same three companies to provide and manage asylum seeker accommodation<sup>69</sup> (Asylum Information Database, 2018, p.69). Asylum seekers are generally housed in privately owned flats and share houses, and have no choice which region they will live in (Asylum Information Database, 2018, pp.68-9). Given the Government's policy of dispersal throughout the UK, asylum seekers will not be housed in London or the South

<sup>67</sup> As per the Immigration and Asylum Act 1999 Part VI s95 and s98, with the detail fleshed out in the Asylum Support Regulations 2000. A hallmark of these support policies has been meeting the bare-minimum needs of asylum seekers (Willman and Knafler, 2009, p.227). This has been the case for two reasons i) the Government has attempted to use destitution as a means of immigration control (despite evidence that this does not work) (Willman and Knafler, 2009, p.v) ii) asylum seekers are an easy group to target for budget cuts in the context of austerity, as they cannot vote, wield little political influence, and do not receive much public sympathy (Darling, 2016, p.489).

<sup>68</sup> The application process to receive Section 95 support is not easy – the application form is 33 pages long, in English, and can only be accessed online (Asylum Information Database, 2018, p.63). The Home Office can also refuse to provide support to asylum seekers who did not lodge their asylum claim as soon as possible (usually three days from arrival in the UK), although as per the High Court ruling in *R (Limbuella) v Secretary of State for the Home Department* [2006] 1 AC 396, this cannot result in forcing people to sleep on the streets (Asylum Information Database, 2018, p.63; Asylum Support Appeals Project, 2016, p.2).

<sup>69</sup> There are several problems with the current system of outsourcing to the private sector: i) the provision of sub-standard accommodation and failure to fulfil all contractual obligations, due to fiscal pressures faced by two of the three companies who are running at a loss (House of Commons Home Affairs Committee, 2017, p.3, pp.49-50) ii) there is a high degree of complexity, with the three providers being at the centre of a convoluted web of contractors, sub-contractors and hundreds of private land lords, with instances of poor communication between the private providers and local authorities, the local community, the Home Office, the third sector and devolved governments (House of Commons Home Affairs Committee, 2017, p.3, p.14, p.23, p.49).

(Asylum Information Database, 2018, p.68). Local authorities choose whether they will allow asylum seekers to be housed in accommodation in their area, with only 121 local authorities out of 453 having asylum accommodation (House of Commons Home Affairs Committee, 2017, p.16).

Section 95 support may be withdrawn on multiple grounds such as obtaining Section 95 support on false pretences (for example, concealing financial assets); failure to comply with conditions of support (for example periods of absence from the accommodation, or having guests stay); and exhibition of extremely violent behaviours (Asylum Information Database, 2018, p.66). Support can also be withdrawn if the asylum seeker's circumstances change and they are no longer destitute (Asylum Support Appeals Project, 2016, p.2). However, asylum support is rarely withdrawn in practice (Asylum Information Database, 2018, p.66; Asylum Support Appeals Project, 2016, p.3). Section 95 support lasts for the duration of the asylum process. The support will end 28 days after an asylum seeker has been granted leave to remain, or if unsuccessful, 21 days after appeal rights have been exhausted or have expired (Asylum Information Database, 2018, p.62). The Immigration Act 2016 provided for support to be withdrawn from refused asylum seekers with children, although this part of the act has not yet been implemented (Asylum Information Database, 2018, p.62).

Asylum seekers are usually not permitted to work while their claim is being assessed. An exception is if the initial decision on their claim has not been made after one year, with the delay not being the fault of the applicant (Willman and Knafler, 2009, p.25). It is obligatory for all children between the ages of five and 17 to attend school. State schools are free and places can be applied for via the local council (UK Government, 2017a). In England, asylum seekers and their dependents are entitled to free primary and secondary healthcare provided under the National Health Service, including maternity care, General Practitioner appointments and non-emergency hospital care (HM Government National Health Service (Charges to Overseas Visitors) Regulations 2015 No. 238, as amended in 2017). Those in receipt of Section 95 support, or who qualify on the basis of low income, are also entitled to free dental care, prescriptions and eye tests. Refused asylum seekers are only entitled to free secondary health care if they receive support from the Home Office or a local authority<sup>70</sup>. Similar entitlements apply in Scotland, Wales and Northern Ireland, except that failed asylum seekers and their dependents have access to free health care on the same basis as citizens and permanent residents (Scottish Government Healthcare Policy & Strategy Directorate, April 2010, CEL 9 (2010) Overseas Visitors' Liability to Pay Charges for NHS Care and Other Services; NHS (Charges to Overseas Visitors) (Amendment) (Wales)(Regulations 2009); Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015 SI No. 27 reg. 9). Asylum seekers may be eligible for legal aid if they cannot afford to pay their own legal costs (UK Government, 2018e). Asylum seekers waiting for the outcome of their application cannot sponsor a family member to join them. However, when lodging their initial asylum application, a person can include their spouse, partner and children as dependents in their application if they are with them in the UK at the time (Home Office, 2018c and 2016c, p.15). Duties imposed upon asylum seekers include meeting any reporting requirements, cooperation with the Home Office and giving truthful information, complying with the law, and supervision of any dependents under the age of 16 (UK Government, 2014).

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<sup>70</sup> Some secondary healthcare services are free to all irrespective of immigration status, such as accident and emergency services, family planning services and palliative care services.

## 5.2. Beneficiaries of International Protection

There are three types of protection status that can be granted in the UK: refugee status, humanitarian protection and discretionary leave to remain. The application procedure is the same for each, and is outlined above in Section 5.1. However once granted, the three categories have different rights, as outlined below.

### 5.2.1. Refugee Status

There are several criteria for being granted refugee status in the UK: i) the applicant must have left their country of origin ii) the applicant must be unable to return to any part of their home country for fear of persecution, whether it be on the basis of race, religion, nationality, political opinion, gender, gender identity, sexual orientation or any other reason that puts the applicant in danger due to the social, religious, cultural or political situation in the home country iii) the authorities in the applicant's home country must have failed to protect them (UK Government, 2018c). Those who are granted refugee status have permission to stay in the UK for five years<sup>71</sup>, after which time they can apply for indefinite leave to remain (Willman and Knafler, 2009, p.33). Refugee status may be revoked if: i) the Refugee Convention no longer applies (for example the person relocates to their country of origin); ii) the person is excluded from the protection of the Refugee Convention (for example it is determined the person has committed a war crime) iii) it becomes apparent that the person gained refugee status via deception iv) the person poses a significant danger to the security of the UK or the public (for example being convicted of a serious crime) (Home Office, 2018o and 2016, p.12; UNHCR, 2010, p.16; Willman and Knafler, 2009, p.33). Refugee status can be revoked during the initial five-year period of leave to remain, while awaiting the outcome of a settlement application, and once the refugee has been granted indefinite leave to remain (which they hold concurrently with their refugee status) (Home Office, 2016a, p.13). If a refugee acquires British citizenship, they cannot have their refugee status revoked on the above grounds as they are no longer a refugee (they have their refugee status revoked upon acquiring British citizenship). However, if it is discovered that a British citizen gained their previous refugee status by deception, or engaged in activities that excluded them from the Refugee Convention, their ongoing entitlement to British citizenship may be reviewed by the Home Office (Home Office 2016, pp.12-13). Review of refugee status is only routine in instances of criminal conviction, where the refugee has been outside the UK for two years, or if the refugee acquires British citizenship (Asylum Information Database, 2018, p.95; Home Office, 2016a, p.13).

A person who receives refugee status is allowed to have their immediate family join them in the UK, that is, a spouse or partner, and children under the age of 18, subject to certain conditions (Asylum Information Database, 2018, pp.96-7; Willman and Knafler, 2009, p.34).

Once granted refugee status, those who have been receiving Home Office support as a destitute asylum seeker will continue to do so for a further 28 days while they transition to the mainstream benefits and housing system (whether privately renting, buying or entering the public housing system) (Asylum Information Database, 2018, p.98). This transition is challenging as often public housing is only allocated to adults with dependents, disability or illness, while the private housing market is expensive and often requires a lump sum deposit which is beyond the means of most refugees (Asylum Information Database, 2018, pp.98-9).

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<sup>71</sup> An exception is if people are determined to be a threat to the UK's security or the public (Willman and Knafler, 2009, p.33)

This means that refugees are reliant on social networks, friends and the third sector for accommodation during this period, or otherwise face homelessness<sup>72</sup> (Stewart and Shaffer, 2015, p.60). Applications for benefits can take weeks to process, and there are additional hurdles such as opening a bank account which can be difficult before having a regular income (Asylum Information Database, 2018, p.99). Formally, refugees have the same access to the labour market as British citizens, however in practice there are obstacles such as English language proficiency and the conversion of qualifications attained in their country of origin (Asylum Information Database, 2018, p.99). Refugees can also theoretically access professional training, although cost is a barrier. Education is compulsory for children until they reach the age of 16, and state schools are free of charge for all children irrespective of whether they are refugees or British citizens (Asylum Information Database, 2018, p.99). Higher education is available to refugees, who are treated as domestic students in terms of tuition fees and access to student support (Asylum Information Database, 2018, p.100). Refugees and their dependents receive free health care from National Health Services on the same basis as Scottish<sup>73</sup>, English<sup>74</sup>, Welsh<sup>75</sup> and Northern Irish<sup>76</sup> citizens. Refugees have the same access to Government-provided legal aid as British nationals, with eligibility for legal aid depending on their financial situation and the nature of their case (UK Government, 2018e). Asylum claims are the only immigration cases that can receive legal aid in England and Wales, which, for example means that applications for family reunion under the Refugee Convention are excluded from legal aid.<sup>77</sup> In Scotland and Northern Ireland legal aid is available for all immigration matters (Right to Remain, 2017b, pp.1-2)

Refugees resettled in the UK, for example via the Syrian Vulnerable Person Resettlement Scheme<sup>78</sup>, also formally have the same access to housing, education, benefits and health care as British nationals. However, they are entitled to additional support beyond that given to refugees that go through the asylum process. They are able to claim a small lump sum payment from the Home Office upon arrival in the UK, and receive support in opening bank accounts, signing leases and claiming benefits (Asylum Information Database, 2018, pp.98-9). Note that prior to 1 July 2017, resettled refugees received humanitarian protection, whereas now they receive refugee status. Those who arrived in the UK before 1 July 2017 are able to switch to refugee status (Asylum Information Database, 2018, p.12, p.60).

