



# Airport procedures in Germany

Gaps in quality and compliance with guarantees



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The visit to Germany was conducted as part of the Asylum Information Database ([AIDA](#)) managed by ECRE, which provides up-to-date information and analysis of the legal framework and practice with regard to asylum procedures, reception conditions, detention and content of international protection in 23 European countries. This report complements and should be read together with the [AIDA Country Report on Germany](#).

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[The information contained in this report is valid as of 30 April 2019, unless otherwise stated.](#)

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Cover picture: Flughafenunterkunft, Munich Airport.

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## GLOSSARY & LIST OF ABBREVIATIONS

<b>Dublin system</b>	System establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application, under <a href="#">Regulation (EU) No 604/2013</a> .
<b>Erstaufnahmeeinrichtung</b>	“Initial reception centre” accommodating asylum seekers subject to the airport procedure in Frankfurt, <i>de facto</i> under a state of deprivation of liberty. This is also referred to as “transit area” ( <i>Transitbereich</i> ).
<b>Flughafenunterkunft</b>	“Airport facility” accommodating asylum seekers subject to the airport procedure in Munich, <i>de facto</i> under a state of deprivation of liberty.
<b>Recognition rate</b>	Percentage of positive decisions granting refugee status, subsidiary protection or humanitarian protection (“prohibition of deportation”) out of the total number of decisions on asylum applications.

<b>AIDA</b>	Asylum Information Database
<b>BAMF</b>	Federal Office for Migration and Refugees   Bundesamt für Migration und Flüchtlinge
<b>BGH</b>	Federal Supreme Court   Bundesgerichtshof
<b>BVerfG</b>	Federal Constitutional Court   Bundesverfassungsgericht
<b>CEAS</b>	Common European Asylum System
<b>CJEU</b>	Court of Justice of the European Union
<b>DRC</b>	Democratic Republic of Congo
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>VG</b>	Administrative Court   Verwaltungsgericht

## INTRODUCTION

The border procedure is one of the contentious and heavily debated aspects of the Common European Asylum System (CEAS). Though it might be a nascent concept in some EU countries' asylum systems,<sup>1</sup> the border procedure is a longstanding and deeply embedded practice for others, as a separate track applicable to people seeking protection at specific border points.<sup>2</sup>

The complex negotiations on the legislative reform of the CEAS have triggered discussions among European Union (EU) Member States on ways to speed up refugee status determination and to contain protection seekers at borders by mainstreaming the border procedure in European asylum systems.<sup>3</sup> While focus is placed by Member States on the perceived effectiveness of border procedures in rapidly distinguishing those in need of refuge from those who do not qualify for protection and in controlling asylum seekers' movements, a careful assessment of the repercussions of truncated border procedures under regimes of detention on the quality of refugee status determination is needed in the context of discussions on the CEAS.

This report analyses the border procedure at the airport applied by Germany pursuant to Section 18a of its Asylum Act, with a focus on compliance with procedural guarantees and the quality of determination of who is entitled to enter the territory and who ought to be refused entry into the country.

It presents the findings of a visit to Germany from 1 to 5 April 2019, during which ECRE visited the initial reception centre (*Erstaufnahmeeinrichtung*) for procedures at Frankfurt Airport and met with representatives of the Church Refugee Service (*Kirchlicher Flüchtlingsdienst am Flughafen*) of Diakonie Frankfurt am Main, and representatives of the Church Service (*Kirchliche Dienste*) present at the airport facility (*Flughafenunterkunft*) for procedures at Munich Airport. Additional information was gathered through discussions with PRO ASYL, attorneys-at-law supporting airport procedure cases in Frankfurt and Munich, and the United Nations High Commissioner for Refugees (UNHCR). Requests were sent to the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, BAMF) but representatives were unfortunately not available to provide information for the purpose of this report or to discuss the operation of the airport procedure.

This report is structured into five sections, covering:

1. The deprivation of liberty regime applicable at airport facilities;
2. The scope of and elements examined in the airport procedure;
3. The time limits and duration of the airport procedure;
4. The quality of the airport procedure, as seen through the lens of interview guarantees, special procedural guarantees and the assessment of "manifestly unfounded" applications; and
5. The provision of information and legal assistance to asylum seekers.

A final part provides concluding remarks and recommendations to the relevant German authorities.

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<sup>1</sup> See e.g. AIDA, Country Report Italy, 2018 Update, April 2019, available at: <https://bit.ly/2JX2Aat>, 60 et seq.

<sup>2</sup> For a recent discussion of border procedures in France, see ECRE, *Access to asylum and detention at France's borders*, June 2018, available at: <https://bit.ly/2JaRrSu>.

<sup>3</sup> See e.g. Council of the European Union, *Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU: Policy debate on the asylum border procedure*, 5047/19, 10 January 2019.

## THE ASSESSMENT OF ASYLUM APPLICATIONS IN THE AIRPORT PROCEDURE

The border procedure in Germany consists of an airport procedure applicable at its international airports in Frankfurt/ Main, Munich, Berlin-Schönefeld, Hamburg and Düsseldorf. It is not applied in land borders as part of the reinstatement of internal Schengen border controls.<sup>4</sup>

The airport procedure was applied in 564 cases in 2018. The majority of cases, 475, were processed at Frankfurt Airport, followed by 88 at Munich Airport and 1 at Düsseldorf Airport.<sup>5</sup>

Statistics indicate that the airport procedure cases represent only 0.3% of the total of 185,853 people seeking asylum in Germany last year. That said, it appears that many asylum seekers at airports originated from the same countries of origin as those applying in the territory:

Asylum seekers at airports / Total asylum seekers: 2018			
Applicants at airports		Total applicants	
<b>Total</b>	<b>564</b>	<b>Total</b>	<b>185,583</b>

Breakdown by top ten countries of origin

Iran	98	Syria	46,146
Syria	41	Iraq	18,074
Turkey	38	Iran	11,846
Afghanistan	30	Nigeria	11,073
Iraq	30	Turkey	10,655
Russia	23	Afghanistan	12,251
Somalia	13	Eritrea	5,920
Unknown	11	Somalia	5,754
Eritrea	4	Russia	5,282
Nigeria	2	Unknown	4,849

Source: AIDA, Country Report Germany, 8, 44.

