



# aida

Asylum Information  
Database

## Country Report: Austria

**December 2015**

***asyl*koordination**  
Österreich

Edited by:



**ecre**

European Council  
on Refugees and Exiles

## ACKNOWLEDGMENTS

This report was written by Anny Knapp, Asylkoordination Österreich, and was edited by ECRE.

**The information in this report is up-to-date as of 30 November 2015.**

## The AIDA project

The AIDA project is jointly coordinated by the European Council on Refugees and Exiles (ECRE), Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee. It aims to provide up-to date information on asylum practice in 16 EU Member States (AT, BE, BG, CY, DE, FR, GR, HR, HU, IE, IT, MT, NL, PL, SE, UK) and 2 non-EU countries (Switzerland, Turkey) which is easily accessible to the media, researchers, advocates, legal practitioners and the general public through the dedicated website [www.asylumineurope.org](http://www.asylumineurope.org). Furthermore the project seeks to promote the implementation and transposition of EU asylum legislation reflecting the highest possible standards of protection in line with international refugee and human rights law and based on best practice.



This report is part of the AIDA project (Asylum Information Database) funded by the European Programme for Integration and Migration (EPIM) and Adessium Foundation.

# TABLE OF CONTENTS

Glossary & List of Abbreviations .....	5
Statistics .....	6
Overview of the legal framework.....	10
Overview of the main changes since the previous report update.....	13
Asylum Procedure.....	15
<b>A. General.....</b>	<b>15</b>
1. Flow chart.....	15
2. Types of procedures.....	16
3. List of authorities intervening in each stage of the procedure.....	16
4. Number of staff and nature of the first instance authority .....	16
5. Short overview of the asylum procedure.....	17
<b>B. Procedures .....</b>	<b>18</b>
1. Registration of the asylum application.....	18
2. Regular procedure.....	19
3. Dublin .....	28
4. Admissibility procedure .....	37
5. Border procedure (border and transit zones).....	41
6. Accelerated procedure .....	43
<b>C. Information for asylum seekers and access to NGOs and UNHCR.....</b>	<b>46</b>
<b>D. Subsequent applications.....</b>	<b>48</b>
<b>E. Guarantees for vulnerable groups of asylum seekers (children, traumatised persons, survivors of torture).....</b>	<b>49</b>
1. Special procedural guarantees.....	49
2. Use of medical reports .....	50
3. Age assessment and legal representation of unaccompanied children .....	52
<b>F. The safe country concepts.....</b>	<b>54</b>
<b>G. Treatment of specific nationalities.....</b>	<b>55</b>
Reception Conditions.....	57

<b>A.</b>	<b>Access and forms of reception conditions .....</b>	<b>57</b>
1.	Criteria and restrictions to access reception conditions .....	57
2.	Forms and levels of material reception conditions .....	59
3.	Types of accommodation .....	60
4.	Conditions in reception facilities .....	62
5.	Reduction or withdrawal of reception conditions .....	63
6.	Access to reception centres by third parties .....	65
7.	Addressing special reception needs of vulnerable persons .....	65
8.	Provision of information .....	68
9.	Freedom of movement .....	69
<b>B.</b>	<b>Employment and education .....</b>	<b>71</b>
1.	Access to the labour market.....	71
2.	Access to education .....	72
<b>C.</b>	<b>Health care .....</b>	<b>73</b>
	<b>Detention of Asylum Seekers .....</b>	<b>74</b>
<b>A.</b>	<b>General .....</b>	<b>74</b>
<b>B.</b>	<b>Legal framework of detention .....</b>	<b>75</b>
1.	Grounds for detention.....	75
2.	Alternatives to detention .....	76
3.	Detention of vulnerable applicants .....	77
4.	Duration of detention .....	77
<b>C.</b>	<b>Detention conditions .....</b>	<b>78</b>
1.	Place of detention.....	78
2.	Conditions in detention facilities .....	79
<b>D.</b>	<b>Procedural safeguards .....</b>	<b>80</b>
1.	Judicial review of the detention order.....	80
2.	Legal assistance for review of detention .....	82
	<b>ANNEX I – Transposition of the CEAS in national legislation .....</b>	<b>84</b>

## Glossary & List of Abbreviations

<b>Basic Care</b>	Material reception conditions offered to asylum seekers
<b>Dismissal</b>	Negative decision on the merits of the application
<b>Rejection</b>	Negative decision on the admissibility of the application
<b>AsylIG</b>	Asylum Act   Asylgesetz
<b>BFA</b>	Federal Office for Immigration and Asylum   Bundesamt für Fremdenwesen und Asyl
<b>BFA-VG</b>	BFA Procedures Act
<b>BVwG</b>	Federal Administrative Court   Bundesverwaltungsgericht
<b>EAST</b>	Initial reception centre   Erstaufnahmestelle
<b>FPG</b>	Aliens Police Act   Fremdenpolizeigesetz
<b>MSF</b>	Doctors Without Borders
<b>TEU</b>	Treaty on European Union
<b>UVS</b>	Independent Administrative Board
<b>VfGH</b>	Constitutional Court   Verfassungsgerichtshof
<b>VQ</b>	Distribution centre   Verteilungsquartier
<b>VwGH</b>	Administrative High Court   Verwaltungsgerichtshof

## Statistics

**Table 1: Applications: 2015 (January-October)**

	<b>Applicants in 2015</b>
<b>Total</b>	68,589
Syria	20,441
Afghanistan	16,549
Iraq	11,190
Pakistan	2,900
Kosovo	2,447
Somalia	1,850
Stateless	1,717
Russia	1,440
Nigeria	1,135
Algeria	788

Source: Ministry of Interior, Asylum Statistics October 2015, available at: <http://bit.ly/1OhJiCf>.

The BFA does not provide statistics on pending asylum applications and decisions either publicly or through Eurostat for 2015. According to information provided by the authorities, in the period January-October 2015, the BFA issued 29,520 status decisions,<sup>1</sup> and asylum was granted in 36% of those cases.<sup>2</sup>

The latest information on decisions and pending applications made available by the Ministry of Interior concerns 2014, as shown in the table below.

---

<sup>1</sup> A "status decision" encompasses all decisions taken with respect to a third-country national, including protection but also return decisions.

<sup>2</sup> Information provided by the BFA to ECRE via email, 9 December 2015.

**Table 2: Applications and granting of protection status at first and second instance: 2014**

	Applicants in 2014	Pending applications in 2014	Refugee status	Subsidiary protection	Humanitarian protection	Rejection <sup>3</sup>	Refugee rate	Subs. Prot. rate	Hum. Prot. rate	Rejection rate
<b>Total</b>	28,064	31,338	8,734	2,617	184	14,596	32.1%	9.6%	0.6%	53.7%

Breakdown by countries of origin of the total numbers

Syria	7,754	4,872	3,604	324	0	448	82.3%	7.4%	0%	10.3%
Afghanistan	5,070	6,964	2,450	1,339	5	2,010	42.1%	23.1%	0.1%	34.7%
Russia	1,996	3,286	775	262	36	1,191	34.2%	11.6%	1.6%	52.6%
Kosovo	1,901	1,371	13	45	13	870	1.4%	4.8%	1.4%	92.4%
Stateless	1,285	1,135	458	37	5	119	74%	6%	0.8%	19.2%
Somalia	1,162	1,539	20	13	11	185	8.7%	5.7%	4.8%	80.8%
Iraq	1,107	1,172	211	217	5	402	25.2%	26%	0.7%	48.1%
Iran	745	944	422	17	3	91	79.2%	3.2%	0.5%	17.1%
Nigeria	659	1,142	20	13	11	337	5.2%	3.4%	3%	88.4%
Pakistan	597	738	41	11	6	336	10.4%	2.8%	1.5%	85.3%

Source: Ministry of Interior, Annual Statistics 2014, <http://bit.ly/1OaseHF>.

<sup>3</sup> Rejection should include *both* in-merit and admissibility negative decisions (including Dublin decisions).

**Table 3: Gender/age breakdown of the total numbers of applicants: 2015 (January-October)**

	Number	Percentage
<b>Total number of applicants</b>	68,589	100%
Men	51,121	74.5%
Women	17,468	25.5%
Children	Not available	Not available
Unaccompanied children	7,155	10.4%

Source: Ministry of Interior, Asylum Statistics October 2015, available at: <http://bit.ly/1OhJiCf>.

**Table 4: Comparison between first instance and appeal decision rates: 2015**

Data for 2015 is not available.

**Table 5: Applications processed under the accelerated procedure in 2015**

Data for 2015 is not available.

**Table 6: Subsequent applications lodged in 2015 (January-October)**

	Number	Percentage
<b>Total number of subsequent applications</b>	2,232	100%

Main countries of origin

Iraq	297	13.3%
Afghanistan	296	13.2%
Russia	290	13%
Syria	213	9.5%
Kosovo	156	7%

Source: Ministry of Interior, Asylum Statistics October 2015, available at: <http://bit.ly/1OhJiCf>.

**Table 7: Number of applicants detained per ground of detention: 2013**

Ground for detention	2013
Executable expulsion order	133
Initiated return procedure	142
Likely expulsion order	229
Executable return decision prior to application	78
Executable return decision in Dublin cases	116
Subsequent application in Dublin cases	19
Violation of restriction of movement	14
Violation of registration duty	1
Violation of obligation to comply with the procedure	1
Subsequent application	8
Unauthorised departure from reception centre	0
<b>Total number of applicants detained</b>	<b>741</b>

Figures are not available in 2014 and 2015.

**Table 8: Number of third-country nationals detained and subject to alternatives to detention: 2013**

Measure	2013
<b>Detention</b>	741
<b>Alternatives to detention</b>	771

Figures are not available in 2014 and 2015.

## Overview of the legal framework

### Main legislative acts relevant to asylum procedures, reception conditions and detention

Title (EN)	Original Title (DE)	Abbreviation	Web Link
Federal Act concerning the Granting of Asylum, as in force since 21 July 2015	Bundesgesetz über die Gewährung von Asyl StF: BGBl. I Nr. 100/2005	Asylgesetz 2005 <b>(AsyIG)</b>	< <a href="http://bit.ly/1jULWW6">http://bit.ly/1jULWW6</a> > (DE)
Federal Act on the Exercise of Aliens' Police, the issuing of Documents for Aliens and the Granting of Entry Permits, as in force since 21 July 2015	Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetitel StF: BGBl. I Nr. 100/2005	Fremdenpolizeigesetz <b>(FPG)</b>	< <a href="http://bit.ly/1QkRGqx">http://bit.ly/1QkRGqx</a> > (DE)
General Administrative Procedures Act	Allgemeines Verwaltungsverfahrensgesetz 1991 StF: BGBl. Nr. 51/1991	<b>AVG</b>	< <a href="http://bit.ly/1GQJ9Gp">http://bit.ly/1GQJ9Gp</a> > (DE)
Federal Act on the general rules for procedures at the federal office for immigration and asylum for the granting of international protection, the issuing of residence permits for extenuating circumstances reasons, deportation, tolerated stay and issuing of stay terminating measures, furthermore the issuing of documents for aliens.	Bundesgesetz, mit dem die allgemeinen Bestimmungen über das Verfahren vor dem Bundesamt für Fremdenwesen und Asyl zur Gewährung von internationalem Schutz, Erteilung von Aufenthaltstiteln aus berücksichtigungswürdigen Gründen, Abschiebung, Duldung und zur Erlassung von aufenthaltsbeendenden Maßnahmen sowie zur Ausstellung von österreichischen Dokumenten für Fremde geregelt werden (BFA-Verfahrensgesetz – BFA-VG) StF: BGBl. I Nr. 87/2012	BFA-Verfahrensgesetz <b>(BFA-VG)</b>	< <a href="http://bit.ly/1Jdmw0F">http://bit.ly/1Jdmw0F</a> > (DE)
Federal Act on the implementation and organisation of the federal immigration and asylum office	Bundesgesetz über die Einrichtung und Organisation des Bundesamtes für Fremdenwesen und Asyl (BFA-Einrichtungsgesetz – BFA-G) idF BGBl. I Nr. 68/2013 StF: BGBl. I Nr. 87/2012	BFA-Einrichtungsgesetz <b>(BFA-G)</b>	< <a href="http://bit.ly/1Fom1KY">http://bit.ly/1Fom1KY</a> > (DE)
Federal administrative court Act Amendment of administrative litigation	Bundesverwaltungsgerichtsgesetz – Verwaltungsgerichtsbarkeits-Novelle 2012	<b>BVwGG</b>	< <a href="http://bit.ly/1FWUFj1">http://bit.ly/1FWUFj1</a> > (DE)
Federal Act on Procedures at Administrative Courts	Bundesgesetz über das Verfahren der Verwaltungsgerichte StF: BGBl. I Nr. 33/2013	Verwaltungsgerichtsverfahrensgesetz <b>(VwGVG)</b>	< <a href="http://bit.ly/1REw4mM">http://bit.ly/1REw4mM</a> > (DE)
Agreement of 15 July 2004 between federal state and states under Article 15a of the	Vereinbarung zwischen dem Bund und den Ländern gemäß Art. 15a B-VG über gemeinsame Maßnahmen zur vorübergehenden	Grundversorgungsvereinbarung	< <a href="http://bit.ly/1PYPndj">http://bit.ly/1PYPndj</a> > (DE)

Federal Constitution concerning joint action for the temporary basic provision of aliens in need of help and protection in Austria	Grundversorgung für hilfs- und schutzbedürftige Fremde (Asylwerber, Asylberechtigte, Vertriebene und andere aus rechtlichen oder faktischen Gründen nicht abschiebbare Menschen) in Österreich StF: BGBl. I Nr. 80/2004		
Federal Act to regulate the basic care of asylum seekers in the admission procedure and certain other foreigners	Bundesgesetz, mit dem die Grundversorgung von Asylwerbern im Zulassungsverfahren und bestimmten anderen Fremden geregelt wird  StF: BGBl. I Nr. 405/1991	Grundversorgungsgesetz - Bund 2005 ( <b>GVGB</b> )	< <a href="http://bit.ly/1JdmHcw">http://bit.ly/1JdmHcw</a> > (DE)

#### Main implementing decrees and administrative guidelines and regulations relevant to asylum procedures, reception conditions and detention

Title (EN)	Original Title (DE)	Abbreviation	Web Link
Ordinance by the federal minister of internal affairs concerning the advisory board on the operation of Country of Origin Information	Verordnung der Bundesministerin für Inneres über den Beirat für die Führung der Staatendokumentation StF: BGBl. II Nr. 413/2005	Staatendokumentation sbeirat-Verordnung	< <a href="http://bit.ly/1BBLaAf">http://bit.ly/1BBLaAf</a> > (DE)
Ordinance by the federal government, concerning the determination of countries as safe countries of origin	Verordnung der Bundesregierung, mit der Staaten als sichere Herkunftsstaaten festgelegt werden StF: BGBl. II Nr. 177/2009	Herkunftsstaaten-Verordnung ( <b>HStV</b> )	< <a href="http://bit.ly/1K3OqeM">http://bit.ly/1K3OqeM</a> > (DE)
Ordinance of the federal minister of internal affairs, for the application of the Asylum Law 2005	Verordnung der Bundesministerin für Inneres zur Durchführung des Asylgesetzes 2005	Asylgesetz-Durchführungsverordnung 2005 ( <b>AsylIG-DV 2005</b> )	< <a href="http://bit.ly/1K3OqM2">http://bit.ly/1K3OqM2</a> > (DE) < <a href="http://bit.ly/1FWUTGD">http://bit.ly/1FWUTGD</a> > (DE)
Ordinance of the federal minister of internal affairs, concerning the prohibition of unauthorised entry and stay in federal care facilities	Verordnung der Bundesministerin für Inneres, mit der das unbefugte Betreten und der unbefugte Aufenthalt in den Betreuungseinrichtungen des Bundes verboten wird 2005 StF: BGBl. II Nr. 2/2005	Betreuungseinrichtungen-Betreuungsverordnung 2005 ( <b>BEBV</b> )	< <a href="http://bit.ly/1FombIG">http://bit.ly/1FombIG</a> > (DE)
Ordinance of the federal minister of internal affairs, concerning the arrest of persons by the security authorities and elements of the public security service	Verordnung der Bundesministerin für Inneres über die Anhaltung von Menschen durch die Sicherheitsbehörden und Organe des öffentlichen Sicherheitsdienstes StF: BGBl. II Nr. 128/1999	Anhalteordnung ( <b>AnhO</b> )	< <a href="http://bit.ly/1AEPtA9">http://bit.ly/1AEPtA9</a> > (DE)
Remuneration for legal advice in appeal procedures at the asylum court	Entgelte für die Rechtsberatung in Beschwerdeverfahren vor dem Asylgerichtshof		< <a href="http://bit.ly/110hAMx">http://bit.ly/110hAMx</a> > (DE)

Ordinance of the minister of internal affairs on the determination of remuneration for legal advice	Verordnung der Bundesministerin für Inneres über die Festlegung von Entschädigungen für die Rechtsberatung		<a href="http://bit.ly/1FOrP2P">&lt;http://bit.ly/1FOrP2P&gt;</a> (DE) <a href="http://bit.ly/1ENcXOh">&lt;http://bit.ly/1ENcXOh&gt;</a> (DE)
---	--	--	--

## Overview of the main changes since the previous report update

The report was previously updated in **December 2014**.

- Legal amendments transposing the recast Reception Conditions Directive and recast Asylum Procedures Directive entered into effect on 20 July 2015. This reform has brought about a number of changes:

### *Procedure*

- Asylum applications must be submitted at police stations. Since the summer of 2015, some offices of the public security service are designated to conduct the first interrogation (*Erstbefragung*) in the asylum procedure. The application is regarded as submitted with the instruction of the Federal Agency for Immigration and Asylum (BFA) on the further steps in the procedure (admission to regular procedure or admissibility procedure).
- Asylum or subsidiary protection shall be adjudged *ex officio* without further procedure when Austria's obligations under international law so require.
- The new dispersal system started with delay. According to the legal amendment, the dispersal centres (*Verteilungsquartiere*, VQ) in seven federal states should have opened on 20 July 2015. Asylum seekers shall be transferred to these dispersal centres instead of going to the first reception centres (*Erstaufnahmestellen*, EAST) in Traiskirchen and Thalham. The obligation to stay in the initial reception centre (EAST) has been removed. Asylum seekers whose application is regarded as likely to be inadmissible shall be transferred to the initial reception centres.
- All unaccompanied minor asylum seekers shall be transferred to the EAST and have their first interrogation at the EAST in Traiskirchen.
- If asylum seekers do not comply with their obligations in the asylum procedure, they may be fined by the BFA. This may affect the confidence of the asylum seeker in the impartiality of the authority.
- Free legal advice will now also be available if the asylum application is rejected as a subsequent application.
- The ECtHR issued two Rule 39 decisions to halt the transfer of asylum seekers to Hungary. The Administrative High Court found that the vulnerable asylum seekers should not be sent back to Hungary unless she guarantees treatment in line with human rights standards.

### *Reception conditions*

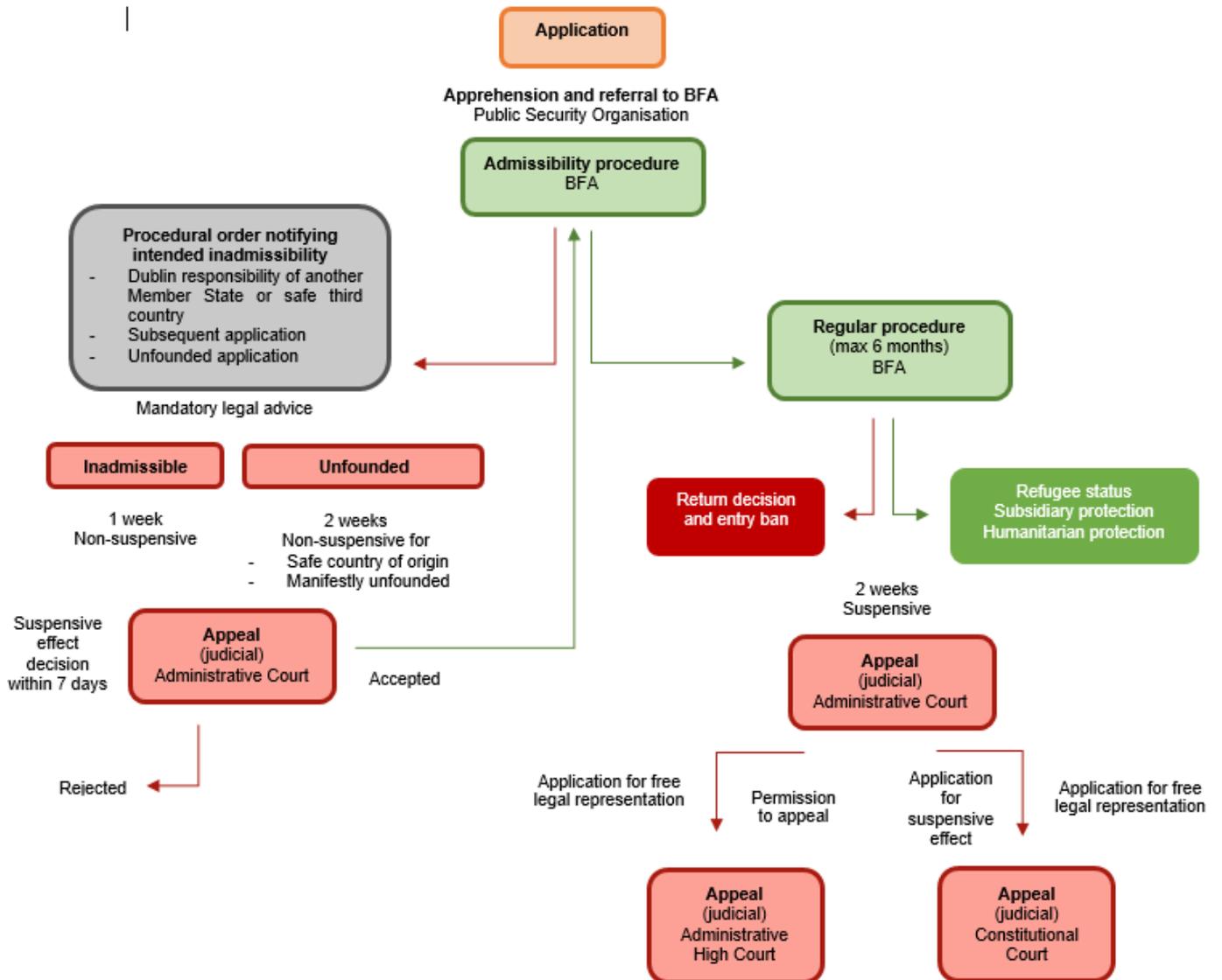
- To implement the legal safeguards of the recast Reception Conditions Directive free legal advice will be available in case of reduction or withdrawal of reception conditions in the reception centres of the Ministry of Interior and several federal states. Legal advisers shall be present in hearings at the court. Although the wording of the law is not clear, it could mean that the legal adviser will represent the asylum seeker in court hearings if they agree to.
- The Ministry of Interior opened several emergency camps. In some of these camps care is provided by volunteers, the Red Cross and other charity organisations. Some places, so-called collection centres (*Sammelstellen*) were opened near the Eastern border under control of the police. These police stations do not serve as regular reception centres for asylum seekers.

