



**Deutsches Institut
für Menschenrechte**

German Institute for Human Rights

Written submission

to the 123rd session of the Human Rights Committee for
adoption of the “List of Issues Prior to Reporting” for the
Federal Republic of Germany

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1 Preliminary observations

The German Institute for Human Rights (*Deutsches Institut für Menschenrechte*) is the independent human rights institution in Germany. The Institute is accredited according to the Paris Principles of the United Nations (A status). The Institute's tasks include public policy research, education, information and documentation on human rights, application-oriented research on issues related to human rights and cooperation with international organisations. It also monitors the application of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child and has established the monitoring mechanisms for these purposes.

With this submission the German Institute for Human Rights wishes to highlight selected issues that are relevant for the implementation of civil and political rights in and by Germany. The issues were selected according to key areas of activity of the Institute on which information has been gathered and expertise developed in recent years.

2 Article 2: Right to effective remedy

Access to justice in the case of violations of human rights by business enterprises

In its report of 2012 the Committee advised Germany to improve legal protection for people whose human rights have been violated by German companies operating abroad.¹

In contrast to the situation in many other countries, the jurisdiction of German courts regarding actions against German companies is enshrined in directly applicable EU law (Rome II Regulation). However, the defined jurisdiction does not resolve all issues of actual access.²

Many material violations of human rights are already covered by the clauses on liability in the German Civil Code (*Bürgerliches Gesetzbuch*); this means that in many cases substantive liability exists. However, the duty to maintain safety and guarantor obligations that give rise to the liability of business enterprises in areas such as environmental or consumer protection are not applicable to human rights violations. The duty of care for directors and company executives under German law does not cover human rights violations. Substantive liability provisions in German law which safeguard legally protected human rights are not classified as overriding mandatory provisions in the sense of international private law and hence are not applicable if a German company violates human rights abroad, even when the requirements of the host country are significantly lower with regard to minimising human rights risks.

In the field of procedural law Germany has very restrictive rules that make it difficult to bring a lawsuit for compensation against a German company, especially for larger groups of parties affected or foreign plaintiffs. The existing options for collective

¹ Human Rights Committee (2012): Concluding observations on the sixth periodic report of Germany, adopted by the Committee at its 106th session (15 October - 2 November 2012). CCPR/C/DEU/CO/6, para. 16.

² See for the issues raised in this chapter Deutsches Institut für Menschenrechte (2015): National Baseline Assessment. Umsetzung der UN-Leitprinzipien für Wirtschaft und Menschenrechte. Berlin, pp. 54-64. Online at: www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Weitere_Publikationen/National_Baseline_Assessment_Umsetzung_der_UN-Leitprinzipien_fuer_Wirtschaft_und_Menschenrechte.pdf.

redress, such as joinder of claims with subrogation of claims by the defenders make high demands on the level of trust and organisation of the groups of those affected, who in practice often have little in common apart from their involvement in the same case. These restrictive structures mean plaintiffs are faced with organisational and financial challenges that are difficult to overcome: the existing group action is not designed for the bundling of several hundred claims. If a few representative plaintiffs are selected, their action does not freeze the period of limitation for the other persons involved. In other areas of German law not applicable to human rights, there is a wider range of available procedures for such claims, such as the so-called “model precedential suit” (*Musterfeststellungsklage*) in consumer law.

There are also obstacles to remedy in the area of pre-trial access to evidence, which is also treated very restrictively in German procedural law. The securing of evidence by experts, which is required in complex cases, is not covered by legal aid.

Proposed questions:

- How will the Federal Government ensure that all serious violations of human rights caused by the operations of German companies are covered by the substantive causes of action in civil law?
- How will the Federal Government extend options for collective redress so that larger groups of persons affected will have realistic prospects of obtaining effective remedy before German courts?
- How will the Federal Government facilitate pre-trial access to evidence for people who are affected by human rights violations but who lack financial means?

3 Article 7: Prohibition of torture and ill-treatment

Independent police complaints bodies and mandatory personal identification for police officers

In its Concluding Observations of 2012, the Committee expressed its concern about the high number of actions for alleged illegal police violence that were dismissed, the lack of independent complaints bodies for police misconduct and the existing disparities between the Länder with regard to measures to ensure that police officers can be identified.³

The number of actions for alleged illegal police violence that were dismissed remains high: in 2016, as in previous years, 85 percent of these actions were dismissed due to lack of adequate suspicion; charges were brought in only three percent of the cases.⁴

³ Human Rights Committee (2012): Concluding observations on the sixth periodic report of Germany, adopted by the Committee at its 106th session (15 October - 2 November 2012). CCPR/C/DEU/CO/6, para. 10.

⁴ Statistisches Bundesamt (2017): Staatsanwaltschaftsstatistik, Sachgebiet 53: Gewaltausübung und Aussetzung durch Polizeibedienstete. Wiesbaden.

