


4-19-2017

## Prioritizing National Security at the Expense of Refugee Rights: The Effects of *H.T. v. Land Baden-Württemberg*

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### Recommended Citation

Thomas F. Lampert, *Prioritizing National Security at the Expense of Refugee Rights: The Effects of H.T. v. Land Baden-Württemberg*, 40 B.C. Int'l & Comp. L. Rev. E. Supp. 14 (), <http://lawdigitalcommons.bc.edu/iclr/vol40/iss3/2>

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# PRIORITIZING NATIONAL SECURITY AT THE EXPENSE OF REFUGEE RIGHTS: THE EFFECTS OF *H.T. v. LAND BADEN-WÜRTTENBERG*

THOMAS F. LAMPERT\*

**Abstract:** Tensions are high in member states of the European Union as they struggle to accommodate a record number of refugees while simultaneously confronting seemingly regular terrorist attacks. In response to this crisis, the European Court of Justice's decision in *H.T. v. Land Baden-Württemberg* continued a trend that began after September 11, 2001, in which countries implement policies that diminish and threaten the rights of refugees. Specifically, the European Court of Justice ruled that legislation governing the distribution of residence permits to refugees impliedly allowed for the revocation of a residence permit from a refugee accused of terrorist activities. This decision weakens international custom prohibiting the expulsion of refugees to places where they may be in danger. While the court implemented safeguards, including a requirement that the refugee engage in more than cursory support for terrorist organizations, the decision is still another step in an alarming trend that places refugees at risk.

## INTRODUCTION

Global forced displacement surpassed sixty million people in 2015 and a record 1.3 million migrants applied for asylum in European Union (EU) countries throughout the year.<sup>1</sup> Many of these asylum seekers qualify as refugees who are entitled to special protections under international law, including protection from refoulement—the expulsion to a state where they may be in danger.<sup>2</sup> This unprecedented increase in asylum seekers comes amidst a process

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<sup>1</sup> Phillip Connor, *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, PEW RES. CTR. (Aug. 2, 2016), <http://pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/> [<https://perma.cc/YH6Y-TX3Y>]; Phillip Connor & Jens Manuel Krogstad, *Key Facts About the World's Refugees*, PEW RES. CTR. (Oct. 5, 2016), <http://www.pewresearch.org/fact-tank/2016/10/05/key-facts-about-the-worlds-refugees/> [<https://perma.cc/43ZD-J4P2>].

<sup>2</sup> See Geneva Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137, 176 [hereinafter Geneva Convention]; Alexandra Popescu, *The EU "Costs" of the Refugee Crisis*, 10 EUROPOLITY CONTINUITY & CHANGE EUR. GOVERNANCE 105, 110 (2016); Laurence Peter, *Migrant Crisis: Who Does the EU Send Back?*, BBC NEWS (Sept. 9, 2015), <http://www.bbc.com/news/world-europe-34190359> [<https://perma.cc/T2ZZ-WR2G>].

that began after September 11, 2001 (9/11), in which countries have imposed anti-terrorism policies that diminish and threaten the rights of refugees.<sup>3</sup> Since that time, and increasingly during the current refugee crisis, the competing interests of protecting refugees' rights and meeting the demands of fearful citizens have led to high tension in EU member states.<sup>4</sup>

In June 2015, the European Court of Justice (ECJ) ruled in *H.T. v. Land Baden-Württemberg* that a nation may revoke a refugee's residence permit, even though refugees are afforded protection and benefits.<sup>5</sup> The court also ruled that revocation requires a case-by-case analysis to determine whether the refugee supports a terrorist group.<sup>6</sup> By trying to balance the competing interests of safety and protecting refugee rights, the court in *H.T.* took another step toward weakening refugee rights in the name of prioritizing national security.<sup>7</sup>

Part I of this comment provides the factual background and procedural history of *H.T. v. Land Baden-Württemberg*. Part II discusses the holding and legal context of the case. Part III highlights the significance of the case in the context of the greater refugee crisis and the continuing trend toward less secure rights for refugees. Part III also argues that while the court established safeguards to protect refugees, this decision is a further blow to their rights.

## I. BACKGROUND

### A. Mr. T's Refugee Status and Indefinite Residence Permit

Mr. T, the plaintiff in *H.T. v. Land Baden-Württemberg*, is a Turkish national born in 1956.<sup>8</sup> He moved to Germany in 1989 and resided in the country with his wife and eight children, five of whom are German nationals, until the time of this case.<sup>9</sup> During the 1990s, Mr. T. engaged in political activities in support of the Kurdistan Worker's Party (PKK), a Kurdish group that has been

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<sup>3</sup> See Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1, 13 (2008) ("Since September 11, 2001, national security has become an increasingly important issue for host states, many of whom have promulgated counter-terror policies that negatively impact protection offered to refugees and asylum-seekers."); Connor, *supra* note 1.

<sup>4</sup> See Popescu, *supra* note 2, at 106, 110; Jeanne Park, *Europe's Migration Crisis*, COUNCIL ON FOREIGN REL. (Sept. 23, 2015), <http://www.cfr.org/refugees-and-the-displaced/europes-migration-crisis/p32874> [<https://perma.cc/5FQJ-7Q3D>]; Richard Wike et al., *Europeans Fear Wave of Refugees Will Mean More Terrorism, Fewer Jobs*, PEW RES. CTR. (July 11, 2016), <http://www.pewglobal.org/2016/07/11/europeans-fear-wave-of-refugees-will-mean-more-terrorism-fewer-jobs/> [<https://perma.cc/RHV2-J6BJ>].