- During the last weeks, namely since 5 September 2015, thousands of refugees transited through Austria. Trains from Hungary to Austria and to Germany were stopped and highways temporarily closed due to security reasons. Refugees entering from Hungary are assisted to continue their route to Germany. For those applying for asylum in Austria it is difficult to submit the application and get a regular place in a reception centre.
- The Ministry of Interior agreed with the Slovakian government that 500 asylum seekers may be transferred to Gabčíkovo while their asylum application is processed in Austria. The first transfers took place at the end of September 2015. According to information from the director of the BFA these asylum seekers have tolerated stay in Slovakia and will have assistance to return to Austria if they have to come to hearings at the BFA or if they get a positive decision.

# Asylum Procedure

## A. General

### 1. Flow chart



## 2. Types of procedures

### Indicators: Types of Procedures

Which types of procedures exist in your country?

- |   |   |                             |
|---|---|-----------------------------|
| ❖ Regular procedure:                    | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ▪ Prioritised examination: <sup>4</sup> | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ▪ Fast-track processing: <sup>5</sup>   | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ❖ Dublin procedure:                     | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ❖ Admissibility procedure:              | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ❖ Border procedure:                     | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ❖ Accelerated procedure: <sup>6</sup>   | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ❖ Other: Family procedure               |   |                             |

Are any of the procedures that are foreseen in the law, not being applied in practice?  Yes  No

## 3. List of authorities intervening in each stage of the procedure

Stage of the procedure	Competent authority in EN	Competent authority in original language (DE)
Application at the border	Aliens Police	Fremdenpolizei
Application on the territory	Aliens Police	Fremdenpolizei
Dublin (responsibility assessment)	Federal Agency for Immigration and Asylum	Bundesamt für Fremdenwesen und Asyl ( <b>BFA</b> )
Refugee status determination	Federal Agency for Immigration and Asylum	Bundesamt für Fremdenwesen und Asyl ( <b>BFA</b> )
First appeal	Federal Administrative Court	Bundesverwaltungsgericht ( <b>BVwG</b> )
Second (onward) appeal	Administrative High Court Constitutional Court	Verwaltungsgerichtshof ( <b>VwGH</b> ) Verfassungsgerichtshof ( <b>VfGH</b> )

## 4. Number of staff and nature of the first instance authority

Name in English	Number of staff	Ministry responsible	Is there any political interference possible by the responsible Minister with the decision making in individual cases by the first instance authority?
Federal Agency for Immigration and Asylum (BFA)	Approx. 750 staff including administration, Dublin-Unit, COI, administration of Basic Care	Ministry of Interior	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

<sup>4</sup> For applications likely to be well-founded or made by vulnerable applicants. See Article 31(7) APD.

<sup>5</sup> Accelerating the processing of specific caseloads as part of the regular procedure.

<sup>6</sup> Labelled as “accelerated procedure” in national law. See Article 31(8) APD.

## 5. Short overview of the asylum procedure

Asylum and aliens law procedures are administrative procedures. For these procedures, the General Administrative Procedures Act applies (**AVG**). The Asylum Act (**AsyIG**) and the Aliens Police Act (**FPG**), however, contain a number of special procedural rules which regulate asylum and aliens law proceedings.

The Federal Agency for Immigration and Asylum (“*Bundesamt für Fremdenwesen und Asyl*”) (**BFA**) is responsible for deciding as the first instance authority in asylum procedures. As of 1 January 2014, a reform of administrative procedures renders the new Federal Agency for Immigration and Asylum responsible for asylum applications, residence permits on exceptional humanitarian grounds and certain Aliens’ Police proceedings. The Federal Asylum Court, which was established in 2008 as the second instance authority in asylum procedures, is replaced by the Federal Administrative Court (“*Bundewertungsgericht*”) (**BVwG**). The procedure before the Court is also regulated by the Asylum Act, by the General Administrative Procedures Act and the Federal Administrative Court Act.<sup>7</sup>

The Asylum Act contains norms on the granting of international protection, expulsion procedures in connection with the rejection or dismissal of applications, provisions on the rejection of applications due to the existence of a safe third country or to the responsibility of another state according to the Dublin Regulation, norms on family reunification procedures and on airport procedures.

The Asylum Act provides for a single procedure for applications for international protection. If such an application is lodged, the authorities have to decide whether the application is to be rejected on account of safety in a third country or the responsibility of another State. In the first stage of the procedure – called admissibility procedure – the authorities have to decide on the admissibility of the application. If the application is declared admissible, the authorities decide whether the person is to be granted refugee status. Only where an application for asylum is rejected on the merits do the authorities have to grant subsidiary protection if the person qualifies for that status. A separate application for subsidiary protection is not possible.

Appeals to the Federal Administrative Court are possible against a decision rejecting the asylum application as inadmissible and also against a decision rejecting the application on the merits. The Act on procedures at the Federal Office for Immigration and Asylum (**BGA-VG**) regulates the appeal and its effects. Suspensive effect is foreseen in merits procedures, while an appeal against a decision rejecting an application as inadmissible does not have suspensive effect and has to be submitted within one week. Suspensive effect may be granted by the Court to an appeal against an expulsion order issued together with a decision rejecting the asylum application as inadmissible. Appeals against the decision rejecting the asylum application on the merits have to be submitted within two weeks and have suspensive effect unless the BFA does not allow for the appeal to have suspensive effect.

Article 18(1) BFA-VG provides a number of grounds for not allowing suspensive effect. These include, *inter alia*, the applicant’s attempt to deceive the BFA concerning their true identity or nationality or the authenticity of their documents, the lack of reasons for persecution, if the allegations made by the asylum seeker concerning the danger they face are manifestly unfounded or if an enforceable deportation order and an enforceable entry ban was issued against the asylum seeker prior to the lodging of the application for international protection.

However, the Court may grant suspensive effect if there would otherwise be a risk of violation of the *non-refoulement* principle. The Court has to grant suspensive effect if an appeal is lodged against an expulsion order issued together with a decision rejecting the asylum application as inadmissible, if it can be assumed

---

<sup>7</sup> See the section on Overview of the legal framework above.

that the decision to refuse entry to the alien at the border and forcible return or deportation to the country to which the expulsion order applies would constitute a real risk of violation of the principle of *non-refoulement* according to Austria's international obligations, or would represent a serious threat to their life or person by reason of indiscriminate violence in situations of international or internal conflict.

Together with the decision to reject the application for international protection, an expulsion order must be issued, unless reasons related to the right to family and private life according to Article 8 ECHR prevail over public interest and order.

The evidential requirements are the same for refugee and subsidiary protection status. In appeal procedures before the Court, new facts and evidence may only be submitted in the following cases: if the grounds on which the first instance negative decision was based have undergone any material change; if the first instance procedure was irregular (e.g. if the right to be heard about the findings of the BFA was not respected, or if outdated country of origin information was used or evidence is missing to substantiate the reasoning of the BFA); if such new facts and evidence were not accessible earlier or if the asylum seeker had been unable to submit such new facts and evidence.<sup>8</sup> Decisions of the Court are issued in the form of judgments and all other decisions, such as those allowing the appeal to have suspensive effect, the rejection of an appeal because it was lodged too late, or on the continuation of an asylum procedures that was discontinued (i.e. decisions on procedural issues), are issued in the form of resolutions.

The appeal to the Administrative High Court ("*Verwaltungsgerichtshof*") (**VwGH**) is reintroduced as of 1 January 2014 after 6 years of almost no leading decisions from the High Courts. The BVwG may decide that the rejection of the application can be appealed to the Administrative High Court. This possibility is foreseen if a decision on the case depends on a leading decision, e.g. if the Administrative Court's decision is not based on a previous decision of the Administrative High Court. If the BVwG does not allow the appeal, the asylum seeker may demand an extraordinary remedy. This new system will improve the VwGH's competence in asylum procedures. The (former) Asylum Court had not submitted any requests for leading decisions to the Administrative High Court from 2008 to 2013.

Appeals to the Federal Constitutional Court ("*Verfassungsgerichtshof*") (**VfGH**) may be lodged in instances where the applicant claims a violation of a right guaranteed by constitutional law.

## B. Procedures

### 1. Registration of the asylum application

#### Indicators: Registration

1. Are specific time-limits laid down in law for asylum seekers to lodge their application?  Yes  No
2. If so, what is the time-limit for lodging an application?
3. Are there any reports (NGO reports, media, testimonies, etc.) of people refused entry at the border and returned without examination of their protection needs?  Yes  No

An application for international protection can be made to an agent of the public security service or a security authority. The application is submitted with the instruction of the branch office of the BFA to the police on the next steps. This could be the transfer of the applicant to the initial reception centre by the security authorities. Asylum seekers may otherwise be transferred to a dispersal centre (VQ) or helped to go there. Within a period of 48 hours after apprehension by the security authority – that may be extended

<sup>8</sup> Article 20 BFA-VG.

to 72 hours – after the request was made, the first interrogation (*Erstbefragung*) has to take place.<sup>9</sup> All documents, including the minutes of the first interrogation, are sent to the asylum authorities, which will have to continue the procedure with the interview. The application is registered as soon as the security authorities have submitted the minutes of the interrogation and all the documents of the asylum seekers to the BFA's branch office. In practice, however, after the summer of 2015 there have been serious delays in the conduct of the first interrogation by the police, with several asylum seekers receiving an appointment for the *Erstbefragung* 3 months after expressing their intention to apply for asylum.

Persons with legal stay (residence permit) must submit their asylum application at the public security service too. The BFA orders to show up before the branch office within 14 calendar days. Otherwise, the application will be terminated as being no longer relevant.

Parents apply for their underage children at the branch office of the BFA.

### Refusals of entry at the Austrian-Italian border

Approximately 5,000 refugees were apprehended at the Austrian-Italian border in the region of Tyrol in 2014, the Italian police stated.<sup>10</sup> They were mainly from Syria and Eritrea and wanted to reunite with relatives in Northern Europe, according to a report by the organisation "Volontarius".<sup>11</sup>

In 2015, Italy, Germany and Austria agreed to common police controls in trains from Italy to Germany between the train stations **Trentino** and **Brenner**. Refugees without valid travel documents have to leave the train in Bozen. The government of South-Tyrol installed a centre for refugees at the railway station at the Austrian-Italian border of Brenner.<sup>12</sup> Italy started in June 2015 with border controls, the newspaper Der Spiegel reported. The Italian police reacted to a request from Germany.

## 2. Regular procedure

### 2.1. General (scope, time limits)

#### Indicators: Regular Procedure: General

- |  |   |
|--|---|
| 1. Time-limit set in law for the determining authority to make a decision on the asylum application at first instance:     | 6 months  |
| 2. Are detailed reasons for the rejection at first instance of an asylum application shared with the applicant in writing? | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |
| 3. Backlog of pending cases as of 31 October 2015:   | Not available   |

The Federal Agency for Immigration and Asylum (BFA) is a specific department of the Ministry of interior, dealing with asylum matters. From 2014 onwards, the tasks of the Agency are extended to cover some Aliens' Law procedures.

According to the General Administrative Procedures Act (AVG), decisions have to be taken within 6 months after the application has been submitted. Within 20 calendar days, the BFA has to decide whether it intends to reject the application as inadmissible due to the responsibility of another Member State under Dublin, the existence of a safe third country or for being a subsequent asylum application, or to dismiss

<sup>9</sup> Article 29(2) AsylG.

<sup>10</sup> ORF Tirol, '5.000 Flüchtlinge am Brenner zurückgeschickt (5,000 refugees returned at Brenner)', 4 January 2015, available at: <http://bit.ly/1FoG1x4>.

<sup>11</sup> Der Spiegel, 'Flüchtlingskrise: Italien will Grenze am Brenner wieder kontrollieren', 2 September 2015, available at: <http://bit.ly/1jViC1Y>.

<sup>12</sup> ORF, 'Kritik an österreichischen Grenzkontrollen', 22 April 2015, available at: <http://bit.ly/1ILWXF1>.

the application for other reasons. If no procedural order is notified to the asylum seeker within 20 days, the asylum application is admitted to the regular procedure – except in Dublin cases if requests to other Member States to take charge or take back the asylum seeker are made within this time frame.

On 31 December 2013, 915 asylum applications were pending at first instance for more than 1 year, while 77 were pending for even longer than 5 years.<sup>13</sup> Information for 2014 and 2015 is not made available.

Numbers for asylum applications not decided within 6 months by the Federal Administrative Court are not available. Information on the average duration of applications is not available either. Minister of interior, Johanna Mikl-Leitner stated that Austria is “the asylum-express” compared to other EU states.<sup>14</sup> In a press conference on 3 June 2015, assisted by the director of the BFA, she announced that asylum procedures are decided within 4 months in first instance. NGOs have doubts as to whether this statement is based on statistics.

At the same time the Ministry stopped the processing of new asylum applications and put priority on Dublin procedures.<sup>15</sup> According to experience of NGOs, asylum seekers often wait more than 6 months for an appointment for the first interview. Only a few years ago it was frequent for appeals to be pending for several years; now most of the cases are decided within one year.<sup>16</sup> The number of pending cases at the Court has decreased. The Ombudsman reports that, in the year 2013, the number of complaints regarding prolonged asylum applications increased, however. The explanations of the Ministry of Interior for the delay in the concrete cases were not convincing, the Ombudsman stated.<sup>17</sup>

With regard to delays in the Asylum Court (now replaced by the BVwG), the Ombudsman received 683 complaints, 574 of which were declared to be well-founded. 350 appeals are still pending from 2012, 146 since 2011, and 79 since 2010. In 22 cases, no decision had been taken since the lodging of the complaint in 2009 and 9 appeals were pending since 2008.

In case of delay of the BFA beyond 6 months, the asylum seeker may apply for devolution, upon which the file will be rendered to the Federal Administrative Court for a decision. However, in practice asylum seekers do not frequently apply for such devolution, as they miss a chance of receiving a positive decision at first instance (by the BFA). In the case of a delay of the Federal Administrative Court, a complaint may be addressed to the Administrative High Court.

## 2.2. Fast-track processing

The time limit for decisions for the BFA and the Federal Administrative Court are reduced to 3 months in case the asylum seeker is detained pending deportation.<sup>18</sup> The same maximum time limit applies to the “procedure for the initiation of a measure terminating residence” (see the section on Accelerated Procedure below).

Moreover, there is a national practice of fast-track processing of cases from certain countries of origin which do *not* fall within the scope of the “safe countries of origin” list and the accelerated procedure. These fast-track procedures are usually decided in the field office of the BFA Traiskirchen during the stay of the asylum seekers in the initial reception centre Traiskirchen. The procedure for asylum seekers who come

---

<sup>13</sup> Answer of the Minister of Interior Mikl-Leitner to a parliamentary request, 306/AB XXV. GP, 18 February 2014.

<sup>14</sup> OVP, ‘Mikl-Leitner zu Flüchtlingen: Asylexpress stoppen, Österreich entlasten’, available in German at: <http://bit.ly/1P0deHS>.

<sup>15</sup> Kurier, ‘Mikl-Leitner: Konzentration auf Dublin Fälle’ 3 June 2015, available in German at: <http://bit.ly/1SVCJZO>.

<sup>16</sup> Asylum Court, *Report of the Asylum Court 2012*, 3 states that 75% of cases were decided within one year.

<sup>17</sup> Austrian Ombudsman, *Report of the Ombudsman to the Parliament and the Federal Council 2013*, April 2014, 188.

<sup>18</sup> Article 22(6) AsylG.

from a specific country of origin in practice often takes less than a week until a rejection decision is issued. This so-called fast track procedure is a political decision to process asylum applicants, usually from a certain country of origin and during a certain period, through such fast procedures, in order to discourage other potential asylum applicants from that country from applying for asylum in Austria.<sup>19</sup> The asylum applicant has, during that time, the same rights as any other asylum applicant in a procedure based on merits, but will receive the negative decision from the BFA immediately after the interview, usually within 1 or 2 weeks instead of within around 6 to 9 months.

The last notable wave of fast track procedures started in the summer of 2011 and lasted about 5 months, and concerned asylum applicants from Afghanistan, Pakistan and Bangladesh. These procedures were even prioritised by the Asylum Court (now BVwG).

In relation to refugees from Syria that will be resettled in Austria, the Ministry of Interior announced that they will be granted asylum immediately upon arrival (*asylum ex officio*). In 2014, most of the resettled refugees received refugee status within a few days. Some Syrian refugees who arrived individually in the last months quickly received positive decisions, but others are waiting for several months for the interview on their case. These delays resulted in uprisings and a hunger strike.<sup>20</sup>

### 2.3. Personal interview

#### Indicators: Regular Procedure: Personal Interview

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the regular procedure?  Yes  No
  - ❖ If so, are interpreters available in practice, for interviews?  Yes  No
2. In the regular procedure, is the interview conducted by the authority responsible for taking the decision?<sup>21</sup>  Yes  No
3. Are interviews conducted through video conferencing?  Frequently  Rarely  Never

All asylum seekers must have one personal interview. Asylum seekers are subjected to an interrogation by the public security service shortly after lodging the application.<sup>22</sup> Such interrogation is conducted in particular with a view to ascertaining the identity of the asylum seeker and the travel route. Such interrogation shall not refer to the specific reasons for fleeing and lodging an asylum application. In practice, statements of the asylum seeker in this part of the admissibility procedure are accorded increased credibility, notwithstanding the fact that the interrogation is conducted by the police and not by the person responsible for the decision. The Constitutional Court ruled that the provision protects asylum seekers who may arrive exhausted and should therefore not be interrogated about their possibly traumatising reasons for flight by uniformed security officers.<sup>23</sup>

Asylum seekers may be accompanied by a person they trust (person of confidence). Unaccompanied children must not be interviewed without the presence of their legal representative.

<sup>19</sup> See for example. Ministry of Interior, Johanna Mikl-Leitner explained during the parliamentary hearing on 30 October 2012: *“Bei Personen, die aus Drittstaaten kommen, im Speziellen aus den Balkanländern, wissen wir, dass es keine Asylgründe gibt, und da sind wir zu Schnellverfahren übergegangen,”* (“We know from persons coming from third countries, especially from Balkan countries, that grounds for asylum do not exist in their case, and we therefore changed to accelerated procedures”).

<sup>20</sup> C Krebs, ‘Burgenland: Asylwerber im Hungerstreik (Asylum seekers in hungerstrike)’, *ORF Morgenjournal* 25 February 2014, available at: <http://oe1.orf.at/artikel/367749>; ORF Tirol, ‘Flüchtlinge: Langes Warten auf Bescheide (Refugees: waiting long for decisions)’, 18 February 2014, available at: <http://bit.ly/1QEeX5k>; Oberösterreichische Nachrichten: Angst um die Familien: Syrer im Hungerstreik, 25. November 2014 (*Fear for the family: Syrians in hunger strike*), available at: <http://bit.ly/11RHfo3>.

<sup>21</sup> However, the official conducting the interview is no longer responsible for the decision.

<sup>22</sup> Article 19 AsylG.

<sup>23</sup> VfGH, U 98/12, 27 June 2012.

If the asylum seeker's fear of persecution is based on infringement of the right to sexual self-determination, they shall be interviewed by an official of the same sex unless they request otherwise. The authorities must prove that they have informed the asylum seeker of such possibility.<sup>24</sup> In practice, this is not consistently applied with regard to interpreters. In the appeal procedure, infringements of the right to sexual self-determination have to be expressed in the written appeal in order to have the hearing at the Court held by a judge of the same sex. The Constitutional Court ruled that UNHCR guidelines have to be applied to male asylum seekers accordingly.<sup>25</sup>

Interpreters are provided by the BFA. Interpreters are available for most languages of the countries of origin, but interviews may also be conducted in a language the asylum seeker is deemed to understand sufficiently. With regard to countries with higher numbers of asylum seekers this practice is not satisfactory (e.g. Chechen refugees are often interviewed in Russian). Asylum seekers from African countries are often interviewed in English or French, languages they are supposed to understand. Asylum seekers are asked at the beginning of the interview if they understand the interpreter. There are no standards for the qualification of interpreters in asylum procedures. Interpretation is often not done by accredited interpreters; usually persons with the requested language knowledge are contracted on a case-by-case basis.

Article 19(3) AsylG allows for tape recording of the interview, which is, however, rarely used in practice. Video conferencing is not foreseen in law.

The transcript is more or less verbatim. Its content may depend on the interpreter's summarising the answers, choosing expressions that fit for the transcript or translating each sentence of the asylum seeker. Immediately after the interview, the transcript is translated in a language the asylum seeker understands and the asylum seeker has the possibility to ask for corrections and completion immediately after the interview. By signing the transcript, they agree with the content. If asylum seekers find something incorrect in the transcript after having signed it at the end of the interview, they should send a written statement to the BFA as soon as possible. In practice, asylum seekers do not frequently ask immediately after the interview for correction of the report. Some asylum seekers explain that they were too tired to be able to follow the translation of the transcript. Asylum seekers often realise that mistakes in the translation or the transcript were made when they receive a negative first instance decision and a legal adviser explains them the details of the transcript.

## 2.4. Appeal

### Indicators: Regular Procedure: Appeal

- |   |  |   |
|---|--|---|
| 1. Does the law provide for an appeal against the first instance decision in the regular procedure? | <input checked="" type="checkbox"/> Yes      | <input type="checkbox"/> No             |
| ❖ If yes, is it   | <input checked="" type="checkbox"/> Judicial | <input type="checkbox"/> Administrative |
| ❖ If yes, is it suspensive  | <input checked="" type="checkbox"/> Yes      | <input type="checkbox"/> No             |
| 2. Average processing time for the appeal body to make a decision:                                  | Not available                                |   |

Appeals against a negative first instance decision have to be submitted within 2 weeks of the receipt of the decision and the whole file is forwarded by the BFA to the Federal Administrative Court (BVwG).<sup>26</sup> The deadline for filing an appeal is 4 weeks where the appellant is an unaccompanied child.<sup>27</sup> The BFA

<sup>24</sup> Article 20 AsylG.

<sup>25</sup> VfGH, U 1674/12, 12 March 2013 mentions Conclusions Nr. 64 (XLI) and Nr. 73 (XLIV) of the Executive Committee of UNHCR. The Asylum Court decided by a male and female judge and its decision was thus unlawful.

<sup>26</sup> Article 16(1) BFA-VG.

<sup>27</sup> Article 16(1) BFA-VG in connection with Art.7 (4) Administrative Court procedures law (VwG –VG).

may make a pre-decision of the appeal within 2 months.<sup>28</sup> This pre-decision may change the decision in any direction (annul, reject or change the decision). The BFA, however, may refrain from deciding and forward the appeal to the Court.

In case refugee status or subsidiary protection status is not granted, the asylum applicant will be assigned a free legal adviser provided by the state at the time of notification of the decision (see the section on Legal Assistance below).

Article 18(1) BFA-VG provides that suspensive effect *may* be withdrawn by the BFA where the application is manifestly unfounded, i.e. where:

- (1) The applicant comes from a safe country of origin;
- (2) Has already been resident in Austria for at least 3 months prior to the lodging of the application;
- (3) The applicant has attempted to deceive the BFA concerning their true identity or nationality or the authenticity of their documents;
- (4) The asylum seeker has not adduced any reasons for persecution;
- (5) The allegations made by the asylum seeker concerning the danger they face clearly do not correspond with reality; or
- (6) An enforceable deportation order or an enforceable entry ban was issued against the asylum seeker prior to the lodging of the application for international protection.

Moreover, the BFA *must* withdraw the suspensive effect of an appeal where:<sup>29</sup>

- (1) The immediate departure of the third-country national is required for reasons of public policy or public security;
- (2) The third-country national has violated an entry ban and has returned to Austrian territory; or
- (3) There is a risk of absconding.

The BVwG must grant suspensive effect within 1 week from the lodging of the appeal, where it assumes that return would expose the person to a real risk of a violation of Articles 2, 3 and 8 ECHR or Protocols 6 or 13 ECHR, or to a serious threat to life or person by reason of indiscriminate violence in situations of conflict in line with Article 15(c) of the Qualification Directive.<sup>30</sup> Appeals against the rejection of an application with suspensive effect have to be ruled by the Court within 8 weeks.<sup>31</sup> The asylum appeal has suspensive effect as long as the case is pending in court.

