

## **'Persons persecuted for political reasons shall enjoy the right of asylum ...': Asylum policies in Germany — myths and realities<sup>+</sup>**

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In the light of the recent global focus on Afghanistan (and the 'Afghanistan Conference' held near the former West German capital Bonn in November 2001), it is interesting to note that there are around 90,000 Afghans living in Germany.<sup>1</sup> The majority have come to Germany as asylum seekers over the last 20 years. Not all applicants have been officially recognised as refugees. Some have gained residency on humanitarian grounds, others have temporary forms of protection, while others have their cases still pending.

Germany provides a powerful illustration of the dynamics of asylum policies and politics. The case for closer scrutiny appears even stronger as the Federal Republic of Germany has until very recently kept reiterating the official mantra that it does not regard itself a 'country of immigration'. In spite of this, considerable *de facto* immigration has occurred in various forms, and asylum applicants have contributed to a substantial increase in the proportion of non-German residents among the population, which at present stands at about 9 per cent (BBA 2001: 19). In the period from 1990 to 2000, Germany recorded close to 2 million asylum applicants (BAF 2000: 11). Compared to these figures, the scale of the asylum seeker flow into Australia appears almost minuscule, with around 100,000 people applying for asylum during the corresponding period (DIMA *nd*; UNHCR 1999). During the same decade, Germany also hosted some 350,000 war refugees from the former Yugoslavia

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1 Figures according to German Foreign Minister Fischer, as quoted in *Spiegel Online*, 27 November 2001, <[www.spiegel.de/politik/deutschland/0,1518,169988,00.html](http://www.spiegel.de/politik/deutschland/0,1518,169988,00.html)>.

(Lederer 1997: 314-5). Does this mean that Germany has been particularly generous to refugees? This article will try to put these figures into perspective and show how this situation developed.

The article is structured in three parts. The first part will be a historical overview of the West German asylum system, from its liberal post-WWII concept to the more restrictive practices in the united Germany of the 1990s. This will include an assessment of the role that the Refugee Convention has played in the German, and increasingly European, context. The second part will look at the different levels of protection that are available under the German system and pose the question of how 'fair' (or how tough) the system has been to the aspirations of refugees. The final part will assess some of the current debates, such as the proposals for comprehensive immigration legislation and their potential implications for asylum seekers and refugees, as well as picking up some reverberations from September 11.

### **Development of the German asylum system**

The Second World War left Germany not only with devastated cities and a shattered economy, but also, as a further legacy of the Nazi regime, a huge refugee problem. At the end of the war, there were an estimated 10 million DPs (Displaced Persons), of whom about 4.5 million were concentrated in the three western zones of Germany. While the majority of these were repatriated within the following two years, about 1 million stayed behind, either to be eventually resettled in third countries, such as Australia, or to be integrated in Germany. Furthermore, the catastrophic policies and subsequent defeat of Nazi Germany had brought on a massive exodus of Germans and ethnic Germans from Eastern Europe. In the years 1945 to 1946, some 10 to 12 million of these German expellees and refugees fled to the territory of what was to become East and West Germany, where they had to be accommodated and absorbed into an already fragile society. By 1950, approximately 20 per cent of the West German population (Federal Republic of Germany, excluding Saarland and Berlin) represented 'new citizens' who had either fled or been expelled from the Eastern European countries or had left the newly established East German state (German Democratic Republic) (Beer 1997; Benz 1985).

Notwithstanding these huge challenges, the experience of Germans who had been forced into exile during the Nazi regime also brought into sharp focus the need to provide a legal basis for the granting of asylum to any refugees who are persecuted for their political beliefs. Likewise intended as a demonstration of a new and different Germany, the West German constitution of 1949 enshrined the right of asylum as a *Grundrecht* (basic right) or human right. Article 16(2) of the *Basic Law* unequivocally stated that 'persons persecuted for political reasons shall enjoy the

right of asylum'. This article provided the foundation for what was arguably one of the most liberal asylum systems in the Western world. The wording was deliberately kept brief and did not entail any specifications, apart from stating that the applicant must be 'politically persecuted', a term that was not further defined. This left the matter quite open for interpretation and, given the political constellations in the days of the Cold War, tended to favour asylum seekers from the Eastern European communist states. In general terms, however, the status determining authority (Federal Office for the Recognition of Foreign Refugees) and the courts interpreted art 16(2) quite liberally.