⁵ Töpfer, Eric; Peter, Tobias (2017): Unabhängige Polizeibeschwerdestellen. Was kann Deutschland von anderen europäischen Staaten lernen? Berlin: Deutsches Institut für Menschenrechte, pp. 29-31. Online at:

Progress has been made in establishing independent complaints bodies: now three Länder (Rhineland-Palatinate, Schleswig-Holstein and Baden-Württemberg) have police commissioners (*Polizeibeauftragte*) who deal with petitions from private citizens regarding alleged police misconduct, operating independently of the executive as bodies of the Landtag (state parliament). To date, however, these bodies are understaffed and – with the exception of Schleswig-Holstein – there is no practical independence of investigations since the actual clarification of the facts of the case often relies on information from the state ministries of the interior. Furthermore, the police commissioners do not have a mandate to conduct criminal investigations themselves, with the result that the public prosecutors remain dependent on support from the police. In the federal state of Bremen plans are being discussed to move an independent investigation unit that previously operated under the Ministry of the Interior to the Ministry of Justice; this would ensure greater institutional and hierarchical independence.⁵

In November 2017, the European Court of Human Rights held that Germany violated Art. 3 ECHR. This case revolved around the question whether effective investigations were carried out in a case of alleged police brutality against football fans in Munich in 2007. Although the Court did not find fault with the fact that criminal investigation officers investigated riot police officers from the same police authority, it held that the investigations lacked a certain thoroughness, which would have compensated for the main difficulty of identifying the relevant members of the riot police because of a lack of personal identification.⁶

Today mandatory personal identification for police officers exists in only around half of the Länder.⁷ North Rhine-Westphalia abolished the mandatory identification of police officers in 2017.⁸

Proposed question:

- What steps is the State Party taking to ensure effective investigations of alleged illegal police violence?

Protection against ill-treatment in the care sector

The right to physical and psychological integrity and protection against inhuman and degrading treatment is enshrined in Art. 7 of the International Covenant on Civil and Political Rights. The term ill-treatment covers not only intentional acts of violence but also neglect, the insufficient provision of nourishment and liquids as well as the

www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/ANALYSE/Analyse_Unabhaengige_Polizeibeswerdestellen.pdf.

⁵ Töpfer, Eric; Peter, Tobias (2017): Unabhängige Polizeibeswerdestellen. Was kann Deutschland von anderen europäischen Staaten lernen? Berlin: Deutsches Institut für Menschenrechte, pp. 29-31. Online at: www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/ANALYSE/Analyse_Unabhaengige_Polizeibeswerdestellen.pdf.

⁶ ECHR (2017): Hentschel and Stark v. Germany, Judgment, 09.11.2017, Application No. 47274/15, para. 84-103.

⁷ Götz, Sören (2017): Nullnummern. Kennzeichnungspflicht für Polizisten. In: Zeit Online, 27.07.2017. Online at: www.zeit.de/politik/deutschland/2017-07/kennzeichnungspflicht-polizisten-nrw-abgeschafft-debatte/komplettansicht.

⁸ Kellers, Rainer (2017): Landtag schafft Kennzeichnungspflicht für Polizisten ab. In: WDR, 11.10.2017. Online at: www1.wdr.de/nachrichten/landespolitik/polizei-kennzeichnungspflicht-100.html.

insufficient provision of hygiene and medical care. Ill-treatment in violation of Art. 7 also occurs when medicines are administered during day-to-day care without the consent of the party concerned.

In 2016, the number of people in Germany over 65 years of age was 17.51 million.⁹ Of these, 2.88 million currently require care.¹⁰ The majority of older persons in need of care (2.08 million) receive outpatient or home care (73 percent), while 783,000 receive inpatient care (23 percent).¹¹ 83% of those in need of care were 65 or more years old.¹²

The WHO defines elder abuse as “a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person”.¹³ Abuse can take various forms such as physical, psychological and sexual abuse, verbal aggression, neglect by care workers, emotional/psychosocial neglect, financial exploitation, avoidable restriction of liberty or autonomy to act or make decisions. All types of abuse occur in Germany.¹⁴

A particular problem in care situations is protection against arbitrary forcible restraints. This applies both to care in institutions and at home. Measures which deprive or restrict liberty are still being carried out, increasingly in the form of sedative medication.¹⁵

The risk of becoming a victim of abuse as an older person increases in line with growing dependency and the need for care and increasing vulnerability in old and very old age. Lack of social contact and isolation also have a negative effect. Violence against older persons is little investigated. Conflicts in outpatient care in particular are rarely recorded. The fact that conflicts and violence occur is only documented in a few reports from complaints bodies. There are also very few options for a person receiving care at home to ask for help from a complaints board.¹⁶

Furthermore, older persons often do not assert their right to lodge a complaint or report a shortcoming because they lack the information, or there are no channels to lodge complaints.¹⁷ This also applies to family members, who often do not lodge a

⁹ Statistisches Bundesamt: GENESIS-Online Datenbank. Online at: www-genesis.destatis.de/genesis/online.

¹⁰ Statistisches Bundesamt (2017): Pflegestatistik 2015. Deutschlandergebnisse. Wiesbaden, p. 5. Online at: www.destatis.de/DE/Publikationen/Thematisch/Gesundheit/Pflege/PflegeDeutschlandergebnisse5224001159004.pdf?__blob=publicationFile

¹¹ *ibid.*, p. 5.

¹² *ibid.*, p. 7.

¹³ World Health Organization (2018): Elder abuse. Fact Sheet No. 357. Geneva. Online at: www.who.int/mediacentre/factsheets/fs357/en.

