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Federal Office  
for Migration  
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# The role of migration authorities in handling third-country nationals who constitute a threat to public security in Germany

Study by the German National Contact Point  
for the European Migration Network (EMN)

Working Paper 86

Friederike Haberstroh

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for the European Migration Network (EMN)

Friederike Haberstroh

# The European Migration Network

The European Migration Network (EMN) was launched by the European Commission in 2003 due to an initiative of the European Council in order to satisfy the need of a regular exchange of reliable information in the field of migration and asylum at the European level. Since 2008, Council Decision 2008/381/EC forms the permanent legal basis of the EMN and National Contact Points have been established in the EU Member States (with the exception of Denmark, which has observer status) plus Norway.

The EMN's role is to meet the information needs of European Union institutions, Member States' authorities and institutions as well as the wider public by providing up-to-date, objective, reliable and comparable information on migration and asylum, with a view to supporting policymaking in these areas. The National Contact Point for Germany is located at the Federal Office for Migration and Refugees in Nuremberg. Its main task is to implement the annual work programme of the EMN. This includes the drafting of the annual policy report "Migration, Integration, Asylum" and of up to four topic specific studies, as well as answering Ad-Hoc Queries launched by other National Contact Points or the European Commission. The German National Contact Point also carries out visibility activities and networking in several forums, e.g. through the organisation of conferences or the participation in conferences in Germany and abroad. Furthermore, the National Contact Points in each country set up national networks consisting of organisations, institutions and individuals working in the field of migration and asylum.

In general, the National Contact Points do not conduct primary research but collect, analyse and present existing data. Exceptions might occur when existing data and information are not sufficient. EMN studies are elaborated in accordance with uniform specifications valid for all EU Member States plus Norway in order to achieve comparable EU-wide results. Furthermore, the EMN has produced a Glossary, which ensures the application of comparable terms and definitions in all national reports and is available on the national and international EMN websites.

Upon completion of national reports, the European Commission drafts a synthesis report with the support of a service provider. This report summarises the most significant results of the individual national reports. In addition, topic-based policy briefs, so-called EMN Informs, are produced in order to present and compare selected topics in a concise manner. The EMN Bulletin, which is published quarterly, informs about current developments in the EU and the Member States. With the work programme of 2014, the Return Expert Group (REG) was created to address issues around voluntary return, reintegration and forced return.

All EMN publications are available on the website of the European Commission Directorate-General for Migration and Home Affairs. The national studies of the German National Contact Point as well as the synthesis reports, Informs and the Glossary are also available on the national website: [www.emn-germany.de](http://www.emn-germany.de).



# Summary

In response to the Islamist terrorist attacks in various cities, including Paris (2015), Brussels (2016), Nice (2016), Berlin (2016) and London (2017), the security debate in the European Union (EU), including Germany, focused primarily on measures to combat Islamist radicalisation and violent extremism. The fact that some of the persons who carried out attacks were third-country nationals directed attention to measures aimed at this category of people. In Germany, following the terrorist attack on a Christmas market in Berlin on 19 December 2016, operational measures were undertaken concerning cooperation between relevant authorities, as well as restrictive measures under residence law.

The migration authorities – that is, the Federal Office for Migration and Refugees and the foreigners authorities – perform various functions relating to third-country nationals who constitute a threat to public security. The Federal Office for Migration and Refugees is assigned a coordinating role with regard to the transfer of information and the evaluation of security-related intelligence between the security services and the migration authorities. In this capacity, the Federal Office for Migration and Refugees has overall charge of the working group ‘Status-Related Accompanying Measures’ at the Joint Counter-Terrorism Centre (Gemeinsames Terrorismusabwehrzentrum, GTAZ), for example. In this working group, lines of action relating to measures under the law on foreigners, asylum and nationality against persons with an Islamist terrorist background are discussed.

The Federal Government supports various projects to prevent extremism and promote democracy. The Federal Office for Migration and Refugees is also active in the field of preventive work, with its “Radicalisation” counselling centre offering advice for people who fear that someone they know is undergoing Islamist radicalisation. The German authorities pursue an overall approach combining both repressive and preventive measures against extremism.

The migration authorities and security services pursue various residence-related and residence-terminating measures against third-country nationals who constitute a threat to public security, the security of the Federal Republic of Germany or the free democratic basic order. These include non-extension of the resi-

dence permit, withdrawal and revocation of the residence permit and the protection status, return, location monitoring, the prohibition and restriction of political activities and bans on entry into and residence in the federal territory. The competent authorities face major legal challenges above all with regard to residence-terminating measures. Such challenges apply where no travel documents are available or where there are concerns that the person concerned could be tortured in the country of destination on account of the grounds for their removal.

Information sharing between different authorities and actors in Germany has proven effective in recent years as a result of its ongoing development and institutionalisation. To date, there is no comparable communication and coordination platform at European level enabling communication between the migration authorities and the security services. Information sharing between Germany and other EU Member States on security-related aspects in connection with third-country nationals takes place on a bilateral basis. In the ongoing course of development of the Schengen Information System (SIS) it is intended to establish a database, however, which will make asylum-related decisions accessible at European level from 2022 and also open up access to residence-related decisions in some areas.

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# 1 Introduction

Following the Islamist terrorist attacks in various cities, including Paris (2015), Brussels (2016), Nice (2016), Berlin (2016) and London (2017), the security debate in the European Union (EU), including Germany, shifted its focus to measures to counter Islamist radicalisation and violent extremism. The fact that some of the attacks were perpetrated by third-country nationals directed attention to measures aimed at this category of people. In Germany, for example, following the terrorist attack on a Christmas market at Breitscheidplatz in Berlin on 19 December 2016, operational measures were undertaken aimed at improving cooperation between relevant authorities, as well as various restrictive measures under residence law (Chapter 2.3 and Chapter 5.4).

Despite the focus of security policy on Islamist third-country nationals, radicalisation and extremism are neither a specifically religious phenomenon, neither do they represent a problem which is specific to third-country nationals<sup>1</sup> (Koser/Cunningham 2017). Numerous Germans are also associated with the Islamist spectrum, for example, in addition to which a distinction needs to be made between different categories of extremism (right-wing extremism, left-wing extremism and Islamist terrorism, for example).

The fact that the main focus of this study is nevertheless on third-country nationals and the role of the migration authorities is attributable to two reasons: Firstly, specific influencing factors can play a role in the radicalisation of third-country nationals. In addition to factors unrelated to someone's origins, such as the social environment and economic conditions, these can be identity conflicts, experience of discrimination, cultural marginalisation and influences from the country of origin. These factors can make certain persons susceptible to approaches by extremist groups (Gafarova 2018: 1). Secondly, with regard to third-country nationals the migration authorities can play an important role in the fields of identification and prevention which does not apply in the case of German extremists. With regard to measures to ensure public

security, the provisions of the law on residence provide the relevant authorities with different options that apply to German nationals or nationals of the European Union (EU). Residence-terminating measures can be taken in certain circumstances, for example, and the migration authorities play an important role here. This study thus examines the specific role of the migration authorities with regard to third-country nationals who constitute a threat to public security. The security services' scope of tasks are consequently not part of the study. The focus of the study is on third-country nationals who are legally residing in Germany. The purview of this study does not extend to persons who are irregularly resident in Germany and asylum seekers who are undergoing the asylum procedure.

The Federal Office for Migration and Refugees and the foreigners authorities play a particularly important role in this context – in establishing security-related findings and intelligence and cooperation with the security services (Chapter 3.1), in prevention and deradicalisation work (Chapter 4), in implementing measures under residence law (Chapter 5) and in the field of cooperation with other EU Member States (Chapter 6), for example.

The regulatory and organisational framework underlying the individual measures in dealing with third-country nationals who constitute a threat to public security is regulated by numerous laws, ordinances, regulations, decrees and directives at Land and federal level. This framework is also increasingly influenced by EU Directives and Regulations.

This study has been drawn up within the context of the European Migration Network (EMN).

<sup>1</sup> The Schengen Borders Code defines third-country nationals as all persons who are not nationals of an EU Member State, a Member State of the European Economic Area (EEA) or Switzerland.

## Sources

In addition to the legal and organisational terms of reference and the latest developments in the policy field, numerous sources were employed for the purposes of this study. The most important sources are legal texts and administrative regulations on the law as applies to foreigners and residence and answers from the Federal Government to questions submitted in the Bundestag. Additional data were gathered from statistical reports of the Federal Statistical Office, Eurostat and the Federal Ministry of the Interior. Further information was obtained directly from the competent authorities (Federal Office for Migration and Refugees, Federal Criminal Police Office). Reference was also made to national and international studies and newspaper reports.

## 2 Threat to public security: national context and definitions

Discussion on the topic of threats to public security in Germany involves a number of terms which are commonly and sometimes interchangeably employed in public debates and media reports, but which actually require to be distinguished, as they encompass quite distinct aspects, at least in terms of legal and security considerations. The relevant key terms are thus defined below (Chapter 2.1) to facilitate an understanding of the spheres of activity and authorisation pertaining to the respective individuals and authorities involved. This study focuses on the functions of the migration authorities<sup>2</sup> in connection with third-country nationals who hold a residence permit<sup>3</sup> and constitute a threat to public security and order. Consequently, the study refers primarily to provisions which apply under the law on foreigners. In addition, statistics are presented both on politically motivated crime (PMC) and on potential offenders and persons of interest (Chapter 2.2). This chapter also introduces the political debate in Germany on the topic of threats to public security, particularly in connection with third-country nationals (Chapter 2.3). In recent years, this debate has centred first and foremost on the threat posed by Islamist terrorism.

### 2.1 Terms and definitions

Legal texts commonly cite public security and order, the security of the Federal Republic of Germany and the free democratic basic order. The terms “public order” and “public security” are derived from general police law (Federal Police Act)<sup>4</sup> and the Länder laws on

police duties. The term “security of the Federal Republic of Germany” is to be found in the penal code (Strafgesetzbuch) and the term “free democratic basic order” is employed in the Basic Law (Grundgesetz). Other European Member States also use the term “national security”, which constitutes a sub-category of public security. “National security” is not defined in German police law, however. The EU acquis also refers to the concept of public security, rather than national security.

#### 2.1.1 Public order

The Federal Constitutional Court defines “public order” as “the collective body of unwritten rules which, according to the prevailing social and ethical tenets, is considered imperative for orderly human co-existence within a certain region” (Federal Constitutional Court, ruling of 14 May 1985<sup>5</sup>). As this definition by the Federal Constitutional Court shows, the term is vague and thus requires interpretation. In conjunction with the Residence Act,<sup>6</sup> the concept of public order is to be “understood within the meaning of police and regulatory law” (55.1.1.1 of the General Administrative Regulation to the Residence Act).

#### 2.1.2 Public security

The concept of “public security”, which is central to this study, is “open and in need of interpretation”, and in the German context is also derived from police law (Gusy/Worms 2019: § 1 PolG NRW, marginal note 47). “Public security is the inviolability of the objective legal system, the subjective rights and legal interests of the individual and the institutions and functions of the state and other holders of public authority” (55.1.1.1 of the General Administrative Regulation to the Residence Act). The Residence Act employs the

<sup>2</sup> Migration authorities in the context of this study are those authorities which are responsible for the issuance, withdrawal and revocation of residence permits for third-country nationals and decisions to repatriate such persons, that is, the Federal Office for Migration and Refugees and the foreigners authorities.

<sup>3</sup> For the purposes of this study, a residence permit is any permit issued by the authorities of an EU Member State which entitles a third-country national to lawfully reside in the territories of the EU Member State concerned for at least three months. As such, the scope of this study does not include persons who hold permission to remain pending an asylum decision or for whom a suspension of removal applies.

<sup>4</sup> German: Gesetz über die Bundespolizei (BPolG).

<sup>5</sup> Federal Constitutional Court, ruling of 14 May 1985 – 1 BvR 233/81, 341/81 – NJW 1985, 2395 <2398>.

<sup>6</sup> German: Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländerinnen und Ausländern im Bundesgebiet.

combined concept of “public security and order” with regard to third-country nationals who constitute a threat<sup>7</sup>.

This study primarily employs the concept of public security as, in contrast to public order, this clearly relates to the security of the legal system and the governmental institutions and is at the same time defined in broad terms, with due regard to the scale of the threat involved. Where other concepts of security (the security of the Federal Republic, for example) are employed in the following study and in the relevant legal texts, this is indicated accordingly.

### 2.1.3 Security of the Federal Republic of Germany

According to the Federal Administrative Court, the term “security of the Federal Republic of Germany” refers to both internal and external security for the purposes of the continued existence and the “effective functioning of the state and its institutions” (Section 92 subs. 3 no. 2 of the Penal Code; Federal Administrative Court ruling of 15 March 2005<sup>8</sup>). The term “security of the Federal Republic of Germany” also occurs in the Residence Act in connection with more restrictive measures pertaining to the residence of third-country nationals who constitute a threat (the removal order pursuant to Section 58a of the Residence Act, for example<sup>9</sup>)<sup>10</sup>. The security of the Federal Republic of Germany is to be understood as a more narrowly defined concept than public security. As such, not every “encroachment of public security” resulting from a

breach of law also constitutes a “threat to ‘internal security’” (54.2.2.2 of the General Administrative Regulation to the Residence Act).

#### 2.1.4 Free democratic basic order

The “free democratic basic order pursuant to Art. 21 paragraph 2 of the Basic Law is an order which represents a constitutional system of rule which, to the exclusion of any form of violence and arbitrary rule, is based on the self-determination of the people and in accordance with the will of the prevailing majority and founded on freedom and equality” (Federal Constitutional Court, judgement of 23 October 1952<sup>11</sup>). This comprises:

- the respect of human rights, in particular the individual’s right to life and the free development of one’s personality,
- the sovereignty of the people,
- the separation of powers,
- the responsibility of the government,
- the conformity of the administration to the law,
- the independence of the courts,
- the multi-party system,
- and “equality of opportunity for all political parties, with the right to form and pursue an opposition” (Federal Constitutional Court, judgement of 23 October 1952).

As such, the free democratic basic order is a more comprehensive concept than the other security concepts and incorporates the essential characteristics of democracy and the constitutional state. According to the Federal Constitutional Court, the Basic Law thus champions a “disputatious democracy” and thus also enables the prohibition of political parties, for example (Federal Constitutional Court, judgement of 17 August 1956<sup>12</sup>).

In the Residence Act, the concept of the “free democratic order” is cited primarily in connection with more restrictive measures relating to residence issues (the prohibition rather than the restriction of political acti-

7 With regard to application of the combined concept in the Residence Act, see Section 11 subs. 2 and 5 (Ban on entry and residence), Section 27 subs. 3a no. 4 (Family reunification), Section 47 subs. 1 no. 1 (Prohibition and restriction of political activities), Section 53 subs. 1 and 3 (Expulsion), Section 54 subs. 1 no. 5 (Interest in expulsion), Section 56 subs. 1 no. 2 (Monitoring for internal security reasons of foreigners required to leave the country) or Section 59 subs. 7 no. 1 (Removal warning) of the Residence Act.

8 Federal Administrative Court, ruling of 15 March 2005 – 1 C 26.03 [ECLI:DE:BVerwG:2005:150305U1C26.03.0] – NVwZ 2005, 1091 <1092>.

9 “The removal order [...] comprises both expulsion and the enforcement order and also entails the imposition of detention to prepare removal, where removal cannot be effected immediately [...]. It is an exceptional provision to address special dangers” (Hoffmeyer-Zlotnik 2017: 19).

10 With regard to application of the term in the Residence Act, see Section 11 subs. 5a (Ban on entry and residence), Section 25 subs. 3 no. 4 (Residence on humanitarian grounds), Section 27 subs. 3a no. 1 (Principles pertaining to the subsequent immigration of dependents), Section 47 subs. 2 no. 1 (Prohibition and restriction of political activities), Section 53 subs. 3a and 3b (Expulsion), Section 54 subs. 1 no. 2 and subs. 2 no. 7 (Interest in expulsion), Section 58a subs. 1 (Removal order), Section 60 subs. 8 (Prohibition of deportation) of the Residence Act.

11 Federal Administrative Court, judgement of 23 October 1952 – 1 BvB 1/51 – NJW 1592, 1407 <1407>.

12 Federal Administrative Court, judgement of 17 August 1956 – 1 BvB 2/51 – NJW 1956, 1393 <1397>.

vities, for example – Section 47 subs. 2 no. 1 of the Residence Act).<sup>13</sup>

### 2.1.5 Threat to public security and order

A “threat” is generally defined in police law as a situation “in which there is a sufficient likelihood that an object of legal protection will be detrimentally affected in the foreseeable future if no action is undertaken to impede the course of events” (written reply from the Federal Criminal Police Office, 2020). According to the Federal Police Act, a substantial threat to public security applies, for example, when a significant object of legal protection, such as the continued existence of the state, life, health or freedom, is under threat or substantial assets or other legal assets of substantial importance to the public which are protected under criminal law are at risk (Section 14 subs. 4 of the Federal Police Act).

The Residence Act stipulates various measures which can be undertaken when a person constitutes a threat to public security. In this connection, there are also legal stipulations defining what facts are considered to constitute a threat to the above-stated objects of legal protection (see Chapter 5 regarding the corresponding measures under the law on foreigners). Section 53 subs. 1 of the Residence Act stipulates that persons who endanger public security and order, the free democratic basic order or any other significant interests of the Federal Republic of Germany are to be expelled<sup>14</sup>. Expulsion on grounds of a threat to public security “also comes into consideration, for example, in case of a sufficient suspicion of serious offences, regardless of whether any criminal conviction has taken place to date” (55.1.1.1 of the General Administrative Regulation to the Residence Act).

A threat to the free democratic basic order or the security of the Federal Republic of Germany is to be assumed pursuant to Section 54 subs. 1 no. 2 of the

Residence Act where facts justify the conclusion that the person concerned belongs to or has belonged to an organisation which supports terrorism, or is preparing or has prepared a serious violent offence endangering the state pursuant to Section 89a subs. 1 second sentence of the Penal Code<sup>15</sup>. Section 92 subs. 3 no. 2 of the Penal Code defines activities directed against the security of the Federal Republic of Germany as activities by persons working towards undermining the external or internal security of the Federal Republic of Germany.

In a judgement of 22 August 2017, the Federal Administrative Court found that, in addition to a concrete threat, a threat also applies when it exists in “adequately concrete form” (Federal Administrative Court, judgement of 22 August 2017, marginal note 26<sup>16</sup>). This means that a removal order may also be issued against a person pursuant to Section 58a of the Residence Act where the threat which they pose to the security of the Federal Republic of Germany or the terrorist threat which they constitute is not yet of a concrete nature. “With regard to terrorist offences [...], this may be the case where [...] although no incident is foreseeable as yet, a person’s individual behaviour constitutes a concrete probability of their committing such offences in the foreseeable future” (Federal Administrative Court, judgement of 22 August 2017, marginal note 26).

### 2.1.6 Politically motivated crime (PMC)

In addition to the above-stated terms, the definition of ‘politically motivated crime’ is also of relevance to this study. Politically motivated crime comprises “criminal offences which are committed as a result of a political motivation” (BMI 2018a: 2). These are firstly such offences as are directed against the constitution, the continued existence of the state or its internal and/or external security, and secondly offences belonging to the category of general crime, where facts justify the assumption that the offender was pursuing certain politically motivated aims in committing the crime

<sup>13</sup> With regard to application of the term in the Residence Act, see Section 25a subs. 1 no. 5 (Granting of residence in the case of well integrated juveniles and young adults), Section 25b subs. 1 no. 2 (Granting of residence in the case of lasting integration), Section 27 subs. 3a no. 1 (Subsequent immigration of dependants), Section 47 subs. 2 no. 1 (Prohibition and restriction of political activities), Section 53 subs. 1 (Expulsion), Section 54 subs. 1 no. 2 and subs. 2 no. 7 of the Residence Act (Interest in expulsion).

<sup>14</sup> “Expulsion (Sections 53-56 of the Residence Act) is [...] not an actual action, but an administrative act which ends the legality of a stay and gives rise to an obligation to leave the federal territory. Expulsion is ordered against foreigners who constitute a threat to order and security or the interests of the Federal Republic of Germany” (Hoffmeyer-Zlotnik 2017: 19).

<sup>15</sup> A serious violent offence endangering the state is an offence against life in the case of Section 211 (Murder) or Section 212 (Homicide) or against personal freedom in the cases covered by Section 239a (Abduction for purpose of extortion) or Section 239 b (Hostage-taking) of the Penal Code which, by virtue of the circumstances concerned, is intended and appropriate to compromise the continued existence or the security of a state or of an international organisation or to eliminate, nullify or undermine constitutional principles of the Federal Republic of Germany (Section 89a subs. 1 second sentence of the Penal Code).

<sup>16</sup> Federal Administrative Court, judgement of 22.08.2017 – 1 A 3.17 [ECLI:DE:BVerwG:2017:220817U1A3.17.0] – BeckRS 2017, 127231 marginal note 26.

(see Info box 1) Criminal offences are distinguished according to the categories ‘PMC -right-wing-’, ‘PMC -left-wing-’, ‘PMC -foreign ideology-’, ‘PMC -religious ideology-’<sup>17</sup> and ‘PMC -not classifiable-’ (BMI 2018a: 2). Persons who commit criminal offences in the area of politically motivated crime may thus be considered a threat to public security and order.