<sup>5</sup> See Case C-373/13, *H.T. v. Land Baden-Württemberg*, 2015 E.C.R. 413, ¶¶ 95, 99.

<sup>6</sup> See *id.* ¶¶ 84, 95, 99.

<sup>7</sup> See *id.* ¶¶ 39, 52; Farmer, *supra* note 3, at 13; Park, *supra* note 4 ("[T]he European Union's collective response to its current migrant influx has been ad hoc and, critics charge, more focused on securing the bloc's borders than on protecting the rights of migrants and refugees.").

<sup>8</sup> *H.T.*, 2015 E.C.R. ¶ 27.

<sup>9</sup> *Id.*

engaged in an armed conflict with the Turkish Government since the 1970s.<sup>10</sup> Due to the threat of political persecution in the event that he returned to Turkey, on June 24, 1993 Mr. T. gained refugee status as defined under the Geneva Convention Relating to the Status of Refugees (Geneva Convention).<sup>11</sup> In addition to his refugee status, Mr. T. received an indefinite residence permit in Germany on October 7, 1993.<sup>12</sup>

On August 21, 2006, Mr. T. lost his refugee status when German authorities determined he was no longer under threat because of changed political circumstances in Turkey.<sup>13</sup> Mr. T. appealed the revocation of his refugee status to the Verwaltungsgericht Karlsruhe (Administrative Court of Karlsruhe), which overruled that decision and reinstated Mr. T's refugee status on November 30, 2007.<sup>14</sup> Mr. T. remained a refugee within the meaning of the Geneva Convention until the time of the decision in *H.T. v. Land Baden-Württemberg* on June 24, 2015.<sup>15</sup>

### *B. Mr. T's Terrorist Activity and Criminal Sanction*

On November 22, 1993, the Federal Ministry of the interior prohibited engagement in activities on behalf of the PKK and organizations connected to the PKK under the Vereinsgesetz (Associations Act).<sup>16</sup> Thereafter, a search of Mr. T's home produced documents revealing that he collected donations and disseminated a PKK publication on behalf of the group.<sup>17</sup> As a result, German authorities charged Mr. T. under the Associations Act and the Landgericht Karlsruhe (Regional Court of Karlsruhe) ordered Mr. T. to pay €3000 for his illegal association and activity.<sup>18</sup> Mr. T. unsuccessfully appealed that decision to the Bundesgerichtshof (Federal Court of Justice), and the Regional Court of Karlsruhe's decision became final on April 8, 2009.<sup>19</sup>

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<sup>10</sup> *Id.* ¶ 32; *Profile: Kurdistan Workers' Party (PKK)*, BBC NEWS (July 27, 2015), <http://www.bbc.com/news/world-europe-20971100> [<https://perma.cc/DDB3-E68B>].

<sup>11</sup> *H.T.*, 2015 E.C.R. ¶ 28; *see* Geneva Convention, *supra* note 2, art. 1.

<sup>12</sup> *Id.* ¶ 29.

<sup>13</sup> *Id.* ¶ 30. Though the court did not delineate the specific political changes, the timing coincides with the PKK's declaration of a ceasefire in a campaign against the Turkish military. *See Turkey Profile—Timeline*, BBC NEWS (Mar. 6, 2017), <http://www.bbc.com/news/world-europe-17994865> [<https://perma.cc/U3KF-7YUG>].

<sup>14</sup> *Id.* ¶ 31.

<sup>15</sup> *Id.* ¶ 37.

<sup>16</sup> *Id.* ¶ 33.

<sup>17</sup> *Id.* ¶ 34.

<sup>18</sup> *Id.* ¶ 35.

<sup>19</sup> *Id.*

### C. The Expulsion Decision

On March 27, 2012, the Regierrungspräsidium Karlsruhe (Karlsruhe Regional Government) ordered Mr. T. expelled from Germany based on actions he took in support of the PKK.<sup>20</sup> The Karlsruhe Regional Government determined Mr. T. qualified as a “present danger” within the meaning of section 54 of the Aufenthaltsgesetz (Residence Act).<sup>21</sup> Accordingly, they called for his expulsion from the country and automatic invalidation of his residence permit pursuant to sections 51 and 54 of the Residence Act.<sup>22</sup>

German authorities understood the expulsion decision to be a discretionary administrative decision under section 56 of the Residence Act.<sup>23</sup> The Act provides special protection from expulsion to, among others, foreign nationals who have refugee status or who live with German family members as a family unit.<sup>24</sup> The authorities suspended Mr. T’s expulsion while he appealed the decision to the Administrative Court of Karlsruhe.<sup>25</sup> The court denied the appeal, and Mr. T. appealed the denial to the Verwaltungsgerichtshof Baden-Württemberg (High Administrative Court).<sup>26</sup> The High Administrative Court accepted the appeal on November 28, 2012.<sup>27</sup> It then stayed the proceeding and requested a preliminary ruling from the European Court of Justice.<sup>28</sup>

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<sup>20</sup> *Id.* ¶ 36.