If the asylum applicant lodges an appeal against the BFA's decision, the appeal is heard by the BVwG. The Federal Administrative Court is organised in chambers, each of which is responsible for certain groups of countries. The BVwG can call for another hearing and additional examinations if necessary. Most of the judges of the BVwG previously worked at the Asylum Court, before it was replaced.

The Administrative Court has only limited competence of review, determined by the content of the appeal. In the view of the Federal Administrative Court and in relation to this link to the grounds and argumentation of the appeal that limits the subject of the appeal, it is necessary to accept an appeal with at least rudimentary grounds during the time-limit, in order to handle the appeal at all. An appeal lacking any argumentation or ground is not to be accepted for a process of improvement and has to be rejected immediately.<sup>32</sup>

The BFA-VG allows exceptions from the principle that a hearing shall take place on the appeal. Such hearing must indeed not be held if the facts seem to be established from the case file and appeal

---

<sup>28</sup> Article 14(1) Administrative Court procedures law (VwG-VG).

<sup>29</sup> Article 18(2) BFA-VG.

<sup>30</sup> Articles 17(1) and 18(5) BFA-VG.

<sup>31</sup> Article 17(2) BFA-VG.

<sup>32</sup> BVwG, W208 2007345-1, 22 May 2014, available at: <http://bit.ly/1FOK1th>.

submission or if it is established that the submission of the applicant does not correspond with the facts.<sup>33</sup> This provision must be read in light of the restrictions on the submission of new facts in the appeal procedure.

The question whether a personal hearing before the Asylum Court (now replaced by the BVwG) has to take place or not has been brought before the Constitutional Court (VfGH). The Court ruled that not holding a personal hearing in the appeal procedure does not violate Article 47(2) of the EU Charter of Fundamental Rights; Charter rights may be pleaded before the Constitutional Court. The Court stated that Article 41(7) AsylG<sup>34</sup> is in line with Article 47(2) of the EU Charter if the applicant was heard in the administrative procedure.<sup>35</sup> However, recent rulings of the Administrative High Court and the Constitutional Court have conversely specified the obligation of the Administrative Court to conduct a personal hearing. In the case of an Afghan asylum seeker, the Administrative Court had confirmed the first instance decision which found the asylum seeker's application to be lacking credibility due to discrepancies in statements about his age. The Constitutional Court ruled that, by deciding without a personal hearing, the Administrative Court had violated the right laid down in Article 47(2) of the EU Charter.<sup>36</sup> Two rulings to the same effect were delivered by the Constitutional Court in September 2014.<sup>37</sup>

The Administrative High Court has specified that all relevant facts have to be assessed by the first instance authorities and have to be up to date at the time of the decision of the court.<sup>38</sup> According to this Court, it was not necessary to explicitly demand an oral hearing if the facts were not sufficiently clear or if the statements of the applicant in his or her appeal contradicted the statements taken by the first instance authority.<sup>39</sup>

The possible outcome of this procedure can be the granting of a status, the refusal of status, or a referral by the BVwG back to the BFA for further investigations and a re-examination of the case. Hearings at the Court are public, but the public may be excluded on certain grounds. Decisions of the Asylum Court and BVwG are published on the legal information website of the Federal Chancellery.<sup>40</sup>

As of 2014, the decision of the BVwG may be appealed before the VfGH. The eligibility to appeal to the VfGH is ruled by the BVwG, but in case the Administrative Court does not allow the regular appeal, the asylum seeker may request for an "extraordinary" revision. For that purpose, the applicant may submit a request for free legal assistance as well as for suspensive effect of the complaint.

In case the asylum applicant seeks to challenge the decision of the BVwG and if they claim it is violating a right that is guaranteed by the constitution, they can appeal to the Constitutional Court within 6 weeks, after the ruling of the Federal Administrative Court has become final. Asylum seekers are informed of the possibility to address a complaint to the Constitutional Court in writing; the information is translated in a language the asylum seeker understands. In that context, it has to be mentioned that the ECHR is a part of Austria's constitutional law. Therefore the risk of violation of Articles 2, 3 or 8 ECHR could be claimed

---

<sup>33</sup> Article 21(7) BFA-VG.

<sup>34</sup> Article 41(7) AsylG corresponds with Article 21(7) BFA-VG.

<sup>35</sup> VfGH, U 466/11-18 and U 1836/11-13, 14 March 2012, available at: <http://bit.ly/1eLj54J>.

<sup>36</sup> VfGH, U 152/13-12, 21 February 2014, available at: <http://bit.ly/1FXmgb6>.

<sup>37</sup> VfGH, U 610/2013, 19 September 2014, available at: <http://bit.ly/1RIQrPN>; U 2529/2013, 22 September 2014, available at: <http://bit.ly/1G4KDfF>. See also K Kessler, 'The right to an oral hearing in Austrian asylum appeal procedures in the light of Article 47(2) of the Charter of Fundamental Rights of the European Union', EDAL, 14 January 2015, available at: <http://bit.ly/1CGfjzK>.

<sup>38</sup> VfGH, Ra 2014/20/0017, 28 May 2014.

<sup>39</sup> VfGH Ro 2014/21/0047, 22 May 2014.

<sup>40</sup> Decisions of the Asylum Court are available at: <http://www.ris.bka.gv.at/Bvwg/>. However, according to the General Administrative Procedures Law, decisions may not be made public if it is necessary for reasons of public order or national security, morality, the protection of children or the private life of the asylum seeker or for the protection of a witness. Decisions of the new Federal Administrative Court (BVwG) are also available at: <http://www.ris.bka.gv.at/Bvwg/>.

at the Constitutional Court, while the refusal of refugee status is not covered by the Court's competence. The appeal does not have automatic suspensive effect. Only very few decisions of the Asylum Court (now BVwG) have been found unlawful by the Constitutional Court, and in those cases mainly because the decision was found extremely arbitrary to the extent that it amounted to being unlawful.

Asylum seekers encounter difficulties to access constitutional appeals due to a submission fee of about €240. Furthermore, asylum seekers are not heard in person before the Constitutional Court, which rather requests written statements from the Asylum Court or BVwG.

## 2.5. Legal assistance

### Indicators: Regular Procedure: Legal Assistance

1. Do asylum seekers have access to free legal assistance at first instance in practice?
  - Yes       With difficulty       No
  - ❖ Does free legal assistance cover:
    - Representation in interview
    - Legal advice
  
2. Do asylum seekers have access to free legal assistance on appeal against a negative decision in practice?
  - Yes       With difficulty       No
  - ❖ Does free legal assistance cover
    - Representation in courts
    - Legal advice

### Legal assistance at first instance

During the regular procedure at the BFA, asylum seekers are offered free legal advice at the branch offices of the BFA. This legal advice is funded by the European Refugee Fund (ERF) and co-funded by the Ministry of Interior. One association, "Verein Menschenrechte Österreich", covers legal advice in 9 out of 10 BFA branch offices. This offer of free legal advice does not meet the needs of asylum seekers, however.

Asylum seekers have to travel to the BFA, which may be difficult when their place of residence is far away from the office or in remote areas. The organisation that receives 89% of the funding for legal assistance in the first instance procedure<sup>41</sup> is not regarded as very helpful or committed to the protection of the rights of asylum seekers due to its cooperation with the Ministry of interior. For instance, the call for ERF proposals mentions that legal advice provision should be organised in cooperation with the authorities. Furthermore, these legal advisers have to inform asylum seekers about voluntary return assistance and send a certain number of asylum seekers to voluntary return projects (which are provided by the same organisation) during the asylum procedure. This funding framework and the activities of the contracted organisation affect the confidence of asylum seekers in the free legal advice offered. Asylum applicants may also opt to contact an NGO offering free legal advice to asylum applicants, but this resource is limited and may not be accessible for asylum seekers living in remote areas.

The tasks are prescribed in the call for ERF proposals: providing information or assistance for administrative or legal formalities and providing information or advice on possible outcomes of the asylum procedure including voluntary return. One of the goals of legal advice must also be to avoid asylum applications without positive perspective. The requirement to provide advice on return as a condition for submitting a project for legal advice under ERF funding has been criticised by NGOs.<sup>42</sup>

<sup>41</sup> Latest figures for ERF 2013.

<sup>42</sup> See Sigrid Pferschinger, *Unabhängige Beratung von AsylwerberInnen in Österreich?*, Diplomarbeit, Wien, August 2011, available at: <http://bit.ly/1IHAbnY>, S 98.

Legal advisers are usually not present during interviews at first instance, except where they are authorised by the asylum seeker for legal representation. According to the information available to Asylkoordination, legal advisers of Verein Menschenrechte Österreich do not accept to act as legal representatives due to a strict interpretation of the contract with the government. Only other organisations or lawyers act as legal representatives for asylum seekers during interviews.

### **Legal assistance at appeal stage**

When a negative decision is issued, a decision providing for the assignment of a legal counselling organisation is also issued. Such organisation must advise the asylum applicant for free. Yet the asylum applicant may also opt to contact an NGO offering free legal advice to asylum applicants.

The system of free legal aid for the appeal was introduced by amendment of the Asylum Act in 2011 and entered into effect on 1 October 2011.<sup>43</sup> Two organisations, Arge Rechtsberatung and Verein Menschenrechte Österreich, are contracted by the Federal Chancellery to give legal advice with regard to the appeal procedure.

The task described by law entails the obligation to provide advice in case of dismissal of the application, but does not include legal representation before the Court. With the latest amendment of the BFA-VG, coming into effect on 20 July 2015, legal advisers shall be present at hearings before the Administrative Court if the asylum seeker wishes so.<sup>44</sup> Although the role of the legal adviser in such a hearing is unclear yet, they may have the role of a legal representative. Asylum seekers may be represented by NGOs<sup>45</sup> or pay themselves for a private lawyer.

Moreover, financial compensation for legal advice ordered by decree seems to be insufficient. The refunding rate per case is €221.55 (excl. VAT) including all other costs (overhead, travel expenses, interpretation). This flat rate is reduced by 25% when the organisation has provided legal advice in Asylum and Aliens Law proceedings in more than 4,001 cases during the year and by 35% when legal advice was provided to more than 7,000 clients.<sup>46</sup> This reduction has been justified with reduced overhead expenses, but this argument is not suitable for the main expenses of legal advice, which are staff, interpreter, and travel expenses. Such reduction bears the risk of the organisation avoiding to get in contact with asylum seekers to keep the number of clients below the mark of 4,000 or 7,000. No extra or increased remuneration is granted for cases that are more time-consuming such as unaccompanied children, abused women or other heavily traumatised asylum seekers, negatively affecting the quality of legal counselling provided accordingly. NGOs have criticised compensation as being too low for providing good standards of legal assistance.<sup>47</sup>

The Council of Europe (CoE) Commissioner for Human Rights Nils Muižnieks found that:

“[W]hile commending that since the last reform of 2011, free legal aid is in principle available for asylum seekers, noted that quality appears to vary. In this regard the allocated fee appears to be a risk factor as it is rather low taking into account that all costs including transportation and translation services must also be covered and no increase is awarded for cases that are potentially more time consuming. Further efforts would be desirable to ensure that free, independent and

---

<sup>43</sup> Federal Law Gazette (BGBl) I Nr. 38/2011.

<sup>44</sup> Article 52(2) BFA-VG.

<sup>45</sup> See e.g. ERF funded project of Caritas Austria, ‘Representation at hearings before the Federal Administrative Court’, available at: <http://bit.ly/1GjTjkk>.

<sup>46</sup> BGBl. II Nr. 320/2011, available at: <http://bit.ly/1dL1VE4>.

<sup>47</sup> Agenda Asyl, ‘Stellungnahme zur Änderung des... Asylgesetzes 2005 (*Comment on the changes to Asylum Law 2005*)’, 28 January 2011, available at: <http://bit.ly/1NkpgcC>; Der Standard, ‘Gute Rechtsberatung wäre doppelt so teuer’ (*Good legal assistance would be twice as expensive*), 9 November 2011, available at: <http://bit.ly/1Jp7y6h>.

confidential legal counselling and representation is ensured during the entire asylum procedure and thereafter, including the deportation procedure.”<sup>48</sup>

Legal advisers do not need to be lawyers or experienced in refugee and asylum law. 3 years of practical experience in foreigner law matters is a sufficient qualification for persons with a University degree other than law, while 5 years of practical experience in foreigner law matters suffice for persons without a University degree.

The system of legal advice does not satisfactorily implement the recast Asylum Procedures Directive,<sup>49</sup> as it is up to the legal advisers to decide whether to help asylum seekers to write an individual appeal (which must be written in German) and assist them with regard to all procedural requests in the appeal procedure, or to provide information only.

Even for the judges of the Administrative Court, the nature of free legal advice seems unclear. In one case the court rejected an appeal as inadmissible. The asylum seeker had submitted the appeal without argumentation and announced that their legal adviser would submit an elaborated appeal as quickly as possible. The court did not allow for an extension of the date to appeal because, in the judge’s view, the asylum seeker had been assisted by a legal representative.<sup>50</sup>

One project run by Caritas Austria, funded by the ERF, offers assistance during the hearing before the Federal Administrative Court, but this resource is limited and therefore only a certain number of cases can be assisted. Besides this free legal advice funded by the state, NGOs help asylum seekers lodging appeals and submitting written statements, accompany them to personal hearings at the Administrative Court and may act as legal representative. However, NGOs cannot represent asylum seekers before the Constitutional Court or the Administrative High Court as this can only be done by an attorney at law.

A merits test with regard to legal assistance at the appeal stage is not foreseen. With the latest amendment of the BFA-VG, legal assistance free of charge is provided in case of the rejection of a subsequent asylum application on *res judicata* grounds too.

The Constitutional Court and the Administrative High Court apply a merits test and tends to refuse free legal aid, if the case has little chances to succeed.

---

<sup>48</sup> CoE Commissioner for Human Rights, *Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Austria from 4 to 6 June 2012*, CommDH(2012)28, 15.

<sup>49</sup> Article 20 recast Asylum Procedures Directive.

<sup>50</sup> BVwG, W208 2007345-1, 22 May 2014, available at: <http://bit.ly/1FOK1th>.

### 3. Dublin

#### 3.1. General

##### Indicators: Dublin: General<sup>51</sup>

1. Number of outgoing requests in 2015 (January-November):	15,594	
Top 3 receiving countries	Hungary	Not available
	Bulgaria	Not available
	Italy	Not available
2. Number of incoming requests in 2015:	4,078	
❖ Top 3 sending countries	Germany	Not available
	Sweden	Not available
	France	Not available
3. Number of outgoing transfers in 2015:	Not available	
❖ Top 3 receiving countries		
4. Number of incoming transfers in 2015:	405	
❖ Top 3 sending countries	Germany	Not available
	Sweden	Not available
	Switzerland	Not available

#### Application of the Dublin criteria

The Dublin Regulation may be triggered if there is a Eurodac hit, if the asylum applicant has a passport with a visa for another Member State of the Dublin III Regulation, if they admit that they entered the European Union via another Member State or if there is any other suspicion or circumstantial evidence which indicates that they entered via another Member State (for instance if a person is caught by the police close to a border or in a certain train coming from another Member State) or any other kind of evidence. Although there are other grounds applicable for determining Member State responsibility under the Dublin III Regulation, these are the most common grounds applied in Austria.

To prove family status – in case family members did not arrive simultaneously in Austria – every asylum applicant must have mentioned the existence of other family members in their respective asylum procedure, i.e. in Austria as well as in the other Member States where they have applied for asylum. Marriage certificates or birth certificates are required on a regular basis. Depending on the country of origin, these documents are surveyed by the Federal Bureau of Criminal Investigation to prove authenticity. DNA tests may be required to provide proof of family links. DNA tests have to be paid by the asylum seeker. If a DNA test has been suggested<sup>52</sup> by the BFA or the Administrative Court and family links have been verified, asylum seekers may demand a refund of the costs from the BFA.

#### The dependent persons and discretionary clauses

##### *Dependent persons*

During a Dublin procedure with Italy, the Federal Administrative Court emphasised that Articles 16 (Dependent persons) and 17 (Discretionary clauses) of the Dublin III Regulation determine separate requirements and cannot be reduced to the meaning of Article 8 ECHR. Italy agreed to the Austrian request to take charge of the asylum application only after Austria made several strong protests due to

<sup>51</sup> Information provided by the BFA to ECRE, December 2015.

<sup>52</sup> It is not possible for the BFA to impose a DNA test. The authorities have to enable such testing, according to Article 13(4) BFA-VG.

the fact that Italy had already issued a Schengen visa. The asylum seeker in question was over 60 years old and, because of his Chechen origin, considered to be very old. In addition, the asylum seeker suffered from a serious illness and a disability which suggested that he relied on support from his son who is legally residing in Austria. The Administrative Court found the decision unlawful and reverted the case back to the first instance authority because Article 16(1) of the Regulation had not been sufficiently considered by that authority. The Court noted, in addition, that Article 17(2) could also be relevant in this case because, due to Chechen culture, the support of the son for his old parents is more likely to be accepted than foreign support.<sup>53</sup>

This argumentation can be found in another decision of the Court in the case of a single Afghan mother who sought asylum with a small child and a new-born baby. She had been raped and was suicidal. The judgment held that the authorities should examine which female relatives, living in Austria as recognised refugees, could support her by taking care of the children. Furthermore, the help of females of a family among themselves could be preferred to foreign support based on the applicant's cultural background.<sup>54</sup> The same argumentation led to the withdrawal of a Dublin decision regarding an Egyptian asylum seeker whose sister required support for her five under-age children after the death of her husband.<sup>55</sup>

A further Dublin decision was regarded as unlawful because a Chechen asylum seeker attempted suicide for the second time after enactment of the notice of transfer to Poland. Therefore her demand for care and the willingness of her sister, who is living in Austria with refugee status, to take care of her should be examined. Due to the recommendation by a specialist to refrain from a transfer to Poland, it would also be a possibility to make use of the sovereignty clause.<sup>56</sup>

#### *Humanitarian clause*<sup>57</sup>

Austrian authorities make reference to this clause mostly in cases where the asylum applicant is still in another country and applies for a reunification with relatives in Austria.

#### *Sovereignty clause*<sup>58</sup>

The asylum applicant has the legal right to request the asylum authorities to implement the sovereignty clause. The Constitutional Court has ruled, on the basis of case law from the European Court of Human Rights (ECtHR), that even in case of responsibility of another Member State under the Dublin Regulation, the Austrian authorities are nevertheless bound by the ECHR.<sup>59</sup> This means that, in case of a risk of a violation of human rights, Austria has a duty to use the sovereignty clause. This decision is applicable according to Articles 2 and 3 ECHR as well as Article 8 ECHR following an interpretation consistent with the constitution.

However, the assessment of risks of human rights violation warranting for use of sovereignty clause need be conducted in a manner that does not unreasonably delay the examination of the application. The principle that admissibility procedures should not last too long was reflected in a decision of the Administrative Court. A Chechen family had applied for asylum in Poland, Austria and Switzerland by submitting consecutive applications since 2005. One family member was severely traumatised. Switzerland decided on the merits of the case and issued a deportation order before they re-entered Austria. The Court reverted the procedure back to the Federal Agency for Immigration and Asylum (BFA).

---

<sup>53</sup> BVwG, W149 2009627-1, 21 July 2014, available at: <http://bit.ly/1cwU37K>.

<sup>54</sup> BVwG, W 149 2009673-1, 20 June 2014, available at: <http://bit.ly/1cwU37K>.

<sup>55</sup> BVwG, W149 2001851-1, 3 July 2014, available at: <http://bit.ly/1KLZNcA>.

<sup>56</sup> BVwG, W185 2005878-1, 2 July 2014, available: <http://bit.ly/1M3QKRz>.

<sup>57</sup> Article 17(2) Dublin III Regulation, previously Article 15 Dublin II Regulation.

<sup>58</sup> Article 17(1) Dublin III Regulation, previously Article 3(2) Dublin II Regulation.

<sup>59</sup> VfGH, 237/03, 15 October 2004, VfSlg. 16.122/2001.

The Court found that it would have been necessary to ask for the details of the procedure in Switzerland to prevent indirect violations of Article 3 ECHR through chain deportation. For one family member, the risk of suicide was obvious according to expert statements. The Court, referring to the judgment of the CJEU in the case of *NS & ME*,<sup>60</sup> held that the long duration of the admissibility procedure has to be taken into consideration when determining the Member State responsible for examining the asylum application and that applying a return procedure in such cases might be more effective.<sup>61</sup>

The sovereignty clause has to be applied in the case of very vulnerable asylum seekers to prevent violations of Article 3 ECHR (Article 4 EU Charter). In the case of a refugee from Syria who arrived in Italy in 2013, where he was fingerprinted, but immediately continued to Austria, the Administrative Court agreed that the situation in his country of origin and his state of worry and uncertainty regarding his wife and three small children led to an exceptional psychological state with the consequence of several stays in hospital.<sup>62</sup>

In September 2015, in the case of an Afghan mother with 6 minor children had applied for asylum in Hungary in September 2014 and shortly after in Austria too, the Administrative High Court ruled, that due to the change of the situation in Hungary, the presumption of safety is rebutted. The BVwG should have answered the question, whether systemic deficiencies exist in Hungary, and the sovereignty clause should be applied to prevent a violation of Article 3 ECHR / Article 4 of the EU Charter.<sup>63</sup>

### 3.2. Procedure

#### Indicators: Dublin: Procedure

1. On average, how long does a transfer take after the responsible Member State has accepted responsibility? 2-3 months

Austria has not passed any national legislation to incorporate the Dublin III Regulation, as it is directly applicable, but refers to it in Article 5 AsylG. This provision states that the authorities issue an inadmissibility decision when Austria is not responsible for conducting the asylum procedure based on the Dublin III Regulation.<sup>64</sup> In the same decision, the authorities have to declare which Member State is responsible for the examination of the asylum application on its merits.

The law also states that there should also be an inadmissibility decision in case another Member State is responsible for identifying which Member State is responsible for the examination of the asylum application on its merits, that is in cases where the applicant is no longer on Austrian territory.<sup>65</sup>

There are 3 EAST which are responsible for the admission procedure: one located in Traiskirchen near Vienna, one in Thalham in Upper Austria and one at the airport Vienna Schwechat. These are specialised in conducting Dublin procedures. A central Dublin department in Vienna is responsible for supervising the work of the initial reception centres. Moreover, it conducts all Dublin procedures with regard to incoming Dublin requests (requests to Austria to take back or to take charge of an asylum seeker by another

<sup>60</sup> CJEU, Joined Cases C-411/10 *NS v Secretary of State for the Home Department* and C-493/10 *ME v Minister for Justice, Equality and Law Reform* [2012] 2 CMLR 9, 21 December 2011, para 98.

<sup>61</sup> BVwG, W125.1257809-8, 20 January 2014, available at: <http://bit.ly/1Jp8HLh>.

<sup>62</sup> BVwG, W205 1438717-1, 29 April 2014, available at: <http://bit.ly/1EUlw8X>.

<sup>63</sup> VwGH, Decision RA 2015/18/0113 bis 0120, 8 September 2015.

<sup>64</sup> The amendment of the Asylum Act failed to cite the Dublin III Regulation. The rejection on an asylum application as inadmissible according to Article 5(1) AsylG refers to the definitions in Article 2, which cites the Dublin II Regulation. See BGBl. I Nr. 144/2013, available at: <http://bit.ly/1lfkahn>. The amendment of the BFA-VG entering into effect on 20 July 2015 refers in Article 2(1)(8) to the Dublin III Regulation: <http://bit.ly/1jULWW6>.