While the Federal Republic of Germany also signed and ratified the Refugee Convention, and later the Protocol, asylum claims were primarily assessed according to art 16. In the 1950s and 1960s, the vast majority of asylum applicants were Eastern Europeans, but given the travel and exit restrictions imposed by these states, the overall number of asylum applications did not pose a problem.<sup>2</sup> In most years, the number of asylum applications remained under 5000, except in the immediate aftermath of the events in Hungary in 1956 and Czechoslovakia in 1968. The number of asylum applicants only started to noticeably increase from the mid 1970s. It first peaked with more than 100,000 claims in 1980 (over half of the asylum applicants originating from Turkey), from where it dropped back to some 20,000 applications in 1983, only to rise again towards the 100,000 mark in 1986. After a temporary fall in the following year, reflecting the closing of the Berlin conduit, the numbers continued to climb to new heights culminating in the record number of 438,000 new applications in 1992 (Lederer 1997: 267-304).

Even in an economically powerful country with a population of 81 million, the accommodation of so many arrivals over a 12-month period caused considerable strain. In addition to the asylum applicants, there were approximately 230,000 ethnic Germans from Eastern Europe who also arrived that year.<sup>3</sup> At the same time,

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2 The substantial numbers of German refugees fleeing from the German Democratic Republic (East Germany) are not considered here, as they were regarded as German citizens and not foreign refugees. It is estimated that at least 2.7 million East Germans left their state for West Germany in the period from September 1949 until the building of the wall in August 1961. From then until the end of 1988, there were an additional 615,000 East Germans who managed to come to West Germany (see Bade 1993: 401-10).

3 Ethnic Germans in the area of the former German territories in the East or Poland, the former Soviet Union, the former Czechoslovakia, Hungary, Romania and several other countries have been entitled to settle in Germany and to become German citizens upon request after arrival. Legislation passed in 1990 and 1993 has since restricted the number of eligible persons and the scope of this type of migration which had peaked in 1990 with 397,000 arrivals over a 12-month period (see Lederer 1997: 227-48).

Germany was facing huge challenges in incorporating and modernising the former GDR. To put it mildly, the inflow of some 700,000 arrivals in one year was not particularly conducive to social cohesion. The asylum debate which had been raging since the 1980s reached new heights of polarisation, and the simmering widespread discontent with the arrival of asylum seekers turned increasingly violent at numerous flashpoints. Not surprisingly, xenophobic feelings ran highest in East Germany where the majority of violent incidents directed at foreigners was recorded. This pattern has sadly continued until the present, particularly, though not exclusively, against asylum seekers, and most prominently people from Africa and Asia (BBA 2000: 173-6).

Against the background of this domestic situation along with continuously rising numbers of asylum claims, the Federal Parliament passed a constitutional amendment in 1993. The two most controversial — but also most effective — components of the revised asylum legislation, known as art 16a *Basic Law*, were the 'safe third country' and 'safe country of origin' clauses. This has meant that asylum seekers who enter Germany via a third country which is considered 'safe', that is a state where the Refugee Convention and the Human Rights Convention are applied, are excluded from lodging an asylum application in Germany. All EU (European Union) countries fall into this category, as do Germany's eastern neighbours who have not yet joined the EU (such as Poland, Czech Republic) and Switzerland. The *safe country of origin* clause further excludes citizens from states that are considered free of political persecution and inhuman or degrading treatment or punishment, unless they can show convincing evidence that their cases warrant consideration under the asylum system. The two lists of *safe countries of origin* and *safe third countries* are determined each year and subject to parliamentary approval. Concomitant legislative changes also provide for fast-track processing in manifestly unfounded cases and curtail options for appeal.