<sup>21</sup> *H.T.*, 2015 E.C.R. ¶ 36; *see* Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BUNDESGESETZBLATT I [BGBl I], §§ 51, 54 (Ger.), [https://www.gesetze-im-internet.de/aufenthg\\_2004/BJNR195010004.html](https://www.gesetze-im-internet.de/aufenthg_2004/BJNR195010004.html) [<https://perma.cc/9PYG-H6MS>]. Section 51 of the Residence Act provides “the residence permit is invalidated . . . upon expulsion of the foreign national.” Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 51 (Ger.). Additionally, Section 54 of the Residence Act states:

A foreigner will generally be expelled if . . . there is reason to believe that he or she belongs to or has belonged to an organisation which supports terrorism or supports or has supported such an organisation; membership or supportive acts in the past may justify expulsion only if they constitute a current threat.

Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 54 (Ger.).

<sup>22</sup> *H.T.*, 2015 E.C.R. ¶ 36; *see* Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, §§ 51, 54 (Ger.).

<sup>23</sup> *See H.T.*, 2015 E.C.R. ¶¶ 22, 37.

<sup>24</sup> *See* Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 56 (Ger.); *H.T.*, 2015 E.C.R. ¶ 37.

<sup>25</sup> *H.T.*, 2015 E.C.R. ¶ 37.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* ¶ 38.

<sup>28</sup> *Id.* ¶ 39. When national courts in European Union (EU) countries face complex questions of EU law, the European Court of Justice (ECJ) has jurisdiction to issue preliminary rulings on the interpretation of that law. Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings, 2012 O.J. (C 338) 1. This procedure aims to ensure “uniform interpretation and application of that law within the European Union.” Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings, *supra*.

## II. DISCUSSION

*A. The Legal Context and Questions Referred to the ECJ*

The original expulsion decision, revocation of Mr. T's permit, and the German authorities' decision to suspend the expulsion have their foundation in German law.<sup>29</sup> Under section 54 of the Residence Act, a foreign national may be expelled if they support a terrorist group and constitute a "present danger."<sup>30</sup> Expulsion on these grounds further results in the invalidation of a residence permit, including the type issued to Mr. T.<sup>31</sup> As a safeguard, however, the law affords special protections against expulsion of foreign nationals when certain conditions are met, which Mr. T. did.<sup>32</sup> Hence, the expulsion decision, revocation of Mr. T's residence permit, and the decision to suspend his expulsion were justified under German law so long as he was properly deemed a "present danger."<sup>33</sup>

German law provides for the expulsion of foreign nationals like Mr. T. notwithstanding their refugee status.<sup>34</sup> International and EU law, on the other hand, provide binding protections for refugees that conflict with these German laws.<sup>35</sup> For example, Article 21 governs the protection of refugees from "re-

<sup>29</sup> See Case C-373/13, *H.T. v. Land Baden-Württemberg*, 2015 E.C.R. 413, ¶¶ 36–37.

<sup>30</sup> Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 54 (Ger.); *H.T.*, 2015 E.C.R. ¶¶ 19, 36.

<sup>31</sup> See Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 51 (Ger.); *H.T.*, 2015 E.C.R. ¶¶ 18, 36. Section 51 of the Residence Act provides that "[t]he residence title shall expire . . . upon expulsion of the foreigner." Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 51 (Ger.).

<sup>32</sup> See Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 56 (Ger.); *H.T.*, 2015 E.C.R. ¶¶ 22, 37. Section 56 of the Residence Act provides, in relevant part, that:

A foreigner who . . . possesses a residence permit, has lawfully resided in the federal territory for at least five years and cohabits with a foreigner . . . cohabits with a German dependent or domestic partner in a family unit . . . is recognised as a person entitled to asylum, enjoys the legal status of a refugee . . . shall enjoy special protection from expulsion. He or she shall only be expelled on serious grounds pertaining to public security and law and order.

Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 56 (Ger.).

<sup>33</sup> See Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, §§ 51, 54, 56 (Ger.); see *H.T.*, 2015 E.C.R. ¶ 36.

<sup>34</sup> See Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 54 (Ger.).

<sup>35</sup> Compare *id.* (stating a foreigner "will generally be expelled"), with Geneva Convention, *supra* note 2, arts. 32, 33, Council Directive 2004/83, arts. 21, 24, 2004 O.J. (L 304) 13 (EC) [hereinafter Council Directive], and *H.T.*, 2015 E.C.R. ¶¶ 4, 5, 12, 22. Article 32 of the Geneva Convention provides, in pertinent part, that "[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order." Geneva Convention, *supra* note 2, art. 32. Article 33 of the Geneva Convention provides, in pertinent part, that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened." Geneva Convention, *supra* note 2, art. 33. Article 21 of the Council Directive provides, in relevant part, that "member states shall respect the principle of non-refoulement in accordance with their international obligations." Council Directive, *supra*, art. 21.

foulement.”<sup>36</sup> It provides that member states shall respect the Geneva Convention’s general prohibition against refoulement, but also outlines exceptions to that general rule.<sup>37</sup> The exceptions, which mirror international law under the Geneva Convention, are laid out in paragraph two of the article.<sup>38</sup> Under paragraph two, a member state may refoule a refugee when there are reasonable grounds for considering them a danger to the member state’s security, or when the refugee has been convicted of a particularly serious crime such that they constitute a danger to the community of the member state.<sup>39</sup> When a refugee qualifies for one of these exceptions, member states can remove, terminate or deny a refugee a residence permit.<sup>40</sup>

