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Money, not protection. Assisted return programmes and the timing of future harm in refugee status determination

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ABSTRACT

Originally established as an alternative to deportation *after* a failed asylum application, Assisted Return programmes have increasingly become a significant factor *in* the asylum procedure. By analysing an extensive body of case law from German courts, this article demonstrates how these programmes are primarily used to argue that life-threatening deprivation upon return is too unlikely to warrant international protection. Only a few courts contend that these programmes do not sufficiently protect against deprivation. This disagreement stems from conflicting assessments of the programmes' effectiveness and differing interpretations of the timing of future harm. The prevalent requirement that harm must be imminent upon return aligns with the judicial expectation that asylum seekers are responsible for availing themselves of return assistance, bringing about their own 'deportability'. It also leads to inadequate fact-finding regarding the actual effects of Assisted Return programmes. Monetary support through return programmes is thus considered as an alternative to protection, or at least facilitates its rejection. Given the original purpose of the programmes to increase the number of returnees among rejected asylum seekers, this demonstrates how policy measures have effects beyond their initial scope, and how judges indirectly implement policy.

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Introduction

Assisted Return (AR) programmes, initially designed to encourage return after a rejected asylum application, have increasingly become a significant factor during or even before the asylum procedure. In Germany, asylum seekers receive extensive return information before applying and are offered additional financial incentives for withdrawing their application. Moreover, AR programmes now play a substantial role in judicial Refugee Status Determination (RSD), serving as evidence in assessing whether a claimant faces a risk of deprivation upon return severe enough to warrant protection. In this paper, I explore how courts use AR programmes, that is how these programmes are referenced as an element of RSD risk assessment. This analysis connects two major strands of

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refugee studies literature: On the one hand, research on administrative and judicial decision-making has demonstrated the various ways judges and other officials use 'evidence' in RSD, for instance for credibility assessment (Affolter 2021; Gill et al. 2024) or to evaluate the overall situation in a state using country of origin information (Feneberg et al. 2022; Vogelaar 2016). On the other hand, return migration in general and AR programmes in particular have become an important subject of migration research (King and Kuschminder 2022a). So far, however, the question of how these programmes are used in RSD has not been addressed. Answering this question not only provides new insights into the judicial use of evidence in asylum procedures. As courts must assess how AR programmes might (not) reduce the risk of future harm, it also concerns notions of *time* in RSD (Anderson et al. 2019; Foster, Lambert, and McAdam 2025; Foster et al. 2022), as well as the allocation of *responsibility* between receiving states and asylum seekers.

Setting the scene for the empirical analysis, the first part of the article provides an overview of the different AR programmes used by courts. As these programmes serve as evidence in decisions where not persecution or war, but life-threatening deprivation is crucial for the risk assessment, the second part introduces the relevant protection regime: Beyond refugee and subsidiary protection, Germany provides a third status – the *ban on deportation* (*Abschiebungsverbot*). It is based on Article 3 of the European Convention on Human Rights (ECHR), the prohibition of torture and of inhuman or degrading treatment or punishment. The European Court of Human Rights (ECtHR) has broadened the interpretation of this provision to include situations where human rights violations arise not from intentional actions by individuals but from severe living conditions in the country of origin. Although German courts have mentioned AR programmes in their written decisions since the 1990s, their use as an argument in assessing the risk of deprivation has grown significantly since 2017. At that time, courts also began incorporating return assistance into the general standards for determining eligibility for a *ban on deportation*. The empirical analysis, based on 346 judicial decisions on the *ban on deportation*, reveals that courts vary in their assessments of the programmes' effectiveness and apply different standards concerning the timing of future harm. They either argue that only a risk of immediate deprivation warrants protection (imminence requirement), or that long-term reintegration must be taken into account (sustainability requirement). The imminence requirement clearly prevails. This coincides with the additional requirement that it is the asylum seekers' responsibility to avail themselves of return assistance to prevent deprivation upon return (reasonableness standard). The detailed analysis of the application of AR programmes in asylum procedures thus allows for broader reflections on *time* and *responsibility* in the refugee regime. The use of AR programmes in RSD shows how a political instrument, originally designed as an alternative to deportation after the procedure, is now being employed as an argument during the procedure itself. This not only highlights the expansion of policy measures beyond their intended scope but also illustrates how policy is indirectly implemented by judges.

Paying to leave: the German AR programmes

In recent years, European states have intensified their return policies, with AR programmes as a cornerstone (King and Kuschminder 2022b). Often labelled as 'voluntary

return', these programmes are promoted as a more humane and less expensive alternative to deportation. However, scholars have highlighted the intrinsic link between forced and 'voluntary' return: 'Both are unavoidably complementary and the more tied their connection, the more efficient removal will be' (Lietaert 2022, 111). Despite criticism of the notion of voluntariness as a legitimising strategy (Erdal and Oeppen 2022; Gerver 2015), most policymakers continue to adhere to this terminology. With the *Reintegration and Emigration Programme for Asylum Seekers in Germany* (REAG) established as early as 1979, Germany runs one of the oldest AR programmes worldwide. In 1989, REAG was joined by the *Government Assisted Repatriation Programme* (GARP). Since then, the abbreviation *REAG/GARP* is almost a synonym for AR policy in Germany. The government programme, previously implemented by the International Organization for Migration (IOM) until 2023 and now managed by the Federal Office for Migration and Refugees (BAMF), offers monetary assistance in three ways: Travel assistance (tickets and 200 Euro travel money), medical support (up to 2.000 Euro for a maximum three month after arrival), and a one-time cash disbursal (1.000 Euro) for migrants from selected countries of origin. Since 2017, the programme *StarthilfePlus* ('Start-up assistance plus') provides a second instalment of financial assistance (1.000 Euro) – also for asylum seekers from selected countries of origin – which can be collected six to eight months after arrival.[1] Between 2013 and 2023, 200.000 people left Germany assisted by these programmes.[2] 63 percent of the beneficiaries were rejected asylum seekers who are legally obligated to leave Germany. However, the programme also targets asylum seekers still undergoing the procedure, offering an incentive of an additional 500 Euro for the withdrawal of their asylum application. This group constitutes another 34 percent of the beneficiaries. Only three percent of the beneficiaries are individuals holding a residence permit.

