

# Potential and Challenges of Private International Law in the Current Migratory Context -Experiences from the Field

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## KEY FINDINGS

- The **rights of the child** (Art. 3, Convention on the Rights of the Child, Art. 24, EU Charter of Fundamental Rights) are **well ensured by the German approach to treat unaccompanied minors first and foremost as children in need of protection**.
- The **responsibility of the youth authorities (*Jugendamt*) to give shelter has priority**.
- The **immediate legal representation of an unaccompanied child is guaranteed** by the **right of the youth authorities to act as first representatives** of the child. The **family court then appoints an appropriate guardian**.
- As it is **not always advisable to apply for asylum**, the **representative of the child has to decide on the application in order to clarify the child's perspective**.
- **Amendments and interdisciplinary practical action plans already improved the situation of unaccompanied minors**. There is still a need for clarification and improvements.

## 1. DATA ON UNACCOMPANIED MINORS IN GERMANY

It is broadly known that many refugees are staying in Germany. Accordingly, the number of children on the move, including **unaccompanied minors**, also increased significantly, particularly in 2014 and 2015. The **peak** in the number of unaccompanied minors was reached at the end of **February 2016, with 60,638** unaccompanied children. **Beginning in May 2016**, the number is ever **decreasing**. On **February 1, 2017** the total number of unaccompanied minors staying in Germany amounted to **43,840**.<sup>1</sup>

**Most unaccompanied children are on the verge of being 18 years old.** 92 % of the unaccompanied minors were aged 14–17.<sup>2</sup> In 2015, 91% of the new arriving unaccompanied minors in Germany were male.<sup>3</sup> Since November 2015, between 50,000 and 60,000

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unaccompanied minors were living in places with services offered by the German youth welfare authorities.<sup>4</sup>

The relevant factors for the decline in the total number are the decrease of new arrivals of minors in Germany and the achievement of maturity of those young people who came to Germany in recent years.<sup>5</sup> **The number of young adults** who came to Germany as unaccompanied minors **is increasing**. While the number was 6,400 in November 2015, it was higher than 14,000 in December 2016.<sup>6</sup>

## 2. CHALLENGES

The substantial increase in the number of unaccompanied minors arriving in Germany caused and still causes challenges for all professionals involved: the authorities dealing with matters of asylum and migration law as well as the authorities dealing with the protection of children – relating to public as well as civil law. Some new problems resulted and are still resulting in **amendments to existing laws**, others in problem solving by the professionals involved, often in the way of **interdisciplinary practical action plans**.

Working as a judge in a German family court for more than 20 years, I soon encountered the new challenges in my daily work. The number of cases in which I was asked to decide on the protection of unaccompanied minors increased significantly. In some weeks, the family court of Munich received 400 new requests a day concerning the protection of unaccompanied minors. In addition, in my position as German network judge in the European Judicial Network<sup>7</sup> and in the International Hague Network of Judges<sup>8</sup> I encountered a lot of additional questions from other German judges dealing with the protection of unaccompanied minors.

## 3. PRIORITISATION OF GIVING SHELTER/ GERMAN PUBLIC LAW

An **unaccompanied minor** is a child who is not a national citizen and who enters the state being temporarily or definitively deprived of his/her parents or legal guardian. In Germany, an unaccompanied minor is first treated as a child in need of protection and care, including the need of a legal representative. The representative decides all relevant questions, including whether to make an application for a specific migration or asylum status and exercises the child's rights in this procedure. At first we look for protection from the public and civil law perspective for all unaccompanied minors and in addition, if appropriate, from the migration law perspective. **The unaccompanied child is foremost a minor, then a foreigner.**

The amendment that should be highlighted is the **Act on the improvement of placement, supply and care of children and adolescents**<sup>9</sup>, which became effective on **November 01, 2015**. The aim of the amendment was to improve the situation of young refugees by creating a system of placement that is based on the best interests of these children and their need of protection.<sup>10</sup> The system can be summarised as follows:

**The German youth authorities have the right and duty to take a child into care** if a child asks to be taken into care, if there is an urgent danger to the best interest of the child and if a foreign unaccompanied child comes to Germany and the person having custodial rights is not in Germany (section 42(1)(1), Social Security Code (SSC) VIII).<sup>11</sup> Taking these children into care includes the right to a preliminary placement of the child (section 42(1)(2) SSC VIII).