While Article 21 protects refugees from refoulement, Article 24 governs the issuance of residence permits to refugees.<sup>41</sup> The permits must be valid for at least three years and are renewable unless compelling reasons of national security or public order require otherwise.<sup>42</sup> As a result, a decision under Article 24 *only* affects the individual’s residence permit.<sup>43</sup> It does not explicitly provide for a permit’s revocation, does not affect refugee status, and thus does not affect the rights and benefits afforded to a refugee.<sup>44</sup> Nonetheless, while it may not lead to expulsion back to the refugee’s country of origin, the revocation of a residence permit is still a step toward expulsion of the refugee.<sup>45</sup> This

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Article 24 of the Council Directive provides, in pertinent part, that “[a]s soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require.” Council Directive, *supra*, art. 24.

<sup>36</sup> Council Directive, *supra* note 35, art. 21.

<sup>37</sup> *See id.*

<sup>38</sup> *See* Geneva Convention, *supra* note 2, art. 33; Council Directive, *supra* note 35, art. 21. Article 21(2) of the Council Directive provides:

Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when: (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

Council Directive, *supra*, art. 21.

<sup>39</sup> Council Directive, *supra* note 35, art. 21.

<sup>40</sup> *Id.* Article 21(3) provides “Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies.” *Id.*

<sup>41</sup> *Id.* arts. 21, 24. Article 24 provides, in relevant part “[a]s soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require.” *Id.* art. 24.

<sup>42</sup> *Id.* art. 24.

<sup>43</sup> *H.T.*, 2015 E.C.R. ¶ 73; Council Directive, *supra* note 35, art. 24.

<sup>44</sup> *See H.T.*, 2015 E.C.R. ¶ 73.; Council Directive, *supra* note 35, art. 24.

<sup>45</sup> *See* Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBL I, § 56 (Ger.); *H.T.*, 2015 E.C.R. ¶¶ 72–73.

is true in Germany in particular because possession of a residence permit is one of the special protections from expulsion under German law.<sup>46</sup>

At the time of the decision, Mr. T. maintained his refugee status and enjoyed the protections of Article 21.<sup>47</sup> Additionally, he held a residence permit valid for an indefinite period of time and Article 24 did not explicitly provide for revocation of a residence permit.<sup>48</sup> To determine whether Articles 21(2), 21(3), and 24 of Directive 2004/83 justified the revocation of the residence permit and the expulsion decision, the Higher Administrative Court referred three questions to the ECJ for a preliminary ruling.<sup>49</sup>

The initial two-part question posed by the Higher Administrative Court first asked whether the rule in Article 24(1) must be observed in the case of revocation of a previously issued residence permit.<sup>50</sup> Second, it asked whether that rule must be interpreted as precluding the revocation or termination of the residence permit of a refugee when the exceptions in Article 21(2) are not met, and there are no compelling reasons of national security or public order within the meaning of Article 24(1).<sup>51</sup>

In its second question, the Higher Administrative Court asked “if parts (a) and (b) of the first question are answered affirmative[ly],” how must “compelling reasons of national security or public order” be interpreted in relation to the risks represented by support for a terrorist organization.<sup>52</sup> Moreover, it asked, “if parts (a) and (b) of the first question are answered affirmative[ly],” was it possible for “compelling reasons of national security or public order” to exist in the fact scenario presented, even if the conditions in Article 33 of the Geneva Convention and Article 21(2) were not fulfilled.<sup>53</sup> Finally, in its third

<sup>46</sup> See Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 56 (Ger.); *H.T.*, 2015 E.C.R. ¶¶ 72–73. Section 56 of the Residence Act provides “special protection from expulsion” for a foreign national who holds “a settlement permit and has lawfully resided [in Germany] for at least five years.” Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 56 (Ger.).

<sup>47</sup> *H.T.*, 2015 E.C.R. ¶ 37; see Council Directive, *supra* note 35, art. 21.

<sup>48</sup> *H.T.*, 2015 E.C.R. ¶ 29; see Council Directive, *supra* note 35, art. 24.

<sup>49</sup> *H.T.*, 2015 E.C.R. ¶¶ 29, 38, 39, 40; see Council Directive, *supra* note 35, art. 24.

<sup>50</sup> See *H.T.*, 2015 E.C.R. ¶ 39 (“Must the rule contained in the first subparagraph of Article 24(1) of Directive 2004/83, concerning the obligation of Member States to issue a residence permit to persons who have been granted refugee status, be observed even in the case of revocation of a previously issued residence permit?”).

<sup>51</sup> See *id.* (“Must that rule therefore be interpreted as precluding the revocation or termination of the residence permit (by expulsion under national law, for example) of a beneficiary of refugee status in cases where the conditions laid down in Article 21(3) in conjunction with (2) of Directive 2004/83 are not fulfilled and there are no ‘compelling reasons of national security or public order’ within the meaning of the first subparagraph of Article 24(1) of Directive 2004/83.”).

<sup>52</sup> See *id.* (“If parts (a) and (b) of the first question are answered in the affirmative: (a) How must the ground for exclusion of ‘compelling reasons of national security or public order’ in the first subparagraph of Article 24(1) of Directive 2004/83 be interpreted in relation to the risks represented by support for a terrorist association?”).

