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The Special Needs Of Vulnerable Persons In The System Of European And  
German Migration Law

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Winfried Kluth\*

## **The Special Needs Of Vulnerable Persons In The System Of European And German Migration Law**

### Abstract

*The Common European Asylum System pays special attention to vulnerable persons, including minors, women, sick and elderly people and victims of human trafficking. The article classifies these regulations systematically, analyses their implementation in the German migration law and also examines how the legislator responds to the fact that protection seekers sometimes invoke a special need without this need being present.*

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# 1. The Concept Of Vulnerable Persons: Genesis And Development

## 1.1 Semantic Preliminary Remark

Discourses in jurisprudence are shaped to a not inconsiderable extent by key terms and guiding principles used<sup>1</sup>. These convey basic orientations and have a considerable influence on the scientific and social attention given to the discourses.

For some years now, significant cross-regional scientific discourses have been conducted under the key terms resilience<sup>2</sup>, digitization<sup>3</sup>, attention<sup>4</sup> and borders<sup>5</sup>. They symbolize high social and scientific relevance of the topics covered and usually trigger extensive research processes.

If one analyses German legal and social science research in this respect with the help of the keyword "schutzbedürftige Personen", the impression does not arise, that this is a guiding principle. The term and topic are "also" mentioned in various research contexts, but they are not given a central orientation function. It is not easy to find thematically relevant studies with corresponding database queries, because they are assigned to other key terms.

The situation is different if you use the English language. The term "vulnerabilities" used there represents a key term (respectively guiding principle) in the Anglo-Saxon and international research landscape and marks a broad field of debate covering many fundamental areas of social development. It is also immediately obvious that the term "vulnerability/defenselessness" generates attention in a completely different way, than the German language version. Both the succinctness and the reference on the "violation" or "infringing act" rather than protection have a significant impact on perception.

Even more important, however, is that the thematic contextualization is different and broader. The debate is embedded in the major discourse of equal opportunities in society and is at the same time conducted much more critically than is the case with the German discourse referring to the "welfare state". Although a thorough analysis is not possible at this point, it seems useful to address a few selected aspects that may be helpful for the further course of reflection.

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<sup>1</sup> On the concept of the leading term Baer, in: Schmidt-Aßmann, Eberhard/Hoffmann-Riem, Wolfgang (ed.), *Methoden der Verwaltungsrechtswissenschaft*, Baden-Baden 2004, p. 223 et seq.

<sup>2</sup> See for example by Lewinski, *Resilienz des Rechts*, 2016; on a particular aspect Krüger/Max (ed.), *Resilienz im Katastrophenfall, Konzepte zur Stärkung von Pflege- und Hilfsbedürftigen im Bevölkerungsschutz*, 2019.

<sup>3</sup> For this purpose including Guckelberger, *Öffentliche Verwaltung im Zeitalter der Digitalisierung*, 2019; Kucklick, *Die granulare Gesellschaft*, 3rd edition 2017; Stalder, *Kultur der Digitalität*, 3rd edition 2017.

<sup>4</sup> Very early on that topic Waldenfels, *Phänomenologie der Aufmerksamkeit*, 3rd edition 2015; Müller/Nießeler/Rauh (Hrsg.), *Aufmerksamkeit*, 2016. In legal texts, the top attention is prominently displayed in Article 9 I TEU.

<sup>5</sup> Exemplary Isensee, *Grenzen: Zur Territorialität des Staates*, 2018.

The debate on vulnerability was triggered, among other things, by addressing the issue of women's dependence,<sup>6</sup> and was later transferred to the situation of other minorities in society.<sup>7</sup> The associated examination of taboo issues in society led to corresponding legislative activities, but at the same time triggered an up to present debate, which is based on the theses, that the reference to vulnerability and dependence is ultimately above all a strategy in a social conflict and an expression of the minorities' striving for more power and influence. Especially with regard to the MeToo movement, this criticism has been expressed again and again. Since this discourse structure is also used in relation to protection seekers with special needs,<sup>8</sup> it also deserves attention in the present context.

In the following, therefore, the question will not only be investigated, whether and how the special needs of protection seekers are responded to in refugee law,<sup>9</sup> but it will also be examined whether there are indications that the appeal to vulnerability is used as a strategy for action and how the legal system reacts to that.

## 1.2. The Geneva Convention And Human Rights Pacts

In the relevant legal texts on asylum, the idea of protection and vulnerability have always been the guiding principle. Here the levels of need for protection are not initially distinguished, but the triggering threshold of relevant dangers and threats gets defined (persecution, act of persecution, serious damage etc. – see §§ 3a et seq. of the Asylum Act). However, there are no regulations concerning vulnerable groups of persons.

In the course of further developments of international law, rights were established by the universal human rights covenants<sup>10</sup> and conventions on particularly vulnerable groups of persons (children<sup>11</sup>, people with disabilities<sup>12</sup>, victims of trafficking in human beings<sup>13</sup>, etc.). People in the individual contracting states are generally entitled to these rights. Therefore these rights are considerable in connection with the application for international protection.

