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LABOUR MIGRATION LAW AND EMPLOYMENT ACCESS FOR MIGRANTS IN GERMANY: GENERAL PRINCIPLES AND NEW DEVELOPMENTS

by Roman Lehner

Abstract: *For a long time, Germany has been struggling with being an immigration country. During the last two decades, however, there has been a highly dynamic development in German immigration law, particularly concerning skilled labour migration. After several reforms during this period, the legal opportunities for skilled workers to immigrate to Germany have already been considered very liberal. After a big legal reform in 2019, yet another reform in 2023 has led to even more liberalization and flexibilization, as far as skilled workers who legally entered Germany are concerned. German migration law, however, is still restrictive regarding low skilled workers and asylum seekers demanding for a residence permit for working purposes after their asylum application has been rejected. But even in this field, there are some new important developments.*

Abstract: *Per molto tempo la Germania ha avuto un approccio controverso al suo essere un Paese di destinazione di flussi migratori. Negli ultimi due decenni, tuttavia, si è assistito a uno sviluppo molto dinamico della legislazione tedesca sull'immigrazione, in particolare per quanto riguarda la migrazione di manodopera qualificata. Le modalità di ingresso per i lavoratori qualificati contenute nelle riforme adottate sono state ritenute molto aperte. Dopo una grande riforma adottata nel 2019, nel 2023 un'altra modifica ha portato a una liberalizzazione e a una flessibilità ancora maggiori. La legge tedesca sull'immigrazione, tuttavia, è ancora restrittiva per quanto riguarda i lavoratori poco qualificati e i richiedenti asilo che chiedono un permesso di soggiorno per motivi di lavoro dopo che la loro domanda di asilo è stata respinta. Ma anche in questo campo ci sono alcuni nuovi importanti sviluppi.*

LABOUR MIGRATION LAW AND EMPLOYMENT ACCESS FOR MIGRANTS IN GERMANY: GENERAL PRINCIPLES AND NEW DEVELOPMENTS

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SUMMARY: 1. Origins of modern German labour migration law. – 1.1. When it all began: the struggle with being an immigration country. – 1.2. The 2004/05 Immigration Act: a “paradigm shift”. – 1.3. Recent reforms. – 2. Reforms and modernization before 2019. – 2.1. State of play 2013: Skilled labour migration law largely liberalized. – 2.2. The ‘Western Balkans clause’: A case for low-skilled labour migration? – 3. Three major reforms since 2019: High-level liberalization and open questions. – 3.1. Reform legislation between liberalization and raising legal complexity. – 3.2. Open doors for skilled migrants. – 3.3. “Changing lane”? – 3.4. The new ‘opportunity right of residence’: an example of over-liberalization? – 4. Conclusion.

1. Origins of modern German labour migration law

1.1. *When it all began: the struggle with being an immigration country*

For many years, Germany struggled with its status as an immigration country¹. While some insisted that Germany was no immigration country – in terms of a classic immigration country (such as Canada or Australia) – others argued that Germany had developed, at least de facto, into an ‘immigration situation’², thus, still lacking proper and consistent immigration rules. The controversy culminated in the late 1990s and continued into the early 2000s, when the red-green federal government of Chancellor *Schröder* launched two highly innovative legislation packages on migration and citizenship rules.

It is interesting and striking that both issues were addressed in a rather fundamental way during the same period. While in 2000 the reform of the German citizenship law³ basically changed the whole idea of national membership by – for the first time in German legal history – implementing the jus soli principle⁴, the 2004/05 migration law reform – the German Immigration Act (*Zuwanderungsgesetz*)⁵ – aimed at fundamentally changing the immigration conditions. Both reforms had in kind a common agenda in modernizing the rules for migration and belonging. Both were highly disputed, and it took several compromises to organize the necessary political majorities: While the governmental majority in the national parliament, the Bundestag, was in favour of the government’s reform

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1. Cf. C. Langenfeld/R. Lehner, *Einwanderungsrecht in Deutschland – Entwicklungslinien, konzeptionelle Grundentscheidungen und offene Fragen*, in *Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR)*, 2020, p. 215.

2. K.J. Bade/J. Oltmer, *Deutschland*, in *Enzyklopädie Migration in Europa*, K.J. Bade et al. (eds.), 2010, p. 141 (161).

3. Gesetz zur Reform des Staatsangehörigkeitsgesetzes (Nationality Act), 15.7.1999, Bundesgesetzblatt (Federal Gazette) I 1999, p. 1224.

4. Section 4 para. 3 Nationality Act.

5. Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts von Unionsbürgern und Ausländern (Zuwanderungsgesetz), 30.7.2004, Bundesgesetzblatt (Federal Gazette) I 2004, p. 1950.

proposals, there was much resistance in federal chamber, the Bundesrat, where at this time in most federal states (*Länder*) the conservative and liberal opposition parties formed the governments and so had the majority in this chamber.

