Detention - Germany

Overview

Content updated and validated on: 29/08/2025

Relevant EU legislation

Germany is bound by the recast Reception Conditions Directive, the recast Asylum Procedures Directive and the Asylum and Migration Management Regulation which replaces the Dublin III Regulation and has transposed their provisions through the Asylum Act | Asylgesetz [DE], [EN] and Residence Act | Aufenthaltsgesetz [DE] [EN]

National legislation

- 2 September 2008: Asylum Act, Asylgesetz (AsylG), Asylgesetz (in DE). Last amended by Article 9 of the Act of 9 July 2021.
- Relevant provisions: English translation only covers changes until the amendments introduced by Article 2 of the Act of 11 March 2016).
- 25 February 2008:Residence Act (Act on the Residence, Economic Activity and Intergation of Foreigners in the Federal territory), Aufenthaltsgesetz - AufenthG : Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet, (source used in DE), AufenthG (in DE). Last amended by Article 3 of the Act of 9 July 2021 (BGBI. I S. 2467).
- Relevant provisions: Residence Act (in EN) (English translation includes the amendment(s) to the Act by Article 4b of the Act of 17 February 2020, Federal Law Gazette I p. 166).

Competent authority and stakeholders

Area	National authority/ stakeholder	Assistance to competent authority

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Detention decision	District courts Federal states	
Administration and management of detention facilities	Federal states	
Information provision in detention	Federal states	
Interpretation services in detention	Federal states	
Access to the procedure and provision of asylum information in detention	Federal states Federal Office for Migration and Refugees | Bundesamt für Migration und Flüchtlinge (BAMF)	
Detention for the Dublin procedure	Federal Office for Migration and Refugees | Bundesamt für Migration und Flüchtlinge (BAMF)	
Processing of asylum applications of applicants who are in detention	Federal Office for Migration and Refugees | Bundesamt für Migration und Flüchtlinge (BAMF)	
Legal assistance and representation in detention		

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Review of detention	Federal states	Judge

Detention is by law used as a last resort (*ultima ratio*) when forcefully terminating the residence of third-country nationals obliged to leave the federal territory. It may also be ordered to enforce the refusal of an entry at an external border.

Within Germany's decentralised legal and administrative framework, the federal states are responsible for the enforcement of detention, including detention pending a removal from the country (*Abschiebungshaft*). There are dedicated immigration detention centres, although they may vary across federal states.

The detention of third-country nationals for the purpose of a deportation, a removal and a refusal of entry are regulated nationwide by the Residence Act (in particular Section 71) and the Asylum Act. Some of the provisions of the Residence Act are detailed in the General Administrative Regulation to the Residence Act, procedural rules are provided in the Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction (Section 106(2) of the Residence Act refers to Book 7 pursuant to Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction). Federal legal provisions only provide the general framework for immigration detention, such as the grounds for detention, rules on the length of detention and basic procedural safeguards, but they contain only a few provisions dealing with conditions of and treatment in detention. It is in the federal states' (*Bundesländer*) capacity to adopt such laws.

Grounds for detention during the asylum procedure

Grounds for detention in national law

Detention in the context of identification or verification of identity

The Residence Act and the Asylum Act provide several grounds for immigration detention. Detention can usually only be ordered by a judge. In cases of entry by air, non-citizens from a safe country of origin or without identity documents who apply for asylum with the border authority may be kept in custody at the airport during the asylum procedure for up to two days if the Federal Office for Migration and Refugees has not taken a decision on the asylum application and up to two

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weeks if the court has not taken a decision on an application for temporary relief for which the asylum seeker must apply within three day of the rejection of his asylum application. (Asylum Act, Section 18(a)). However, an application for asylum in it self does not constitute sufficient reason for custody or arrest.

Detention to determine elements on which the application for international protection is based, in particular where there is a risk of absconding

The Residence Act provides a legal basis for the detention of persons in the Dublin procedure (this was introduced by legislative changes to the Residence Act of 27 July 2015 (Federal Law Gazette I No 32/2015) and later changed through Federal Law Gazette I No 31/2019). According to Section 2(14), the criteria in connection to Section 62(3a,3b Nr. 1-5) for a significant risk of absconding in return procedures should also apply in Dublin transfer procedures. Namely:

- The foreigner deceives the authorities about his/her identity or has suppressed or destroyed identity or travel documents or used a false identity (detailed in Section 62 (3b) of the Residence Act);
- The foreigner without excuse did not present himself/herself at the place indicated by the authorities to conduct a hearing or medical examination, provided that the foreigner was informed of the possibility of detention (detailed in Section 62 (3a) 2 of the Residence Act);
- The time limit for departure has expired and the foreigner has changed his/her place of residence despite being advised of the obligation to notify the authorities, without giving the competent authority an address at which he/she can be reached (Section 62 (3a) 3 of the Residence Act);
- The foreigner is staying on the territory despite already being banned from entry and residence (Section 62 (3) 4 of the Residence Act);
- The foreigner has already evaded deportation in the past (Section 62 (3a) 5 of the Residence Act);
- The foreigner has expressly declared that he/she intends to evade deportation (Section 62 (3a) 6 of the Residence Act).