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<sup>6</sup> Fineman, *The Autonomy Myth. A Theory of Dependency*, 2004.

<sup>7</sup> Fineman, Feminist and queer legal theory, to aspects of the German debate see Schnell, *Ethik im Zeichen vulnerabler Personen*, 2017; Neulinger, *Zwischen Dolorismus und Perfektionismus: Konturen einer politischen Theologie der Verwundbarkeit*, 2018; Janssen, *Verletzbar Subjekte. Grundlagentheoretische Überlegungen zur conditio humana*, 2018 (with particular reference to Hannah Arendt).

<sup>8</sup> Already during the discussions on the inclusion of the fundamental right of asylum in the Basic Law it has been mended to allow for the possibility of an unjustified appeal on the fundamental right. Documented in: *Jahrbuch des öffentlichen Rechts 1* (1951), p. 165 et seq. Currently, for example, the conversion from Muslims to Christianity after the flight and the resulting well-founded fear of persecution on return to the home state is often criticised as strategic action and the need for protection questioned; see Hillgruber, ZAR 2018, p. 160.

<sup>9</sup> At a glance also Bhaba, in: Opeskin/Perruchoud/Redpath-Cross (ed.), *Foundations of International Migration Law*, 2012, p. 205 et seq., the as a summary umbrella term "marginalized migrant groups" is used. There also the reference that in developed countries regularly more women than men are granted protection status (p. 207).

<sup>10</sup> In particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights rights (both ratified by Germany in 1976). In addition and hereinafter also referred to as Bhaba, in: Opeskin/Perruchoud/Redpath-Cross (ed.), *Foundations of International Migration Law*, 2012, p. 205 (211 et seq.).

<sup>11</sup> UN Convention on the Rights of the Child of 1989.

<sup>12</sup> UN Disability Rights Convention of 2006.

<sup>13</sup> See Frei, *Menschenhandel und Asyl*, 2018; Bhaba, in: Opeskin/Perruchoud/Redpath-Cross (ed.), *Foundations of International Migration Law*, 2012, p. 205 (220 et seq.).

However, these “general” rights are not specifically adapted and geared to the usually exceptional circumstances of refugees and the search for protection due to their general regulatory context. In practice, they therefore “only” operate as discretionary directives. For example, the provision to give priority to the best interests of the child, which follows from the Convention on the Rights of the Child, must be considered in all measures affecting children. This is also subject to administrative court scrutiny.

### **1.3 Differentiation In EU Secondary Law**

Against this background, the legislation of the European Union based on Article 78 TFEU has proved to be the decisive step towards capturing the points of attention generally established under international law in a situation-specific manner and reacting to them by means of appropriate normative directives. Here, again, a distinction must be made between general requirements and detailed specifications for individual measures. Union law thus assumes the task of implementing the general human rights requirements for the Member States.

### **1.4 Purpose Of The Investigation**

The aim of this examination is to identify the specific view and effects of the regulations on vulnerable persons, especially the relevant directives under EU law, and at the same time to ask what tensions and subsequent problems may be associated with them. In this context, the question will be investigated whether and how the appeal to a special reception need can be used in connection with the application for protection and how the legislator reacts to this.

## **2. Constitutional And Human Rights Basics As A Horizon Of Understanding**

### **2.1 The Protection Of The Weaker As A Concern Of The Welfare State**

The fact that the state and the law turn their attention to the particularly vulnerable members of society is not new, but rather a characteristic that characterizes many areas of law and has its roots in the social constitutional principle, which in turn goes back to the idea of a society built on solidarity, which was developed particularly in connection with the processing of the consequences of industrialization.<sup>14</sup> The core idea has been precisely formulated with the postulate of „protecting the weaker party“ by Eike von Hippel and others.<sup>15</sup>

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<sup>14</sup> Exemplary Zacher, in: Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts*, Volume II, 3rd ed. 2004, in: Paragraph 28. The welfare state does not consider the nation or nationality but primarily linked to legal residence and employment. This can already be seen in the early phase of Development of welfare state mechanisms at local level prove it. Currently, the connection between the welfare state and migration is re-contextualised by the new § 18 of the Residence Act by the immigration of skilled workers as a contribution to securing social insurance schemes.

<sup>15</sup> V. Hippel, *Der Schutz des Schwächeren*, 1982.