For the citizenship reform, the controversial ‘double citizenship’, in cases where the new German *jus soli* clause was applicable simultaneously with a foreign (e.g. Turkish) *jus sanguinis* clause, was substantially mitigated. All Germans who had acquired their citizenship on the grounds of the *jus soli* clause and were in possession of another citizenship were obliged to opt between both citizenships after the age of majority. This ‘option rule’ was the political price the *Schröder* government had to pay for the enactment of the citizenship law reform in 2000. This rule, however, has been set out of application in most cases by an amendment in 2014⁶ and might be completely abolished soon; the *Scholz* government recently made a proposal for another wide-reaching citizenship reform which has been enacted in spring 2024⁷. Besides some – again – controversial and partially problematic aspects, such as the considerable lowering of the waiting time for the entitlement to naturalization or of the obligatory language skills for older immigrants from the first ‘*Gastarbeiter*’ generation, the current reform comes back to the point of the first proposals of the *Schröder* government regarding the *jus soli* principle: After 24 years, the acquisition of nationality by birth for children of foreign parents could, for the first time, be applicable without any reservations for children with multiple citizenships. In the long run, this keystone of the 2000 citizenship modernization project is likely to be put into effect to its full extent.

1.2. *The 2004/05 Immigration Act: a “paradigm shift”*

For the migration law reform, which was finally implemented in 2004 and entered into force in 2005, an initial proposal for a points-based system for (highly skilled) working migrants, could not be upheld in the last turn. After a political *éclat* in the Bundesrat and a decision of the Federal Constitutional Court⁸ declaring the first 2002 reform bill⁹ null and void for formal reasons, the political compromise leading to a final enactment included the abandonment of a points-based system that would have offered residence titles for foreign workers based on human capital criteria. But even without this element, the 2004/05 migration law reform was widely considered to be a ‘paradigm shift’¹⁰ for immigration politics in Germany. Although current discussions are mainly related to issues of asylum and refugees (as well as the latter’s labour market access), it is important to note that the fundamental turn in German immigration politics after decades of denying the country’s status as an immigration country was about the question of *regular working immigration*. “Deutschland ist kein Einwanderungsland!”; ‘Germany is no immigration country!’¹¹: this slogan could no longer be upheld after the enactment of the 2005 German Immigration Act.

6. Amendment by Act of 13.11.2014, Bundesgesetzblatt (Federal Gazette) I 2014, p. 1714.

7. Gesetz zur Reform des Staatsangehörigkeitsrechts, 22.03.2023, Bundesgesetzblatt (Federal Gazette) I 2024, no. 104.

8. Bundesverfassungsgericht, 18.12.2002, 2 BvF 1/02 (= BVerfGE 106, p. 310).

9. Entwurf eines Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts von Unionsbürgern und Ausländern (Zuwanderungsgesetz) (draft law), 14.1.2002, Bundestag-Drucksache (Circular) 14/7987. A points-based ‘selection procedure’ was provided for in Section 20 of the draft version for a new Residence Act.

10. K. Hailbronner, *Ausländerrecht*, 2021, p. 5.

11. Cf. C. Langenfeld/R. Lehner, *Einwanderungsrecht in Deutschland – Entwicklungslinien, konzeptionelle Grundentscheidungen und offene Fragen*, Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR) 2020, p. 215.

This Act ended three decades of closed labour market politics beginning with the so-called 'recruitment stop' in 1973 (*Anwerbestopp*) which abolished the recruitment of 'guest workers' (*Gastarbeiter*), i.e. working migrants by German state agencies¹². The 1990 Foreigner Act (*Ausländergesetz*)¹³ and two related ordinances¹⁴ upheld the recruitment stop and limited the options for working immigration to some specific professions (e.g. foreign cooks for gastronomic specialities, professional athletes). This restricted approach constituted the legal status quo in the early 2000s, except the so-called "Green Card" initiative that offered a legal option for IT workers but was limited to a small number of immigrants (10,000; later, 20,000) with a concrete job offer and a minimum salary of 100,000 Deutsche Mark¹⁵. The 2005 Immigration Act replaced the Foreigner Act with a new Residence Act (*Aufenthaltsgesetz*) that "serves to manage and limit the influx of foreigners into the Federal Republic of Germany" and "enables and organizes immigration with due regard to the capacities for admission and integration and the interests of the Federal Republic of Germany in terms of its economy and labour market", according to its Section 1 para. 1. Since 2005, labour market orientation has been one of the key elements of German immigration politics and – at least mainstream – political debates are no longer about whether Germany should be a migration country but about how immigration could be organized in the best and smartest way.

1.3. Recent reforms

Two milestone reform acts have significantly reshaped the immigration rules for working migrants: the Skilled Immigration Act of 2019¹⁶ and, recently, the Act on the advancement of skilled immigration (Skilled Immigration Advancement Act) of 2023¹⁷. With both these acts, the German working immigration law has been further liberalized, and one could say that the modernization process concerning this important field of migration politics, which started in the early 2000s, now seems to have come to a final point. In particular, the 2023 reform act finally provides a points-based system for working immigrants (Section 20a, 20b Residence Act)¹⁸. So, in the long run, this classic element of (skilled) working immigration politics has finally found its place in the German legal framework. In addition, the legislator now – cautiously – expands the option for asylum seekers, whose asylum applications are likely to be rejected, for a direct application of the regular rules for working immigrants if the relevant immigration conditions (particularly professional qualifications and an employment contract) are met, the so-called 'lane change'

12. Cf. C. Langenfeld/R. Lehner, Migration in Staatslexikon der Görres-Gesellschaft, H. Oberreuter, Vol. 3, 8th Edition, 2019 (updated online-version 2022: <https://www.staatslexikon-online.de/Lexikon/Migration#II. Rechtswissenschaft>), no. 4.