<sup>53</sup> See *id.* (“Is it possible for ‘compelling reasons of national security or public order’ within the meaning of the first subparagraph of Article 24(1) of Directive 2004/83 to exist in the case where a



question, the court asked if rule 24(1) must be adhered to in the case of revocation of a previously issued residence permit, whether the revocation or termination of a residence permit issued to a refugee is permissible only in cases where the conditions laid down in Article 21(2) and (3) are satisfied.<sup>54</sup>

### *B. Revocability of a Residence Permit Under Articles 21 and 24*

In response to questions one and three, the court determined that a member state can revoke a residence permit under both Article 21 and Article 24 so long as certain conditions are met.<sup>55</sup> The court reasoned that a state may not revoke the residence permit of a refugee under Article 21(3) if they do not qualify for *refoulement* under Article 21(2).<sup>56</sup> The question, therefore, was whether a refugee that does not meet the criteria for *refoulement* under Article 21 could have their residence permit revoked under Article 24.<sup>57</sup> While Article 24 does not explicitly allow for the revocation of a refugee's residence permit, the court held that the ability of a member state to revoke it is inferred, so long as there are compelling reasons of national security or public order within the meaning of that provision.<sup>58</sup> As a result, German officials can revoke a residence permit under Article 21 and Article 24.<sup>59</sup>

### *C. Mr. T's Actions and the National Security and Public Order Conditions*

In response to the second question, the court held that support provided by a refugee to a terrorist organization, including the PKK, can meet the national security and public order conditions of Article 24(1).<sup>60</sup> Nevertheless, the court found that a state must, on a case-by-case basis, determine whether the acts of the organization and the individual in question endanger national security or public order.<sup>61</sup> Moreover, the court found that just because an organization's acts fall within the conditions of Article 24(1), "the mere fact that the

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beneficiary of refugee status has supported the PKK, in particular by collecting donations and regularly participating in PKK-related events, even if the conditions for non-compliance with the principle of non-*refoulement* laid down in Article 33(2) of the [Geneva Convention] and also, therefore, the conditions laid down in Article 21(2) of Directive 2004/83 are not fulfilled?").

<sup>54</sup> *Id.* ("If part (a) of the first question is answered in the negative: Is the revocation or termination of the residence permit issued to a beneficiary of refugee status (by expulsion under national law, for example) permissible under EU law only in cases where the conditions laid down in Article 21(3) in conjunction with (2) of the Directive 2004/83 . . . are satisfied?").

<sup>55</sup> *Id.* ¶ 55.

<sup>56</sup> *Id.* ¶ 44.

<sup>57</sup> *Id.* ¶¶ 44–45.

<sup>58</sup> *Id.* ¶¶ 47–52.

<sup>59</sup> *Id.* ¶ 55.

<sup>60</sup> *See id.* ¶¶ 80–82.

<sup>61</sup> *See id.* ¶¶ 84, 86.

refugee supported that organisation cannot automatically mean that that person's residence permit is revoked pursuant to that provision."<sup>62</sup>

The ECJ laid out various factors for the High Administrative Court to consider in determining whether Mr. T.'s actions warranted expulsion.<sup>63</sup> First, the court highlighted three considerations for national courts to use in determining whether a refugee's actions meet the national security or public order exception of Article of 24(1): (1) whether the person in question actually committed terrorist acts, (2) whether and to what extent they were involved in planning, decision-making, or directing others planning or executing acts of that nature, and (3) whether and to what extent they financed such acts or provided the means to commit them to others.<sup>64</sup> The court then highlighted contextual factors for this particular case, including "the degree of seriousness of danger to national security or public order of the acts committed by Mr. T.;" whether he may be charged personally for any of the PKK's actions; whether the threat to national security or public order that may have been previously posed by Mr. T. still existed at the date of the decision; whether the fact that he was ordered to pay a fine and not imprisoned for his previous acts should carry weight; and whether, in light of that fact, there were compelling reasons of national security or public order to revoke his permit.<sup>65</sup>

In sum, the court determined that supporting a terrorist organization, including the PKK, could qualify as a compelling reason of national security or public order under Article 24(1).<sup>66</sup> In order to act on that finding, the member state must conduct a case-by-case analysis of both the individual and the organization in question to determine whether or not revocation of a residence permit is justified.<sup>67</sup> Importantly, the court also found that so long as an individual maintains their refugee status, the revocation of the residence permit does not reduce the rights and benefits granted to those protected by their refugee status.<sup>68</sup> Those benefits include "protection from refoulement, maintenance of family unity, the right to travel documents, access to employment, education, social welfare, healthcare and accommodation, freedom of movement within the Member State and access to integration facilities."<sup>69</sup>

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<sup>62</sup> *Id.* ¶ 87.

<sup>63</sup> *Id.* ¶¶ 90–93.

<sup>64</sup> *See id.* ¶ 90.

<sup>65</sup> *Id.* ¶¶ 92–93.

<sup>66</sup> *See id.* ¶¶ 81, 99.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* ¶¶ 73, 96.

<sup>69</sup> *Id.* ¶ 95.