¹⁴ Görgen, Thomas u.a. (2012): Kriminalitäts- und Gewalterfahrungen im Leben älterer Menschen. Zusammenfassung wesentlicher Ergebnisse einer Studie zu Gefährdungen älterer und pflegebedürftiger Menschen. Berlin: Bundesministerium für Familie, Senioren, Frauen und Jugend. Online at: www.bmfsfj.de/blob/jump/94188/kriminalitaets-und-gewalterfahrungen-aelterer-data.pdf.

¹⁵ Medizinischer Dienst des Spitzenverbandes Bund der Krankenkassen (2017): 5. Pflege-Qualitätsbericht. Essen, p. 10. Online at: www.mds-ev.de/fileadmin/dokumente/Publikationen/SPV/MDS-Qualitaetsberichte/_5_PflegeQualitaetsbericht_des_MDS_Lesezeichen.pdf; ; Zentrum für Qualität in der Pflege (2017): ZQP-Befragung „Gewalt in der stationären Langzeitpflege“. Berlin, pp. 1-2. Online at: www.zqp.de/wp-content/uploads/2017_06_13_AnalyseGewaltStationaerePflege_vf.pdf.

¹⁶ Görgen, Thomas et al. (2012): Kriminalitäts- und Gewalterfahrungen im Leben älterer Menschen. Zusammenfassung wesentlicher Ergebnisse einer Studie zu Gefährdungen älterer und pflegebedürftiger Menschen. Berlin: Bundesministerium für Familie, Senioren, Frauen und Jugend, pp. 38-39. Online at: www.bmfsfj.de/blob/jump/94188/kriminalitaets-und-gewalterfahrungen-aelterer-data.pdf.

¹⁷ Mahler, Claudia (2017): Altersdiskriminierung und das Recht Älterer auf Freiheit von Gewalt, Misshandlung und Vernachlässigung Fachgespräche zur Vorbereitung der 8. Sitzung der UN Open Ended Working Group on Ageing (OEWG-A). Berlin: Deutsches Institut für Menschenrechte, p. 23. Online at: www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Dokumentation/Dokumentation_Fachgespraeche_Rechte_Aelterer.pdf.

complaint since they are afraid of reprisals against their relatives living in a residential care home. Germany does not have a nationwide network of independent complaints mechanisms for violations of rights in care institutions. Professional carers often do not report abuse because whistle-blowers are not sufficiently protected under labour law.¹⁸ Furthermore, there are very few facilities offering protection against violence that meet the needs of older persons in need of care.¹⁹

Proposed questions:

- What preventative measures does Germany intend to take in order to protect older persons against neglect, abuse and violence?
- What options does the Federal Government intend to implement so that older persons in need of care, family members and carers can effectively lodge complaints and report failings?
- What protective mechanisms will be introduced for carers so that they do not run the risk of losing their job because they report shortcomings?

4 Article 9: Protection against arbitrary arrest or detention

Article 12: Right to liberty of movement

Administrative control measures and preventive detention of terrorist suspects

In order to improve security after the terrorist attack on a Berlin Christmas market in December 2016, the Federal Government and some Länder adopted laws in 2017 and 2018 which extended the powers of curtailing the right to liberty of persons deemed by the police to be potential terrorists or to pose a threat to public security (“Gefährder”).²⁰ Thus, similar to an amendment of the Residence Act in 2004 directed at foreign nationals who are deemed to be a threat to public security,²¹ the police, upon receipt of a court order, can also restrict the liberty of movement of German “Gefährder” and impose a ban on social contacts and communication.²² Furthermore, electronic

¹⁸ *ibid.*, p. 23. See also ECHR (2011), *Heinisch v. Germany*, Judgment, 21.07.2011, Application No. 28274/08.

¹⁹ Görge, Thomas u.a. (2012): *Kriminalitäts- und Gewalterfahrungen im Leben älterer Menschen. Zusammenfassung wesentlicher Ergebnisse einer Studie zu Gefährdungen älterer und pflegebedürftiger Menschen*. Berlin: Bundesministerium für Familie, Senioren, Frauen und Jugend, p. 29 and pp. 37-38. Online at: www.bmfsfj.de/blob/jump/94188/kriminalitaets-und-gewalterfahrungen-aelterer-data.pdf.

²⁰ Among others by the Act on the Restructuration of the Act on the Federal Criminal Police Office (*Gesetz zur Neustrukturierung des Bundeskriminalamtgesetzes*) of 01.06.2017. Online at: http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl117s1354.pdf; the Act for the Improved Enforcement of the Obligation to Leave (*Gesetz zur besseren Durchsetzung der Ausreisepflicht*) of 20.07.2017. Online at: www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl117s2780.pdf; and at state level the Bavarian Act for the Effective Surveillance of Dangerous Persons (*Bayerische Gesetz zur effektiveren Überwachung gefährlicher Personen*) of 24.07.2017. Online at: www.verkuendung-bayern.de/gvbl/jahrgang:2017/heftnummer:13/seite:388; or the Act Amending the Police Act Baden-Württemberg (*Baden-Württembergische Gesetz zur Änderung des Polizeigesetzes*) of 15.11.2017. Online at: www.landtag-bw.de/files/live/sites/LTBW/files/dokumente/WP16/Drucksachen/3000/16_3011_D.pdf.