### 5.2.2. Humanitarian Protection

A person may be granted humanitarian protection if they do not meet the criteria for refugee status, but would nonetheless face serious harm if they were returned to their country of origin

<sup>72</sup> Homelessness is not uncommon amongst refugees, with 40% of refugees interviewed by Stewart and Shaffer (2015: 60) having experienced homelessness.

<sup>73</sup> As per the National Health Service (Charges to Overseas Visitors) (Scotland) Regulations 1989 No.364

<sup>74</sup> As per HM Government National Health Service (Charges to Overseas Visitors) Regulations 2015 No. 238, as amended in 2017.

<sup>75</sup> As per the National Health Service (Charges to Overseas Visitors) Regulations 1989 No.306

<sup>76</sup> *Provision of Health Services to Persons not Ordinarily Resident Regulations (Northern Ireland) 2005 No. 551.*

<sup>77</sup> Some exceptions include victims of trafficking, domestic violence and cases involving the Special Immigration Appeals Commission (Right to Remain, 2017b, p.2).

<sup>78</sup> Please see Section 6.1 for further information about the Syrian Vulnerable Person Resettlement Scheme.

(Immigration Rules, Part 11 Paras 339c and 339A)(i). A person will not be granted humanitarian protection if they have committed a serious crime (such as a war crime or crime against humanity), have acted in a way that is inconsistent with the principles of the United Nations, are a threat to the security of the UK, are a danger to the community, or who have committed a crime in their country of origin that would, if committed in the UK attract a custodial sentence, and fled to escape punishment (Home Office, 2017, pp.16-17). Holders of humanitarian protection are granted permission to stay in the country for five years, after which time they can apply for indefinite leave to remain (UK Government, 2018c; Willman and Knafler, 2009, p.34).

Like refugee status, humanitarian protection can be revoked during the initial five-year visa period, while awaiting the outcome of a settlement application, and once the person has been granted indefinite leave to remain (Home Office, 2017, p.23). Humanitarian protection may be revoked if i) the conditions warranting humanitarian protection no longer apply ii) the person is excluded from humanitarian protection iii) the person gained humanitarian protection via deception (Home Office, 2018o). A criminal conviction should trigger the automatic review of the person's humanitarian protection status. A person's case will also be reviewed if evidence arises that they may meet one of the grounds for revocation listed above, such as evidence included in a family reunion application indicating that the protected person lied in their original asylum application (Home Office, 2018o).

Holders of Humanitarian Protection have the same rights to family reunion, housing, the labour market, the welfare system, professional training, education, healthcare and legal assistance as refugees (and British nationals), although like refugees, these rights are often *de jure* not *de facto* (Asylum Information Database, 2018, pp.96-100; Willman and Knafler, 2009, p.35). In access to higher education however there are differences between refugees and those with humanitarian protection. Holders of humanitarian protection must live in the UK for three years before gaining access to domestic student fee rates and student loans (Asylum Information Database, 2018, p.100).

### 5.2.3. Discretionary and Other Types of Leave

Asylum seekers who are not eligible for refugee status or humanitarian protection may be granted discretionary leave on exceptional humanitarian or compassionate grounds (Asylum Information Database, 2018, p.6; Home Office, 2015a, p.8). Leave is granted for those cases that fall outside the Immigration Rules on a discretionary basis, as determined by UK Visas and Immigration (Home Office, 2015a, p.4). An example of when Discretionary Leave may be granted is in situations of severe illness, where return to the person's country of origin would constitute inhuman or degrading treatment (as per Article 3 of the ECHR)<sup>79</sup>. Discretionary Leave may also be granted in some instances of trafficking, or situations involving unaccompanied asylum-seeking children (see Section 5.5 for further details). The length of time granted depends on the individual case, but is generally no more than 30 months (Home Office, 2015a, p.5). The person can reapply for discretionary leave after the 30 months, and

<sup>79</sup> The threshold for a breach of Article 3 is very high however. As per *D v United Kingdom* [1997] 25 EHRR 423, *N v Secretary of State for the Home Department* [2005] UKHL31 and *GS (India) & Ors v The Secretary of State for the Home Department* [2015] EWCA Civ 40, only exceptional circumstances would trigger Article 3 protections – where a terminally ill patient in the later stages of their illness faces return to their country of origin where they would not have access to palliative care or a support network.



then after ten years of living in the UK can apply for indefinite leave to remain (Home Office, 2015a, p.15). Discretionary leave may be curtailed or ceased on the following grounds: if the reasons the person was granted discretionary leave no longer apply (for example a medical condition improves), the person becomes a threat to national security or commits a serious crime, the person gained discretionary leave by deception (Home Office 2015a, pp.18-19). Discretionary leave holders can access benefits, the labour market and the housing market (both private and council housing). Since 2011, holders of discretionary leave to remain were treated as international students (and were therefore not eligible for domestic fee rates, student support or student finance). However, the Supreme Court decision in *R (Tigere) v. Secretary of State for Business* [2015] UKSC 57, ruled that the universal denial of student loans to those who do not hold indefinite leave to remain breached their rights under Article 2 (Protocol 1) and Article 14 of the ECHR. As a result of the ruling, the Student Loans Company introduced an interim policy for handling applications from holders of discretionary leave (and other forms of limited leave), while the Department for Business, Innovation and Skills contemplates how to best accommodate the judgment (Hubble and Foster, 2015, pp.3-8). Holders of discretionary leave are not entitled to bring their family members to the UK to join them (Clayton, 2016, p.429). In Wales, Scotland and Northern Ireland, any person (and their dependents) who has lodged a formal asylum application is eligible for the same health care entitlements as citizens and residents, irrespective of the outcome of their application<sup>80</sup> (including the granting of Discretionary Leave). In England, holders of Discretionary Leave are not an exempt category for the purposes of health care charges, although the Secretary of State can approve treatment for persons granted leave outside the immigration rules in exceptional humanitarian circumstances) (HM Government National Health Service (Charges to Overseas Visitors) Regulations 2015 No. 238). All people in England are entitled to primary healthcare (including General Practitioner appointments), as well as certain categories of secondary health care (including accident and emergency services, family planning services, and treatment for some diseases) free of charge (HM Government National Health Service (Charges to Overseas Visitors) Regulations 2015 No. 238).

Restricted leave can be granted to people who are excluded from refugee status and humanitarian protection (for example because they committed a serious crime or threaten the security of the UK), but whose human rights would be abrogated if they were to be removed (Home Office, 2016b, pp.6-7)<sup>81</sup>. In such instances leave is granted outside the immigration rules by the Office for Security and Counter Terrorism, Home Office (Home Office, 2016b, p.12). An example of Restricted Leave is the case of *R. (on the application of Kardi) v Secretary of State for the Home Department* [2014] EWCA Civ 934. This case concerned a Tunisian man who was convicted in France of weapons smuggling-related charges. He applied for asylum in the UK, however his application was rejected given that his conviction made him ineligible under Article 1F of the Refugee Convention. He was instead granted

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<sup>80</sup> National Health Service (Charges to Overseas Visitors) Regulations 1989 No.306 (which cover Wales); the National Health Service (Charges to Overseas Visitors) (Scotland) Regulations 1989 No.364; *Provision of Health Services to Persons not Ordinarily Resident Regulations (Northern Ireland) 2005 No. 551*.

<sup>81</sup> As per the Immigration Act 1971 s 3(1)(c) and s 24(1)(b)(ii); the Nationality, Immigration and Asylum Act 2002 ss 72(2), 76, 82, 94 and 96; UK Borders Act 2007 ss 32 and 33; Part 9, 11 and 13 of the Immigration Rules; Immigration Rules Paragraph 8(c) of Appendix AF, Paragraph S-LTR.1.8 of Appendix FM and Paragraph S-ILR.1.9 of Appendix FM.



discretionary leave because return to Tunisia would risk his Article 3 ECHR rights being contravened.

Leave is usually granted for a maximum of six months, after which it may be renewed (Home Office, 2016b, p.14). There is no limit to how many times restricted leave can be renewed, as long as the person still satisfies the qualifying criteria. Restricted leave is reviewed regularly, so that the person can be removed from the UK as soon as it would no longer breach their human rights to do so (Home Office, 2016b, p.7). The conditions attached to grants of restricted leave vary from case to case, however in most cases employment is restricted (and is sometimes prohibited), study is prohibited and the person is not entitled to any public funds, housing or benefits unless that would render them destitute (Home Office, 2016b, pp.14-15, p.18). In terms of healthcare, the same entitlements apply as with holders of discretionary leave, outlined above. Residence conditions can also be imposed obliging the person to receive permission from the Secretary of State in order to move houses (Home Office, 2016b, p.20). Holders of restricted leave cannot sponsor a family member to come to the UK to join them (Home Office, 2016b, p.13).