The Residence Act, Section 2(14 Nr. 1,2) adds two more criteria:

- The foreigner left a Member State before the proceedings were concluded to determine competence or to examine an application for international protection and the circumstances of apprehension in the in federal territory provide concrete indications that he/she does not intend to visit the

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competent Member State in the foreseeable future;
- The foreigner has previously lodged several applications for asylum in Member States other than Germany and has left the other Member State(s) without awaiting the outcome of the procedure to establish the competent state or the results of the application for international protection.
- Detention in the context of a procedure to decide on the applicant's right to enter the territory
- At ports of entry, if a non-citizen is refused entry but the refusal cannot be enforced immediately, then the person is placed in 'detention pending exit from the federal territory' (*Zurückweisungshaft*) (Section 15(5) Residence Act).
- At airports, if a non-citizen is refused entry and 'detention pending exit from the federal territory' is not applied, the person is taken to an airport transit area or other place of accommodation for up to fourteen days from which exit from Germany is possible (Section 15 (6) Residence Act).This detention does not constitute custody.

Detention in the context of a return procedure

Information currently not available.

Detention in the context of national security and public order

A person can be placed in custody to secure a removal (*Sicherunghaft*) if there is a risk of absconding and a removal order has been issued in accordance with Section 58a of the Residence Act (special danger to the security of the Federal Republic of Germany or a terrorist threat), but cannot be enforced immediately; (Section 62(3) Residence Act). In order to prepare the expulsion or the deportation order a person may be placed in custody (*Vorbereitungshaft*) if a decision on expulsion or the deportation order can not be reached immediately and deportation would be more difficult or impossible without such detention. A person who resides in Germany in violation of an existing entry and residence ban and has no permission to enter Germany can be taken into custody by judicial order for the purpose of preparing a deportation warning if the person poses a significant risk to the life and limb of others or to significant legally protected interests of internal security or if they are subject to expulsion order on the ground of a particularly serious public interest in expulsion.

Detention for the purpose of a Dublin transfer

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Detention may be imposed once an application has been rejected as inadmissible because another Member State was found responsible for the asylum procedure. In these cases, the legal basis for ordering and prolonging detention is the same as for other forms of detention pending a deportation.

The Residence Act provides a legal basis for the detention of persons in the Dublin procedure (this was introduced by legislative changes to the Residence Act of 27 July 2015 (Federal Law Gazette I No 32/2015) and later changed through Federal Law Gazette I No 31/2019). According to Section 2(14), the criteria in connection to Section 62(3a,3b Nr. 1-5) for a significant risk of absconding in return procedures should also apply in Dublin transfer procedures. Namely:

- The foreigner deceives the authorities about his/her identity or has suppressed or destroyed identity or travel documents or used a false identity (detailed in Section 3b of the Residence Act);
- The foreigner without excuse did not present himself/herself at the place indicated by the authorities to conduct a hearing or medical examination (detailed in Section 62 (3a) No. 2 of the residence Act), provided that the foreigner was informed of the possibility of detention;
- The time limit for departure has expired and the foreigner has changed his/her place of residence despite being advised of the obligation to notify the authorities, without giving the competent authority an address at which he/she can be reached (detailed in Section 62 (3a) No. 3 of the residence Act);
- The foreigner has already evaded deportation in the past (detailed in Section 62 (3a) No. 5 of the Residence Act);
- The foreigner has expressly declared that he/she intends to evade deportation (detailed in Section 62 (3a) No. 6 of the Residence Act).

The Residence Act, Section 2(14 Nr. 1,2) adds two more criteria:

The foreigner left a Member State before the proceedings were concluded to determine competence or to examine an application for international protection, and the circumstances of apprehension in the federal territory provide concrete indications that he/she does not intend to visit the competent Member State in the foreseeable future;

The foreigner has previously lodged several applications for asylum in Member States other than Germany and has left the other Member State(s) without awaiting the outcome of the procedure to establish the competent state or the

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results of the application for international protection.

Less coercive measures (alternatives to detention)

According to the Residence Act, pre-removal detention is not permissible if the purpose of the custody can be achieved by other, less severe means (Section 62(1) Residence Act). Less severe means of achieving the deportation of a person include geographic restrictions to the territory of the state concerned for persons who are enforceable required to leave Germany and residence restrictions for those persons who are enforceable required to leave Germany and whose subsistence is not secured. Departure facilities for persons enforceable required to leave Germany may also be established by the states. In the departure facilities support and counselling are to be provided to promote a person´s willingness to leave Germany voluntarily. A person may also be placed in custody by judicial order for no more than 28 days to secure deportation if there is a risk of absconding and if it is clear that deportation can be carried out within this period. The responsibility for carrying out removal procedures lies with local or regional authorities or with the border police.

Application for international protection and processing while in detention/impact on the asylum procedure

Information is currently not available.