Islamist criminal offences in particular are recorded under PMC -religious ideology-. The area of PMC -foreign ideology- includes criminal offences committed by persons with links to groups which are classified as extremist, such as the banned Kurdistan Worker’s Party (‘Partiya Karkerên Kurdistan’ – PKK)<sup>18</sup> and their affiliated (sub-)organisations, such as the so-called People’s Defence Forces ‘Hêzên Parastina Gel’ (HPG), the ‘Democratic Union Party’ (PYD), the ‘People’s Defence Units’ (YPG/YPJ) and the right-wing extremist Turkish Ülkücü movement<sup>19</sup>, which is also known as the ‘Grey Wolves’ and is under observation by the intelligence services. The Federal Criminal Police Office is also aware of a small number of cases running into double figures in connection with the Turkish ‘Revolutionary People’s Liberation Party/Front’ (DHKP/C) and the ‘Communist Party of Turkey/Marxist–Leninist’ (‘Türkiye Komünist Partisi/Marksist–Leninist’ – TKP/ML) (written reply from the Federal Criminal Police Office, 2020). Third-country nationals may also commit criminal offences in the areas of PMC -right-wing- and PMC -left-wing- which are not perpetrated in connection with right- or left-wing extremist ideologies from abroad.

17 The categories ‘PMC -foreign ideology-’ and ‘PMC -religious ideology-’ were derived in 2017 from the former category ‘PMC -foreigners crime-’. Within the former category ‘PMC -foreigners crime-’, offences which are now classified under ‘PMC -religious ideology-’ were registered under “Islamism/fundamentalism” (BMI 2018a: 2).

18 The PKK was founded in Turkey in 1978 with the aim of “establishing an independent Kurdish state along socialist lines”. It has been listed as a terrorist organisation by the European Union since 2002 and in Germany it “continues to be by far the largest non-Islamist extremist organisation of foreigners, with a membership of some 14,500” (Federal Office for the Protection of the Constitution (BfV) 2019: 5f).

19 The Ülkücü movement has existed in Turkey for more than 50 years and has also been present in Germany for some decades. Its membership in Germany is estimated at 18,000 (Bozay 2017). “Racism, in particular hostility towards Jews and Israel, is an essential element of the Ülkücü movement’s Turkish right-wing extremist ideology” (Deutscher Bundestag 2018a: 3).

## Info box 1: Politically motivated crime

### “What is politically motivated crime?”

The following are designated and recorded as politically motivated crime:

#### 1.

All criminal offences, any elements of which constitute crimes against the state, regardless of whether any political motivation is ascertainable in the individual case concerned. These include propaganda crimes (Sections 86, 86a of the Penal Code), forming a terrorist organisation (Section 129a of the Penal Code) and high treason (Sections 81, 82 of the Penal Code).

#### 2.

Criminal offences committed in the area of general crime (such as homicide, bodily harm, arson, resistance to state authority, criminal damage), where an assessment of the overall circumstances pertaining to the offence and/or the offender’s mindset provide an indication that they:

- are intended to influence the democratic decision-making process, to serve the attainment or obstruction of political objectives or are aimed at preventing the implementation of political decisions,
- are directed against the free and democratic basic order or one of its essential characteristics, against the continued existence or security of the Federation or a Land or are intended to unlawfully hinder members of the constitutional bodies of the Federation or a Land from discharging their official duties,
- jeopardise foreign interests of the Federal Republic of Germany through the use of violence or preparations for the same,
- are directed against a person on account of their political views, nationality, ethnicity, race<sup>20</sup>, skin colour, religion, ideology, origin or due to their appearance, disablement, sexual orientation or social status (so-called hate crime)” BMI n. d.).

20 The term “race” is used by reference to the Geneva Convention on Human Rights – author’s note.



## Organised crime

So-called clan crime<sup>21</sup> in the area of organised crime is also discussed frequently in the debate on security and aspects of residence law. A “coordinated approach to combating ‘clan crime’, to be jointly pursued by all the Länder”, was agreed at the 210th meeting of the Standing Conference of Interior Ministers and Senators (IMK) in June 2019. It was further resolved that “in extreme, isolated cases [...] links to international terrorism” exist and clan crime must be combated “across the board as a matter of priority” (IMK 2019: 19). At present, the Federal Criminal Police Office does not have any evidence of any “established structures” between “(international) organised crime” and third-country nationals who constitute a threat to public security. However, the Federal Criminal Police Office “cannot rule out the possibility that potential perpetrators from the field of Islamist-motivated terrorism/extremism could, in isolated instances, exploit the opportunities in particular to procure resources in the area of organised crime by specifically establishing contacts or using existing contacts in this milieu (written reply from the Federal Criminal Police Office, 2020).

### 2.1.7 Potential offenders and persons of interest

In the area of averting threats to public security, the competent police authorities can also classify individuals as ‘potential offenders’ (Gefährderinnen/Gefährder) or ‘persons of interest’ (relevante Personen) (BKA 2020). ‘Potential offender’ is a “working term employed by the security services particularly in the context of fighting terrorism” (Deutscher Bundestag 2017a: 3). According to the definition adopted by the association of Federal Criminal Police Office and the Land criminal police offices, a “potential offender” is “a person for whom specific facts justify the assumption that they will commit politically motivated criminal offences of substantial significance, in particular such offences pursuant to Section 100a of the ‘Code of Criminal Procedure’” (Deutscher Bundestag 2017a: 3). This concerns “serious criminal offences” covering various fields of law, such as the Criminal Code (including the crimes of offences against peace, high treason and endangering democratic state rule, treason and endangering external security, offences against public order, murder and manslaughter), the Asylum Act (including

incitement to submit fraudulent applications for asylum), the Residence Act (including smuggling foreign persons), the War Weapons Control Act or the Code of Crimes Against International Law (including genocide, crimes against humanity, war crimes) (Section 100a para. 2 of the Code of Criminal Procedure).

In contrast to classification as a ‘potential offender’, an individual is to be considered a ‘person of interest’ “when they have the role of (a) a leader, (b) a supporter/logistician, (c) an actor within the extremist/terrorist spectrum and where there are objective indications that they promote, support, commit or are involved in politically motivated criminal offences of substantial significance, in particular such offences pursuant to Section 100a of the Code of Criminal Procedure, or (d) if they are a contact or accomplice of an individual classified as a potential offender, a person accused or suspected of having committed a politically motivated criminal offence of substantial significance, in particular such an offence pursuant to Section 100a of the Code of Criminal Procedure (BKA 2020a). In contrast to the PMC categories, which concern criminal offences that have already been committed, potential offenders or persons of interest must not necessarily have committed politically motivated crimes in order to be classified as such.

The classification of individuals as potential offenders or persons of interest generally takes place by the locally competent police authorities of the respective Länder (Deutscher Bundestag 2017b: 2). In addition, Section 4a of the Federal Criminal Police Act also permits the Federal Criminal Police to draw up its own list of potential offenders and persons of interest (Deutscher Bundestag 2017b: 6). Assessment as to whether a person will commit politically motivated criminal offences pursuant to Section 100a of the Code of Criminal Procedure “is always dependent on the individual case concerned. Assessment takes place [...] by way of an individual coordinated appraisal process” (Landtag Brandenburg 2017: 2). Accordingly, persons who commit politically motivated criminal offences are not automatically classified. Equally, they must not necessarily have been classified as potential offenders or persons of interest in order to constitute a threat to public security.

### Classification as a potential offender or person of interest

In connection with the various Islamist attacks in Europe, in recent years resources have been invested above all in assessing dangers in the area of Islamist

<sup>21</sup> “Clan crime” refers to the “perpetration of criminal offences by members of ethnically isolated sub-cultures”. The term ‘clan crime’ does not constitute a legal definition (BKA 2019a: 29).

extremism and terrorism. With regard to Islamist extremism and terrorism, the police have “three standardised classification systems which pursue different objectives” at their disposal:

1. “Eight-stage forecasting model: When facts and circumstances become known which indicate a concrete damaging event, such as a plan to stage an attack by persons previously unknown to the police, an eight-stage forecasting model is applied to assess the probability of the potential damaging event actually occurring.
2. Classification as a potential offender: When certain facts justify the assumption that a person will participate in varying ways in politically motivated criminal offences or that a person plays a specific role in the scene, classification as a potential offender or a person of interest takes place, leading to police and/or penal measures.
3. RADAR-iTE (rule-based analysis of potentially destructive offenders to assess the acute risk – Islamist terrorism): With RADAR-iTE, a person about whom a minimum scope of information relating to events from their life is available undergoes an assessment of the risk they pose of committing a serious act of violence in Germany and is rated according to a scale of risks in order to subsequently prioritise intervention measures.” This is intended to enable a “standard nationwide system of assessment” (BKA 2017).

RADAR-iTE was developed by the Federal Criminal Police Office in cooperation with the Forensic Psychology work group at the University of Konstanz (BKA 2017). By reference to a risk assessment questionnaire containing standardised questions and answers and covering a total of 73 characteristics in seven subject areas, a regulated procedure is applied to classify the individual concerned according to a three-stage scale of risks (high, manifest, moderate risk). This procedure is carried out using information which is already available to the police authorities on the basis of existing legal provisions or information which they are permitted to collect. “The characteristics relate, for example, to previously committed violent crimes, experience with weapons or explosives, integration in the radical scene, time spent in war zones, participation in fighting there and aspects of a problematic personality, such as diagnosed psychological disorders” (Deutscher Bundestag 2017c: 7). As a general rule, the assessment is carried out by the competent Land police. The result of the assessment and the information forming the basis for the assessment are forwarded to

the Federal Criminal Police Office, which then undertakes a quality assurance check. High-risk persons are always subjected to individual case assessment and are dealt with in the Joint Counter-Terrorism Centre (Gemeinsames Terrorismusabwehrzentrum, GTAZ) work group Risk Management (Chapter 3.1.1), in which the relevant security services participate (written reply from the Federal Criminal Police Office, 2020). RADAR-iTE offers the authorities relevant initial information on and assessments of the individuals concerned, on the basis of which the security services can prioritise appropriate measures (BKA 2017).

Building on this, a joint project is currently being carried out (August 2017 to January 2020) by the Federal Criminal Police Office, the Police Training College of Saxony-Anhalt, the University of Konstanz, the Land Criminal Police Office of North-Rhine Westphalia and the Austrian Office for the Protection of the Constitution and Counterterrorism (BVT) as associated partner organisations to develop a further analysis system: the two-stage ‘risk-analysis system for Islamist-motivated potential perpetrators’ (‘RISKANT’). This analysis system is intended to be used solely for “radicalised Islamist persons who have already come to the attention of the police”. The first stage entails “a risk assessment based on standardised questions”. In the following stage, “those persons who have been assessed as constituting a high risk” on the basis of the questions “are subjected to individual in-depth examination (BMBF 2020).

Holger Münch, president of the Federal Criminal Police Office, stated in an interview in 2019 that the focus on Islamist terrorism in recent years meant that the German security services had not addressed the area of PMC -right-wing- with the “same intensity” (BKA 2019b). In view of the “increase in right-wing violence, as well as hate and agitation on the internet”, the Federal Criminal Police Office sees a need to invest greater resources in combatting the area of PMC -right-wing-, however. In this connection, it has announced that it will be applying the RADAR risk assessment system to the area of PMC -right-wing- in a two-year project (March 2020 to February 2022). There are no plans at present to introduce RADAR for the areas of PMC -left-wing- and PMC -foreign ideology- (BKA 2019b, written reply from the Federal Criminal Police Office, 2020).



### 2.1.8 Radicalisation

The term ‘radicalisation’ is not defined in law and there is no standard official definition applied by all government bodies. The term ‘radicalisation’ has drawn “fundamental” criticism in some instances, on account of its “normativity”, its “subjectivity”, its “stigmatising potential and the individuality of personal change processes” (Beratungsstelle “Radikalisierung” 2018: 5). The various individuals involved in this area focus on “different aspects of radicalisation” according to their respective “mandate and self-perception” as “formed by their professional outlook” (Uhlmann 2017: 20).

By way of example, the counselling centres network of the “Radicalisation” counselling centre at the Federal Office for Migration and Refugees defines “radicalisation” as “a complex, generally non-linear, individual, often but not exclusively group-related process of adopting an extremist mindset and corresponding behaviour” (Beratungsstelle „Radikalisierung“ 2018: 5). This process is often accompanied by a “growing willingness to advocate, support and/or apply non-democratic means, culminating in the use of violence, in order to achieve political, social and/or religious objectives (Beratungsstelle “Radikalisierung” 2018: 5).

At the Joint Counter-Terrorism Centre (GTAZ)<sup>22</sup>, radicalisation is defined as a “growing shift among people or groups towards an extremist mindset and corresponding behaviour and an increasing willingness to advocate, support and/or apply illegitimate means, culminating in the use of violence, in order to achieve their objectives.” It sees “radicalisation” as “often an insidious process” resulting from “an interplay of individual experiences, contact with extremist scenes and the consumption of propaganda” (written reply from BKA, 2020).

### 2.1.9 Extremism

As with radicalisation, there is equally no legal definition of the term “extremism” in Germany. According to case law, however, it can be stated on the whole that “the essential, defining characteristic of extremism is that it is at odds with the free democratic basic order pursuant to the Basic Law” (Deutscher Bundestag 2018b: 4).

The counselling centres network of the “Radicalisation” counselling centre at the Federal Office for Migration and Refugees defines the term ‘extremism’ as one of the “ideologised mindsets and behavioural patterns which is contrary to human rights, the paramount principles of democracy and the fundamental principles of the constitution. These relate to the inviolable democratic constitution of the Federal Republic of Germany, as set down in the Basic Law and condensed in the term ‘free democratic basic order’. While extremist mindsets and behaviour may be related to violence, this must not necessarily be the case” (Beratungsstelle “Radikalisierung” 2018: 5).

The Federal Office for the Protection of the Constitution defines as “extremist” activities which “are aimed at eliminating the fundamental values of liberal democracy” (BfV 2020a). Reference is sometimes also made to “violence-oriented” or “violent extremism” (BMI 2018b). At the GTAZ, “violent extremism” is defined as “endeavours to overcome the system which are directed against the free and democratic basic order, including the use of violence (written reply from the Federal Criminal Police Office, 2020). Criminal offences “for which there are actual indications that they are directed against the free democratic basic order, that is, at eliminating or nullifying one of the following constitutional principles, are classified as extremist crime:

- The right of the people to exercise state authority in elections and ballots and through special legislative bodies and institutions of executive power and jurisdiction, and to elect the representation of the people in general, direct, free, equal and secret ballots.

<sup>22</sup> The GTAZ is a cooperation and communication platform of the Federal Office for the Protection of the Constitution (BfV), the Federal Criminal Police Office (BKA), the Federal Intelligence Service (BND), the Federal Public Prosecutor, the federal police, the Customs Investigation Bureau (ZKA), the Federal Office for Migration and Refugees, the Military Counter-Intelligence Service (MAD), the Land Offices for the Protection of the Constitution and the Land Criminal Police Offices to counter Islamist terrorism. See Chapter 3.

- The binding of legislative power to the constitutional order and the binding of executive power and jurisdiction to justice and the law.
- The right to establish and pursue parliamentary opposition.
- The removability of the government and its accountability parliament.
- The independence of the courts.
- The exclusion of any form of tyranny or arbitrary rule.
- The human rights specified in the Basic Law.

Criminal offences which jeopardise foreign interests of the Federal Republic of Germany through the use of violence or preparations for the same or are directed against peaceful relations between nations are also classified as extremist crime” (written reply from the Federal Criminal Police Office, 2020).

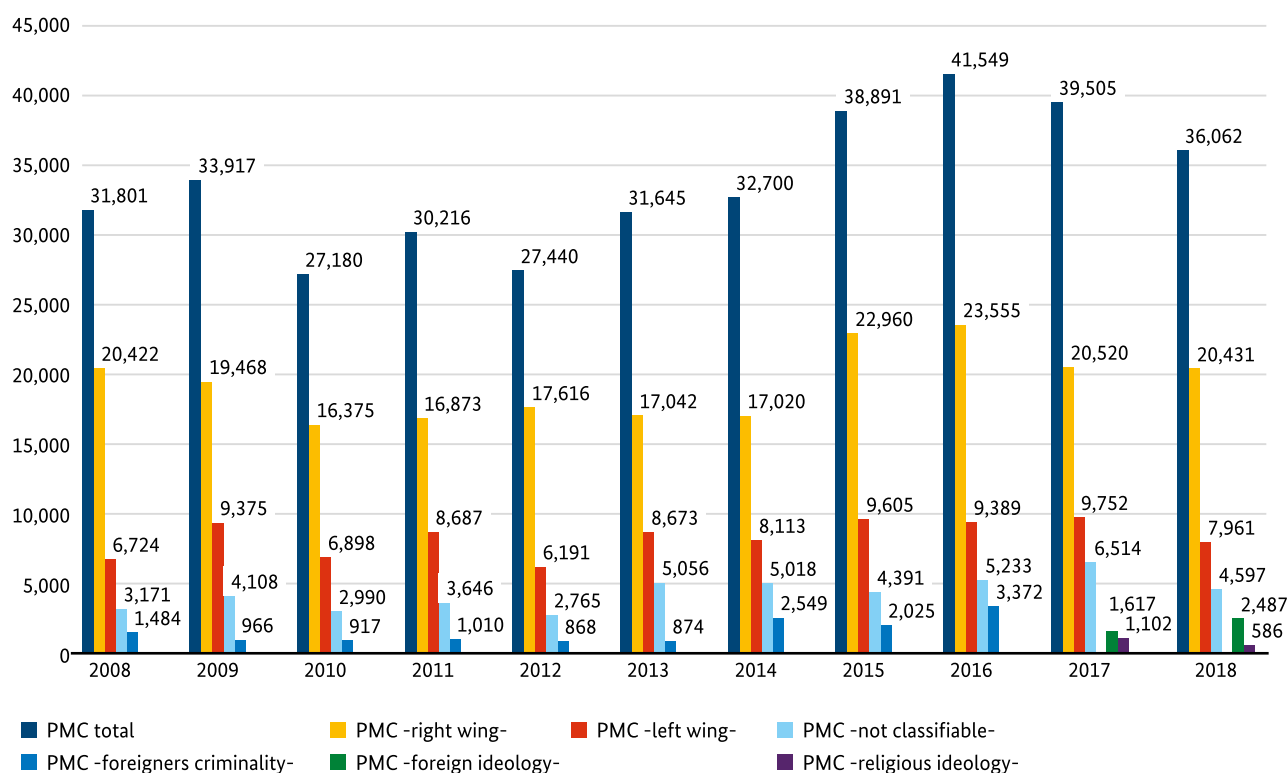
There is no specific definition of violent extremism in relation to a threat to public security, the security of the Federal Republic of Germany or the free and democratic basic order. In accordance with Section 53 subs. 1 no. 2 of the Residence Act, a person is to be regarded as a threat to the free democratic basic order and/or the security of the Federal Republic of Germany where facts justify the conclusion that they belong to or support an organisation which supports terrorism or that they are preparing a serious violent offence endangering the state<sup>23</sup>. Criminal offences with extremist motives, that is, such offences as are aimed at eliminating the constitutional principles which are vital to the free democratic basic order, are also classified as belonging to the area of politically motivated crime (BMI 2018: 24). The extent to which a person constitutes a threat to public security, the security of the Federal Republic of Germany or the free and democratic basic order as a result of extremist activities must be determined on the basis of the individual case concerned.

## 2.2 Statistics on politically motivated crime, potential offenders and persons of interest

This sub-chapter presents statistics on politically motivated crime, potential offenders and persons of interest. To facilitate a clearer understanding in the general context, the overall statistics are first of all presented in the respective categories, followed by a differentiation according to third-country nationals. The statistics on PMC (Figure 1) take the form of incoming statistics and comprise the number of criminal offences “committed on the basis of a political motivation” (BMI 2019a: 2; Chapter 2.1.6). Offences which fall into the category of politically motivated crime are registered by the Criminal Police Offices of the Länder as part of the ‘criminal police alert service for politically motivated crime’ and forwarded to the Federal Criminal Police Office. These take the form of so-called ‘incoming statistics’, whereby committed offences are registered at the time when an offence is reported or criminal investigations are initiated. “The aggrieved party’s point of view” is also to be considered in assessing the offence. Where the political background to a criminal offence only becomes apparent at a later juncture (i.e. in the course of investigations or court proceedings), this must be subsequently reported. “In practice”, it is “not rare” for this subsequent reporting to be neglected, however. The fact that only reported offences are included in the statistics means that there are a large number of undisclosed cases, the scale of which varies according to the type of phenomenon concerned. A particularly large number of unreported cases is to be assumed above all in the area of crime motivated by right-wing extremism, for example (Staud 2018). In addition to the police statistics, there are also statistics from civil society – from victim counselling centres, for example, which commonly “register markedly more incidents than the authorities,” because victims often wish to avoid contact with authorities (Staud 2018).

In contrast to the statistics on persons classified as potential offenders and persons of interest (Table 1), these statistics thus relate to criminal offences in the area of PMC which have actually been committed. Persons classified as potential offenders must not necessarily have committed politically motivated criminal offences in order to be classified as such, however.

23 A serious violent offence endangering the state is an offence against life in the case of Section 211 (Murder) or Section 212 (Homicide) or against personal freedom in the cases covered by Section 239a (Abduction for purpose of extortion) or Section 239 b (Hostage-taking) of the Penal Code which, by virtue of the circumstances concerned, is intended and appropriate to compromise the continued existence or the security of a state or of an international organisation or to eliminate, nullify or undermine constitutional principles of the Federal Republic of Germany (Section 89a subs. 1 second sentence of the Penal Code).

**Figure 1: Development of total number of criminal offences by PMC category (2008-2018)**

Source: BMI 2018a: 3, 2019a: 3.

Note: As of 2017, the category PMC -foreigners criminality- is divided into PMC -foreign ideology- and PMC -religious ideology-.

**Table 1: Number of potential offenders and persons of interest in Germany (as per 30 November 2019)**

	Potential offenders	Persons of interest <sup>1)</sup>					
	Total	Total	Leaders	Supporters/ logisticians	Actors	Contacts/ accomplices	No informa- tion provided/ available
PMC -total- <sup>2), 3)</sup>	752	778	n/a	n/a	n/a	n/a	n/a
PMC -right-wing-	46	126	41	22	66	40	-
PMC -left-wing-	5	85	23	6	70	0	-
PMC -foreign ideology-	21	48	12	10	19	5	11
PMC -religious ideology-	679	517	45	141	102	137	-

Source: Deutscher Bundestag 2019a: 5.