²¹ Section 56 of the Residence Act (*Aufenthaltsgesetz*). Online at: www.gesetze-im-internet.de/aufenthg_2004.

²² See, for example, Section 20y of the Act on the Federal Criminal Police Office and the Cooperation of the Federation and the States in Criminal Police Matters (*Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten*). Online at: www.gesetze-im-internet.de/bkag_1997.

location tracking (“*elektronische Fußfessel*”) can be ordered for the purpose of enforcing such administrative control measures.²³

In addition, several Länder have amended their police acts to extend time limits for police custody (*Polizeigewahrsam*) in order to expand the options for preventive detention.²⁴ Furthermore a legal basis was established so that the instrument of preventive detention after serving criminal sentence (*Sicherungsverwahrung*) can also be applied to “extremist criminals”.²⁵ Moreover, the Residence Act was amended to lower the thresholds for ordering detention pending deportation so that foreigners deemed to pose a security threat can be detained more easily and deported, where possible.²⁶

Proposed questions:

- Since the introduction of powers to restrict and deprive persons who pose a security threat of their liberty, to what extent have they been exercised?
- How does the State Party ensure that the civil liberties enshrined in Articles 9 and 12 are respected?

5 Article 17: Right to privacy

Communications surveillance, international exchange of information and surveillance by intelligence services

As a reaction to Edward Snowden’s revelations on communications surveillance by the NSA and allied intelligence services, the Federal Intelligence Service Act (*Gesetz über den Bundesnachrichtendienst*)²⁷ was amended in December 2016.²⁸ For the first time, this Act provided an explicit legal basis for the surveillance of extraterritorial communication (foreign country to foreign country), also at German communication hubs, and at the same time established a new three-member oversight body (“Independent Body” – *Unabhängiges Gremium*) that is tasked with approving and monitoring this kind of surveillance.²⁹ Nevertheless the lawmaker was of the opinion that communication between foreign citizens abroad is not protected by Art. 10 of the Basic Law (privacy of correspondence, post and telecommunications), so the BND may continue to monitor such communications without significant restrictions. According to the wording of the law, surveillance powers can be used for reasons of national safety but also to “obtain other intelligence on processes being important for

²³ See, for example, Section 20z of the Act on the Federal Criminal Police Office and the Cooperation of the Federation and the States in Criminal Police Matters.

²⁴ For example Bavaria, see Article 17 to 20 of the Bavarian Act on Police Tasks (*Bayerisches Polizeiaufgabengesetz*). Online at: www.gesetze-bayern.de/Content/Document/BayPAG.

²⁵ Act for the Amendment of the Criminal Code – Expanding the Sentencing Guidelines for Extremist Criminals (*Gesetz zur Änderung des Strafgesetzbuches – Ausweitung des Maßregelrechts bei extremistischen Straftätern*) of 11.06.2017. Online at: www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117s1612.pdf.

²⁶ Section 62 of the Residence Act (*Aufenthaltsgesetz*). Online at: www.gesetze-im-internet.de/aufenthg_2004.

²⁷ The Federal Intelligence Service (*Bundesnachrichtendienst*, BND) is the German foreign intelligence agency.

²⁸ Amendment of the BND Act (*BND-Gesetz*) by the Act on Foreign-to-Foreign-Communication Surveillance of the Federal Intelligence Service (*Gesetz zur Ausland-Ausland-Fermmeldeaufklärung des Bundesnachrichtendienstes*) of 23.12.2016. Online at: www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl116s3346.pdf.

²⁹ Sections 6 to 18 of the BND Act. Online at: www.gesetze-im-internet.de/bndg.

foreign and security policy”, that are laid down in the BND mission profile by six federal ministries.³⁰

The law also provides for close cooperation with foreign intelligence agencies in joint surveillance projects.³¹ Such projects are subject only to random, ex post facto checks by the Independent Board, which has to check whether the electronic filter programmes actually warrant that no communication data end up abroad illegally.³² The automation of information exchange by means of establishing joint databases shared by the BND with foreign partners was also legalised.³³ The Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*, the federal domestic intelligence agency) was already authorised by law in the summer of 2016 to establish such international databases the exchange of information among intelligence agencies.³⁴ Since then the Federal Office has been involved in the operation of a joint database of the “Counter Terrorism Group”, a network of European intelligence agencies and security services which is run from The Hague under the umbrella of the Dutch intelligence agency AIVD.³⁵

International surveillance networks and the automated exchange of information require effective oversight. Although the administrative organisation of the various supervisory bodies has been strengthened in recent years, the Federal Data Protection Commissioner has complained that staff shortages make it difficult to effectively oversee the security authorities.³⁶ In addition, the supervision of international cooperation projects is limited by the executive branch of government with reference to the “third party rule” and national security clauses, and none of the supervisory bodies has access to the activities of German intelligence agencies abroad.³⁷

Proposed questions:

- How far does the State Party consider the unequal treatment of German nationals and foreigners in regard to communication surveillance according to the BND Act to be compatible with the International Covenant on Civil and Political Rights?

³⁰ Section 6 Para. 1 No. 3 of the BND Act.

³¹ Sections 13 to 15 of the BND Act.