<sup>65</sup> Article 5(2) AsylG.

Member State) and, in response to a request of the Foreigners Police department, all consultations with Member States concerning foreigners who have not applied for asylum.

Once an application for asylum is made, a preliminary interview by the police takes place on the circumstances of entering Austria and the first country of entry in the EU, the personal data and – in a very brief manner – also on the reasons why an applicant left their home country. The asylum applicant is fingerprinted and photographed. Fingerprints are taken from all asylum seekers older than 14 years of age. The asylum seeker gets a green “procedure card” after the public security officer consulted the BFA about the further steps in the asylum procedure: admittance to the regular procedure or admissibility procedure. Asylum seekers are transferred or asked to go to the initial reception centre when a Dublin procedure is initiated. The green card permits the asylum seeker to stay in the district of the initial reception centre. Due to a lack of reception places the green card may be issued to asylum seekers without a local restriction.

In every procedure, the BFA has to consider within the admissibility procedure whether an asylum seeker could find protection in a safe third country or another EU Member State or Schengen Associated State. According to the experiences of NGOs, consultations with other Member States do not take place if there is no concrete evidence for the responsibility of another Member States.

Every asylum seeker receives written information about the first steps in the asylum procedure, basic care, medical care and the Eurodac and Dublin III Regulation at the beginning of the procedure in the EAST.

Within 20 calendar days after the application, the BFA has to either admit the asylum applicant to the in merit procedure or inform the applicant formally about the intention to issue an inadmissibility decision on the ground that another state is considered responsible for the examination of the asylum claim.

### **Individualised guarantees**

Individualised guarantees are not requested systematically.

In April 2015, in the case of a Syrian father with his underage daughter, the BVwG allowed the appeal and stated that the father is a vulnerable person due to his hearing defect. A guarantee from Italy should have been requested. In this case his already adult son has received asylum status in Austria. Therefore, further investigation of the question is necessary if the transfer would violate of Article 8 ECHR.<sup>66</sup> However, the BFA has deemed that the obligation to obtain guarantees from Italy on the basis of the *Tarakhel v Switzerland* judgment of the ECtHR has been fulfilled following the Italian Ministry of Interior’s letter of 8 June 2015 to all Dublin Units, stating the projects where Dublin returnees would be accommodated.<sup>67</sup>

### **Transfers**

Transfers are normally carried out without the asylum applicant concerned being informed of the time and the location they are transferred to before the departure from Austria, giving them no possibility to return to the responsible Member State voluntarily. It could be argued that this practice is questionable under Recital 24 and Article 26(2) Dublin III Regulation according to which a transfer decision must contain the details of the time carrying out the transfer and “if necessary, contain information on the place and date

---

<sup>66</sup> BVwG, Decision W161 2104959-1/3E, 14 April 2015, available at: <http://bit.ly/1I3clNi>.

<sup>67</sup> Information provided by the BFA to ECRE, November 2015. See Italian Ministry of Interior, *Circular Letter to all Dublin Units Re: Dublin Regulation Nr. 604/2013 – Guarantees for vulnerable cases: family groups with minors*, 8 June 2015, available at: <http://bit.ly/1HI9cSM>.

at which the applicant should appear, if he is travelling to the Member State responsible by his own means.”

In case of an enforced transfer to another EU Member State, the police first transfers the asylum applicant to a detention centre. Since 2011, there is also a special detention centre for families in Vienna. The asylum applicant has to stay there until the deportation takes place, usually after one or two days. Under the Dublin procedure, asylum seekers can be held for up to 48 hours without detention being specifically ordered. In a less coercive measure, instead of detention asylum seekers may be ordered to stay at a certain place (such as a flat or a reception centre).<sup>68</sup> Depending on the responsible state and the number of persons being transferred, the transfer takes place by plane, by bus or by police car under escort.

The BFA has not been able to provide data on the number of outgoing transfers in 2015. However, the minister of the Interior stated on 24 September 2015 that this year about 5,000 asylum seekers have been transferred to other Member States, mainly Bulgaria and Romania. Nobody was sent back to Greece due to the difficult humanitarian situation and, for the time being, transfers to Hungary do not take place due to the harsh asylum politics of Hungary.<sup>69</sup>

Asylum seekers returning to Austria under the Dublin Regulation, and whose claim is pending a final decision, do not face obstacles if their transfer takes place within two years after leaving Austria. In this case, the discontinued asylum procedure will be reopened as soon as they request for it at the BFA or the BVwG. If a final decision has already been taken on the asylum application upon return to Austria, the new asylum application will be processed as a subsequent asylum application.

### 3.3. Personal interview

#### Indicators: Dublin: Personal Interview

Same as regular procedure

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the Dublin procedure?  Yes  No  
❖ If so, are interpreters available in practice, for interviews?  Yes  No
2. Are interviews conducted through video conferencing?  Frequently  Rarely  Never

A personal interview is required by law. The law permits an exception in case the asylum seeker has evaded the procedure in the initial reception centre.<sup>70</sup> If the facts are established, and a decision can be taken, the fact that the asylum seeker has not been interviewed yet by BFA or by the BVwG shall not preclude the taking of a decision. In practice this exception is not applied very often.<sup>71</sup> Such relevant facts for a decision in Dublin cases could be a Eurodac hit and the acceptance of the requested Member State to take back the asylum seeker.

An appointed legal adviser must be present at the interview organised to provide the asylum seeker an opportunity to be heard. In practice, legal advisers are present at the hearing. Legal advisers are often

<sup>68</sup> Article 77(5) FPG.

<sup>69</sup> Salzburger Nachrichten, 'Mikl-Leitner und CSU fordern Kontrolle der EU Außengrenzen', 24 September 2015, available at: <http://bit.ly/1IHBTpc>.

<sup>70</sup> Article 24(3) AsylG.

<sup>71</sup> See Asylum Court, S6 430.113-1/2012, 5 November 2012: the Court found that the procedure was unlawful in the case of an unaccompanied minor asylum seeker from Afghanistan, who was interrogated by the police without the presence of his legal representative or a person of trust and disappeared shortly after. The Federal Agency for Aliens' Affairs and Asylum did not submit the minutes of the first interrogation or give the legal representative the opportunity to be heard before rendering the rejection of the application. However, ct. the negative decision of the Asylum Court in the case of an unaccompanied minor: S2 429505-1/2012, 04 October 2012.

informed only shortly before the interview, which means that they lack time to study the file. Legal advice to asylum seekers in detention takes place immediately before the hearing in the detention centre, contrary to Article 29(4) AsylG, according to which the asylum seeker must have at least 24 hours to prepare for the hearing with the assistance of the legal adviser.

In Dublin procedures, the rules and practice are the same as in the regular procedure.

Usually only parts of the record of the Dublin consultation between Austria and the requested state(s) are made available to the asylum seeker and the legal adviser. Therefore it is not guaranteed that legal advice is given on the basis of all relevant information and it may happen that asylum seekers will be confronted with facts during the hearing concluding the admissibility procedure in the initial reception centre that were not disclosed before. Furthermore, it is not possible for the asylum seeker and his or her legal representative to check whether the requested state has received all relevant information. One of the judges of the Federal Administrative Court mentioned in a decision regarding a Chechen father whose son was legally residing in Austria that Italy, which had issued a visa for the couple from Chechnya, finally agreed to take charge but was not informed about the severe illness and the disability of the asylum seeker who would rely on the care of his son.<sup>72</sup> The judge noted that the dependency clause should have been applied in this case.

### 3.4. Appeal

**Indicators: Dublin: Appeal**

Same as regular procedure

1. Does the law provide for an appeal against the decision in the Dublin procedure?

<ul style="list-style-type: none"> <li>❖ If yes, is it</li> <li>❖ If yes, is it suspensive</li> </ul>	<input checked="" type="checkbox"/> Yes <input checked="" type="checkbox"/> Judicial <input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/> Administrative <input checked="" type="checkbox"/> No
---	---	--

As Dublin cases are rejected as inadmissible, the relevant rules detailed in the section on [Admissibility Procedure: Appeal](#) apply.

The time limit within which the appeal against the BFA's inadmissibility decisions (including Dublin decisions) must be lodged is only 7 days. The appeal has no suspensive effect, unless the Federal Administrative Court (BVwG) grants suspensive effect within 7 calendar days after the appeal reaches the court. The expulsion order may not be executed before the time limit for granting suspensive effect expires. In 2012, the Commissioner for Human Rights of the Council of Europe criticised the time limit of one week for appeals lodged against Dublin deportation decisions by the Federal Asylum Office for being very short.<sup>73</sup> The BVwG has to decide *ex officio* if the appeal must be given suspensive effect. In many Dublin cases, asylum applicants never received a final decision from the Asylum Court (which was competent for appeal decisions until 31 December 2013) because they were transferred back to the responsible Member State before the Court's decision on Dublin was issued. This practice remains unchanged at the new Administrative Court.

The BVwG can either refuse the appeal or decide to refer it back to the BFA with the instruction to conduct either an in-merit procedure or investigate the case in more detail (for instance if the Court finds that the BFA has not properly taken into account family ties or that the assessment of the situation in the responsible Member State was based on outdated material or was insufficient with regard to a possible violation of Article 3 ECHR). Usually, the Asylum Court decided on the basis of the written appeal and the

<sup>72</sup> BVwG, W149 209627-1, 21 July .2014

<sup>73</sup> CoE Commissioner for Human Rights, *Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Austria from 4 to 6 June 2012*, CommDH(2012)28, 8.

asylum file without a personal hearing of the asylum seeker. This practice is likely to be continued, as most of the Asylum Court judges became judges in the new Administrative Court and the Austrian procedural laws have remained unchanged in this regard.

Asylum seekers whose appeals were given a suspensive effect or were accepted by the Court have the right to re-enter Austria by showing the decision of the court at the frontier. This is related to the fact that, if the court does not decide within 7 days on suspensive effect, the asylum seeker may be deported. If no suspensive effect was granted but the court finds that the decision of the BFA was unlawful, the asylum seeker is also allowed to re-enter.

### 3.5. Legal assistance

**Indicators: Dublin: Legal Assistance**

Same as regular procedure

1. Do asylum seekers have access to free legal assistance at first instance in practice?

Yes       With difficulty       No

❖ Does free legal assistance cover:

Representation in interview  
 Legal advice

2. Do asylum seekers have access to free legal assistance on appeal against a Dublin decision in practice?

Yes       With difficulty       No

❖ Does free legal assistance cover

Representation in courts  
 Legal advice

Free legal assistance during the admissibility procedure was implemented to compensate for the restricted movement of asylum seekers during this type of procedure, as they are obliged to stay within the district of the EAST. If asylum seekers leave the district of the EAST to consult an attorney-at-law or NGOs – which normally have their offices in the bigger cities – they can be given a fine ranging from €100 to €1,000. In case of repeated violation of the restricted residence (“*Gebietsbeschränkung*”), the fine may amount to €5,000 and even detention may be ordered in case the asylum seeker is unable to pay the fine. A violation of the restriction of movement could furthermore be a reason for pre-expulsion custody. This punishment is not applied very often in practice. The second reason why free legal assistance is provided at this stage of the procedure is the lack of suspensive effect of an appeal in admissibility procedures, which justifies the incorporation of additional safeguards in the first instance procedure.

As discussed in the section on Regular Procedure: Legal Assistance, the quality of the advice provided by legal aid counsels is problematic because they lack time and because asylum seekers do not trust them, as they are considered being too closely linked to the BFA. They have their offices within the building of the BFA and their task is only to provide objective information about the procedure to the asylum seeker; not to assist them in the procedure and defend their interests.

In case of unaccompanied asylum seeking children, the appointed legal adviser is at the same time their legal representative during the admissibility procedure. Without consent of their legal adviser they are not able to act, for example to choose a legal representative by themselves or to submit an appeal in case the legal adviser fails to do so. Here too, the quality of the assistance provided is considered to be problematic at times. One example is the case of an unaccompanied asylum seeking child from Afghanistan who submitted a hand-written appeal against the rejection of his application and his expulsion to Italy. The Asylum Court rejected the appeal as inadmissible, because his legal representative from Verein Menschenrechte Österreich did not sign the complaint.<sup>74</sup> NGOs report that this is not the only case

<sup>74</sup> Asylum Court, S7 424252-1/2012, 9 February 2012.

where the legal representative has refrained from lodging an appeal in disregard of the best interests of the child.

Although Article 29(4) AsylG stipulates that free legal assistance shall be provided to all asylum seekers at least 24 hours before the hearing on the results of the evidentiary findings determining the responsible Member State under the Dublin Regulation, legal advisers are often informed only shortly before the interview, therefore lacking time to study the file and prepare for the hearing. Asylum seekers in detention do not normally receive legal advice until immediately before the hearing in the detention centre.

The legal adviser must be present at the interview held to give the asylum seeker an opportunity to be heard. At the interview in relation to Dublin with the BFA, the asylum seeker together with the legal adviser may submit written statements with regards to the situation in the Member State deemed responsible or make requests for additional investigations, but they are not allowed to ask questions; this is usually respected by the legal advisers.

### 3.6. Suspension of transfers

#### Indicators: Dublin: Suspension of Transfers

1. Are Dublin transfers systematically suspended as a matter of policy or jurisprudence to one or more countries?  Yes  No  
❖ If yes, to which country or countries? Greece

Under both the previously applicable Dublin II and the Dublin III Regulation, all EU Member States are considered safe where the asylum applicant may find protection from persecution. There is an exception in case it is obvious that there will be a lack of protection, especially if it is well-known to the authorities, or if the asylum applicant brings evidence that there is a risk that they will not be protected properly. This real risk cannot be based on mere speculations, but has to be based on individual facts and evidence. This statement of danger has to be related to the individual situation of the asylum applicant. All EU Member States and Associated Schengen States except **Greece** are regarded as safe countries that provide protection and fulfil the obligations of the EU asylum *acquis*.

Country reports are taken into consideration, but the threshold for declaring that a country is not in line with its obligations under the *acquis* is usually the establishment of an infringement procedure launched by the Commission against that country. Recently, letters of UNHCR claiming protection gaps and difficulties to access the asylum procedure have gained more relevance. Reports of NGOs usually are seen as not objective, contrary to reports of fact-finding missions or reports of authorities. This practice was applied even in the case of Greece until the *M.S.S. v Belgium and Greece*<sup>75</sup> case was decided by the European Court of Human Rights (ECtHR).

According to the jurisprudence, notorious severe human rights violations in regard of Article 3 of the European Convention on Human Rights (ECHR) have to be taken into consideration *ex officio*. If the asylum application is already rejected by the Member State responsible for the examination of the application, a divergent interpretation of the Refugee Convention in a Member State or manifestly unlawful procedures could be relevant in an individual case. Generally low recognition rates in a certain Member State are not regarded as a characteristic of a dysfunctional asylum system.

After the ruling of the ECtHR in *M.S.S. v Belgium and Greece*, Austria suspended transfers to **Greece**. The Asylum Court ruled in some cases of vulnerable asylum seekers that there would be a risk of violation of Article 3 ECHR if returned to Greece and relied on the sovereignty clause acknowledged in the *N.S. & M.E.* judgment of the Court of Justice of the European Union (CJEU). However, in general, outside the

<sup>75</sup> ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011.

context of transfers to Greece, poor general reception conditions do not automatically imply the use of the sovereignty clause. Even in Dublin cases relating to Greece, it took a lot of discussions with Austrian authorities before they changed the policy following the *M.S.S.* and *N.S. & M.E.* judgments.

Since April 2015, in almost all Dublin appeals against transfers to **Hungary**, suspensive effect is allowed by the Administrative Court. The court ruled in some vulnerable cases, that additional medical examinations would be necessary. One recent decision of the Administrative High Court could gain more importance. In this case the risk of an Afghan mother with her children<sup>76</sup> was not sufficiently assessed. The legal assumption that Hungary is safe for asylum seeker does not exist at the time being, the court ruled. The BFA and the Administrative Court have to examine the situation in Hungary more accurate and have to examine if Austria may send back asylum seekers to Hungary. UNHCR issued on 17 September 2015 a press release expressing its concerns vis-a-vis the Hungarian asylum policy: the closing of the borders, sending back asylum seekers to Serbia which will not be able to cope with a bigger number of refugees and the new Hungarian law punishing refugees for illegal entry.<sup>77</sup>

The ECtHR issued three interim measures and asked for factual information from the Austrian Government in a case concerning a Syrian national facing removal from Austria to Hungary. The asylum seeker had been sent back to Hungary before, has been mistreated there. He submitted a consequent application in Austria. The BVwG ruled in October 2015, that the allegations of a Syrian applicant in relation to conditions in Hungary and the knowledge of Austrian authorities about the situation and recent developments in Hungary were sufficient to rebut the notion of security of Article 5(3) AsylG for Hungary.<sup>78</sup> At the same time, the BFA sent back even vulnerable asylum seekers to Hungary.

In relation to **Italy**, the BFA has now deemed that the obligation to obtain guarantees from Italy on the basis of the *Tarakhel v Switzerland* judgment of the ECtHR has been fulfilled following the Italian Ministry of Interior's letter of 8 June 2015 to all Dublin Units, stating the projects where Dublin returnees would be accommodated.<sup>79</sup>

On 3 January 2014, UNHCR called for temporary suspension of Dublin transfers of asylum seekers back to **Bulgaria**.<sup>80</sup> This recommendation of UNHCR was respected by Austrian authorities, as Dublin procedures with Bulgaria were stopped at the beginning of 2014 and suspensive effect to the appeal was given in some pending cases. The Administrative Court ruled on 24 February 2014 that additional and up to date information would be necessary after UNHCR's report.<sup>81</sup> After UNHCR stated in April 2014 that conditions in Bulgaria have improved,<sup>82</sup> Dublin procedures with Bulgaria continued even in cases where the procedure was already admitted to the regular procedure. This was e.g. the case for a refugee from Syria, who applied for asylum in Austria in December 2013. Austria started consultations with Bulgaria but admitted the application to the regular procedure by the end of January 2014. In June 2014, the BFA issued the rejection of the application due to the responsibility of Bulgaria processing the asylum application. Despite the statement of a psychiatrist confirming PTSD in the case of the asylum seeker, suspensive effect was not awarded and the appeal was rejected. The BVwG stated in the decision with reference to jurisprudence from the Administrative High Court that "the admission to procedure does not

<sup>76</sup> VwGH Ra 2015/18/0113, 8 September 2015.

<sup>77</sup> UNHCR Austria, 'Kursänderung in Europa notwendig', 17 September 2015, available at: <http://bit.ly/1P1zNvM>.

<sup>78</sup> BVwG, Decision W205 2010327, 22 October 2015, available at: <http://bit.ly/1Qgogq2>.

<sup>79</sup> Information provided by the BFA to ECRE, November 2015. See Italian Ministry of Interior, *Circular Letter to all Dublin Units Re: Dublin Regulation Nr. 604/2013 – Guarantees for vulnerable cases: family groups with minors*, 8 June 2015, available at: <http://bit.ly/1HI9cSM>.

<sup>80</sup> UNHCR, *Observations on the current asylum system in Bulgaria*, January 2014, available at: <http://bit.ly/1dsMr2Y>.

<sup>81</sup> BVwG: W211 2000025-1, 24 February 2014, available at: <http://bit.ly/1GYHjDu>; BVwG W168 1439304-1, 6 March 2014, available at: <http://bit.ly/1eOMpaB>.

<sup>82</sup> UNHCR issued updated guidelines in April 2014, noting improvements in reception conditions in Bulgaria: UNHCR, *UNHCR Observations on the current asylum system in Bulgaria*, April 2014, available at: <http://bit.ly/1eJxjfN>.

lead to an automatic use of the Sovereignty Clause". The admission to the procedure has no binding effect according to Article 28(1) AsylG and does not justify a *res judicata*.<sup>83</sup>

At the same time, in a different case the Court found the assessment of the BFA in regard to the situation of asylum seekers in Bulgaria to be insufficiently detailed, not up to date and not taking into consideration the individual situation of the applicant. This appeal was awarded suspensive effect and finally upheld.<sup>84</sup> Insufficient COI with regard to families returned to Bulgaria after several months of absence was the reason to revert the procedure back to the BFA for further investigations. In the procedure the statement of the psychiatric hospital stating a complex PTSD and danger of suicide of the mother has to be taken into consideration, the court recommended in the ruling.<sup>85</sup> The BVwG granted suspensive effect in a different case,<sup>86</sup> because the risk of a violation of Article 3 ECHR could not be excluded.

Based on the judgment of the CJEU in *MA* in relation to Article 8(4) of the Dublin III Regulation,<sup>87</sup> for asylum applications lodged by **unaccompanied children**, the BFA/EAST ordered age assessments even in cases where there are no reasons for doubts in regard to the age of the asylum seeker.<sup>88</sup>

Suspensive effect of appeals was allowed in more than 200 cases in 2014.

## 4. Admissibility procedure

### 4.1. General (scope, criteria, time limits)

With the amendment of the Asylum Act and the BFA-VG coming into effect on 20 July 2015, the admissibility procedure has changed. The admissibility procedure starts with the first interrogation of the asylum seeker by the public security officer, who has to submit the findings thereof to the branch office of the BFA. The BFA officer in charge instructs the police about the next steps in the admissibility procedure: the application may be assessed as admitted to the regular procedure or the asylum-seeker ordered to travel to the EAST or transferred by the police to the EAST.<sup>89</sup> There are three EAST which are responsible for the admissibility procedure: one located in Traiskirchen near Vienna, one in Thalham in Upper Austria and one at the airport Vienna Schwechat.

All asylum seekers have to undergo the admissibility procedure except children born in Austria whose parents have received protection status in Austria or whose application is admitted to the regular procedure. Their applications are admitted immediately to the regular procedure.<sup>90</sup>

An application may be rejected as inadmissible for the following reasons:

- (1) The person comes from a safe third country;<sup>91</sup>
- (2) The person enjoys asylum in an EEA country or Switzerland;<sup>92</sup>
- (3) Another country is responsible for the application under the Dublin Regulation;<sup>93</sup>

---

<sup>83</sup> BVwG, W185 2009054-1, 24 September 2014, available at: <http://bit.ly/1RIJ37g>.

<sup>84</sup> BVwG, W200 8050-1, 10 July 2014, available at: <http://bit.ly/1MjXtaL>.

<sup>85</sup> BVwG, W177 2013744-1, 6 June 2014, available at: <http://bit.ly/1K8QVwA>.

<sup>86</sup> BVwG, W185 2008238-1, 28 May 2014, available at: <http://bit.ly/1KCMW9C>.

<sup>87</sup> CJEU, Case C-648/11, *MA and Others v Secretary of State for the Home Department*, 6 June 2013.

<sup>88</sup> According to information from the BFA, from January until May 2013 456 unaccompanied children applied for asylum. The age assessment was ordered in 274 cases and further medical examinations have been ordered in 171 cases.

<sup>89</sup> Article 29(1) AsylG.

<sup>90</sup> Article 17(3) AsylG.

<sup>91</sup> Article 4(1) AsylG.

<sup>92</sup> Article 4a(1) AsylG.

<sup>93</sup> Article 5(1) AsylG.

- (4) The person files a subsequent application and “no change significant to the decision has occurred in the material facts”.<sup>94</sup>

Asylum seekers receive a green “procedure card” within 3 days, which is an indication that their stay in Austria is tolerated. This card is replaced by a “white card” as soon as the application is admitted to the regular procedure. Since the number of asylum seekers increased in the summer 2015, the issuance of these cards has suffered delays.