13. Enacted by Gesetz zur Neuregelung des Ausländerrechts, 9.7.1990, Bundesgesetzblatt (Federal Gazette) I 1990, p. 1354.

14. Arbeitsaufenthaltsrechtverordnung, 18.12.1990, Bundesgesetzblatt (Federal Gazette) I 1990, p. 2994; Anwerbestopp-Ausnahmeverordnung, 21.12.1990, Bundesgesetzblatt (Federal Gazette) I 1990, p. 3012.

15. Verordnung über Aufenthaltserlaubnisse für hoch qualifizierte ausländische Fachkräfte der Informations- und Kommunikationstechnologie, 28.07.2000, Bundesgesetzblatt (Federal Gazette) I 2000, p. 1146.

16. Fachkräfteeinwanderungsgesetz, 15.8.2019, Bundesgesetzblatt (Federal Gazette) I 2019, p. 307.

17. Gesetz zur Weiterentwicklung der Fachkräfteeinwanderung, 16.8.2023, Bundesgesetzblatt (Federal Gazette) I 2023, no. 217.

18. These provisions will enter into force June 1st 2024.

(Spurwechsel) ¹⁹. The legislator also recently significantly widened the general regularization options for irregular migrants, particularly for rejected asylum seekers who cannot (temporarily) be deported for factual or legal reasons. In 2022, a special ‘opportunity right of residence’ was established²⁰, enabling foreigners whose deportation is temporarily suspended to obtain a short-term (one year) residence title (Section 104c Residence Act)²¹. Finally, with the 2023 reform, the options for non-formally qualified foreign workers have been extended ²². Altogether, these latest amendments may almost be considered a conclusion of the reform period that started in 2004. German labour migration law has now reached a very high level of liberality.

2. Reforms and modernization before 2019

2.1. *State of play 2013: Skilled labour migration law largely liberalized*

It was in 2013 that the OECD stated²³ that Germany would offer one of the most open and liberal labour migration systems, compared with other relevant industrial states²⁴. Starting with the 2005 Immigration Act, the German legislator had made several amendments to the legal provisions on skilled labour migration, thus leading to the positive OECD assessment. However, even after 2013 the political discussion regarding immigration issues in Germany, besides the question of how to deal with the influx of refugees particularly during and after the so-called ‘refugee crisis’ in 2015/16, concentrated on how to further improve the rules for skilled labour migration. For critics of the 2005 Immigration Act, the lack of human capital-based access options, working with a points-based system, was still to be seen as a huge disadvantage²⁵. In general, one can distinguish between human capital-based and demand-driven labour migration systems²⁶. While human capital-based systems

19. *Infra* 3.

20. Gesetz zur Einführung des Chancen-Aufenthaltsrechts, 21.12.2022, Bundesgesetzblatt (Federal Gazette) I 2022, p. 847.

21. *Infra* 3.

22. *Infra* 3.

23. OECD, *Recruiting Immigrant Workers: Germany*, 2013 (https://www.oecd-ilibrary.org/social-issues-migration-health/recruiting-immigrant-workers-germany_9789264189034-en).

24. Cf. C. Langenfeld/R. Lehner, *Einwanderungsrecht in Deutschland – Entwicklungslinien, konzeptionelle Grundentscheidungen und offene Fragen*, in *Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR)*, 2020, p. 215 (216).

25. Two legislative proposals have been set up by the parliamentary group of the Socialdemocratic Party (SPD) as well as by the Green Party over the years. For the first proposal, see SPD-Bundestagsfraktion, Entwurf eines Einwanderungsgesetzes, 2016 (<https://www.spdfraktion.de/system/files/documents/einwanderungsgesetz-spd-bundestagsfraktion.pdf>). For the Green Party proposal that was formally introduced as a draft bill in the Bundestag in 2017, see Bundestag-Drucksache (Circular) 18/11854. For a critical discussion of both proposals as well as of the integration of a points-based system into German labour migration law, see R. Lehner/H. Kolb, *Vorschlag zu einem Einwanderungsgesetz – Viel Lärm um wenig*, in *Zeitschrift für Rechtspolitik (ZRP)*, 2017, p. 34 et seqq.; H. Kolb/R. Lehner, *Radikale Moderne? Zum Entwurf eines Einwanderungsgesetzes (EinwG-E) der Bundestagsfraktion von BÜNDNIS 90/DIE GRÜNEN*, in *Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR)*, 2017, p. 270 et seqq.; R. Lehner /H. Kolb, *Aus der Zeit gefallen: Warum ein Punktesystem kaum mehr Platz im deutschen Erwerbsmigrationsrecht hat*, in *Neue Zeitschrift für Verwaltungsrecht (NVwZ)*, 2018, p. 1181 et seqq.