### 5.3. Regular Migrants

There are three broad categories of regular immigrants to the UK: those that immigrate for work, study and family<sup>82</sup>. The visa (or 'entry clearance') system for regular migrants is incredibly complex, with multiple different visa types under each category (for example there are at least 16 different work visas). Each visa has different eligibility criteria, entitlements and conditions attached to it, and the duration varies<sup>83</sup>. Generally speaking, visas may be refused if the applicant does not meet the specific eligibility criteria, has a criminal history or is a threat to national security, has committed an immigration offence in the past, has a National Health Service or litigation debt, or if the application contains evidence of forgery, fraud or dishonest information (UK Visas and Immigration, 2018b, p.3). Applications have also been refused because of minor errors, which are made ever the more likely given the growing complexity of the visa system (Clayton, 2016, p.329). Other conditions that must be met include the payment of an 'immigration health surcharge' when the applicant lodges their immigration application, allowing them to use the National Health Service<sup>84</sup> (UK Government, 2018f); further, residents of 102 countries who are applying to live in the UK for more than 6 months must also have a tuberculosis test, including evidence of a positive result with their application (UK Government, 2018g).

Once living in the UK, there are also several conditions that the visa-holder must comply with, depending on the type of visa. Breach of these conditions may mean revocation of the visa and removal from the UK. A visa may also be cancelled if the visa-holder's circumstances change, for example if a student on a Tier 4 visa takes a break from their studies, their university (sponsor) must notify the Home Office who will bring forward to expiry date of their

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<sup>82</sup> This section does not consider short-term visas such as visitor and transit visas.

<sup>83</sup> Beyond its commitments as a member of the EU and European Economic Area, the UK does give preferential treatment to citizens of certain countries based on reciprocal arrangements, however this is generally in the area of visitor visas, rather than residence visas (exceptions are the Tier 5 (Youth Mobility) visa and the Turkish Businessperson visa, outlined in Annex V).

<sup>84</sup> Which is £150-200 per year of the visa, which must be paid upfront. Visa-holders however still must pay for some types of healthcare, including prescriptions, dental care and eye tests.

visa (London School of Economics, 2018). Committing a serious offence is automatic grounds for the deportation of non-British nationals, and thus cancellation of their leave to enter or remain status (as per the UK Borders Act 2007) (McGuinness, 2017a, p.5). The Secretary of State can also deport foreign nationals and revoke their leave to remain if it would be beneficial for the public good (McGuinness, 2017a, p.5). Current UK residence visas are listed in Annex V below, along with their specific eligibility criteria, conditions, and the entitlements they bestow.

Visas can be granted either inside the point-based system (PBS)<sup>85</sup>, or outside it. Most work routes and study visas fall within the PBS, while family reunion visas fall outside it. The PBS was introduced to make immigration more transparent, objective and flexible, however since its introduction in 2008, it has become increasingly complex and restrictive, with widening scope for subjective decision-making (Clayton, 2016, pp.328-9). Although the hallmark of points-based systems is meant to be flexibility, whereby an applicant who falls short in one eligibility category can still gain entry by performing well in another, this has entirely disappeared from the UK system (Clayton, 2016, p.329). The PBS is also exceptionally complex, with the guidance on Tier 2 visas being 75 pages long; and expensive, with fees for applications lodged outside the UK ranging from £244 for a Tier 5 Temporary Worker visa to £1,623 for a Tier 1 (Investor) visa (Clayton, 2016, p.331; UK Visas and Immigration, 2018a, p.1). The PBS is also subject to rapid change, with work visa categories regularly being established and discontinued, reflecting the Government's attempts to both limit immigration, and be responsive to employer demands to have the skilled employees they need (Clayton, 2016, p.52). With the exception of Tier 1, all PBS applications require a sponsor (in the case of student visas, the sponsor is the educational institution) (Clayton, 2016, p.334). Sponsorship has become costly and burdensome, with sponsors having many reporting obligations to the Home Office, for example if a student misses enrolment or an employee has unapproved absences (Clayton, 2016, p.334). The consequences can be devastating, with companies and universities having their sponsorship license revoked if they are deemed non-compliant (Clayton, 2016, p.335).

Family visas fall outside the PBS (except for PBS applicants who apply for dependents to join then). Family migration has been an area of concern for the UK Government, particularly since the 1960s, when immigration from the Commonwealth was in full swing (Clayton, 2016, p.271). Whereas the Government can more easily control who enters the UK on a work or student visa, and ensure this aligns with the UK's economic interests, immigrants moving to the UK to join family can gain entry when they might not have otherwise through other routes (Clayton, 2016, p.271). Balancing the interests of British citizens who want their family to join them with tight immigration control has been a perpetual challenge, often resulting in restrictive policies regarding family immigration (Clayton, 2016, p.271-2).

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<sup>85</sup> The PBS comprises five tiers, only four of which are active – Tier 1 includes investor, entrepreneur and exceptional talent visas; Tier 2 includes skilled worker visas; Tier 4 includes student visas, Tier 5 includes temporary worker visas. The logic of the PBS is that applicants must accumulate a certain number of points across different categories in order to be successful (for example English language capabilities, qualifications, or a certain amount of savings).

## 5.4. Undocumented Migrants

There are several ways of becoming an undocumented immigrant in the UK: i) entering the country without permission (for example clandestinely in a lorry) ii) entering the country with permission, but then overstaying a visa iii) remaining in the country after an asylum claim and/or appeal has been refused iv) no longer having the requisite documentation or papers (whether via loss, accident or an employer or partner holding on to them) v) being born to undocumented immigrant parents (citizenship is not automatically given to babies who are born in the UK) (Housing Rights Information, 2018; Library of Congress, 2016; Migration Watch UK, 2017, p.1). Most undocumented migrants are thought to be visa overstayers (Library of Congress, 2017; Vollmer, 2011).

The legislation surrounding undocumented migrants in the UK is expansive and strict. The Immigration Act 1971 Part 3 criminalizes entering the UK without leave or in breach of a deportation order, using deception to gain entry<sup>86</sup>, remaining beyond the period of leave granted and breaking the conditions attached to a visa. The Immigration Act 2014 ss 40 and 46 prevents undocumented migrants from opening bank accounts and being granted driving licenses<sup>87</sup>. As discussed previously, aiding undocumented immigrants can also be a criminal offence – helping someone to enter the country unlawfully, employing an undocumented migrant and renting housing to undocumented migrant are all crimes (Immigration Act 1971 s 25, Immigration Act 2014 s 22, Immigration, Asylum and Nationality Act 2006, s 15). This means undocumented migrants have few rights in the UK – both working and renting private housing are criminal offences, while undocumented migrants are unable to access benefits, homelessness assistance and council housing (Homeless Link, 2016, p.4). Primary and emergency healthcare is available to all people free of charge, including undocumented migrants. There are concerns that undocumented migrants may be wary of seeking health care as a result of a Memorandum of Understanding between National Health Service Digital and the Home Office, which allows confidential patient data to be given to the Home Office to help track immigration offenders (Iacobucci, 2018). Although all children between the ages of five and 16 must attend school in the UK and can do so free of charge at state schools, undocumented child migrants can face barriers to enrolment in practice (Signoa and Hughes, 2012, p.30). Such barriers include difficulties providing identity documents, the discretion schools enjoy as to whether they enrol undocumented migrants, undocumented parents being fearful of discovery by the authorities, and language challenges (Signoa and Hughes, 2012, p.30). Access to pre-schooling and education beyond the age of sixteen is virtually impossible, due to the cost of nurseries and visa status requirements for further and higher education (Sigona and Hughes, 2016, p.viii).

## 5.5. Unaccompanied Foreign Minors

There are several ways unaccompanied children can enter the UK – for example as a Tier 4 (child) student visa-holder, on a standard visitor visa (with written parental permission), as an unaccompanied asylum-seeking child (UASC), under the ‘Dubs Amendment’ (see Section 6.3

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<sup>86</sup> This can include asylum seekers who apply for entry as a visitor, but then who lodge an asylum claim shortly after (Willman and Knafler, 2009, pp.17-18).

<sup>87</sup> Without records such as bank statements and driver’s licenses, it can be hard for unauthorised immigrants to prove how long they have lived in the United Kingdom for regularization purposes (Library of Congress, 2017).

for more details), as part of the Dublin System, or as a child trafficking victim. The law necessarily treats these categories of children very differently<sup>88</sup>. This section deals with UASC.

UASC go through a different process to the usual asylum seeker pathways outlined above in Section 5.1. UASC do not attend a screening interview. If they are already in the care of a local authority, the child will attend an appointment with a Home Office immigration officer to register their claim for asylum. If the child is not yet in the care of a local authority, they will attend a 'welfare interview' with an immigration officer. Biometric data is taken at both types of appointments, and if the child is under the age of 16, a responsible adult who is independent of the Home Office will attend the appointment as well (Asylum Information Database, 2018, p.19). Unlike other asylum seekers, UASC will have a publicly-funded legal representative attend their interview (Asylum Information Database, 2018, p.25). Age assessment processes in the UK have been criticised by various non-governmental-organisations and researchers (see for example Coram Children's Legal Centre, 2017a; Dehaghani, 2017; Refugee Council, 2015). Criticisms have centred on the detention of presumed-adults who have subsequently been found to be children, reliance on the ineffective indicators of demeanour and appearance when making initial age assessments, the delegation of age assessments to social workers, and a 'prevailing culture of disbelief' when dealing with young asylum seekers (Coram Children's Legal Centre, 2017a, pp.1-2; Refugee Council, 2015; Dehaghani, 2017). Some of these concerns have been addressed in updated Home Office guidelines, published on 26 February 2018<sup>89</sup> (Asylum Information Database, 2018, p.44). Ongoing concerns relate to the policy that claimants must be treated as adults 'if their physical appearance and demeanour very strongly suggest that they are significantly over 18 years of age', as independently assessed by two Home Office staff (Home Office, 2018p, p.11).