**The unaccompanied child arriving in Germany is provisionally taken into care** by the local youth Authority (*Jugendamt*) of the district where the child is found for the first time or the child gets in touch with first ("**youth authority of admission**"), **in accordance with** section 42a SSC VIII. It is the task of this youth authority to evaluate together with the child:

- whether the child's best interest is in danger in case of reallocation proceedings (which allow for reallocating children between the different German *Länder*),
- whether relatives of the child live in Germany or abroad,
- whether the child's best interest requires a placement together with siblings or other unaccompanied minors,
- whether the state of health of the child does not allow the reallocation proceedings within 14 days (section 42a (2) SSC VIII).

Subsequently, a **reallocation within Germany within 1 month** occurs, having regard to an allocation formula between the Federal Länder ("*Königsteiner Schlüssel*"<sup>12</sup>). The reallocation is excluded:

- if the best interest of the child would be endangered,
- if the state of health of the child does not allow the reallocation proceedings within 14 days,
- in case a rapid matching with a relative, for example under the Dublin III Regulation<sup>13</sup>, is both possible and in the interest of the child,
- if the reallocation proceedings cannot take place within one month after the provisional taking into care, section 42 b (4) SSC VIII.

Separation of siblings is not allowed, unless their best interest urges for it (section 42b(5) SSC VIII).

After reallocation, the child is **taken into care by the local "youth authority of reallocation"**.

**The local youth authorities are the first representatives of the unaccompanied minors.** During the time of the provisional taking into care, the "youth authority of admission" is empowered to act as the child's representative according to section 42a (3) (1) SSC VIII. The child participates and the alleged intention of the person having custodial rights is taken into account (section 42a (3) (2) SSC VIII). After the reallocation within Germany and the regular taking into care, the "youth authority of reallocation" represents the minor, under section 42 (3) (4) SSC VIII.

## 4. GERMAN FAMILY LAW

**Anyone can propose the commencement of proceedings in case of danger to a child** to a German family court, in accordance with section 24 (1), Act on Proceedings in Family Matter and in Matters of Noncontentious Jurisdiction (AFP)<sup>14</sup>. The **court** then determines whether to commence proceedings **ex officio** (section 24 (1) AFP). The Family court orders guardianship on its own motion, under section 1774 of the Code of Civil Procedure.<sup>15</sup> The court conducts the necessary inquiries **ex officio** to establish the facts that are relevant to the decision (Art. 26 AFP). The conditions for action by the Family Court are **irrespective of the child's nationality. No amendments** to the procedural and substantive law took place because of the increase in unaccompanied minors arriving in Germany.

In case of an unaccompanied minor, the "**youth authority of reallocation**" has the **obligation to inform the family court immediately**, according to section 42 (3) (4) SSC VIII.<sup>16</sup> Such information may also come from any other person, especially the child's relatives.

If needed, the "youth authority of admission" can also propose the commencement of the proceedings. That might be the case if urgent matters have to be decided without delay and the youth authority is of the opinion that the decision that has to be taken has such a substantial effect that it would be better to ask for a court-appointed guardian than to act as first representative. An early appointment of a guardian by the court might be wise in the individual case if actions concerning family reunion or access to the job market are advisable<sup>17</sup>. Generally, it makes sense to wait until the child's position within the state is clarified, *i.e.* after the reallocation.

The German civil law approach to unaccompanied minors is based on the fact that **a representative who is capable of acting is essential for the protection of children. If this person is not available, the state has to adopt child protection measures.** A minor, who under German law is a person under the age of 18 (section 2 of the German Civil Code), once he/she has reached the age of 7 has limited capacity to contract, according to section 106 of the Civil Code (CC). For any declaration of intent or contract as a result of which he does not only receive a legal benefit, a minor requires the consent of his legal representative, section 107 CCP. Thus, without a legal representative a child is unable to enter into any legal relationship or contract.