### III. ANALYSIS

In *H.T.*, the ECJ held that even if a refugee does not meet the requirements for refoulement under Article 21, Article 24 impliedly allows for the revocation of that refugee's residence permit.<sup>70</sup> In order to take such action, the member state must determine that the terrorist organization, and the refugee's actions in particular, amount to "compelling reasons of national security or public order" within the meaning of Article 24.<sup>71</sup> In addition, the court held that so long as an individual maintains their refugee status, they are still entitled to the basic rights and benefits enjoyed by those with refugee status.<sup>72</sup>

In the post 9/11 era, EU member states have consistently prioritized protection of the homeland over the protection of refugees' rights.<sup>73</sup> In doing so, the EU has developed what some consider to be exclusionist policies and tighter restrictions toward individuals seeking refugee status.<sup>74</sup> This trend has arguably been exacerbated by the recent influx of refugees fueled by crises in the Middle East and Africa.<sup>75</sup> Rightly or wrongly, many citizens in Europe tie this current influx of refugees to the constant threat of terrorism in their nations.<sup>76</sup> This association forces EU member states to balance two competing interests: answering the call to protect the homeland while simultaneously adhering to international custom that requires the protection of refugee rights.<sup>77</sup> Thus far, the EU's efforts to strike this balance are inconsistent and reject a common strategy.<sup>78</sup> This has led to criticism of their inability to effectively address the phenomenon.<sup>79</sup>

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<sup>70</sup> Case C-373/13, *H.T. v. Land Baden-Württemberg*, 2015 E.C.R. 413, ¶¶ 50–51.

<sup>71</sup> *See id.* ¶¶ 84–86.

<sup>72</sup> *Id.* ¶ 95.

<sup>73</sup> *See Park, supra* note 4.

<sup>74</sup> *See Farmer, supra* note 3, at 13–15 ("European nations have instituted counterterrorism policies that damage refugee protection. The promulgation of restrictive policies is not limited to states: intergovernmental organizations such as the European Union and the United Nations Security Council have also articulated positions limiting access to asylum on terrorist grounds."); David Kosar, *Inclusion Before Exclusion or Vice Versa: What the Qualification Directive and the Court of Justice Do (Not) Say*, 25 INT'L J. REFUGEE L. 87, 88 (2013).

<sup>75</sup> *See Farmer, supra* note 3, at 13; Popescu, *supra* note 2, at 108, 113; Park, *supra* note 4.

<sup>76</sup> *See Park, supra* note 4; Wike et al., *supra* note 4.

<sup>77</sup> *See Popescu, supra* note 2, at 110; Meher Talib, Note, *Numbers Versus Rights: State Responsibility Towards Asylum Seekers and the Implications for the International Refugee Regime*, 27 GEO. IMMIGR. L.J. 405, 411 (2013) ("[T]he principle of non-refoulement is part of customary international law, so all states, regardless of whether they are party to the Geneva Convention, must respect the principle of non-refoulement."); Wike et al., *supra* note 4.

<sup>78</sup> *See Park, supra* note 4 ("[N]ational interests have consistently trumped a common European response to this migrant influx. Some experts say the bloc's increasingly polarized political climate, in which many nationalist, anti-immigrant parties are ascendant, is partially to blame for the muted humanitarian response from some states.")

<sup>79</sup> *See, e.g., Popescu, supra* note 2, at 116 ("The European Union has been strongly criticized for the lack of initiative and the inefficient measures implemented in order to cope with the migrant crisis.")

*H.T.* has a direct impact on one of the many potential issues related to the migration crisis.<sup>80</sup> Specifically, the case addresses when and why a refugee may have their residence permit revoked.<sup>81</sup> Though Mr. T. already had refugee status, this was the first time the court determined courses of action available to a member state when an individual protected by refugee status takes action supporting a terrorist group.<sup>82</sup> As such, the ECJ faced the difficult task of reaching a decision that sufficiently protected Germany, while simultaneously upholding Mr. T.'s rights as a refugee.<sup>83</sup> This forced the court to consider international, EU, and German law.<sup>84</sup>

With their decision to allow revocation of a residence permit under Article 24, the ECJ may have weakened what some consider *jus cogens*: the prohibition against the refoulement of refugees.<sup>85</sup> If they did, the balancing test and requirement that member states still provide benefits to refugees who have had their permit revoked may safeguard refugees against abuse in a charged political climate.<sup>86</sup> Despite those potential safeguards, the question remains whether the ECJ opened the door for the continued weakening of refugee rights and protections that diminish a refugee's fear of expulsion.<sup>87</sup>

#### *A. Weakening the International Prohibition of the Refoulement of Refugees*

The court in *H.T.* went to great lengths to distinguish refoulement of a refugee from the revocation of a refugee's residence permit.<sup>88</sup> The policy of non-refoulement of refugees is grounded in the belief that human beings

<sup>80</sup> See Popescu, *supra* note 2, at 110–13; Steve Peers, *What If a Refugee Allegedly Supports Terrorism? The CJEU Judgment in T*, EU LAW ANALYSIS (June 24, 2015, 6:16 PM), <http://eulawanalysis.blogspot.com/2015/06/what-if-refugee-allegedly-supports.html> [<https://perma.cc/3GBV-JUVF>]; Wike et al., *supra* note 4.

<sup>81</sup> See *H.T.*, 2015 E.C.R. ¶¶ 95, 99.