In legal terms, this concept is implemented by the state objective in Article 20 I of the Basic Law (principle of the welfare state) <sup>16</sup>, which is supplemented in some points by duties of protection under fundamental rights if the dangers for weaker persons emanate from private actors.<sup>17</sup>

In the past, the welfare state has developed a comprehensive set of instruments, including solidarity-based insurance systems, tax-financed benefits and administrative support and empowerment instruments.<sup>18</sup> The legal regulations are hardly manageable and the twelve social code books only mark the core area of the regulations. The Asylum Seekers Benefits Act takes on the function of formulating a humane but lowered level of benefits for persons undergoing the recognition procedure or whose stay has become illegal.<sup>19</sup>

The fundamental right of asylum as such is already an expression of a right to protection, as its benefits include not only a residence permission but also the right to a livelihood and the ability to exercise fundamental rights.<sup>20</sup> In purely formal terms, this is implemented by including the recognized beneficiaries of protection within the scope of the welfare state guarantees by granting the residence permit, whereby equal treatment with nationals follows from the corresponding provisions of the GCR (Art. 23) and Union law (Art. 29, 30 Directive 2011/95/EU).

## 2.2 Human Rights Protection Concepts

The reference to equal treatment for nationals also points to a fundamental problem, since the ideas about the level of social security in the individual states and their societies differ considerably, so that there are considerable differences in standards.<sup>21</sup> The human rights protection concepts, such as for human right to food and health, only establish relative minimum requirements, linked to the performance of the respective societies, which cannot and do not want to achieve an alignment of the various social models.<sup>22</sup> Against this background, international comparisons also prove to be demanding, because the respective „self- understandings“ of regarding the welfare state or the scope of state social care are not only important, but are respected by the human rights pacts in any case if a minimum standard is guaranteed.

In addition to the pull effect on countries with a high level of social security benefits, this also causes paradoxes, because the Reception Directive sometimes sets higher levels of benefits and care during the recognition procedure than those available to nationals in some Member States.<sup>23</sup> As a result, the persons seeking protection, once they have been recognised, enjoy less social security than during the recognition procedure.

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<sup>16</sup> See just BVerfGE 27, 253 (283); BVerfGE 82, 60 (80).

<sup>17</sup> See Krings, *Grund und Grenzen grundrechtlicher Schutzpflichten*, 2001.

<sup>18</sup> See also Zacher, in: Isensee/Kirchhoff (eds.), *Handbuch des Staatsrechts*, Volume II, 3rd edition 2004, in: § 28, marginal no. 32 et seq.

<sup>19</sup> Haedrich, ZAR 2010, 227 et seq.; Kluth, *Soziale Sicherheit* 2018, 32 et seq.; idem, *zfme* 2018, 5 et seq.

<sup>20</sup> Kluth, in: Stern/Becker (eds.), *Grundrechte Kommentar*, 3rd ed. 2018, Article 16a, recital 64 et seq.

<sup>21</sup> In more detail, Kaufmann, *Varianten des Wohlfahrtsstaates*, 2003.

<sup>22</sup> For an attempt to determine a minimum performance level, see Müller, in: Bielefeldt/Frewer (eds.), *Das Menschenrecht auf Gesundheit*, 2016, p. 125 et seq.

<sup>23</sup> This is the case in Italy and South-East European member states, among others.

Another thematically relevant regulation of the Council of Europe is the Istanbul Convention<sup>24</sup>, which aims to protect women and also addresses the specific dangers that consists in camps and collective accommodations. It requires specific protection measures for women and thus also for female migrants, in particular against domestic violence and thus also in collective accommodation.<sup>25</sup>

The issue of special needs of vulnerable persons was most recently taken up by the Global Pact for Safe, Orderly and Regular Migration of 11.12.2018<sup>26</sup>, which in its seventh objective for the relevant groups of persons formulates concrete objectives for the common policy of community of states, whereby the „precarious situation“ in which these migrants find themselves is used as a (new) guiding concept.

### 3. Specification In European And German Migration Law

#### 3.1. Regulations In The Common European Asylum System

The rules of the Common European Asylum System take up the concerns of the most vulnerable in several contexts and set out the obligations of Member States in their actions. A distinction can be made between basic principles on the one hand and concrete requirements for certain procedures and actions on the other.

The central and most important complex of regulations in this respect are the regulations in Chapter IV of the EU Reception Directive 2013/33/EU<sup>27</sup>. Starting with the general principle of assistance to vulnerable persons in Art. 21, which contains a more detailed but not exhaustive definition of the groups of persons covered as well as the general obligation to assess their special needs in Art. 22 and the following provisions on specific groups (minors in general, unaccompanied minors and victims of torture and violence), a distinction is made.

The group of persons covered by the regulation is not exhaustively defined in Art. 21 and refers in particular to the groups of persons who are also prominent in other contexts – such as in case of limit values in Environmental and Product Law<sup>28</sup>: minors, people with disabilities, the elderly, pregnant women, single parents with minor children, victims of trafficking, persons with serious physical illnesses or mental health problems. For each of these groups applies, that they are dependent on „ability“ in the form of community support for a „normal“ use of freedom and life<sup>29</sup>. This distinguishes their need for protection even in the asylum procedure from the other groups of persons.

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<sup>24</sup> Council of Europe Convention for the Prevention and Combating of Violence against women and domestic violence from the 11.5.2011, ETS 210.

<sup>25</sup> For further details see Runge, ZAR 2020, p. 127 et seq.