³² Section 15 Para. 3 of the BND Act.

³³ Sections 26 to 30 of the BND Act.

³⁴ Amendment of the Federal Act on the Protection of the Constitution (*Bundesverfassungsschutzgesetzes*) (here Sections 22b and 22c) by the Act for Improved Information Exchange in Combating International Terrorism (*Gesetz zum besseren Informationsaustausch bei der Bekämpfung des internationalen Terrorismus*) of 26.07.2016. Online at: www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl116s1818.pdf.

³⁵ Deutscher Bundestag (2016): Geheimhaltung wesentlicher Informationen zu einem als operative Plattform bezeichneten europäischen Geheimdienstzentrum in Den Haag. Drucksache 18/9323, 03.08.2016. Online at: <http://dipbt.bundestag.de/doc/btd/18/093/1809323.pdf>.

³⁶ Die Bundesbeauftragte für den Datenschutz und die Informationsfreiheit (2017): 26. Tätigkeitsbericht zum Datenschutz für die Jahre 2015 und 2016. Bonn, p. 39. Online at: www.bfdi.bund.de/SharedDocs/Publikationen/Taetigkeitsberichte/TB_BfDI/26TB_15_16.pdf?__blob=publicationFile&v=3.

³⁷ For the Parliamentary Control Panel (*Parlamentarisches Kontrollgremium*) see: Section 6 Para. 1 of the Act on the Parliamentary Control of the Intelligence Activities of the Federation (*Gesetz über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes*). Online at: www.gesetze-im-internet.de/pkgrg. For the Federal Data Protection Commissioner see: Die Bundesbeauftragte für den Datenschutz und die Informationsfreiheit (2017): 26. Tätigkeitsbericht zum Datenschutz für die Jahre 2015 und 2016. Bonn, p. 114. Online at: www.bfdi.bund.de/SharedDocs/Publikationen/Taetigkeitsberichte/TB_BfDI/26TB_15_16.pdf?__blob=publicationFile&v=3.

- What resources are available to the Independent Body (“Unabhängiges Gremium”) for the oversight of the BND’s actual surveillance practice, apart from its approval activities, and how often are the corresponding ex post facto random checks carried out by the Body?
- In legal and practical terms, how does the State Party ensure that the international cooperation of Germany’s intelligence services with foreign partner services is supervised effectively by independent oversight?

6 Article 17: Right to family life

Regulations on family reunification

In Germany the right to allow members of the core family to be joined by persons with subsidiary protection status was suspended for two years, from March 2016 to March 2018. Beneficiaries of subsidiary protection status are people who, during the asylum procedure, have been identified as being at risk of torture, the death penalty or a serious risk to life and limb due to an armed conflict in their country of origin. In practice, the amendment to the law affects people who have fled from Syria.

Shortly before the suspension of the right to family reunification expired in March 2018, it was extended again to 31 July 2018.³⁸ Without any legal entitlement, from 1 August 2018, spouses, underage children and parents of underage children are to be granted residence permits on humanitarian grounds until the number reaches 1,000 per month. This regulation is to be further specified in a federal law still to be passed. Furthermore, in individual cases people may be given a residence permit when applying for entry from abroad,³⁹ whereby the rule of the right to a family life will not be material. In practical terms, the Federal Foreign Office will only issue a visa allowing them to join their family in exceptional circumstances and where they face a specific threat.⁴⁰

The number of people who had a right to join their families and who were affected by the suspension of this right from March 2016 to March 2018 was the subject of controversial debate. However, the numbers were in fact significantly lower than was often represented in the debate. According to a study published in October 2017 by the Institute for Labour Market and Occupational Research,⁴¹ for each refugee there are on average 0.28 persons entitled to join them (core family), for refugees from Syria

³⁸ Sections 104 Para. 13 of the Residence Act (*Aufenthaltsgesetz*). Online at: www.gesetze-im-internet.de/aufenthg_2004; Deutscher Bundestag (2018): Entwurf eines Gesetzes zur Verlängerung der Aussetzung des Familiennachzugs zu subsidiär Schutzberechtigten. Drucksache 19/439, 16.01.2018. Online at: <http://dipbt.bundestag.de/doc/btd/19/004/1900439.pdf>; Deutscher Bundestag (2018): Beschlussempfehlung des Hauptausschusses. Drucksache 19/586, 30.01.2018. Online at: <http://dipbt.bundestag.de/doc/btd/19/005/1900586.pdf>; Deutscher Bundestag (2018): Bericht des Hauptausschusses. Drucksache 19/595, 31.01.2018. Online at: <http://dipbt.bundestag.de/doc/btd/19/005/1900595.pdf>.

³⁹ Section 22 Sentence 1 of the Residence Act (*Aufenthaltsgesetz*).

³⁹ Section 22 Sentence 1 of the Residence Act (*Aufenthaltsgesetz*).

⁴⁰ See Informationsverbund Asyl & Migration: Besondere Erteilungsvoraussetzungen beim Nachzug bestimmter Familienangehöriger. Online at: <https://familie.asyl.net/ausserhalb-europas/besondere-erteilungsvoraussetzungen>.