Within 20 calendar days after the application is made, the BFA has to either admit the asylum applicant to the in-merit procedure or notify them formally by procedural order about the intention to issue an inadmissibility decision on the ground that another state is considered responsible for the examination of the asylum claim or that the BFA intends to revoke the suspensive effect of a subsequent application. This time-limit does not apply if consultations with another state on the application of the Dublin Regulation take place.<sup>95</sup>

The 20-day time-limit shall not apply if the asylum seeker does not cooperate in the procedure, the procedure is deemed no longer relevant or the asylum seeker evades the procedure.<sup>96</sup> The duty of the asylum seeker to cooperate includes, among others, providing the BFA with information and evidence about their identity and reasons for applying for asylum, to come to hearings in time and to notify the authorities of their address. If, for reasons relating to his or her person (e.g. illness, postponing the interview due to duty to comply with summons etc.), the asylum seeker is unable to cooperate in the procedure, the computation of the 20-day time-limit shall be suspended.<sup>97</sup>

If the BFA has ordered an age assessment, the 20-day time limit does not apply. This practice is based on lack of cooperation on the part of the asylum seeker in the procedure. As a result, unaccompanied minor asylum seekers often wait for several months before they are found underage as a result of the age assessment and their application is admitted.

In practice the time limit is respected. If the BFA does not notify the applicant the intention to issue an inadmissibility decision within 20 days, the application is admitted to the regular procedure.

Within the admissibility procedure, the application may be also be dismissed on the merits or asylum or subsidiary protection status may be granted.

The granting of a status or the dismissal of the application in the admissibility procedure replaces the admissibility ruling.<sup>98</sup>

An admissible application shall nevertheless be rejected if facts justifying such a rejection decision become known after the application was admitted.<sup>99</sup> In practice, this provision is applied in Dublin cases without the precondition that the facts justifying admissibility were not known before.<sup>100</sup>

---

<sup>94</sup> Article 12a(2)(2) AsylG.

<sup>95</sup> Article 28(2) AsylG.

<sup>96</sup> Article 28(2) AsylG.

<sup>97</sup> Article 28(2) AsylG.

<sup>98</sup> Article 28(2) AsylG.

<sup>99</sup> Article 28(1) AsylG.

<sup>100</sup> VwGH, 2006/20/0624, 25 November 2008.

## 4.2. Personal interview

### Indicators: Admissibility Procedure: Personal Interview

Same as regular procedure

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the admissibility procedure?  Yes  No
  - ❖ If so, are questions limited to identity, nationality, travel route?  Yes  No
  - ❖ If so, are interpreters available in practice, for interviews?  Yes  No
2. Are interviews conducted through video conferencing?  Frequently  Rarely  Never

A personal interview is required by law. The asylum seeker is interrogated by agents of the public security service upon the lodging of the application or during the admissibility procedure at the EAST. The police may not ask detailed questions on the specific reasons for fleeing the country of origin or residence. The clear division of tasks between the police, which has the duty to assess identity, personal data and the travel route of the applicant, and the civil servants of the BFA for assessing the facts on which the application is based, is not always respected in practice, however. The reasons for fleeing the country of origin may be found not credible at the interview before the civil servant of the BFA if the asylum seeker has based the application on other reasons immediately upon arrival. Article 19(4) AsylG states explicitly, that in the admission procedure, the asylum seeker shall also be informed that his or her own statements will be accorded increased credibility.

The law permits an exception from the personal interview in the case the asylum seeker has evaded the procedure in the EAST. If the facts relevant to a decision are established, the fact that they have not been interviewed yet by the BFA or by the BVwG shall not preclude the rendering of a decision. In practice this exception is not applied very often, however. An exception may apply in a subsequent asylum application that was submitted within two days before the execution of an expulsion order.<sup>101</sup> An interview during the admission procedure may be dispensed with if the procedure is admitted.

## 4.3. Appeal

### Indicators: Admissibility Procedure: Appeal

Same as regular procedure

1. Does the law provide for an appeal against the decision in the admissibility procedure?
  - Yes  No
  - ❖ If yes, is it  Judicial  Administrative
  - ❖ If yes, is it suspensive  Yes  No

For the admissibility procedure, the appeal stages are the same as in the regular procedure, but the time limits within which an appeal against the BFA's inadmissibility decision must be lodged is only 7 days and the appeal has in general no suspensive effect, except when decided otherwise by the BVwG.

As a first step, the BVwG decides within 7 days after receiving the appeal whether the appeal will have suspensive effect during the continuing appeal procedure. If the BVwG neither issues suspensive effect nor accepts the appeal after 7 days, the asylum applicant can be deported to the responsible Member State, safe third country or his or her country of origin in case of a subsequent application.

<sup>101</sup> Article 19(1) AsylG.

If the application is rejected on the merits in the admissibility procedure, such application shall be deemed to be admitted if, or as soon as, a complaint against that decision has suspensive effect. In this case, the time limit for the appeal is the same as for dismissed applications in the regular procedure (within 2 weeks), and a legal adviser is appointed.

Appeals against a decision rejecting the asylum application as inadmissible do *not* have suspensive effect unless this is granted by the BVwG.<sup>102</sup> The reasons for not granting suspensive effect to the appeal in inadmissible cases correspond to grounds for declaring claims manifestly unfounded, as mentioned in Regular Procedure: Appeal.

One week to lodge an appeal against the decision rejecting the asylum application as inadmissible is the minimum time according to a 1998 ruling of the Constitutional Court.<sup>103</sup> This short time limit is in practice very problematic, considering that the applicant may be in detention for instance and that arranging a meeting with the legal advisor could already take a few days. One week does not seem to be sufficient in practice also for submitting an appeal explaining the procedural and/or legal incorrectness of the decision. The appointed legal adviser is not obliged to assist the asylum seeker with writing the complaint that has to be written in German language and the requested qualification for legal advisers is also not sufficient.

#### 4.4. Legal assistance

**Indicators: Admissibility Procedure: Legal Assistance**

Same as regular procedure

1. Do asylum seekers have access to free legal assistance at first instance in practice?

Yes       With difficulty       No

❖ Does free legal assistance cover:

Representation in interview  
 Legal advice

2. Do asylum seekers have access to free legal assistance on appeal against an inadmissibility decision in practice?

Yes       With difficulty       No

❖ Does free legal assistance cover

Representation in courts  
 Legal advice

A legal adviser is appointed by the BFA in case it intends to reject the application in the framework of the admissibility procedure. The BFA has to notify the asylum seeker of its intention to reject the application in the admissibility procedure and inform them about the mandatory consultation of a legal adviser. Legal advice has to be provided at least 24 hours before the next interview, during which the asylum seeker is given the opportunity to be heard. Presence of legal advisers during the interview is mandatory.

Since the reform of 20 July 2015, free legal advice is foreseen for subsequent asylum applications as well,<sup>104</sup> including in appeals. Most of the cases that are regarded as inadmissible are Dublin cases (see the section on Dublin: Legal Assistance above).

<sup>102</sup> Article 16(2) BFA-VG.

<sup>103</sup> VfGH, G31/98 UA, 24 June 1998.

<sup>104</sup> Article 52(1) BFA-VG.

## 5. Border procedure (border and transit zones)

### 5.1. General (scope, time-limits)

#### Indicators: Border Procedure: General

1. Do border authorities receive written instructions on the referral of asylum seekers to the competent authorities?  Yes  No
2. Can an application made at the border be examined in substance during a border procedure?  Yes  No
3. Is there a maximum time-limit for border procedures laid down in the law?  Yes  No
  - ❖ If yes, what is the maximum time-limit?
    - Subsequent applications 4 weeks

Austria has no land border with third countries. All neighbouring states are Schengen Associated States and Member States, party to the Dublin Regulation.

Asylum seekers who apply for international protection at the airport are transferred after the interview by the police to the building of the police station with the EAST and the rejection zone. On the basis of the first interview, the BFA decides whether the procedure shall be processed under the special regulations of the airport procedure, or if the case should be considered under the regular procedure and the asylum seeker should be summoned by the BFA.<sup>105</sup>

If the BFA intends to reject the application in the airport procedure, UNHCR has to be informed within one week, a time limit which is generally respected.<sup>106</sup> In the context of Dublin procedures at the airport, UNHCR is not involved.

Under Article 33(1) AsylG, an asylum application lodged at the airport can only be rejected as inadmissible or dismissed on the merits on two grounds:

- (a) Inadmissible by reason of existing protection in a safe third country; or
- (b) Dismissed on the merits if there is no substantial evidence that the asylum seeker should be granted protection status *and*:
  - i. the applicant tried to mislead the authorities about their identity, citizenship or authenticity of their documents and they were previously informed about the negative consequences of doing so;
  - ii. the applicant's claims relating to the alleged persecution are obviously unfounded;
  - iii. the applicant did not claim any persecution at all; or
  - iv. the applicant comes from a safe country of origin.

For procedures in the initial reception centre of the airport, one interview is regarded as sufficient. Furthermore, the rejection decision has to be approved by UNCHR, otherwise the application is admitted to the regular procedure and the asylum seeker is allowed entry.<sup>107</sup>

Detention measures – more precisely the measures which require the asylum seeker to stay in the EAST at the airport, limiting their freedom of movement – which are ordered to implement rejection at the border can only be maintained for a maximum duration of six weeks. During the asylum procedure at the airport, the assumption that the asylum seeker is not entitled to enter applies and a rejection of the asylum seeker at the border is conducted automatically. Therefore, at this stage, a decision rejecting the asylum application on the merits or as inadmissible is issued without expulsion order. Rejection at the border may be enforced only after a final decision on the asylum application.

<sup>105</sup> Article 31(1) AsylG.

<sup>106</sup> Article 32(2) AsylG.

<sup>107</sup> Article 33(2) AsylG.

In 2014, most cases processed at the airport were Dublin procedures. In-merits procedures of asylum seekers from Iran, Iraq or Syria are usually not dealt with in the border procedure.

## 5.2. Personal Interview

### Indicators: Border Procedure: Personal Interview

Same as regular procedure

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the border procedure?
 

	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
❖ If so, are questions limited to nationality, identity, travel route?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
❖ If so, are interpreters available in practice, for interviews?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
  
2. Are interviews conducted through video conferencing?
 

<input type="checkbox"/> Frequently	<input type="checkbox"/> Rarely	<input checked="" type="checkbox"/> Never
-------------------------------------	---------------------------------	---

In procedures at the airport, only one personal interview is conducted.<sup>108</sup> There are no other differences compared to the system for personal interviews under the regular procedure.

## 5.3. Appeal

### Indicators: Border Procedure: Appeal

Same as regular procedure

1. Does the law provide for an appeal against the decision in the border procedure?
 

	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
❖ If yes, is it	<input checked="" type="checkbox"/> Judicial	<input type="checkbox"/> Administrative
❖ If yes, is it suspensive	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No

The time-limit for lodging appeals against a decision by the BFA in procedures at the airport is 7 calendar days.<sup>109</sup> The BVwG must render its decision within 2 weeks from the submission of the complaint.<sup>110</sup> A hearing in the appeal proceedings must be conducted at the EAST at the airport,<sup>111</sup> yet this rarely happens in practice.

In all other cases the same system for appeals applies as described in the section on Regular Procedure: Appeal. In practice, the short time-limit for lodging an appeal creates the same obstacles for asylum seekers as in the admissibility procedure. One NGO, Caritas, is present at the airport and assists asylum seekers.

<sup>108</sup> Article 33(2) AsylG.

<sup>109</sup> Article 33(3) AsylG.

<sup>110</sup> Article 33(4) AsylG.

<sup>111</sup> Article 33(4) AsylG.

## 5.4. Legal assistance

### Indicators: Border Procedure: Legal Assistance

Same as regular procedure

1. Do asylum seekers have access to free legal assistance at first instance in practice?  
 Yes       With difficulty       No  
❖ Does free legal assistance cover:  
 Representation in interview  
 Legal advice
2. Do asylum seekers have access to free legal assistance on appeal against a negative decision in practice?  
 Yes       With difficulty       No  
❖ Does free legal assistance cover  
 Representation in courts  
 Legal advice

The same system for legal assistance applies as described under the regular procedure. Caritas Vienna, which provides care to asylum seekers at the airport, may help them with legal questions too.

## 6. Accelerated procedure

### 6.1. General (scope, grounds for accelerated procedures, time-limits)

Before 20 July 2015, the law already provided for “procedures for the imposition of measures to terminate residence” subject to reduced time limits for appeal and decisions on appeal, with the effect that certain cases are dealt with in an accelerated manner. For the purposes of this report these are referred to as accelerated procedures.

Under Article 27 AsylG, such a procedure is applied where:

- (a) During the admissibility procedure, the BFA has notified the applicant of its intention to reject the application as inadmissible (see section on Admissibility Procedure) or dismiss the application on the merits;<sup>112</sup>
- (b) The appeal procedure is to be discontinued where the asylum seeker has evaded the procedure and a return decision was issued by the BFA;<sup>113</sup>
- (c) The BFA determines that the application should be rejected as inadmissible or dismissed on the merits *and* there is a public interest in accelerating the procedure.<sup>114</sup> Public interest exists in particular, albeit not exhaustively, where an applicant:<sup>115</sup>
  - i. Has committed a criminal offence;
  - ii. Has been charged with a criminal offence by the Department of Public Prosecution;
  - iii. Has been subject to pre-trial detention; or
  - iv. Has been caught in the act of committing a criminal offence.

In case a “procedure for the imposition of measures to terminate residence” has been initiated, a decision shall be taken as quickly as possible and no later than 3 months on the asylum application.<sup>116</sup>

The amendment of the Asylum Act coming into effect on 20 July 2015 introduces in Article 27a an accelerated procedure as such and states that certain cases may be decided within 5 months, with a possible extension if necessary for the adequate assessment of the case. Such accelerated procedures

<sup>112</sup> Article 27(1)(1) AsylG, citing Article 29(3)(4)-(5) AsylG.

<sup>113</sup> Article 27(1)(2) AsylG, citing Article 24(2) AsylG.

<sup>114</sup> Article 27(2) AsylG.

<sup>115</sup> Article 27(3) AsylG.

<sup>116</sup> Article 27(8) AsylG.

are foreseen when grounds for denying the appeal suspensive effect apply, as stated in Article 18 BFA-VG. These reasons are:

- (a) The asylum seeker comes from a safe country of origin;
- (b) There are indications that the asylum seeker endangers public security and order;
- (c) The asylum seeker has provided false statements on their identity, nationality and authenticity of documents;
- (d) No reasons for persecution have been asserted;
- (e) Statements adduced are obviously false or contradictory;
- (f) An executable return decision has been issued before applying for international protection; and
- (g) The asylum seeker refuses to give fingerprints.<sup>117</sup>

Procedures are also subject to stricter time-limits in case the asylum application is examined at the airport (see section Border Procedure above).

## 6.2. Personal Interview

### Indicators: Accelerated Procedure: Personal Interview

Same as regular procedure

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the accelerated procedure?  Yes  No
  - ❖ If so, are questions limited to nationality, identity, travel route?  Yes  No
  - ❖ If so, are interpreters available in practice, for interviews?  Yes  No
2. Are interviews conducted through video conferencing?  Frequently  Rarely  Never

All asylum seekers must have one personal interview. The law permits an exception in case the asylum seeker has evaded the procedure.<sup>118</sup> If the facts are established, failure by the BFA or by the Federal Administrative Court to conduct an interview should not preclude the rendering of a decision.

In last-minute subsequent applications to prevent the execution of an expulsion order and subsequent applications without *de facto* protection against deportation (which have no suspensive effect and the expulsion order issued after the rejection of the first asylum application can be executed), the BFA may omit the personal interview.<sup>119</sup>

## 6.3. Appeal

### Indicators: Accelerated Procedure: Appeal

Same as regular procedure

1. Does the law provide for an appeal against the decision in the accelerated procedure?
  - Yes  No
  - ❖ If yes, is it  Judicial  Administrative
  - ❖ If yes, is it suspensive  Yes  No

Time limits for appeals depend on the nature of the decision appealed in the accelerated procedure. For decisions rejecting an application as inadmissible, the appeal must be submitted within 1 week (see

<sup>117</sup> Article 18 BFA-VG.

<sup>118</sup> Article 24(3) AsylG.

<sup>119</sup> Article 19(1) AsylG.

section on Admissibility Procedure: Appeal above). The BVwG has to decide on the appeal within 3 months in such cases with suspensive effect.<sup>120</sup>

The Federal Administrative Court (BVwG) has to decide on the appeal against decisions to reject the application including an expulsion order within 8 weeks.<sup>121</sup>

In subsequent applications without protection against deportation, the court has to decide within 8 weeks if suspensive effect was not awarded. This provision has not much effect for the asylum seeker, however, as they may have been expelled or transferred before. Nevertheless, the appeal that must be lodged within 2 weeks after the notification of the decision may have suspensive effect.<sup>122</sup>

Difficulties in lodging an appeal against negative decisions in the accelerated procedure are the same as those described under the Dublin procedure and result mainly from the short time-limit of 1 week to lodge the appeal, as well as insufficient availability of free legal assistance. Organisations contracted to provide legal assistance have to organise interpreters if necessary.

#### 6.4. Legal assistance

##### Indicators: Accelerated Procedure: Legal Assistance

Same as regular procedure

1. Do asylum seekers have access to free legal assistance at first instance in practice?  
 Yes       With difficulty       No  
❖ Does free legal assistance cover:  
 Representation in interview  
 Legal advice
  
2. Do asylum seekers have access to free legal assistance on appeal against a decision in practice?  
 Yes       With difficulty       No  
❖ Does free legal assistance cover  
 Representation in courts  
 Legal advice

Access to free legal assistance at first instance is difficult for asylum seekers detained during the accelerated procedure, although they may contact NGOs for advice. Since the last amendment of 20 July 2015, free legal assistance is available for subsequent asylum applications too.<sup>123</sup>

In accelerated procedures, mandatory free legal advice for the admissibility procedure is circumvented by forwarding the procedure to the BFA branch office without prior admission to the regular procedure. This practice takes place in Traiskirchen, where admissibility procedures are conducted in one building (EAST) and in another building in which a branch office of the BFA conducts regular procedures. At the time asylum seekers get the invitation for their interview, they are still subject to restrictions on freedom of movement. Therefore they are not able to consult NGOs or lawyers outside the district of Baden.

<sup>120</sup> Article 27(8) AsylG.

<sup>121</sup> Article 17(2) BFA-VG.

<sup>122</sup> Article 18(2)(5) BFA-VG. See e.g. AsylGH (Asylum Court), A8 260.187-2/2011, 2 August 2011.

<sup>123</sup> Article 49(2) BVA-VG in connection with Article 29(3) BFA-VG.

## C. Information for asylum seekers and access to NGOs and UNHCR

### Indicators: Information and Access to NGOs and UNHCR

1. Is sufficient information provided to asylum seekers on the procedures, their rights and obligations in practice?  Yes  With difficulty  No
  - ❖ Is tailored information provided to unaccompanied children?  Yes  No
2. Do asylum seekers located at the border have effective access to NGOs and UNHCR if they wish so in practice?  Yes  With difficulty  No
2. Do asylum seekers in detention centres have effective access to NGOs and UNHCR if they wish so in practice?  Yes  With difficulty  No
3. Do asylum seekers accommodated in remote locations on the territory (excluding borders) have effective access to NGOs and UNHCR if they wish so in practice?  Yes  With difficulty  No

Asylum seekers must receive written information sheets in a language understandable to them during the first interrogation.<sup>124</sup> At the beginning of the interview, the applicant must be informed about their duties in the procedure.

The following information is available in 11 languages on the website of the BFA:

- (1) The “first information sheet” explains the first steps and possible outcomes in the admissibility procedure including mandatory or voluntary advice on return including information;
- (2) Information sheet on the duties and rights of asylum seekers;
- (3) Information for asylum seekers according the Eurodac Regulation;
- (4) A short written information regarding the Dublin III Regulation.

An overview on the asylum procedure is available on the webpage of the Federal Office for Immigration and Asylum.<sup>125</sup>

An asylum seeker against whom an enforceable but not yet final expulsion order is issued shall be informed in an appropriate manner (if available, a leaflet is provided in a language understandable to them) that, for the notification of decisions in the asylum procedure, they may avail themselves of the services of a legal representative and that they are obliged to inform the authority of their place of residence and address, including outside Austria.<sup>126</sup>

Detailed written information about the different steps of the procedure and rules and obligations does not exist so far. As asylum legislation changes very often, it does not seem to be affordable for NGOs to have brochures or other written information in the various languages required. “Plattform Rechtsberatung”, an NGO in Tyrol, intends to update the short videos that were available on the internet and give information about the asylum procedure in 8 languages.<sup>127</sup> At the time of writing they offer some audio-files in English and Arabic.

Useful explanations of terminology for asylum seekers from the Russian Federation were developed by an NGO from the federal state of Styria in cooperation with the University of Graz.<sup>128</sup> Updated information

<sup>124</sup> These are available at: <http://www.bfa.gv.at/publikationen/formulare/>.

<sup>125</sup> See: [http://www.bfa.gv.at/bmi\\_docs/1753.pdf](http://www.bfa.gv.at/bmi_docs/1753.pdf).

<sup>126</sup> Article 15(1)(4) and 14(4) AsylG explaining the duty to register even for delivering letters abroad.

<sup>127</sup> Plattform Rechtsberatung, Welcome to Europe, available at: <http://bit.ly/1Z7o41m>.

<sup>128</sup> ‘Asylterminologieführer Deutsch/Russisch’, available at: <http://bit.ly/1eQJe22>.

will be available on the website soon. UNHCR has also produced a brochure about the asylum procedure for unaccompanied child refugees. It is available in four languages (German, English, Pashtu, Dari).<sup>129</sup>

The system of free legal advice should, at least, provide information and counselling during the mandatory consultation with the appointed legal adviser in case the BFA intends to reject the asylum application as inadmissible or dismiss it on the merits in the admissibility procedure. The BFA has to include information in its decision about the right to appeal in a language understandable to the applicant. Besides the mother tongue, this could be the *lingua franca* of a country. In the decision of the Federal Administrative Court (BVwG), reference shall also be made, in a language understandable to the asylum seeker, to the possibility of filing a complaint with the Administrative High Court (VwGH) and the Constitutional Court (VfGH).<sup>130</sup>

For Dublin cases, a project entitled “Go Dublin” – previously under ERF and now continuing under the Asylum, Migration and Integration Fund (AMIF) – assists the authorities to enable quick transfers.<sup>131</sup> The project is run by “Verein Menschenrechte Österreich”, an association that has a close working relationship with the authorities and that does not cooperate at all with NGOs. This is why it is unknown whether and how comprehensive information is provided in Dublin cases. The aim of the project is to inform asylum seekers about the Dublin system, modalities and time limits of transfer, but in several known cases asylum seekers agreed to voluntary return (an activity carried out by the same organisation) but were nevertheless sent back to the Member State responsible for the asylum procedure.

The notification by procedural order to the asylum seeker that the BFA intends to apply the Dublin Regulation in his or her individual case, includes the contact details of Verein Menschenrechte Österreich, who also offers advice on assisted voluntary return to third-country nationals. This form of advice is also provided by Caritas in regions such as Upper Austria. Verein Menschenrechte Österreich provides both legal assistance to asylum seekers and advice on voluntary return, on condition that they are not provided by the same staff member. It is not clear how the two functions are distinguished in practice.

According to the law, UNHCR has access to all facilities and is allowed to get in contact with asylum seekers.<sup>132</sup> NGOs have contracts in 7 out of 9 federal provinces for providing social counselling and visit reception centres of the federal provinces regularly. NGOs without such a contract may have to apply at the responsible office of the federal province for a permit to visit an asylum seeker. Access to asylum seekers in detention is difficult for NGOs, insofar as they are not the authorised legal representative of the asylum seeker. The two contracted organisations providing legal advice, “Arge Rechtsberatung” and “Verein Menschenrechte Österreich”, are bound by secrecy and are for this reason hindered from passing on information about clients to NGOs.