## International Jurisdiction

The relevant criterion for the existence of international jurisdiction is the **habitual residence of the child**, in accordance with Art. 8 ff. of the Brussels II bis Regulation<sup>18</sup> and with Art. 5 ff. of the 1996 Hague Convention (HC).<sup>19</sup> However, both instruments provide for an exception to this rule when it comes to refugee and internationally displaced children: the courts of the State where they are present have jurisdiction over them, according to Art. 6 of the Hague Convention and 13(2) of the Brussels II bis Regulation. The Explanatory Report of the 1996 Hague Convention clarifies, concerning refugee children and children who, due to disturbances occurring in their country, are internationally displaced: "(...) the normal jurisdiction attributed by the Convention to the authorities of the State of their habitual residence is here inoperative, since these children have by hypothesis broken all links with the State of their previous habitual residence, and the precariousness of their stay in the State where they have provisionally found refuge does not allow it to be considered that they have acquired a habitual residence there."<sup>20</sup>

The unaccompanied minors the German family courts are dealing with when deciding on guardianship **regularly have lost their habitual residence in their home state and have regularly not – yet - established a new habitual residence.** Due to the German system of protection,<sup>21</sup> the family courts are normally seized only a few weeks after the arrival of the minor in Germany. The German courts regularly apply **Art. 13 (2) Brussels II bis**, which, as mentioned above, establishes jurisdiction based on the refugee or displaced child's presence. These children are usually not yet integrated, have often already changed their place of residence within the new state, do not yet have enough social attachments in the new state, and their status in Germany is unassured. In case the unaccompanied minor has been in the state for months or years, the evaluation of the question of whether the unaccompanied minor has established a new habitual residence in the Member State might be different.<sup>22</sup> The perspective of the migrant child has to be considered in addition to all the other relevant factors. It should be considered that children adapt quickly in a new environment. **The status of being a refugee makes it more difficult, but does not exclude a child from establishing a habitual residence** in Germany.<sup>23</sup> It is ambiguous whether

Art. 13 (2) Brussels II bis is still applicable in case of a refugee who has established a new habitual residence in a Member State, or whether Art. 8 (1) Brussels II bis takes precedence in such a case. Having regard to the high number of unaccompanied minors in Europe, there is a need for discussions in order to guarantee an autonomous interpretation to Article 13(2). A European practical handbook would be helpful.

Indeed, in German practice, having regard to the fact that the courts are seized shortly after the arrival in the state and before an immigration decision is taken, it is often difficult to determine whether the child is a **refugee child or displaced because of disturbances occurring in the country**, as mentioned in both Art. 13 (2) of Brussels II bis and Art. 6 (1) of the 1996 HC. The Explanatory Report of the 1996 HC points out: "The category of children here contemplated is limited to those who have left their countries because of conditions which were arising there, and who often are not accompanied and, in any case, are temporarily or definitively deprived of their parents. It does not concern the other children who have been internationally displaced, such as **runaway or abandoned children**."<sup>24</sup> As judges, we regularly depend on the reasons to move that are given by the minor, with no or only limited possibilities of verification. Most unaccompanied children do not come from a Member State of the Brussels II bis Regulation or a Contracting State of the 1996 HC, so that we do not have the possibility of asking for a report on the situation of the child, as would be allowed under Art. 55 (a) (ii) Brussels II bis and Art. 32 1996 HC. We usually have no possibility of getting in contact with relevant authorities in the state of origin. In order to check the circumstances of the case, it is important to question the minor and if possible to get in contact with parents and the foreign authorities. If the child is not a child in the sense of Art. 13 (2) of Brussels II bis and Art. 6 (1) of the 1996 HC, this does not lead automatically to the application of Art. 13 (1) of Brussels II bis and Art. 6 (2) of the 1996 HC, which provide for jurisdiction based on presence for children whose habitual residence cannot be established. While abandoned children will be in a situation that their habitual residence cannot be established, this is difficult for runaway children as their parents did not consent in their move.

## Substantive Law

In case of international jurisdiction, the German courts deal with all unaccompanied minors as minors without a legal representative and in need of measures for protection. The Explanatory Report on the 1996 HC states, concerning children within the scope of Art. 6 (1) 1996 HC, that "(... t)he children contemplated (...) often have need, even without a situation of urgency, for their protection to be organised in a lasting manner. They may indeed, for example, be led to apply for asylum or be the subject of a request for adoption. It is therefore necessary to designate a legal representative (...)"<sup>25</sup> The German approach goes even further based on the already mentioned fact that a representative capable of acting is essential for the protection of children. If this person is not available, the state has to ensure the adoption of child protection measures.