26. See D. Thym, *Komplexität als Chance. Gestaltungsoptionen für das künftige Punktesystem zur Fachkräfteeinwanderung*, in *Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR)*, 2022, p. 139 (140); D. Thym, *Punktesystem: Steuerung der Wirtschaftsmigration mit mathematischer Präzision?*, in *Zeitschrift für Ausländerrecht und*

provide immigration options for skilled workers solely considering the applicants' human capital (professional qualifications, language abilities, age etc.), demand-driven systems only allow working immigration even for highly skilled foreign workers if a concrete job offer can be shown. The German Residence Act, as it was enacted with the 2005 Immigration Act, embodies a demand-driven system. Section 18 para. 2 figure 1 Residence Act defines as a basic condition for the granting of a temporary residence permit to take up employment that the foreigner has a solid job offer. But in 2012, during the implementation of the first EU Blue Card Directive²⁷, the legislator – without being obliged to do so by EU law – added a provision offering an immigration option for highly skilled foreign workers to be able to search for employment in Germany (the former Section 18c of the Residence Act)²⁸. However, jobseekers could only be granted a temporary residence permit for a maximum of six months. Furthermore, economic activity during the searching period was restricted. Consequently, jobseekers had to possess sufficient financial resources regarding the general legal requirement that a residence title can only be granted if the foreigner's subsistence is secure during his or her stay in Germany (see Section 5 para. 1 figure 1 of the Residence Act).

Over the years, some other entitlements for jobseekers were added or expanded, concerning foreigners who successfully completed vocational training in Germany²⁹ and foreign students who were granted a temporary residence permit for the purpose of university studies³⁰. In both cases, foreigners who successfully completed qualification measures/university studies were given additional residence time to look for a job for which their training qualifies them. Hence, until 2015, a 'job-seeking triptychon'³¹ had become an integral part of the German labour migration system, thus complementing the demand-driven immigration options for skilled foreign workers (including the Blue Card option). With the 2019 Skilled Immigration Act³², all temporary residence permits for job-seeking purposes were merged into the new Section 20 Residence Act, meanwhile also including foreigners who were granted a temporary residence permit to undertake compensatory qualification measures suited to enabling recognition of the foreigner's professional qualification³³ or who finished their research activities as part of their preceding stay³⁴. Additionally, since 2019, skilled foreign workers with a vocational training qualification from their country of origin have also been included in the job-seeking immigration option, in accordance with the new legal definition of "skilled worker" embracing not only holders

Ausländerpolitik (ZAR), 2022, p. 49 et seq.; H. Kolb, *Punktesystem ante portas – Erwerbsmigrationsrecht*, in *Zeitschrift für Rechtspolitik (ZRP)*, 2022, p. 14 (16 et seq.).

27. Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *OJ L 155*, 18.6.2009, p. 17.

28. Amended by Gesetz zur Umsetzung der Hochqualifizierten-Richtlinie der Europäischen Union, 1.6.2012, Bundesgesetzblatt (Federal Gazette) I 2012, p. 1224.

29. Amended also by Gesetz zur Umsetzung der Hochqualifizierten-Richtlinie der Europäischen Union, 1.6.2012, Bundesgesetzblatt (Federal Gazette) I 2012, p. 1224.

30. This option for job-seeking university graduates was already part of the 2005 Immigration Act (Section 16 para. 4 Residence Act 2005). While it could initially be granted for a period up to one year, today the maximum duration now comprises 18 months.

31. C. Langenfeld/H. Kolb, *Deutschlands Arbeitsmigrationspolitik im internationalen Vergleich: Eine "unkanadische" Betrachtung eines Paradigmenwechsels*, in: *Yonsai Law Journal* 6/1,2, 2015, p. 69 (84).

32. See footnote 16.

33. Amended by Gesetz zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung, 27.07.2015, Bundesgesetzblatt (Federal Gazette) I 2015, p. 1386.

34. Amended by Gesetz zur Umsetzung aufenthaltsrechtlicher Richtlinien der Europäischen Union zur Arbeitsmigration, 12.5.2017, Bundesgesetzblatt (Federal Gazette) I 2017, p. 1106.

of foreign university degrees but also foreigners with vocational qualifications from abroad (Section 18 para. 3 Residence Act). Altogether, the numerous legal reforms, notably the 2019 reform, have significantly extended the human capital-based elements in German labour migration law.

2.2. *The ‘Western Balkans clause’: A case for low-skilled labour migration?*

While the numerous reforms between 2004 and 2019 mainly aimed at improvements and facilitations for skilled workers, the question of whether labour immigration of low-skilled or non-formally qualified workers should be allowed remained an issue of permanent controversy. Besides a privilege for citizens of some selected states (Section 26 para. 1 of the Ordinance on the Employment of Foreigners³⁵), from which a mass influx of low-skilled workers, until today, has never seemed to present a realistic possibility, foreigners must traditionally not be granted to engage in any employment irrespective of their qualifications. In all the years after the enactment of the 2005 Immigration Act and the hereby implemented Residence Act with its many highly liberal elements, there has been a broad political consensus not to generally open the domestic labour market for low-skilled or non-formally qualified foreign workers. Regarding the existing needs for non-domestic low-skilled labour, migration from EU countries, which is not subject to the provisions of the Residence Act and cannot be genuinely regulated by the national legislator³⁶, has been regarded as being sufficient. Particularly after the so-called refugee crisis of 2015/16, a huge number of recognized asylum seekers, often without higher qualifications, joined the pool of domestic labour. Hence, political advocacy for the establishment of immigration options for low-skilled foreign workers could never gain broad endorsement. However, in late 2015 the ‘Western Balkans clause’ was added to the Ordinance on the Employment of Foreigners³⁷. Since then, and based on Section 26 para. 2 of this Ordinance, nationals of the Western Balkans states³⁸ may be granted to engage in any kind of employment without being restricted to skilled jobs and without being obliged to have any professional qualifications. At first, the respective provision was only temporary, but in 2020 it was renewed³⁹ before being phased out, and since 2023⁴⁰ the ‘Western Balkans clause’ has applied for an unlimited period, due to its unexpected success⁴¹ and taking into account the general shortage of – not