Those determined to be under the age of 18, or given the benefit of the doubt, are transferred into the care of the social service department of a local authority while their claim is processed (Asylum Information Database, 2018, p.76). The local authority must look after the following needs of UASC (as well as other children in their care): i) health ii) education and training iii) emotional and behavioural development iv) identity (including religious, cultural and linguistic background v) family and social relationships vi) social presentation vii) self-care skills (Coram Children's Legal Centre, 2017b, p.1). Accommodation depends on the age and needs of the individual child. Generally, children under the age of 16 are placed with foster carers or in a children's home, while children 16 and over tend to be accommodated in quasi-autonomous housing (Coram Children's Legal Centre, 2017b, p.2; Home Office, 2017d, p.12). The experiences of UASC vary greatly, with some having positive foster care experiences and others not even having a social worker assigned to them (Asylum Information Database, 2018, p.77). More thorough guidance is needed for social workers and local authorities to understand and meet the needs of UASC (Asylum Information Database, 2018, p.76). The National Transfer Scheme was launched in July 2016. The objective of the scheme is to disperse

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<sup>88</sup> Details about Tier 4 (Child) Student visas can be found in Annex V, while more information on EU child-trafficking victims can be found on ECPAT UK's website (ECPAT, 2015).

<sup>89</sup> The guidelines incorporate a Court of Appeal ruling in the case of *Ali, R (on the application of) v The Secretary of State for the Home Department & Anor* [2017] EWCA Civ 138. The Court of Appeal confirmed that the detention of a child asylum seeker prior to deportation was unlawful, even though at the time of detention there were reasonable grounds for believing the asylum seeker was an adult. Other changes to the guidelines include the direction that Home Office staff are to treat asylum seekers as per their stated age until an age assessment has been undertaken, unless the 'Significantly Over 18' policy applies (Asylum Information Database, 2018, p.45).

unaccompanied asylum-seeking children throughout the UK, with no one region to have unaccompanied asylum-seeking children comprise more than 0.07% of the total child population (Local Government Association, 2018). If an unaccompanied asylum-seeking child arrives in a local authority with a high ratio of unaccompanied asylum-seeking children, they will be transferred to a local authority who has volunteered to take on more (Local Government Association, 2018).

UASC can be granted refugee status or humanitarian protection (Home Office, 2017d, pp.58-60). Unsuccessful UASC are only very occasionally returned to their home country, as the UK does not return children to countries where there are no safe reception arrangements in place (Asylum Information Database, 2018, p.50; Home Office, 2017d, p.62). Children who do not meet the criteria for refugee status or humanitarian protection, but who would face an inadequate reception system upon return home are usually granted UASC leave, that is, limited leave to remain in the UK for 30 months or until they are 17.5 years old (whichever is sooner). The child can reapply for leave until they reach the age of 17.5 (Asylum Information Database, 2018, p.50, p.61). Once a child turns 18 they can be returned to their home country even without adequate reception system in place (Home Office, 2017d, p.62). If a UASC does not qualify for refugee status, humanitarian protection or UASC leave and they cannot be returned to their home country, then they may be granted discretionary leave which is generally not to exceed 30 months (Home Office, 2017d, p.58). In exceptional circumstances a child may be granted indefinite leave to remain (Home Office, 2017d, p.61). Children who are granted refugee status are not able to sponsor their parents or siblings to join them in the UK, although Two Private Members' Bills to change this have recently been introduced to Parliament (Asylum Information Database, 2018, p.96).

## 6. Refugee Crisis Driven Reforms 2011-2016

Reforms and new policies that have been introduced in the context of the refugee crisis have had uneven outcomes – reflecting the Government’s clumsiness in walking the tightrope between appearing compassionate towards refugees, as well as tough on immigration control. The overall effect has been the introduction of three new policies to enable vulnerable refugees to settle in the UK, two of which have had limited success. The three programmes – the Syrian Vulnerable Person Resettlement Scheme (VPRS), the Vulnerable Children Resettlement Scheme and children relocated under the ‘Dubs Amendment’ – were introduced under the Conservative Government, with significant pressure from other Members of Parliament (McGuinness, 2017b, p.9, p.12).

### 6.1. Syrian Vulnerable Person Resettlement Scheme

The UK Government announced the VPRS in January 2014, and it was implemented two months later. The Programme followed several years of Government recalcitrance on the issue of resettling Syrian refugees, during which it had instead preferred to address the Syrian conflict by contributing humanitarian relief (McGuinness, 2017b, p.9). Initially the Government did not commit to a quota, instead promising that an unspecified number of the most vulnerable refugees would be resettled in the UK (McGuinness, 2017b, p.10). By June 2015, only 216 refugees and their dependents had arrived in the UK under the programme (McGuinness, 2017b, p.10). Following consternation from the third sector and the public at the Government’s tepid response to the refugee crisis, the Government announced in September 2015 that it would take as many as 20,000 Syrian refugees<sup>90</sup> over the next five years (McGuinness, 2017b, p.10). The definition of vulnerability (for the purposes of prioritised resettlement) was also expanded from the elderly, disabled and trauma-survivors to include children, orphans and people rendered vulnerable by their minority status (such as Yazidis and Christians) (McGuinness, 2017b, pp.10-11). As of 22 February 2018, 10,538 refugees have been resettled under the VPRS (Home Office, 2018r).

### 6.2. Vulnerable Children Resettlement Scheme

In April 2016 the Government committed to resettle up to 3,000 at-risk<sup>91</sup> children and their families from conflict zones in the Middle East and North Africa, by 2020 (McGuinness, 2017b, p.12). The scheme is not exclusive to Syrian nationals (McGuinness, 2017b, p.3). So far only 570 people have been resettled under this scheme (Home Office, 2018d).

### 6.3. The ‘Dubs Amendment’

The ‘Dubs Amendment’ is an amendment to the Immigration Act 2016 successfully advocated for by Lord Dubs. As per the amendment (section 67), the Secretary of State must allow for

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<sup>90</sup> The Government announced in July 2017 that the programme would be expanded to all nationals fleeing the conflict in Syria. This means, for example, that Palestinians who had found refuge in Syria and have since been displaced by the conflict can be resettled in the UK (Electronic Immigration Network, 2017).

<sup>91</sup> The UK Government borrowed the ‘at-risk’ UNHCR definition, and includes unaccompanied children, child carers or children vulnerable to exploitation and abuse (McGuinness, 2017b, p.12).

the relocation of unaccompanied children from Europe to the UK, with the specific number to be determined in consultation with local authorities (Asylum Information Database, 2018, p.6; McGuinness, 2017b, p.13). As implemented in practice, the scheme applies to unaccompanied asylum-seeking children who are currently in France, Greece and Italy, with priority being given to those at risk of abuse or exploitation (McGuinness, 2017b, pp.13-14). There are other eligibility criteria, for example children located in Calais must be one of the following: i) 12 years or younger ii) at high risk of sexual exploitation iii) 15 or under and either Syrian or Sudanese nationals iv) under 18 with a sibling that meets one of the preceding three criteria<sup>92</sup> (McGuinness, 2017b, p.14). Controversially, the number of children to be resettled under the scheme was initially only 350, being revised slightly upwards to 480 children in April 2017. (McGuinness, 2017b, pp.15-16). The reason the Government has given for such a small number is the capacity of local authorities to care for these children (McGuinness, 2017b, pp.15-16). Only around 200 children have been transferred under the programme to date (Home Office, 2018q, p.1).

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<sup>92</sup> For further eligibility criteria, please see: Home Office, 2018q, pp.1-2.



## 7. Conclusions

An examination of the legal and policy framework has shown that migration governance in the UK is characterised by three key themes. First, the system of migration governance is incredibly complex. One reason for this is the sheer number of government actors involved in the immigration and asylum system. The dense web of public actors makes communication, coherence and collaboration more challenging. A peculiar feature of the UK system of government that makes it particularly complex is the existence of the devolved Scottish, Welsh and Northern Irish administrations, as well as the multi-tier local authority system. Not only are there challenges in clearly delineating functions, but there are tensions and conflicting objectives, for example between the executive and the judiciary, and between the UK government and devolved governments. This is further complicated by the role of the private and third sectors in the immigration and asylum system, with the UK Government subcontracting elements of the reception system to the private sector, and the third sector playing a crucial role in supporting immigrants due to legislative deficiencies. Whereas the for-profit motive of the private sector has sometimes meant inadequate service provision in the context of their costs exceeding their remuneration from the Government, the third sector plays a critical role in supporting immigrants on a not-for-profit basis. Another element of complexity is due to the detail and volume of migration legislation – both primary and secondary. There have been 12 Acts affecting immigration and asylum over the last 20 years, and thousands of Immigration Rules which are often technical and hard to understand. The complex legislative environment is particularly difficult for vulnerable immigrants to navigate.

A second, and related, feature of migration governance in the UK is its frequent evolution. Constantly changing legislation affects immigrant's everyday lives, with appeals procedures and requirements, access to Government benefits, and the criteria for being accepted as a refugee frequently shifting, often in a regressive direction. The pace of change also applies to institutional arrangements, with institutions changing names, merging and being scrapped altogether. For example, the two-tier system of immigration appeals was collapsed into one in 2005, and then replaced with a unified two-tier structure in 2010. Further, in 2008 the Border and Immigration Agency, UK Visas and part of HM Revenue and Customs were merged to become the UK Border Agency. However, in 2013 the UK Border Agency was abolished and replaced by three new bodies: UK Visas and Immigration, the UK Border Force and Immigration Enforcement. Another example is the renaming of the Asylum Screening Unit as the Asylum Intake Unit, although this name change doesn't appear in all official information (Asylum Information Database, 2018, p.15). The shifting legislative and institutional environment is difficult for migrants and their advocates to navigate and keep pace with, and can lead to confusion and difficulties engaging with the immigration system. Another major shift will take place in March 2019 when the UK exits the EU. Unless otherwise negotiated, freedom of movement between the UK and the EU will end, and the UK will no longer be bound by and able to participate in the Common European Asylum System.