According to Art. 15(1) 1996 HC, the authorities shall apply their own law in exercising their jurisdiction. The applicable German national law provides that **the family court must take the measures that are necessary in the interest of the child if the parents are prevented from exercising parental responsibility** (section 1693 of the Civil Code)<sup>26</sup>. **The parental custody of a parent is suspended if the family court establishes that he or she cannot in fact exercise it for a long period of time**, according to section 1674 (1) CC. **A minor is given a guardian if he or she is not subject to parental custody or if the parents are not entitled to represent the minor**; moreover, if the holders of

parental responsibility are dead, the minor is given a guardian if he or she is not subject to parental custody (section 1773 (1) CC). A minor is also given a guardian if his or her personal status cannot be determined, according to section 1773 (2) CC. These sections apply to all children lacking a legal representative who is able to exercise custodial rights, no matter whether they are German or foreign citizens. Unaccompanied refugee and internationally displaced minors, in the sense of Art. 13 (2) Brussels II bis and Art. 6 (1) 1996 HC, fall into the scope of the relevant sections of the Civil Code without regard to their immigration status.

The German family court hears the minor, the youth authority and others and checks any documents that might be available. If possible, the parents are also heard. In addition to taking final measures, the court may impose temporary measures by way of interlocutory order insofar as there is an urgent need for immediate action, section 49 (1) AFP. The courts often see a need for temporary measures for unaccompanied minors as these children are regularly in urgent need of a representative and the period of time the ordinary trial lasts is often too long, so that the child cannot wait.

Some requirements for actions taken by the court need extra remarks:

- **Is the person a minor?**

Age assessment is often difficult as most persons concerned declare that they are unable to show documents. Some present scans of documents on their mobile phones and a few submit documents - this is the case especially of children coming from Syria. The evidence shown often has gaps as it is often uncertain whether such documents are genuine. There is no available method to determine the exact age of a person.<sup>27</sup>

Section 42f SSC VIII provides the rules for **age assessment by the youth authority**: When taking a person into interim care, the youth authority shall decide on the age by inspecting the person's documents, or alternatively by way of a qualified visual inspection, in accordance with Section 42f (1) SSC VIII. In case of doubts, the youth authority shall order an age assessment upon application by the person concerned or the person's representative or *ex officio*. In order to undertake the age assessment procedure, the person concerned must be informed about the method of the medical examination and about the consequences of a refusal to undergo it, and his/her consent must be obtained, in accordance with section 42f (2) SSC VIII. The best interest of the child is the standard for the age assessment, *i.e.* the age assessment must observe the dignity and physical integrity of the person. If after the medical examination there are still doubts concerning the applicant's age, the authorities shall assume that the applicant is a minor, Art. 25 (5) (2) Directive 2013/32/EU.<sup>28</sup>

There are no specific regulations for **the family court** about how to deal with the age assessment while conducting the necessary inquiries *ex officio*. There is no uniform approach within Germany. Family courts should use the regulation that applies to youth authorities as a guideline.<sup>29</sup> The age assessment by the youth authority is not binding for the family court and for the immigration authorities.<sup>30</sup> The court only has to start inquiries in case the age assessment performed by the youth authority gives rise to doubts. The person concerned then has the duty to co-operate: if he/she refuses to undergo reasonable investigations, the court is allowed to draw negative conclusions. In case the court still has doubts after utilising all appropriate means, it shall use the **benefit-of-the-doubt principle**.<sup>31</sup> Sometimes the doubts only concern the specific day in a year. The benefit-of-the-doubt principle then results in treating the person as a person born December 31.<sup>32</sup>



- **Who is the representative of the child at the moment?**

The attribution of parental responsibility by operation of law is governed by the law of the State of habitual residence according to Art. 16 (1), 1996 HC. Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another state, according to para. 3 of the same Article. These provisions apply even if the law designated is the law of a non-Contracting State, according to Art. 20 1996 HC. It is often difficult to check the applicable foreign law, and in many Islamic States there are even several family laws applicable having regard to the faith of the person. It is mostly impossible to check whether a judgment changed the custodial situation of the child. Unaccompanied minors often have no information about that and minor refugees normally do not travel with documents in their luggage about their custodial situation.