---

<sup>129</sup> UNHCR, ‘Your Asylum Procedure in Austria’, available at: <http://bit.ly/1ljRCdT>.

<sup>130</sup> Article 133(4) B-VG; Article 30 VwG-VG.

<sup>131</sup> Ministry of Interior, List of AMIF funded projects 2015-2016, available at: <http://bit.ly/1OqSfsR>; Verein Menschenrechte Österreich, Information on Dublin Procedures, available at: <http://bit.ly/1NrSLac>.

<sup>132</sup> Article 63(1) AsylG.

## D. Subsequent applications

### Indicators: Subsequent Applications

1. Does the law provide for a specific procedure for subsequent applications?  Yes  No
2. Is a removal order suspended during the examination of a first subsequent application?
  - ❖ At first instance  Yes  No
  - ❖ At the appeal stage  Yes  No
3. Is a removal order suspended during the examination of a second, third, subsequent application?
  - ❖ At first instance  Yes  No
  - ❖ At the appeal stage  Yes  No

Subsequent applications are defined by the AsylG as further applications after a final decision was taken on a previous asylum application.<sup>133</sup> If a further application is submitted while an appeal is still pending, the new application is considered as addition to the appeal. Different legal safeguards apply depending on the previous procedure (in merits or Dublin procedure) and the time of submitting the application. Usually, a subsequent application is not admitted to the regular procedure and is rejected as inadmissible.<sup>134</sup>

The Federal Administrative Court (BVwG) can either refuse the appeal or decide to revert it back to the BFA with the binding instruction to examine the subsequent asylum application either in a regular procedure or by conducting more detailed investigations.

Within the admissibility procedure, an interview has to take place, except in the case where the previous asylum application was rejected due to the responsibility of another Member State. Such interviews are shorter than in the first application and focus on changed circumstances or new grounds for the application. New elements are not defined by the law, but there are several judgments of the Administrative High Court that are used as guidance for assessing new elements.<sup>135</sup>

Reduced legal safeguards apply in case an inadmissibility decision was taken within the previous 18 months (rejection is connected to an expulsion order and a re-entry ban of 18 months). In this case, there is generally no suspensive effect either for the appeal or for the application itself. In many cases the asylum applicant does not even undergo a personal interview except for the preliminary interrogation conducted by the police.<sup>136</sup>

Suspensive effect may be granted for an application following a rejection of the application on the merits or a safe third country decision, if the execution of the expulsion order of the previous asylum procedure could violate the non-*refoulement* principle. If suspensive effect is not granted, the file has to be forwarded to the BVwG for review and the Court has to decide within 8 weeks on the lawfulness of not granting suspensive effect.<sup>137</sup> The expulsion may be effected 3 days after the Court has received the file.

In certain cases, it might be necessary for the person concerned to lodge a subsequent asylum application, due to the inactivity of the authorities or the lack of another possibility to get a legal residence. Family and civil status may have changed since the final decision on the first asylum application, e.g. marriage or birth of a child, and due to the expulsion order issued as a result of that negative decision it is not possible for the person concerned to apply for a residence permit as family member of a legally

<sup>133</sup> Article 2(1)(23) AsylG.

<sup>134</sup> Article 68 AVG.

<sup>135</sup> See AsylGH 09.04.2013, C6 408.412-2/2013; VwGH v. 20.03.2003, ZI. 99/20/0480, AsylGH 10.04.2013, B10 305.993-2/2013.

<sup>136</sup> Article 12a(1) AsylG.

<sup>137</sup> Article 22(1) BFA-VG.

residing person or of a person with protection status in Austria. A subsequent application for international protection would then include the question of a possible violation of Article 8 ECHR.

Moreover, in Dublin cases, if the asylum seeker has not been transferred to the responsible Member State after the rejection of their first application although another Member State was considered responsible, the asylum seeker will have to submit a new asylum application in Austria, which will be considered as a subsequent asylum application. Where it becomes clear that the situation has changed or the requested Member State does not accept the request for transfer, a regular procedure is initiated to assess the case on the merits.

Asylum seekers sent back to Austria by other Member States 2 years after their file has been closed due to their absence have to submit a subsequent application too. The same applies if the decision has become final while the asylum seeker was staying in another Member State.

There is no limit on the number of subsequent applications that can be submitted. Different rules apply to subsequent applications with regard to suspensive effect of the application, which depends on whether the expulsion order will be executed within the following 18 days or whether the date is not yet fixed. Free legal assistance is available to appeal the rejection of the subsequent asylum application.

Asylum seekers who submit a subsequent application within 6 months after the previous application has been rejected are not entitled to Basic Care provisions; nevertheless they may receive Basic Care during the admissibility procedure of the subsequent application (see section on Reception Conditions: Criteria and Restrictions to Access Reception Conditions).<sup>138</sup> If Basic Care is not granted, detention or a less coercive measure such as a designated place of living and reporting duties is ordered.<sup>139</sup>

## E. Guarantees for vulnerable groups of asylum seekers (children, traumatised persons, survivors of torture)

### 1. Special procedural guarantees

#### Indicators: Special Procedural Guarantees

1. Is there a specific identification mechanism in place to systematically identify vulnerable asylum seekers?  Yes  For certain categories  No  
❖ If for certain categories, specify which: Unaccompanied minors
2. Are there special procedural arrangements/guarantees for vulnerable people?  Yes  For certain categories  No  
❖ If for certain categories, specify which: Unaccompanied minors, victims of torture or sexual violence

There is no effective system in place to identify asylum seekers in need of special procedural guarantees. During the admissibility procedure in the initial reception centre (EAST), asylum seekers are instructed in the written leaflets to state psychological problems to the doctor and the legal adviser. At the beginning of the interview, they are asked whether they have any health or mental problems that could influence their ability to cooperate in the procedure. Doctors qualified in psychology in the EAST are requested by the BFA to assess if the asylum seeker is suffering from a medically significant stress-related mental disorder as a result of torture or another event which prevents them from defending their interests in the

<sup>138</sup> Article 3(1)(3) Basic Care Act (GVG-B).

<sup>139</sup> Articles 76(3)(4) and 77 FPG.

procedure or entails for them a risk of permanent harm or long term effects.<sup>140</sup> In August 2015, the organisation Doctors Without Borders (MSF) criticised the EAST Traiskirchen in its report, stating that communication between asylum seekers and doctors was insufficient even in cases of severe illness, and found that the responsible person of the ministry, of the security service and the staff lacked empathy for the situation of the asylum seekers and that doctors were not able to treat all clients queuing on one day.<sup>141</sup>

If such effects are deemed to be highly probable, the application shall not be dismissed in the admissibility procedure. Article 30 AsylG also states that, in the further course of the procedure, consideration should be given to the asylum seekers' specific needs. However, this does not seem to be applied in first instance procedures in practice. Usually the 6-month time limit for deciding on the application is long enough to gather evidence and could be extended without any consequences.

### Special procedural guarantees

If an asylum seeker bases the fear of persecution on infringements of the right to sexual self-determination, they should be interviewed by an official of the same sex, unless they request otherwise.<sup>142</sup> In the procedure before the BVwG, this rule should apply only if asylum seekers have already claimed an infringement of their right to sexual self-determination before the BFA or in the written appeal. The Constitutional Court (VfGH) has ruled that a judge of the same sex has to decide on the appeal regardless of whether a public hearing is organised or the decision is exclusively based on the file.<sup>143</sup> A similar provision for interpreters is lacking, however. The Asylum Court (now replaced by the BVwG) had listed in its yearly report 2009 a training of a Psychiatrist on the issue of "Trauma/Pseudo-trauma", however no such lectures were reported in 2010 and 2011.

Each member of a family has to submit a separate application for international protection. During the interview they are asked whether they have individual reasons to apply for protection or they want to rely on the reasons of one of their family members. Accompanied children are represented in the procedure by their parents, who are requested to submit the reasons on behalf of their children.

It is not likely that applications of vulnerable asylum seekers like victims of torture or violence or unaccompanied minors are processed in the airport procedure (the only border procedure), although accelerated procedures for public security reasons may be conducted.

## 2. Use of medical reports

### Indicators: Use of medical reports

1. Does the law provide for the possibility of a medical report in support of the applicant's statements regarding past persecution or serious harm?  
 Yes       In some cases       No
2. Are medical reports taken into account when assessing the credibility of the applicant's statements?  
 Yes       No

Medical reports are mainly requested in the admissibility procedure to assess whether an expulsion would cause a violation of Article 3 ECHR. Therefore, a standard form is used with space for a narrative.

<sup>140</sup> Article 30 AsylG.

<sup>141</sup> Ärzte ohne Grenzen Österreich, *Bericht zur medizinisch-humanitären Lage im Erstaufnahmezentrum Traiskirchen*, August 2015, 10.

<sup>142</sup> Article 20(1) AsylG.

<sup>143</sup> VfGH, U 688-690/12-19, 27 September 2012.

The determining authority requests medical reports from psychiatrists, which are partly criticised by NGOs and psychotherapists.<sup>144</sup> Some of these psychiatrists or medical experts are accredited by the courts, but have no special training on torture survivors, do not allow a person of confidence to be present during the examination or are biased. Therefore asylum seekers also submit opinions of experts of their own choice, which they normally pay themselves, although sometimes these opinions are covered by their health insurance.

The Administrative Procedures Act (AVG) requires the assessment of all relevant facts and imposes an obligation on the authorities to undertake all necessary investigations. Statements of the applicants have to be credible, persecution need not be proved and preponderant plausibility is sufficient. If the authorities have doubts on whether the applicant has been subjected to torture or other serious acts of violence, a medical examination may be ordered by the authorities. These examinations are paid by the state. Often asylum seekers submit expert opinions e.g. a report of the psychiatric department of a hospital where they have been treated or an opinion of a psychotherapist. In every federal state, an NGO provides psychotherapy for asylum seekers with treatment free of charge, funded by the ERF.

In an appeal against a decision of the BFA, new facts and evidence may be submitted only if the asylum seeker had been unable to submit such facts and evidence before the BFA. Negative first instance decisions are often based on the lack of credibility of the facts presented. To convince the Federal Administrative Court (BVwG) of the applicant's credibility, expert opinions demanded from the Court or submitted by the applicant may play a crucial role in the appeal procedure in practice.

The Administrative High Court (VwGH) delivered a crucial decision with regard to the consideration of medical evidence, in which it criticised the first instance authority for:

“[N]eglecting to take into account medical reports as proof of psychological conditions, which consequently deprived the applicants of an objective examination of contentious facts... The responsible authority has thereby judged the applicants' mental state without going into the substance of the individual circumstances.”<sup>145</sup>

A psychiatric opinion was taken into consideration, which concerned the need to treat the psychiatric illness. Post-traumatic stress disorder (PTSD), illusions and concentration difficulties were diagnosed, but the opinion did not bring evidence of how far those issues would influence the asylum seeker's statements. Therefore the authority believed that the asylum seeker should remember the exact date of the events reported.

The established jurisprudence of the VwGH requires exhaustive reasoning to deny the causality between alleged torture and visible scars, including through an expert opinion indicating the likelihood of alleged torture causing the visible effects.<sup>146</sup> In the same ruling, the Court repeats earlier jurisprudence to the effect that psychiatric illness has to be taken into account in regard to discrepancies that have been identified in the statements of an asylum seeker.

Medical reports are not based on the methodology laid down in the Istanbul Protocol.<sup>147</sup>

---

<sup>144</sup> K Ottomeyer: *Genereller Simulationsverdacht (General suspicion of simulation)* (Zebratl, May 2006) available at: <http://bit.ly/1RjDwGt>; Weltverband für Psychiatrie, *Sektion psychologische Folgen von Folter & Verfolgung: Expert opinion on two psychiatric opinions*, 29 November 2002.

<sup>145</sup> VwGH, 007/19/0830, 19 November 2010.

<sup>146</sup> VwGH, 2006/01/0355, 15 March 2010.

<sup>147</sup> United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2004 (Istanbul Protocol), Professional Training Series No. 8/Rev.1.

### 3. Age assessment and legal representation of unaccompanied children

#### Indicators: Unaccompanied Children

1. Does the law provide for an identification mechanism for unaccompanied children?  
 Yes  No
2. Does the law provide for the appointment of a representative to all unaccompanied children?  
 Yes  No

In the case of doubt with regard to the age of an unaccompanied asylum-seeking child, authorities may order a medical examination. Several methods might be used. According to the 2009 amendment of the Asylum Law and decrees of the Minister of Interior (which are not public), age assessments through medical examination should be a measure of *ultima ratio*. Other evidence to prove age should be verified first. If doubts remain after investigations and age assessment, the principle of *in dubio pro minore* (the benefit of the doubt) should apply.<sup>148</sup>

In practice these principles are not strictly applied, however. Children have to undergo the age assessment without the asylum authorities' acknowledging submitted documents or giving enough time to obtain documents. If the child is deemed to be at least 18 years old according to an age assessment examination, they are declared to be adults. The Human Rights Board (*Menschenrechtsbeirat*), NGOs and the Medical Association criticise the age assessment methods used, in regard of their reliability and ethnic acceptance.<sup>149</sup> The age assessment examination states a minimum age and consists of three medical examinations: a general medical examination; an X-ray examination of the wrist and a dental examination by a dentist. If the X-ray examination of the wrist is not conclusive (i.e. it shows a high level of ossification), a further X-ray (CT) examination of the clavicle may be ordered.

The question of whether or not it is possible to appeal the decision to declare an unaccompanied child an adult has been referred to the Constitutional Court (VfGH). In a ruling of 3 March 2014,<sup>150</sup> the Court found that the declaration of the BFA that a person is of age and the consequent discharge of the legal representative may not be appealed during the first instance procedure. As a consequence, unaccompanied children who were erroneously declared to be adults have to continue the procedure without legal representation. An article by Daniela & Rainer Lukits presents the ruling of the Constitutional Court as disappointing.<sup>151</sup> The authors criticise the Court for setting out criteria that are not in line with effective legal safeguards and for misunderstanding the gap in legal protection which presents itself upon such a declaration that an applicant is adult.

In 2012, 698 age assessments have been ordered and 556 expert opinions have been delivered. 336 asylum seekers (60%) have been declared to be 18 or older as a result of age assessment and in 220 cases underage was confirmed.<sup>152</sup> During the first half of 2013, 206 age assessments were ordered and 178 examinations took place. In 128 (74%) cases the conclusion was that the asylum seekers were 18 years of age or above, while 44 (26%) were still considered children.<sup>153</sup> Most of the age assessments are ordered by the EAST during the admissibility procedure, because special safeguards in the Dublin III

<sup>148</sup> Article 13(3) BFA-VG.

<sup>149</sup> Menschenrechtsbeirat (*Human Rights Board*): Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren (*Report of the Human Rights Board on children and adolescents in cross-border procedures*), 2011; Stellungnahme der Ärztekammer (*Comment by the Medical Council*), FPG 2010, 21 July 2009.

<sup>150</sup> VfGH, U 2416/2013-8, 3 March 2014.

<sup>151</sup> D Lukits & R Lukits, 'Neues zur Volljährigerklärung im österreichischen Asylverfahren (News on the declaration of maturity in the Austrian asylum procedure, FabI, January 2014.

<sup>152</sup> Ministry of Interior, Answer of the Minister of Interior to the parliamentary request 13129/AB XXIV. GP, 18 February 2013.

<sup>153</sup> Ministry of Interior, Answer of the Minister of Interior to the parliamentary request 1590/AB XXIV. GP, 3 September 2013.

Regulation apply for unaccompanied children. Age assessments take place even after the application is admitted to the regular procedure.

Moreover, in several cases, unaccompanied children have even been declared to be above 18 years old without a medical age assessment being performed as prescribed by law. Legal representatives have been informed about the cessation of their legal representation by informal email notice without any procedural guarantees (legal information, possibility to submit a written statement or personal hearing). The legal character of the informal notice that legal representation ended due to the age assessment is still not finally solved. An appeal was not forwarded to the BVwG, because the notice was not regarded as administrative decision. The appeal against the rejection of the asylum application was rejected by the BVwG, but the appeal to the Administrative High Court allowed. In the BVwG's decision the contested age assessment was not picked up. The VwGH ruled that the BVwG has not yet issued a decision on the age assessment. Nevertheless – a rejection of a Dublin decision would be unlawful in case the applicant would be underage.

A legal representative is appointed as soon as an unaccompanied child applies for asylum. Contrary to adult refugees, unaccompanied minors have to apply for asylum in the initial reception centre (EAST). Unaccompanied children have no legal capacity to act by themselves in the procedure; nevertheless, they are under the same obligation to cooperate in the procedure as adults. Legal representatives have to be present at interviews organised by the Federal Agency for Immigration and Asylum (and hearings at the Federal Administrative Court). During the admissibility procedure, the legal advisers (who are contracted by the Ministry of Interior) act as legal representatives of the unaccompanied asylum-seeking child. Legal advisers are either from Verein Menschenrechte Österreich or from ARGE Rechtsberatung. According to *Menschenrechtsbeirat*,<sup>154</sup> it is problematic that these legal advisers are only responsible for the asylum procedure and do not have whole custody of the child. Furthermore, legal advisers are not required to have special expertise on children.

After admission to the regular procedure and transfer to one of the federal provinces, the Child and Youth Service (*Kinder- und Jugendhilfe*) takes over the legal representation according to the Asylum Law or by court decision. During his visit, the Commissioner for Human Rights of the Council of Europe learned however that gaps persist for children at the admissibility stage and for those whose cases have been declared inadmissible or who are subject to being returned to another EU Member State under the Dublin Regulation.<sup>155</sup>

Since January 2014, all children shall have a legal representative in Aliens Police Act procedures. This legal provision has been adopted in the *Fremdenbehördenneustrukturierungsgesetz* (FNG), a 2012 amendment.<sup>156</sup> Before, children of 16 years of age were not legally represented in procedures according to the Foreigner Police Law, e.g. an expulsion order or detention. Furthermore, legal safeguards for unaccompanied children have been improved. The time-limit for submitting the appeal has been extended to 4 weeks (instead of 2 weeks in the regular procedure).<sup>157</sup>

As of 1 January 2014, unaccompanied children also have the duty to cooperate with family tracing in the country of origin or third countries, regardless of the organisation or person who is undertaking the tracing.<sup>158</sup> For the time being it seems that tracing in countries of origin or third countries is not applied. The same amendment of the law implements the extended definition of family members and legal

---

<sup>154</sup> Menschenrechtsbeirat: (*Human Rights Board*): Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren (*Report of the Human Rights Board on children and adolescents in cross-border procedures*), 2011.

<sup>155</sup> CoE Commissioner for Human Rights, *Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Austria from 4 to 6 June 2012*, CommDH(2012)28, 7.

<sup>156</sup> BGBl. I Nr. 87/2012, 16 August 2012.

<sup>157</sup> Article 16(1) AsylG.

<sup>158</sup> Article 13(6) FNG Adoption Law. BGBl. I Nr. 68/2013, 17 April 2013.

representatives of children introduced by the recast Qualification Directive (QD) and the Dublin III Regulation.<sup>159</sup>

The number of unaccompanied children seeking asylum in Austria has increased in the last years, from 934 in 2010 to 1,346 in 2011 to 1,781 in 2012, which is an increase of almost 90% in two years. Children from Afghanistan are the largest group (58% in 2012).<sup>160</sup> In 2013 their number decreased. According to the figures released by the Ministry of Interior,<sup>161</sup> 999 unaccompanied children applied for asylum in 2013, 1,253 in 2014<sup>162</sup> and 7,155 from January until October 2015. Children from Afghanistan (4,699) are still the largest group.<sup>163</sup>

During 2014, the BFA took no action regarding the applications of unaccompanied asylum-seeking children, other than to register their application. Many did not even have an interview. In some cases their legal representatives submitted appeals due to the delay in rendering the decision on the application. Some asylum seekers were called to the BFA after letters of complaint were submitted to the BFA by the children's legal representatives. The BFA explained their inaction with reference to a lack of reception places for unaccompanied children, as a result of which they could not be transferred to the federal provinces. It was therefore unclear which branch office of the BFA would be responsible for processing the application. The delay in processing applications of unaccompanied minors is still not solved.

## F. The safe country concepts

### Indicators: Safe Country Concepts

- |  |   |                             |
|--|---|-----------------------------|
| 1. Does national legislation allow for the use of "safe country of origin" concept?  | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ❖ Is there a national list of safe countries of origin?                              | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ❖ Is the safe country of origin concept used in practice?                            | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| 2. Does national legislation allow for the use of "safe third country" concept?      | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ❖ Is the safe third country concept used in practice?                                | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| 3. Does national legislation allow for the use of "first country of asylum" concept? | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |

Article 19 BFA-VG provides a list of safe countries of origin. This list includes all EU Member States,<sup>164</sup> although there is a mechanism to take Member States off the list in case Article 7 of the Treaty on European Union (TEU) would be applied.<sup>165</sup> As a consequence, suspensive effect must be granted for appeals in asylum procedures of nationals of such EU Member State.

Other safe countries of origin mentioned in the Asylum Act are **Switzerland, Liechtenstein, Norway, Iceland, Australia** and **Canada**. States waiting for accession to the EU are defined as safe countries of origin by Governmental order; these are **Bosnia-Herzegovina, FYROM, Serbia, Montenegro, Kosovo** and **Albania**.<sup>166</sup>

<sup>159</sup> Article 2(j) recast Qualification Directive; Article 2(g) Dublin III Regulation.

<sup>160</sup> Ministry of Interior, *Asylum Statistics 2012*, available at: <http://bit.ly/1QrNWPu>.

<sup>161</sup> Ministry of Interior, *Asylum Statistics 2013*, available at: <http://bit.ly/1KFSjom>.

<sup>162</sup> Ministry of Interior, *Asylum Statistics 2014*, available at: <http://bit.ly/16FjhxT>.

<sup>163</sup> Ministry of Interior, *Asylum Statistics October 2015*, available at: <http://bit.ly/1OhJiCf>.

<sup>164</sup> Defined as states party to the EU Treaties: Article 2(1)(18) AsylG.

<sup>165</sup> Article 7 TEU provides for suspension of certain rights deriving from the application of the Treaties in case of serious breach of the values on which the EU is based, as laid down in Article 2 TEU.

<sup>166</sup> BGBl. II Nr. 405/2013, 3 December 2013, available at: <http://bit.ly/1KbnKsD>.

The suspensive effect of an appeal against a negative decision may not be granted in such cases by the BFA, and the Federal Administrative Court (BVG) has to decide within 7 calendar days on suspensive effect. In such procedures, asylum seekers have access to free legal assistance where applications are rejected. Legal advisers have to organise interpreters. The procedure may be accelerated, but there are no exceptional time limits for deciding such applications.

The Governmental order of safe countries of origin must take into account primarily the existence or absence of state persecution, protection from persecution by non-state actors and legal protection against human rights violations. The COI department of the BFA has to take various state and non-state sources into consideration. The Federal Government can by ministerial order decide that, in such cases, suspensive effect may no longer be refused and that the BFA and the Court are bound by such decision. The examination by the Ministry of Interior took reports of the COI of the (former) Federal Asylum Agency into consideration and drafted the list following the extension of a safe country of origin list of Switzerland. The list was drafted by the Ministry of Interior,<sup>167</sup> while NGOs had the possibility to submit comments on it. The list of safe countries of origin is applied in practice and has not been changed since 2010.