A third feature of migration governance is that policies, legislation and rules regarding immigration and asylum have become increasingly regressive and far-reaching. This is to do in part with the significant power wielded by the executive in the governance apparatus. The executive, who are also members of parliament, are able to push through legislation as their party has a parliamentary majority, weakening the ability of parliament to control the executive (Carroll, 2015, p.44). Further, as discussed in Section 3.4.1, parliamentary sovereignty in the UK means that the judiciary are unable to strike down parliamentary legislation on the basis

that it is incompatible with the constitution (including the Human Rights Act 1998). This deprives the UK judiciary of an important check on parliamentary (and executive) power (Hansen, 2000, pp.241-2). As the executive and other parliamentarians are beholden to voters, hostile public sentiment towards asylum seekers and immigrants has resulted in ever tightening restrictions and an ever-greater system of control (see Section 2.1). Migration governance has become pervasive, interfering in the lives of landlords, employers, educational institutions, the National Health Service, and registrars of births, marriages and deaths. These regressive measures notwithstanding, the UK Government has generally managed not to overstep its international law obligations. The UK ratified the Refugee Convention in 1954 and acceded to the Protocol relating to the 1967 Status of Refugees in 1968. The Refugee Convention (as modified by the Protocol) was incorporated into domestic law via the Asylum and Immigration Appeals Act 1993. The UK Government has been cooperating with UNHCR on the resettlement of refugees, however UNHCR has raised several concerns regarding UK refugee and asylum policy, some of which will be elaborated below. First, UNHCR has been critical of the UK's detention of significant numbers of asylum seekers, and for being one of only a few countries that does not have a maximum timeframe for immigration detention (UNHCR, 2017a) (relevant to Article 31 of the Refugee Convention). The UNHCR and the High Commissioner for Human Rights have recommended that the UK institute a prohibition on indefinite detention, stop detaining vulnerable asylum seekers and migrants, impose time limits on detention, introduce regular judicial oversight of people's detention and increase the use of alternatives to detention (UNHCR, 2017a; Al Hussein, 2017, p.7). Second, UNHCR has been critical of the UK's narrow interpretation of the Refugee Convention grounds – with those fleeing violent conflict not deemed to be refugees unless they could demonstrate persecution above and beyond the general risks of conflict (UNHCR, 2011, p.3) (relevant to Article 1(A)(2) of the Refugee Convention).

The UK ratified the ECHR in 1951, as one of the founding members of the Council of Europe. The ECHR was directly incorporated into domestic law via the Human Rights Act 1998 (which came into force in 2000). Despite periodic political grumbings about the European Court of Human Rights (ECtHR)<sup>93</sup>, the UK has one of the strongest compliance records amongst Council of Europe member states (Jay, 2017). Compliance can be measured across two dimensions i) the number of successful complaints brought against the UK in the ECtHR, and ii) whether and how quickly the UK implements judgements handed down by the ECtHR domestically. Examining the first dimension, between 1959 and 2017 there were 545 judgements handed down by the ECtHR concerning the UK, of which 314 found at least one violation of the ECHR (European Court of Human Rights, 2018). This means that only 58% of judgements went against the UK, making the UK the sixth most complaint member state, behind Andorra, Denmark, the Netherlands, Sweden and Switzerland (King, 2018)<sup>94</sup>. The number of judgements handed down are only a fraction of the total applications made against

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<sup>93</sup> The UK media and politicians have been critical of the ECtHR when they have found against the UK on particularly sensitive issues, such as the prohibition on prisoners voting (Amos, 2017: 764). After their electoral victory in May 2015, the Government, led by the Conservative Party, promised to get rid of the Human Rights Act 1998 and replace it with a Bill of Rights (although this proposal has subsequently been put on hold in light of Brexit) (Amos, 2017, p.764).

<sup>94</sup> Although a 58% adverse ruling rate does not sound particularly positive, this is a relatively low rate when compared to the 47 other Council of Europe Members. Further, as a result of the stringent admissibility criteria, only those applications that have a significant degree of merit make it all the way to the judgment phase, resulting in high applicant success rates (Donald et al., 2012, p.vii).

the UK, with over 99% of applications being declared inadmissible prior to reaching the judgment stage (King, 2018). When factoring in these cases that don't make it past the first hurdle, the UK has an even better record. The Human Rights and Equality Commission has found that between 1999 and 2010, only 3% of applications were deemed admissible, with only 1.8% of total applications resulting in adverse judgments against the UK (Donald et al., 2012, p.xii). In the period between August 2016 and July 2017 the ECtHR made nine judgements relating to the UK, three of which related to immigration, specifically detention<sup>95</sup>.

In terms of the second dimension – the implementation of Strasbourg Court judgements – the UK also performs well, with a 'generally exemplary record' (Donald et al., 2012, p.x). A large-N study comparing the implementation performance of nine states<sup>96</sup> shows the UK to be the best performer (Anagnostou and Mungiu-Pippidi, 2014). This assessment is based on the percentage of judgments implemented, as well as the average time to implementation (Anagnostou and Mungiu-Pippidi, 2014). There are only two significant categories of cases that have not yet been implemented in the UK – concerning the UK's ban on prisoner voting, and the security forces' actions in the deaths of two people in Northern Ireland during 'the Troubles' (Amos in Moxham and Wicks, 2017, pp.1-2). Neither of these cases directly relate to immigration. The barriers to implementation in the UK are political, not institutional – the UK certainly has the resources and institutional structures to implement ECtHR judgments efficiently (Amos in Moxham and Wicks, 2017, p.2).

The UK has a challenging time ahead, as it continues to balance restrictive immigration policies, its international law obligations, and its changing relationship with Europe and beyond as it extricates itself from the EU.

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<sup>95</sup> *V.M. v. the United Kingdom* (no. 49734/12) - Violation of Article 5 § 1; *Ahmed v. the United Kingdom* (no. 59727/13) – no violation of Article 5 § 1 f) and no violation of Article 34; *SMM v. United Kingdom* (no. 77450/12) – violation of Article 5 § 1.

<sup>96</sup> These nine states are: Austria, Bulgaria, France, Germany, Greece, Italy, Romania, Turkey and the UK.



## Appendices

### Annex I: Overview of the Legal Framework on Migration, Asylum and Reception Conditions

Legislation title	Date	Type of law	Object	Link/PDF
Immigration Act 1971	Jan-1973	Statute	Replaced all existing immigration laws and amended contemporary citizenship laws. Removed the special immigration status of Commonwealth citizens, instead introducing the concept of partiality.	<a href="http://www.legislation.gov.uk/ukpga/1971/77/contents">http://www.legislation.gov.uk/ukpga/1971/77/contents</a>
British Nationality Act 1981	Jan-1983	Statute	Replaced the existing citizenship category with three new categories, and made amendments to the category of right of abode.	<a href="https://www.legislation.gov.uk/ukpga/1981/61">https://www.legislation.gov.uk/ukpga/1981/61</a>
Immigration Act 1988	Jul-1988	Statute	Restricted the settlement entitlements of Commonwealth citizens and their families.	Immigration Act 1988
Asylum and Immigration Appeal Act 1993	Jul-1993	Statute	Restricted the appeal rights of people applying to enter the UK as a visitor or short-term student.	<a href="https://www.legislation.gov.uk/ukpga/1993/23/contents">https://www.legislation.gov.uk/ukpga/1993/23/contents</a>
Asylum and Immigration Act 1996	Jul-1996	Statue	Expanded the accelerated appeal procedure for refused asylum seekers, and restricted appeal rights against return to countries deemed safe.	<a href="https://www.legislation.gov.uk/ukpga/1996/49/contents">https://www.legislation.gov.uk/ukpga/1996/49/contents</a>
Human Rights Act 1998	Oct-2000	Statute	Enacted the primary provisions of the European Convention on Human Rights into domestic legislation.	<a href="https://www.legislation.gov.uk/ukpga/1998/42/contents">https://www.legislation.gov.uk/ukpga/1998/42/contents</a>
Immigration and Asylum Act 1999	Oct-2000	Statute	Part IV superseded all previous legislation on asylum appeals, creating a 'one-stop' process. New arrangements introduced for people who overstay their visa, breach the conditions of their leave, or obtain further leave via deception.	<a href="http://www.legislation.gov.uk/ukpga/1999/33/contents">http://www.legislation.gov.uk/ukpga/1999/33/contents</a>
Nationality Immigration and Asylum Act 2002	Nov-2002	Statute	Applicants for British citizenship required to demonstrate their knowledge of UK culture and language; further amended appeal rights; asylum seekers required to apply for asylum as soon as reasonably possible to receive support (with some exceptions); Exceptional Leave to Remain replaced by Humanitarian Protection, Discretionary Leave.	<a href="http://www.legislation.gov.uk/ukpga/2002/41/contents">http://www.legislation.gov.uk/ukpga/2002/41/contents</a>