⁴¹ Brücker, Herbert (2017): Familiennachzug, 150.000 bis 180.000 Ehepartner und Kinder von Geflüchteten mit Schutzstatus leben im Ausland. In: IAB Forum. 19.10.2017. Online at: <https://www.iab-forum.de/familiennachzug-150-000-bis-180-000-ehepartner-und-kinder-von-gefluechteten-mit-schutzstatus-leben-im-ausland/?pdf=5323>.

the figure is 0.34 persons. The application of these factors would have meant around 85,000 family members authorised to join their core family member in Germany.⁴²

The suspension in March 2016 of the right to family reunification and the subsequent quota limitation from August 2018 onwards means that some of those affected will have to wait for a number of years before they can join their family members, with all the attendant uncertainties. Many people will not be able to claim this right because minors will have come of age during the waiting time of several years. The legal amendments for minors who have come of age since March 2016 mean that they will not be able to reunite with their parents.

Going beyond the legal suspension of the right to family reunification for persons with subsidiary protection status, it can be observed that in the case of unaccompanied minors who are recognised as refugees according to the Geneva Refugee Convention, the practice is being handled significantly more restrictively. Their underage siblings are increasingly being rejected for entry to Germany with their parents. For example, it can happen that the parents of a 16 year old who fled Syria are given a visa, but the younger siblings are not.⁴³

Proposed questions:

- When will the quota restrictions on family reunification for those with subsidiary protection status end?
- What is Germany's interpretation of the term 'family' in the International Covenant on Civil and Political Rights?
- How does Germany explain the fact that underage siblings are not allowed to join recognised unaccompanied underage refugees?

7 Article 23 para. 1 and 3: Right to protection of the family and respect of consent to marriage

Protection of children and young people affected by child marriage

In June 2017, the "Act to Combat Child Marriage" (*Gesetz zur Bekämpfung von Kinderehen*) was adopted.⁴⁴ The law was adopted in particular with regard to married minors who have fled to Germany. It declares all marriages legally concluded abroad involving at least one person under 16 years of age to be retroactively invalid under the law (law of nullification). A hearing and examination of individual cases based on

⁴² See also: Deutsches Institut für Menschenrechte (2018): Stellungnahme zur öffentlichen Anhörung am Montag, dem 29. Januar 2018, 9 Uhr im Hauptausschuss des Deutschen Bundestags zum Familiennachzug. Berlin, p. 8 f. Online at: www.bundestag.de/blob/540484/f5f829c84a0c526355ab7c47e9630e3d/dr--hendrik-cremer-data.pdf.

⁴³ UNHCR Deutschland (2017): Familienzusammenführung – rechtliche Probleme und deren Auswirkungen. In: *Asylmagazin*. 4/2017. pp. 132 and following; Cremer, Hendrik (2017): Das Recht auf Familie für unbegleitete Minderjährige: Eltern dürfen nachziehen – Geschwister nicht? In: *Zeitschrift für Ausländerrecht und Ausländerpolitik*. 8/2017, pp. 312 and following.

⁴⁴ Act to Combat Child Marriages (Gesetz zur Bekämpfung von Kinderehen) of 17.07.2017. Online at: www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117s2429.pdf

⁴⁴ Act to Combat Child Marriages (Gesetz zur Bekämpfung von Kinderehen) of 17.07.2017. Online at: www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117s2429.pdf

the best interests of the child are not provided for in this case group. However, marriages of 16 to 18 year-olds (with each other or with an adult) can only be legally annulled after a judicial proceeding where cases are examined on an individual basis. In such cases it is possible to examine whether, based on the best interests of the child, the marriage and the family started thereby are to be maintained. Since the law of nullification generally and retroactively voids marriages of persons who, at the time of the marriage, were younger than 16 years, any children of such marriages are considered illegitimate under the law, which – depending on the cultural background – can result in their stigmatisation.

The automatic invalidity of marriages involving a person under 16 years can lead to problems for that person on returning to their home country or when travelling to a third country. In these countries they are still considered married, since no formal annulment proceedings have taken place in Germany. Without a verdict by a court of law, which only happens when a marriage is annulled, no legal act exists which is recognised by the new host country or home country. This means that the person involved is kept in a marriage which was concluded without their free consent and where it was not ascertained whether the family so created ensures the best interests of the child.

Proposed questions:

- How is the general rule putting children under 16 years of age in a worse position due to the legal consequences of the Law to Combat Child Marriage, without his or her best interests taken as a primary consideration, compatible with their fundamental human rights to the protection of the family and the respect of their will without the possibility of considering their best interests in individual cases?
- What specific steps are being taken to ensure the protection of children and young people following the annulment or invalidity of their marriage?