The BAMF often grants protection to many people fleeing some of these countries of origin. The overall recognition rate in 2018 was 99.8% for Syria, 94% for Eritrea, 65.8% for Somalia, 52.3% for Afghanistan, 46.7% for Turkey, 45.9% for Iraq and 34.3% for Iran.<sup>6</sup>

As of the end of the first quarter of 2019, recognition rates have risen to 99.9% for Syria, 62% for Afghanistan, 55.6% for Turkey, 52.1% for Iraq, while rates for Somalia have dropped to 64.5% and for Iran to 28.9%.<sup>7</sup>

That said, detailed official statistics on the full nationality breakdown of the persons applying for asylum at airports are not available, thereby hindering a comprehensive picture of the applicants undergoing the airport procedure.

<sup>4</sup> Information provided by the Munich Airport Church Service, 5 April 2019.

<sup>5</sup> AIDA, Country Report Germany, 44.

<sup>6</sup> AIDA, Country Report Germany, 8.

<sup>7</sup> BAMF, *Aktuelle Zahlen zu Asyl*, March 2019, available in German at: <https://bit.ly/2KPh8ZW>, 3.



## 1. *De facto* deprivation of liberty

In Germany, facilities where airport procedures are conducted carry different official denominations and are managed by the respective Federal States (*Bundesländer*):

- In the Federal State of Hesse, the facility at **Frankfurt Airport** is officially entitled “initial reception centre” (*Erstaufnahmeeinrichtung*). However, the Federal Police “transit notification” (*Transitbescheinigung*) issued to persons arriving at the airport refers to it as “transit area” (*Transitbereich*). The facility is located in Building 587a of “Cargo City South”, a restricted area near the airport.<sup>8</sup>
- In the Federal State of Bavaria, the facility at **Munich Airport** is called “airport facility” (*Flughafenunterkunft*). It is located in the “Visitors’ Park” near the airport.

Both facilities are closed centres that people are not allowed to enter and exit at will, therefore places of detention. Yet the official position of the German authorities remains that persons held in those facilities are not deprived of their liberty,<sup>9</sup> as confirmed both by the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) and the Federal Supreme Court (*Bundesgerichtshof*, BGH).<sup>10</sup> The fiction of no deprivation of liberty is maintained in Germany despite clear pronouncements by the European Court of Human Rights (ECtHR) on the deprivation of liberty regime applicable in transit zones at air and land borders.<sup>11</sup>

In practice, when placing asylum seekers in *de facto* detention in the *Flughafenunterkunft* of **Munich Airport**, the Federal Police (*Bundespolizei*) issues a “notification of residence in the airport facility” (*Bescheinigung für den Aufenthalt in der Flughafenunterkunft*) for the purpose of the airport procedure. This decision expressly states that the person is informed that such residence is not a freedom-restrictive measure and that the person can abandon the asylum procedure at any time, unless there are reasons grounded in criminal law which prohibit this. An excerpt of this decision can be found in [Annex II](#). As for **Frankfurt Airport**, the Federal Police issues a “transit notification” (*Transitbescheinigung*) stating that the person is allowed to stay in the facility until the completion of border police controls.

The fiction of non-entry into German territory is maintained for the duration of the airport procedure, including where the person is transferred from the facility at the airport to a hospital or court.

<sup>8</sup> See also Frankfurter Neue Presse, ‘Transitzone: Zwischen Hoffen und Bangen’, 23 November 2016, available in German at: <https://bit.ly/2uvO277>.

<sup>9</sup> Note that under Section 15(6) Residence Act, a person refused entry “shall be taken to the transit area of an airport or to a place of accommodation from which his exit from the federal territory is possible if detention pending exit from the federal territory is not applied for. The foreigner’s stay in the transit area of an airport or in accommodation pursuant to sentence 1 shall require a judicial order no later than 30 days after arrival at the airport”. Upon expiry of that time limit, the person must be allowed entry into the territory: Section 18a(6)(4) Asylum Act.

<sup>10</sup> BVerfG, Decision 2 BvR 1516/93, 14 May 1996; BGH, Decision V ZB 170/16, 16 March 2017.

<sup>11</sup> ECtHR, *Amuur v. France*, Application No 19776/92, Judgment of 25 June 1996, EDAL, available at: <https://bit.ly/2UsJc5b>; *Z.A. v. Russia*, Application No 61411/15, Judgment of 28 March 2017, EDAL, available at: <https://bit.ly/2ZfRq49>; *Ilias and Ahmed v. Hungary*, Application No 47287/15, Judgment of 14 March 2017, EDAL, available at: <https://bit.ly/2vaeenQ>. For a discussion and comparative analysis of practice, see ECRE, *Boundaries of Liberty: Asylum and de facto detention in Europe*, March 2018, available at: <https://bit.ly/2Epi5Qh>.