More recently, the financially subsidised departure of (rejected) asylum seekers has been complemented by programmes focussing on the 'reintegration' in the country of origin. Politically, this is often framed as part of a return-development-nexus, claiming that successful reintegration of returnees has a positive impact on the socio-economic development of the country of origin. In research, this nexus is discussed critically, not least because of the accompanying political strategy of legitimising return (Collyer 2018). Since 2017, the programme *Perspektive Heimat* ('Perspective Home') of the Federal Ministry for Economic Cooperation and Development complements the German AR programmes described above. In addition to strengthening existing structures for return preparation, *Perspektive Heimat* established so-called migration counselling centres in selected countries of origin. These centres aim to provide labour market advice for returnees as well as for the local population. The programme therefore does not offer financial return assistance but focuses on counselling and labour market reintegration.

Protection from deprivation: the *ban on deportation*

A refugee under international law is a person who has a well-founded fear of an *act* of persecution *by* a state or non-state actor on account of a *ground* of persecution, that is an individual attribute such as political conviction or ethnic origin. The recognition as a refugee thus requires a human rights violation not only caused by a human actor;

this violation must be also directly targeted at a characteristic of the persecuted individual. According to this, deprivation only merits protection if it results from a discriminatory act, for instance the destruction of socio-economic living conditions of a particular group (Foster 2007). While a human rights violation for reasons of an individual characteristic of the victim is not required to qualify for subsidiary protection – complementing the refugee status since 2004 – it must still be caused by a human actor and intentionally targeted at individual victims.[3]

Neither refugee nor subsidiary protection can therefore be granted in cases where people face a risk of deprivation not intentionally caused by a human actor – that is, where harm is generalised, not targeted. However, the risk of extremely severe living conditions may still warrant protection. Since the late 1990s, the ECtHR has progressively reached an interpretation of Article 3 ECHR, the prohibition of torture and of inhuman and degrading treatment, as prohibiting deportation even when the risk of harm upon return does not emanate from the hands of other people. The ECtHR rules that although the general humanitarian conditions normally do not give rise to protection, the absolute nature of Art 3 ECHR can in 'very exceptional circumstances'[4] which attain a 'minimum level of severity'[5] encompass cases where the human rights violation is not primarily attributable to a human actor. This level is reached where a person

> find[s] himself irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity.[6]

Although the ECtHR rulings on Article 3 ECHR show that the violation of socio-economic human rights upon return can merit protection, the Court only rules on the prohibition of refoulement, not on the award of protection *statuses* based on this prohibition. It is thus up to the member states if a status beyond refugee and subsidiary protection is granted in cases where the risk of deprivation upon return is severe enough to prevent deportation (European Migration Network 2020). The German protection regime is comparably far-reaching, as it includes the consideration of a *ban on deportation* as a third protection status alongside refugee and subsidiary protection. If such a *ban on deportation* is granted, this results in a temporary residence status which is extended on a yearly basis if the risk prevails. The status includes a work permit, but no right to family reunification.

Unlike refugee and subsidiary protection, the requirements of a *ban on deportation* are not defined in the residence or asylum act. The core clause merely states that deportation is prohibited under the terms of the ECHR.[7] Due to the open texture of the legal provision, ECtHR case law and its interpretation and application by domestic courts is central. Equipped with a high degree of judicial independence, lower courts play a crucial role in specifying the abstract standards (Feneberg and Pettersson 2022). They have distilled these standards into the succinct formula 'bed, bread, soap'.[8] This formula signifies that, to justify a return, basic needs must be met at a minimum level, ensuring the preservation of human dignity.[9] Applying country knowledge from different sources, the courts introduce the overall economic and humanitarian situation in a country of origin, including living expenses, food supply, availability of accommodation, access to the labour market, or the provision of medical treatment. Based on

that, they determine factors which either increase or decrease the risk not to meet the required minimum level of basic needs upon return, such as a claimant's vulnerability, personal resilience, the potential support from a family network back home, or the availability of return assistance. This is how courts develop standards which go beyond the abstract 'bed, bread, soap' requirement, but are still applicable across cases. This cross-case application often involves evaluating the overall risk for entire groups of applicants, such as unaccompanied minors, single mothers with children, or young, able-bodied men from a specific country of origin, before assessing the risk faced by an individual claimant. This development is remarkable, as German courts have always emphasised the ECtHR's requirement for exceptionality in potential violations of Article 3 ECHR, traditionally defined as 'uniqueness'. Now, however, they acknowledge that 'such very exceptional circumstances may also be those shared by a person with other persons who are carriers of the same characteristic or are in a substantially comparable situation'.[10]

The judicial recognition of deprivation as a collective risk warranting protection is particularly evident in decisions regarding claimants from Afghanistan. Following the outbreak of the COVID-19 pandemic in spring 2020, many courts deemed the humanitarian situation in Afghanistan sufficiently dire to justify a *ban on deportation*. This stance was reinforced after the Taliban's takeover in August 2021, prompting the Federal Office for Migration and Refugees to align its policies. By 2022, nearly three out of four Afghan asylum seekers were classified as poverty refugees (BAMF 2023). Although the recognition rate for a *ban on deportation* remains lower for asylum seekers from other countries, extreme living conditions not intentionally caused by human actions are now broadly considered in asylum procedures. In this context, return assistance has gained prominence in recent years as a significant factor in the decision-making process, based on the assumption that it can mitigate the risk of deprivation.