<sup>1)</sup> Several roles are allocated in some instances.

<sup>2)</sup> All categories, including PMC -not classifiable-.

<sup>3)</sup> This table lists only those cases which are known to the federal authorities, as the Länder are responsible for dealing with potential offenders. The figures also vary on a daily basis as a result of new classifications, declassifications and reclassifications (Deutscher Bundestag 2019a: 4).

The discrepancy between the criminal offences recorded in the PMC statistics and the list of potential offenders, in particular with regard to PMC -right-wing- and PMC -religious ideology-, has been a subject of discussion in political and government circles for some time now. As Table 1 shows, as per November 2019, 679 persons were classified as potential offenders in the area of PMC -religious ideology- while the corresponding number in the area of PMC -right-wing- stood at 46. This represents a stark contrast to the crimes recorded in the PMC statistics according to PMC categories. In 2018, 20,431 right-wing and 586 religiously motivated crimes were recorded (Figure 1). The Federal Office for the Protection of the Constitution puts the number of right-wing extremists at approx. 25,350 in 2018 and assumes that half of these are violence-oriented<sup>24</sup> (12,700, BMI 2019b: 50). An orientation towards violence does not mean that these persons are also prepared to use violence and that it is to be assumed that these people intend to carry out attacks, however (Götschenberg/Schmidt 2019). An orientation towards violence and a preparedness to carry out attacks would mean that these people would be classifiable as potential offenders. On the basis of 12,700 right-wing extremists classified as violence-oriented, the Federal Office for the Protection of the Constitution and the Federal Criminal Police Office assume that the number of right-wing extremists classified as potential offenders is too low, and have each announced plans for more detailed monitoring and counter-active measures in this area (Götschenberg/Schmidt 2019).

The statistics on potential offenders are broken down in part according to nationality and residence permits. A response by the Federal Government to a question from the party The Left (Die Linke) regarding the nationalities of potential offenders and persons of interest who are assignable to the PMC category of religious ideology reveals, for example, that of the total of 767 potential offenders and 470 persons of interest as per 7 November 2018 the share of German nationals was around 53%. Not all of these persons were resident in Germany, however (Deutscher Bundestag 2018c: 2f.).

**Table 2: Number of cases processed in the Status working group at the GTAZ involving persons from the Islamist category (as per 26 November 2019)**

Nationality	Potential offenders <sup>1)</sup>	Persons of interest <sup>1)</sup>
<b>Total</b>	<b>225</b>	<b>126</b>
Syria	94	37
Turkey	30	21
Russian Federation	20	15
Iraq	14	8
Unclassified	10	3
Tajikistan	7	4
Tunisia	6	5
Afghanistan	5	5
Bosnia and Herzegovina	5	2
Stateless	5	1
Algeria	3	0
Jordan	3	1
Kosovo	3	3
Morocco	3	3
Somalia	3	2
Libya	2	1
Pakistan	2	2
Serbia	2	1
Albania	1	1
France	1	1
Greece	1	0
Israel	1	0
Cameroon	1	0
Lebanon	1	2
North Macedonia	1	1
Romania	1	1
Belgium	0	1
India	0	1
Italy	0	3

Source: Deutscher Bundestag 2019a: 6ff.

24 The Federal Office for the Protection of the Constitution uses the generic term 'violence-oriented' "where extremists can be classified as violent, potentially violent, supporters of violence or advocates of violence" (BMI 2019b: 19).

<sup>1)</sup> This table lists only those cases which are known to the federal authorities, as the Länder are responsible for processing potential offenders. The figures also vary on a daily basis as a result of new classifications, declassifications and reclassifications (Deutscher Bundestag 2019a: 4).

Table 2 shows the number of cases involving potential offenders and persons of interest which have been dealt with in the so-called ‘Status-Related Accompanying Measures’ working group (Status) focusing on accompanying measures relating to the legal status of foreign nationals at the Joint Counter-Terrorism Centre (GTAZ; Chapter 3.1.1) (as per 26 November 2019). The Status working group is tasked here with “the timely identification of persons with an extremist Islamist or terrorist Islamist background who may constitute suitable subjects for measures under the law as applies to foreigners, asylum and nationality in the interests of averting a threat to public security” (Deutscher Bundestag 2014a: 10). The Status working group is concerned solely with foreign nationals in the area of Islamist terrorism. German Islamist potential offenders (except where they hold an additional nationality in addition to their German nationality) and foreign potential offenders who do not fall into this category are consequently not included in these statistics. Cases are also processed in which persons are classified neither as potential offenders nor as persons of interest, however, as such classification may not (yet) have been carried out. In all, 677 cases involving individuals from the Islamist category were being processed by 26 November 2019, including 225 potential offenders and 126 persons of interest. This means that, of the 677 cases processed, 326 persons had not (yet) been classified as potential offenders or persons of interest.

As Table 2 reveals, the largest numbers of potential offenders who have been processed in the Status working group are Syrian, Turkish and Russian nationals. EU nationals are also included in the Status working group’s statistics (Belgium, France and Greece), although substantially smaller numbers of cases are involved here.

Table 3 shows the residence status of potential offenders and persons of interest from the Islamist category of cases involving persons with an asylum background processed in the Status working group (as per 26 November 2019). It can be seen here that of the 42 potential offenders who held refugee status, the revocation procedure was pending regarding the refugee status of 32 persons. The revocation procedure was pending for 15 of the 22 cases relating to persons of interest. The revocation procedure was in progress for seven of the twelve potential offenders who were entitled to subsidiary protection. Among the persons of interest, the corresponding figure was two out of 13 cases.

**Table 3: Residence status of cases processed in the Status working group at the GTAZ involving persons from the Islamist category with an asylum background (as per 26 November 2019)**

	Potential offenders <sup>1)</sup>			Persons of interest <sup>1)</sup>		
	Total	Of which, revocation procedure pending	Legal actions pending following revocation	Total	Of which, revocation procedure pending	Legal actions pending following revocation
Persons entitled to asylum	0	-	-	1	-	1
Refugee status	42	32	-	22	15	-
Beneficiaries of subsidiary protection	12	7	-	13	2	-

Source: Deutscher Bundestag 2019a: 9f.

<sup>1)</sup> This table lists only those cases which are known to the federal authorities, as the Länder are responsible for processing potential offenders. The figures also vary on a daily basis as a result of new classifications, declassifications and reclassifications (Deutscher Bundestag 2019a: 4).

## 2.3 Political debate

The question as to how persons who constitute a threat to public security are to be dealt with has become a subject of large-scale political and public debate in recent years. This is attributable to the increased number of Islamist terrorist attacks in Europe, including Germany, since 2014 and the growing number of supporters of so-called 'Islamic State' (IS)<sup>25</sup> returning from Syria and Iraq. In addition, the exposure of attacks by the National Socialist Underground (NSU)<sup>26</sup> and the subsequent prosecutions, as well as various other right-wing terrorist attacks and new organisations which have emerged in recent years have played an important role (including 'Revolution Chemnitz'<sup>27</sup>; the murder of Walter Lübcke<sup>28</sup>, a regional chief administrator in Hesse, in 2019; attack on a synagogue and a kebab restaurant in Halle in 2019<sup>29</sup>). These attacks led to the introduction of repressive measures (through the amendment of the Residence Act, for example), while at the same time increased attention was directed to prevention measures aimed at the timely prevention of such dangers. The Federal Ministry of the Interior refers in this context to an "integral approach" combining repressive measures with measures aimed at prevention and deradicalisation (BMI 2020b; see Chapter 4.3 in the context of the 'Federal Government strategy to prevent extremism and promote democracy').

25 Politicians and the media sometimes also call the terrorist organisation "Daesh" or "Daish", as for many people the term "state" "unnecessarily enhances the terrorist organisation's status" and the word "Islamic" upsets "many Muslims, who criticise the fact that it equates their religion with the terrorists" (Deutschlandfunk, 2015). The word "Daesh" derives from the acronym of the Arab designation for the terrorist organisation ("Al-daula al-Islamiya fi-l-Iraq wa-l-Scham", which is "used in a pejorative sense" and "evokes other Arab terms which translate roughly as "to breed discord" or "to crush underfoot" (Schulte von Drach 2015).

26 At the end of 2011 it became known that the so-called National Socialist Underground (NSU), an extreme right-wing terrorist group, was responsible for ten murders, a number of bomb attacks and various bank robberies in Germany (BpB 2013; EMN/BAMF 2018: 77).

27 The purportedly right-wing terrorist organisation 'Revolution Chemnitz' allegedly "planned to overthrow the democratic order with weapons" (Jüttner 2019). The Federal Public Prosecutor's Office has brought charges against the eight suspected members. The criminal proceedings were still in progress at the time of completion of this study.

28 Walter Lübcke, a regional chief administrator in Hesse, was shot dead on 2 June 2019. In view of the main suspect, the Federal Public Prosecutor's Office assumes a "right-wing extremist background to the crime" (Zeit Online 2019).

29 On 9 October 2019 the suspected right-wing extremist attacker Stephan B. attempted to blow open the door to the synagogue in Halle with an explosive device, in order to stage a massacre inside. Two people died and several were injured (Strack 2019).

### Attack on the Christmas Market at Berlin's Breitscheidplatz (2016)

On December 19, 2016, a terrorist attack was carried out on a Christmas market at the Breitscheidplatz in Berlin (BMI 2018c).<sup>30</sup> Twelve people died and more than 70 people were injured when the Tunisian assassin Anis Amri drove a lorry into the Christmas market. Amri was an asylum applicant who had used several different names to file asylum applications at a number of places in Germany since July 2015. Before, he had already applied for asylum in Italy. In Germany, several investigations against Amri were underway, and he had been temporarily in custody to secure his departure. However, it was impossible to remove him because he lacked passport substitutes (Schneider 2017).

The attack fuelled a debate about security gaps concerning potential terrorists or Islamist criminals among refugees, which had already started in 2016. This led to changes in administrative practice, a more restrictive asylum law and measures to facilitate forced returns. In terms of administrative practice, already in 2016 the introduction of a core database allowed to introduce additional measures in order to unveil multiple registrations of asylum seekers. Asylum and residence law provisions were tightened by the 'Act to Improve the Enforcement of the Obligation to Leave the Country', which entered into force on 29 July 2017. With this, the possibility of detention for people who pose a threat to public security has been expanded. The monitoring for persons who are obliged to leave the country (electronic ankle cuffs, restriction of the area of residence) were also tightened (Deutscher Bundestag 2017d: 21162).

The creation of the Repatriation Support Centre (ZUR) was one measure to facilitate removals; the Centre helps to coordinate the operative efforts of the Federal and Land authorities, including in the area of forced returns (EMN/BAMF 2018: 26f.). Amri had been classified as a potential offender by the authorities in North Rhine-Westphalia in February 2016 and by the authorities in Berlin in March 2016 and had thus been discussed several times at the meetings of the Joint Counter-Terrorism Centre (GTAZ). It proved impossible to remove him from Germany, because the competent foreigners authority was unable to obtain the necessary documentation from the Tunisian authorities (BMI 2017a: 6ff.).

30 This section is based on the EMN/BAMF Policy Report 2017 (EMN/BAMF 2018: 26f.).



On an operational level, the Federal Criminal Police Office was tasked among other things with improving the risk assessment of violent criminals and standardising the assessment of potential offenders. In addition, further efforts were to be undertaken to improve the exchange of intelligence within Europe (Deutscher Bundestag 2017d: 21162). This was done in light of the fact that in the case of Anis Amri the Italian authorities failed to inform the German authorities that his asylum application had been rejected in Italy and that he had a criminal record there. Similarly, Amri's fingerprints had not been stored in the European Dactyloscopy fingerprint identification system (EURODAC) (Deutscher Bundestag 2017e: 21173). The then federal minister of the interior also announced that there would be "an increased focus on including other policy fields, in particular the areas of foreign, economic and development policy, in negotiations with countries of origin on taking back their own nationals" (Deutscher Bundestag 2017d: 21162). It was also decided that "in cases in which a foreign Islamist potential offender could not be successfully prosecuted under criminal law, their removal was to be pursued as a matter of priority" (Deutscher Bundestag 2019b; Chapter 5.4).

In the debate on the attack at Breitscheidplatz, the Federal Ministry of Justice also stressed the high importance of prevention work: "No-one believes that we can manage this solely through repressive means. It is not sufficient to place potential offenders under surveillance or to punish offenders. But this does need to happen: We need to make every effort in the area of prevention, because we must prevent people who have come here, and also those who originate from here – as not all potential offenders hold a foreign passport – from becoming radicalised in our country and drifting into radical Islamism" (Deutscher Bundestag 2017f: 21165). One example of initiatives in the area of preventive measures is the federal democracy-promotion programme 'Demokratie leben!', which was launched back in 2015 to promote projects aimed at preventing radicalisation and promoting democracy (BMFSFJ 2020; Chapter 4.3 ). The 'Federal Government strategy to prevent extremism and promote democracy' (Bundesregierung 2016) was also adopted back in 2016 (Chapter 4.3). The 'National prevention programme against Islamist extremism' (NPP), which was adopted in 2017 in the wake of the attack on Breitscheidplatz, "builds on the Federal Government's existing prevention measures" (BMI 2017b, Chapter 4.1).

The opposition, first and foremost the party The Left, criticised the approach by the German security services and foreigners authorities and called for investigations by a committee of enquiry. It was questioned

whether the planned repressive amendments to the law could actually prevent future attacks, as in the critics' view the attack by Amri resulted primarily from misjudgements by the German authorities, rather than the absence of appropriate laws (Deutscher Bundestag 2017g: 21163). Similar criticism was voiced by the representatives from Alliance 90/The Greens (Bündnis 90/Die Grünen), the Free Democratic Party (Freie Demokratische Partei, FDP) and The Left (Die Linke) of the Breitscheidplatz committee of enquiry (ZDF 2019).

## IS returnees

A major security debate has also been in progress for a number of years now on the question of how to deal with German nationals, with and without a migrant background, and with foreign nationals and holders of dual citizenship who return to Germany after having joined the 'Islamic State' (IS). The 'Third Act amending the Nationality Act' entered into force on 9 August 2019, introducing a new provision on the loss of German nationality. Under this provision, Germans who hold an additional nationality are to lose their citizenship if they take part in fighting for a terrorist organisation abroad (Section 17 subs. 1 no. 5 of the Nationality Act; Flade/Mascolo 2019).

# 3 The role of the migration authorities in the security context

This chapter considers the role of the migration authorities in the identification of, the exchange of information on and the handling of third-country nationals who constitute a threat to public security, and documents the corresponding framework and administrative procedures. The Federal Office for Migration and Refugees is of primary importance here as, in accordance with Section 75 no. 11 of the Residence Act, it is responsible for “coordinating the transfer of information and evaluating findings of the federal authorities, in particular of the Federal Criminal Police Office and the Federal Office for the Protection of the Constitution, on foreigners for whom measures under the law on foreigners, asylum or nationality must be considered owing to a risk to public security”. The Federal Office for Migration and Refugees is a federal authority within the sphere of responsibility of the Federal Ministry of the Interior, Building and Community which has its headquarters in Nuremberg and is additionally represented at 66 additional locations throughout Germany.

Alongside the Federal Office for Migration and Refugees, the foreigners authorities are competent at local level in the Länder for all residence- and passport-related measures and rulings in accordance with the Residence Act and pursuant to provisions relating to foreigners in other laws (Section 71 subs. 1 first sentence of the Residence Act). As such, they also play a substantial role in enforcing residence-related measures against third-country nationals who constitute a threat to public security.

## 3.1 At federal level: The role of the Federal Office for Migration and Refugees

The Federal Office for Migration and Refugees has been responsible for coordinating the transfer of information and evaluating findings of the federal authorities (Section 75 no. 11 of the Residence Act) since the ‘Act to Implement Residence- and Asylum-Related Directives of the European Union’ entered into force on

1 September 2008. The Federal Office for Migration and Refugees cooperates with the Federal Criminal Police Office and the Federal Office for the Protection of the Constitution with the aim of “identifying in good time whether and what measures under the law on foreigners and asylum and measures to prevent naturalisation can be applied in specific cases” (Deutscher Bundestag 2007: 194). To this end, in its capacity as a federal authority the Federal Office for Migration and Refugees compiles relevant findings, evaluates these and coordinates the forwarding of information to the competent federal and Land authorities<sup>31</sup> (Deutscher Bundestag 2007: 194).

The assumption of this task by the Federal Office for Migration and Refugees has received criticism from various quarters on the grounds that Section 75 no. 11 of the Residence Act does not define this task of the Federal Office with sufficient clarity, given its far-reaching consequences with regard to residence issues. Critics cite the fact that there are no stipulations as to which items of information are to be forwarded to which authorities and which concrete measures come into consideration under the law as it relates to foreigners, asylum and nationality matters (Clodius 2016: § 75 AufenthG, marginal note 14).

In addition to this coordinating role, the Federal Office for Migration and Refugees also forwards information to the security services relating to security aspects which is obtained in asylum hearings or with regard to beneficiaries of international protection in the revocation procedure (Chapter 3.3.1).

### 3.1.1 Joint Counter-Terrorism Centre (GTAZ)

The Joint Counter-Terrorism Centre (Gemeinsames Terrorismusabwehrzentrum, GTAZ) was established on 14 December 2004 in response to the attacks in New York on 11 September 2001 (Deutscher Bundestag 2018: 5). The GTAZ operates in the field of “monitoring and combating Islamist terrorism”. “To this

<sup>31</sup> Interior ministries, foreigners authorities and authorities concerned with matters of nationality.



end, the security services are to work together so as to incorporate all available sources of intelligence, to improve the efficiency of information management, to strengthen analytical capacities, to identify potential threats at an early juncture and to facilitate the coordination of operational measures” (Deutscher Bundestag 2018d: 5). The GTAZ thus pools the expertise of the German security services. The Federal Office for Migration and Refugees is also involved here, participating in particular in the ‘Status-Related Accompanying Measures’ and ‘Deradicalisation’ working groups, where it is able to contribute its expertise in the fields of the law as it applies to foreigners and asylum and in the area of deradicalisation, in accordance with its legal mandate (Section 75 no. 11 of the Residence Act) (BAMF 2020a).

The following federal and Land authorities are represented at the GTAZ:

- The Federal Office for the Protection of the Constitution,
- the Federal Criminal Police Office,
- the Federal Intelligence Service,
- the Federal Public Prosecutor,
- the Federal Police,
- the Customs Criminological Office,
- the Federal Office for Migration and Refugees,
- the Federal Office for the Military Counter-Intelligence Service,
- the Land Offices for the Protection of the Constitution
- and the Land Criminal Police Offices.

The GTAZ is divided up into various working groups (WG):

- WG ‘Daily Briefing’,
- WG ‘Threat Assessment’,
- WG ‘Operational Exchange of Information’,
- WG ‘Risk Management’,
- WG ‘Cases/Analyses of Islamic Terrorism’,
- WG ‘Islamist Terrorist Headcount’,
- WG ‘Radicalisation’,
- WG ‘Transnational Aspects’,
- WG ‘Status-Related Accompanying Measures’.

In the ‘Daily Briefing’ working group all the authorities involved in the GTAZ convene for a 30-minute meeting to discuss the latest findings on a daily basis and to present results and reports from other areas of work (Deutscher Bundestag 2018d: 8).

The ‘Threat Assessment’ working group meets on an ad hoc basis as necessary to discuss current findings

and to draw up and update joint threat assessments. These results “serve to enable the reliable evaluation of a possible need for action and of the threat situation, and to accelerate proceedings in case of facts and circumstances indicating an acute threat” (Deutscher Bundestag 2018d: 8).

The working group ‘Operational Exchange of Information’ meets on an ad hoc basis to enable an exchange of intelligence between the police and the intelligence services. Lines of inquiry are identified at the meetings and operational measures are coordinated “with the aim of swift operations planning” (Deutscher Bundestag 2018d: 8).

The ‘Case Assessment’ working group meets on an ad hoc basis around three to four times a year. At the meetings, multi-case situation assessments are carried out and analyses of “selected fields of Islamist terrorism with a German connection” are drawn up. Points on the agenda are jointly clarified and agreed between the Federal Criminal Police Office, the Federal Intelligence Service and the Federal Office for the Protection of the Constitution. The relevant Land Criminal Police Offices and Land Offices for the Protection of the Constitution are invited to these meetings as appropriate to the given agenda. In addition to terrorist activities, this working group also evaluates secondary criminal offences (such as the illegal procurement of identity papers, procurement of weapons) and corresponding measures and prevention strategies are defined (Deutscher Bundestag 2018d: 8f).

The ‘Structural Analysis’ working group carries out basic research projects on the structures and modus operandi of Islamist networks and undertakes centralised structural analyses to “identify and classify long-term aspects of the workings and methods of internationally operative terrorist groups and suspects”. These meetings also take place on an ad hoc basis (Deutscher Bundestag 2018d: 9).

The ‘Radicalisation’ working group was established in 2009 and has been managed since 2019 by the “Radicalisation” counselling centre of the Federal Office for Migration and Refugees. Meetings to share information and experiences in the field of deradicalisation measures are held annually and on an ad hoc basis as required. Sub-working groups focus on various topics throughout the course of the year, drafting joint guidelines, for example. In addition, new deradicalisation and intervention measures are developed and “strategies for combating radicalisation in the Islamist milieu” are drawn up (BAMF 2019; Deutscher Bundestag 2018: 9).

The 'Transnational Aspects' working group meets roughly four times a year on an ad hoc basis. This work group is tasked with "clarifying and evaluating influencing factors originating from abroad and developments in the field of international Islamic terrorism, where these affect German interests" (Deutscher Bundestag 2018d: 9).