<sup>26</sup> See Griesbeck, ZAR 2019, p. 85 et seq.

<sup>27</sup> Directive 2013/33/EU of the European Parliament and the Council to the determination of rules of admission of persons seeking international protection, ABl. EU Nr. L 180/96.

<sup>28</sup> To that Böhm, *Der Normmensch*, 1996.

<sup>29</sup> To the concept of Capabilities basically Nussbaum, *Frontiers of Justice*, 2007, p. 155 et seq.; Sen, *Die Idee der Gerechtigkeit*, 2010, p. 253 et seq. For the corresponding interpretation of the social national objective see Heinig, *Der Sozialstaat im Dienst der Freiheit*, 2008.



The interactions between the specific situations of the individual groups of persons and the asylum protection, which are generally addressed in Art. 22 IV Directive 2013/33/EU and therefore recognized by the legislator<sup>30</sup>, must be assessed differently. Minority, old age, disability and pregnancy are situations in life that generally give rise to special needs. In contrast, it is possible that the case groups of illness are directly related to persecution and flight, so that they are also relevant for the assessment of the need for protection. Especially in cases of traumatisation<sup>31</sup> this is regularly the case.

The systematic relevance of this connection becomes apparent when one considers that in these cases the reference to the special needs is or can be at the same time constitutive for the establishment of the right to protection. This, in turn, may tempt the applicants to invoke it for strategic reasons, although this does not correspond to reality. Such a strategy may also be pursued with regard to minors if the age is not certain due to the lack of reliable documents.<sup>32</sup>

This shows that the duty to assess „whether the applicant is an applicant with special reception needs“, as prescribed in Art. 22 I 1 of Directive 2013/33/EU, because the he\*she belongs to one of the vulnerable groups of persons, not only serves for a formal classification<sup>33</sup> but also fulfils the task of excluding a strategic and thus incorrect reference to special needs.

Only after this (positive) status clarification follows the obligation of Art. 22 I 2 Directive 2013/33/EU to identify the special needs requiring a special treatment in individual cases.<sup>34</sup> However, the regulation then leaves open to what extent and in what way a claim to special treatment exists. Insofar, Art. 22 I Directive 2013/33/EU lacks an explicit reference standard. Nevertheless, indications of the scope of support can be derived from other provisions of the Directive, as indicated from the obligation to provide support in paragraph 3. Since these explicit regulations only refer to some of the special circumstances covered (Art. 23 et seq. Directive 2013/33/EU), it remains open what exactly is owed, especially in cases of disease.<sup>35</sup> The Member States are therefore only obliged to adopt corresponding guidelines.<sup>36</sup>

The clarifying reference in Art. 22 II Directive 2013/33/EU that the assessment of special needs doesn't need (but may) to be carried out in a separate administrative procedure indicates that the relevant conclusions may be combined with the registration procedure and medical examinations already provided for.<sup>37</sup>

In addition to the obligation to provide support, an obligation to observe is established. Art. 22 I para. 3 Directive 2013/33/EU requires that the Member States “shall provide for appropriate monitoring of their situation”. This is intended to ensure that the measures ordered are sufficiently effective, but also to be able to react to the loss of special needs. In addition, in this way it is possible to clarify an incorrect assertion of special needs.

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<sup>30</sup> Paragraph 4 especially clarifies that the determination in the recognition process by the determinations under Art. 22 I Directive 2013/33/EU are not influenced and insofar no binding effect is created.

<sup>31</sup> To the assesment of credibility in the cases of traumatisation Gierlichs, ZAR 2010, p. 102 et seq.

<sup>32</sup> To the determination of age Neundorf, ZAR 2018, 238 et seq.

<sup>33</sup> To that Peek/Tsourdi, in: Hailbronner/Thym (eds.), *EU Immigration and Asylum Law*, 2nd edition 2016, Part D V, Art. 22, recital 9.

<sup>34</sup> *ibid.*, recital 9 et seq.

<sup>35</sup> Similar *ibid.*, recital 12.

<sup>36</sup> In this area, internal law should also be sufficient, i.e. concretisation through administrative regulations.

<sup>37</sup> *ibid.*, recital 11.

At this point, only a general reference should be made to the other regulations relating to the most important groups of persons: minors (Article 23), unaccompanied minors (Article 24) and victims of torture and violence (Article 25). The provisions define the support measures and decision-making criteria that are essential from the perspective of the European legislator. The only thing to be emphasized is that the requirements for the qualification of the personnel are also addressed (see, for example, Art. 24 IV), so that the depth of influence in the legal system of the Member States is significant.

It should also only be mentioned here that other directives also contain specific provisions for vulnerable persons which refer to the respective context.