## 2. Scope of the procedure

### Grounds for activation

The recast Asylum Procedures Directive permits the use of border procedures at the border or transit zones of a Member State for the purpose of examining: (a) the admissibility of an application;<sup>12</sup> or (b) its merits in an accelerated procedure where one or more of the grounds for acceleration permitted under the Directive apply.<sup>13</sup>

The accelerated procedure is applicable when any of the following circumstances occur:

1. the applicant has only raised issues not relevant to refugee or subsidiary protection status;
2. the applicant comes from a “safe country of origin”;
3. the applicant has misled the authorities by presenting false documents or withholding relevant information relating to identity and nationality which could adversely affect the decision;
4. it is likely that, in bad faith, he or she has destroyed or disposed of identity or travel documents;
5. the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his or her claim unconvincing;
6. the applicant has filed an admissible subsequent application;
7. the applicant entered or stayed irregularly in the territory and, without good reasons, did not present him or herself to the authorities to file an application as soon as possible;
8. the applicant is making an application to delay or frustrate the enforcement of a return decision;
9. the applicant is a danger to national security or has been expelled for reasons of public security and public order;
10. the applicant refuses to be fingerprinted.

The scope of the border procedure is therefore strictly limited by the Directive to the cases covered by inadmissibility and accelerated procedure grounds.

The German Asylum Act foresees the applicability of the airport procedure where the asylum seeker arriving at the airport:<sup>14</sup>

- Comes from a “safe country of origin”;
- Is unable to prove his or her identity with a valid passport or other means of documentation.

The second ground merits particular consideration. German law triggers the airport procedure as soon as it is established that the asylum seeker is unable to prove identity by means of a passport or other documentation. It does not condition the applicability of the procedure upon requirements of misleading the authorities by withholding relevant information on identity or nationality, or destroying or disposing of an identity or travel document in bad faith.<sup>15</sup> The scope of the airport procedure in Germany is therefore not consistent with the boundaries set by the recast Asylum Procedures Directive.<sup>16</sup>

<sup>12</sup> Article 43(1)(a) recast Asylum Procedures Directive, citing Article 33. Given that Article 33 also makes a reference to the Dublin Regulation, the border procedure permits Member States to examine the Dublin criteria as well.

<sup>13</sup> Article 43(1)(b) recast Asylum Procedures Directive, citing Article 31(8).

<sup>14</sup> Section 18a(1) German Asylum Act.

<sup>15</sup> Article 31(8)(c) and (d) recast Asylum Procedures Directive.

<sup>16</sup> See also Dominik Bender, *Das Asylverfahren an deutschen Flughäfen*, May 2014, available in German at: <https://bit.ly/2GQ6xJ2>, 41.



In practice, lawyers have referred to cases where persons arriving at the airport have been subjected to the airport procedure even though they did not originate from a “safe country of origin” and produced a passport.<sup>17</sup>

### Elements examined

The airport procedure in Germany entails solely an examination of whether or not an asylum application should be rejected as “manifestly unfounded”.<sup>18</sup> In such a case, the person is issued a refusal of entry pursuant to the Schengen Borders Code.<sup>19</sup>

The law does not permit a refusal of entry into the territory if the BAMF dismisses asylum applications as inadmissible in the airport procedure; entry is refused only if the application is rejected as “manifestly unfounded”. In practice, however, stakeholders at **Frankfurt Airport** are aware of cases where the BAMF erroneously relied on “first country of asylum” or “safe third country” grounds – for Democratic Republic of Congo (DRC) or Zimbabwean nationals having obtained status and/or resided in South Africa prior to arriving in Germany – to reject applications as manifestly unfounded.<sup>20</sup>

At the moment, the Dublin Regulation is not conducted at the airport procedure either. Although the “order of placement” in the *Flughafenunterkunft* of Munich Airport includes an option for maintaining the person in the facility for the purposes of the Dublin procedure,<sup>21</sup> that box is never ticked in practice (see [Annex II](#)). Persons falling within the scope of the Dublin Regulation are transferred to the nearest branch facility of the BAMF – **Gießen** and **Munich** respectively – or to a pre-removal detention centre e.g. Erding or Eichstätt depending on the individual circumstances.<sup>22</sup> Organisations active at the airport detention facilities have not witnessed Dublin transfer decisions being taken under the airport procedure.

### 3. Duration of the procedure

Under the recast Asylum Procedures Directive, Member States must ensure that first instance decisions in the border procedure are taken “within a reasonable time”, and that asylum seekers are granted entry into the territory if no decision is taken within four weeks.<sup>23</sup>

Time limits are much shorter in Germany. The applicant is allowed entry into the territory if the BAMF has not rejected the application as “manifestly unfounded” within two days, or where it informs the Federal Police that it will be unable to do so within that timeframe.<sup>24</sup> In practice, the BAMF complies with that deadline and decides within two days. However, the notification of the BAMF decision tends to take up to eight more days at **Munich Airport**,<sup>25</sup> which could raise issues of compliance with the time limits set out in Section 18a of the Asylum Act. This may be related to the fact that the BAMF has no permanent presence in the *Flughafenunterkunft*, as mentioned below.

<sup>17</sup> Information provided by an attorney-at-law, 15 April 2019.

<sup>18</sup> Section 18a(2) German Asylum Act.

<sup>19</sup> Section 18a(3) German Asylum Act.

<sup>20</sup> Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019; an attorney-at-law, 29 April 2019; an attorney-at-law, 3 May 2019.

<sup>21</sup> The form refers to Section 18(2)(2) German Asylum Act, which foresees refusal of entry by the Federal Police on the basis of indications that another country is responsible under the Dublin Regulation.

<sup>22</sup> Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019; Munich Airport Church Service, 5 April 2019.

<sup>23</sup> Article 43(2) recast Asylum Procedures Directive.

<sup>24</sup> Section 18a(6)(1) and (2) German Asylum Act.