The working group 'Status-Related Accompanying Measures' (Status working group) was set up by the Federal Ministry of the Interior in 2005 and is under the overall direction of the Federal Office for Migration and Refugees. It meets at least once a month with the aim of "terminating the residence of persons with an Islamist terrorist background" and enforcing "the relevant status-related measures in accordance with the law on asylum, foreigners and nationality to this end". The Status working group also analyses the registers of foreign residents and performs corresponding data matching to enable the "timely identification of legally possible prevention measures in the area of the law on foreigners and asylum law" (Deutscher Bundestag 2018: 9).

### 3.1.2 Joint Centre for Countering Extremism and Terrorism (GETZ)

The Joint Centre for Countering Right-Wing Extremism was set up along the lines of the GTAZ at the end of 2011, after the existence of the right-wing extremist National Socialist Underground (NSU) and the results of investigations into the organisation became known. In 2012, the Joint Centre for Countering Right-Wing Extremism was succeeded by the Joint Centre for Countering Extremism and Terrorism (Gemeinsames Extremismus- und Terrorismusabwehrzentrum, GETZ) (Deutscher Bundestag 2018d: 28). Based in Cologne, the GETZ serves as a communication platform for federal and Land authorities with the aim of "combating extremism and terrorism by right-wing and left-wing organisations and foreigners and pursuing counter-intelligence" (BfV 2020b). The Federal Office for Migration and Refugees is also represented at the GETZ, together with the following authorities:

- The Federal Office for the Protection of the Constitution,
- the Federal Intelligence Service,
- the Federal Office for the Military Counter-Intelligence Service,
- the Land Offices for the Protection of the Constitution,
- the Federal Criminal Police Office,
- the Federal Police,

- the European Police Office (EUROPOL),
- the Federal Public Prosecutor,
- the Central Customs Authority,
- the Land Criminal Police Offices,
- The Federal Office for Economic Affairs and Export Control (BfV 2020b)

In the GETZ the Federal Office for Migration and Refugees is the point of contact regarding politically motivated crime involving foreign ideology, that is, such cases which have a foreign, but not Islamist background. Similarly to its role at the GTAZ, the role of the Federal Office for Migration and Refugees at the GETZ is based on its expertise in residence- and asylum-related issues and its status as a migration authority at federal level.

### 3.1.3 Land working groups

In addition to the GTAZ and the GETZ, the Federal Office for Migration and Refugees is also represented in bodies comparable to the Status working group at Land level – the Land working groups. At Land level, the Department 'Operational Cooperation with the Federal and Land Security Services' (Security department) of the Federal Office for Migration and Refugees participates in the 15 working groups (Table 4).

The 'Special Task Force Dangerous Foreigners' of the Baden-Württemberg interior ministry provides an example of the role played by the Federal Office for Migration and Refugees in these cooperation bodies. The special task force can submit a "written request for the prioritisation of legal actions before the administrative courts under asylum law" to the point of contact at the branch office of the Federal Office for Migration and Refugees in Karlsruhe or to the Security department of the Federal Office for Migration and Refugees in Nuremberg, for example (Landtag BW 2018: 4). The Baden-Württemberg Land Criminal Police Office reports persons who constitute a threat to public security and order to the special task force. Where removal of the person concerned is not possible, "a chain of sanctions under the law relating to foreigners, such as expulsions, geographic restrictions or requirements to report to the authorities" is initiated through the Federal Office for Migration and Refugees and the foreigners authorities, according to the competent body in the case concerned (Landtag BW 2018: 3).

**Table 4: Land work groups in which the Federal Office for Migration and Refugees is involved**

Federal state	Body
Baden-Württemberg	WG 'Termination of residence of foreigners classifiable as dangerous' / since 2018: 'Special Task Force Dangerous Foreigners'
Bavaria	WG 'Expedited identification and expulsion of potential offenders from the area of Islamist terrorism and/or extremism' (WG BIRGiT)
Berlin	WG 'Extremist foreigners' (AG ExtrA)
Brandenburg	'Standing work group on residence and naturalisation' (WG SAGA)
Bremen	'Case conference' (no meetings held)
Hamburg	'Counter-terrorism coordination' (ATK) (no meetings held)
Hesse	WG 'for the expedited return of identified Islamist offenders (in Hesse)' (WG BRiT)
Mecklenburg-Western Pomerania	'Expert working group on combating terrorism' (FAKT)
Lower Saxony	WG 'Individual cases' (AGE)
North Rhine-Westphalia	WG 'Security conference' (SiKo)
Rhineland-Palatinate	WG 'Return of foreign potential offenders' (RaG) (no meetings held)
Saarland	-
Saxony-Anhalt	WG ARIS 'The law on foreigners and internal security in Saxony-Anhalt'
Saxony	WG 'Residence'
Schleswig-Holstein	WG 'Residence aspects of handling extremist/terrorist foreigners' (ABex)
Thuringia	WG 'Residence and nationality aspects of handling persons from the area of foreign extremism' (Aux)

### 3.2 At local government level: The role of the foreigners authorities

In addition to the level of federal authorities, the local level at the place of residence of potential offenders is of central importance to information sharing, for which the foreigners authorities are responsible. In accordance with the Federal Act on the Protection of the Constitution, the foreigners authorities of the Länder forward information which comes to their knowledge regarding, inter alia, attempts directed against

the free democratic order or against the existence or security of the Federal Republic or of one of the Länder to the competent authority on their own initiative, including personal data. They also forward information about activities directed against the concept of international understanding, in particular peaceful relations between nations (Section 18 subs. 1a, Section 3 subs. 1 first sentence no. 1 and Section 4 of the Federal Act on the Protection of the Constitution). The Bavarian Act on the Responsibilities and Powers of the Bavarian State Police<sup>32</sup> provides an example of the regulations

32 German: Gesetz über die Aufgaben und Befugnisse der Bayerischen Staatlichen Polizei.

applying to the transfer of data from foreigners authorities to security services in the Länder. Public bodies may transfer personal data to the police when a threat to public security is to be assumed (Art. 60 paragraphs 1 and 2 of the Bavarian Act on the Responsibilities and Powers of the Bavarian State Police).

Where appropriate, the foreigners authorities also take part in the meetings of the GTAZ working group 'Status' (Deutscher Bundestag 2006: 6). The foreigners authorities are also represented in the working groups of the Länder (Table 4). In the working groups the individual cases of third-country nationals who constitute a threat to public security are presented, discussed and the appropriate manner of dealing with them is agreed. With the support of the relevant working group, the foreigners authorities then attend to implementing measures under the law on foreigners. In certain circumstances, it may be appropriate to examine possible measures in a specific sequence, for example the revocation of the international protection status by the Federal Office for Migration and Refugees before expulsion by the competent foreigners authority (Chapter 5.1, 5.3).

Participants in the Bavarian working group 'Expedited identification and expulsion of potential offenders from the area of Islamist terrorism and/or extremism' (WG BIRGiT), which was set up in 2004, include the major Bavarian foreigners authorities, the Bavarian Land Office for the Protection of the Constitution, the Bavarian Land Police Office, the Federal Office for Migration and Refugees and the Federal Police, for example. The working group is directed by the Bavarian interior ministry (STMI 2014).

### 3.3 Investigative and reporting procedures between the migration authorities and security services

#### 3.3.1 At federal level

##### Reporting of security information by the Federal Office for Migration and Refugees to the security services

The security services receive information from the Federal Office for Migration and Refugees on third-country nationals who demonstrate a threat to the security of the Federal Republic of Germany and the free democratic basic order. Such information is generally obtained within the context of the asylum procedure

as well as the revocation or withdrawal procedures of protection statuses. This is regulated in the following legislation:

- Federal Act on the Protection of the Constitution<sup>33</sup>
- Federal Intelligence Service Act<sup>34</sup>,
- Military Counter-Intelligence Service Act<sup>35</sup>,
- Federal Criminal Police Act<sup>36</sup>,
- Asylum Act.

The Federal Office for Migration and Refugees notifies the Federal Office for the Protection of the Constitution (Section 3 subs. 1, Section 18 subs. 1a of the Federal Act on the Protection of the Constitution) of facts which become known to it indicating

- activities directed against the free democratic order or against the existence or security of the Federal Republic or of one of the Länder, or intended to unlawfully hinder federal or Land constitutional bodies or their members in carrying out their official duties (Section 3 subs. 1 no. 1 of the Federal Act on the Protection of the Constitution),
- activities constituting a threat to state security or intelligence activities on behalf of a foreign power (Section 3 subs. 1 no. 2 of the Federal Act on the Protection of the Constitution),
- activities which jeopardise foreign interests of Germany through the use of violence or preparations for the same (Section 3 subs. 1 no. 3 of the Federal Act on the Protection of the Constitution),
- activities directed against the concept of international understanding (Art. 9 paragraph 2 of the Basic Law), in particular peaceful relations between nations (Section 26 subs. 1 of the Basic Law) (Section 3 subs. 1 no. 4 of the Federal Act on the Protection of the Constitution).

The Federal Office for the Protection of the Constitution filters this information and forwards it as appropriate to the relevant Land Offices for the Protection of the Constitution. Similar provisions apply to the transfer of information from the Federal Office for Migration and Refugees to the Military Counter-Intelligence Service (Section 10 subs. 1 of the Military Counter-Intelligence Service Act), the Federal Intelligence Service (Section 23 subs. 1 of the Federal Intelligence Service

33 German: Gesetz über die Zusammenarbeit des Bundes und der Länder in Angelegenheiten des Verfassungsschutzes und über das Bundesamt für Verfassungsschutz.

34 German: Gesetz über den Bundesnachrichtendienst.

35 German: Gesetz über den militärischen Abschirmdienst.

36 German: Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten.

Act) and the Federal Criminal Police Office (Section 9 subs. 4 of the Federal Criminal Police Office Act). In addition, the Federal Office for the Protection of the Constitution, the Federal Intelligence Service and the Military Counter-Intelligence Service may request the Federal Office for Migration and Refugees to transfer the information required to discharge their duties, including personal data (Section 18 subs. of the Federal Act on the Protection of the Constitution, Section 23 subs. 3 of the Federal Intelligence Service Act in conj. with Section 18 subs. 3 of the Federal Act on the Protection of the Constitution, Section 10 subs. 2 of the Military Counter-Intelligence Service Act in conj. with Section 18 subs. 3 of the Federal Act on the Protection of the Constitution). Similar provisions apply with regard to the Federal Criminal Police Office (Section 9 subs. 1 of the Federal Criminal Police Office Act).

The Security department is responsible for these activities at the Federal Office for Migration and Refugees. In this role it serves to forward security-related information arising from the asylum and revocation procedure, for example, to the relevant security services and law enforcement agencies. The civil service regulations of the Federal Office for Migration and Refugees define what is security-related and notifiable.

### Data Sharing Improvement Act (2016) and Second Data Sharing Improvement Act (2019)

The Data Sharing Improvement Act<sup>37</sup>, which entered into force on 5 February 2016, created the conditions for establishing the identity of all asylum seekers, before application, and unauthorised entering or staying third-country nationals who entered Germany as quickly as possible and for improving the data sharing between all authorities involved in the procedure.<sup>38 39</sup> The new security data matching process (consultation in the asylum context, ‘AsylKon’) which was introduced with this legislation enables security services to

check at an early juncture “whether any terrorism-related findings or other serious security concerns” apply to such persons (BMI 2020c).

The Second Data Sharing Improvement Act<sup>40</sup>, the essential elements of which entered into force on 9 August 2019, included additional measures to increase security. The ‘AsylKon’ security data matching process which was introduced by the First Data Sharing Improvement Act is now also carried out for third-country nationals in connection with asylum revocation or withdrawal procedures, readmission requests from another Member State, resettlement procedures and other humanitarian admission procedures for third-country nationals and reallocation procedures for asylum applicants. Therefore, these changes partly also apply to regularly staying persons. Intelligence from the Federal Police is also incorporated into the technically automated security data matching processes (BMI 2020c).

As the changes specified here primarily concern procedural security matters relating to the asylum process, it is not appropriate to discuss them in greater detail here, on account of the study’s focus on third-country nationals who hold a residence permit (who generally do not comprise asylum applicants but only foreigners who have been recognised as being entitled to protection). These changes are noteworthy with regard to the exchange of data between the security services and migration authorities in that they have made it possible to identify persons constituting a threat to public security at an earlier juncture.

### Reporting of security information by the security services to the Federal Office for Migration and Refugees

Within the context of the GTAZ the Federal Office for Migration and Refugees receives, in its capacity as holding the overall direction of the Status working group, information on regularly as well as irregularly staying persons or asylum seekers from the Federal Office for the Protection of the Constitution (Section 19 subs. 1 first sentence of the Federal Act on the Protection of the Constitution), the Federal Criminal Police Office (Section 25 subs. 2 of the Federal Police Act) and the Federal Police (Section 32 subs. 2 of the Federal Police Act) “for the purpose of preparing measures under the law as it relates to foreigners, asylum or nationality”. The Federal Office for Migration and Refugees

37 German: Gesetz zur Verbesserung der Registrierung und des Datenaustauschs zu aufenthalts- und asylrechtlichen Zwecken.

38 All data collected at the time of registration are now stored in the core database of the Central Register of Foreigners at the time of the foreigner’s first contact with the authorities. The Act on the Central Register of Foreigners (Gesetz über das Ausländerzentralregister, AZR-Gesetz) was amended: the list of collected data in the core database was extended (fingerprints, country of origin, contact data such as address, phone numbers and e-mail addresses, information on allocation and information on health examinations and vaccinations). With that the Federal Office for Migration and Refugees, the authorities monitoring cross-border travel, the Länder police authorities, the reception centres and the foreigners authorities all enter data into the core database.

39 This section is based on the EMN/BAMF Annual Policy Report 2016 (EMN/BAMF 2017: 42).

40 German: Zweites Gesetz zur Verbesserung der Registrierung und des Datenaustauschs zu aufenthalts- und asylrechtlichen Zwecken.

forwards this information to the foreigners authorities and the authorities concerned with matters of nationality in accordance with Section 19 subs. 1 second sentence of the Federal Act on the Protection of the Constitution, Section 25 subs. 6 first sentence of the Federal Police Act and Section 33 subs. 6 of the Federal Police Act (Deutscher Bundestag 2014b: 7). Security aspects of the protection status are additionally examined in the course of the so-called standard review. In this connection, the Federal Office for Migration and Refugees requests information from the security services to enable it to “accord due consideration to additional low-threshold intelligence of the security services” (Deutscher Bundestag 2018e: 10, 2018f: 8; cf. Chapter 5.1 regarding revocation and withdrawal of a protection status).

### 3.3.2 At Land and local government level

#### Reporting of security information by the foreigners authorities to the security services

In connection with the security enquiry which the competent foreigners authority can submit to the security and intelligence services prior to any issuance or extension of a residence permit, a temporary suspension of removal or a permission to remain pending the asylum decision the foreigners authorities provide due notification when they have any “knowledge indicating personal data relevant to security matters” (Section 3 subs. 3 fifth sentence of the General Administrative Regulation to the Residence Act regarding Section 73 subs. 2 and 3 first sentence of the Act<sup>41</sup>; cf. Chapter 5.2 regarding the security enquiry).

Aside from the security enquiries, the foreigners authorities also forward any security-related information of which it obtains knowledge to the security services. While no specified procedure applies here, it can be assumed that the foreigners authorities inform the local police authorities as established practice. The facts of the cases concerned are elaborated at foreigners authorities and forwarded to the competent central departments at the Land Criminal Police Offices and or the Federal Criminal Police Office for possible discussion at the GTAZ and/or GETZ (written reply from the Federal Criminal Police Office, 2020). In the case of Anis Amri, for example, the foreigners authority in Kleve informed the competent police department “that a person occupying a room next door to a person resident under the name of “Mohamed HASSA” at

the local community accommodation facility in Emmerich had seen photographs on the latter’s mobile phone showing persons dressed in black who were armed with rapid-fire weapons (Kalashnikovs) and posing with hand grenades. The police duly drew up an “Islamism investigation case”. ‘HASSA’ was an alias of AMRI [the perpetrator of the attack at Breitscheidplatz in Berlin; author’s note], who was not directly identifiable as such” (BMI 2017a: 2; see Attack in Berlin, Chapter 2.3).

#### Reporting of security information by the security services to the foreigners authorities

The GTAZ, GETZ and the Land working groups generally serve as communication and coordination platforms offering a vehicle for the exchange of information between the security services and the foreigners authorities. The security and intelligence services additionally furnish the foreigners authorities with information in response to security enquiries pursuant to Section 73 subs. 2 and 3 first sentence of the Residence Act. In the security enquiry, which can be submitted to the security and intelligence services *inter alia* prior to any issuance or extension of a residence permit, the foreigners authorities enquire whether such issuance or extension is to be withheld pursuant to Section 2 subs. 4 of the Residence Act. In this connection it is enquired, amongst other things, whether an interest in expulsion applies on account of a threat to the free democratic basic order or the security of the Federal Republic of Germany or participation in violent acts in pursuit of political or religious aims (Section 54 subs. 1 nos. 2 and 4 of the Residence Act), whether a removal order has been issued pursuant to Section 58a of the Residence Act or whether any other security concerns exist, whereupon any relevant measures under the law as applies to foreigners (such as non-extension) are initiated (Chapter 5.2).

41 German: Allgemeine Verwaltungsvorschrift zu § 73 Absatz 2 und 3 Satz 1 vom 25. August 2008.



## 4 Prevention work by the Federal Government

Prevention work is organised in Germany along federalist and cooperative lines. Many different actors are involved in prevention work. Important roles are played, for example, by the democracy centres of the Länder, partnerships for democracy in local communities and involved individuals, organisations and associations from civil society, the Federal Agency for Civic Education (Bundeszentrale für politische Bildung, BpB), the Federal Anti-Discrimination Agency (Antidiskriminierungsstelle, ADS), the Federal Ministry of the Interior, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth and also the Federal Office for Migration and Refugees with its Advice Centre on “Radicalisation” and its counselling centres network. This chapter covers central federal programmes and institutions. There is not sufficient space here to present programmes and measures at Land and municipal level or civic and religious (including Muslim) bodies involved in prevention work.

### 4.1 National prevention programme to prevent Islamist extremism (NPP)

On 29 March 2017, the Federal Government adopted a new ‘National Programme to Prevent Islamist Extremism’ (Nationales Präventionsprogramm gegen islamistischen Extremismus, NPP).<sup>42</sup> It builds on the ‘Strategy to Prevent Extremism and Promote Democracy’ (Chapter 4.3) and aims to meet the special challenges of Islamist extremism throughout society (BMI 2020d). € 100 million have been earmarked for the NPP in the budget for 2018 and 2019. The programme will be continued in the years 2020 and 2021 with an equal amount of funds (subject to legislative approval). Based on the key elements mentioned in the NPP, an “effective national programme aimed at Islamist extremism and including additional foci” is to be developed.

These key elements are:

- Places of prevention – municipalities, families and the social environment, educational institutions and mosque communities;
- Prevention on the internet – support “measures which raise awareness among users, multipliers and platform providers of dissemination strategies and mechanisms of Islamist propaganda”, strengthen users’ ability of judgement and discourse, for example by target-group specific information on civic education, develop guidelines for communication for alternative narratives to counteract extremist propaganda, and monitor Islamist content;
- Prevention through integration – language courses, access to the labour market and to labour market access measures for refugees;
- Prevention and deradicalisation in prisons and in probation assistance – expand efforts to help radicalised people leave the scene and support efforts to establish Muslim chaplaincy in prisons;
- Increasing effectiveness – expand research, make additional efforts to combine measures, improve the risk management, engage in international and European exchange and cooperation (BMI 2017b: 2ff.).

The NPP is based on existing prevention schemes and aims to conclude a “Pact for Prevention” together with the Länder, “national associations of local authorities, security authorities, religious communities and civil-society actors” (BMI 2017b: 2, 6). The Federal Ministry of the Interior and the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth jointly lead the programme (BMI 2017b: 7).

<sup>42</sup> This section is based on the EMN/BAMF Annual Policy Report 2017 (EMN/BAMF 2018: 78f.).

## 4.2 Advice Centre on “Radicalisation” at the Federal Office for Migration and Refugees

Since 2012, the Advice Centre on Radicalisation is set up at the Federal Office for Migration and Refugees, which can be approached by anyone “who observes an Islamist-motivated radicalisation in their personal environment” (BAMF 2020b)<sup>43</sup>. Relatives, friends or for example also teachers may contact the staff at the hotline of the Advice Centre, “which record the cases and provide individual and demand-oriented counselling together with the non-profit organisations. Since its establishment, the Advice Centre has received more than 4.400 calls. There are around 70 specially trained employees. Among the employees are social pedagogues, political scientists, scholars of Islam and psychologists, all trained accordingly to conduct the counselling interviews, to develop consulting strategies and put them into practice with those seeking for counsel. Counselling is provided in the languages German, Turkish, Arabic, English, Farsi, Russian and Urdu”.

The Advice Centre on “Radicalisation” has a nationwide network of counselling centres in the form of so-called “partners in the field” to whom the staff of the counselling centre at the Federal Office for Migration and Refugees refer parties seeking counselling. There are eleven partner organisations in all, represented at more than 16 locations. The department ‘Counselling Centre Radicalisation, Prevention’ enables and tracks mutual knowledge sharing nationwide between the NGOs and the security services and authorities in diverse discussion formats. The Deradicalisation working group serves as a key platform in this context (Chapter 3.1.1).

In addition to these counselling services for persons with people who are (suspected of) undergoing Islamist radicalisation among their acquaintances, there are other counselling services and programmes for people breaking away from the radical right- and left-wing scene. Here too, there is no specific focus on third-country nationals.

The counselling services are not differentiated according to the residence status of the persons concerned, and deradicalisation measures may also be applied

even if the person concerned is likely to be removed (Advice Centre on “Radicalisation” of the Federal Office for Migration and Refugees).