Data and method

With three out of four asylum seekers appealing negative administrative decisions, German courts play a pivotal role in shaping the asylum regime. This makes their decisions an ideal case study for examining the role of AR programmes in RSD. The analysis draws on 346 decisions by German administrative courts (*Verwaltungsgerichte, VG, n = 297*) and higher administrative courts (*Oberverwaltungsgerichte, OVG, n = 49*) on claimants from Afghanistan, Iraq, Nigeria, Somalia, Ethiopia, and the Russian Federation. For procedures of asylum seekers from these countries, the *ban on deportation* is a key element in the judicial reasoning. Based on the observation that judicial asylum decisions referencing AR programmes have increased in recent years, my research focuses on *how* courts use AR programmes as evidence in their reasoning. Instead of comparing decisions that reference AR programmes with those that do not, I examine the different ways courts incorporate these programmes into their decisions. Using a comprehensive list of return-assistance-related keywords, I searched the central German case law database, *juris*, for all decisions referencing AR programmes.[11] From an initial set of 967 decisions, I excluded Dublin cases, procedural rulings, duplicates, and cases where courts simply reused text modules on return assistance from earlier

rulings. This refinement produced a dataset of 346 decisions, encompassing rulings from 46 of the 51 administrative courts and 10 of the 15 higher administrative courts. The sample thus captures the interpretative variety of judicial reasoning in German RSD and provides a robust basis for analysing how courts reference AR programmes. Among these decisions, 236 rejected and 110 granted a *ban on deportation*. While the analysis in the following section highlights differences in how these two groups reference AR programmes, further categorisation has been avoided. The ways in which courts integrate AR programmes into their reasoning are highly varied, with fluid transitions between different uses, making it difficult to assign decisions to distinct categories. Instead, I conducted a close reading of all decisions and, following inductive qualitative content analysis (Kuckartz and Rädiker 2023), gradually developed a coding scheme to analyse the argumentative use of AR programmes. This method involves deriving categories and themes directly from the data rather than relying on pre-existing frameworks, allowing patterns and structures to emerge organically during analysis. The in-depth analysis is structured around three overarching factors that emerged during this inductive approach: the effectiveness of AR programmes, their sustainability, and whether asylum seekers can be expected to avail themselves of the assistance. Sub-categories within this scheme were continuously refined as the analysis progressed, ensuring a nuanced understanding of the different ways courts employ AR programmes in their decisions.

AR programmes in refugee status determination

Courts reference and assess AR programmes differently depending on whether protection is refused or granted, focusing on three interconnected factors: the general *effectiveness* of AR programmes, their *sustainability*, and whether it is *reasonable* for asylum seekers to avail themselves of the assistance. The first two factors are closely linked, as courts must evaluate not only whether the assistance provided is sufficient to prevent deprivation but also the duration for which it can effectively do so. The third factor addresses the broader issue of an asylum seeker's responsibility to mitigate harm upon return, including whether utilising return assistance is considered part of that responsibility.

Effectiveness and sustainability: immediate deprivation v. sustainable reintegration

To evaluate AR programmes as a means of preventing severe deprivation, courts must answer two intertwined questions: Are the programmes effective in avoiding impoverishment? And within what time frame after return would deprivation need to occur to be considered relevant for the risk assessment? This second question is key as it determines which time frame must be considered when assessing AR programmes' effectiveness.

Courts granting a *ban on deportation* argue that the programmes are not efficient enough to avoid socio-economic deprivation after return. According to them, only the long-term absence of such a deprivation justifies a return to the country of origin.[12] Return assistance, however, 'at best provides initial support'[13] or 'temporary compensation'[14], and 'allows for a postponement of deprivation'[15] without guaranteeing a

'permanent survival'.[16] To justify return, however, AR programmes would have to have a 'sustainable significance'.[17] Besides the rejection of AR programmes' long-term efficiency, some courts examine evidence that shows that also the short-term implementation of these programmes is insufficient. This concerns, for instance, the lack of coordination mechanisms of different AR programmes or the difficulties for returnees to get in touch with IOM after returning due to bureaucratic obstacles, for instance to receive the second instalment of the payment (Afghanistan Analysts Network 2017; Asylos 2017; Schmitt, Bitterwolf, and Baraulina 2019).[18] Moreover, courts refer to reports saying that return assistance can only be effective as basis for a business start-up when returnees have vocational qualifications or a supportive family network (ERIN 2017; Schwörer 2020).[19]