35. Beschäftigungsverordnung from 06.06.2013, as amended by Ordinance of 7.12.2023, Bundesgesetzblatt (Federal Gazette) I 2023, no. 353.

36. For the fundamental distinction between the EU law “mobility regime of EU citizens” (and their close family members) on the one hand and the EU immigration rules concerning third country nationals, see D. Thym, *Constitutional Framework and Principles for Interpretation*, in *EU Immigration and Asylum Law Commentary*, Daniel Thym/Kay Hailbronner (eds.), 3rd Edition 2022, Chapter 1, MN 6.

37. Amended by Verordnung zum Asylverfahrensbeschleunigungsgesetz, 28.10.2015, Bundesgesetzblatt (Federal Gazette) I 2015, p. 1789.

38. Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North-Macedonia, Serbia.

39. Amended by Ordinance of 27.10.2020, Bundesgesetzblatt (Federal Gazette) I 2020, p. 2268. For a critical discussion, see R. Lehner/H. Kolb, *Warum die Westbalkanregelung nicht verlängert werden sollte*, in *F.A.Z. Einspruch*, 15.5.2020, <https://www.faz.net/einspruch/warum-die-westbalkanregelung-nicht-verlaengert-werden-sollte-16770546.html>.

40. Amended by Skilled Immigration Ordinance, 30.8.2023, Bundesgesetzblatt (Federal Gazette) I 2023, no. 233.

41. For the quantitative figures see H. Brücker et. al., *Evaluierung der Westbalkanregelung*, 2020 (https://www.bmas.de/SharedDocs/Downloads/DE/Publikationen/Forschungsberichte/fb544-evaluierung-der-westbalkanregelung.pdf?__blob=publicationFile&v=2) with the conclusion that successful labour market integration can generally be observed.

only skilled – workers in Germany. Since 2020, the application of the ‘Western Balkans clause’ has been limited to 25,000 working visas a year. This contingent is to be raised to 50,000 in summer 2024.

The ‘Western Balkans clause’ is an interesting example of how to interconnect asylum politics with labour migration regulation by opening a legal option for immigrants from countries with high numbers of asylum seekers. In 2015, there was a (rather) high number of asylum applications from Albanian and Kosovan citizens in Germany (together about 20% of all applications)⁴²; the recognition rate, however, was (and still is) extremely low. The idea of the ‘Western Balkans clause’ is to close the door to asylum seekers from the Western Balkans – by a simultaneous amendment of Section 29a of the Asylum Act⁴³ all states from this region were classified as safe countries of origin, resulting in a general evaluation of the nationals of these states not to be subject to persecution – and to create an alternative entry option instead. In fact, this mechanism only works because of the respective states’ willingness to cooperate with Germany and to accurately take back their own nationals whose asylum applications have been rejected. This is the main reason why the ‘Western Balkans clause’ until now has not yet been extended to other countries, for example to North African states. In December 2023, a bill for the classification of Georgia and Moldova as safe countries of origin was enacted⁴⁴. It would not be surprising, if, after an adoption of this bill, proposals for a correspondent extension of Section 26 para. 1 of the Ordinance on the employment of foreigners were to be submitted soon.

3. Three major reforms since 2019: High-level liberalization and open questions

3.1. Reform legislation between liberalization and raising legal complexity

By the most recent reforms of German immigration law, the legal options for labour migrants have – again – been extended⁴⁵. This is the case for the Skilled Immigration Act (2019)⁴⁶, as well as for the Skilled Immigration Advancement Act (2023)⁴⁷ and the “Skilled Immigration Act 2.0”.⁴⁸ Additionally, more options for asylum seekers to ‘change lane’ and to apply for a residence title for labour migrants without having to first travel back to their country of origin, have been – very cautiously – implemented by the 2023 reform⁴⁹. For

42. 441,889 were submitted in Germany in 2015. 12.2% of these applications were submitted by Albanian nationals and 7.6% by Kosovan nationals. Cf. Bundesamt für Migration und Flüchtlinge (BAMF), Das Bundesamt in Zahlen 2015, p. 20 (https://www.bamf.de/SharedDocs/Anlagen/DE/Statistik/BundesamtinZahlen/bundesamt-in-zahlen-2015.pdf?__blob=publicationFile&v=16#:~:text=Insgesamt%20stellten%20seit%201953%20rund,eine%20Steigerung%20um%20135%20Prozent).