The work of the Advice Centre on “Radicalisation” demonstrates the integral approach to combating terrorism, covering both repressive and preventive measures to counter radicalisation and extremism. Deradicalisation work already begins in the course of a prison stay, for example. This integral approach has proved itself in the last years. While the counselling centre is primarily involved with cases of Islamist-motivated radicalisation, it has also dealt with a small number of cases in which relatives of people who had become radicalised through other channels approached it for help. These cases were referred to the competent partners in the field (Advice Centre on “Radicalisation” of the Federal Office for Migration and Refugees).

### Evaluation of the Advice Centre

The Research Centre at the Federal Office for Migration and Refugees carried out an evaluation of the Advice Centre on “Radicalisation” in 2017. The presented findings show the Advice Centre on “Radicalisation” at the Federal Office for Migration and Refugees to have proven effective with regard to both the structure of the network of counselling centres and its cooperation with relevant authorities from the security field. As a result of the networking with the security services, the Federal Office for Migration and Refugees is able to contact the competent authorities in good time in the case of (potentially) security-related cases. The security authorities surveyed in connection with the evaluation and the counselling centre itself described this cooperation as “highly professional and very good” (Uhlmann 2018: 34). Above all, the point of contact of the Federal Office for Migration and Refugees at the GTAZ and the liaison staff of the Federal Intelligence Service, the Federal Office for the Protection of the Constitution and the Federal Police, together with the network of contacts which was established in 2012 at the Land Criminal Police Offices and the Land Offices for the Protection of the Constitution, enable “direct responses to security-related constellations” (Uhlmann 2018: 34).

The counselling centre also rates the manner in which the local partners of the network of counselling centres attend to and report security-relevant cases as “very professional”. In this context, it notes that “reporting channels are observed” and the “existing structures and contacts to the security services” are used to

<sup>43</sup> This section is based on the EMN/BAMF Annual Policy Report 2018 (EMN/BAMF 2019: 61).



report “volatile constellations [...] [very quickly], both on weekdays and at the weekend” (Uhlmann 2018: 47). For such cases, the Advice Centre at the Federal Office for Migration and Refugees has developed a so-called ‘notification guideline’ in consultation with the relevant security services and the partners in the field. At Land level and in some instances at Federal level there are also discussion formats in place which allow NGOs and security services to discuss individual security-related cases. In a small number of cases, when measures under residence law are necessary, advisors from the partners in the field may also attend meetings between the relevant foreigners authority and the security services. There is also increasing cooperation between the counselling centre and refugee establishments at Land and local government level.

The “projectisation” of deradicalisation work was criticised in the evaluation – a criticism which is commonly aimed at projects subject to limited periods of funding and support. According to this line of criticism, the short terms of such projects is “at odds with the intended aims of the counselling to pursue sustainable stabilisation processes” (Uhlmann 2018: 51). In addition, the payment is often considered “inadequate” for the “demanding work and the widespread work overload”. Recruiting qualified personnel also represents an additional challenge (Uhlmann 2018: 51).

### 4.3 Further measures by the Federal Government

The Federal Government adopted the ‘Strategy to prevent extremism and promote democracy’ (Strategie der Bundesregierung zur Extremismusprävention und Demokratieförderung) in 2016. This strategy paper was sparked by the growing number of politically motivated acts of violence (right-wing-motivated criminal offences against asylum accommodation centres, vitriolic and racist hate campaigns online and anti-constitutional political movements). The Federal Government supports preventive measures in the different categories of politically motivated crime and is involved in prevention work to counter right-wing extremism, left-wing extremism, Islamist radicalisation, Islamophobia, Muslimophobia, antisemitism, antiziganism, homophobia and transphobia (Bundesregierung 2016: 11ff.). Since 2015, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth has additionally been supporting “efforts by civil society to promote democracy and combat all forms of extremism” through the Federal Government programme ‘Demokratie leben!’ (BMFSFJ 2020).

# 5 Residence-related and residence-terminating measures

Third-country nationals whom the security services consider to represent a threat to public security face consequences under the law on residence. The possible residence-related and residence-terminating measures are to be examined in the context of each individual case and are presented in the following chapters. These measures include:

- Expulsion,
- non-extension or subsequent reduction of the period of validity of the temporary residence permit,
- revocation or withdrawal of the residence permit and international protection status,
- transfer to the EU Member State which issued the residence permit,
- return to the country of origin or another third country,
- curtailment of the rights pertaining to the residence permit (surveillance on grounds of internal security),
- ban on leaving the federal territory,
- alerts (determination of whereabouts, detention, reservations regarding entry into the federal territory),
- ban on entry and residence and
- refusal of entry at the border.

The authorities responsible for ordering the respective measures are the foreigners authorities, and at the border also the border police authorities. Where the individuals concerned are beneficiaries of protection and there are corresponding indications that they may represent a threat to public security, the Federal Office for Migration and Refugees assesses the option of revoking and withdrawing the protection status (standard review), independently of the review of the case under residence law.

## 5.1 Expulsion

The expulsion of persons who represent a threat to public security as defined in this study is regulated in Sections 53, 54 and 55 of the Residence Act. “Expul-

sion is [...] not an actual action, but an administrative act which ends the legality of a stay and gives rise to an obligation to leave the federal territory” (Hoffmeyer-Zlotnik 2017: 19). Expulsion is not part of the return procedure, but a prerequisite. Expulsion is carried out by removal. Section 53 subs. 1 of the Residence Act stipulates that a person who endangers public security and order, the free democratic basic order or any other significant interests of the Federal Republic of Germany is to be expelled where the weighing of the interest in expulsion (Section 54 of the Residence Act) against the interest in the foreigner remaining in the federal territory (Section 55 of the Residence Act) in the individual case concerned shows the public interest in expulsion to outweigh the interest in the foreigner remaining. The interest in expulsion in cases involving a threat to public security as defined in this study is established as a legal norm in Section 54 subs. 1 nos. 2-5.

In the decision on expulsion, a distinction is made between whether the interest in expulsion is “serious” (Section 54 subs. 2 of the Residence Act) or “particularly serious” (Section 54 subs. 1 of the Residence Act). A particularly serious interest in expulsion applies, for example, when the person represents a threat to the free democratic basic order or the security of the Federal Republic of Germany; this is to be assumed where facts justify the conclusion that the person concerned belongs to or has belonged to, or supports or has supported an organisation which supports terrorism, or is preparing or has prepared a serious violent offence endangering the state (Section 54 subs. 1 no. 2 of the Residence Act), or where the person participates in acts of violence or publicly incites to violence in pursuit of political objectives or threatens the use of violence (Section 54 subs. 1 no. 4 of the Residence Act). Section 53 subs. 3 and 4 of the Residence Act stipulates that persons with specific residence permits may only be expelled in special circumstances (Table 5).

**Table 5: Expulsions on grounds of a threat to public security**

A holder of a(n)...	...may only be expelled, if...
residence permit in accordance with the EEC/Turkey Association Agreement (Section 5 of the Residence Act)  EU long-term residence permit (Section 9a of the Residence Act)	their personal behaviour presently poses a serious threat to public security and order, which constitutes a fundamental interest of society, and their expulsion is crucial to protecting this interest (Section 53 subs. 3 of the Residence Act).
residence permit as a foreigner who is recognised as being entitled to asylum (Section 25 subs. 1 of the Residence Act in conj. with Art. 16a of the Basic Law)  residence permit as a recognised refugee (Section 25 subs. 2 of the Residence Act in conj. with Section 3 subs. 1 of the Asylum Act)  a travel document issued by a German authority in accordance with Art. 28 of the Geneva Convention on Refugees	there are serious grounds to suspect that they are to be regarded as a threat to the security of the Federal Republic of Germany or a terrorist threat or if they poses a threat to the general public or the security of the Federal Republic of Germany because they have been finally convicted of a serious criminal offence (Section 53 subs. 3a of the Residence Act).
residence permit as a beneficiary of subsidiary protection (Section 25 subs. 2 of the Residence Act in conj. with Section 4 subs. 1 of the Asylum Act)	they have committed a serious criminal offence or represent a threat to the general public or the security of the Federal Republic of Germany (Section 53 subs. 3b of the Residence Act).

## 5.2 Non-extension of the residence permit

When third-country nationals submit an application for renewal or extension of their residence permit to the relevant foreigners authority, the latter may transfer personal data which they have in storage via the Federal Office of Administration to the security and intelligence services by way of the so-called ‘security enquiry’ for the purposes of establishing any grounds for refusal or examining other security concerns (Section 73 subs. 2 and 3 first sentence of the Residence Act; see also Chapter 3.3.2).

A residence permit is not issued or extended where an interest in expulsion applies pursuant to Section 54 subs. 1 nos. 2 or 4 of the Residence Act or a removal order has been issued pursuant to Section 58a of the Residence Act (Section 5 subs. 4, Section 8 subs. 1 of the Residence Act). This is the case when the person concerned

- threatens the free democratic basic order or the security of the Federal Republic of Germany; this shall be assumed to be the case if there is reason to believe that the foreigner is or has been a member of an organisation which supports terrorism or supports or has supported such an organisation, or is preparing or has prepared a serious violent of-

fence endangering the state<sup>44</sup> pursuant to Section 89a subs. 1 second sentence of the Penal Code, unless the person recognisably and credibly distances himself from the activity which endangers the state (Section 54 subs. 1 no. 2 of the Residence Act),

- is involved in violent activities in the pursuit of political or religious objectives or calls publicly for the use of violence or threatens the use of violence (Section 54 subs. 1 no. 4 of the Residence Act),
- or where a removal order has been issued against the person concerned on the basis of a prognosis based on facts, in order to avert a special danger to the security of the Federal Republic of Germany or a terrorist threat (Section 58a of the Residence Act).

The security enquiry procedure is regulated in Section 73 subs. 2 and 3 first sentence of the Residence Act, and in the ‘General Administrative Regulation to the Residence Act concerning Section 73 subs. 2 and subs. 3 first sentence of 25 August 2008’ together with supplementary regulations of the Länder. Under these provisions, a security enquiry *inter alia* takes place

<sup>44</sup> A serious violent offence endangering the state is an offence against life in the case of Section 211 (Murder) or Section 212 (Homicide) or against personal freedom in the cases covered by Section 239a (Abduction for purpose of extortion) or Section 239 b (Hostage-taking) of the Penal Code which, by virtue of the circumstances concerned is intended and appropriate to compromise the continued existence or the security of a state or of an international organisation or to eliminate, nullify or undermine constitutional principles of the Federal Republic of Germany (Section 89a subs. 1 second sentence of the Penal Code).

for persons falling within the purview of the law on foreigners:

- prior to issuance of a settlement permit,
- prior to issuance of an EC long-term residence permit,
- in certain cases prior to initial issuance of a residence permit,
- in certain cases prior to extension of a residence permit,
- prior to initial issuance of a residence permit to the holder of permission to remain pending the asylum decision, and in certain cases prior to initial issuance of a residence permit to a person whose removal has been suspended.

A stipulated procedure applies to the security enquiry (Section 3 of the General Administrative Regulation to the Residence Act concerning Section 73 subs. 2 and 3 first sentence). During the security enquiry, the foreigners authority transfers any personal data<sup>45</sup> which it holds to the security services and intelligence services. The security services and intelligence services receiving the enquiries then provide feedback as to whether there is any intelligence indicating grounds for refusal pursuant to Section 5 subs. 4 of the Residence Act<sup>46</sup> or whether any other security concerns apply (Section 73 subs. 3 first sentence first clause of the Residence Act) via a technical data gathering system which employs reporting abbreviations. They can also communicate further details of the available intelligence via this system, or reserve such communications for the special, direct exchange of information with the foreigners authorities (Section 3 subs. 5 of the General Administrative Regulation to the Residence Act concerning Section 73 subs. 2 and 3 first sentence). After the case has been reviewed, the foreigners authority informs the security services and intelligence services whether the residence permit is refused, granted or renewed (Section 3 subs. 8 of the General Administrative Regulation to the Residence Act concerning Section 73 subs. 2 and 3 first sentence).

45 The transferred personal data includes: Surname; maiden name; first names; spelling of names under German law; divergent spelling of names; other names; former names; date of birth; town and district of birth; country of birth; gender; nationalities; aliases (surname, maiden name, date of birth, town and district of birth, country of birth, gender, nationalities); ID document details (type and number of passport, passport substitute or substitute identity document, issuing country, period of validity); current address; former addresses; where applicable, period of validity of any ordered suspension of removal.

46 Issuance of a residence permit is refused where an interest in expulsion applies pursuant to Section 54 subs. 1 nos. 2 or 4 of the Residence Act or a removal order has been issued pursuant to Section 58a (Section 5 subs. 4 of the Residence Act).

The security services and intelligence services additionally check on grounds for refusal or security concerns during the period of validity of a residence permit.

“Where grounds for refusal or security concerns become known to the security services and intelligence services during the period of validity of the residence permit [...] they notify the [...] foreigners authority forthwith, using the procedures [...] in accordance with the given technical possibilities” (73.3.2 of the General Administrative Regulation to the Residence Act). The GTAZ, GETZ and the Land working groups also play an important role in this context (Chapter 3.1).

In addition to the national administrative regulations, the Länder specify additional security-related administrative procedures under the law on foreigners in corresponding regulations. These generally represent classified information, on account of the security-related subject matter<sup>47</sup>.

## 5.3 Withdrawal and revocation of the residence permit and protection status

Both the residence permit of third-country nationals and the protection status of beneficiaries of protection can be withdrawn or revoked in certain circumstances. A residence permit can be revoked or withdrawn by the competent foreigners authority, while the Federal Office for Migration and Refugees is generally responsible for revoking and withdrawing a protection status.

### Withdrawal of residence permit

The grounds for expiry of the residence permit are stated in Section 51 subs. 1 of the Residence Act. This also includes withdrawal of the residence permit (Section 51 subs. 1 no. 3 of the Residence Act). As the Residence Act does not stipulate any special provisions for the withdrawal of residence permits, the general legal norm of Section 48 of the Administrative Procedure Act, which regulates the withdrawal of an unlawful administrative act, is applied in such cases (51.1.1 of the General Administrative Regulation to the Residence Act). Residence permits are thus withdrawn in cases in which they should not actually have been

47 Cf. inter alia no. 73, ‘Administrative regulation of the Baden-Württemberg interior ministry on the law on foreigners’ (VwV-AusIR-IM); no. 15, Administrative regulation of the Bavarian State Ministry of the Interior, for Housing and Transport on the law on foreigners’ (BayVV AusIR).

issued in the first place. This is the case, for example, when it becomes apparent that an interest in expulsion of the person concerned already applied at the time of issuance of the residence permit, because they represented a threat to the free democratic basic order or the security of the Federal Republic of Germany or were preparing a serious violent offence endangering the state (Section 48 of the Administrative Procedure Act in conj. with Section 5 subs. 4 of the Residence Act). Responsibility for withdrawal lies with the foreigners authority in whose district the person has or had their habitual place of residence (Section 48 subs. 5 of the Administrative Procedure Act in conj. with Section 3 subs. 1 no. 3 of the Administrative Procedure Act in conj. with Section 71 subs. 1 of the Residence Act).

### Revocation of residence permit

The revocation of residence permits is regulated in Section 52 of the Residence Act. As a general rule, residence permits are revoked when the person concerned no longer fulfils the requirements according to which the residence permit was issued. The general conditions pertaining to issuance are no longer fulfilled pursuant to Section 5, subs. 4 of the Residence Act, for example, when an interest in expulsion applies because the person concerned represents a threat to the free democratic basic order or the security of the Federal Republic of Germany or is preparing a serious violent offence endangering the state (Section 54 subs. 1 nos. 2 and 4 of the Residence Act), or if a removal order has been issued pursuant to Section 58a of the Residence Act. Revocation concerns a discretionary decision by the competent foreigners authority. "In this connection, the public interest in terminating the residence must be weighed against the foreigner's personal interest in staying in the federal territory" (Heusch/Kluth: § 52 AufenthG marginal note 6).

### Withdrawal of international protection status

Recognition as a person entitled to asylum or recognition of refugee status is withdrawn where such recognition has been granted on the basis of false information or the concealment of essential facts and where the person concerned could not be recognised on other grounds (Section 73 subs. 2 of the Asylum Act). This is the case "where such false information or concealment contributed to the granting of recognition" (Fleuß 2019: § 73 AsylG marginal note 32). The international protection status is also withdrawn where the person concerned "already fulfilled the grounds for exclusion" pursuant to Section 3 subs. 2

of the Asylum Act or represented a threat pursuant to Section 60 subs. 8 of the Residence Act "at the time of granting of protection status" (Eichler 2019: 13). The withdrawal of protection status thus only takes place in cases "in which protection status was wrongfully granted" (Eichler 2019: 10). For the purposes of this study, grounds for exclusion apply where the person concerned

- has committed crimes against peace or humanity or a war crime (Section 3 subs. 1 first sentence no. 1 of the Asylum Act),
- has committed a serious non-political criminal offence outside of the federal territory prior to their admission as a refugee (Section 3 subs. 2 first sentence no. 2 of the Asylum Act),
- or acts contrary to the aims and principles of the United Nations (Section 3 subs. 2 first sentence no. 3 of the Asylum Act),
- or is to be regarded as a threat to the security of the Federal Republic of Germany (Section 60 subs. 8 first sentence first alternative of the Residence Act).

The Federal Office for Migration and Refugees is responsible for the withdrawal of protection status.

### Revocation of protection status

The protection status is to be revoked where "[...] a person has rightly received the protection status in the past but no longer meets the requirements which led to recognition" (Eichler 2019: 10). The Federal Office for Migration and Refugees carries out the so-called standard review for recognised refugees and persons entitled to asylum after no more than three and five<sup>48</sup> years respectively (Section 73 subs. 2a of the Asylum Act). This practice stems from the fact that the possibility of making a foreigner's residence permanent through issuance of a settlement permit arises for the first time after three years and in this connection it is to be checked once again whether the conditions pertaining to protection are still met. The security services are also involved here and database matching is carried out (Grote 2019: 29). Both the foreigners authority and the security services are required to provide further information on any findings and intelligence of relevance to revocation. Where new findings are available which could lead to revocation, a revocation

48 The Third Act Amending the Asylum Act (German: Drittes Gesetz zur Änderung des Asylgesetzes), which entered into force on 12 December 2018, extended the period for the standard review of protection status from three to five years (Section 73 subs. 7 of the Residence Act).

procedure is initiated. The Federal Office for Migration and Refugees notifies the outcome of the revocation procedure to the foreigners authority (Section 73 subs. 2a 2nd sentence of the Asylum Act) and the person concerned (Section 73 subs. 4 third sentence of the Asylum Act). Revocation of the protection status does not automatically lead to loss of the residence permit and termination of the foreigner's stay in Germany (Grote 2019: 29).

In addition to the standard review, the Federal Office for Migration and Refugees can also carry out an ad hoc revocation review. Relevant reasons may be a threat to security as relevant to this study or findings relating to misrepresentation of the applicant's identity in the asylum procedure, criminal offences or a journey to the country of origin, for example. Ad hoc reviews of residence status are generally carried out in response to information or requests from foreigners authorities and security services.

### 5.3.1 Statistics on the revocation and withdrawal of protection status

A total of 114,669 revocation and withdrawal procedures were dealt with in the first three quarters of 2019. Of these, 2,401 (approx. 2.1%) were dealt with "in response to concrete security-related information from other authorities" (Deutscher Bundestag 2020a: 4f.).

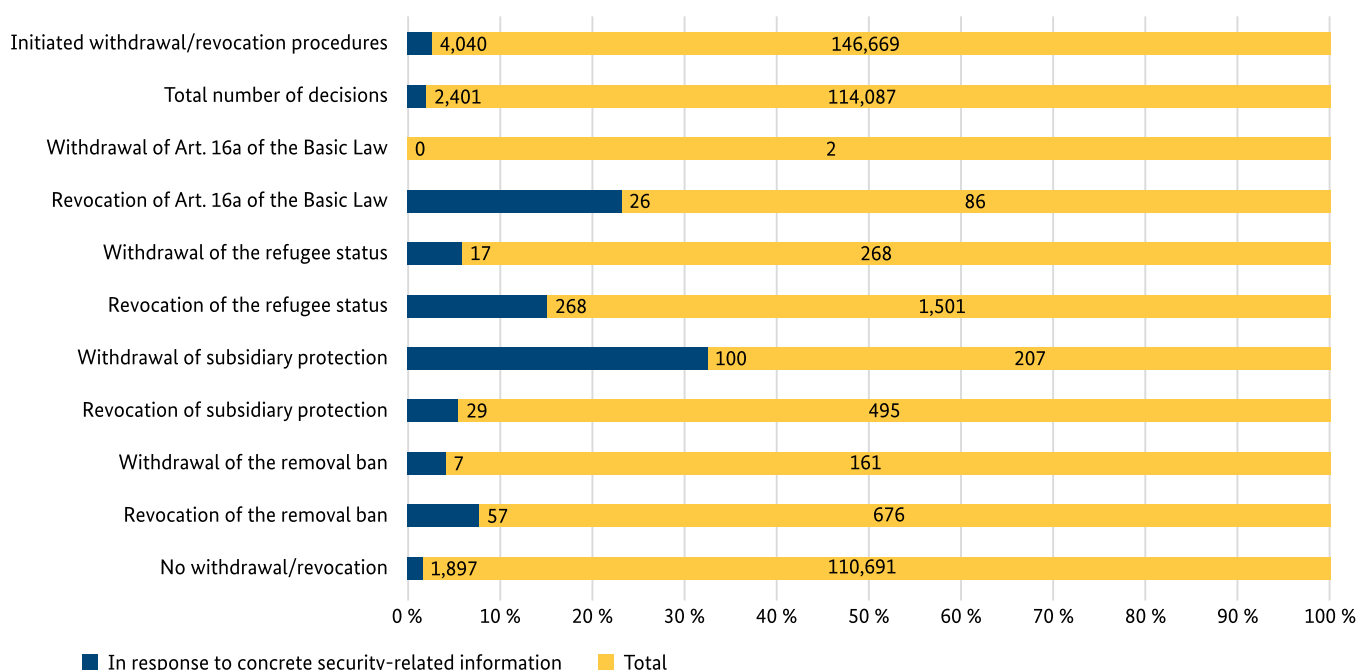
Figure 1 shows the total number of revocation and withdrawal procedures initiated by the Federal Office for Migration and Refugees in the first three quarters of 2019 and the total number of decisions made on revocation or withdrawal of the respective protection statuses<sup>49</sup>. The respective shares of procedures initiated on security grounds are also indicated. The numbers in Figure 1 represent the number of procedures initiated and completed respectively each refer to the period 1 January 2019 to 30 September 2019<sup>50</sup> (Deutscher Bundestag 2020a: 4).