Courts rejecting protection assess both AR programmes' effectiveness and the decisive period after return differently. Often, they assume the smooth implementation of these programmes and their positive impact on preventing impoverishment, mentioning them only briefly in terms of their existence or the amount of aid a claimant can expect. In such decisions, AR programmes are presented as supplementary arguments, following an analysis of the general humanitarian and socio-economic conditions in the country of origin and the claimant's individual circumstances. This approach suggests that the primary reasons for denying protection lie in the claimant's perceived resilience and/or their existing social networks in the home country. Despite the auxiliary role of AR programmes in these rulings, courts highlight their purported positive impact. For instance, they frequently refer to the 'not insignificant amount'[20] of aid offered, or assert that, because of the programmes, returnees from Europe have 'unequally higher chances'[21] of survival compared to internally displaced persons, returnees from neighbouring states, or the local population. To reinforce this favourable framing, some courts cite reports referencing the annual number of returnees to Afghanistan and Iraq who received REAG/GARP assistance (Federal Foreign Office 2020; German Bundestag 2021), interpreting this data as evidence of the programme's effectiveness.[22] Similarly, decisions regarding claimants from Nigeria, Iraq, and Afghanistan often cite country reports that merely note the existence of AR programmes or migration counselling centres aimed at supporting reintegration (Federal Foreign Office 2017; 2022).[23] From the fact that organisations like IOM and GIZ 'make an effort'[24] to establish reintegration measures and the additional funding allocated to these programmes, courts deduce that reintegration is feasible. The assumption of AR programmes' effectiveness is therefore backed by evidence which does not evaluate this effectiveness, with courts modifying the information from country reports to support specific conclusions (Feneberg et al. 2022, 260–261). Some decisions on claimants from Afghanistan even draw inferences from the absence of evidence, assuming that the lack of reports on the deprivation among returnees proves the unlikelihood of such deprivation, and, by extension, the effectiveness of return assistance.

> Given the numerous organizations that report on conditions in Afghanistan, it can be assumed that if single young men returning without a social network were predominantly living in destitution in Kabul, such situations would be reported. In the absence of such reports, the court concludes that single, healthy, young returnees (…) are likely able to secure at least a minimal income through occasional work, enabling them to sustain a life at the edge of subsistence.[25]

Another explanation offered for the absence of such reports is that 'the available return assistance, provided through monetary aid, material support, counselling, and other services, effectively serves its intended purpose as reintegration assistance'. Rather than citing the few existing reports that evaluate German AR programmes (Schmitt, Bitterwolf, and Baraulina 2019), these courts speculate about their effectiveness based on the lack of evidence.

Among the decisions rejecting a protection status, some courts explicitly relate return assistance to living expenses to estimate the duration for which it could ensure a secure livelihood. Using various sources and assumptions about living costs for instance in Afghanistan, they calculate that the assistance could sustain returnees for periods ranging from one to five years.[26] These courts argue that this is sufficient for returnees to establish a stable income and rebuild a social network. In these cases, return assistance serves as the primary argument for denying a protection status.

However, despite this effort to show the mid- or even long-term effectiveness of return assistance that some courts refusing protection undertake, these decisions rely on another central argument: The denial that sustainable reintegration of returnees is the standard of assessment. In most decisions, this argument is made indirectly, stating that AR programmes help for a 'transition period',[27] implying that covering this period is sufficient. Some courts introduce this standard more explicitly, stating that the subsistence level of a returnee does not need to be permanently secured in the home country. 'Rather, it is necessary, but also sufficient, that the minimum subsistence level is secured for a foreseeable period after the return or repatriation'.[28] Legally, this position relies on a 'relation of attribution'.[29] According to this principle, protection requires a causal link between the removal and the harm upon return. This harm must be 'objectively attributed'[30] to the deportation, demanding a temporal proximity between deprivation (or other human rights violations) and return: deprivation must occur 'shortly'[31] upon return.

In sum, courts have opposing views on the effectiveness of AR programmes, mainly based on different standards regarding the time frame to be considered to assess the risk of impoverishment. Applying a sustainability requirement, those granting protection argue that long-term reintegration must be the standard of assessment and that AR programmes are not sufficiently effective to meet this standard. Based on the imminence requirement, the courts rejecting a protection status instead assert that the responsibility of the state of deportation covers only a short period upon return, and that this period is covered by return assistance. This latter view is accompanied by another responsibility-related issue, namely if it is 'reasonable' ('zumutbar') for returnees to avail themselves of assistance, that is whether it is their personal responsibility to limit the negative consequences of return as much as possible.

Helping people to help themselves: the reasonableness of return assistance

The German term 'zumutbar' is only insufficiently translated with 'reasonable', although this comes closest. If a certain action is 'zumutbar', it is not so much reasonable in the sense of 'rational', it rather means an expectation that this action is, despite negative impacts, still bearable. In RSD, courts argue that rejected asylum seekers can be expected

to apply for AR programmes to improve their situation. According to this, there is no need for protection for a person 'who can avert risk in his or her home country by reasonable conduct which includes, in particular, voluntary departure and return to the home country'.[32] In other words: Even if people are deported (and therefore receive no or hardly any return assistance), they would have had the 'option'[33] to behave 'lawfully'[34] by leaving before deportation. Thus, the responsibility is placed on the asylum seeker who is 'free to improve his or her financial situation by own efforts'.[35] This makes return assistance an argument for rejection, even if it is not paid out in the end. The chance for the appellant to receive the money would have existed. When applying the reasonableness standard, courts refer to the internal protection principle, which states that an applicant is not entitled to international protection if they can find safety from persecution or other human rights violations in at least one part of their country of origin. This is based on the subsidiary logic of international protection: a host state bears responsibility only when the applicant's home state fails to provide protection anywhere within its territory. In the 1990s, the Federal Administrative Court (Bundesverwaltungsgericht, BVerwG) clarified that this 'basic thought' applies to situations in which 'one's own reasonable behaviour' prevents a human rights violation.[36] This created a second level of subsidiarity: Protection can only be granted if a returnee cannot secure their livelihood through their own labour or the support of non-governmental aid organisations.[37] Return assistance fulfils the same function as this aid: it compensates for the need for protection elsewhere. Courts rejecting protection based on the availability of return assistance state that it makes

> a considerable difference whether a person is placed in a situation without any way out, in which he or she has virtually no chance of survival, or whether the person is not without a chance despite all difficulties – even those that threaten their very existence – but has the opportunity to influence his or her destiny.[38]

The courts thus emphasise the personal responsibility of those seeking protection as part of the reasonableness standard.