<sup>82</sup> Peers, *supra* note 80.

<sup>83</sup> See *H.T.*, 2015 E.C.R. ¶ 38.

<sup>84</sup> See *id.* ¶¶ 3, 9, 16.

<sup>85</sup> See *H.T.*, 2015 E.C.R. ¶ 55; Farmer, *supra* note 3, at 22 (defining *jus cogens* as an international norm binding the entire international community); Talib, *supra* note 77, at 407, 412; Peers, *supra* note 80. Peers also makes clear, however, that while the court left unanswered questions regarding refoulement, “it is rarely if ever possible to refoule a refugee consistently with international obligations.” Peers, *supra* note 80.

<sup>86</sup> See *H.T.*, 2015 E.C.R. ¶¶ 84, 95; Peers, *supra* note 80; Wike et al., *supra* note 4.

<sup>87</sup> See Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 56 (Ger.) (outlining safeguards from expulsion); *H.T.*, 2015 E.C.R. ¶¶ 42, 51, 95 (providing safeguards while simultaneously delineating scenarios by which member states can revoke a residence permit); Farmer, *supra* note 3, at 13, 15 (discussing promulgation of post 9/11 policies that negatively impact refugee protections); Kosar, *supra* note 74, at 88 (discussing the post 9/11 shift in refugee adjudication toward a “culture of exclusion”); Talib, *supra* note 77, at 412 (highlighting the “significant . . . discretion” enjoyed by member states and interpreting their obligations toward refugees); Peers, *supra* note 80 (arguing the decision in *H.T.* leaves some questions unanswered, including whether states can remove refugees to countries other than their country of origin).

<sup>88</sup> See *H.T.*, 2015 E.C.R. ¶¶ 41, 70–75.

should not be returned to countries where their dignity and safety is at risk.<sup>89</sup> Given this powerful foundation, the decision to refoule a refugee is to be made only in the most extreme circumstances, and the international standards for doing so set a high bar for refoulement.<sup>90</sup>

The ECJ highlighted this high bar in *H.T.* and contrasted refoulement with the decision to revoke a residence permit.<sup>91</sup> The main difference, the court determined, was the potentially dire consequence of refoulement of a refugee in contrast to the seemingly less grave decision to revoke their residence permit.<sup>92</sup> Accordingly, the court stated that the exceptions to the non-refoulement rule should be read more strictly than the requirements for the revocation of a residence permit.<sup>93</sup>

EU member states enjoy discretion in determining how to treat refugees within their borders.<sup>94</sup> In the current climate, EU member states go to great lengths to fit refugees into the delineated exceptions to non-refoulement.<sup>95</sup> That being said, given that the referring court only asked whether Mr. T.'s actions fit within the exceptions to Article 24, it follows that the ECJ may have thought Mr. T.'s actions in support of the PKK did not meet the high bar set for refoulement under Article 21.<sup>96</sup> Nevertheless, the court questioned whether they could take steps to expel Mr. T. because of his actions in support of the PKK.<sup>97</sup> Where EU member states prioritize the protection of their borders and homeland over the rights of refugees, it is logical that member states want the ability to take action when they perceive a potential terrorist threat.<sup>98</sup> The

<sup>89</sup> Geneva Convention, *supra* note 2, art. 33 (stating that no refugee shall be sent “where his life or freedom would be threatened”); see Farmer, *supra* note 3, at 22.

<sup>90</sup> See Geneva Convention, *supra* note 2, art. 33; *H.T.*, 2015 E.C.R. ¶¶ 71, 72 (holding that refoulement “is only the last resort a Member State may use,” and finding Article 21(2) subjects “the practice of refoulement to rigorous conditions”); Council Directive, *supra* note 35, arts. 21, 24; Farmer, *supra* note 3, at 22; Peers, *supra* note 80.

<sup>91</sup> *H.T.*, 2015 E.C.R. ¶¶ 72–74.

<sup>92</sup> *Id.* ¶¶ 73–74.

<sup>93</sup> *H.T.*, 2015 E.C.R. ¶ 75; Council Directive, *supra* note 35, arts. 21, 24. The exceptions to the non-refoulement rule include being “a danger to the security of the Member State” or being convicted of a serious crime that suggests the refugee is a danger to the community of the member state. Council Directive, *supra* note 35, art. 21. In order to revoke a residence permit a foreign national must take actions that a member state deems to constitute “compelling reasons of national security or public order.” Council Directive, *supra* note 35, art. 21.

<sup>94</sup> See *H.T.*, 2015 E.C.R. ¶ 99; Talib, *supra* note 77, at 412 (“[A]lthough constrained by the principle of non-refoulement, states have a significant amount of discretion in their obligation towards asylum seekers and refugees.”).

<sup>95</sup> See Farmer, *supra* note 3, at 1 (“[T]here is great potential for refugee-receiving states to rely heavily on the exceptions to non-refoulement in enacting anti-terrorism policies, to the detriment of refugee protection.”); Talib, *supra* note 77, at 407.

<sup>96</sup> See *H.T.*, 2015 E.C.R. ¶¶ 39, 56.

<sup>97</sup> *Id.* ¶ 39.

<sup>98</sup> See *id.* ¶¶ 75, 84; Council Directive, *supra* note 35, art. 21; Farmer, *supra* note 3, at 13; Park, *supra* note 4; Peers, *supra* note 80.