Procedural safeguards

Access to information and interpretation

A non-citizen can only be placed in detention by a judicial order (Section 62(2)-(3) Residence Act). Pre-removal detention decisions are the responsibility of the court (*Amtsgericht*) in the district where the non-citizen resides or, if the person is not a permanent resident, where detention will take place (Section 62.0.3 General Administrative Regulation to the Residence Act). Before the court makes a decision, the person has the right to a personal hearing (Section 420 Act on Procedure in Family Matters and in Non-Contentious Matters). Before the hearing at the court, the foreigner must receive a copy of the request for detention (*Haftantrag*) which the authorities have filed. Upon application, staff of relevant

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aid and assistance organisations are to be permitted to visit the detainees (Section 62b (4) of the Residence Act). Detainees awaiting deportation are to be informed of their rights and obligations and the rules applied in the detention facility (Section 62b (5) of the Residence Act).

The authorities may only take a person into custody without a court order if there is enough reason to believe that the person is trying to abscond in order to avoid deportation and a decision by the competent judge cannot be obtained beforehand. Detention pending a deportation must only be ordered or prolonged if there is a possibility of the deportation to be carried out in the near future: the maximum duration of the detention must be stated in the detention order.

Legal assistance and representation

Detention decisions by district courts can be challenged at the regional court level (*Landgericht*). A judicial review of detention decisions is possible. Applicants from detention are immediately given access to legal representative (Section 62d of the Residence Act), and there is also a possibility to apply for legal aid in the context of a judicial review of detention. It is granted depending on how the court rates the chances of success.

Access to legal advice is given at all pre-removal detention centres, however it is only free of charge and financed by some federal states (Brandenburg, Hamburg, North Rhine-Westphalia); Rhineland-Palatinate offers some financial assistance; otherwise NGOs frequently offer legal advice free of charge.

Length of detention

The maximum duration of detention for the purpose of a removal is 18 months.

Custody to prepare for a deportation (*Vorbereitungshaft*) should not exceed 6 weeks but can be extended in exceptional cases.

Custody awaitingdeportation (*Sicherungshaft*) pending an exit from the federal territory can be up to 6 months and is extendable by a maximum of 12 months, up of a total maximum time of 18 months (Article 62(4) Residence Act).

Supplementary custody to prepare deportation (*ergänzende Vorbereitungshaft*) ends upon decision of the asylum application by the Federal office for Migration and Refugees but at the latest four weeks after the asylum application was filed

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unless the application has been denied as inadmissible or as manifestly unfounded. In these cases, custody ends when the time for appealing the deportation expires. If the decision is appealed, custody ends with the positive court ruling. If the appeal is denied by the court custody ends no later than one week after the court decision.

Custody to secure departure (*Ausreisegewahrsam*) can not exceed 28days.

If asylum seekers come from a safe country of origin, they can be kept in custody at an airport transit zone up to two days if the Federal Office for Migration and Refugees has not taken a decision on the asylum application and up to two weeks if the court has not taken a decision on an application for temporary relief for which the asylum seeker must apply within three days of the rejection of his asylum application.(Section 18(a) Asylum Act).

Judicial review of detention

Information is currently not available.

Specific conditions relating to detention

Conditions of detention

Access to outdoor space

Supervised time spent in the fresh air 1-1.5 hours each day at most pre-removal detention centres.

Visitors/access to external communications

Ranges between 4 hours per month (Munich Prison) to several visits per week (Hamburg Prison), to all-day visits and unlimited visiting rights (pre-removal detention centre Eisenhüttenstadt).

Access to following bodies is regulated:

- Civil society organisations (limited)
- NGOs (limited)
- UNHCR
- Lawyer

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- Journalists
- Family members (limited)

Access to education (school for minors, language courses, etc.)

There are some institutional educational courses available to persons in detention. Residence Act, Section 62(a3) provides that age-dependent needs should be taken into account in line with Article 17 of the Returns Directive. According to this provision, children in detention should have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and should have access to education depending on the length of their stay.

Opportunity to leave the detention facility

No day release outside the pre-removal detention centre as they are closed facilities.

Language support (translation and interpretation services)

If there are communication difficulties, other multilingual detainees may be asked to help out or the services of an interpreter may be enlisted. Any judicial orders on the extension of or release from detention must be translated into the detainee's native language. The immigrant has the obtain, at their own expense, a suitable interpreter/translator of choice in other situations. This is subject to the person having sufficient funds to do so.

Medical care

Most pre-removal detention centres (particularly those at prisons) have doctors or nurses on duty – some have their own sick bay and some have medical staff on duty for several hours a day. External doctors may also be consulted; however, medical examinations are generally not initiated at their own initiative but are subject to the approval of the management of the pre-removal detention centre.

Detention of applicants with special needs

Legislative overview

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Families with children are only detained as a last resort and careful consideration is given to detaining, for example, pregnant women, single parents, nursing mothers and the elderly.

The Residence Act decrees that minors (and family with minors) “may be placed in pre-removal detention awaiting a deportation only in exceptional cases and only for as long as is reasonable, taking into account the well-being of the child”. Several states do not detain minors under 16 years of age, others do not do so if the minor is attending school.

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