Asylum and Immigration (Treatment of Claimants etc) Act 2004	Jul-2004	Statute	Appeals system restructured and new offences created regarding undocumented migrants.	<a href="http://www.legislation.gov.uk/ukpga/2004/19/contents">http://www.legislation.gov.uk/ukpga/2004/19/contents</a>
Immigration, Asylum and Nationality Act 2006	Mar-2006	Statute	Restricted appeal rights for those refused entry to the UK for work or study.	<a href="https://www.legislation.gov.uk/ukpga/2006/13/contents">https://www.legislation.gov.uk/ukpga/2006/13/contents</a>
UK Borders Act 2007	Jan-2008	Statute	Allowed asylum seekers with remaining in-country appeal options to remain eligible for support; introduced automatic deportation for serious criminal offence committed by non-EEA nationals.	<a href="https://www.legislation.gov.uk/ukpga/2007/30/contents">https://www.legislation.gov.uk/ukpga/2007/30/contents</a>
Borders Citizenship and Immigration Act 2009	Nov-2009	Statute	Extended nationality registration provisions, and allowed the UK Border Agency to perform the functions of Her Majesty's Revenue and Customs, a step towards the creation of a unified border agency.	<a href="http://www.legislation.gov.uk/ukpga/2009/11/contents">http://www.legislation.gov.uk/ukpga/2009/11/contents</a>
Legal Aid Sentencing and Punishment Offenders Act 2012	Apr-2013	Statute	Legal aid no longer awarded in some immigration and human rights cases.	<a href="http://www.legislation.gov.uk/ukpga/2012/10/section/85/enacted">http://www.legislation.gov.uk/ukpga/2012/10/section/85/enacted</a>
Immigration Act 2014	Apr-2014	Statute	Further extended nationality registration provisions; restricted the ability of undocumented migrants to access services; stipulated certain factors that the courts must consider when dealing with Article 8 of the Human Rights Act 1998 appeals	<a href="http://www.legislation.gov.uk/ukpga/2014/22">http://www.legislation.gov.uk/ukpga/2014/22</a>
Immigration Act 2016	May-2016	Statute	Introduced further measure targeting undocumented migrants; allowed for the withdrawal of support from refused asylum seeker families	<a href="http://www.legislation.gov.uk/ukpga/2016/19/contents">http://www.legislation.gov.uk/ukpga/2016/19/contents</a>

Source: Asylum Information Database, 2018, p.11; Clayton, 2016, p.11, pp.24-6; Home Office, 2018m; Lea, 2016; No Recourse to Public Funds Network, 2016; Phelan and Gillespie, 2015; Willman and Knafler, 2009, p.8

## Annex II: List of Authorities Involved in Migration Governance

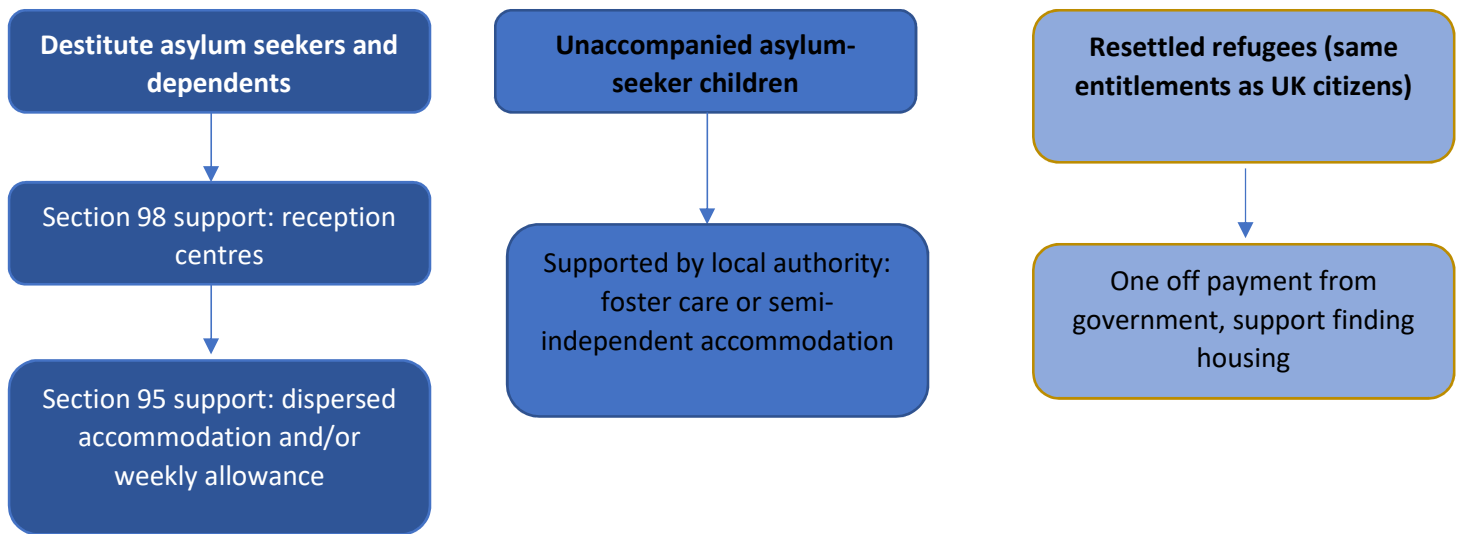
Authority	Tier of government	Type of organization	Area of competence	Link
Home Office UK Border Force	UK	UK Government Department	Implements customs and immigration controls at airports and ports	<a href="https://www.gov.uk/government/organisations/uk-visas-and-immigration">https://www.gov.uk/government/organisations/uk-visas-and-immigration</a>
Home Office UK Visas and Immigration	UK	UK Government Department	Processes visitor and residency applications (including asylum applications); supports eligible asylum seekers	<a href="https://www.gov.uk/government/organisations/uk-visas-and-immigration">https://www.gov.uk/government/organisations/uk-visas-and-immigration</a>
Home Office Immigration Enforcement	UK	UK Government Department	Monitors and enforces compliance	<a href="https://www.gov.uk/government/organisations/immigration-enforcement">https://www.gov.uk/government/organisations/immigration-enforcement</a>
HM Passport Office	UK	UK Government Department	Processes British passport applications	<a href="https://www.gov.uk/government/organisations/hm-passport-office">https://www.gov.uk/government/organisations/hm-passport-office</a>
First Tier Tribunal (Immigration and Asylum Chamber)	UK	Tribunal (administered by HM Courts & Tribunals Service)	Handles appeals against Home Office decisions	<a href="https://www.gov.uk/courts-tribunals/first-tier-tribunal-immigration-and-asylum">https://www.gov.uk/courts-tribunals/first-tier-tribunal-immigration-and-asylum</a>
Upper Tribunal (Immigration and Asylum Chamber)	UK	Tribunal (administered by HM Courts & Tribunals Service)	Handles appeals against First Tier Tribunal decisions; handles applications for judicial review against Home Office decisions	<a href="https://www.gov.uk/courts-tribunals/upper-tribunal-immigration-and-asylum-chamber">https://www.gov.uk/courts-tribunals/upper-tribunal-immigration-and-asylum-chamber</a>
Supreme Court	UK	Court	Presides over appeals on arguable points of law that are of public importance	<a href="https://www.supremecourt.uk/">https://www.supremecourt.uk/</a>
Court of Appeal (England and Wales)	National	Court	Presides over appeals on arguable points of law	<a href="https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/">https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/</a>



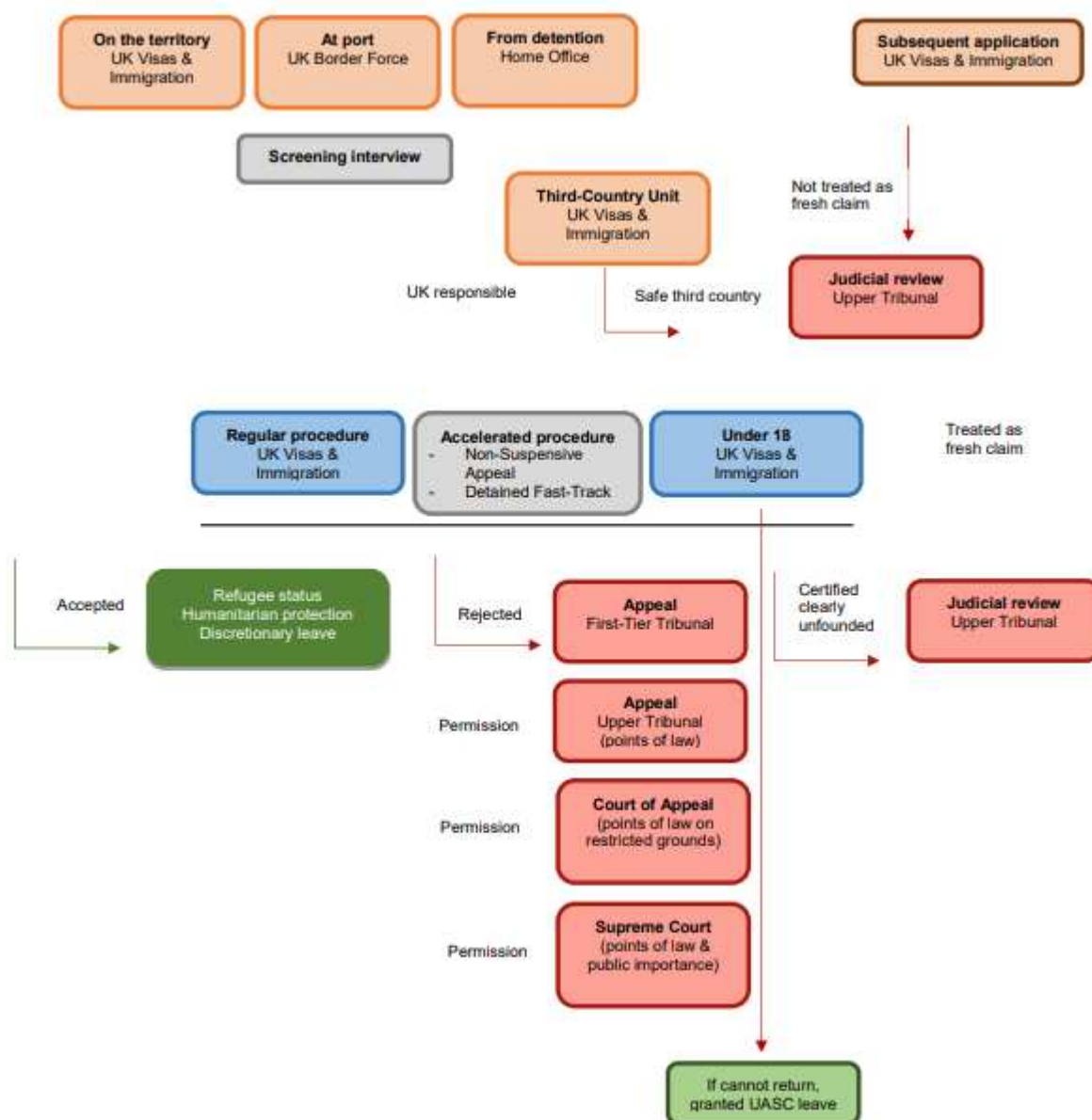
Court of Appeal (Northern Ireland)	National	Court	Presides over appeals on arguable points of law	<a href="https://www.justice-ni.gov.uk/articles/royal-courts-justice">https://www.justice-ni.gov.uk/articles/royal-courts-justice</a>
Court of Session (Scotland)	National	Court	Presides over appeals on arguable points of law	<a href="https://www.scotcourts.gov.uk/the-courts/supreme-courts/about-the-court-of-session">https://www.scotcourts.gov.uk/the-courts/supreme-courts/about-the-court-of-session</a>
Scottish Government	National	Devolved Government	Education and training, health and social services, housing, law and order Local government	<a href="http://www.gov.scot/">http://www.gov.scot/</a>
Welsh Government	National	Devolved Government	Economic development, education and training, health and health services, housing, local government, social welfare	<a href="http://gov.wales/?lang=en">http://gov.wales/?lang=en</a>
Northern Irish Government	National	Devolved Government	Health and social services, education, employment and skills, social security, pensions and child support, housing, economic development, local government, equal opportunities, justice and policing	<a href="https://www.nidirect.gov.uk/articles/overview-government-northern-ireland">https://www.nidirect.gov.uk/articles/overview-government-northern-ireland</a>
Local authorities	Local	Local Government	Directly responsible for the care of unaccompanied asylum-seeking children; support of destitute people (which can include refused asylum seekers), and provision of council housing (which can be refugees if they are eligible).	Various. See: <a href="https://www.gov.uk/understand-how-your-council-works">https://www.gov.uk/understand-how-your-council-works</a> for more information.