43. Amended by Asylverfahrensbeschleunigungsgesetz (Asylum Procedure Acceleration Act), 20.10.2015, Bundesgesetzblatt (Federal Gazette) I 2015, p. 1722. By this act, Albania, Kosovo and Montenegro were added to the relevant Annex II of the Asylum Act. Serbia, (North-)Macedonia and Bosnia and Herzegovina had been added to this list already in 2014. So, since 2015, all Western Balkan states were legally to be considered as safe countries of origin.

44. Gesetz zur Bestimmung Georgiens und der Republik Moldau als sichere Herkunftsstaaten (draft law), 22.12.2023, Bundesgesetzblatt (Federal Gazette) I 2023, no. 382.

45. *Infra* 3.2.

46. See footnote 16.

47. See footnote 17.

48. For this wording see Bundesagentur für Arbeit (Federal Employment Agency), ‘Skilled Immigration Act 2.0 opens new doors’, <https://www.arbeitsagentur.de/en/press/2023-50-skilled-workers-immigration-act-20-opens-new-doors#>.

49. *Infra* 3.3.

foreigners whose deportation is temporarily suspended for legal or factual reasons, the new ‘opportunity right of residence’, implemented during the 2022 reform⁵⁰, offers a new legal perspective for immigrants with a ‘tolerated’ status⁵¹. Altogether, German labour migration law, as well as the general legal conditions for foreigners to gain a legal perspective based on labour market integration, can only be considered to be highly liberal and – in some respects – even to be ‘over-liberalized’.

On the other hand, legal complexity has been raised to a new level which is, of course, also due to the increasingly complex requirements coming from EU law (that are not the subject of this article). While, for example, the 2021 amendments to the EU Blue Card Directive⁵² provides more options⁵³ for highly skilled labour migrants, in some terms the German legislator is trying to do the same in relation to the national norms that are not directly determined by EU law. Hence, the German Residence Law now offers a potpourri of very different immigration options and residence titles for labour migrants as well as for asylum seekers and for ‘tolerated’ immigrants to be granted a proper residence status after successful labour market integration. These various options cannot all be portrayed and analyzed here. Some considerations, however, shall illustrate the large importance of the recent legal reforms. In the end these reforms cannot only be seen as self-contained concepts but have to be related to other elements of German migration law. To gain a full picture, it must be considered that labour market access for asylum seekers during the ongoing asylum procedure has been significantly restricted in 2019⁵⁴. Hence, the practical possibilities for asylum seekers to attempt successful labour market integration are limited.

3.2. *Open doors for skilled migrants*

The 2023 Skilled Immigration Advancement Act⁵⁵ leads to more flexibilization in terms of labour migration and offers some new legal entry options. Three main elements should be considered. Firstly, skilled workers can now apply for skilled jobs that they are not specifically qualified for⁵⁶. An obligatory match of the professional qualification and the job that a labour migrant is offered by an employer in Germany is no longer required

50. See footnote 20.

51. *Infra* 3.4.

52. Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC, OJ L 382/1.

53. See for the conceptual approach and its legal development in J. Herzog-Schmidt/R. Lehner, *Blue Card Directive 2009/50/EC*, in *EU Immigration and Asylum Law Commentary*, Daniel Thym/Kay Hailbronner (eds.), 3rd Edition 2022, Chapter 12, Article 1, MN 4 et seq.; C. Langenfeld/H. Kolb, in *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2016, p. 527 et seqq.

54. *Infra* 3.3.

55. For a critical discussion see J. Uznanski, *Die Fachkräftesäule des Gesetzes zur Weiterentwicklung der Fachkräfteeinwanderung – good on paper?*, in *Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR)*, 2023, p. 187 et seqq.; A. Siegert, *Das weiterentwickelte Fachkräfteeinwanderungsgesetz: Auf Sand gebaut – Ohne Wumms und Erfolgsaussicht*, in *Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR)*, 2023, p. 146 et seqq.

56. See Section 18a para. 1, Section 18b para. 2 Residence Act. Cf. R. Lehner, in *Ausländerrecht*, K. Hailbronner, 132. Edition, § 18a AufenthG, MN 10 et seq.; R. Lehner, *Stellungnahme für die Öffentliche Anhörung des Ausschusses für Inneres und Heimat des Deutschen Bundestags am 22 Mai 2023 zum Entwurf eines Gesetzes zur Weiterentwicklung der Fachkräfteeinwanderung* (Statement on the Skilled Immigration Advancement Act, Parliamentary hearing, Committee on Internal Affairs and Community, 22 May 2023) Ausschuss-Drs. (Committee Circular) 20(4)219 G, p. 5 et seq. (<https://www.bundestag.de/resource/blob/949544/7dc4fee145aa645f6b6e70e9a7f53467/20-4-219-G.pdf>).