<sup>25</sup> Information provided by the Munich Airport Church Service, 5 April 2019; an attorney-at-law, 15 April 2019.

#### 4. Quality of the procedure: Interviews and procedural guarantees

The recast Asylum Procedures Directive requires states applying border procedures to abide by the same basic principles and guarantees set out for the general procedure.<sup>26</sup> Current practice in Germany, however, raises serious reasons to believe that such guarantees are not always complied with.

##### Interviews with the Federal Police and the BAMF

The asylum seeker is first interviewed by the Federal Police before attending an interview with the BAMF. These first interviews focus predominantly on travel routes and modes of arrival in Germany. The organisation of the Federal Police interviews seems to vary depending on the airport:

- At **Frankfurt Airport**, the person undergoes two interviews with the Federal Police, one at the airport terminal upon apprehension, and a second interview upon the person's arrival at the *Erstaufnahmeeinrichtung*. According to asylum seekers' reports to stakeholders, at the first interview at the terminal, the Federal Police does not always proactively inform the individual of the possibility to seek international protection, and uses interpretation by phone; this often leads to poor quality interpretation. Organisations and practitioners in Frankfurt are aware of some cases where persons were immediately removed from Germany from the airport terminal without being brought to the *Erstaufnahmeeinrichtung* despite having expressed their wish to apply for international protection, or attempted removals.<sup>27</sup>
- At **Munich Airport**, the initial interview is carried out immediately upon the person's arrival at the *Flughafenunterkunft*, usually during late hours.<sup>28</sup> No cases of persons removed directly from the airport terminal without having had the chance to apply for asylum have been reported.<sup>29</sup>

At the end of these interviews, the Federal Police writes a report, which is however not provided to the applicant; it can only be accessed in the person's case file and it is only available in German.<sup>30</sup> On the other hand, the report is shared with the BAMF and can be relied upon to identify inconsistencies between the individual's statements at the BAMF interview and the statements made to the Federal Police upon arrival. This practice has been noted in both Frankfurt and Munich.<sup>31</sup>

The BAMF is responsible for the personal interview for the purpose of processing the asylum application in the airport procedure. Interviews are always conducted by the BAMF in person, without the use of videoconferencing or other remote communication media.<sup>32</sup> The BAMF has permanent presence at the *Erstaufnahmeeinrichtung* where **Frankfurt Airport** procedures are conducted, but not at the *Flughafenunterkunft* at **Munich Airport**. In the latter cases, the BAMF travels to the *Flughafenunterkunft* from Munich for the purpose of carrying out interviews.<sup>33</sup>

<sup>26</sup> Article 43(1) recast Asylum Procedures Directive, citing Chapter II.

<sup>27</sup> Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019; an attorney-at-law, 29 April 2019.

<sup>28</sup> Information provided by the Munich Airport Church Service, 5 April 2019. In one recent case, for example, two asylum seekers from Turkey were interviewed at 03:00 in the facility.

<sup>29</sup> Information provided by the Munich Airport Church Service, 5 April 2019; an attorney-at-law, 15 April 2019.

<sup>30</sup> Information provided by an attorney-at-law, 29 April 2019.

<sup>31</sup> Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019; an attorney-at-law, 15 April 2019.

<sup>32</sup> Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019; Munich Airport Church Service, 5 April 2019.

<sup>33</sup> Information provided by the Munich Airport Church Service, 5 April 2019.

Interpretation has been highlighted as problematic at both airports.<sup>34</sup> The BAMF often struggles to find adequate interpreters for the interview, resulting in cases where the interview was conducted in a language not understood by the applicant.

At the end of the interview with the BAMF, asylum seekers are reportedly pressured to sign the interview transcript, even without having understood the procedure. Some stakeholders have referred to BAMF officials threatening with immediate removal from Germany in case the person would refuse to “cooperate”.<sup>35</sup>

### Special procedural guarantees

The German Asylum Act exempts neither unaccompanied children nor persons with special procedural guarantees from the airport procedure, despite an express obligation under the recast Asylum Procedures Directive to provide for such exemptions under certain conditions.<sup>36</sup> It also makes no reference to “adequate support” which should be provided to those requiring special procedural guarantees.<sup>37</sup> While there were no cases of the former being subject to the procedure in 2018,<sup>38</sup> the *Erstaufnahmeeinrichtung* at **Frankfurt Airport** includes two special rooms for accommodating unaccompanied children, and there have been cases of age assessment of unaccompanied children in the facility.<sup>39</sup>

Asylum seekers with special needs are channelled into the airport procedure and are detained in the airport facilities in practice. During its visits, ECRE was made aware of cases including pregnant women, survivors of rape, and persons with disabilities.<sup>40</sup>

The lack of procedural guarantees for vulnerable groups in the airport procedure is a matter of serious concern.<sup>41</sup> Cases reported to ECRE include the following:<sup>42</sup>

- Pregnant women subjected to very long interviews with the BAMF in both **Frankfurt** and **Munich**, even in cases of advanced pregnancy;
- Survivors of rape and persons with specific medical conditions not referred for specialised medical treatment in **Frankfurt**;
- Survivors of rape denied the possibility to be interviewed by a “special officer” (*Sonderbeauftragter*) of the BAMF in **Munich**, although in **Frankfurt** victims of gender-based violence were provided with a female caseworker and interpreter upon request in known cases;<sup>43</sup>
- Survivors of rape obliged to undergo the interview in the official language of their country of origin instead of their spoken language in **Munich**.

<sup>34</sup> Information provided by the Munich Airport Church Service, 5 April 2019; an attorney-at-law, 15 April 2019; an attorney-at-law, 29 April 2019.