Sources: Asylum Immigration Database, 2017, p.14; Clayton, 2016, p.243; Library of Congress, 2016; Scottish Parliament, 2018; Supreme Court, 2018c; UK Government, 2017a, 2013a, 2013b.

## Annex III: Flow Chart of the National Reception System



## Annex IV: Flow Chart of the International Protection Procedure



Source: Asylum Information Database, 2018, p.11.

## Annex V: Non-visitor Visa Categories<sup>1</sup>

### Work Visas

#### Tier 1 (Investor) visa

- Criteria. The applicant:
  - must have at least £2 million disposable funds to invest in the UK, that is either theirs or their partners, and held in a regulated financial institution/s
  - must at least 18 years of age
  - must have opened a UK bank account
  - must not be from a European Economic Area country or Switzerland
- Duration: maximum 3 years and 4 months
- Conditions. The visa-holder:
  - cannot access public funds<sup>2</sup>
  - cannot be employed as a professional sports person or sports coach, or a doctor or dentist in training (except in certain circumstances)
  - cannot invest in property investment, management or development companies
- Entitlements:
  - Work and study
  - Invest in UK Government bonds, share or loan capital in active and trading UK registered companies
  - Bring family members (partner and children)

#### Tier 1 (Entrepreneur) visa

- Criteria. The applicant:
  - must have at least £50,000 in disposable investment funds, that is held in a regulated financial institution/s, and want to set up or run a business
  - must demonstrate English language ability
  - must be at least sixteen years of age
  - must not be from a European Economic Area country or Switzerland
- Duration: maximum 3 years and 4 months
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot work in any job outside the person's business/es
- Entitlements
  - Set up or take over one or more businesses
  - Work for your business/es
  - Bring family members (partner and children)

#### Tier 1 (Graduate Entrepreneur) visa

- Criteria. The applicant:
  - must be endorsed as having a credible business idea by either a UK higher education institution or the Department for International Trade
  - must have £945 in savings (if applying inside the UK) or £1,890 in savings (if applying outside the UK)
  - must demonstrate English language ability
  - must not be from a European Economic Area country or Switzerland
- Duration: maximum 1 year
- Conditions. The visa-holder:

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<sup>1</sup> The information in Annex V is taken from the UK Government's website (UK Government, 2018i).

<sup>2</sup> Public funds include most government-funded welfare benefits, tax credits, housing assistance (UK Visas and Immigration, 2014).

- cannot access public funds
- cannot be employed as a doctor, dentist in training, a professional sports person or sports coach
- Entitlements:
  - Bring family members (partner and children)

#### Tier 1 (Exceptional Talent) visa

- Criteria. The applicant:
  - must be endorsed as a recognized or emerging leader in science, the humanities, engineering, medicine, digital technology or the arts
  - must not be from a European Economic Area country or Switzerland
- Duration:
  - maximum 5 years and 4 months (if applicant applied outside the UK)
  - maximum 5 years (if applicant applied inside the UK)
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot be employed as a doctor, dentist in training, a professional sports person or sports coach
- Entitlements:
  - Employment and voluntary work (with no requirement to report to the Home Office when changing jobs)
  - Travelling and returning to the UK
  - Bring family members (partner, children and dependents)

#### Tier 2 (General) visa

- Criteria. The applicant:
  - must have been offered a skilled job in the UK, by a licensed sponsor
  - must not be from a European Economic Area country or Switzerland
  - must demonstrate English language ability
  - must have £945 to support themselves, or an 'A-rated' sponsor that has certified their maintenance
- Duration:
  - maximum 5 years and 14 days, or the length of sponsorship plus one month (whichever is shorter)
- Conditions. The visa-holder:
  - cannot access to public funds
  - cannot own more than 10% of the employer's shares, unless they earn more than £159,600 a year
  - cannot be employed in a second job until the sponsored role has commenced
- Entitlements:
  - Employment in the sponsored role and voluntary work (a second job may be allowed in some circumstances)
  - Study (as long as it doesn't interfere with the sponsored role)
  - Travelling and returning to the UK
  - Bring family members (partner, children and dependents)

#### Tier 2 (Intra-Company Transfer) visa

- Criteria. The applicant:
  - must have been offered a job at a UK branch of their organization
  - have a valid certificate of sponsorship from a licensed sponsor
  - must have £945 to support themselves, or an 'A-rated' sponsor that has certified their maintenance
  - must not be from a European Economic Area country or Switzerland
- Duration:

- 9 years (long-term staff earning more than £120,000 per year)
  - 5 year 1 month (long-term staff earning less than £120,000 per year)
  - 1 year (graduate trainees)
  - OR the length of sponsorship (whichever is shorter)
- Conditions. The visa-holder:
  - cannot access to public funds
  - cannot start work before they have received their visa.
- Entitlements:
  - Employment in the sponsored role and voluntary work, as well as a second job in the same sector and at the same level for up to 20 hours per week
  - Study (as long as it doesn't interfere with the sponsored role)
  - Travelling and returning to the UK
  - Bring family members (partner, children and dependents)

#### Tier 2 (Minister of Religion) visa

- Criteria. The applicant:
  - must have been offered a religious job in the UK, and have a certificate of sponsorship reference number
  - must demonstrate English language ability
  - must have £945 to support themselves, an 'A-rated' sponsor that has certified their maintenance, or already holds a Tier 2 visa and is applying inside the UK
  - must not be from a European Economic Area country or Switzerland
- Duration:
  - 3 years 1 month, or the length of sponsorship plus one month (whichever is shorter)
- Conditions. The visa-holder:
  - cannot access to public funds
  - cannot own more than 10% of their sponsors shares (unless they earn more than £159,600 per year).
- Entitlements:
  - employment in the sponsored role and voluntary work (as well as a second job in some circumstances)
  - Study (as long as it doesn't interfere with the sponsored role)
  - Travelling and returning to the UK
  - Bring family members (partner, children and dependents)

#### Tier 2 (Sportsperson) visa

- Criteria. The applicant:
  - must be an elite sportsperson or coach who is at the highest level of their profession globally, who will develop their sport in the UK
  - must have £945 to support themselves, an 'A-rated' sponsor that has certified their maintenance, or already holds a Tier 2 visa and is applying inside the UK
  - must demonstrate English language ability
  - must not be from a European Economic Area country or Switzerland
- Duration:
  - Maximum 3 years
- Conditions. The visa-holder:
  - cannot access to public funds
  - cannot setup or run a business
  - cannot apply for a second job until they have commenced their sponsored role
- Entitlements:
  - employment in the sponsored role and voluntary work (as well as a second job in some circumstances)
  - Study (as long as it doesn't interfere with the sponsored role)

- Travelling and returning to the UK
- Bring family members (partner, children and dependents)

#### Tier 5 (Temporary Worker – Charity Worker) visa

- Criteria. The applicant:
  - must have a certificate of sponsorship reference number from a UK sponsor
  - must have £945 to support themselves, or an 'A-rated' sponsor that has certified their maintenance
  - must not be from a European Economic Area country or Switzerland
- Duration: maximum 1 year or the time listed on the certificate of sponsorship plus 28 days (whichever is shorter)
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot be paid for work (it must be voluntary work)
  - cannot take on a permanent role
- Entitlements:
  - Employment in the sponsored role (and in a second job in the same sector and at the same level for up to 20 hours per week, or on the Tier 2 shortage occupation list for up to 20 hours per week)
  - Study
  - Bring family members (partner and children)