Because of these difficulties, German courts are quick to assume that no foreign judgment changed the attribution of parental responsibility for the unaccompanied minor and that in case both parents are still alive, they have shared custody under the applicable national law. As the declaration of suspension of parental custody of a parent by a German court causes no harm in case this parent is not the holder of parental rights, the approach to assume joint custody of both parents seems practical and adequate.

- **When is a parent in a situation that he/she cannot in fact exercise parental custody for a long period of time?**

Many unaccompanied minors inform us that they have **contact via electronical means** (mobile phone/computer) with their parents who are still in the state of origin or in another state. Some report having rare contact, some report daily contact. The assessment whether these parents are unable to exercise parental custody differs. Physical absence alone does not exclude the parents, as modern means of communication might enable them to take an active part in exercising their rights.<sup>33</sup> The court should take into account the special situation of unaccompanied minors and their parents: the parents often live under difficult political and economical circumstances, means of contact are often limited, they often have no idea about the child's conditions and needs in Europe. In addition they lack knowledge of the German language. As a result, in general these parents cannot exercise their parental custody even in case they have daily contact.<sup>34</sup>

Some unaccompanied minors produce a **written power of disposal** given by their parents to a relative who is already living in Germany or a sibling or person, often a relative who accompanied the child to Germany. The German courts do not evaluate such a situation uniformly. Some courts accept such written power of disposal and are of the opinion that these parents are able to exercise their parental rights with the help of the power of disposal. From my opposite point of view the foreign written power of disposal will result in many problems of acceptance in practice, so that there is a need for a court decision which has to take into account the will of the parents as stated in the power of disposal.<sup>35</sup>

- **What are the tasks of a guardian?**

The court defines the fields of work of the person appointed. If the court determines that there is no need to appoint a representative for all matters of parental custody (**guardian**), it appoints a **supplementary curator** and defines the areas where his/her intervention is necessary. In case of unaccompanied minors, the German family courts regularly appoint a guardian, as these children need a representative in all areas.

There were a few cases in which guardians had problems dealing with situations in which the minor was asked to accept an inheritance in the state of origin, for example after the death of a relative. The guardian appointed in Germany was responsible to decide in the child's best

interest but felt unable, as he/she lacks knowledge of the system and the circumstances in the individual case in the home state. In order to avoid the duty of the appointed guardian to act, so far a few courts considered limiting the tasks of the representative whom they appoint to affairs that have to be decided within Europe.

The tasks of a guardian for unaccompanied minors are manifold: He/she represents the child in all areas where such an intervention is needed. These are regularly:

- Decisions on the child's migration status:  
Which application under immigration law shall be filed? Is it better for this child to apply for asylum or for exceptional leave to remain for education? Shall the guardian apply for family reunification? Appropriate reasons have to be given and if appropriate, decisions under immigration law have to be appealed;
  - Decisions concerning health: There are no available findings concerning the physical and mental health of unaccompanied minors. It can be assumed that their physical health is affected by the often long and physically stressful escape, the consequences of bad sanitary conditions and the lack of medical care.<sup>36</sup> It can also be emphasized that a high number of unaccompanied minors are affected by trauma;<sup>37</sup>
  - Access to education and the job market;
  - Application for financial support or educational allowance;
  - Etc.
- **Who is an appropriate guardian?**

There are no special rules about guardians for unaccompanied minors. According to the general rules, the family court selects the guardian after hearing the youth welfare office (section 1779 (1) CC). The family court should choose a person who is suitable to act as guardian in view of his or her personal circumstances and his or her financial situation, and also in view of the other circumstances of the case. When a selection is made between several suitable persons, the presumed wishes of the parents, the personal ties of the ward, the relationship (by blood or marriage) with the ward and the religious faith of the ward are to be taken into account, according to section 1779 (2) CC. The court may appoint:

- a volunteer already known to the child, like a relative,
- a volunteer not yet known to the child,
- a professional sole guardian,
- an association declared to be suitable for this by the youth welfare office of the Land, section 1791a CC,
- the youth welfare office, if no person suitable as a voluntary sole guardian is available, 1791b CC.