<sup>35</sup> Information provided by the Munich Airport Church Service, 5 April 2019; an attorney-at-law, 15 April 2019.

<sup>36</sup> Articles 25(6)(b) and 24(3) recast Asylum Procedures Directive.

<sup>37</sup> Article 24(3) recast Asylum Procedures Directive.

<sup>38</sup> German Federal Government, Response to parliamentary question by The Left, 19/8701, 25 March 2019, available in German at: <https://bit.ly/2OV0hmM>, 41.

<sup>39</sup> Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019.

<sup>40</sup> *Ibid*; Information provided by the Munich Airport Church Service, 5 April 2019.

<sup>41</sup> See also Bistum Limburg, ‘Caritas und Diakonie wollen Aus für Flughafen-Asylverfahren’, 30 October 2018, available in German at: <https://bit.ly/2uvSqD7>.

<sup>42</sup> *Ibid*.

<sup>43</sup> Information provided by an attorney-at-law, 29 April 2019.

## The assessment of “manifest unfoundedness”

The German Asylum Act provides that an application shall be rejected as manifestly unfounded for the following reasons:

- The criteria for granting international protection are “obviously not met”, in particular when it is obvious from the circumstances that the applicant has arrived “only for economic reasons or in order to evade a general emergency situation”;<sup>44</sup>
- Key aspects of the applicant’s statements are unsubstantiated or contradictory, obviously do not correspond to facts or are based on forged or falsified evidence;<sup>45</sup>
- The applicant misrepresents or refuses to state his identity or nationality in the procedure;<sup>46</sup>
- The applicant has made another application under a different name;<sup>47</sup>
- The applicant has made an application to avoid an imminent measure of termination of residence, even though he or she had the opportunity to do so earlier;<sup>48</sup>
- The applicant has grossly violated his or her obligations to cooperate;<sup>49</sup>
- The applicant has been issued an enforceable expulsion decision;<sup>50</sup>
- The applicant has made an application on behalf of a person without legal capacity or after an application by the parent has been rejected by a final decision.<sup>51</sup>
- The applicant poses a threat to national security or public order.<sup>52</sup>

Last year, the BAMF took the following decisions in the airport procedure:

Outcomes of airport procedures: 2018		
Airport	No decision within two days	Rejected as manifestly unfounded
Frankfurt/Main	253	214
Munich	0	15
Düsseldorf	0	0
Berlin	0	0
Hamburg	0	0
<b>Total</b>	<b>253</b>	<b>229</b>

Source: AIDA, Country Report Germany, 45. Note that there are differences in the official statistics on decisions and applications in the airport procedure.

As indicated in the table above, according to official statistics, all procedures completed at Munich Airport resulted in a “manifestly unfounded” rejection. At Frankfurt Airport, the BAMF rejected 214 applications as manifestly unfounded, and failed to decide within the two-day timeframe for the remainder. It is important to recall that the main nationalities of people applying at airports in 2018 were the same as for the general population of asylum seekers.

In practice, to the knowledge of organisations supporting asylum seekers, the BAMF has a more restrictive approach to claims in the airport procedure compared to procedures elsewhere in Germany.<sup>53</sup> Interviewers focus on and actively seek to find inconsistencies or contradictions in

<sup>44</sup> Section 30(1) and (2) German Asylum Act.

<sup>45</sup> Section 30(3)(1) German Asylum Act.

<sup>46</sup> Section 30(3)(2) German Asylum Act.

<sup>47</sup> Section 30(3)(3) German Asylum Act.

<sup>48</sup> Section 30(3)(4) German Asylum Act.

<sup>49</sup> Section 30(3)(5) German Asylum Act.

<sup>50</sup> Section 30(3)(6) German Asylum Act.

<sup>51</sup> Section 30(3)(7) German Asylum Act.

<sup>52</sup> Section 30(4) German Asylum Act, citing Section 60(8) German Residence Act.

<sup>53</sup> For a critique, see Bistum Limburg, ‘Caritas und Diakonie wollen Aus für Flughafen-Asylverfahren’, 30 October 2018, available in German at: <https://bit.ly/2uvSqD7>; EFO, ‘Diakonie und Caritas fordern die

applicants' statements on elements such as travel route, duration of stay in transit, personal details of relatives, including contradictions compared to statements made during the Federal Police interview.<sup>54</sup> This practice has been described by a practitioner as an effort to make the asylum seeker "produce mistakes". As soon as the BAMF identifies even minor contradictions, it establishes "serious doubts" (*erhebliche Zweifel*) about the credibility of the application and proceeds to a "manifestly unfounded" rejection.<sup>55</sup>

At the same time, stakeholders in Frankfurt and Munich have referred to superficial assessments of grounds of persecution,<sup>56</sup> such as religion, political opinion or membership of a particular social group due to sexual orientation. In one case involving an investigative journalist, the BAMF reportedly refused to take into consideration information on his written work available on his laptop that he wished to disclose during the interview.<sup>57</sup>

BAMF decisions rejecting claims as manifestly unfounded have been described in 2019 as superficially motivated and of poor quality.<sup>58</sup> These findings echo criticisms voiced by civil society in previous years as to the quality of the airport procedure.<sup>59</sup>

As detailed elsewhere by ECRE, case law from other European countries is instructive on the meaning of "manifest unfoundedness".<sup>60</sup> The Migration Court of Appeal of Sweden has consistently ruled that the requirement of "manifestly" unfounded involves the ability to make a clear assessment regarding the applicant's right to a residence permit without any further examination of the case.<sup>61</sup> In a similar context relating to "clearly" unfounded cases, the United Kingdom Court of Appeal has found that the "draconian" power of certification of claims as clearly unfounded should only be exercised when applications are "bound to fail" after being assessed "at their highest, as if all the claimed historic events did occur".<sup>62</sup> The Court of Justice of the European Union (CJEU) recently confirmed a strict interpretation of the notion of manifest unfoundedness in *A v Migrationsverket*, stating that under the Directive "a Member State may not consider an application for international protection to be manifestly unfounded because the applicant's representations are insufficient."<sup>63</sup>