8 Article 24 para. 2: Obligation to register a birth

Registration of the birth of children born in Germany to refugee parents without sufficient proof of identity

The registration of a new-born child is of prime importance so that the child can exercise its rights. Problems occur when registering children born in Germany whose parents are not able to present satisfactory proof of identity (for example, birth and marriage certificates and identity cards)⁴⁵. The German Institute for Human Rights has received reports from Berlin, Munich and Stuttgart on this issue. It was alerted to the problem by the Berlin Association of Midwives (*Berliner Hebammenverband*), the German Academy for Paediatrics and Adolescent Medicine (*Deutsche Akademie für Kinder- und Jugendmedizin*) and registered paediatricians. Reports state that children are not given a birth certificate, but only an extract from the register of births with a qualifying comment on the identity of the parents or only written confirmation that the birth was reported to the registry office. Records of civil status and registration in civil

⁴⁵ Section 33 of the Regulation for the Implementation of the Personal Statute Act (*Verordnung zur Ausführung des Personenstandsgesetzes*). Online at: www.gesetze-im-internet.de/pstv.

registers are in fact equivalent; however, reports have been received that registry offices have reservations about certified extracts from the civil registry. Furthermore, it is reported that not all authorities who require birth certificates to be presented for registration or for benefit applications recognise these substitute certificates. This means that the children in question cannot exercise all their rights and claim the benefits to which they are entitled.

There are still no exact figures on how many children born in Germany do not have a birth certificate.

Proposed questions:

- What steps will be taken to ensure that registering a birth is possible for all children as soon as possible, regardless of their legal status or the origin of their parents?

9 Article 25: Right to vote

Right to vote for persons with disabilities

In its consideration of state reports, the Human Rights Committee consistently calls on State Parties to ensure that “electoral legislation does not discriminate against persons with intellectual and psychosocial disabilities by denying them the right to vote on bases that are disproportionate or that have no reasonable or objective relation to their ability to vote”.⁴⁶

Germany has two types of exclusion from electoral rights which the German Institute for Human Rights considers discrimination based on disability within the meaning of the International Covenant on Civil and Political Rights. These two types of exclusion affect around 81,000 people across Germany who have a civil-law guardian appointed for all matters (Art 13 Para. 2 Federal Electoral Act (*Bundeswahlgesetz*), and around 3,300 who committed a crime while in a state of diminished responsibility and who, because of the potential threat they pose, have been placed in a psychiatric hospital (Art. 13 Para. 3 Federal Electoral Law).⁴⁷ Both exclusion scenarios are linked to individual court findings, but the latter refer to other factual issues and, as confirmed by an investigation carried out on behalf of the Federal Government, do not constitute a valid basis to presume the ability of the affected persons to make a voting decision.⁴⁸

⁴⁶ See: Human Rights Committee (2017): Concluding observations on the sixth periodic report of Australia. CCPR/C/AUS/CO/6, 01.12.2017, para. 48; Human Rights Committee (2016): Concluding observations on the seventh periodic report of Poland. CCPR/C/POL/CO/7, 23.11.2016, para. 42.

⁴⁷ Bundesministerium für Arbeit und Soziales (2016): Studie zum aktiven und passiven Wahlrecht von Menschen mit Behinderungen (Forschungsbericht 470), Berlin, p. 46. Online at: www.bmas.de/DE/Service/Medien/Publikationen/Forschungsberichte/Forschungsberichte-Teilhaber/fb470-wahlrecht.html.

⁴⁷ Bundesministerium für Arbeit und Soziales (2016): Studie zum aktiven und passiven Wahlrecht von Menschen mit Behinderungen (Forschungsbericht 470), Berlin, p. 46. Online at: www.bmas.de/DE/Service/Medien/Publikationen/Forschungsberichte/Forschungsberichte-Teilhaber/fb470-wahlrecht.html.

⁴⁸ A survey conducted in the context of the clinical-psychological part of the study on the active and passive right to vote of persons with disabilities (Fn. 47) showed that for the group falling under Section 13 No. 2 of the Federal Electoral Act (*Bundeswahlgesetz*) a permanent supervisory relationship “does not necessarily mean a basic inability to make complex rational decisions”, and that for the group falling under Section 13 No. 3 of the Federal Electoral Act more than 80 percent of the interviewed were “without reasonable doubt regularly capable to make rational and complex decisions”; see: *ibid.* pp. 116-117.

In 2015, the CRPD Committee confirmed the opinion of the German Institute for Human Rights. In its Concluding Observations on Germany⁴⁹ the Committee expressed its concern “about the exclusion of persons with disabilities from the electoral rights stipulated in section 13 (2–3) of the Federal Electoral Act and equivalent Land legislation”⁵⁰, as, in the Committee’s view, this exclusion is discriminatory in nature and amounts to a violation of Art. 29 CRPD. The CRPD Committee recommended to Germany “that the State party repeal all laws and regulations that deprive persons with disabilities of the right to vote, as well as reduce barriers and put in place appropriate support mechanisms”.⁵¹

During the previous parliamentary term the Federal Government declared repeatedly that there will be no general testing of voter competence of people who have reached the legal voting age. Nevertheless the Federal Government continues to adhere to the forms of exclusion mentioned here, citing the argument that this is intended to exclude only those who are fully incapable of making any decision, and justifies this with an increased risk of abuse. However, the court decisions which initiate such exclusion do not allow any inferences to be drawn on whether the person is generally incapable of making a decision or not since they refer to other factual issues. Furthermore, the Federal Government has been unable so far to explain why the problem of abuse weighs so heavily in this group as to make it necessary to exclude them from their electoral rights in order to ensure elections are conducted properly, while a considerable risk of abuse in the case of the much larger number of postal votes is very much accepted, although the same penalties under criminal law apply to misuse in both scenarios.

With regard to the issues described here, identical exclusions from electoral rights were rescinded in three Länder in 2016.⁵² However, most Länder are waiting to see what happens at the federal level.