In 2014, 8% of asylum seekers came from Kosovo and Serbia and during the first 10 months of 2015 the share of Kosovars out of in total 68,589 applications was 3.6%.

## G. Treatment of specific nationalities

### Indicators: Treatment of Specific Nationalities

1. Are applications from specific nationalities considered manifestly well-founded?  Yes  No  
❖ If yes, specify which:
2. Are applications from specific nationalities considered manifestly unfounded?<sup>168</sup>  Yes  No  
❖ If yes, specify which: Bosnia-Herzegovina, FYROM, Serbia, Montenegro, Kosovo, Albania

The so-called “**fast-track procedure**” is applied to swiftly examine and deliver negative decisions on asylum applications, usually from a certain country of origin beyond the “safe countries of origin” list and during a certain period. This stems from a political decision to discourage other potential asylum applicants from the same country from applying in Austria.<sup>169</sup>

The asylum applicant has, during that time, the same rights as any asylum applicant in a procedure in which the merits of the claim are examined (See the section on Regular procedure), but will receive the negative decision from the BFA within 1 or 2 weeks instead of around 5 to 6 months. Nevertheless, the appeal filed within 2 weeks after the notification of the decision usually has a suspensive effect.

So-called “fast-track-procedures” were conducted in recent years with regarding asylum seekers from countries of origin with low recognition rates, such as Pakistan and Algeria. The last notable wave of fast track procedures started in summer 2011 and lasted about 5 months, and concerned asylum applicants

<sup>167</sup> According to information from the Ministry of Interior, human rights standards have been assessed by the Ministry of Interior based on the country of origin information of the Federal Asylum Agency. See Ministry of Interior, *Fremdenwesen (Alien Affairs)*, June 2009, available at: <http://bit.ly/1SXBISC>, 72.

<sup>168</sup> Whether under the “safe country of origin” concept or otherwise.

<sup>169</sup> Ministry of Interior, *Parliamentary Hearing*, 30 October 2012: Johanna Mikl-Leitner, Minister of Interior, explained during the parliamentary hearing: “We know from persons coming from third countries, especially from Balkan countries, that grounds for asylum don’t exist, and we therefore changed to accelerated procedures” (“Bei Personen, die aus Drittstaaten kommen, im Speziellen aus den Balkanländern, wissen wir, dass es keine Asylgründe gibt, und da sind wir zu Schnellverfahren übergegangen.”)

from **Afghanistan, Pakistan** and **Bangladesh**. Many asylum applications were rejected the day following the first interview, which clearly indicates that the BFA did not investigate the individual case and made it impossible for the applicants to submit documents or evidence of their reasons for requesting asylum.

Asylum seekers from **Syria** receive protection status. Moreover, Austria resettled 500 refugees from Syria in 2014 and agreed to resettle a further 1,000 Syrian refugees. 400 of them were selected by the Ministry of Interior mainly because they have relatives in Austria. These refugees will be granted asylum *ex officio*.<sup>170</sup> While all Syrian refugees of the first Humanitarian Reception Program (HAP) arrived – 388 persons in the year 2014, 573 came until October 2015 to Austria mainly from the second program.<sup>171</sup>

In relation to rights provided to refugees fleeing Syria, persons with refugee status receive a permanent residence permit, the right to family reunification and access to Austria's labour market. Persons with subsidiary protection status are granted residence permit for one year and for two years after the first extension, the right to family reunification after the first extension of their residence permit, and access to labour market immediately after recognition of their subsidiary protection status.

---

<sup>170</sup> Wiener Zeitung, 'Until Monday the first Syrian refugees will arrive ("*Bis Montag kommen die ersten syrischen Flüchtlinge*")', 26 September 2013, available at: <http://bit.ly/1BLvtXt>.

<sup>171</sup> Ministry of Interior, *Asylum Statistics December 2014; Asylum Statistics October 2015*.

## Reception Conditions

### A. Access and forms of reception conditions

#### 1. Criteria and restrictions to access reception conditions

##### Indicators: Criteria and Restrictions to Reception Conditions

1. Does the law make material reception conditions to asylum seekers in the following stages of the asylum procedure?
- |                           |   |  |  |
|---------------------------|---|--|--|
| ❖ Regular procedure       | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions | <input type="checkbox"/> No            |
| ❖ Dublin procedure        | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions | <input type="checkbox"/> No            |
| ❖ Admissibility procedure | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions | <input type="checkbox"/> No            |
| ❖ Border procedure        | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions | <input type="checkbox"/> No            |
| ❖ Accelerated procedure   | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions | <input type="checkbox"/> No            |
| ❖ First appeal            | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions | <input type="checkbox"/> No            |
| ❖ Onward appeal           | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions | <input type="checkbox"/> No            |
| ❖ Subsequent application  | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions | <input checked="" type="checkbox"/> No |
2. Is there a requirement in the law that only asylum seekers who lack resources are entitled to material reception conditions?  Yes  No

Asylum seekers and other persons who cannot be expelled are not entitled to the same social benefits as citizens. In 2004, the Basic Care Agreement between the State and the federal provinces entered into force and has been implemented at national and provincial level. The agreement sets out the duties of the Federal State and the states and describes material reception conditions such as accommodation, food, health care, pocket money, clothes and school material, leisure activities, social advice and return assistance, by prescribing the amount for each.

Asylum seekers are entitled to Basic Care immediately after submitting the asylum application until the final decision on their asylum application in all types of procedures. Since the last legal amendment in July 2015, however, the provision of Basic Care may violate Article 17(1) of the recast Reception Conditions Directive. Contrary to the Directive, Basic Care is foreseen as soon as the person requesting international protection is regarded as asylum seeker. An asylum seeker is an alien whose request is submitted, which is the case after the BFA gives an instruction about the next steps to the public security officer.

Since the amendment of the Asylum Law in July 2015, the registration of the application and the provision of Basic care has changed. Asylum seekers do not submit the application in the EAST, but request for asylum at a police station. As long as their application is not regarded as submitted, the person is not an asylum seeker in the sense of Article 2(14) of the Asylum Act. Different entitlements are foreseen in the Basic Care Agreement and the Basic Care Act (GVG-B). While the Agreement declares in Article 2(1) as target group asylum seekers who have *requested* for asylum, the Basic Care Act of the Federal State defines the responsibility of the Federal state for asylum seekers after having *submitted* the application during the admissibility procedure in a reception facility of the Federal State.<sup>172</sup> However, Basic Care conditions do not apply in detention or where alternatives to detention are applied.<sup>173</sup> While an alternative to detention is being applied, the asylum seeker is entitled to reception conditions that are more or less similar to Basic Care (accommodation, meals and emergency health care). Some NGOs have contracts to care for asylum seekers and other aliens.<sup>174</sup>

<sup>172</sup> Articles 1(1) and 2(1) GVG-B.

<sup>173</sup> Article 2(2) Basic Care Agreement; Article 2(3) GVG-B. Note that this not in conformity with Article 3 recast Reception Conditions Directive.

<sup>174</sup> E.g. Verein Menschen.Leben, available at: <http://bit.ly/1QuetAe>.

Asylum seekers subject to Dublin procedures are entitled to basic care provisions until their transfer to the Member State responsible for the examination of the asylum application is executed. This general rule is not applicable if the asylum seeker is detained or ordered less coercive measures, however. In both cases they are not covered by health insurance but have access to necessary urgent medical treatment. In contrast to asylum seekers subject to the Dublin procedure but accommodated in one of the reception facilities in Austria, those undergoing Dublin procedures whilst in detention or less coercive measures do not receive monthly pocket money (€40). This distinction in the reception conditions available to applicants detained or subject to alternatives to detention does not respect the recast Reception Conditions Directive, which should remain applicable in all Dublin procedures.<sup>175</sup>

A precondition for Basic Care is the need for support. This is defined by law as applicable where a person is unable to cover subsistence by their own resources or with support from third parties.<sup>176</sup> Asylum seekers arriving in Austria with a visa are thus not entitled to Basic Care due to the precondition of having “sufficient means of subsistence” for the purpose of obtaining a Schengen visa.<sup>177</sup> This exclusion clause is applied very strictly, even when the sponsor is unable to care for the asylum seeker. Exception may be made if the asylum seeker has no health insurance and gets seriously ill and needs medical treatment. Although the amount of material reception conditions is specified in the Basic Care Agreement,<sup>178</sup> the level of income or values relevant to assessing the lack of need for Basic Care is not specified by law. Legislation does not lay down the amount of means of subsistence below which a person is entitled to Basic Care, even though the amounts for subsistence and accommodation are prescribed by law. In practice, the level of income in the law of Tyrol is applied in other federal provinces too: asylum seekers who have an income beyond 1.5 times the amount of Basic Care benefits (€465) are deemed to be without need of Basic Care. In Salzburg, the regulation for Basic Care sets out that income up to €110 is not taken into account; for any family member in a household, a further €80 of income should not lead to a reduction of basic care support.<sup>179</sup>

Furthermore, EU and EEA (European Economic Area) citizens are excluded from Basic Care.

Special documents for the entitlement to Basic Care are not foreseen. All asylum seekers and other persons who cannot be deported are registered in a special database, the *Grundversorgungssystem*. National and local authorities, as well as contracted NGOs, have access to the files. Asylum seekers returned to Austria from other Member States may face obstacles to getting full Basic Care after arrival. Sometimes free places in the Federal province they are assigned to are not available. Therefore it happens that they stay in the transit zone of the airport (*Sondertransit*) voluntarily and wait for the renewal of their entitlement to Basic Care, although they stay in a closed centre in the meantime.

After a positive decision, refugees may stay up to 4 months in the reception centre. For persons with subsidiary protection status, no maximum time period exists, which means that they stay in reception centres as long as they are not able to cover subsistence and accommodation costs by their own.<sup>180</sup>

After a final negative decision on the asylum application, the law provides for Basic Care until departure from Austria, if the rejected applicant cannot leave e.g. due to inability to obtain a travel document. Usually, rejected asylum seekers remain in the same reception facility. While in Vienna, Basic Care after a negative decision is usually prolonged, other federal provinces cease support. Depending on available places,

---

<sup>175</sup> Recital 11 Dublin III Regulation. See also CJEU, Case C-179/11 *Cimade & GISTI v Ministre de l'Intérieur*, 27 September 2012, para 46.

<sup>176</sup> Article 2(1) Basic Care Agreement (GVV)-Art 15a.

<sup>177</sup> Article 5(1)(c) Schengen Borders Code.

<sup>178</sup> Articles 6, 7 and 9 Grundversorgungsvereinbarung (GVV); Art. 15a B-VG.

<sup>179</sup> Verordnung (Regulation) 53/2013, Landesgesetzblatt Land Salzburg, 24 May 2013.

<sup>180</sup> Article 2(1)(3) GVG-Art 15a.

rejected asylum seekers may stay in the reception centre on the basis of a private agreement with the landlord or NGO.

By the end of November 2015, 54,065 asylum seekers received Basic Care, 92% with applications pending in first instance.

## 2. Forms and levels of material reception conditions

### Indicators: Forms and Levels of Material Reception Conditions

1. Amount of the monthly financial allowance/vouchers granted to asylum seekers as of 31 December 2015 (in original currency and in €):	
❖ Accommodated, incl. food	€40
❖ Accommodated without food	€150-200
❖ Private accommodation	€320

Basic Care may be provided in three different forms:<sup>181</sup>

- (1) Asylum seekers can be accommodated in reception centres where catering is provided. Asylum seekers in such reception centres receive €40 pocket money per month, while the care provider (NGOs, private companies contracted by the Government) receives €19 maximum compensation for the costs per day, depending on the standards of the facility.
- (2) Basic Care can be provided in reception centres where asylum seekers cook by themselves. In that case, asylum seekers receive between €150 and 180 per month mainly in cash. Alternatively, as is practice in Tyrol, they receive € 200 for subsistence (which equals the amount given for subsistence to those living in private flats). In some federal provinces the amount for children is reduced, e.g. in Tyrol children receive €90.
- (3) Basic Care can be provided for asylum seekers in private rented accommodation. In this case asylum seekers receive €320 in cash.

All asylum seekers receive additionally €150 a year for clothes in vouchers and pupils get €200 a year for school material, mainly as vouchers.<sup>182</sup>

Asylum seekers living in private rented flats receive 41% of the needs-based minimum allowance (*bedarfsorientierte Mindestsicherung*) for citizens in need of social welfare support, which is about €820 per month (€600 for subsistence and €220 for accommodation). The sum given to a provider, €570 per month (€19 per day) for accommodation and subsistence, is below the level of welfare support for citizens, although staff and administrative costs have to be covered by the care provider.

Unaccompanied asylum-seeking children must be accommodated according to their need of guidance and care. The daily fee for NGOs hosting unaccompanied asylum-seeking children ranges from €39 to €95, depending on the intensity of psychosocial care.

<sup>181</sup> Article 9 (1)-(3) GVV-Art 15a and the respective Basic Care Acts of the federal provinces. See also Article 17(1) recast Reception Conditions Directive.

<sup>182</sup> Article 9 (10), (14) GVV-Art 15a.

### 3. Types of accommodation

#### Indicators: Types of Accommodation

1. Number of reception centres:<sup>183</sup> Not available
2. Total number of places in the reception centres:<sup>184</sup> 72,500
3. Total number of places in private accommodation: Not available
4. Type of accommodation most frequently used in a regular procedure:  
 Reception centre  Hotel or hostel  Emergency shelter  Private housing  Other
5. Type of accommodation most frequently used in an accelerated procedure:  
 Reception centre  Hotel or hostel  Emergency shelter  Private housing  Other

Asylum seekers are accommodated in facilities of different size and capacity. A quota system requires the federal provinces to provide places according to their population.<sup>185</sup>

Each of the 9 federal provinces has a department responsible for administering Basic Care. This department searches suitable accommodation places, and concludes contracts with NGOs or landlords, owners of hotels or inns, to provide a certain number of places and Basic Care provisions. Regular meetings of the heads of the provincial departments and the Ministry of Interior take place to evaluate the functioning of the Basic Care system and the level of financial compensation for the federal provinces. According to the Basic Care agreement between the State and the federal provinces, the latter have to cover 40% of the expenditures, while the Ministry has to pay 60% of the costs. This share of the Ministry of Interior could rise to 100% if an asylum application is not processed within due time.

#### Lack of accommodation

Recently arrived asylum seekers have severe difficulties getting Basic Care. Many have been sent away in Traiskirchen with the information that there are no places available and the asylum seeker should inform the BFA about their address. Some asylum seekers manage to find Austrians who help them to get a private shelter in Lower Austria or Vienna. Nevertheless, it takes several weeks to receive Basic Care benefits.

In practice, most federal provinces do not provide the number of places required under their quota. Consequently, asylum seekers cannot be dispersed according to the law and often stay longer in the initial reception centre (EAST) or the distribution centres (VQ). This has been an issue high on the political agenda since autumn 2012 when, instead of 480 asylum seekers (the number agreed between the Minister of Interior and the mayor of Traiskirchen), around 1,500 asylum seekers were hosted in the EAST Traiskirchen. The lack of reception places was high on the political agenda in 2014. Since September 2014, the number of asylum applications increased, while only a few asylum applications were processed by the BFA. This led to a sharp increase of asylum seekers in need of reception places in the federal provinces and an overcrowded EAST. By the end of 2014, 1,803 asylum seekers lived in EAST Traiskirchen and 516 in the EAST West in Thalham, the initial reception centres provided by the federal State.

The federal provinces agreed to fulfil their reception quota by January 2015, the media reported.<sup>186</sup> In summer 2015, the situation in the reception centres of the state collapsed – asylum seekers did not get

<sup>183</sup> Both permanent and for first arrivals.

<sup>184</sup> As of 30 November 2015, according to information provided by the Ministry of Interior to ECRE.

<sup>185</sup> Article 1(4) GVV-Art.15a.

<sup>186</sup> Oberösterreichische Nachrichten, 'Oberösterreich muss noch 668 Asyl-Plätze finden (Upper Austria has to find 668 asylum-places)', 2 December 2014, available at: <http://bit.ly/1k47cZQ>.

proper registration and material reception conditions. In the EAST Traiskirchen, which is equipped for 1,750 persons, 2,500 to 3,000 persons were living at the beginning of summer.<sup>187</sup>

#### *Efforts to increase reception capacity*

The Ministry of Interior opened several additional reception centres and even sport halls of the police were used. Emergency centres were opened by the end of the year in military barracks. Due to the shortage of reception places in late 2014, other emergency measures were discussed, such as hosting asylum seekers in military camps or in tents. The Ministry of Interior suggested the idea of establishing reception centres in former military camps and one in **Klosterneuburg** was opened before the end of 2014. In September 2015 about 800 asylum seekers were hosted in military camps in **Lower Austria, Salzburg, Upper Austria, Tyrol** and **Styria**.<sup>188</sup> Others in **Upper Austria** and **Salzburg** followed. Federal reception centres were opened in several federal provinces because the number of asylum seekers in the initial reception centre had increased.

As of 20 July 2015 the EAST should serve as centre for asylum seekers with an admissibility procedure likely to be rejected. The 2 initial reception centres in Traiskirchen and in Thalham are therefore reserved for asylum seekers in the admissibility procedure and for unaccompanied minor asylum seekers as long as they are not transferred to reception facilities of the federal provinces. Instead of streaming all asylum seekers to the EAST, they should have their first accommodation in the so called distribution centres (VQ), which should be set up in 7 federal provinces. Not all distribution centres opened in time.<sup>189</sup>

The Ministry of Interior, which is responsible for Basic Care during the admissibility procedure, subcontracts their day-to-day management to companies, while remaining the responsible authority. Until 2012, European Homecare, which is mainly active in Germany, was providing federal care to asylum seekers. Since 2012, ORS, a company running accommodation centres for asylum seekers in Switzerland, provides basic care in the reception centres under the responsibility of the Ministry.

By the end of 2014, the Ministry of Interior was responsible for 12 reception centres.<sup>190</sup> In 2015 the Ministry of Interior was no longer able to provide adequate reception places and used tents and sport halls to give newly arrived refugees shelter. A legal amendment enables the Ministry of Interior since 1 October 2015 to open reception facilities in federal provinces that do not fulfil the reception quota. Such centres may be opened even when the facility is not dedicated as refugee home, where special safeguards apply like fire protection or building regulations.<sup>191</sup> Immediately after the law entered into effect, the Ministry started to prepare three bigger centres and started negotiations with 15 municipalities<sup>192</sup>

In case of larger numbers of arrivals and difficulties in transferring asylum seekers to reception facilities in the federal provinces, the Federal State may host asylum seekers even after their asylum application is admitted to the regular asylum procedure for a maximum period of 14 days. In practice it can take much longer to transfer an asylum seeker to one of the federal provinces.

At the Vienna airport, the EAST is under the responsibility of the border police. Caritas has a contract to provide care for asylum seekers waiting for transfer to Traiskirchen or for the final decision on their application.

---

<sup>187</sup> Bernhard Odehnal, Tages-Anzeiger, 'Endstation Traiskirchen (last station Traiskirchen)', 30 June 2015, available at: <http://bit.ly/1Zdotj3>.

<sup>188</sup> APA OTS, 'Bundesheer: Kasernen als Notquartiere für Flüchtlinge geöffnet', 6 September 2015.

<sup>189</sup> Die Presse, 'Nicht alle Verteilerzentren starten pünktlich', 14 July 2015, available at: <http://bit.ly/1Rqayof>.

<sup>190</sup> See Ministry of Interior, Grundversorgung/Bundesbetreuung, available at: <http://bit.ly/11qIDgA>.

<sup>191</sup> Bundesverfassungsgesetz: Unterbringung und Aufteilung von hilfs- und schutzbedürftigen Fremden. BGBl 120, 28 September 2015, available at: <http://bit.ly/1JdszhK>.

<sup>192</sup> Orf, 'Durchgriffsrecht in ersten Gemeinden (right to take drastic measures in first municipalities)', 2 October 2015, available at: <http://bit.ly/1m9mKws>.

NGOs or owners of hostels and inns, who run reception centres under the responsibility of the federal provinces, have contracts with the governmental department of the respective federal provinces. While in some federal provinces almost all asylum seekers are placed in reception centres (e.g. Burgenland, Upper Austria), private accommodation is more often used in others such as Vienna.

By the end of November 2015, the Austrian system counted 72,500 persons cared for under the Basic Care System. However, a significant number of asylum seekers continue to have no access to accommodation. Many have been staying in emergency shelters set up by NGOs and volunteers, including in train stations of main cities.

#### **Transit centres (*Transitquartiere*)**

In parallel to the reception system, several transit centres have been opened in various locations in Austria for refugees transiting the country *en route* to Germany. Even though these are only intended for short stays of hours or days, as many as 7,100 asylum seekers have been staying in those centres due to the lack of accommodation as of the end of November 2015.<sup>193</sup>

#### **4. Conditions in reception facilities**

##### **Indicators: Conditions in Reception Facilities**

1. Are there instances of asylum seekers not having access to reception accommodation because of a shortage of places?  Yes  No
2. What is the average length of stay of asylum seekers in the reception centres? Not available
3. Are unaccompanied children ever accommodated with adults in practice?  Yes  No

Conditions in the reception centres vary. According to the standards of the facility, NGOs or the landlord receive up to €19 per person a day for providing housing, food and other services like linen or washing powder. There are still some reception centres that get only €16 or €17 per person refunded due to low standards, e.g. because there is no living room or more people have to share the bathroom and toilet. A survey by journalists in summer 2014 showed big differences in the reception centres of three federal provinces.<sup>194</sup> One of the centres was overcrowded, while others had severe sanitary problems and asylum seekers complained about the poor and unhealthy meals. The federal provinces agreed on minimum standards in September 2014.<sup>195</sup>

Additionally, the Ombudsman released a report in 2013 about grievances in reception centres in Carinthia and Burgenland.<sup>196</sup> After the partly very poor and unhealthy living conditions became public, a working group was established among the federal provinces to define standards in reception centres and some centres were closed.

Depending on the former use of the buildings, asylum seekers may live in an apartment and have their own kitchen and sanitary facilities, which is sometimes the case in former guest houses. Usually single persons share the room with other people. In most reception centres, asylum seekers have to keep their

<sup>193</sup> OE1ORF.at 'Notquartiere immer öfter fixe Asylquartiere' 20 November 2015, available at <http://oe1.orf.at/artikel/425867>.

<sup>194</sup> Dossier, 'Asyl – Ein Jahr Danach', 3 November 2014, available here: <http://bit.ly/1cyZZNB>, contains reports on each of about 100 facilities visited.

<sup>195</sup> Mindeststandards betreffend die Unterbringung in der Grundversorgung in Österreich (Minimum standards for hosting in Basic Care in Austria, 2014, available at: <http://bit.ly/1ZdoiUP>.

<sup>196</sup> Ombudsman, *Mängel in Asylunterkünften im Burgenland*, 16 July 2013, available at: <http://bit.ly/1IXzJIG>.

room clean, but they could also be responsible for keeping the floor, living rooms, toilets and showers clean. This work in the centre may also be remunerated from €3 to €5 per hour.

There is a trend to allow asylum seekers to cook for themselves because it is evident that this contributes to the well-being of the asylum seeker and reduces tensions. In the reception centres of the state, cooking is not possible and even taking food into the living room or bedroom is not allowed. If meals are served, dietary or religious requirements have to be respected, but there are complaints about quality and some failures to take religious requirements into account.<sup>197</sup> In Burgenland and Styria, meals are often served by the centre, while in Tyrol the three remaining reception centres where asylum seekers get the meals from the central kitchen will be closed.