## Quality assurance

The BAMF has two types of arrangements in place for the purposes of quality assurance of decisions taken by its staff on asylum applications, one taking place *ex ante* and one *ex post*:

1. Decentralised quality assurance: Review of every draft decision by a second BAMF branch facility official ("four eyes principle") prior to their issuance, which continues to date.<sup>64</sup> A higher

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Abschaffung des Flughafen-Asylverfahrens', 29 October 2018, available in German at: <https://bit.ly/2DKZxMV>.

<sup>54</sup> Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019; an attorney-at-law, 29 April 2019.

<sup>55</sup> Information provided by an attorney-at-law, 15 April 2019; an attorney-at-law, 29 April 2019.

<sup>56</sup> Information provided by an attorney-at-law, 15 April 2019.

<sup>57</sup> Information provided by the Munich Airport Church Service, 5 April 2019.

<sup>58</sup> Information provided by the Munich Airport Church Service, 5 April 2019; an attorney-at-law, 15 April 2019; an attorney-at-law, 29 April 2019.

<sup>59</sup> PRO ASYL et al., *Memorandum für faire und sorgfältige Asylverfahren in Deutschland*, November 2016, available in German at: <https://bit.ly/2gZGhBq>, 28.

<sup>60</sup> ECRE, *Accelerated, prioritised and fast-track procedures: Legal frameworks and practice in Europe*, May 2017, available at: <https://bit.ly/2tsBE8D>, 2-3.

<sup>61</sup> (Sweden) Migration Court of Appeal, MIG 2006:7, UM 230-06, 31 October 2006; UM 2244-10, 22 December 2010.

<sup>62</sup> (United Kingdom) Court of Appeal, *R (FR and KL) v Secretary of State for the Home Department* [2016] EWCA Civ 605, 23 June 2016, EDAL, available at: <http://bit.ly/2qrqD6r>.

<sup>63</sup> CJEU, Case 404-17 *A v Migrationsverket*, Judgment of 25 July 2018, EDAL, available at: <https://bit.ly/2UmQrv7>, para 34.

<sup>64</sup> See e.g. BAMF, 'The number of pending asylum applications falls below 100,000', 11 October 2017, available at: <https://bit.ly/2GXfwJA>.

standard is applied in the airport procedure, whereby the draft decision is verified by a second official of the branch facility and an official from the headquarters of the Office ("six eyes principle").<sup>65</sup>

2. Centralised quality assurance: Random sampling and analysis of decisions by the Quality Assurance Division.

In the context of the airport procedure, the "*Dialogforum Flughafenverfahren*" set up in 2009 brought together representatives of the BAMF, the Federal Police, UNHCR, the Church Refugee Service, the Refugee Council of Hesse, PRO ASYL and the Bar Association of **Frankfurt** to discuss quality issues.<sup>66</sup> Meetings of the *Dialogforum Flughafenverfahren* have been organised until 2015.<sup>67</sup>

## 5. Access to information and legal assistance

Asylum seekers face severe challenges to obtaining clear and comprehensible information on the airport procedure. At **Munich Airport**, people generally have no understanding of the procedure followed in the *Flughafenunterkunft*. The information provided to applicants on the procedure prior to the BAMF interview (*Belehrung*) is considered very complicated and difficult to understand, according to some stakeholders.<sup>68</sup> Applicants have their phones confiscated and read out by the Federal Police to extract possible information on their travel route. This means they have no access to their phone for several days, as there are no phones in the facility and they have no internet access in the facility. Therefore they are unable to communicate with the outside world, to organise legal support at their own initiative, and to send or receive documents from lawyers which can help establish elements of their claim, unless helped by the Church Service to do so.<sup>69</sup> Phones equipped with a camera are also confiscated at the *Erstaufnahmeeinrichtung* at **Frankfurt Airport**.<sup>70</sup>

Presence of NGOs during the asylum interview conducted by the BAMF at **Munich Airport** is not clearly regulated. As a result, authorisation for the Church Refugee Service to attend the interview depends on the individual caseworker, which is usually allowed in the case of female applicants.<sup>71</sup> This is not an issue at **Frankfurt Airport** if informally announced to the BAMF beforehand.

According to the abovementioned BVerfG judgment, asylum seekers whose applications are rejected in the airport procedure are entitled to free, quality and independent legal assistance.<sup>72</sup> In practice, legal aid is made available after a negative decision by the BAMF. This means that legal aid is not provided during the first instance airport procedure. Subject to available capacity, organisations such as PRO ASYL provide funding for lawyers to support asylum seekers from the outset of the procedure at **Frankfurt Airport**. This has led to about 80 to 90 cases being supported at first instance by PRO ASYL-funded lawyers in 2018.<sup>73</sup> Legal practitioners witness a notable difference in the procedure depending on whether they are present or not during the interview with the BAMF. When the interview is conducted without the presence of a lawyer, it has been reported that interviewers tend to make superficial assessments of the claim and to omit asking questions on important elements such as

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<sup>65</sup> Refugee Council Brandenburg, *Dialogforum Flughafenverfahren: Jahresergebnisbericht 2010*, available in German at: <https://bit.ly/2JbAgz5>, 2. This was introduced as an early result of the Dialogforum.