In the wider EU arena, formal agreements (such as the Schengen Agreements of 1985 and 1990, and the 1994 Dublin Convention) have also had profound implications. The most striking effect has been that asylum seekers are only allowed to lodge an application in one member state, and that the state responsible for processing the application should normally be the 'country of first arrival'. It goes without saying that this legislation has been accompanied by a series of security measures, such as the application of advanced identification technologies, to prevent people from lodging asylum applications in more than one country.

At the same time, a new legislative framework was established for refugees from war and civil war. This had become particularly pertinent in the light of the massive inflow of refugees from the former Yugoslavia, above all from Bosnia-Herzegovina.

The framework provides for temporary protection and a conditional work permit, but excludes those falling in this category from simultaneously lodging an application for asylum. A similar version was adopted by Australia in 1999 to cover the 'safe haven' arrangements for Kosovar and East Timor refugees.

In 1992, the three major source countries of asylum seekers in Germany had been Yugoslavia (with some 115,000 applicants), Romania (approximately 103,000) and Bulgaria (around 31,000). When the revised asylum legislation came into effect in 1993, Romania and Bulgaria were listed as *safe countries of origin* where there was allegedly no systematic political persecution. By 1994, asylum applications from citizens of these countries had dropped to roughly 10 per cent of their respective 1992 numbers, and in subsequent years they virtually vanished from the statistics (BAF 2000). A large proportion of the people fleeing the conflicts in the former Yugoslavia were subsumed under the temporary protection arrangements in the new category of 'refugees from war and civil war'. In the mid 1990s, some 330,000 refugees from Bosnia-Herzegovina were covered under this category, while a further 20,000 had lodged a formal asylum claim.

A glance at the development of the number of asylum applicants in Germany since 1993 shows that the annual numbers averaged around 120,000 in the mid 1990s. At the end of the decade they even dropped below the magic 100,000 mark, and in the year 2000 they stood at less than 80,000. While in the mid to late 1990s the largest numbers of asylum seekers had consistently come from Yugoslavia and Turkey, the year 2000 saw Iraqi asylum seekers (with more than 11,000 applications) becoming the largest group (followed by applicants from Yugoslavia, Turkey, Afghanistan and Iran).<sup>4</sup>

On a European level, the tightening of the German asylum system led to a noticeable shift in the destinations favoured by asylum seekers. The UK experienced by far the largest increase in the number of asylum applications. By the year 2000, Britain had become the European country with the highest number of asylum claims in that year, thus replacing Germany as the top destination, a distinction it had carried for over 20 years. Other EU countries also recorded a marked rise in the number of asylum seekers, in particular the Netherlands, and in recent years also Belgium, while even tiny Ireland had close to 11,000 asylum applications in the year 2000 (UNHCR 2001). While the much promised goal of 'European harmonisation of asylum policy' has remained as elusive as ever, these developments have certainly led to a wider spread of asylum claimants across EU member states.

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<sup>4</sup> Figures for 2000 as quoted by the German Interior Ministry (BMI - A 5 - 936 047/0 (02) and (04c)).

On the other side, the tightening of the German system has had a ripple-through effect throughout Europe which has seen a noticeable hardening of policies towards refugees. Besides the ambivalent 'success' of repelling asylum seekers from Europe, one major side effect has undoubtedly been the increase in people smuggling (Morrison 2001), which has resulted in numerous horrific incidents where asylum seekers have suffocated in containers during the trip to the country of asylum.

### **'Fairness' of the German asylum system and levels of protection available**

Only a very limited number of the 2.8 million asylum applicants, who arrived in Germany over the last 25 years, have been granted refugee status. During this time, the annual approval rate has fluctuated considerably, averaging about 10 per cent. This refers to the primary stage of the asylum process. Subsequent appeals lodged in the courts have effectively doubled the official approval rate for applicants from some countries, but this does not apply to all review cases. Overall, it means that approximately 15 per cent of all asylum applicants have been granted refugee status.