The EU Qualification Directive 2011/95/EU takes vulnerable persons into account in connection with the requirements for medical care (Art. 30 II) as well as the handling of unaccompanied minors (Art. 31).<sup>38</sup>

The EU Asylum Procedures Directive 2013/32/EU takes the special needs of vulnerable persons into account, inter alia, in the application process (Art. 7 in relation to minors), in the conduct of the hearing (Art. 14 II), in the medical examination (Art. 18) as well as in relation to procedural guarantees (Art. 24 et seq.).<sup>39</sup>

Besides to special rules for (unaccompanied) minors (Art. 6, 8), the Dublin III Regulation (EU) No. 604/2013 also contains special rules for dependent persons (Art. 16).<sup>40</sup>

Finally, the EU Return Directive 2008/115/EC includes above all special provisions in connection with the deportation and deportation detention (Art. 10, 17) of minors in addition to a legal definition (Art. 3 No. 9).<sup>41</sup>

### **3.2. Implementing Regulations In German Migration Law**

The German legislator is obliged to implement the requirements of international and European law.<sup>42</sup> In doing so, he is free to decide how to systematically locate the implementing regulations. This applies to the subject-related legal context (regulations in laws on foreigners or related specialised laws) but also to regulations at the federal, state or local level.

In the following, it is not or cannot be a matter of completely determining and examining the implementing regulations in more detail. Rather, the limited aim of the study is to show different implementation strategies exemplarily and to discuss the associated advantages and disadvantages.

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<sup>38</sup> Battjes, in: Hailbronner/Thym (eds.), *EU Immigration and Asylum Law*, 2nd edition 2016, Part D III, Art. 30, recital 5, Art. 31, recital 5.

<sup>39</sup> Vedstedt-Hansen, in: Hailbronner/Thym (eds.), *EU Immigration and Asylum Law*, 2nd edition 2016, Part D IV, Art. 2, recital 4.

<sup>40</sup> Hruschka/Maiani, in: Hailbronner/Thym (eds.), *EU Immigration and Asylum Law*, 2. Edition 2016, Part D VI, Art.82, recital 7 et seq.

<sup>41</sup> Hörich, *Abschiebung nach europäischen Vorgaben*, 2015, p. 206 et seq.

<sup>42</sup> To Europeanisation of the German aliens law see Hecker, ZAR 2011, 46 et seq.

### 3.2.1. Implementation In Migration-specific Laws

A first part of the provisions on vulnerable persons in European legislation is implemented by the main laws of German migration law. The Asylum Act (Asylgesetz) and the Residence Act (Aufenthaltsgesetz), however, only contain a few detailed regulations, and the Asylum Seekers Benefits Act (Asylbewerberleistungsgesetz), as a special law for the period of the recognition procedure or the illegal residence with regard to existential living and medical benefits, only makes a general reference to special needs.<sup>43</sup> This is related to the fact that the central connecting point for the implementation of Article 22 Directive 2013/33/EU in particular, is the admission procedure, which is shaped by state law (see 3.2.3. below).

The Asylum Act refers, inter alia, to § 14 II Nos. 2, 3 Asylum Act, which provides special responsibilities for vulnerable persons, as well as specific regulations on minors in several contexts. However, the issue plays a minor role in total.

Many of the provisions of the Asylum Seekers Benefits Act serve the implementation of the Reception Directive and, by granting discretionary powers, they open up the possibility of meeting the special needs of vulnerable persons. This becomes particularly clear in the case of medical care. In this respect, § 4 I Asylum Seekers Benefits Act normally only provides treatment for acute illnesses and pain. Paragraph 2 includes more extensive care for expectant mothers and women who have recently given birth. But even with this, the regulation remains below the scope of benefits which are relevant to vulnerable persons. This is only made possible by § 6 I Asylum Seekers Benefits Act, which allows more extensive health care services in individual cases. In the case of vulnerable persons, the discretion has to be exercised by an interpretation in accordance with the directives pursuant to Article 22 Directive 2013/33/EU. Moreover, it is not understandable that the legislator did not extend the provision of § 6 II Asylum Seekers Benefits Act to the cases of vulnerable persons under the Reception Directive. It is still limited to the cases of § 24 I Resident Act and serves to implement the Mass Influx Directive 2001/55/EC<sup>44</sup>.

The Residence Act has normative references to persons seeking protection and thus also to vulnerable persons among them in two fundamentally different situations. The first is when a residence permit is given to grant protection. These are the cases of §§ 22 to 25 Residence Act.<sup>45</sup> They integrate the persons concerned into the regular social security system and thus, with a few exceptions, equate them with nationals. As a result, this allows an appropriate response to their special needs. International and Union law are not expecting more.

The second point of contact concerns cases in which no recognition has been granted and therefore an enforceable obligation to leave the country exists, to which the foreigner invokes obstacles to deportation which are the expression of a special need, in particular a need for medical care. § 60 of the Residence Act responds to this by recognising an obstacle to deportation under certain conditions and

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<sup>43</sup> See generally to the social services the comprehensive description in Frings/Janda/Keßler/Steffen, *Sozialrecht für Zuwanderer*, 2nd edition 2018.