<sup>66</sup> *Ibid*, 1.

<sup>67</sup> Information provided by UNHCR, 30 April 2019.

<sup>68</sup> Information provided by an attorney-at-law, 15 April 2019.

<sup>69</sup> Information provided by the Munich Airport Church Service, 5 April 2019; an attorney-at-law, 15 April 2019.

<sup>70</sup> Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019.

<sup>71</sup> Information provided by the Munich Airport Church Service 5 April 2019.

<sup>72</sup> BVerfG, Decision 2 BvR 1516/93, 14 May 1996.

<sup>73</sup> Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019.



health conditions.<sup>74</sup> The duration of interviews can also vary, from less than one hour if a lawyer is not present, to three to five hours in the presence of a lawyer.<sup>75</sup>

For counselling following a negative BAMF decision and potential appeals before the Administrative Court (*Verwaltungsgericht*, VG), the bar association of the airport's region coordinates a consultation service with qualified lawyers. For example, the Bar Association of **Frankfurt** currently has a list of 43 lawyers dedicated to the airport procedure, who are on stand-by for counselling with asylum seekers when needed.<sup>76</sup>

If an applicant wants to speak to a lawyer, the Federal Police contacts one of the lawyers on the list of the association as soon as the rejection of the asylum application is issued.<sup>77</sup> However, appeals are not frequently lodged against negative decisions.<sup>78</sup> Also, given that the examination of the appeal is a written procedure without a mandatory hearing,<sup>79</sup> not all lawyers meet with their clients before the VG takes a decision.<sup>80</sup> Furthermore, single VG judges dealing with appeals appear to confirm negative decisions taken by the BAMF in the airport procedure in most cases. In the experience of NGOs supporting litigation, the VG do not provide a real opportunity to further clarify inconsistencies between the reports of the interviews conducted by the BAMF and the Federal Police.<sup>81</sup> While an urgent appeal to review the single judge's decision is possible under Section 80(7) of the Code of Administrative Court Procedure, such a review is decided upon by the same judge.

For those reasons, NGOs and practitioners highlight that access to quality legal assistance prior to the BAMF interview in the airport procedure increases the likelihood of a positive first instance decision by the BAMF.

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<sup>74</sup> Information provided by an attorney-at-law, 29 April 2019.

<sup>75</sup> *Ibid.*

<sup>76</sup> Information provided by an attorney-at-law, 3 May 2019.

<sup>77</sup> AIDA, Country Report Germany, 47.

<sup>78</sup> Information provided by an attorney-at-law, 3 May 2019.

<sup>79</sup> Section 18a(4) Asylum Act.

<sup>80</sup> Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019; Munich Airport Church Service, 5 April 2019.

<sup>80</sup> Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019

<sup>81</sup> Information provided by PRO ASYL, 1 April 2019; an attorney-at-law, 29 April 2019.

## CONCLUSIONS & RECOMMENDATIONS

The airport procedure in Germany has been described as a “black box” due to its obscurity, lack of quality, and limited scrutiny.<sup>82</sup> Although the number of claims processed at airports is clearly manageable, representing less than 1% of the total caseload before the BAMF, the airport procedure seems marred by severe deficiencies in practice. Among other concerns, ECRE highlights that asylum seekers navigate highly truncated procedures without comprehensible information and adequate interpretation. The BAMF is reported to make superficial and inadequate assessments of the reasons for flight from the country of origin and maintains a restrictive stance aimed at filtering out claims, going beyond the scope of cases that should be deemed “manifestly unfounded” in line with the law. Furthermore, applicants with special procedural needs such as pregnant women or persons with disabilities are subjected to lengthy interviews with the BAMF without benefitting from “adequate support” guaranteed to them by EU law.

Finally, procedural deficiencies are exacerbated by the conduct of the entire airport procedure in a regime of *de facto* deprivation of liberty, without effective access to means of communication or remedies against arbitrary detention.<sup>83</sup> In that respect, ECRE is particularly concerned by the persisting failure of German authorities to comply with constant ECtHR jurisprudence on the right to liberty in airport transit zones and to appropriately transpose the relevant provisions of the EU asylum *acquis*.

In light of the above observations, ECRE makes the following recommendations:

### Legislative amendments

1. The deprivation of liberty of asylum seekers held in airport facilities for the purpose of the airport procedure should be expressly acknowledged in the Asylum Act in order to bring German legislation in line with the right to liberty enshrined in Article 5 of the European Convention on Human Rights (ECHR) as interpreted by the Strasbourg Court, Article 6 of the EU Charter of Fundamental Rights, and Article 8 of the recast Reception Conditions Directive.
2. Exemption of unaccompanied children and persons in need of special procedural guarantees from the airport procedure should be laid down in Section 18a of the Asylum Act. To avoid individuals falling through the cracks of inconsistent interpretation of Articles 24(3) and 25(6)(b) of the recast Asylum Procedures Directive, ECRE urges for an unequivocal exemption of all vulnerable groups from the airport procedure, as it is by definition unsuitable and not conducive to offering sufficient time and safety for them to put forward their protection claims.
3. The right to free legal assistance and representation should be guaranteed to asylum seekers as soon as their asylum application is lodged, in particular given the truncated nature of the airport procedure. Frontloading legal assistance will ensure effective opportunities for people to prepare their claim within short time frames and contribute to better quality in the personal interview with the BAMF and the first instance decision.

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<sup>82</sup> Statement by the Munich Airport Church Service, 5 April 2019.

<sup>83</sup> See also ECRE, *Taking Liberties: Detention and Asylum Law Reform*, September 2018, available at: <https://bit.ly/2PTebp9>.