In 504 of the procedures resulting from security-related information the protection status was revoked or withdrawn. There were far more cases (1,897) in which the protection status was neither revoked nor withdrawn. Figure 1 does not provide any indication as to how many of the protection statuses as a whole were revoked or withdrawn due to security-related aspects, showing only how many procedures were initiated on this basis.

49 Art. 16a of the Basic Law, refugee status, subsidiary protection, ban on removal.

50 Procedures that were initiated in the third quarter of 2019 but had not yet been completed are therefore only included in the number of initiated procedures. Procedures that were initiated in the fourth quarter of 2018 but only completed in the first quarter of 2019 are only included in the number of procedures completed.

**Figure 2: Revocation and withdrawal procedures, 1 January to 30 September 2019**



Source: Deutscher Bundestag 2020a: 4f; own calculations.



## 5.4 Return

In recent years, the Federal Government has increasingly come to see the return<sup>51</sup> of third-country nationals who constitute a threat to public security as a means of protecting public security in Germany (Deutscher Bundestag 2019b). The corresponding debate was sparked not least of all by the failure to remove the attacker Anis Amri to his country of origin, Tunisia, because passport substitute papers were missing (Schneider 2017). The following subchapters describe the existing individual return measures and the attendant conditions.

### 5.4.1 Removal

Removal in general and removal on grounds of a threat to public security are regulated in Sections 58, 58a and 59 of the Residence Act. Removal (Section 58 of the Residence Act) entails enforcement of the obligation to leave the federal territory. It presupposes that the requirement to leave the federal territory is enforceable, no period has been allowed for departure or such period has expired, and voluntary fulfilment of the obligation to leave is not assured or supervision of departure appears necessary on grounds of public security and order (Section 58 subs. 1 first sentence of the Residence Act). In accordance with Section 58a subs. 1 of the Residence Act, the supreme Land authority may issue a removal order against a person without prior expulsion on the basis of a prognosis based on facts, in order to avert a special danger to the security of the Federal Republic of Germany or a terrorist threat. The removal order is immediately enforceable; no removal warning is necessary. In addition, for persons whose whereabouts are not known the police may use their search tools for the purpose of terminating residence and apprehension (Section 50 subs. 6 first sentence of the Residence Act).

No removal order is to be enforced if the conditions pertaining to the prohibition of removal pursuant to Section 60 subs. 1-7 of the Residence Act are met. A prohibition of removal derived from the Geneva Convention (Section 60 subs. 1 of the Residence Act) does not apply, however, where third-country nationals are, for serious reasons, to be regarded as constituting a threat to the security of the Federal Republic

of Germany or represent a threat to the general public because they have been unappealably sentenced to a prison term of at least three years for a crime or a particularly serious offence (Section 60 subs. 8 first sentence of the Residence Act). The same applies if an exclusion with regard to asylum legislation following Section 3 subs. 2 of the Asylum Act is applicable, including for example crimes against peace, war crimes or crimes against humanity (Section 60 subs. 8 second sentence of the Residence Act). Other forms of the prohibition of removal, such as the national prohibition of removal (Section 60 subs. 5 or 7 of the Residence Act), however, are still granted in the cases listed above.

Where applicable, the enforcement of the expulsion, that is removal, may be temporarily suspended in certain circumstances, for example because the travel documents are missing. In such cases, a suspension of removal may take place (Section 60a of the Residence Act). Where a person creates an obstacle to removal themselves, for example by misrepresenting their identity or nationality, supplying false information or omitting of reasonable acts to obtain a passport a 'suspension of removal for persons of unclarified identity' is ordered, which entails more restrictive conditions, which includes sanctions, in particular a ban on gainful employment (Section 60b of the Residence Act).

Complete suspensions of removal to certain countries of origin may also be ordered pursuant to Section 60a subs. 1 of the Residence Act, such as applies to Syria since 30 March 2012, for example (Official Gazette of North Rhine-Westphalia, 2019 no. 17 p. 363). At the 211th meeting of the Standing Conference of Interior Ministers and Senators on 4 December 2019 the federal government was requested to work out a recommended course of action for the easing of the complete suspension of removals in cooperation with the Federal Ministry of the Interior, Building and Community and the Länder. This is to make possible the removal of amongst others potential offenders to Syria "under observance of human rights and differentiated examination of each case" (IMK 2019b: 26).

Under certain circumstances, removal may not be immediately possible following a removal order pursuant to Section 58a of the Residence Act, for example due to a lack of transport connections, unwillingness of the country of origin to take the person back or because the person concerned has filed an application for temporary relief pursuant to Section 58a subs. 4 second sentence of the Residence Act; Chapter 5.8). In such cases, the person concerned is to be detained by judicial order in order to ensure due process of remo-

51 "Return' is a generic term for all measures which terminate or prevent residence and is commonly used as the opposite to voluntary or independent departure" (Hoffmeyer-Zlotnik 2017: 19).

val (Section 62 subs. 3 first sentence of the Residence Act). Detention to prepare removal is not permissible where removal is not possible in the next three months for reasons for which the person concerned is not responsible (Section 62 subs. 3 third sentence of the Residence Act). Preventive detention is limited to six months (Section 62 subs. 4 first sentence of the Residence Act) and is extendable by a maximum of 12 months to a maximum of 18 months only in such cases where the person concerned obstructs their removal. Where the person concerned cannot be detained in accordance with this provision or cannot be removed within the time limit applying to preventive detention, special monitoring may be ordered (Sections 56 and 56a of the Residence Act).

### Act to Improve the Enforcement of the Obligation to Leave the Country

The ‘Act to Improve the Enforcement of the Obligation to Leave the Country’ entered into force on 29 July 2017.<sup>52</sup> It introduced various amendments to the Residence Act, concerning aspects such as detention to prepare removal, custody to secure removal, the requirement for persons who are obliged to leave the country to reside in the allocated district, the electronic monitoring of such persons and the announcement of removals. Further amendments pertained to the obligation to live at reception centres and the read-out of data from mobile devices to verify the identity of asylum applicants, for example. In introducing the act, the Federal Government aimed “to achieve additional improvements in the area of repatriation, particularly with regard to such persons obliged to leave the country who constitute security risks”. The act was adopted in part in response to the attack on a Christmas market in Berlin in December 2016 (Deutscher Bundestag 2017h: 1; Chapter 2.3). This section focuses on the amendments concerning residence-related measures for persons who constitute a threat to public security as defined in this study.

The act broadened the application of detention to prepare removal for persons who are enforceably required to leave the federal territory and who “pose a substantial threat to life and limb or to significant objects of legal protection pertaining to internal security”, for example (Deutscher Bundestag 2017h: 5). For such persons, detention to prepare removal may also

be ordered where removal is not possible within three months (Section 62 subs. 3 fourth sentence of the Residence Act). As a general rule, it is not permissible to order detention to prepare removal when it is foreseeable that removal will not be enforceable within three months (Section 62 subs. 3 third sentence of the Residence Act).

In addition, the possibility of detaining persons pending removal at penal institutions was re-introduced for persons who pose “a substantial threat to the life and limb of third parties or to significant objects of legal protection pertaining to internal security” (Section 62a subs. 1 second sentence of the Residence Act, old version<sup>53</sup>). For a number of years now, it has only been permissible to detain persons in preparation for their removal at special detention facilities (Grote 2014: 7). The question as to the permissibility of detaining potential offenders in preparation for removal at penal institutions remains the subject of judicial negotiation. The Federal Court of Justice submitted the issue of legality to the European Court of Justice in December 2018 for clarification (decision by the Federal Court of Justice of 22 November 2018<sup>54</sup>); assessment by the European Court of Justice is still pending.<sup>55</sup>

The act also introduced the possibility of electronic location monitoring (so-called ‘electronic tagging’) for persons constituting a threat to internal security (Section 56a of the Residence Act). The provisions pertaining to geographic restrictions on persons granted permission to remain pending the asylum decision have also been tightened for persons constituting a substantial threat to internal security or the life and limb of third parties (Section 59b subs. 1 no. 4 of the Asylum Act).

53 This exception was suspended with the Second Act to Improve the Enforcement of the Obligation to Leave the Country. With the Second Act a temporary relaxation of the rule requiring specialised detention facilities for the purpose of removal was introduced, however, which also applies to security cases.

54 Federal Court of Justice, decision of 22 November 2018 – V ZB 180/17 [ECLI:DE:BGH:2018:221118BVZB180.17.0] – BeckRS 2018, 35794.

55 A Tunisian whom the security services had classified as a potential offender on the grounds that he was suspected of supporting a foreign terrorist organisation was detained pending removal not at a special detention centre, as is customary, but at a normal penal institution. The man lodged an appeal with the Federal Court of Justice. While Art. 16 paragraph 1 of Directive 2008/115/EC stipulates exceptions to the requirement for detention to take place at dedicated detention facilities when no such specialised facilities are available, there is no specific provision for cases in which the person concerned constitutes a substantial threat to public security (MIGAZIN 2019).

52 The information presented in this section is based on the observations in the EMN/BAMF Policy Report 2017 and Hoffmeyer-Zlotnik 2017 (EMN/BAMF 2017: 97f., Hoffmeyer-Zlotnik 2017: 39).



## Second Act to Improve the Enforcement of the Obligation to Leave the Country

The ‘Second Act to Improve the Enforcement of the Obligation to Leave the Country’ entered into force on 21 August 2019. This section focuses on the amendments concerning residence-related measures for persons who constitute a threat to public security in terms of this study.

The act broadens the application of custody to prepare deportation. The revised arrangements stipulate among other things that, in the case of a removal order pursuant Section 58a of the Residence Act in order to avert a special danger to the security of the Federal Republic of Germany or a terrorist threat, a person may be placed in custody by judicial order to prepare deportation for up to six weeks when no immediate decision is possible on the removal order (Section 62 subs. 2 of the Residence Act). Prior to the amendment to the law, it was only permissible to place such persons in custody when the removal order had already been issued or the conditions pertaining to preventive detention were met (BMI 2020e).

A further amendment of importance to this study concerned the enforcement of detention to prepare removal. The act provides for an amendment to Section 62a subs. 1 of the Residence Act in two stages. Firstly, the requirement for persons detained to prepare their removal to be accommodated separately from convicts is to be suspended until 30 June 2022. During this period, detention to prepare removal can thus “also take place at penal institutions”, although persons detained to prepare their removal and convicts “are always to be kept apart” (BMI 2020e). The Federal Ministry of the Interior justifies this amendment on the grounds that there is a shortage of places at detention centres for foreigners awaiting removal in Germany (BMI 2020e). The requirement for detainees awaiting removal to be accommodated separately from convicts will apply once again from 1 July 2022, subject to the existing exceptions (see above).

## Operational measures to support return

In addition to the named legislative changes to support return further operational measures were taken. On 9 February 2017, the Chancellor and the Länder prime ministers decided on establishing the Repatriation Support Centre (Gemeinsames Zentrum zur Unterstützung zur Rückkehr, ZUR). The Repatriation Support Centre started work in March 2017; it coordinates

the operative efforts of the Federal and Land authorities in the areas of both voluntary and forced returns. For example, it supports the Länder in organising collective removals or procuring passport substitutes for return purposes (Deutscher Bundestag 2017i: 3).<sup>56</sup>

Removal is not always enforceable, for a variety of reasons – for example due to a lack of travel documents and difficulties obtaining passport substitutes. A working group spanning the Federation and the Länder at the Standing Conference of Interior Ministers and Senators is also concerned with the challenges relating to the repatriation of potential offenders, and presented the Standing Conference with recommended actions “to remove legal and actual obstacles pertaining to the return of potential offenders” in May 2018 (IMK 2018: 1). The recommendations included:

1. Optimisation of work structures in the Länder “to enable swift and efficient collaboration between all involved authorities”,
2. involvement of the Länder in evolving the concept for the “Potential Offenders” task force at the Federal Ministry of the Interior,
3. simplification of official procedures via amendments to the Residence Act (which were adopted in the revised version of the Residence Act in 2019),
4. establishment of a work group spanning the Federation and the Länder to draw up “recommendations on holding potential offenders at prisons”,
5. reduction of the number of judicial authorities involved in connection with to removal orders to avert a special danger to the security of the Federal Republic of Germany or a terrorist threat (Section 58a of the Residence Act),
6. instilling an awareness in the judiciary of diplomatic assurances in connection with removals regarding compliance with Art. 3 of the European Convention on Human Rights – Prohibition of torture in the country of destination (IMK 2018: 1f.; see below).

In order to optimise the work structures in the Länder, the Federal Ministry of the Interior duly took the following measures: various workshops were held to qualify the Länder in the Security work group at the ZUR, on matters such as “enforcement of the obligation to leave the federal territory, on Section 58a of the Residence Act, on the establishment of identity, on the possibilities of retrograde data matching with the Visa information system”. In addition, confidential

<sup>56</sup> This section is based on the EMN/BAMF Policy Report 2017 (EMN/BAMF 2017: 98f.).

Federation-Länder case conferences were held with individual Länder in the Security work group at the ZUR and in the Status work group of the GTAZ. The Federal Foreign Office was also more closely involved in the Security work group, for the purposes of “working on cases with the Länder and discussing case files according to specific aspects relating to countries of origin” (Deutscher Bundestag 2018c: 18).

The establishment of the GTAZ, the GETZ and the respective Land working groups shows that the German authorities are attaching priority to the repatriation of third-country nationals who constitute a threat to public security. As it is the Länder which are responsible for enforcing removals in Germany, this prioritisation is also in evidence at Land level. The Land government of Hesse, for example, attaches “clear priority to the repatriation of potential offenders” (Hessischer Landtag 2019: 1).

### Court rulings relating to the removal order

Both the Federal Administrative Court and the Federal Constitutional Court made important rulings on the removal order pursuant to Section 58a of the Residence Act in 2017. Under these rulings, so-called potential offenders can be removed on the basis of a prognosis based on facts in order to avert a special danger to the security of the Federal Republic of Germany or a terrorist threat, without requiring prior expulsion or termination of the right of residence by any other means (Section 58a subs. 1 first sentence of the Residence Act). Equally, there is no requirement for the person concerned to have been convicted of a criminal offence. Removal may not be enforced, however, where it is prohibited by law, in particular where the person concerned faces the threat of torture, inhuman or degrading treatment in the country of destination (Section 58a subs. 3 first sentence of the Residence Act; Art. 3 of the European Convention on Human Rights).

This provision has been in force since 2005, but was applied for the first time only in 2017 as the hurdles are considered too high (Mascolo/Steinke 2017). On 21 March 2017<sup>57</sup> the Federal Administrative Court rejected the granting of temporary relief against the first removal of two persons which had been ordered on the basis of Section 58a of the Residence Act (Federal

Administrative Court, ruling of 21 March 2017<sup>58</sup>). This was seen as a sign that the provision might be applied more frequently in future (Mascolo/Steinke 2017). On 22 August 2017, the appeal against the two removals was finally dismissed (Federal Administrative Court, judgements of 22 August 2017). On 24 July 2017 the Federal Constitutional Court ruled in another case that the provision contained in Section 58a of the Residence Act is compatible with the Basic Law (Federal Constitutional Court, ruling of 24 July 2017<sup>59</sup>).<sup>60</sup>

There is also a ruling by the Federal Administrative Court from 21 March 2017 regarding the right to respect for private and family life (Art. 8 of the European Convention on Human Rights) in connection with a removal order pursuant to Section 58a of the Residence Act. A removal order pursuant to Section 58a of the Residence Act was issued for an Algerian national who had been classified as a potential offender in the radical Islamist scene in Germany. He subsequently filed an application for temporary relief pursuant to Section 80 subs. 5 of the Code of Administrative Court Procedure, which was rejected. The applicant was then removed before the main proceedings had begun.

The Federal Administrative Court stated that, in examining the granting of temporary relief, “despite the fact that the applicant was rooted in Germany [...] the intended termination of his residence is not disproportionate, including in the context of Art. 2 paragraph 1 and Art. 6 of the Basic Law and Art. 8 of the European Convention on Human Rights, in view of the circumstances which apply in this case, with a terrorist attack by the applicant possible at any time.” The interest in expulsion was considered greater than the interest in remaining in this case, despite the fact that “his mother, his siblings and his wife to whom he is married in accordance with Islamic rituals, and who holds German nationality”, live in Germany. The applicant had also invoked the prohibition of removal pursuant to Section 60 subs. 5 (threat of torture). The Administrative Court also rejected this, on the grounds that “existing dangers [...] can be countered with appropriate diplomatic assurances”. The Senate thus made the

57 Federal Administrative Court, ruling of 21.03.2017 – 1 VR.17 [ECLI:DE:BVerwG:2017:210317B1VR1.17.0] – BVerwGE 158, 225 marginal note 3.

58 Federal Administrative Court, judgements of 22.08.2017 – 1 A 3.17 [ECLI:DE:BVerwG:2017:220817U1A3.17.0] – BeckRS 2017, 127231 and 1 A 2.17 [ECLI:DE:BVerwG:2017:220817U1A2.17.0] – BeckRS 2017, 128737.

59 Federal Constitutional Court, chamber ruling of 24 July 2017 – 2 BvR 1487/17 [ECLI:DE:BVerfG:2017:rk20170724.2bvr148717] – BeckRS 2017, 118574 marginal note 20.

60 The information presented in this section is based on observations in the EMN/BAMF Policy Report 2017 (EMN/BAMF 2017: 98).

removal contingent on the provision of corresponding assurances.

In certain circumstances, the European Court of Human Rights regards such diplomatic assurances as a suitable instrument to remove the danger of inhuman or degrading treatment (Art. 3 of the European Convention on Human Rights) even where – in contrast to Algeria – systematic torture and mistreatment take place in the countries concerned. In response to an enquiry from the Federal Administrative Court regarding Algeria, the Federal Foreign Office stated that the Algerian ministry of justice had given the German authorities “written guarantees concerning trial and prison conditions” (Federal Administrative Court, ruling of 21 March 2017<sup>61</sup>).

#### 5.4.2 Removal to another EU Member State

Third-country nationals who hold certain residence permits in another EU Member State may also legitimately stay (temporarily) in Germany. This is the case, for example, for holders of a valid residence permit in another Member State which permits a stay of 90 days within any period of 180 days in another Member State in accordance with Art. 21 of the Schengen Convention, as well as for third country family members of EU nationals (Citizens’ Rights Directive (Directive 2004/38/EC)<sup>62</sup> and Section 3 of the Freedom of Movement Act/EU<sup>63</sup>), or for holders of an EU long-term residence permit for other EU Member States (Section 38a of the Residence Act) and for persons who are recognised as refugees in another state under the Geneva Convention on Refugees. Such a person who is classified as being a threat to public security can be removed to the EU Member State in which they hold a residence permit.

#### 5.4.3 Statistics: Removals in cases of threats to public security

Statistics on removals of persons belonging to Islamist terrorist circles “have only been kept since 2017 [...]. Removal orders pursuant to Section 58a of the Residence Act were issued for the first time in 2017” (Deutscher Bundestag 2018c: 8). Table 6 shows the number of removals in 2017 and 2018 of persons classified as belonging to the Islamist terrorist field and who were dealt with by the Status working group at the GTAZ or in a Land working group in which the Federal Office for Migration and Refugees participates (Deutscher Bundestag 2008: 2). As the Status working group is concerned solely with the Islamist category, this is to receive due consideration when interpreting the figures, and the figures do not allow any inferences with regard to the total number of all removals effected in the face of a threat to public security.

In 2017 a total of 56 persons from Islamist terrorist circles were removed. Half of this total (30 persons) were classified as potential offenders. In 2018 the number of such removals fell to 47, of which 22 cases involved potential offenders. The main countries of origin in both years were Tunisia and Algeria. In 2017 seven persons were removed on the basis of a removal order pursuant to Section 58a of the Residence Act. The corresponding figure in 2018 stood at five persons.

61 Federal Administrative Court, ruling of 21.03.2017 – 1 VR.17 [ECLI:DE:BVerwG:2017:210317B1VR1.17.0] – BVerwGE 158, 225 Rn. 43.

62 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

63 German: Gesetz über die allgemeine Freizügigkeit von Unionsbürgern.

**Table 6: Removals of persons classified as belonging to the Islamist terrorist field (2017-2018)**

		2017 <sup>1)</sup>			2018 <sup>1)</sup>		
		Total	of which, potential offenders	of which, persons of interest	Total	of which, potential offenders	of which, persons of interest
Countries of destination	Removals	56	30	4	47	22	2
	Of which, removal orders (Section 58a of the Residence Act)	7	7	0	5	4	1
	Afghanistan	1	1	0	2	2	0
	Egypt	0	0	0	1	0	0
	Algeria	8	4	1	9	2	1
	Bosnia and Herzegovina	2	2	0	0	0	0
	France	2	1	0	0	0	0
	Georgia	0	0	0	2	0	0
	Iraq	1	0	0	4	4	0
	Italy	1	0	0	2	0	0
	Croatia	0	0	0	1	0	0
	Kenya	1	1	0	0	0	0
	Lebanon	2	2	0	2	2	0
	Morocco	4	4	0	5	0	1
	Netherlands	1	0	0	1	0	0
	Nigeria	1	1	0	0	0	0
	Austria	1	1	0	0	0	0
	Pakistan	2	0	0	1	0	0
	Russian Federation	7	4	1	1	0	0
	Sweden	2	0	0	0	0	0
	Serbia	1	0	0	1	1	0
	Spain	1	0	0	0	0	0
	Tunisia	14	6	1	11	7	0
	Turkey	3	2	1	4	4	0
	Belarus	1	1	0	0	0	0

Source: Deutscher Bundestag 2018c: 8.