(flexibilization clause). However, skilled workers can still only be admitted to skilled jobs. The new element is that skilled workers can now be given a temporary residence permit to perform *any* kind of skilled work. Secondly, skilled workers from abroad with (only) practical work experience will be able to come to work in Germany when they have worked in a specific job for at least two years during a five-year period (experience clause)⁵⁷. Such a clause has already existed since 2019⁵⁸, but is limited to IT workers. This new general option, however, is limited to non-regulated professions where no legal permission to practise is required. Additionally, the work experience must be based on a degree or a similar vocational qualification recognized by state authorities in the country of origin. The difference from the hitherto existing immigration options for skilled workers is that workers with practical work experience do not have to prove that they possess a formal qualification that can be recognized as being *equivalent* to German formal qualifications. The labour migrant under this new option must only prove that he or she possesses a formal qualification that is recognized in his or her home country and therefore does not have to apply for formal recognition of the professional qualification in Germany. However, there is a material condition that nevertheless has to be checked during a formal procedure in Germany. The vocational training in the country of origin must have lasted at least two years and must be officially recognized in that country.

Thirdly, a points-based application system is to be implemented⁵⁹, coming into force in June 2024. As skilled workers who already have a concrete job offer are entitled to work in Germany based on a temporary residence permit, or even an EU blue card, and skilled workers without a concrete job offer already can apply for a temporary residence permit to seek employment, an additional points-based granting of a residence permit can only be conceptualized for foreign workers with practical working experience in order to seek employment⁶⁰. Only for this group of foreign workers does the new “opportunity card” offer a substantially new immigration option. For skilled workers, i.e. formally qualified workers whose degree or vocational qualification has been recognized as being equivalent to German standards, who already have the option to come into Germany to seek employment for many years now⁶¹, the opportunity card only offers some new benefits. Under the former ‘job-seeking option’, foreign workers were not entitled to work while seeking employment in Germany. When possessing an opportunity card, foreigners now have the right to work for 20 hours a week, thus improving their living conditions during this period. Moreover, the opportunity card may be granted for one year, while the legal job-seeking period has been limited to six months so far. Hence, the new opportunity card will only represent a small element within the complicated legal framework of German labour migration law.

Unfortunately, the 2023 legislator did not address the practical problems for labour migrants particularly regarding the duration of application procedures⁶². German diplomatic

57. Section 6 Ordinance on the Employment of Foreigners, Section 19c para. 2 Residence Act.

58. Amended by the Skilled Immigration Act.

59. See Section 20a, 20b Residence Act.

60. See D. Thym, *Komplexität als Chance. Gestaltungsoptionen für das künftige Punktesystem zur Fachkräfteeinwanderung*, in *Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR)*, 2022, p. 139 (143); H. Kolb, *Punktesystem ante portas – Erwerbsmigrationsrecht*, in *Zeitschrift für Rechtspolitik (ZRP)*, 2022, p. 14 (15).

61. Supra 2.1.

62. See for the practical problems B. Offer, *Das Fachkräfteeinwanderungsgesetz 1.1 – ...und was für eine gelungenes Einwanderungsrecht noch fehlt*, in *Zeitschrift für Rechtspolitik (ZRP)*, 2023, p. 101 et seqq.; B. Offer, *Politische Glasperlenspiele oder praktische Verbesserungen als zentrale Stellschraube*, in *Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR)*, 2022, p. 147 et seqq.

representations which are competent for proceeding visa applications have been overloaded and understaffed for many years; the same is true of national authorities in Germany, such as the local ‘foreigners authorities’ (*Ausländerbehörden*) and the competent bodies for the recognition of foreign professional qualifications. The complexity of the implementation process of the 2023 reform should not be underestimated and – obviously – has not been underestimated by the legislator. The provisions of the Skilled Immigration Advancement Act enter into force only successively, taking into account that national authorities have to (again) readjust the application processes. Regarding the abovementioned three main reform elements, a step-by-step implementation is foreseen by the legislator. While the flexibilization clause came into force in November 2023, the experience clause has come into force in March 2024 and the points-based system will not be applicable before June 2024.

3.3. “Changing lane”?

Also as a result of the 2023 reform, asylum seekers who find a job during the application period and meet the legal conditions for the granting of a temporary residence permit to perform (skilled) work may be granted such a permit, but only if they withdraw their asylum application and if they have entered Germany before a cutoff-date (March 29, 2023)⁶³. In these cases, the general requirement for the granting of a residence title that the applicant has to have entered the country with the necessary visa before⁶⁴, is not applicable. Hence, this is only a small improvement for asylum seekers who want to ‘change lane’ and apply as a working migrant instead. After the rejection of an asylum application a foreigner is still generally banned from directly applying for a labour market-related residence title⁶⁵. As a consequence, rejected asylum seekers, even those with a good chance of finding a job in Germany and of meeting the general requirements for labour migrants, are obliged to leave Germany and apply for a specific visa to have the right to legally re-enter German territory. However, there is an important exception for asylum seekers who started vocational training – that generally lasts for three years in Germany – during the period that preceded their application. According to the so-called “3-plus-2” clause, which has existed since 2015/16⁶⁶, foreigners are entitled to continue their training even after a rejection of their asylum application, and can apply for a temporary residence permit for another two years after successfully finishing their training if they find an equivalent job. The ‘carry-on’ option has, however, been limited to a ‘tolerated’ legal status (*Ausbildungsduldung*)⁶⁷, so during the continuation of the vocational training only the deportation of the foreigner has had to be suspended. Since March 2024, and also as a result of the 2023 reform, this clause is now upgraded and a proper temporary residence permit is to be granted for the continuation of vocational training under the previously specified conditions – among them: no application for foreigners from safe countries of origin – that are not altered by the legislator⁶⁸. In fact, the ‘carry-on’ option for asylum seekers who started vocational training during the asylum procedure period still represents the only substantial option for a ‘lane change’ in German

63. Section 10 para. 3 clause 5 Residence Act.

64. Section 5 para. 2 Residence Act.

65. Section 10 para. 3 clause 1 Residence Act.

66. Amended by the Federal ‘Integration Act’ (*Integrationsgesetz*), 31.07. 2016, *Bundesgesetzblatt* (Federal Gazette) I 2016, p. 939.