The unaccompanied minor must obtain a qualified and independent representative as soon as possible, as follows from Art. 6 (2) Dublin III Regulation, Art. 25 (1) of the Asylum Procedures Directive<sup>38</sup>, and Art. 16 of the Anti-Trafficking Directive.<sup>39</sup> This person needs to have specific knowledge of pedagogical and cultural issues, of immigration law and the different sorts of applications under immigration law and of trafficking in human beings, as well as, desirably, language skills. There is no uniform approach in the German jurisdiction. From my point of view, a relative or a close person accompanying the child to Germany is overburdened by the task, not knowing the German system. Even a relative who is already living in Germany since a while might be overcharged. The risk of human trafficking and exploitation has to be considered, of course without incriminating all persons accompanying the child.

Especially in times of high numbers of unaccompanied minors arriving, these qualifications were not always guaranteed. At the moment, this tension between the law and its application



is reduced with the decline in numbers. Nowadays all professionals are better prepared. Many new professionals, most of them with a social background, are now recruited to work with unaccompanied minors. The appropriate language skills are still difficult to find, especially in rural areas. The guardian then has to work with an interpreter. In practice there is still a need for improvement in order to guarantee qualified representation in each case.

The family court advises the guardians and assists in introducing them to their tasks, in accordance with section 1837 (1) CC. The family court is to supervise all the activity of the guardian and to intervene against breaches of duty by taking all suitable orders and prohibitions (Section 1837 (2) CC).

- **When does the legal measure end?**

The decision by the German court does not impose a time limit. The guardianships ends if the family court establishes that the reason for the suspension of parental responsibility no longer applies (section 1674 (2) CC) or when the requirements laid down for the commencement of the guardianship in section 1773 CC cease to exist (section 1882 CC). There are situations in which parental custody revives because of the capacity of the parents to exercise their parental rights; in other cases, the minor reaches legal age. Many unaccompanied minors then receive support for young adults.<sup>40</sup>

As in some states of origin the age of majority is higher than in Germany,<sup>41</sup> the open question so far is which law decides whether the child has become an adult or not. Some German courts<sup>42</sup> are of the opinion that Art. 12 of the Geneva Convention Relating to the Status of Refugees, which provides that "the personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence," does not rule on the personal statute. This results in German international private law<sup>43</sup> being applicable: "...the law applicable shall be that of the country with which the person has the closest connection, especially through his or her habitual residence or through the course of his or her life".<sup>44</sup> From this point of view, unaccompanied minors arriving from states where the age of majority is over 18 years of age remain minors even when reaching the age of 18. Other courts apply Art. 12 of the Geneva Convention.<sup>45</sup> The consequences of treating a person over 18 as a minor are far-reaching: the person remains in care of the youth authority, the guardian is still deciding, the contractual capacity is still limited. It would be desirable to find a uniform approach, best a European or even an international one.

## 5. GERMAN IMMIGRATION LAW

There are different possibilities to apply for a right to stay in Germany for unaccompanied minors: in particular, an application for asylum under the Asylum Act<sup>46</sup> or an application for residence, especially for educational purposes, under sections 16 and 17 of the Residence Act.<sup>47</sup>

In 2015, 53% of all unaccompanied minors arriving in Germany applied for asylum.<sup>48</sup> A relevant number therefore did not apply for asylum and chose another way to obtain the right to reside in Germany.<sup>49</sup> It has to be checked carefully which application is the appropriate one for the individual child, as a change between the two is difficult (section 10 Residence Act). In case the asylum application is rejected, it is difficult then to consider an application for residence for educational purposes.<sup>50</sup> A few German courts are of the opinion that - because of the complexity of these decisions in the area of immigration and asylum law - unaccompanied minors are insofar in need of a representation by a specialised lawyer.<sup>51</sup>

**No unaccompanied minor arriving in Germany has the legal capacity to act in proceedings for residence purposes and asylum.** In October 24, 2015, by way of amendment to the law, the legal capacity to act in these proceedings was raised from age 16 to 18 (section 80 Residence Act, section 12 Asylum Act). The reason for this change was to emphasise the precedence of the Child and Youth Services also for foreign minors who have attained the age of 16.<sup>52</sup>

## **6. RECENT AMENDMENTS**

On the 2nd of June 2017, the German Federal Parliament decided on an Act to combat underage marriage: thus, child marriage is no longer possible in Germany. A marriage of a spouse under 16 is void by law, while a marriage contracted by a spouse who is between 16 and 18 is voidable. Unaccompanied refugee minors shall be taken into care even if they are married. The youth authority then examines the protective measures that the situation requires, especially the need to separate the minor from his/her spouse. A spouse who married underaged shall have no disadvantages caused by the invalidity of the marriage.<sup>53</sup>