Why has the approval rate been this low? The definition of 'political persecution' has become very narrow over time, and further restricted by the stipulated condition that such persecution has to be carried out by the government or government agents in the country from where the applicant is fleeing. The same proviso has been applied when the asylum claim is assessed against the somewhat wider refugee criteria laid down in the Refugee Convention ('... well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'). As such, Somali asylum seekers were routinely denied political asylum, as it was found that the state had effectively collapsed, which implied that there was no government-instigated persecution. While for most of the 1990s the general rule that non-government based persecution does not qualify an applicant for refugee status held sway, things started to shift a little in mid 2000. In a landmark decision regarding asylum claims of Afghan applicants, the Federal Constitutional Court ruled that such requests may be approved, even if persecution is not carried out by the government, but by *de facto* government authorities in civil war situations, such as the Taliban in Afghanistan. Quite pointedly, the Federal Constitutional Court emphasised in its ruling that the protection of a refugee should be given preference to 'philosophical considerations of what constitutes a state'.<sup>5</sup>

If a person is not recognised under the very narrow definition of 'political

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5 UNHCR, press release, Berlin, 21 August 2000.

persecution', they may gain protection under the Refugee Convention criteria, in which case they are granted so-called 'small asylum'.<sup>6</sup> Interestingly enough, in the year 2000 the number of applicants granted 'small asylum' was more than double those who gained protection under art 16(2). Refugee status is gained in both cases, although 'small asylum' holders are initially awarded only temporary residency permits before becoming eligible for permanent residency. In cases, where neither 'political asylum' nor 'small asylum' is granted, claimants may still be awarded some form of temporary 'humanitarian status' to enable them to stay. This has been employed in cases where there is a substantial risk that the rejected asylum seeker may face torture or the death penalty if she/he were to be returned to his/her own country, although this practice has not been applied in all cases (Blatter 1996). In the past, it has, in particular, failed to protect numerous Algerian nationals who have feared persecution by fundamentalist anti-government militias.

While such forms of protection under *Duldung* (leave to stay) may be fairly precarious, they may lead to more secure residence status over time. The German Government has in the past run several 'regularization' schemes, where numerous long-running cases that involved rejected applicants from particular countries, have under certain circumstances been 'resolved' and claimants have been granted regular residence permits [so-called *Härtefälle* (hardship cases) and *Altfälle* (old cases)].

Such 'acts of pragmatism' should, however, not be overstated, as the general thrust of German, and indeed European, policies has been to prevent asylum seekers from getting to the stage where they can access the respective asylum system. If asylum seekers manage to overcome that hurdle and are able to lodge a claim for asylum, they face a thorough investigation of their applications that in the majority of cases results in rejection. If appeals are unsuccessful and no substantial reasons for delaying a deportation order are brought forward, rejected asylum seekers have to leave the country or risk being deported.

This scenario has also eventually applied to the majority of Bosnian refugees who fled from the war in their country, although longer deadlines, staggered repatriation and other options such as resettlement in third countries (for example, under Australia's Humanitarian Program) were in place here. Notwithstanding the government's overall push for repatriation or resettlement of this group, the huge effort, let alone cost, to provide 'temporary protection' to approximately 350,000

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6 The term 'small asylum' has been used in official publications and statistics since 1993. It denotes the type of protection [non-refoulement] granted to asylum applicants under s 51 (1) *Aliens Law*. Persons covered under this status are considered refugees under the Refugee Convention.

people for many years should not be overlooked. During the Kosovo war in 1999, it was again Germany who was the first to announce the intake of 10,000 Kosovar refugees, to be subsequently raised by another 5000 — a move which was undoubtedly also intended to pressure other countries to follow suit. Compared with the Bosnian refugees who had arrived about six years earlier, the conditions attached to the Kosovars' stay were more clearly defined and intended for a swift repatriation.