<sup>44</sup> Directive 2001/55/EC, ABl. 2001 L 212, 12. To that detailed Schmidt, ZAR 2015, p. 205 et seq.

<sup>45</sup> To the individual residence titles on humanitarian grounds in greater detail Maaßen/Koch, in: Kluth/Hund/Maaßen (eds.), *Handbuch Zuwanderungsrecht*, 2nd edition 2017. § 4, recital 474 et seq.

thus creating the basis for granting a “Duldung” (temporary suspension of deportation).<sup>46</sup> In addition, the regulation on deportation detention contains special criteria with regard to the order (§ 62 I 2 Residence Act) and the execution of deportation detention (§ 62a III Residence Act) towards minors.

### 3.2.2. Implementation In Other Special Laws

Of great practical importance for the group of unaccompanied minors are the special legal regulations in §§ 42a et seq. Social Code No. 8, which regulate the treatment of this group very detailed and in this respect implement the requirements of Article 24 Directive 2013/33/EU.<sup>47</sup>

From a systematic perspective, the individual regulations refer to the determination of age and thus to the question of membership of the group of vulnerable persons (§ 42f Social Code No. 8)<sup>48</sup>, the responsibility of a professionally qualified authority and an obligation to observe and report (§ 42e Social Code No. 8). Thereby, the participation rights of minors are also precisely regulated.<sup>49</sup>

### 3.2.3. Implementation By States And Municipalities

In addition to these federal regulations, a considerable part of the guidelines of the Residence Directive is implemented by the State Reception Acts on the initial reception procedure and the associated implementing ordinances. This is a systematic consequence of the responsibility of the States for the accommodation of the applicants in accordance with §§ 44 et seq. Asylum Act and provokes that although the implementation is not uniform<sup>50</sup>, it does regulate the same issues. The following description is based on the legal situation in the State Brandenburg.<sup>51</sup>

The State Reception Act generally stipulates in § 2 III that in its execution „the special needs of vulnerable persons within the meaning of Article 21 of Directive 2013/33/ EU ... must be taken into account“. This general requirement thus controls the discretionary power in all decisions relating to the type and manner of accommodation. In some cases, this is explicitly addressed, for example in § 8 V No. 3 of the implementing ordinance.

The state legislator is thus largely dispensing with its own evaluations and concretisation and works with the technique of referral back. The requirement of the directive is generally referred and the implementing agencies are obliged to exercise discretion in accordance with the guideline. According to the case law of the ECJ, this is a legitimate way of implementing a directive.<sup>52</sup>

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<sup>46</sup> Hecht/Koch, in: Kluth/Hund/Maaßen (ed.), *Handbuch Zuwanderungsrecht*, 2nd edition 2017, § 5, recital 217 et seq.

<sup>47</sup> Overall presentation at Haubner/Kalin, *Einführung in das Asylrecht*, 2017, Chapter 10.

<sup>48</sup> To that more detailed Neundorf, ZAR 2018, p. 238 et seq.

<sup>49</sup> To the details Haubner/Kalin, *Einführung in das Asylrecht*, 2017, Chapter 10, recital 21 et seq.

<sup>50</sup> A uniform regulation of the admission procedure by the federal legislator as regulation of the administrative procedures under Art. 84 I of the constitution would constitutionally be possible, but the federal legislator has not made use of it.

<sup>51</sup> State Reception Law 15.3.2016 (GVBl. I Nr. 11), last amended by Art. 1 first amending law 19.6.2019 (GVBl. I Nr. 31) such as implementing ordinances of the State Reception Law 19.10.201 (GVBl. II Nr. 55), last amended by Art. 1 2nd Regulation to the modification of the implementing ordinances of the State Reception Act N 1.8.2019 (GVBl. II Nr. 54).

<sup>52</sup> To the details Ruffert, in: Callies/idem (eds.), *EUV/AEUV Kommentar*, 5th edition 2017, Art. 288 AEUV, recital 33.

The special requirements of the Return Directive for the execution of deportation detention in the case of vulnerable persons are taken into account in the deportation detention execution laws of the States<sup>53</sup>, whereby in practice the ordering of deportation detention with regard to vulnerable persons is generally avoided.

### 3.2.4. *Interim Result*

The analysis of German migration law shows that the Union's provisions on vulnerable persons are implemented in the respective legal contexts. In addition to the central federal migration laws and the State Reception Laws, the provisions of §§ 42a et seq. of the German Social Code No. 8 on the taking into care of minors must be emphasised.

In terms of regulation, a distinction must be made between detailed regulations on the one hand and the technique of referral back with the aim of discretionary control on the other. Although the German legislator does not issue a specific regulation for the latter, this approach is sufficient for the implementation of the relevant directives.

Wherever this technique is used and where the implementation is carried out by the federal states, it can lead to an inconsistent implementation in practice and it is further difficult to check the actual handling of the requirements of the directives, as there is a lack of comprehensive documentation. This describes a first field of legal analysis.