<sup>1)</sup> The figures in this table relate solely to foreign persons whose cases were dealt with by the Status working group at the GTAZ or by one of the Land working groups in which the Federal Office for Migration and Refugees participates (Deutscher Bundestag 2018c: 2).

## 5.5 Monitoring on security grounds

Beyond the measures outlined above, foreigners authorities also have additional measures at their disposal under the law on residence. A person against whom an expulsion order has been issued because they

- threaten the free democratic basic order or the security of the Federal Republic of Germany,
- belong to the leadership of a banned organisation,
- participate in acts of violence in pursuit of political or religious objectives,
- publicly incite hate against sections of the population or threaten the same,
- or against whom a removal order exists

is obliged to report to the competent police office at least once a week, unless the foreigners authority stipulates otherwise. A reporting obligation may also be imposed in cases in which none of the above-stated interests in expulsion apply, where this is necessary in order to avert a threat to public security and order (Section 56 subs. 1 second sentence no. 2, Section 54 subs. 1 nos. 2-5, Section 58a of the Residence Act). Residence is restricted to the district covered by the foreigners authority (Section 56 subs. 2 of the Residence Act), except where it appears expedient to stipulate residence in another location or at specific types of accommodation in order to hinder or prevent activities which have led to the expulsion order and to facilitate monitoring of compliance with provisions under the law governing organisations and associations or other statutory conditions and obligations or to prevent the person concerned from repeating criminal offences of substantial significance which have led to the expulsion order (Section 56 subs. 3 of the Residence Act).

In addition, contact to certain persons or groups and the use of certain means of communication may also be prohibited where such restrictions are necessary in order to avert a substantial threat to internal security or the life and limb of third parties (Section 56 subs. 4 of the Residence Act).

A further measure involves electronic location monitoring in the form of an electronic tag. A person whose residence is subject to geographic restrictions or to whom contact restrictions apply may be required by judicial order to submit to electronic location monitoring. Such an order applies for a maximum of three months and can be extended by subsequent periods of a maximum of three months if the relevant conditions

continue to apply. The foreigners authority collects and stores data on the person's whereabouts via automated processes by means of electronic tagging (Section 56a of the Residence Act).

## 5.6 Prohibition and restriction of political activities

A person's political activities may be restricted or prohibited by the competent foreigners authority, if they

- impair or endanger political decision-making, peaceful co-existence, public security and order or any other substantial interests of the Federal Republic of Germany,
- may be counter to the interests of the Federal Republic of Germany in the field of foreign policy or to the obligations of the Federal Republic of Germany under international law,
- contravene the laws of the Federal Republic of Germany, particularly in connection with the use of violence,
- are intended to promote parties, other organisations, establishments or activities outside of the federal territory whose aims or means are incompatible with the fundamental values of a system of government which respects human dignity (Section 47 subs. 1 of the Residence Act).

A person's political activities are to be prohibited by the competent foreigners authority, if they

- endanger the free democratic basic order or the security of the Federal Republic of Germany or contravene the codified standards of international law,
- publicly support, advocate or incite to the use of violence as a means of enforcing political, religious or other interests or are capable of inciting such violence or
- support organisations, political movements or groups within or outside of the federal territory which have initiated, advocated or threatened attacks on persons or objects in the federal territory or attacks on Germans or German establishments outside of the federal territory (Section 47 subs. 2 of the Residence Act).

## 5.7 Ban on entry and residence, ban on leaving the federal territory

### Ban on entry and residence

A ban on entry and residence is to be issued against a person who has been refused entry, removed or expelled. As a result of the ban on entry and residence, the person concerned may neither enter nor reside in the federal territory again, neither may they be issued with a residence permit, even in the event of an entitlement under this Act (Section 11 subs. 1 of the Residence Act). The duration of the ban on entry and residence is subject to a discretionary decision. As a general rule, it should not exceed five years (Section 11, subs. 3 of the Residence Act). Exceptions to this limit apply in case of a threat to security and are listed in Table 7. An alert may be issued regarding a person against whom a ban on entry and residence has been imposed pursuant to Section 11 of the Residence Act for the purposes of refusal of entry and in the event of their arrival in the Federal territory or the Schengen area (Section 50 subs. 1 first and second sentence of the Residence Act; see Schengen Information System (SIS) in Chapter 6.2, 6.2.3). In addition, the data relating to persons against whose entry into the federal territory reservations apply, for example because of interests in their expulsion, are stored in the Central

Register of Foreigners (Section 2 subs. 2 no. 4 of the Central Register of Foreigners Act in conj. with Section 5 subs. 1 of the Residence Act).

### Ban on leaving the federal territory

In certain circumstances, a person who constitutes a threat to the internal or external security or any other substantial interests of the Federal Republic of Germany may also be banned from leaving Germany (Section 46 subs. 2 first sentence of the Residence Act in conj. with Section 10 and Section 7 subs. 1 of the Passport Act. This is the case, for example, where the person's leaving the country "constitutes a threat to the internal or external security or any other substantial interests of the Federal Republic of Germany" or where they intend to leave the country in order to prepare a serious violent offence endangering the state<sup>64</sup>, pursuant to Section 89a of the Penal Code (Hörich/Hruschka 2019: § 46 AufenthG, marginal note 29ff.).

<sup>64</sup> A serious violent offence endangering the state is an offence against life in the case of Section 211 (Murder) or Section 212 (Homicide) or against personal freedom in the cases covered by Section 239a (Abduction for purpose of extortion) or Section 239 b (Hostage-taking) of the Penal Code which, by virtue of the circumstances concerned, is intended and appropriate to compromise the continued existence or the security of a state or of an international organisation or to eliminate, nullify or undermine constitutional principles of the Federal Republic of Germany (Section 89a subs. 1 second sentence of the Penal Code).

**Table 7: Durations of bans on entry and residence in case of threats to security**

Case	Duration of the ban on entry and residence	Amendments to stipulated duration
Expulsion due to a criminal conviction or where the person constitutes a serious threat to public security and order (Section 11 subs. 5 of the Residence Act)	As a rule, a maximum of ten years	Rescission and reduction to protect interests meriting protection of the person concerned and extensions on grounds of public security and order are possible (Section 11 subs. 4 of the Residence Act)
Expulsion due to a crime against peace, a war crime or a crime against humanity or to avert a threat to the security of the Federal Republic of Germany or a terrorist threat (Section 11 subs. 5a of the Residence Act)	As a rule, 20 years as standard	Rescission and reduction are ruled out as a general principle. Exceptions may be approved by the supreme Land authority in individual cases. Extension on grounds of public security and order is possible.
Removal on the grounds of a removal order to avert a special threat to the security of the Federal Republic of Germany or a terrorist threat (Section 11 subs. 5b of the Residence Act)	As a rule, an of unlimited duration	Rescission and reduction are ruled out as a general principle. Exceptions may be approved by the supreme Land authority in individual cases.



## 5.8 Legal remedies

Persons against whom measures are undertaken under the law on residence can appeal against such administrative acts and pursue actions for their rescission. Such appeals or actions have suspensory effect pursuant to Section 80 subs. 1 first sentence of the Code of Administrative Court Procedure, with exemptions for measures under the law on foreigners stipulated in Section 84 subs. 1 of the Residence Act. Appeals and legal actions have no suspensory effect in the case of non-extension, revocation or withdrawal of a resi-

dence permit, for example (see also Table 8). In cases in which suspensory effect does not apply, temporary relief may be applied for pursuant to Section 80 subs. 5 of the Code of Administrative Court Procedure, however. This applies in the case of the removal order pursuant to Section 58a of the Residence Act, for example. Here, the court hearing the main proceedings can order or restore the suspensory effect in part or in its entirety. The corresponding application may be filed prior to bringing the action for rescission. Where the administrative act has already been enforced at the time of the decision, the court may order rescission of the enforcement.

**Table 8: Information to be provided on measures under residence law**

Measures under residence law	Contents of information to be provided on the measure
Expulsion (Section 53 of the Residence Act)	<ul style="list-style-type: none"> <li>Written statement of grounds (Section 77 subs. 1 no. 2 of the Residence Act).</li> <li>Explanation of legal remedies and deadlines to be observed (Section 77 subs. 1 second sentence of the Residence Act).</li> </ul>
Non-extension of the residence permit (Section 8 of the Residence Act)	<ul style="list-style-type: none"> <li>Written statement of grounds (Section 77 subs. 1 no. 1 lit. a of the Residence Act).</li> <li>Explanation of legal remedies and deadlines to be observed (Section 77 subs. 1 second sentence of the Residence Act).</li> <li>Appeals and legal actions have no suspensory effect (Section 84 subs. 1 no. 1 of the Residence Act).</li> </ul>
Ban on entry and residence (Section 11 of the Residence Act)	<ul style="list-style-type: none"> <li>Written statement of grounds (Section 77 subs. 1 no. 9 of the Residence Act).</li> <li>Explanation of legal remedies and deadlines to be observed (Section 77 subs. 1 second sentence of the Residence Act).</li> <li>Appeals and legal actions have no suspensory effect (Section 84 subs. 1 no. 7 of the Residence Act).</li> </ul>
Ban on leaving the federal territory (Section 46 subs. 2 of the Residence Act)	<ul style="list-style-type: none"> <li>Generally written statement of grounds (77.1 of the General Administrative Regulation to the Residence Act).</li> <li>Appeals and legal actions have no suspensory effect (Section 84 subs. 1 no. 6 of the Residence Act).</li> </ul>
Prohibition and restriction of political activities (Section 47 of the Residence Act)	<ul style="list-style-type: none"> <li>Written statement of grounds (Section 77 subs. 1 no. 7 of the Residence Act).</li> </ul>
Alert to determine whereabouts and effect detainment (Section 50 subs. 6 of Residence Act)	<ul style="list-style-type: none"> <li>Subjects of alert are not informed.</li> </ul>
Revocation/withdrawal of the residence permit (Section 52 of the Residence Act)	<ul style="list-style-type: none"> <li>Written statement of grounds (Section 77 subs. 1 no. 8 of the Residence Act).</li> <li>Explanation of legal remedies and deadlines to be observed (Section 77 subs. 1 second sentence of the Residence Act).</li> <li>Appeals and legal actions against revocation have suspensory effect in certain cases only (Section 84 subs. 1 no. 4 of the Residence Act).</li> </ul>
Monitoring for internal security reasons (Section 56 of the Residence Act)	<ul style="list-style-type: none"> <li>Written statement of grounds (Section 77 subs. 1 no. 7 of the Residence Act).</li> </ul>
Removal order (Section 58a of the Residence Act)	<ul style="list-style-type: none"> <li>Written statement of grounds (Section 77 subs. 1 no. 3 of the Residence Act).</li> <li>Issuance of removal order without prior expulsion pursuant to Section 53 of the Residence Act (Section 58a subs. 1 of the Residence Act).</li> <li>The removal order is immediately enforceable (Section 58a subs. 1 of the Residence Act).</li> <li>An application for temporary relief pursuant to the Code of Administrative Courts Procedure is to be filed within seven days of announcement of the removal order. Removal may not be enforced until the deadline [...] has expired and, where an application is filed within the deadline, until the court has decided on the application for temporary relief (Section 58a subs. 4 of the Residence Act).</li> </ul>
Removal warning (Section 59 of the Residence Act)	<ul style="list-style-type: none"> <li>Written statement of grounds (Section 77 subs. 1 no. 4 of the Residence Act).</li> </ul>
Detention to prepare removal (Section 62 of the Residence Act)	<ul style="list-style-type: none"> <li>Detainment on judicial order (Section 62 of the Residence Act). Exemptions apply where there is a risk of absconding or a removal order has been issued but is not directly enforceable, for example (Section 62 subs. 5 of the Residence Act).</li> </ul>
Reservations regarding entry into the federal territory (Section 2 subs. 2 no. 4 of the Central Register of Foreigners Act)	<ul style="list-style-type: none"> <li>Subjects of alert are not informed.</li> <li>The registration authority provides information about the stored data upon application. The provision of information is waived, for example, where disclosure of the information would jeopardise public security or order (Section 34 of the Central Register of Foreigners Act).</li> </ul>



Table 8 lists the formal requirements for the administrative act under the Residence Act. Most of the listed measures under residence law require a written statement of grounds, explaining legal remedies and deadlines to be observed. Appeals and legal actions do not generally have suspensory effect, except in cases where the competent court grants an application for temporary relief pursuant to Section 80 subs. 5 of the Code of Administrative Court Procedure.

Where a person cannot be present at the time of the judicial hearing regarding the measure undertaken under residence law, on account of a stay abroad, for example, the matter may also be negotiated and decided without them, in accordance with Section 102 subs. 2 of the Code of Administrative Court Procedure. This is of particular significance with regard to potential offenders who are located outside of Germany, for example in order to take part in the fighting in Syria and Iraq (IS fighters, for example). In proceedings before the Federal Administrative Court and the Higher Administrative Court, representation by a counsel for the parties concerned is compulsory (Section 67 subs. 4 of the Code of Administrative Court Procedure). Where the measure has been undertaken at a time at which the person concerned was already abroad and a ban on entry and residence has been issued pursuant to Section 11 of the Residence Act, the person concerned cannot re-enter the federal territory as appeals and legal actions have no suspensory effect here (Section 84 subs. 1 no. 7 of the Residence Act).

Where, in connection with the measures undertaken under residence law, a ban on entry and residence pursuant to Section 11 of the Residence Act or a ban on leaving the federal territory pursuant to Section 46 of the Residence Act has been issued (bans on entry and residence are issued in connection with expulsion, removal and removal following unauthorised entry), the person concerned may not re-enter or leave the federal territory while the proceedings are ongoing, as appeals and legal actions have no suspensory effect here (Section 84 subs. 1 nos. 6 and 7 of the Residence Act). By way of exception, the foreigner may be granted temporary entry into the federal territory for a short period prior to expiry of the ban on entry and residence, if their presence is required for compelling reasons or if the refusal of permission would constitute undue hardship (Section 11 subs. 8 first sentence of the Residence Act).

### 5.8.1 Handling of confidential information in legal proceedings

The administrative courts have jurisdiction for legal actions brought against measures under residence law. In legal actions concerning measures undertaken under residence law, particularly where measures relating to threats to public security are involved, it is possible that confidential information may be used during the legal proceedings. Section 99 subs. 1 of the Code of Administrative Court Procedure stipulates that authorities are obliged to present documents or files, to transfer electronic documents and to furnish information to the court. The supreme competent supervisory authority, that is, the competent ministry, may refuse to present, transfer or furnish information, however, where disclosure of the content would be detrimental to the Federation or a Land or where the proceedings require to be kept secret in accordance with a law or on account of their nature. “The concept of non-disclosure ‘pursuant to a law’ is to be defined in narrow terms and is intended to protect a highly important area of life which is protected by the constitution or by basic rights” (Posser 2019: § 99 VwGO, marginal note 21).

On request from a party to the proceedings, the higher administrative court determines whether the refusal to furnish documents and information is lawful, without a corresponding hearing. Where the rules applying to the substantive protection of classified information are not complied with or where the competent supervisory authority asserts that special grounds relating to non-disclosure or the protection of classified information prevent the presentation or transfer of such information, presentation or transfer is effected by furnishing the documentation to the court at premises specified by the supreme supervisory authority (Section 99 subs. 2 seventh and eighth sentences of the Code of Administrative Court Procedure). Under these conditions, the parties to the proceedings<sup>65</sup> have no access to the files presented to the court (Section 99 subs. 2 ninth sentence, Section 100 subs. 1 first sentence of the Code of Administrative Court Procedure). Consequently, in connection with measures which are undertaken under residence law on grounds of a threat to public security, it is possible that only the court may have access to the confidential information.

<sup>65</sup> The parties to the proceedings are prosecutors, defendants, intervening parties and representatives of the Federation's interests at the Federal Administrative Court or any representatives of the public interest who exercise their authorisation to participate in the proceedings (Section 63 of the Code of Administrative Court Procedure).

Section 99 of the Code of Administrative Court Procedure is criticised by practitioners, who observe that the law is silent “in particular on concrete terms of reference under substantive law, on the relationship with substantive rights of information and on the consequences of a lawfully exercised right to refuse to furnish information, all of which poses great difficulties in practice. As such, the legal norm is structurally inadequate and requires amendment” (Posser 2019: § 99 VwGO, marginal note 1-55). “The European Court of Justice has been unable to reach a decision on the conformity of Section 99 with EU law to date, as a corresponding submitted question was withdrawn in the course of the proceedings” (Posser 2019: § 99 VwGO, marginal note 4).

# 6 Cooperation within the EU

## 6.1 Exchange of information at EU level

### 6.1.1 Migration authorities

No communication platform exists to date for discussion of the topic of “third-country nationals who constitute a threat to public security” between the German migration authorities and the migration authorities of other EU Member States. As per January 2020, for the purposes of the general exchange of information at EU and international level the Federal Office for Migration and Refugees was represented through liaison staff at the partner authorities of five Member States (in France, Greece, Italy, Poland and Hungary). The liaison staff here can forward enquiries by the German migration authorities regarding third-country nationals, for example, to the competent bodies in the EU Member States. The liaison officer of the Federal Office for Migration and Refugees in Italy at the time forwarded enquiries to the Italian authorities concerning intelligence about Anis Amri, for example (Bundestag 2018h).

In response to recommendations from a Federation-Länder work group of the Standing Conference of Interior Ministers and Senators from 6 to 8 June 2018, the Federal Ministry of the Interior also undertook measures in the area of cooperation with other Member States. These included a “sharing of knowledge and experience with the Netherlands within the Status working group [at the GTAZ – author’s note] and with France within the Security work group” at the ZUR (Deutscher Bundestag 2018c: 18). No other formats for communication between the Federal Office for Migration and Refugees and the migration authorities of other EU Member States are known.

There are also various formats for the exchange of information and experiences at EU level in the field of prevention and deradicalisation work. The ‘Radicalisation Awareness Network’ (RAN) was established by the European Commission in 2011, for example – in particular for the purposes of knowledge-sharing between practitioners (KOM o. J.) There is also bilateral contact in connection with prevention work, in particular with

France, Austria, Belgium, the Netherlands and Luxembourg. Since the Advice Centre on “Radicalisation” was established at the Federal Office for Migration and Refugees in 2012, there has been consultation between NGOs or the competent authorities in other Member States in between one and three cases.

### 6.1.2 Migration authorities and security services

To date, there is no comparable communication and coordination platform at European level such as the GTAZ or GETZ enabling communication between the migration authorities and the security services and prison authorities. The exchange of information between the security services of the EU Member States is the responsibility of the Federal Criminal Police Office and is generally conducted bilaterally and in connection with specific individual cases (written reply from the Federal Criminal Police Office, 2020). The Federal Criminal Police Office is additionally represented by liaison officers at the respective diplomatic missions in two thirds of all the countries in the world, where they have a “preventive and repressive remit” and are tasked to “prevent criminal offences [...], but can also initiate investigations or support investigations which are already in progress.” (BKA 2020d).

## 6.2 Schengen Information System (SIS)

### 6.2.1 General information

The abolition of border controls was adopted by the Schengen Convention<sup>66</sup> in 1990. In order to maintain internal security, various countervailing measures were established, including the establishment of a joint investigation and information system – the Schengen Information System (SIS). The SIS “enables the nati-

<sup>66</sup> Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

onal border control, customs and police authorities which are responsible for controls at the external borders within the Schengen area to post alerts concerning wanted or missing persons or stolen vehicles or documents (BMI 2020f).

The second generation of the Schengen Information System (SIS II) was introduced in 2013 on the basis of the legal provisions of the SIS II Council Decision (2007/533/JHA)<sup>67</sup> and the EU Council Regulation (no. 1987/2006)<sup>68</sup> on SIS II. “SIS II provides information on persons who do not have the right to enter or reside in the Schengen area. SIS II also covers information on missing persons, in particular children or other persons in need of protection” (BMI 2020f). “SIS II contains the necessary information to identify persons (including photographs and fingerprints) and the relevant data (such as the measures to be undertaken)” (BMI 2020f).

The Schengen Information System is currently being upgraded to SIS 3.0, which is to be used to compile asylum- and also residence-related decisions in a European database as of 2022. Each Member State has a national central office, the so-called SIRENE (Supplementary Information Request at the National Entry), which is responsible for intelligence sharing in connection with SIS alerts at national and international level. SIRENE Germany is located within the Federal Criminal Police Office (BKA 2020c).

Alerts can be posted in the SIS regarding persons (for the purpose of handover/extradition, for example) or objects (e.g. vehicles) (BKA 2020c). The national law enforcement, judicial, police, customs, foreigners, visa and vehicle licencing authorities, EUROPOL and the Eurojust agency for judicial cooperation within the European Union have access to the SIS, but are only permitted to access such SIS data as they require in order to perform their respective tasks (written reply from Federal Criminal Police Office, 2020). “Possible grounds for issuing alerts are:

- Refusal of entry for persons who are not entitled to enter or reside in the Schengen area
- Determination of whereabouts and detainment of persons for whom a European arrest warrant has been issued

- Assistance in searching for wanted persons in accordance with the requirements of the law enforcement and judicial authorities
- Searches for and protection of missing persons
- Location of stolen or lost property” (BMI 2020f).