67. See Section 60c Residence Act.

68. See Section 16g Residence Act, which entered into force in March 2024.

migration law. The legislator's reservation in this respect is due to the apprehension that a more liberal approach could offer the wrong incentives and lead to a massive increase of unfounded asylum applications.

In fact, the application of the 'carry-on' clause is restricted due to limitations concerning the general asylum seekers' access to the German labour market, including the possibility to practise vocational trainings in a company, which is very common in Germany as part of the so-called 'dual vocational training' concept. According to the general principle as it is laid down in the German Asylum Act⁶⁹, foreigners shall not be allowed to take up paid employment as long as they are required to stay in a reception centre, the latter period is determined to last up to 18 months⁷⁰. Only if families with minors are involved, is the period for the required stay in a reception centre limited to six months. Following EU law provisions, the employment ban itself is, however, generally limited to nine months⁷¹ so that after this period, beginning with the submission of the asylum application, asylum seekers generally have the right to work and to take up vocational training. The waiting period for access to the labour market, which was shortened in 2014 (then: max. three months)⁷², has been prolonged (again) by the amendment of a stricter restriction clause in 2019⁷³. Since then, asylum seekers in Germany have been banned from working for the longest time that EU law allows for. The underlying legislative idea – the restriction clause and the Skilled Immigration Act were both enacted in Summer 2019 – is a sharp separation between forced migration (asylum) and regular (working) migration⁷⁴.

3.4. *The new 'opportunity right of residence': an example of over-liberalization?*

A critical point with the recent reforms is the abovementioned 'opportunity right of residence'⁷⁵. Although the basic idea to improve regularization options for irregular migrants, i.e. for migrants with a 'tolerated' status, can only be agreed with, the new option must be regarded as an example of an 'over-liberalization' bearing negative effects. The idea of the new 'opportunity right of residence' is quite simple. Regarding the existing regularization options providing for the granting of residence in the case of well-integrated juveniles and young adults⁷⁶, and in the case of permanent integration⁷⁷, that require specified integration performances (e.g. the acquiring of a school degree or a vocational profession, some knowledge of the German language, a certain degree of economic subsistence) as well as the fulfilment of general granting conditions (particularly the

69. See Section 61 para. 1 Asylum Act.

70. According to Section 47 para. 1 Asylum Act.

71. See Article 15 of the 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, OJ L 180/96.

72. Amended by Federal Act (Gesetz zur Einstufung weiterer Staaten als sichere Herkunftsstaaten und zur Erleichterung des Arbeitsmarktzugangs für Asylbewerber und geduldete Ausländer), 31.10.2014, Bundesgesetzblatt (Federal Gazette) I 2014, p. 1649.

73. Amended by Federal Act (Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht), 21.08.2019, Bundesgesetzblatt (Federal Gazette) I 2019, p. 1294.

74. See C. Langenfeld/R. Lehner, *Einwanderungsrecht in Deutschland – Entwicklungslinien, konzeptionelle Grundentscheidungen und offene Fragen*, in *Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR)*, 2020, p. 215 (217, 221).

75. See Section 104c Residence Act.

76. See Section 25a Residence Act.

77. See Section 25b Residence Act.

establishment of the foreigner's identity), the 'opportunity right of residence' offers a one-year legal status to meet all the necessary regularization conditions. Although such a regularization is generally excluded if the foreigner has delayed the termination of his or her residence by deceit regarding his or her identity or nationality, the new option is much more generous. Only in cases where a foreigner has *repeatedly* deceived authorities about his or her identity or nationality is the granting of an 'opportunity right of residence' excluded⁷⁸. A single deceit can be compensated during the regularization process by the provision of the necessary information, and even the presentation of official documents such as a driver's licence or a birth certificate can be sufficient during this phase. This – polemically spoken – easygoing approach regarding the enormous practical problems with identity deceits has been criticized by many scholars and, in fact, seems to overshoot the mark.

4. Conclusion

Germany is, not only after the last big legal reforms, an immigration country whose doors for legal entry, in particular for working migrants, are widely open. The recent reforms have complemented the progressive development that started with the Immigration Act in 2004 and has been successively advanced during a substantial reform process over two decades. For skilled workers as well as, newly, for practically experienced workers the material conditions for migrating into Germany are not very high. But there are many practical obstacles resulting, above all, from slow-working bureaucratic processes during the application procedures. It does not seem very likely that the reform process has now come to an end. There are still open questions not only regarding the working options for asylum seekers but also concerning the general opening of the domestic labour market for low-skilled or non-qualified foreign workers.

78. For a critical discussion see A. Dietz, in *Ausländerrecht*, K. Hailbronner, 132. Edition, § 104c AufenthG, MN 44.