## 4. Vulnerability As A Strategy

### 4.1 Problem Findings

It is part of the everyday findings of the recognition procedure that applicants „modify“ their history of persecution selectively or even very extensively in order to increase the chances of recognition. Above all, deception about one's own identity and origin is one of the challenges with which the Federal Office of Migration and Refugees and administrative courts must repeatedly deal. The legislator has reacted to this, most recently by tightening the obligations to cooperate and by reducing benefits through §1a Asylum Seekers Benefits Act.<sup>54</sup>

In addition to these cases, it is also possible to make strategic use of the reference to personal characteristics or life situations that cause particular vulnerability, especially in order to present obstacles to deportation and thus avoid return. In this context, the reference to a serious illness, in particular trauma, as an obstacle to deportation according to § 60 VII of the Residence Act is of particular legal and practical importance.

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<sup>53</sup> Overview and evidences in Kluth, in: idem/Heusch (editor), *BeckOK AusIR*, 24th edition 2019, § 62a of the Residence Act, recital 23 et seq.

<sup>54</sup> For details Wahrendorf, in: Grube/idem., *AsylbLG, Kommentar*, 6th ed. 2018, § 1a, recital 1 et seq.

The regulation has been further developed over the past years. In doing so, the legislator has included aspects that were previously developed by the highest court.<sup>55</sup> Today, the regulation makes it clear that the argument cannot be that one will not receive the same level of care in his\*her home country as in Germany. The situation is different in the case of serious and short- term dangers to life.<sup>56</sup>

Particularly in cases of traumatisation, the correct diagnosis is already the subject of a demanding process and the therapy can only be carried out in the long term. It is therefore even more important that the determination of an obstacle to deportation is only made by doctors with the appropriate expertise and not out of pure goodwill.

## 4.2. Exemplary Response Strategies

In order to prevent a strategic use of the vulnerability argument in these cases, the legislator has inserted two new paragraphs in § 60a of the Residence Act, which above all are intended to exclude any reference to corresponding obstacles to deportation shortly before the planned date and to ensure that the doctors issuing a certification have sufficient expertise.

For this purpose, § 60a II c of the Residence Act stipulates a legal presumption that there are no health reasons opposing deportation. This shifts the burden of proof to the foreigner. It must be fulfilled by a medical certification. This medical certificate shall contain in particular the actual circumstances on the basis of which a professional assessment was made, the method of fact-finding, the professional medical assessment of the clinical picture (diagnosis), the severity of the illness and the consequences which, according to the medical assessment, are likely to result from the situation caused by the illness.

By specifying the requirements for medical certificates more precisely, the legislator takes up the results and recommendations of a sub-working group on enforcement deficits. The latter had come to the conclusion that medical certificates are often only presented very late, shortly before the enforcement of the deportation, are partly based on circumstances that were not recognised in the previous proceedings and, in addition, often lead to a dispute among experts that takes a lot of time. In addition, it has been found that many doctors, out of personal conviction, either easily give expert opinions or refuse to participate as experts.<sup>57</sup>

The legislator has taken up this insight and the recommendations formulated in the report and, by means of the new regulation, has made the obstacle to deportation standardised in § 60 VII more concrete by stating that when invoking health risks as a consequence of a deportation, only such circumstances are relevant in which there is a significant aggravation in cases of life- threatening or serious illnesses. In addition, in order to clarify the assessment standards for authorities and courts, it is „clarified“ that the reference point may not be a health care equivalent to German conditions and that the possibility of health care in a part of the target country is sufficient to deny a risk. When classifying this provision, it must be taken into account that the legislator has based the substance of the legislation on the guidelines of the previous highest court rulings as a point of orientation, so

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<sup>55</sup> Among others BVerwG, NVwZ 2011, p. 48 et seq.

<sup>56</sup> On casuistry Dollinger, in: Bergmann/Dienelt, *AuslR*, 13th ed. 2020, § 60 AufenthG, recitel 102 with further references.

<sup>57</sup> See the report [www.fragdenstaat.de/files/foi/29570/bericht-un-terarbeitsgruppe-vollzugsdefizite-april2015.pdf](http://www.fragdenstaat.de/files/foi/29570/bericht-un-terarbeitsgruppe-vollzugsdefizite-april2015.pdf), p. 15 et seq. Medical practitioners, however, had denied the practice described there.

that there is de facto no major change in the legal situation. Up to now, the Federal Administrative Court has only accepted a ban on deportation if a serious illness would lead to a significant aggravation.<sup>58</sup>

With the regularly high effort required for the diagnosis of mental illness, the new obligation in § 60a II d to submit the medical certificate without delay is only at first glance contradictory. This is because the doctor can also show in such a certificate that there are sufficient indications for the presence of the illness, but that these require further diagnostic care. Likewise, it is constitutionally unproblematic that a certificate under § 60a II d 2 that is not submitted without delay may no longer be taken into account in the administrative procedure, with the exception of special cases regulated therein. Since this provision does not exclude the complete investigation of the facts of the case in court proceedings, because the inquisitorial principle is not restricted in this area, the plea is not completely disregarded. Conversely, however, this shows that the scope of the regulation adopted is limited, since in its present form the lodging of appeals is inevitable.