The timing of future harm as a matter of responsibility

When courts consider AR programmes in asylum procedures, three intertwined topics stand out: The assessment of the overall effectiveness of return assistance and the judicial use of evidence, the opposing positions of the imminence requirement and the sustainability requirement (the consideration of a shorter versus longer period upon return), and the assessment of the 'reasonableness' for returnees availing themselves of assistance, in line with the argument of asylum seekers' personal responsibility.

Most courts take both the disbursement and the effectiveness of return assistance for granted. The presentation of AR programmes in country reports, as well as on the official website www.returningfromgermany.de allows courts to quickly gather basic information about these programmes and to assume their effectiveness without further consideration of the actual implementation. However, this approach excludes relevant questions of evidence, for instance how much of the money is ultimately available to the returnee: Return assistance might be used to pay off debts incurred during emigration or otherwise, be taken by border officials, or leave the returnee vulnerable to crime due

to the perception that they have prospered abroad. These issues are only discussed in few decisions.[39] Courts generally do not reference the extensive academic literature on AR programmes and reintegration. While such literature may not typically include traditional evaluations of specific programmes, it offers valuable insights into the success factors for reintegration, such as the impact of stigmatisation of returnees and the ambivalent role of social networks (Majidi 2021), the support via mentoring programmes (Majidi et al. 2023), and the inclusion of local civil society organizstions in the return regime (Marino, Schapendonk, and Lietaert 2023). Instead, the analysis reveals that courts predominantly rely on evidence from providers of country of origin information, such as domestic governmental organisations, the European Union Agency for Asylum, or NGOs like Amnesty International. However, these sources often provide only superficial information about the effectiveness of AR programmes, if they address the topic at all.

The differing consideration of evidence about AR programmes' implementation and effectiveness can be traced back to the divide between the sustainability requirement and the imminence requirement: When only a short period of time upon return is considered relevant for the assessment of the risk of harm, it is sufficient to merely refer to the existence of return assistance, and to exclude its lasting effects from the legal reasoning. Despite the lack of a conceptual reason for an imminence requirement in international refugee law, it serves as a widely used standard in the case law of international legal bodies for the period considered in risk assessment (Anderson et al. 2019; Foster, Lambert, and McAdam 2025). The results are 'poor decision-making, legal error, and, ultimately, negative outcomes for refugees and others in need of protection' (Anderson et al. 2019, 113). Matthew Scott explains the dominance of the imminence requirement with a widespread but misleading 'event paradigm', that is an understanding of persecution and other harm as a specific event that occurs shortly upon return: 'Such an approach narrows the temporal scope of the refugee definition to the moment the harm is experienced, and thus detracts attention from the wider social context in which the risk of exposure to such acts arises' (Scott 2020, 96). Instead, decision-makers should assess the 'overall predicament of the claimant in a wider temporal frame' (Scott 2020, 108), to be 'capable of encompassing the evolving nature of many contemporary forms of slower-onset harms which may present less immediate, but no less serious, risks to human rights' (Anderson et al. 2019, 119). This counts even more for the cases discussed in this paper where potential future harm is not directly caused by human agency: Extreme poverty as a human rights violation that can give rise to protection can only be properly understood as a slower-onset harm, not materialising immediately upon return. Deprivation is not an event.

By asserting the logic that harm must be causally connected to deportation, German courts tacitly reframe the question of *time* in RSD as a matter of *responsibility* (Feneberg 2024, 436). That a state's responsibility only extends to a short period after deportation and that therefore any human rights violation must occur shortly upon return is based on the legal requirement that a *ban on deportation* can only be granted if a person would otherwise be exposed to 'certain death or the most serious injuries with eyes wide open'.[40] In other words: For protection against deprivation, the risk must be obvious and visible. This leads to the position that only threats in temporal proximity to return can be grasped by the judicial 'eyes wide open'. In 2022, the Federal Administrative Court applied this literally myopic view to the assessment of return assistance in