When personal data are stored in the SIS, the persons concerned can request corresponding information and verification of the legality of holding such data. Should storage of the data not be lawful, the person concerned can require the data to be corrected or erased. Information is not provided, however, “where such data is indispensable to performing a lawful task in connection with the entry in the database and to protect the rights and freedoms of third parties” (BKA 2020c).

## 6.2.2 Alerts in the SIS: Discreet and specific checks

Article 36 of the SIS II Council Decision stipulates the objectives and conditions pertaining to the issuance of alerts. An alert may be issued for the purposes of discreet or specific checks in order to prosecute criminal offences and to prevent threats to public security a) where there is a clear indication that a person intends to commit or is committing a serious criminal offence, or b) where an overall assessment of a person, in particular on the basis of past criminal offences, gives reason to suppose that person will also commit serious criminal offences in the future (Art. 36 paragraph 2 of the SIS II Council Decision).

In addition, an alert may be issued in accordance with national law, at the request of the authorities responsible for national security, where there is concrete indication that the information [...] is necessary in order to prevent a serious threat by the person concerned or other serious threats to internal or external national security (Art. 36 paragraph 3 of the SIS Council Decision). There are thus two types of alerts: 1. Alerts concerning criminal offences which have already been committed, and 2. alerts concerning persons who have not yet committed a criminal offence but who constitute a threat.

German alerts for the purposes of discreet or specific checks<sup>69</sup> take place in accordance with Art. 36 of the SIS II Council Decision and the existing national regu-

67 Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II).

68 Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II).

69 “An alert for the purpose of ‘discreet checks’ is aimed solely at discreet registration of the person or object specified in the alert. The alert does not permit the covert searching of objects. An alert for the purpose of ‘specific checks’ is aimed at searching persons and objects. This is an open measure in the presence of or with the knowledge of the person concerned” (Deutscher Bundestag 2018j: 2).

lations (Code of Criminal Procedure, Federal Criminal Police Office Act, Federal Police Act, Federal Act on the Protection of the Constitution, Customs Investigation Service Act<sup>70</sup>, Land police acts) (Deutscher Bundestag 2018j: 8). The police authorities of the Länder and the Federal Police are responsible for issuing alerts in the SIS (Section 31 subs. 1 of the Federal Police Act). Where necessary in order to discharge the duties of the Federal Office for the Protection of the Constitution, the Military Counter-Intelligence Service and the Federal Intelligence Service, these authorities may also issue an alert concerning a person or an object in the police information system to provide notification that the person or object concerned has been located (Section 17 subs. 3 of the Federal Act on the Protection of the Constitution). The Customs Criminalological Office may also issue alerts in the SIS in discharging its duties (Section 10 subs. 1 of the Customs Investigation Service Act).

When alerts are issued for persons in the SIS, the ‘type of criminal offence’, for example a ‘terrorism-related activity’, is specified by the authority issuing the alert (Deutscher Bundestag 2018j: 5f.). A note can also be added to alerts such that, in the event of a match, the end user is requested to “contact the SIRENE office immediately” (Deutscher Bundestag 2018j: 3). When such an alert is issued, the SIRENE office of the issuing Member State notifies all other SIRENE offices (7.4. lit. a of Commission Implementing Decision (EU) 2015/219<sup>71</sup>).

Table 9 presents the number of alerts for persons in order to prosecute criminal offences and to prevent threats to public security pursuant to Art. 36 paragraph 2 of the SIS II Council Decision. The number of alerts in the SIS has increased almost four-fold from 2014 to 2020 (2014: 40,004, 2020: 155,222). The German alerts over recent years account for only a very small share of the total number of SIS alerts pursuant to Art. 36 paragraph 2 in the Schengen area as a whole (approx. 1-4%). The number of German alerts pursuant to Art. 36 paragraph 2 have increased slightly more than two-fold (2014: 1,166, 2020: 2,810). A relatively large number of German alerts pursuant to Art. 36 paragraph 2 contain the additional note ‘contact SIRENE office immediately’ (around half of all alerts with this addendum in the Schengen area and around 10-17% of all

German alerts). Furthermore, as per 1 January 2020 the SIS contained a total of 1,731 alerts for persons with the characteristic ‘terrorism-related activity’ pursuant to Art. 36 paragraph 2 of the SIS II Council Decision. Of these, more than one quarter had been issued by German authorities (446 persons).

Table 10 shows the number of alerts issued for persons to prevent a serious threat by the person concerned or other serious threats to internal or external national security pursuant to Art. 36 paragraph 3 of the SIS II Council Decision. While far less alerts are issued pursuant to Art. 36 paragraph 3 than pursuant to para. 2 of the SIS Council Decision, this number has nevertheless also risen sharply. The total number of alerts in the Schengen area has increased more than twelve-fold (2014: 1,046, 2020: 12,726) and the corresponding number in Germany has grown more than three-fold (2014: 433, 2020: 1,526), with Germany accounting for the most alerts relating to persons pursuant to Art. 36 paragraph 3 in 2017.

In addition, the incidence of alerts pursuant to Art. 36 paragraph 3 which contain the addendum ‘contact SIRENE office immediately’ is very much higher. Around half of all alerts in the Schengen area contain the addendum. In Germany, the addendum “contact SIRENE office immediately” was included in roughly one third of all alerts. Furthermore, as per 1 January 2020 the SIS contained a total of 8,105 alerts for persons with the characteristic ‘terrorism-related activity’ pursuant to Art. 36 paragraph 2 of the SIS II Council Decision. Of these, just under 14% had been issued by German authorities (1,115 persons). This means that almost three quarters of all German alerts concerning persons pursuant to Art. 36 paragraph 2 were “terrorism-related”. The share of German alerts is greater among all alerts pursuant to Art. 36 paragraph 3 than among all alerts pursuant to Art. 36 paragraph 2.

70 German: Gesetz über das Zollkriminalamt und die Zollfahndungsämter.

71 Commission Implementing Decision (EU) 2015/219 of 29 January 2015 replacing the Annex to Implementing Decision 2013/115/EU on the Sirene Manual and other implementing measures for the second generation Schengen Information System (SIS II).

**Table 9: Alerts for persons pursuant to Art. 36 paragraph 2 of the SIS II Council Decision (Decision 2007/533/JHA)**

Reference date	Alerts pursuant to Art. 36 paragraph 2 of the SIS II Council Decisions <sup>1)</sup>			Alerts pursuant to Art. 36 paragraph 2 of the SIS II Council Decision <sup>1)</sup>		
	Schengen area as a whole	of which, with addendum "contact SIRENE office immediately"	of which, specifying characteristic "terrorism-related activity"	Germany as a whole	of which, with addendum "contact SIRENE office immediately"	of which, specifying characteristic "terrorism-related activity"
01.01.2014	40,004	k. A.	k. A.	1,166	k. A.	k. A.
01.01.2015	44,493	k. A.	k. A.	1,720	k. A.	k. A.
01.01.2016	61,575	k. A.	k. A.	1,908	k. A.	k. A.
01.01.2017	86,373	574	k. A.	2,517	267	k. A.
01.01.2018	118,174	753	k. A.	2,703	377	k. A.
01.01.2019	142,046	870	k. A.	2,717	470	k. A.
01.01.2020	155,222	820	1,731	2,810	446	482

Source: Deutscher Bundestag 2018j: 3, 2018k: 6ff., 2019c: 6, 2020b: 9ff.

<sup>1)</sup> Multiple categorisations possible.

**Table 10: Alerts for persons pursuant to Art. 36 paragraph 3 of the SIS II Council Decision (Decision 2007/533/JHA)**

Reference date	Alerts pursuant to Art. 36 paragraph 3 of the SIS II Council Decision <sup>1)</sup>			SIS II alerts pursuant to Art. 36 paragraph 3 of the SIS II Council Decision <sup>1)</sup>		
	Schengen area as a whole	of which, with addendum "contact SIRENE office immediately"	Alerts, specifying characteristic "terrorism-related activity"	Germany as a whole	of which, with addendum "contact SIRENE office immediately"	Alerts, specifying characteristic "terrorism-related activity"
01.01.2014	1,046	k. A.	k. A.	433	k. A.	k. A.
01.01.2015	1,854	k. A.	k. A.	845	k. A.	k. A.
01.01.2016	7,945	k. A.	k. A.	1,308	k. A.	k. A.
01.01.2017	9,735	5,889	k. A.	1,749	241	k. A.
01.01.2018	11,238	5,856	k. A.	1,652	399	k. A.
01.01.2019	14,394	5,953	k. A.	1,532	433	k. A.
01.01.2020	12,726	5,801	8,105	1,526	453	1,115

Source: Deutscher Bundestag 2018j: 3, 2018k: 6f., 2019c: 6, 2020b: 9ff.

<sup>1)</sup> Multiple categorisations possible.

### 6.2.3 Access to alerts in the SIS for the migration authorities

#### Access by the Federal Office for Migration and Refugees to alerts in the SIS

To date, the Federal Office for Migration and Refugees has no access to the SIS. This situation is set to alter with the planned upgrade of the SIS, which is to be replaced by SIS 3.0 in 2020. The project “SIS 3.0 sub-project 2 – Return expertise” (SIS 3.0 Teilprojekt 2 – Fachlichkeit Rückkehr), which is being pursued under the overall direction of the Federal Office for Migration and Refugees, has been assigned the task of implementing three EU regulations on upgrading of the Schengen Information System in Germany. In future, not only the police authorities, but also all foreigners authorities throughout Germany and the Federal Office for Migration and Refugees will enter return alerts/alerts relating to refusal of entry and residence in the SIS. These alerts are also to include decisions under asylum and residence law.

#### Access by foreigners authorities to alerts in the SIS

Prior to every decision under the law on foreigners, the foreigners authorities check by reference to the SIS whether an alert has been issued by the German authorities and courts or by authorities and courts of other Schengen states regarding refusal of entry for the person concerned pursuant to Section 96 of the Schengen Convention (5.5.4.0.1.1 of the General Administrative Regulation to the Residence Act). The foreigners authorities are further required to initiate the issuance and erasure of alerts concerning refusal of entry in the SIS pursuant to Art. 96 of the Schengen Convention via the competent local police stations, using an official form. These alerts are then forwarded to the Central Register of Foreigners. SIRENE Germany, which is located within the Federal Criminal Police Office, coordinates the exchange of information in cases of matches (5.5.4.3 of the General Administrative Regulation to the Residence Act). The foreigners authorities themselves have no access to alerts for the purposes of discreet or specific checks on grounds of threats to public security pursuant to Art. 36 of the SIS II Council Decision.



# 7 Challenges and best practice

## 7.1 Implementation of measures under residence law

From the perspective of the Federal Interior Ministry and the interior ministries of the Länder, the administrative and legal hurdles pertaining to the repatriation of third-country nationals who constitute a threat to public security are among the major challenges in this context. Removals sometimes prove unenforceable because travel documents are missing and difficulties are encountered in obtaining passport substitutes (Deutscher Bundestag 2019a: 12). In view of similar challenges relating to the Amri case, the then federal minister of the interior, Thomas de Maizière, announced that there would be “an increased focus on including other policy fields, in particular the areas of foreign, economic and development policy, in negotiations with countries of origin on taking back their own nationals” (Deutscher Bundestag 2017d: 21162).

In addition, removal is generally prohibited where the person to be removed originates from a country in which they face human rights violations. In the case of third-country nationals who constitute a threat to public security, removals are sometimes made contingent on diplomatic assurances from the relevant government body in the country of origin (BVerwG 2017). The practice of obtaining diplomatic assurances is strongly criticised by human rights organisations. Maria Scharlau, expert on international law at Amnesty International, criticises the fact that “diplomatic assurances from the country of destination [...] are usually hollow promises”, for example, stating that “they offer no effective protection from torture. As a general rule, no checks are carried out as to whether these promises are kept” (Flade 2017). In individual cases, the competent authorities may refrain from providing the countries of destination with any information on the grounds for removal, for the above-stated reasons. In the case of a removed Nigerian potential offender who had appealed against his removal, this practice led to the Federal Administrative Court ruling that no prohibition of removal pursuant to Section 60 of the Resi-

dence Act applied under law. In its explanation of the grounds for this ruling, the court stated that the German authorities had not provided the Nigerian authorities with any information on the background to the removal, in view of which the removed person did not face any threats in this respect (Federal Administrative Court, judgement of 22 August 2017, no. 38).

The Länder also face challenges when it comes to initiating measures to terminate the residence of persons who constitute a threat to public security but who have not yet committed any criminal offences. For a long time, the Länder refrained from issuing removal orders pursuant to Section 58a of the Residence Act, because the provision was “practically meaningless” due to “doubts as to its formal constitutionality and on account of contentious questions of interpretation regarding the requirements pertaining to forecasting of the level of threat involved” (Kluth 2019: § 58a AufenthG marginal note 1). A precedent was established in 2017, however, when the Federal Administrative Court dismissed appeals by two Salafist potential offenders (from Algeria and Nigeria) against their removal orders pursuant to Section 58a of the Residence Act. The Federal Administrative Court found that “no constitutional reservations of a formal or substantive nature apply to Section 58a [of the Residence Act – author’s note]” (Kluth 2019: § 58a AufenthG, marginal note 3; Chapter 5.3.2). The court ruled that in both cases there were sufficient indications and evidence, as “both had long been firmly established in the radical Islamist scene in Germany”, they “sympathised” with the terrorist organisation ‘Islamic State’ (IS) and they had “repeatedly announced their intention to carry out acts of violence using weapons” (BVerwG 2017). Boris Pistorius (Social Democratic Party, Sozialdemokratische Partei Deutschlands, SPD), interior minister of Lower Saxony, noted that this ruling had “made legal history”, and the then interior minister of North Rhine-Westphalia, Ralf Jäger, (SPD) announced to examine whether the ruling could be used as a “blueprint” for ordering removal orders against potential offenders (Flade, 2017).

## 7.2 Challenges relating to the exchange of information between authorities

### 7.2.1 At national level

In Germany, the police authorities of the Länder are responsible for averting dangers and prosecuting crimes, and the foreigners authorities and the Federal Office for Migration and Refugees are responsible for residence- and asylum-related measures respectively. Consequently, cases involving third-country nationals who constitute a threat to public security and against whom measures are consequently to be initiated under residence and asylum law requires cooperation between numerous authorities. The necessary exchange of information between various authorities with divergent objectives often represents a challenge in practice. Efforts to improve the exchange of intelligence are being pursued in “close cooperation” within the bounds of the relevant legislation and via the joint working groups at the GTAZ. The working groups in particular have led to an “intensification of cooperation” in recent years (written reply from the Federal Criminal Police Office, 2020).

With regard to the exchange of information between authorities and relevant actors in the fields concerned, the federal structure in Germany gives rise to a number of challenges. These relate primarily to the coordination of security- and residence-related measures between the Land authorities and federal authorities. The establishment of the various information sharing platforms for the different Land and federal authorities in the respective PMC categories has led to an improvement in information sharing, however (including GTAZ, GTEZ, ZUR; Chapters 3.1.1, 3.1.2, 3.1.3).

### Federal Data Protection Act and European General Data Protection Regulation (GDPR)

The European General Data Protection Regulation (GDPR)<sup>72</sup>, which entered into force on 24 May 2016, does not apply, for example, to the processing of personal data by the competent law enforcement authorities, including for the purposes of protection from and the aversion of threats to public security (Section 2 subs. 2 lit. d of the GDPR). Whereas certain difficulties used to apply with regard to the transfer of security-relevant information from the partners in the field at the Advice Centre on “Radicalisation” at the Federal Office for Migration and Refugees (Chapter 4.2) to the security services, because the advisors were not always able to forward security-related cases directly to the competent authorities, this situation has now changed with the introduction of the new Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG), which entered into force to implement the European General Data Protection Regulation (GDPR) on 25 May 2018. It is now clearly stipulated in Section 24 subs. 1 no. 1 of the Federal Data Protection Act that the processing of personal data is also permissible by private bodies where this is necessary in order to avert threats to state or public security.

### 7.7.2 At EU level

The Federal Office for Migration and Refugees is currently represented by liaison staff at the relevant migration authorities in five other Member States. The Federal Office for Migration and Refugees bemoans the lack of a larger network of migration authorities in security-related issues, however, noting that bilateral enquiries to authorities of individual Member States sometimes receive delayed or inadequate replies. In view of the stated challenges, the Federal Office for Migration and Refugees calls for improved networking and greater transparency among the Member States with regard to adopted security- and residence-related decisions. The introduction of EU-wide databases for asylum- and residence-related decisions and the possibility of matching registers (such as criminal records) would also facilitate the identification of persons who constitute a threat to public security. This should be preceded by clear legal provisions and clear definition of the respective areas of competence as well as reviewed in accordance to European law, however.

<sup>72</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

In the area of return measures, the Federal Office for Migration and Refugees proposes that third-country nationals who hold a residence permit in another EU Member State should be returned directly to their country of origin, rather than first returning them from the Member State to the other Member State. A mutual cost reimbursement mechanism could be implemented in this connection.

In the area of the police, EUROPOL has been established in recent years as the central coordinating body for information sharing between the security services and has been invested with more extensive powers. The Federal Criminal Police Office is of the view that a similarly structured central body would also be expedient for the area of migration, in order to exploit synergies and avoid redundancies (written reply from Federal Criminal Police Office, 2020).

## 8 Conclusions

In summary, it can be stated that the migration authorities play an important role in Germany when it comes to dealing with third-country nationals who constitute a threat to public security. In connection with Islamist terrorist attacks in a number of European and German cities in recent years, the corresponding powers and scopes of responsibility in this field have been further broadened.

The Federal Office for Migration and Refugees serves as the coordinating body for the transfer of information and the evaluation of intelligence from the Federal Criminal Police Office and the Federal Office for the Protection of the Constitution where measures under the law on foreigners, asylum or nationality come into consideration on account of a threat to public security (Section 75 subs. 11 of the Residence Act). In view of the given federal structure and the residence- and security-related tasks of the Länder, representatives of the security services and interior authorities in particular consider information sharing between different Länder and authorities to be central to the enforcement of measures terminating the residence of third-country nationals who constitute a threat to public security. The Federal Office for Migration and Refugees plays an important role here in particular by virtue of its overall leadership of the Status working group at the GTAZ. On the basis of their experience with information sharing at national level, a number of authorities propose establishing similar structures and databases at EU level. An initial step in this direction is already observable in the ongoing development of the SIS, which is intended to assure national security services and migration authorities of Europe-wide access to asylum- and residence-related measures in future.

The migration authorities are also specifically involved in the identification of persons who constitute a potential threat to public security. The Federal Office for Migration and Refugees obtains knowledge of security-related aspects in the course of the asylum or revocation procedure, for example, which it duly forwards to the security services. The foreigners authorities also acquire a knowledge of security-related information on certain persons, and also forward these findings to the security services. The migration authorities are also specifically involved in implemen-

ting residence- and asylum-related measures. Through cooperation within the GTAZ, GETZ, ZUR or individual Land working groups, the security services and migration authorities seek to ensure close coordination in individual cases and to swiftly overcome any challenges relating to the enforcement of residence-terminating measures in particular.

In addition to the restrictive measures in the area of combating extremism, preventive measures form an additional focus of work in Germany which has been under expansion for some years now. Here too, the Federal Office for Migration and Refugees plays a particularly important role with its Advice Centre on “Radicalisation” and through its work in the Deradicalisation working group at the GTAZ.

For many years now, numerous Land interior ministries, as well as the Federal Ministry of the Interior, have been pointing to various legal and administrative challenges in returning persons who constitute a threat to public security. Difficulties apply, for example, when the person concerned does not possess any travel documents, the countries of destination refuse to take the person back or doubts exist as to whether human rights are respected in the country of destination and whether it is guaranteed that the returned person will not be exposed to any form of inhuman treatment.

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# List of abbreviations

AAEMN	European Migration Network
EMRK	Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten – Europäische Menschenrechtskonvention
EU	European Union
EURODAC	European Asylum Dactyloscopy Database
Europol	European Police Office
f.	and the following page
ff.	and the following pages
GETZ	Gemeinsames Extremismus- und Terrorismusabwehrzentrum (Joint Centre for Countering Extremism and Terrorism)
GTAZ	Gemeinsames Terrorismusabwehrzentrum (Joint Counter-Terrorism Centre)
IS	„Islamic State“
NGO	Non-Governmental-Organization
PMC	Politically motivated crime (Politisch motivierte Kriminalität, PMK)
RADAR-iTE	Regelbasierte Analyse potentiell destruktiver Täter zur Einschätzung des akuten Risikos – islamistischer Terrorismus (rule-based analysis of potentially destructive offenders to assess the acute risk – Islamist terrorism)
RISKANT	Risiko-Analyse System bei islamistisch motivierten Tatgeneigten (risk-analysis system for Islamist-motivated potential perpetrators)
SIRENE	Supplementary Information Request at the National Entry
SIS	Schengen Information System
subs.	subsection
WG	working group
ZUR	Zentrum zur Unterstützung der Rückkehr (Repatriation Support Centre)

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<b>WP 85</b>	Attracting and retaining international students in Germany. Study by the German National Contact Point for the European Migration Network (EMN). Authors: Paula Hoffmeyer-Zlotnik und Janne Grote (2019)	<b>01/2019</b>	Second wave of the IAB-BAMF-SOEP Survey. Language skills and employment rate of refugees improving with time. Authors: Herbert Brücker, Johannes Croisier, Yuliya Kosyakova, Hannes Kröger, Giuseppe Pietrantuono, Nina Rother und Jürgen Schupp (2019)
<b>WP 84</b>	Beneficiaries of protection travelling to their country of origin: Authorization, Policies and Revocation Procedure in Germany. Study by the German National Contact Point for the European Migration Network (EMN). Author: Janne Grote (2019)	<b>04/2018</b>	Resettlement in Germany – What does the admission programme for particularly vulnerable refugees achieve? Authors: Tatjana Baraulina und Maria Bitterwolf (2018)
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