At the federal level, in its coalition agreement of March 2018 the new coalition government has announced the following for the current parliamentary term: “We will end the exclusion from electoral rights of people supported by plenary guardianship. We recommend that the Bundestag implement this matter correspondingly in its deliberations on amendments to the right to vote.”⁵³ However, this means that only one of the problematic reasons for exclusion will be addressed. Furthermore, no sense of urgency can be found in the coalition agreement. Should the coalition agreement only be implemented towards the end of the parliamentary term, the consequence would be that several elections to the Landtage (state parliaments) would still be carried out with these people being excluded, due to the wait-and-see attitude of the Länder until a change is brought about at the federal level, and before the relevant laws on Landtag elections are adapted.

⁴⁹ Deutschland ratified the CRPD in 2009.

⁵⁰ Committee on the Rights of Persons with Disabilities (2015): Concluding observations on the initial report of Germany. CRPD/C/DEU/CO/1, 13.05.2015, para. 53.

⁵¹ *ibid.*, para. 54.

⁵² North Rhine Westphalia (2016), Schleswig Holstein (2016), Bremen (2018).

⁵³ CDU, CSU und SPD (2018): Ein neuer Aufbruch für Europa - Eine neue Dynamik für Deutschland. Koalitionsvertrag zwischen CDU, CSU und SPD für die 19. Legislaturperiode, p. 95. Online at: https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1.

⁵³ CDU, CSU und SPD (2018): Ein neuer Aufbruch für Europa - Eine neue Dynamik für Deutschland. Koalitionsvertrag zwischen CDU, CSU und SPD für die 19. Legislaturperiode, p. 95. Online at: https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1.

Proposed questions

- To what extent do court decisions which provoke an exclusion from electoral rights provide a legally admissible statement on the person-in-question's inability to make decisions?
- Does the Federal Government continue to be of the opinion that the existing types of exclusion from electoral rights are absolutely essential for the elections to the Bundestag, insofar as they exclude persons with disabilities from electoral rights, in order to ensure that the elections to the Bundestag are conducted properly, and if so, why?

10 Article 2 and 26: Prohibition of discrimination

Discrimination in the housing market

In its Concluding Observations of 2012, the Committee expressed its concern with regard to the consistency of section 19 para. 3 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG) with the provisions of the International Covenant on Civil and Political Rights. In the view of the Committee section 19 para. 3 of the General Equal Treatment Act should be reworded to clarify that the provision does not grant any room to exclude people due to their (alleged) ethnic origin or migration background by private actors in the housing market.⁵⁴

Since the last review by the Committee various stakeholders have criticised section 19 para. 3 of the General Equal Treatment Act. In 2015, the CERD Committee repeated its recommendation to delete the provision.⁵⁵ An evaluation of the General Equal Treatment Act commissioned by the Federal Anti-Discrimination Agency and published in 2016 recommends that the legislature should remove the provisions of section 19 para. 3 of the General Equal Treatment Act, at least with regard to the characteristics of “race” and ethnic origin.⁵⁶ According to this evaluation, removal is the only way to ensure conformity with European Union law.⁵⁷ Actors from civil society have also severely criticised the clause in past years.⁵⁸

To date Germany has not followed the recommendation of the Committee; section 19 para. 3 of the General Equal Treatment Act remains in force. It is difficult to say to what extent, in practice, the clause has led to the justification of unequal treatment based on (alleged) ethnic origin. The main reason is the lack of research and figures/statistics on the subject of discrimination in the housing market.

⁵⁴ Human Rights Committee (2012): Concluding observations on the sixth periodic report of Germany, adopted by the Committee at its 106th session (15 October - 2 November 2012). CCPR/C/DEU/CO/6, para. 16.

⁵⁵ Committee on the Elimination of Racial Discrimination (2015): Concluding observations on the combined nineteenth to twenty-second periodic reports of Germany, CERD/C/DEU/CO/19-22, para. 12.

⁵⁶ Berghahn; Sabine; Klapp, Micha; Tischbirek, Alexander (2016): Evaluation des AGG, erstellt im Auftrag der Antidiskriminierungsstelle des Bundes, 2016, p. 114. Online at: www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/AGG_Evaluation.pdf?__blob=publicationFile&v=15.

⁵⁷ See EU Directive 2000/43/EC.

⁵⁸ See, for example, Diakonie Deutschland – Evangelischer Bundesverband (2015): Rassistische Diskriminierung in Deutschland. Parallelbericht an den UN-Antirassismusausschuss zum 19. – 22. Bericht der Bundesrepublik Deutschland, p. 24. Online at: www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/ICERD/icerd_state_report_germany_19-22_2013_parallel_FMR_Diakonie_2015_de.pdf.

Proposed questions:

- How many cases of discrimination based on the alleged ethnic origin in access to the housing market are known to the State Party since the Committee's last review?
- What steps has Germany taken to prevent or correct the discriminatory application of section 19 para. 3 of the General Equal Treatment Act by private actors in the housing market?
- Is the Federal Government planning to amend or rescind section 19 para. 3 of the General Equal Treatment Act in accordance with the recommendations of the Human Rights Committee and the CERD Committee during the current (19th) legislative period?

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The Institute

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