asylum procedures: Protection cannot be granted if a threat of inhuman or degrading treatment or punishment is presumed 'at any time after return to the home country'. Instead, returnees must be only able to satisfy their 'most basic needs for a foreseeable period of time'.[41] Whether return assistance contributes to a *sustainable* livelihood is irrelevant in the legal assessment of material hardship. With this decision, the highest German administrative court explicitly validates the foundation upon which most lower courts have already based their AR related reasoning.[42] However, there is another argument in the same judgement with which the court partially deconstructs the requirement that harm must be causally connected to deportation. Although it clarifies that the period to be assessed begins directly upon return, it additionally establishes a second starting point: A *ban on deportation* must also be granted if there is a real risk of deprivation shortly *after* the return assistance has been exhausted. In this case, the court assumes that the longer the financially assisted period lasts, the more likely it is that deprivation will not occur when the assistance is used up. This sets a high threshold for protection in these cases: 'The longer the period of livelihood security covered by return assistance, the higher the probability of impoverishment after this period must be'.[43] Despite this, this reasoning is a sustainability requirement through the back door: If, according to the court, deprivation justifying protection becomes less likely the longer return assistance lasts, then the medium- or even long-term effectiveness of the assistance must be considered for the risk assessment. Otherwise, the causal argument ('the longer … the higher') would make no sense. The Federal Administrative Court thus indirectly establishes the following rule: The longer the assistance lasts, the more likely it is to lead to a sustainable livelihood. This, however, requires an assessment of AR programmes' effectiveness beyond the period directly following return. Although the court thus provides a small window of opportunity for the consideration of the sustainable impact of AR programmes, it mainly emphasises the imminence requirement, encouraging lower courts to consider AR programmes' implementation and effectiveness only superficially. In the two years following the decision, first and second instance courts have primarily cited it to justify a strict imminence requirement, focussing on a short period immediately after return. Only few courts have referred to the new sustainability requirement and granted protection based on the assumed risk of deprivation after the exhaustion of return assistance.[44]

Such as there is no conceptual reason for the general imminence requirement in refugee law, it is, from a normative point of view, not self-explanatory to justify this requirement by referring to temporal limits of a deportation state's responsibility. The asylum decision is an assessment of future risk and thus inherently speculative to some degree. It requires a reduction of (evidentiary) complexity. Narrowing the relevant time frame to be considered by courts to a brief period upon return is one of many means of this reduction. Courts defend this by asserting that, otherwise, the direct impact of deportation could not be distinguished from 'subsequent developments in the country of origin or the asylum seeker's chosen behaviour'.[45] This implies that the difficulty of assessing 'subsequent developments' justifies not taking them into account at all. Although the risk of harm may indeed decrease over time, for instance due to mitigating effects or measures, there is no automatic assumption that this reduction will be sufficient to deny protection. Depending on the context, the risk of harm could also increase. Moreover, stressing the imminence requirement leads to an unwarranted high degree

of predictive certainty where asylum law rather provides for a low standard of proof to do justice to the combination of evidential handicaps and the complexity of future risk assessment (Foster et al. 2022, 18). '[T]he focus is not on *certainty* of harm, but whether there is a real *risk* of it' (Anderson et al. 2019, 128). Nearly all cases where deprivation is at the core of consideration are cases of delayed risk, even more when return assistance might help to overcome the period directly following return. Instead of rejecting the overall consideration of subsequent developments, courts should therefore reflect how these developments can be incorporated in the risk assessment. However, framing the issue of future timing of harm as a matter of responsibility enables courts to sidestep the challenge of a more nuanced recognition of subsequent developments by assuming that a deporting state's responsibility automatically decreases over time.

The reference to a claimant's 'chosen behaviour' links the imminence requirement to the reasonableness standard, that is asylum seekers' responsibility of taking advantage of AR programmes. I have demonstrated above how this argument has traversed various levels of subsidiarity: from the reasoning of an internal protection alternative, through the potential support by NGOs in the country of origin, to the justification that return assistance serves as a surrogate for a protection status. The overarching logic is that it is the asylum seeker's personal responsibility to exhaust all available means of self-protection before seeking protection elsewhere is justified.

On a basic level, there is a common ground with so-called discretion reasoning in RSD. Applied in cases of persecution based on sexual orientation, this reasoning posits that there is no need for international protection if a person can behave 'discreetly' in their country of origin, essentially hiding a persecuted sexual orientation through self-restraint (Wessels 2021). Although it is, of course, not of the same kind, self-restraint is a requirement in the legal reasoning on impoverishment, too: According to the common interpretation of the legal standards of a *ban on deportation*, protection is not justified if a person 'can earn a scanty income through casual work and thus sustain a life at or just above the subsistence level'.[46] Self-restraint, in the sense of living just above the subsistence level, is thus considered a reasonable expectation for asylum seekers. The same counts for illegal work in the shadow economy or unlawful employment during the Covid lockdown.[47] In a broader sense, the argument that it is reasonable for returnees to avail themselves of return assistance is, like discretion reasoning, based on the 'expectation that persons should, to the extent that it is possible, co-operate in their own protection'.[48] This means that asylum seekers should cooperate to facilitate their own 'deportability' (Genova 2002); they are even responsible to do so. At the same time, it is not a receiving state's responsibility to provide protection against life-threatening impoverishment, as long as it provides money to compensates for protection. AR programmes thus substitute protection, or at least facilitate rejection.

The imminence requirement – the reduction of state responsibility for human rights violations through a limitation of the period considered – and the reasonableness standard – the emphasis of the personal responsibility of asylum seekers for their livelihood – embody this distribution of responsibility. It also aligns with the political strategy of consistently emphasising the voluntariness of individuals applying for return assistance (Erdal and Oeppen 2022; Gerver 2015; Leerkes, van Os, and Boersema 2017), making

it a tool of 'migration control in disguise' (Marino et al. 2023: 337). According to the Federal German Government,

> [t]he application for voluntary return assistance and the ultimate use of it is the returnees' own responsibility. The same applies to a voluntary return to a crisis area and the withdrawal of the asylum application. (…) The voluntary returnees concerned have made a decision about their lives on their own responsibility (…). (German Bundestag 2018, 4–5)

The courts can build on this political discourse of asylum seekers' voluntariness and personal responsibility: Those who act voluntarily can be expected to act responsibly.