This leaves one last and sometimes overlooked aspect of German refugee policy. During the 1980s, a small number of Jewish refugees from the former Soviet Union had settled in Germany, most prominently in Berlin. After the fall of the Berlin Wall, the last East German government decided to facilitate Jewish migration to East Germany, as a *Zeichen später Gutmachung* ('a gesture of late restitution'). After reunification, the (united) German Government agreed in 1991 to the precedent set by the then decommissioned East German Government and allowed this migration scheme to continue. The legal framework covering their entry as well as their residency rights falls within specific refugee legislation, which was originally created during the intake of Indochinese refugees in the early 1980s. An annual numerical quota has not been set, but arrivals have averaged around 15,000 a year. By the end of the 2000, approximately 130,000 Russian Jews had arrived under this scheme.<sup>7</sup>

### Outlook: current debates

The election of a centre-left government (the so-called 'red-green' coalition) in 1998 has not dramatically altered Germany's asylum and refugee policy. The new Interior Minister Otto Schily of the Social Democratic Party sounded, and often acted, just as tough as his predecessor, Manfred Kanther of the Christian Democratic Union. One major difference, however, has been that the present government has pursued a reformist agenda that has resulted in new citizenship legislation, which entails conditional *ius soli* principles affecting citizenship at birth and also allows for swifter naturalisation, as well as the planned introduction of an immigration law.<sup>8</sup> In the context of the latter, some sections of the political spectrum have once again called

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7 Figures as published by the German Interior Ministry (BMI - A 5 - 936 046/4).

8 Until the 1990s, German citizenship had been based almost exclusively on ethnic descent (*ius sanguinis*). Acquiring German citizenship by naturalisation was discretionary and regarded as the exception, but legislative reforms enacted in 1991 and 1993 made naturalisation of longstanding non-German residents easier. The new citizenship law of 15 July 1999, effective since 1 January 2000, still entails the *ius sanguinis* principle, but has added a conditional *ius soli* framework. The latter means that children born in Germany acquire German citizenship at birth, if their non-German parents have lived in Germany for at least eight years and been granted an unlimited residence permit.



for a complete scrapping of the constitutional right to asylum, if an immigration law is to be introduced. While such a move seems unlikely for the time being, the existence of a formal immigration program may not necessarily be beneficial to asylum seekers. In a broader sense, however, the benefits may lie in migration options for persons who want or have to leave their country without necessarily being refugees. It may also prove positive for refugees, if a modest quota for refugees selected outside Germany were to be included in such an immigration program (along the lines of the Australian off-shore Humanitarian Program).

On a European level, increasing integration will further advance the sharing of data on individuals and asylum flows, amidst efforts to form a united approach. Notwithstanding the gap between EU rhetoric and diverging practices in individual member countries, many criteria are commonly adhered to in all countries. As such, the European Commission's recent proposal (EC 2001) to include gender-based persecution as criteria mandating the granting of refugee status may also soon be applied in all member countries, which would cover a considerable gap in the German asylum legislation.

With regard to the events of September 11, the notion of political asylum has also again become the subject of fierce debate. While there is, apart from the Far Right, a general consensus that the right to claim asylum should not and cannot be abolished, there are certainly loud calls for tougher screening of asylum applicants and non-German residents alike. This may even entail the revoking of 'permanent' protection, if those covered by refugee status are found to be involved in violent activities with political objectives or are seen to be endangering the democratic system and public order in Germany. While instances where successful asylum applicants have committed serious offences have been rare, a number of sensational and widely publicised cases have generated considerable unease in German society.<sup>9</sup> As this mood deepens, it is more important than ever not to lose sight of the value of the concept of asylum. This is of utmost importance to those who need to claim it, but also highly significant for the state that is able to grant it. After the vitriol of the 2001 federal election campaign, the Australian government and opposition would do well to remember the basis of this principle. ●

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9 See the case of Metin Kaplan, leader of fundamentalist Muslim groups in Germany, who has been granted permanent protection, because he faces the death penalty in Turkey. As of early December 2001, moves were under way to revoke Kaplan's protection status and have him deported to Turkey, if the Turkish government guarantees to renounce the death penalty: *Spiegel Online*: 12 December 2001 <[www.spiegel.de/politik/deutschland/0,1518,172321,00.html](http://www.spiegel.de/politik/deutschland/0,1518,172321,00.html)>.

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