#### Tier 5 (Temporary Worker – Government Authorized Exchange) visa

- Criteria. The applicant:
  - must have a certificate of sponsorship reference number from their sponsor
  - must have £945 to support themselves, or an 'A-rated' sponsor that has certified their maintenance
  - must not be from a European Economic Area country or Switzerland
- Duration: maximum 1 year or the time listed on the certificate of sponsorship plus 28 days (whichever is shorter)
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot take on a permanent job.
- Entitlements:
  - employment in the sponsored role (and in a second job for up to 20 hours per week, or on the Tier 2 shortage occupation list for up to 20 hours per week)
  - Study
  - Bring family members (partner and children)

#### Tier 5 (Temporary Worker – International Agreement) visa

- Criteria. The applicant:
  - must have a certificate of sponsorship reference number from their UK sponsor, being contracted to do work in the UK covered by international law (for example working for a foreign government)
  - must have £945 to support themselves, or an 'A-rated' sponsor that has certified their maintenance
  - must not be from a European Economic Area country or Switzerland
- Duration: maximum 2 years or the time listed on the certificate of sponsorship plus 28 days (whichever is shorter). There are some differences for those providing services under some trade agreements.
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot start working before they receive their visa.
- Entitlements:



- employment in the sponsored role (and in most cases in a second job in the same sector for up to 20 hours per week, or on the Tier 2 shortage occupation list for up to 20 hours per week)
- study
- travel abroad and return to the UK
- bring family members (partner and children)

#### Tier 5 (Temporary Worker – Religious Worker) visa

- Criteria. The applicant:
  - must have a certificate of sponsorship reference number from their UK sponsor, to do religious work (for example preaching)
  - must have £945 to support themselves, or an ‘A-rated’ sponsor that has certified their maintenance
  - must not be from a European Economic Area country or Switzerland
- Duration: maximum 2 years or the time listed on the certificate of sponsorship plus 28 days (whichever is shorter).
- Conditions. The visa-holder:
  - cannot access public funds.
- Entitlements:
  - employment in the sponsored role (and in a second job in the same sector for up to 20 hours per week, or on the Tier 2 shortage occupation list for up to 20 hours per week)
  - study
  - bring family members (partner and children)

#### Tier 5 (Youth Mobility Scheme) visa

- Criteria. The applicant:
  - must be between the ages of 18 and 30
  - must have £1,890 to support themselves
  - must be from certain countries<sup>3</sup>
  - have a certificate of sponsorship reference number (if from Hong Kong or Korea)
  - cannot have children living with them, or who are financially dependent
  - cannot have previously held this visa.
- Duration: maximum 2 years
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot extend their stay
  - bring family members
  - cannot work as a professional sportsperson or sports coach, doctor or dentist in training (unless they received their qualifications in the UK).
- Entitlements:
  - employment and study (including being self-employed and setting up a company, as long as the premises are rented, equipment isn’t worth more than £5,000 and there are no employees).
  - travel abroad and return to the UK

#### Representative of an Overseas Business visa

- Criteria. The applicant:

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<sup>3</sup> Australia, Canada, Japan, Monaco, New Zealand, Hong Kong, Republic of Korea and Taiwan, with reciprocal rights offered to British youth. British overseas citizens, British overseas territory citizens and British national (overseas) are also eligible.

- must be the only representative of an overseas company intending to establish a UK branch or wholly owned subsidiary for a foreign parent company, or
  - must work for a foreign newspaper, news agency or broadcasting entity posted on a longer-term assignment to the UK
  - must demonstrate English language ability
  - must not be from a European Economic Area country or Switzerland
- Duration: 3 years initially
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot be self-employed or work for another business
- Entitlements
  - employment in existing role
  - bring family members (partner and children)

#### Turkish Businessperson visa

- Criteria. The applicant:
  - must have Turkish citizenship
  - must have sufficient funds to set up and run the business (or join an existing business in a crucial capacity)
  - must be able to support themselves and any dependants without needing another job
- Duration: 1 year
- Conditions. The visa-holder:
  - cannot access public funds
- Entitlements
  - start a new business (or join an existing business)
  - bring family members (partner and children)

#### Domestic Worker in a Private Household visa

- Criteria. The applicant<sup>4</sup>:
  - must be employed as a domestic worker in the same private household for at least one year
  - must be at least 18 years of age
  - must intend to travel to the UK with their employer and work for them full-time while in the UK
  - must be able to support themselves while in the UK
  - must not be from a European Economic Area country or Switzerland
  - the employer must be British or a European Economic Area national who usually lives outside the UK
- Duration: six months or the duration of the employer's trip (whichever is shorter)
- Conditions. The visa-holder:
  - cannot access public funds
  - bring family members (partner and children)
  - cannot change jobs once in the UK
- Entitlements:
  - travel abroad and return to the UK

#### Student Visas

##### Tier 4 (General) student visa

- Criteria. The applicant:
  - must be 16 years of age or more

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<sup>4</sup> There are other eligibility criteria that are relevant to the employer. For further information, please see Home Office, 2018h.

- must hold an unconditional offer to study at a licensed Tier 4 sponsor
  - must have enough money to pay their tuition fees and support themselves
  - must demonstrate English language ability
  - must not be from a European Economic Area country or Switzerland
- Duration: contingent on the type of course and level of study
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot work in some jobs for example as a professional sport person or sports coach
  - cannot study at a maintained school (an academy of a school funded by a local authority)
- Entitlements:
  - study in the sponsored course
  - work in most jobs (depending on the sponsor and the course-level)
  - bring family members (if enrolled in a course that lasts more than one year and at a higher level; a Doctorate Extension Scheme student; a new government-sponsored student enrolled in a course of at least 6 months).

#### Tier 4 (Child) student visa

- Criteria. The applicant:
  - must be between the ages of 4 and 17
  - must hold a place in an eligible course at an independent school
  - must have enough funds to cover tuition fees and support themselves
  - must not be from a European Economic Area country or Switzerland
- Duration: contingent on the length of the course and the student's age
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot study at a maintained school (an academy of a school funded by a local authority) or a further education college
  - cannot work in a full-time, ongoing job, be self-employed, work as a doctor or dentist in training, work as a sportsperson or sports coach, or as an entertainer
  - settle in the UK
  - cannot bring family members (parents can apply for a Parent of a Tier 4 (Child) visa).
- Entitlements:
  - study in the sponsored course
  - work if 16 years or older: part-time during term (up to 10 hours per week) and full-time in the holidays; as part of a course-related work placement (but no more than 50% of the course load); as a student union sabbatical officer (for up to 2 years)

#### Family Visas

##### Parent of a Tier 4 (Child) visa

- Criteria. The applicant:
  - must have a child under the age of 12 enrolled in a fee-paying independent school, who is on a Tier 4 (Child) student visa
  - must have the funds to support themselves and any dependents, and fly home after the child has left school
  - must have another home outside the UK
  - must not be from a European Economic Area country or Switzerland
- Duration: usually six or 12 months, and can be extended
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot switch into a different visa category

- cannot have their main residence in the UK
- cannot work or study
- cannot bring family members
- Entitlements:
  - apply to extend the visa every 12 months, as long as still eligible

#### UK Ancestry visa

- Criteria. The applicant:
  - must be a Commonwealth citizen
  - must be 17 years of age or older
  - must have a grandparent that was born in the UK
  - must apply from outside the UK
  - must be able to work, and plan to do so while in the UK
  - must have sufficient funds to support themselves
- Duration: 5 years (and can be extended)
- Conditions. The visa-holder:
  - cannot access public funds
- Entitlements:
  - work and study
  - bring family members (partner and children)

#### Family visa – partner or spouse

- Criteria. The applicant:
  - must be 18 years or older (and their partner must be too)
  - must have a partner who is a British citizen, has permanent residency or has refugee status or humanitarian protection
  - must intend to live with their partner permanently in the UK
  - must demonstrate English language ability
  - must be able to support themselves and any dependants
- Duration:
  - fiancé, fiancée or proposed civil partner: 6 months
  - partner: 2.5 years
- Conditions:
  - generally no access to public funds
- Entitlements:
  - work
  - study

#### Family visa – parent

- Criteria. The applicant:
  - must have a child under 18 years of age that lives in the UK, and does not lead an independent life (for example, is married and has children). The child must either be a British citizen, have indefinite leave to remain, or have lived in the UK for 7 continuous years and it would be unreasonable for them to leave
  - must have sole or shared parental responsibility for their child
  - must demonstrate English language ability
  - must be able to support themselves and any dependants
- Duration: 2.5 years
- Conditions:
  - generally no access to public funds
- Entitlements:
  - other children can be added to the application as dependants
  - work
  - study

#### Family visa – child

- Criteria. The applicant:
  - if under the age of 18: must not be leading an independent life; must be able to be supported financially
  - if over the age of 18: must not be leading an independent life; must have received a family visa when they were under the age of 18

#### Family visa – adult coming to be cared for by a relative

- Criteria. The applicant:
  - Must be 18 years of age or older
  - must have a relative (parent, grandchild, brother, sister, son or daughter) who is settled in the UK. The relative must be a British citizen, have indefinite leave to remain in the UK or have refugee status or humanitarian protection
  - must need long-term care because of illness, disability or age
  - must not be able to receive the care they need in their home country
  - must be able to be financially supported, cared for and housed by their relative, without the relative needing public funds for five years.
- Duration:
  - indefinite (relative is a citizen or had indefinite leave to remain)
  - time limited (relative has refugee status or humanitarian protection)

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