Conclusion

The question of the scope of state responsibility for protection seekers constitutes a core area of RSD. My analysis of the use of AR programmes in judicial asylum decisions has shown that courts – like policy-makers – strongly promote asylum seekers' personal responsibility, limiting a receiving state's responsibility as much as possible. However, the courts fail to thoroughly justify this division of responsibility, as well as the normative priority of the imminence requirement over the sustainability requirement. This lack of justification of the imminence requirement extends to many other jurisdictions beyond Germany (Foster, Lambert, and McAdam 2025). The alignment between the political and judicial understanding of responsibility and voluntariness highlights the close connection between asylum policy and judicial RSD. This connection becomes even more apparent when considering that the original purpose of AR programmes is to provide an alternative to deportation *after* the asylum procedure. The increasing use of return assistance as an argument *in* the procedure not only demonstrates how policy measures have effects beyond their initial scope. It also serves the political objective of increasing the number of returnees through return assistance. In this way, the policy is indirectly implemented by judges who reference AR programmes to reject asylum applications.

In their written decisions, judges do not acknowledge or critically reflect on their role in extending the enforcement of a policy beyond its original intent. Instead, they approach AR programmes from a legal perspective, using them to assess a claimant's future situation based on the standards determining when deprivation warrants international protection. For judges, an AR programme is not a policy measure but a piece of evidence. By incorporating it into the legal process, the policy becomes judicialised. It might thus be unrealistic to expect judges to refrain from referencing AR programmes in their reasoning simply because these programmes were not designed to serve as evidence in RSD. However, it is reasonable to expect courts to conduct a more thorough assessment of AR programmes' effects when factoring them into their decisions. To achieve this, courts require more robust evidence regarding the implementation and impact of specific AR programmes. Despite the extensive academic literature on return and reintegration (see above) and the growing research on return counselling in host countries (Cleton and Schweitzer 2021; Feneberg 2019; Vandevoordt 2016), there remains an 'implementation black box' (Lietaert 2022, 110) regarding the effects of AR programmes on returnees' reintegration. For the German context, the only notable exceptions are two research reports evaluating the *StarthilfePlus* programme (Kothe et al. 2023; Schmitt, Bitterwolf, and Baraulina 2019). However, both evaluations

were conducted by the implementing organisations – the Federal Office for Migration and Refugees and the IOM – resulting in a lack of critical, independent perspectives. Furthermore, courts rarely cite these reports, instead relying on the brief presentations available on the official website www.returningfromgermany.de, which is designed to inform returnees, not judges. The scarcity of independent and comprehensive evaluations of AR programmes, coupled with judges often mistaking the existence of a programme or the official number of returnees for evidence of its effectiveness, leads to a superficial application of AR programmes in RSD. The imminence requirement compounds this issue by allowing judges to simplify their evidentiary process, focusing narrowly on the short-term risk of deprivation after return. While the imminence requirement sets a legal benchmark, it does not justify disregarding broader questions of implementation and effectiveness. Courts must engage with the available evidence beyond superficial programme descriptions and rigorously evaluate whether these programmes effectively mitigate deprivation, even for a limited period after return. As the analysis indicates, most courts fail to meet even this modest standard, which does not even require the consideration of long-term reintegration effects.

Beyond examining how courts reference AR programmes in their decisions, the broader integration of AR programmes into asylum decision-making requires further attention. While Germany stands out for the extent to which AR programmes are embedded in its asylum regime, similar patterns are evident in other countries, such as the UK or Switzerland.[49] This case study offers a basis for comparative research into AR programmes as migration management tools that link policy and judicial decision-making.

Notes

1. Amounts as of 2024 (https://www.returningfromgermany.de/en/programmes/). The assistance is adjusted every year. During the peak of the pandemic, for instance, an additional payment of 1.500 Euro was disbursed.
2. Source: annual parliamentary inquiries 'deportations and departures', most recently: German Bundestag 2024.
3. Art 6 2011/95/EU and Recital 35 2011/95/EU. The exception is subsidiary protection due to indiscriminate violence in an armed conflict (Art. 15c 2011/95/EU).
4. ECtHR, 2 May 1997 (D v. UK), 30240/96, para 53.
5. ECtHR, 27 May 2008 (N v. UK), 26565/05, para 29.
6. CJEU, 19 March 2019 (Jawo), C-163/17, para 92. CJEU derives this standard directly from ECtHR, 21 January 2011 (MSS v. Belgium and Greece), 30696/09, see also ECtHR, 28 June 2011 (Sufi/Elmi v. UK), 8319/07 & 11449/07.
7. Sec 60 (5) German Residence Act.
8. First used by OVG Baden-Württemberg, 27 May 2019, A 4 S 1329/19, para 5.
9. BVerwG, 17 January 2021, 1 B 66/21, para 20.
10. BVerwG, 21 April 2022, 1 C 10/21, para 15; OVG Hamburg, 25 March 2021, 1 Bf 388/19.A, para 49.
11. The database was searched for decisions that contained at least one of the following keywords: 'REAG', 'GARP', 'Rückkehrhilfe', 'Rückkehrerhilfen', 'Rückkehrbeihilfen', 'Rückkehrunterstützung' [all: 'return assistance'], 'Rückkehrprogramm' [AR programme], 'Reintegrationshilfen' [reintegration assistance], 'Reintegrationsprogramm' [reintegration programme], 'Migrationsberatungszentrum' [migration counselling centre], 'Perspektive Heimat', 'returningfromgermany'. The sample includes decisions until 30 June 2024.