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- <sup>1</sup> Report on the situation of unaccompanied foreign minors in Germany, Official Publication of the Bundestag 18/11540 from March 15, 2017, p. 5  
Available in German at <http://dipbt.bundestag.de/doc/btd/18/115/1811540.pdf> (last consulted 1 June 2017).
- <sup>2</sup> See, *ibid.*, p. 28.
- <sup>3</sup> See, *ibid.*, p. 29.
- <sup>4</sup> See, *ibid.*, p.6.
- <sup>5</sup> See, *ibid.*, p.6.
- <sup>6</sup> See, *ibid.*, p.6.
- <sup>7</sup> See [https://e-justice.europa.eu/content\\_ejn\\_in\\_civil\\_and\\_commercial\\_matters-21-en.do](https://e-justice.europa.eu/content_ejn_in_civil_and_commercial_matters-21-en.do) (last consulted 1 June 2017).
- <sup>8</sup> See <https://assets.hcch.net/upload/haguenetwork.pdf> (last consulted 22 May 2017).
- <sup>9</sup> [https://www.bgb1.de/xaver/bgb1/start.xav?startbk=Bundesanzeiger\\_BGB&start=//%255B@attr\\_id=%27bgb115s1802.pdf%27%255D#\\_bgb1\\_%2F%2F%255B%40attr\\_id%3D%27bgb115s1802.pdf%27%25D\\_1494716669814](https://www.bgb1.de/xaver/bgb1/start.xav?startbk=Bundesanzeiger_BGB&start=//%255B@attr_id=%27bgb115s1802.pdf%27%255D#_bgb1_%2F%2F%255B%40attr_id%3D%27bgb115s1802.pdf%27%25D_1494716669814) (last consulted 1 June 2017).
- <sup>10</sup> <https://www.bmfsfj.de/blob/89934/e8d49465612183283e44f52c04fcf01d/gesetzentwurf-umf-data.pdf> (last consulted 1 June 2016).
- <sup>11</sup> Social Security Code VIII. German version at [https://www.gesetze-im-internet.de/sgb\\_8/](https://www.gesetze-im-internet.de/sgb_8/) (last consulted 1 June 2017).
- <sup>12</sup> The "Königsteiner Schlüssel" determines how many asylum seeker each Federal land has to house.
- <sup>13</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013.  
At <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0604&from=de> (last consulted 1 June 2017).
- <sup>14</sup> Act on Proceedings in Family Matter and in Matters of Noncontentious Jurisdiction.  
At [http://www.gesetze-im-internet.de/englisch\\_famfg.html#p0132](http://www.gesetze-im-internet.de/englisch_famfg.html#p0132) (last consulted 1 June 2017).
- <sup>15</sup> Code of Civil Procedure.  
At [https://www.gesetze-im-internet.de/englisch\\_zpo/index.html](https://www.gesetze-im-internet.de/englisch_zpo/index.html) (last consulted 1 June 2017).
- <sup>16</sup> Federal Administrative Court 24.6.1999, No. 5 C 24/98.  
At [https://www.jurion.de/urteile/bverwg/1999-06-24/5-c-24\\_98/](https://www.jurion.de/urteile/bverwg/1999-06-24/5-c-24_98/) (last consulted 1 June 2017).
- <sup>17</sup> Erb-Klünemann/Köbler, Unbegleitete minderjährige Flüchtlinge – eine verstärkte familiengerichtliche Herausforderung. FamRB 2016, p. 160 (161).
- <sup>18</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.  
At <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML> (last consulted 1 June 2017).
- <sup>19</sup> Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.  
At <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70> (last consulted 1 June 2017).
- <sup>20</sup> Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, *Proceedings of the Eighteenth Session* (1996). No. 44. At <https://assets.hcch.net/upload/expl34.pdf> (last consulted 1 June 2017).
- <sup>21</sup> See chapter 4.
- <sup>22</sup> Such situations regularly occur in proceedings on parental responsibility concerning children that came to Germany with their parents. Such cases often involve parents who arrived together with their children in the state of refuge and who now disagree on the child's future, especially on the question whether the child should return to the state of origin or whether he/she should stay in Germany. As these children are regularly already been in Germany for a longer period of time, the evaluation of habitual residence is difficult and depending on the particular case.
- <sup>23</sup> Baetge, *Gewöhnlicher Aufenthalt und Personalstatut von Flüchtlingen*. StAZ 2016, 289 (292); Mankowski, *Die Reaktionen des Internationalen Privatrechts auf neue Erscheinungsformen der Migration*. IPRax 2017, 40 (48).
- <sup>24</sup> See the Report (*ibid.*), para 20, no. 44.
- <sup>25</sup> See, *ibid.*
- <sup>26</sup> Civil Code. At [https://www.gesetze-im-internet.de/englisch\\_bgb/index.html](https://www.gesetze-im-internet.de/englisch_bgb/index.html) (last consulted 1 June 2017).
- <sup>27</sup> European Asylum Support Office, Age assessment practice in Europe, 12/2013. p. 24.  
At <https://www.easo.europa.eu/sites/default/files/public/EASO-Age-assessment-practice-in-Europe1.pdf> (last consulted 1 June 2017).
- <sup>28</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.  
At <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0032&from=DE> (last consulted 1 June 2017).
- <sup>29</sup> See Erb-Klünemann/Köbler, cited, p. 163.
- <sup>30</sup> See, *ibid.*
- <sup>31</sup> Higher Regional Court Karlsruhe, 26.8.2015. FamRZ 2015, 2183.
- <sup>32</sup> See Erb-Klünemann/Köbler, cited, p. 164.
- <sup>33</sup> Federal High Court of Justice, 6.10.2004. FamRZ 2005, 29.
- <sup>34</sup> See Erb-Klünemann/Köbler, cited, p. 163.
- <sup>35</sup> See Erb-Klünemann/Köbler, cited, p. 163.
- <sup>36</sup> See the Report cited in footnote 1, p. 46.
- <sup>37</sup> See *ibid.*, p. 47.
- <sup>38</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