## Improvements in administrative practice

4. **Federal Police:** To ensure compliance with the right to liberty, the “notification of placement” (*Bescheinigung für den Aufenthalt*) of asylum seekers in airport detention facilities should consist of a motivated, individual decision, always preceded by a rigorous assessment to ascertain that: (a) there are grounds to detain; (b) detention is necessary; (c) detention is proportionate as less coercive alternatives have been examined and cannot be applied; (d) detention is permissible in the individual circumstances of the person, including his or her potential vulnerability. The “notification of placement” should also indicate the available legal remedies and steps for the person to access them.
5. **BAMF:** The BAMF should take concrete steps to monitor and address specific gaps in the examination of asylum claims at the airport, against the backdrop of consistent and longstanding concerns about the quality of the airport procedure.

Such monitoring should be conducted as part of the ongoing work of the Office on quality assurance. The Quality Assurance Division of the BAMF should conduct a thorough thematic evaluation of the quality of decisions taken by the competent branch offices (Frankfurt-Airport, Munich, Düsseldorf, Berlin, Hannover) in the context of the airport procedure. Such a thematic evaluation should be conducted in cooperation with the “*Dialogforum Flughafenverfahren*” involving UNHCR, the church services, refugee councils and other organisations assisting applicants in the airport procedure. The evaluation should focus in particular on: provision of information; compliance with interview and special procedural guarantees; credibility and risk assessment; and motivation of decisions. The results of the evaluation should be made public.

## ANNEX I - LIST OF INTERLOCUTORS

Name and Organisation	Date	Location
United Nations High Commissioner for Refugees		
Henrike Janetzek-Rauh, UNHCR Sub-Office Nuremberg	30 Apr 2019	Phone
Civil society organisations & legal practitioners		
Bellinda Bartolucci, Meral Zeller, Bernd Mesovic & Wiebke Judith, PRO ASYL	01 Apr 2019	Frankfurt
Can Atik, Silvia Gerlinger, Roxana Kolb & Anke Leuthold, Kirchlicher Flüchtlingsdienst am Flughafen / Diakonie Frankfurt am Main	01 Apr 2019	Frankfurt Airport
Christina Trappendreher, Kirchliche Dienste am Flughafen München	05 Apr 2019	Munich Airport
Dr Franz Bethäuser, attorney-at-law, Munich	15 Apr 2019	Phone
Dr Annabelle Voßberg, attorney-at-law, Frankfurt	29 Apr 2019	Phone
Johannes Hallenberger, attorney-at-law, Frankfurt	03 May 2019	Phone

## ANNEX II - “NOTIFICATION OF RESIDENCE”: MUNICH AIRPORT FACILITY

### Bescheinigung für den Aufenthalt in der Flughafenunterkunft

☒ Diese Bescheinigung gilt nur für meine Unterbringung in der Flughafenunterkunft im Rahmen des Asylverfahrens nach § 18 a AsylVfG.

Ich wurde darauf hingewiesen, dass der Aufenthalt in der Unterkunft keine freiheitsentziehende Maßnahme ist und ich soweit keine aufenthaltsrechtlichen / strafrechtlichen Vorschriften entgegenstehen, den Geltungsbereich des AsylVfG verlassen kann.

☐ Diese Bescheinigung gilt nur für meine Unterbringung in der Flughafenunterkunft im Rahmen meines Antrages auf internationalen Schutz und der behördlichen Einreiseverweigerung nach § 18 Abs. 2 Nr. 2 AsylVfG für die Dauer des beabsichtigten Überstellungsverfahrens gem. VO (EU) 604/2013.

Ich wurde darauf hingewiesen, dass ich, soweit keine aufenthaltsrechtlichen / strafrechtlichen Vorschriften entgegenstehen, den Geltungsbereich des AsylVfG jederzeit verlassen kann.

## THE ASYLUM INFORMATION DATABASE (AIDA)

The **Asylum Information Database** is a database containing information on asylum procedures, reception conditions and detention and content of international protection across 23 European countries. This includes 20 European Union (EU) Member States (Austria, Belgium, Bulgaria, Cyprus, Germany, Spain, France, Greece, Croatia, Hungary, Ireland, Italy, Malta, Netherlands, Poland, Portugal, Romania, Sweden, Slovenia, United Kingdom) and 3 non-EU countries (Switzerland, Serbia, Turkey).

The overall goal of the database is to contribute to the improvement of asylum policies and practices in Europe and the situation of asylum seekers by providing all relevant actors with appropriate tools and information to support their advocacy and litigation efforts, both at the national and European level. These objectives are carried out by AIDA through the following activities:

❖ **Country reports**

AIDA contains national reports documenting asylum procedures, reception conditions, detention and content of international protection in 23 countries.

❖ **Comparative reports**

Comparative reports provide a thorough comparative analysis of practice relating to the implementation of asylum standards across the countries covered by the database, in addition to an overview of statistical asylum trends and a discussion of key developments in asylum and migration policies in Europe. AIDA comparative reports are published in the form of thematic updates, focusing on the individual themes covered by the database. Thematic reports published so far have explored topics including reception, admissibility procedures, content of protection, vulnerability, detention, access to the territory and registration.

❖ **Fact-finding visits**

AIDA includes the development of fact-finding visits to further investigate important protection gaps established through the country reports, and a methodological framework for such missions. Fact-finding visits have been conducted in Greece, Hungary, Austria and Croatia, France, Belgium and Germany.

❖ **Legal briefings**

Legal briefings aim to bridge AIDA research with evidence-based legal reasoning and advocacy. Twelve briefings have been published so far. In addition, statistical updates on the Dublin system have been published 2016, the first half of 2017, 2017, the first half of 2018 and 2018.

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