12. VG Augsburg, 31 August 2010, Au 6 K 10.30089, para 39; VG Wiesbaden, 17 March 2021, 4 K 924/17.WI.A, 32–33; OVG Baden-Württemberg, 3 November 2017, A 11 S 1704/17, para 477–487.
13. Eg OVG Baden-Württemberg (n 12), para 486; VG Potsdam, 26 March 2018, 7 K 2118/16.A, para 52.
14. Eg OVG Bavaria, 21 November 2014, 13a B 14.30285, para 29; OVG Saxony, 18 March 2019, 1 A 198/18.A, para 105.
15. Eg VG Cottbus, 21 August 2021, 2 K 1561/16.A, para 87.
16. Eg VG Würzburg, 22 March 2018, W 5 K 16.31427, para 25; VG Berlin, 11 December 2023, 28 K 54.19 A, 15.
17. OVG Baden-Württemberg, 17 December 2020, A 11 S 2042/20, para 111.
18. Eg OVG Baden-Württemberg, 16 October 2017, A 11 S 512/17, para 284; VG Freiburg, 16 March 2021, A 15 K 9379/17, para 52; OVG Baden-Württemberg (n 17), para 111.
19. OVG Bavaria, 23 March 2017, 13a B 17.30030, para 24; OVG Baden-Württemberg (n 17), para 96. VG Berlin (n 16), 15.
20. Eg OVG Lower Saxony, 29 January 2019, 9 LB 93/18, para 104.
21. Eg VG Aachen, 14 September 2018, 7 K 5337/17.A, para 142.
22. Eg VG Freiburg, 24 November 2020, A 3 K 1267/17, para 90; OVG Bavaria, 7 June 2021, 13a B 21.30342, para 39.
23. Eg VG Munich, 2 September 2019, M 27 K 17.40672, para 23; OVG Bavaria (n 22), para 37; VG Hamburg, 14 July 2023, 8 A 490/21, para 78; VG Gießen, 29 November 2023, 1 K 1602/20, para 42; VG Munich, 7 June 2021, M 6 K 17.36400, para 22.
24. VG Würzburg, 6 December 2018, W 10 K 17.32175.
25. Eg OVG Lower Saxony (n 20), para 106; OVG Hamburg (n 10), para 170.
26. VG Freiburg, 5 March 2021, A 8 K 3716/17, para 77 (one year); OVG Bavaria (n 22), para 38 (13–14 months); OVG Hamburg (n 10), para 140 (2,5 years); VG Magdeburg, 22 July 2021, 5 A 193/20 MD, page 15 (five years).
27. Eg VG Düsseldorf, 4 March 2020, 18 K 4165/17.A, para 72.
28. OVG Bavaria (n 22), para 38. In its previous decisions, the court applied the sustainability requirement instead, see OVG Bavaria, 21 November 2014, 13a B 14.30285, para 29; OVG BY, 23 March 2017, 13a B 17.30030, para 24.
29. 'Zurechnungszusammenhang'; VG Karlsruhe, 26 February 2020, A 4 K 7158/18, para 47; OVG Hamburg (n 10), para 139.
30. VG Freiburg (n 26), para 62.
31. BVerwG (n 10), para 20.
32. Eg VG Bayreuth, 17 June 2020, B 7 K 20.30314, para 31.
33. Eg VG Aachen, 10 November 2020, 2 K 2521/18.A, para 90.
34. Eg OVG Rhineland-Palatinate, 30 November 2020, 13 A 11421/19, para 138.
35. VG Würzburg 2 December 2020, W 1 K 20.31090, Rn. 32; VG Cologne, 7 December 2023, 8 K 10690/17.A, para 136.
36. BVerwG, 3 November 1992, 9 C 21/92, para 12.
37. BVerwG, 7 September 2021, 1 C 3/21, para 25.
38. BVerwG, 31 January 2013, 10 C 15/12, para 40.
39. VG Munich, 28 December 2006, M 23 K 06.50114, para 27; VG Augsburg, 17 January 2006, 6 K 05.30380, para 19. OVG Baden-Württemberg (n 17), para 97.
40. BVerwG, 21 March 1996, 9 C 9/95, para 14 (first decision on *juris* using this wording).
41. BVerwG (n 10), para 25.
42. In UK and Australian case law, the term 'foreseeable' implies a lower threshold than 'imminent', making it the 'appropriate analytical frame' (Foster, Lambert, and McAdam 2025). The German Federal Administrative Court, however, uses 'foreseeable' ('absehbar') as a synonym for a strong imminence requirement.
43. BVerwG (n 10), para 25.
44. Eg OVG Berlin-Brandenburg, 30 November 2023, 4 B 8/22, 5870347, para. 60; VG Cologne, 1 June 2023, 8 K 6071/18.A, 100.

45. BVerwG (n 10), para 25. This wording originally comes from the OVG Hamburg (n 10), para 139.
46. OVG Lower Saxony (n 20), para 106; OVG North Rhine-Westphalia, 18 June 2019, 13 A 3741/18.A, para 74.
47. BVerwG (n 10), para 17; VG Würzburg, 2 September 2020, 1 K 20.30872, para 46.
48. RRT Case No. V95/03527, [1998] RRTA 246, Australia: Refugee Review Tribunal, 9 February 1996; quoted from Wessels 2021, 4.
49. E.g. UK Upper Tribunal [2022] UKUT 00110, para 33; Staatssekretariat für Migration 2019, 16.

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