<sup>39</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

<sup>40</sup> See (*l.c.*), para 6.

<sup>41</sup> Examples are Algeria (19 years), Nigeria (21 years).

<sup>42</sup> Higher Regional Court Karlsruhe 23.7.2015. FamRZ 2015, 1820.

<sup>43</sup> Article 5, Introductory Act to the Civil Code. At [https://www.gesetze-im-internet.de/englisch\\_bqbeq/index.html](https://www.gesetze-im-internet.de/englisch_bqbeq/index.html) (last consulted 1 June 2017).

<sup>44</sup> Higher Regional Court Karlsruhe, 23.7.2015. FamRZ 2015, 1820.

<sup>45</sup> Hein. FamRZ 2015, 1822.

<sup>46</sup> Available in English at [https://www.gesetze-im-internet.de/englisch\\_asylvfg/index.html](https://www.gesetze-im-internet.de/englisch_asylvfg/index.html) (last consulted 1 June 2017).

<sup>47</sup> Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory. Available in English at [https://www.gesetze-im-internet.de/englisch\\_aufenthg/index.html](https://www.gesetze-im-internet.de/englisch_aufenthg/index.html) (last consulted 1 June 2017).

<sup>48</sup> [https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2016/08/PD16\\_268\\_225.html](https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2016/08/PD16_268_225.html) (last consulted 1 June 2017).

<sup>49</sup> [http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Asyl/um-zahlen-entwicklung.pdf?\\_\\_blob=publicationFile](http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Asyl/um-zahlen-entwicklung.pdf?__blob=publicationFile) (last consulted 1 June 2017).

<sup>50</sup> See Erb-Klünemann/Köbler, cited, p. 164.

<sup>51</sup> Higher Regional Court Frankfurt, 11.9.2014. FamRZ 2014, 2015 and 8.1.2015. FamRZ 2015, 1412.

<sup>52</sup> Official Publication of the Bundestag 18/5921, p. 18.

At <https://dip21.bundestag.de/dip21/btd/18/059/1805921.pdf> (last consulted 1 June 2017).

<sup>53</sup> At <http://dip21.bundestag.de/dip21/btd/18/120/1812086.pdf> (last consulted 2 June 2017).

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