ECJ's decision to allow revocation of a residence permit under Article 24 may provide them with that opportunity.<sup>99</sup>

The holding that member states can revoke the residence permit of a refugee seemingly creates a new option through which member states can take steps toward expelling refugees.<sup>100</sup> It is true that expulsion and *refoulement* are two different things, as one returns the refugee to where they may be in danger, while the other does not necessarily do so.<sup>101</sup> The decision nonetheless provides a new avenue for member states to begin the expulsion process and jeopardizes benefits afforded to refugees.<sup>102</sup> These threatened benefits include protection from *refoulement* and maintenance of family unity.<sup>103</sup> For Mr. T. and other refugees like him, the loss of a residence permit is a major blow to the safety and security that international, EU, and German law are designed to provide.<sup>104</sup>

### *B. How Strong Are the ECJ's Safeguards and Will They Last?*

While the court may have weakened protections designed to afford a certain level of geographic security to refugees, it simultaneously strengthened safeguards.<sup>105</sup> These safeguards include the required case-by-case analysis and the demand that member states continue to provide benefits to refugees who have had their residence permit revoked.<sup>106</sup> Unfortunately, due to the inconsistent approach taken by many member states regarding refugee issues, the question remains whether these rights will be further eroded over time.<sup>107</sup>

With the case-by-case analysis requirement put in place, the ECJ made clear that an individual must perform a number of actions in support of a terrorist organization to meet the "compelling reasons of national security or public order" requirement.<sup>108</sup> Data indicates that EU countries tighten standards

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<sup>99</sup> See *H.T.*, 2015 E.C.R. ¶¶ 75, 84; Council Directive, *supra* note 35, art. 21; Farmer, *supra* note 3, at 13; Park, *supra* note 4; Peers, *supra* note 80.

<sup>100</sup> See *H.T.*, 2015 E.C.R. ¶ 47 ("Despite the lack of express provision authorizing Member States, on the basis of Article 24(1) . . . a number of arguments support an interpretation whereby Member States are allowed to take such a measure."); Farmer, *supra* note 3, at 1; Talib, *supra* note 77, at 412; Park, *supra* note 4.

<sup>101</sup> See *H.T.*, 2015 E.C.R. ¶¶ 72, 74.

<sup>102</sup> See Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 56 (Ger.); *H.T.*, 2015 E.C.R. ¶¶ 39, 52, 95; Peers, *supra* note 80.

<sup>103</sup> See Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 56 (Ger.).

<sup>104</sup> See *id.*; Geneva Convention, *supra* note 2, art. 33; *H.T.*, 2015 E.C.R. ¶¶ 95, 99; Council Directive, *supra* note 35, arts. 21, 24.

<sup>105</sup> See Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 56 (Ger.); *H.T.*, 2015 E.C.R. ¶¶ 52, 95, 99.

<sup>106</sup> See Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 56 (Ger.); *H.T.*, 2015 E.C.R. ¶¶ 52, 95, 99.

<sup>107</sup> Farmer, *supra* note 3, at 13; Kosar, *supra* note 74, at 88; Park, *supra* note 4.

<sup>108</sup> See *H.T.*, 2015 E.C.R. ¶¶ 84, 85, 87, 90–93.

regarding refugee rights as the number of refugees and asylum seekers rises.<sup>109</sup> In combination with the recent pattern of prioritizing security over refugee rights, this suggests it is possible member states will impose a stricter interpretation of the rule and consequently revoke more residence permits.<sup>110</sup> Despite this threat, the court took the important step of protecting the benefits of refugees who find themselves in the limbo of having their residence permit revoked.<sup>111</sup> Nonetheless, given the fact that that protection from refolement is one of the guaranteed benefits, refugees may reasonably fear that the other benefits they have traditionally enjoyed are in similar jeopardy.<sup>112</sup>

### CONCLUSION

In *H.T. v. Land Baden-Württemberg*, the ECJ found that even though Article 24(1) does not explicitly provide for the revocation of a residence permit, a member state can nonetheless revoke a refugee's residence permit under the Council Directive. Doing so requires that a refugee's acts engender a threat that justifies revocation of the permit. As the refugee crisis continues in Europe, this decision can be seen as another step taken by EU member states to weaken the rights of refugees in the face of mounting fear and criticism. The court did provide certain safeguards, including the continued obligation to provide benefits typically afforded to refugees and the implementation of standards that require something more than cursory support of a terrorist group. That being said, many of the benefits are dependent on the refugee's presence in the country, and it remains to be seen how great a blow this decision will deal to refugee protections.

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<sup>109</sup> See Talib, *supra* note 77, at 407 (“[C]ountries interpret their responsibilities more restrictively when they are faced with higher relative asylum applications.”).

<sup>110</sup> See *H.T.*, 2015 E.C.R. ¶¶ 47, 52, 90–93; Farmer, *supra* note 3, at 13; Kosar, *supra* note 74, at 88; Talib, *supra* note 77, at 407; Park, *supra* note 4.

<sup>111</sup> *H.T.*, 2015 E.C.R. ¶ 95.

<sup>112</sup> See Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl I, § 56 (Ger.); *H.T.*, 2015 E.C.R. ¶ 95; Farmer, *supra* note 3, at 13; Peers, *supra* note 80.