If preference is given to a certificate complying with the requirements of subsection 2c, the authority may nevertheless order a (further) medical examination in accordance with the third sentence. If the foreigner does not comply with this order without good reason, his or her submissions are not to be taken into account for this reason. In accordance with sentence 4, he\*she must be informed of his or her obligations and the legal consequences of their noncompliance.

The regulation thus combines obligations to cooperate with preclusion regulations in a form that goes to the limit of what is legally permissible. As a result, in the case of judicial scrutiny, great importance will be attached above all to official information pursuant to sentence 4, since this is an indispensable basis for justifying the far-reaching legal consequences. The authorities are therefore well advised to pay close attention to this procedural step and to provide appropriate documentation.

## **5. Current Fields Of Attention**

### **5.1 Protection During The Crisis - Reception Of Children By Federal States And Municipalities**

The Covid-19 pandemic once again demonstrates to the world public that crises hit those who are vulnerable anyway particularly hard. This also applies to refugees in refugee camps or on the escape route. For such and other cases of acute special needs, the instrument of reception programmes (also known as re-settlement) has developed alongside the established flight mechanisms in the laws of many states.<sup>59</sup>

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<sup>58</sup> BVerwGE 105, p. 383 et seq.; 127, 33 et seq.

<sup>59</sup> For details see Maaßen/Koch, in: Kluth/Hund/Maaßen (eds.), *Handbuch Zuwanderungsrecht*, 2nd edition 2017, § 4, recitel 520 et seq.



The specific effectiveness of these programmes is characterised by the fact that they provide safe escape routes<sup>60</sup>, civil engagement<sup>61</sup> and, above all, help those who cannot seek international protection on their own. In this context, there is also a current debate about whether and how certain municipalities can participate in such reception programmes.<sup>62</sup>

These programmes and the associated regulations make it clear that the special needs of vulnerable persons can only be effectively met if safe escape routes are opened up for them. This is possible and practiced within the framework of reception programmes and contingent reception in accordance with § 23 of the Residence Act, but the established programmes reach only a small part of the relevant groups of persons.

## 5.2 Differences In National Standards

The differences between the social standards of performance in the individual Member States of the European Union, which are not overcome by the Common European Asylum System, have already been mentioned. The differences become even greater when emerging economies and other parts of the developed world are included in the comparison. The CEAS „only“ counters the associated incentive to seek out those countries with higher social performance standards by banning secondary migration<sup>63</sup> and imposing sanctions. In view of the problems of effectively enforcing this ban, it will be necessary in the long term to consider other regulatory models at European and international level, at least for the initial period of the stay.

## 5.3 Better Position Than Nationals?

Closely linked to this is the domestic problem that, from the point of view of the socially weak groups of the regular resident population, the high level of investment in favour of refugees and the simultaneous reduction in domestic benefits are also being critically scrutinised. There are some very good reasons for this. The criticism must not, however, lead to a failure to take humanitarian action. Rather, it will be necessary to discuss whether and how a balance can be achieved with the legitimate interests of both groups of people. The appropriate response to the needs of persons seeking protection should not go any further than the attention paid to one's own nationals, to whom the state initially owes protection and care.

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<sup>60</sup> On this aspect see also Endres de Oliveira, in: Foblets/Leboeuf (eds.), *Humanitarian Admission to Europe*, 2020, pp. 199 et seq.; Kluth, ZAR 2017, p. 105 et seq.

<sup>61</sup> This includes the assumption of costs through declarations of commitment according to § 68 of the Residence Act.

<sup>62</sup> Regarding the project „Seabridge“ have a look at [www.seebruecke.org](http://www.seebruecke.org).

<sup>63</sup> This is understood as the entry into another member state after the responsibility of a particular member state has been established.



## **6. Perspectives And Further Need For Research**

The above analysis was intended to illustrate that the internationalised migration law takes account of the special (reception) needs of vulnerable persons in a variety of ways. In spite of the extensive legal regulations that have now been introduced, especially at European level, knowledge of the actual protection is rudimentary and in many areas there is a lack of reliable information on how the regulations are implemented in the different parts of the world, Europe and Germany. This concerns both the instruments used and the concrete measures that are applied. In order to gain a more precise picture of the situation of vulnerable persons and to learn which approaches exist and how effective they are, a comparative law study seems to be useful and necessary.

In addition, dealing with the issue shows that humane offers of help are always exposed to the risk of abuse and instrumentalization, so the legislator can and must also deal with the question of how such abuse can be detected and prevented. Since, against this background, the refugees are always also in a conflict of interests, special qualitative requirements must be set for the empirical analysis.

VULNER is a research project with 9 academic partners  
from 6 countries.