A monthly amount of €10 is foreseen in the Basic Care agreement for leisure activities in reception centres. This is partly used for German language classes. Because administration of this benefit is very bureaucratic, it is not often used.

Hotels and inns usually do not have staff besides personnel for the kitchen, administration and maintenance of the buildings. These reception centres are visited by social workers, most of them staff of NGOs, on a regular basis (every week or every second week). Reception centres of NGOs have offices in the centres. The capacities foreseen by law – 1 social worker for 140 clients - are not sufficient, especially when social workers have to travel to facilities in remote areas or need the assistance of an interpreter. NGOs work with trained staff. Some of the landlords host asylum seekers since many years and may have learned by doing, but have not received specific training.

The system of dispersal of asylum seekers to all federal provinces and within the federal provinces to all districts results in reception centres being located in remote areas. One of these centres in the mountains of Tyrol, a former military camp, cannot be reached by public transport, a shuttle bus brings the asylum seekers two times a week to the next village, two and a half hour walking distance. Mobile phone or internet is not accessible.<sup>198</sup>

## 5. Reduction or withdrawal of reception conditions

### Indicators: Reduction or Withdrawal of Reception Conditions

1. Does the law provide for the possibility to reduce material reception conditions?  
 Yes  No
2. Does the legislation provide for the possibility to withdraw material reception conditions?  
 Yes  No

### Grounds for reduction or withdrawal

Material reception conditions are reduced if the asylum seeker has an income, items of value or receives support from a third party.<sup>199</sup> For the first phase of the asylum procedure (the admission stage), this rule is not applicable. If an asylum seeker earns money or receives support from other sources, they are allowed to keep €110; or €240 in Tyrol, there is no common practice across all federal provinces. All additional income will be requested as a financial contribution for the asylum seeker's Basic Care. Reduction could also consist in not granting the monthly pocket money for subsistence or the support for the child if the child is entitled to child benefits, which mainly applies to those who have received refugee status.

<sup>197</sup> Dossier, 'Asyl – Ein Jahr Danach', 3 November 2014, available here: <http://bit.ly/1cyZZNB>.

<sup>198</sup> Profil, 'Nächtlicher Angriff auf Asylwerber in tiroler Bergen (Attack on asylum seeker in the mountains of Tyrol in the night)' 30 October 2014, available at: <http://bit.ly/1G8a8MZ>.

<sup>199</sup> Article 2(1) B-VG Art 15a.

Material reception conditions may be withdrawn where the asylum seeker:<sup>200</sup>

- (a) Repeatedly violates the house rules and/or his or her behaviour endangers the security of other inhabitants;
- (b) Leaves the designated place for more than 3 days, as it is assumed that they are no longer in need of Basic Care;
- (c) Has submitted a subsequent application;
- (d) Has been convicted by court for a crime on a ground which may exclude him or her from refugee status according to Article 1F of the Refugee Convention. This ground for withdrawal is not in line with Article 20 of the recast Reception Conditions Directive but does not seem to be applied or relevant in practice.
- (e) Since 20 July 2015, in the case the application is rejected or dismissed and suspensive effect was excluded according to Article 18(1) BFA-VG, benefits are terminated. If the applicant cooperates to return voluntarily, he or she is eligible to material reception conditions until his departure.<sup>201</sup> The new regulation makes a reference to Article 20(5) of the recast Reception Conditions Directive according to this article a dignified living standard and access to medical treatment have to be provided.

In some federal provinces and the state, the laws also permit the exclusion of asylum seekers who fail to cooperate with establishing their identity and need of basic care, although this is not applied in practice.<sup>202</sup>

## Procedure

Withdrawal or reduction of Basic Care provisions should be decided by the BFA as long as asylum seekers are in the admissibility procedure and by the governmental office of the federal province if the asylum seeker is admitted to the procedure in merits and Basic Care is provided by one of the federal provinces. In practice, only few procedures of reduction or withdrawal of Basic Care have been carried out. This is partly because NGOs manage to arrange a solution for their clients, partly because the competent offices are unwilling to make a written decision. Decisions are taken on an individual basis but written reasoned decisions are rare.

Procedural safeguards in case of withdrawal or reduction do not fully meet the requirements set out in Article 20 RCD. In some federal provinces, reduction or withdrawal of reception conditions may be ordered without prior hearing of the asylum seeker and without written notification of the decision. In some federal provinces, the latter is only rendered upon request of the asylum seeker. It has also happened that the reception conditions of all asylum seekers involved in a violent conflict in a reception facility were withdrawn without examination of the specific role of all individuals concerned in the conflict.

A legal remedy in the Basic Care Law of the Federal State is foreseen in case material reception conditions are withdrawn. Such decisions to withdraw or reduce Basic Care provision can be appealed at the Administrative Court (the Federal Administrative Court in case of a BFA decision, the Administrative Court of the federal provinces in case of decisions of the provincial government). Free legal assistance for appeal is not foreseen in all provinces, though provided in the law since 20 July 2015. At the time of writing the report, implementation of legal assistance took place in **Tyrol, Lower Austria, Upper Austria and Vorarlberg**.

Asylum seekers whose Basic Care has been terminated or reduced may re-apply for the provision of basic care in the federal province they have been allocated to. In practice, it is difficult to receive Basic Care again after it has been terminated. Asylum seekers who endanger the security of other inhabitants

---

<sup>200</sup> Article 2(4)-(5) GVG-B.

<sup>201</sup> Article 2(7) GVG-B.

<sup>202</sup> Article 3(1) GVG-B.

are sometimes placed in other reception centres with lower standards. Asylum seekers who have left their designated place of living may get a place in another reception centre in the same federal province after applying for Basic Care.

If Basic Care is withdrawn because the asylum seeker is no longer considered to be in need of benefits, for example because they earn some money, they may receive Basic Care if it is proven that they are again in need of it. However, asylum seekers may end up homeless or in emergency shelters of NGOs mainly because they do not succeed in obtaining Basic Care after withdrawal or they have left the federal province for various reasons such as presence of community, friends or family in other federal provinces, unofficial job offers and so forth.

## 6. Access to reception centres by third parties

### Indicators: Access to Reception Centres

1. Do family members, legal advisers, UNHCR and/or NGOs have access to reception centres?  
 Yes  With limitations  No

UNHCR has unrestricted access to all reception centres. In the EAST, access of legal advisers and NGOs to the reception buildings is not allowed, based on the argument that it would disrupt the private life of other asylum seekers. This restriction is laid down in a regulation introduced by the Minister of Interior ("*Betreuunseinrichtung-Betreuungsverordnung*") intending to secure order and preventing assaults to life, health or freedom and protecting the facility.<sup>203</sup> The restriction of access to the facilities does not apply to lawyers or legal representatives in order to meet their clients. Family members may meet their relatives in the visitor room and legal advisers and NGOs in the premises of the BFA. In the federal provinces, NGOs with a contract for providing advice in social matters have access to the reception centres, while other NGOs have to apply for permission, sometimes on a case-by-case basis. Asylum seekers living in reception centres in remote areas usually have difficulties to contact NGOs, because they have to pay the tickets for public transport from their pocket money (which amounts to €40 per month). Travel costs for meetings with the appointed legal adviser should be paid by the organisations that provide legal advice, Verein Menschenrechte Österreich and ARGE Rechtsberatung. In the majority of cases, asylum seekers are only reimbursed by the organisations for one journey to meet their appointed legal adviser.

## 7. Addressing special reception needs of vulnerable persons

### Indicators: Special Reception Needs

1. Is there an assessment of special reception needs of vulnerable persons in practice?  
 Yes  No

The laws relating to the reception of asylum seekers include no mechanism for identifying vulnerable persons with special needs. Article 2(1) GVG-B states that regard should be given to special needs when the asylum seeker is registered in the Basic Care System. Basic Care conditions shall safeguard human dignity at least. After the asylum seeker has submitted the asylum application in the EAST, a general health examination is carried out and asylum seekers are obliged to undergo this examination, including a TBC (Tuberculosis) examination. All asylum seekers have health insurance. For necessary medical treatment they may be transferred to a hospital.

<sup>203</sup> BGBl. II Nr. 2005/2 and 2008/146.

Basic Care provisions for unaccompanied asylum-seeking children reflect the need of care with regard to accommodation and psychosocial care. Unaccompanied asylum-seeking children must be accommodated according to their need for guidance and care. The daily fee for NGOs hosting unaccompanied asylum-seeking children ranges from €39 to €77 depending on the intensity of psychosocial care. Unaccompanied asylum-seeking children with higher need of care are accommodated in groups with one social pedagogue responsible for the care of 10 children; those who are not able to care for themselves must be accommodated in dorms, where one social pedagogue takes care of 15 children. A third group, which is that of those who are instructed and able to care for themselves live in supervised flats. For this group, one social pedagogue is responsible for 20 children. In most cases the transfer of an unaccompanied asylum-seeking child from the initial reception centre to Basic Care facilities of the federal provinces takes place without knowledge of the specific needs of the child. In Vienna with several accommodation facilities for unaccompanied asylum-seeking children NGOs may arrange a type of accommodation suitable for their client; in federal provinces without different facilities their needs could not be adequately met. The Youth Welfare Agency is responsible for providing adequate guidance and care.

Social educational and psychological care for unaccompanied asylum-seeking children shall stabilize their psychic constitution and create a basis of trust according to the description of the Basic Care provisions for unaccompanied asylum seeking children in some of the Federal provinces' Basic Care Laws. Furthermore daily organised activities (e.g. education, sport, group activities, and homework) and psychosocial support are foreseen, taking into account age, identity, origin and residence of family members, perspective for the future and integration measures.

The Basic Care laws of Lower Austria and Vorarlberg include provisions for the special needs of vulnerable persons. The elderly, pregnant women, single parents and victims of torture, rape or other forms of severe psychological, physical or sexual violence are considered as vulnerable persons. In the laws of the federal provinces Vienna, Carinthia, Upper Austria, Salzburg, Tyrol and Burgenland vulnerable asylum seekers are not mentioned. Nevertheless the federal provinces have to respect national and international law, including the RCD. A special monitoring mechanism is not in place. It is up to the asylum seeker, social adviser, social pedagogue or the landlord to ask for adequate reception conditions.

The monthly amount of €2,480 for nursing care in specialised facilities is included in the Basic Care Agreement between the State and the federal provinces, which describes the material reception conditions. The needs of ill, handicapped asylum seekers and asylum seekers with nursing care are not sufficiently met. There is no allowance to cover extra costs as long as nursing care is provided by relatives or friends. NGOs have to employ professionals if they offer places for asylum seekers with special – mainly medical – needs. The maximum daily fee for special care of severely ill asylum seekers is €40.

Single women/mothers are accommodated in a separate building of the EAST Traiskirchen. There are also some special facilities throughout federal provinces for this particularly vulnerable group.

### **Women and families**

For single women, there are some specialised reception facilities, one in the EAST and a few others run by NGOs. In bigger facilities of NGOs, separated rooms or floors are dedicated for single women. There may also be floors for families. The protection of family life for core family members is laid down in the law of the federal provinces.<sup>204</sup> If the asylum application is declared inadmissible under the Dublin III Regulation, detention may be ordered. While in the past families had often been separated when pre-expulsion detention was ordered to one or more adult family members and less coercive measures were

---

<sup>204</sup> See e.g. Article 2 of the Basic Care law Salzburg, Law Gazette Salzburg Nr 35/2007, 30 May 2007 or Law Gazette Upper Austria Nr. 15/2007, 15 February 2007.

applied to children family members, this practice ceased with the establishment of a special closed facility for families. There are only a few reception facilities with more than 80 or 100 places, almost all run by NGOs in Vienna.

Hostels and inns have between 20 and 40 places. Therefore separation of single women from single men is not the rule.

Due to the larger number of asylum seekers and the lack of reception places single women and families were homeless and living in the area of Traiskirchen without care. In August 2015, the Ombudsman (*Volksanwaltschaft*) reported that many women and children slept on the floor in Traiskirchen.<sup>205</sup> The Ministry of Interior ordered a halt of new registrations in Traiskirchen with the exception of unaccompanied minor asylum seekers.

### **Unaccompanied children**

Unaccompanied asylum-seeking children are placed in special facilities run by NGOs. In the EAST Traiskirchen and other reception facilities under the responsibility of the Ministry of Interior, ORS, a private enterprise, is responsible for the care of unaccompanied children. This provision of separated facilities was not respected in Traiskirchen because the EAST ran out of places and unaccompanied children were hosted in buildings for adults. In 2013, NGOs provided for new reception places for unaccompanied asylum-seeking children. This reception crisis repeated in 2014 and remains unresolved. Several new facilities for unaccompanied asylum-seeking children opened, some of them run by private companies or the Children and Youth Assistance. Those under 14 years are cared for in socio-pedagogic institutions of the federal provinces.<sup>206</sup> About 600 were hosted in the EAST by the end of the year 2014, some were transferred to reception centres of the Ministry in **Vienna** and **Styria**, where they live in the same building as adults.<sup>207</sup> At the end of 2014, 350 unaccompanied minors were accommodated and cared for in the centres under the responsibility of the Ministry of Interior.<sup>208</sup> It is unclear who is responsible for the legal representation of those children; the legal adviser who has to fulfil their tasks in the EAST or the Children and Youth Assistance, which becomes responsible after the child is allocated to a federal province. The legal adviser in the EAST provides legal advice once a week in these reception centres in Vienna to prevent disadvantages for those who could not be orderly dispersed due to the lack of adequate places. In 2014, the same situation as that heavily criticised by the Council of Europe Human Rights Commissioner in 2011 recurred.

The Human Rights Commissioner had noted after his visit in Austria in June 2012 that, since 2011, the number of unaccompanied children from Afghanistan has increased considerably, resulting in a lack of special places with adapted services foreseen for unaccompanied children in the EAST. This raised the issue of whether all unaccompanied asylum-seeking children benefit from the child-adapted services as originally planned for.<sup>209</sup>

Due to the lack of adequate places in the federal provinces, 600 unaccompanied asylum-seeking children lived in EAST Traiskirchen without proper assistance and care and enrolment in school for children

---

<sup>205</sup> Ombudsman, *Unmenschliche Eindrücke aus dem Erstaufnahmezentrum Traiskirchen* (Inhuman impressions from the EAST Traiskirchen), 5 August 2015, available in German at: <http://bit.ly/1RXInfO>.

<sup>206</sup> Der Standard, *Frequently Asked Questions on Unaccompanied children*, 3 August 2015, available in German at: <http://bit.ly/1gGuyE3>.

<sup>207</sup> See Asylkoordination Österreich, 'Ein Bett allein ist zu wenig (A bed is not enough)' – Press Release, 7 October 2014, available at: <http://bit.ly/1NY3UU7>, demanding adequate care of unaccompanied minor asylum seekers.

<sup>208</sup> Wien ORF.at, 'Viele minderjährige Flüchtlinge in Erdberg', 9 January 2015, available at: <http://bit.ly/1UKS291>.

<sup>209</sup> CoE Commissioner for Human Rights, *Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe Following his visit to Austria from 4 to 6 June 2012*, CommDH(2012)28, 8.

younger than 15 years, who are obliged to attend school. Following public criticism, classes were installed in the initial reception centre.

The situation in Traiskirchen and other reception places under the responsibility of the Ministry of Interior remain critical at the time of writing. The Ombudsman released a very critical report after the visit in Traiskirchen in summer 2015, asking which human right was *not* violated. During the visit in July 2015, 3,828 persons were staying in the camp, 1,588 out of which were unaccompanied minor refugees. Half of them did not have a bed. Similar findings were reported from visits in the camp in summer by Amnesty International and Doctors without Borders.<sup>210</sup>

All federal provinces have reception places for unaccompanied asylum-seeking children although standards differ. The Ombudsman highlighted the difference between funding for the care of children under the responsibility of the Children and Youth Assistance, which is at least €120 per day, and funding for unaccompanied asylum-seeking children, with the highest level of support at €77. The Ombudsman expressed its concern and point of view in a report about **Burgenland** published in June 2015, that the lack of assessment of an unaccompanied asylum-seeking children's needs and their accommodation in institutions with insufficient standards of material reception conditions due to lower daily rates, the qualification of their staff, surveillance and control do not reach the quality of institutions of the Children and Youth Assistance.<sup>211</sup>

The Ministry of Interior and the competent department of the federal provinces started negotiations on a quota system for unaccompanied children.<sup>212</sup> The concept of foster families is not foreseen in Austrian law. Nevertheless, the Children and Youth Assistance may place children with foster families or smaller children in facilities of the Children and Youth Assistance. A few places are available for those children who have reached the age 18, responding to their higher need of care compared with older adults. This possibility corresponds to youth welfare regulations, stating that under special circumstances the youth welfare agency will care for young adults up to the age of 21.

Finally, traumatised or ill asylum seekers may be cared for in facilities of NGOs with places for persons with higher need of care ("*Sonderbetreuungsbedarf*"). In the last years, the number of places for asylum seekers with disabilities or other special needs of care increased.

## 8. Provision of information

The information leaflets in the initial reception centres provide brief information about obligations and entitlements with regard to reception conditions e.g. the possibility and obligation to visit a doctor, the possibility to contact UNHCR, the restricted movement and the meaning of the different documents such as green card (for more information, see section on Freedom of Movement below). Information leaflets are available in most of the languages spoken by asylum seekers.

In the reception centres, asylum seekers are informed about the house rules, including information about their duties and sanctions. These are either posted in the most common languages (like English, Russian, French, Arabic, Farsi, Urdu, Serbian) or a paper containing brief written instructions has to be signed by

---

<sup>210</sup> Ombudsman, *Unmenschliche Eindrücke aus dem Erstaufnahmezentrum Traiskirchen* (Inhuman impressions from the EAST Traiskirchen), 5 August 2015; Amnesty International, *Quo vadis Austria. Die Situation in Traiskirchen darf nicht die Zukunft der Flüchtlingsbetreuung in Österreich werden*, 14 August 2015, available in German at: <http://bit.ly/1YmXWTg>; Doctors without Borders, *Traiskirchen Report*, 25 August 2015, available in German at: <http://bit.ly/1IXAU4I>.

<sup>211</sup> Ombudsman, *Bericht der Volksanwaltschaft an den burgenländischen Landtag, Bericht 2013-2014*, June 2015, available at: <http://bit.ly/1PbKxG7>.

<sup>212</sup> Die Presse, 'Länder beschließen Quote für unbegleitete Minderjährige' (Federal provinces agree on quota for unaccompanied minors), 6 May 2015, available in German at: <http://bit.ly/1ZgsjrH>.

the asylum seeker. The federal province of **Carinthia** has published the latter on its website.<sup>213</sup> In the states of **Lower Austria**,<sup>214</sup> **Salzburg**,<sup>215</sup> a brochure, which is also available on the internet, describes the Basic Care system, although information is not up to date. In other provinces like **Vienna**, the information brochure contains the issues of the Basic Care system and contact details of NGOs providing information and advice.<sup>216</sup> Advice from social workers is included in the reception provisions laid down by law. Social advisers visit reception centres on a regular basis, but have to fulfil at the same time administrative tasks such as handing over the monthly pocket money or the vouchers for clothes and school material. Organisations providing social advice usually also have departments for legal advice to asylum seekers.

Asylum seekers living in rented flats have to go to the offices of the social advice organisations. The system of information is not satisfactory, because one social worker is responsible for 170 asylum seekers. This entails that the standards for social work are not met in practice. Some federal provinces provide for more effective social advice than others; for instance, 50 clients per social worker in **Vorarlberg** or 70 in **Vienna**. All federal provinces have agreed to raise the capacities for social advice to 1 person per 140 asylum seekers, although this still does not satisfy the demands of NGOs providing social advice. It has to be taken into consideration that reception centres in remote areas cannot be visited very often by the social workers because of insufficient funding.

Since summer 2015 a lot of volunteers and communities help asylum seekers. They share information via social networks.<sup>217</sup>

## 9. Freedom of movement

### Indicators: Freedom of Movement

1. Is there a mechanism for the dispersal of applicants across the territory of the country?  Yes  No
2. Does the law provide for restrictions on freedom of movement?  Yes  No

After requesting asylum at the police, asylum seekers are apprehended for up to 48 hours, until the BFA branch office decides whether the asylum seeker should be transferred or advised to go to the EAST or to a distribution centre.<sup>218</sup> During the admissibility procedure, they receive a green card also known as procedure card, which indicates the tolerated stay in the district of the reception centre of the state. Asylum seekers are allowed to leave the district for necessary medical treatment or to appear in court. Violations of this restriction of movement may be punished with fines between € 100 and €1,000 or with detention of up to 2 weeks if payment of the fine cannot be enforced. These restrictions of movement impede asylum seekers' access to family members or friends and consultations with legal advisers of trust or lawyers.

Asylum seekers whose application is admitted to the regular procedure receive the white card, which is valid until the final decision on the application and allows free movement in the entire territory of Austria.

Every federal province has to offer reception places according to its population. Asylum seekers are dispersed throughout the country to free reception places and according to their needs, for instance in places for unaccompanied minor asylum seekers, single women or handicapped persons. Governments

<sup>213</sup> Land Kärnten, *Erstinformation für Asylwerber. Grundversorgung Kärnten*, available at: <http://bit.ly/1lfpb7h>.

<sup>214</sup> Stadt Wien, *Grundversorgung Wien*, available at: <http://bit.ly/1YqTAVV>. The Basic Care brochure for Lower Austria is available in 16 languages.

<sup>215</sup> County of Salzburg, *Grundversorgung*; available at <http://bit.ly/1UKUkol>.

<sup>216</sup> Fonds Soziales Wien, *Wiener Grundversorgung. Die Beratungsstellen*. <http://bit.ly/1cz0cQP>.

<sup>217</sup> E.g. information about accommodation: <http://asylwohnung.at/faq/>.

<sup>218</sup> Article 43(1) BFA-VG.

of federal provinces have claimed that information about necessary medical treatment or handicap are not always communicated, with the result that asylum seekers are transferred to inadequate places. However, asylum seekers have no possibility to choose the place where they will be accommodated according to the dispersal mechanism, although family ties are taken into consideration and usually asylum seekers can be transferred to the federal province where the family lives. Moreover, it is not possible to appeal the dispersal decision because it is an informal decision taken between the Ministry of Interior and the respective federal province.

In the summer of 2015, Austria signed an agreement with the Slovak Republic to provide reception places for 500 asylum seekers in **Gabcikovo**. Transfer to this centre outside of Austria should be on a voluntary basis and asylum seekers have the possibility to travel to Austria if this is necessary for the asylum procedure. Their stay in Slovakia is tolerated. NGOs report that transfer takes places without the consent of the asylum seeker, and that if they do not agree they would lose their benefits. Asylkoordination fears violations of the rights of asylum seekers accordingly.<sup>219</sup>

In all federal provinces, places for unaccompanied children exist and in some there are places for single women. Some facilities are better equipped to host families, others for single persons. Not every province has places for asylum seekers in need of special treatment, however. The province of Vienna offers many more reception places than those foreseen by the quota system, while other provinces such as Salzburg have failed to provide enough places for several years. This discrepancy leads to negotiations between the responsible departments of the federal provinces, while the malfunctioning of the dispersal system overall raises public reactions. The lack of reception places has not been solved by the new distribution centres after 20 July 2015, and asylum seekers stay much longer than planned in those centres.

Asylum seekers who are allocated to a province after admission to the asylum procedure are usually not transferred to other federal provinces, even if they wish so. Within the same province, asylum seekers may be placed in other reception centres for different reasons, for instance if another reception centre is better equipped to address the needs of the asylum seeker.

Often asylum seekers do not have enough money for travelling, as the monthly travel allowance is only €40. If they stay away from their designated place (reception facility) without permission for more than 3 days, Basic Care will be withdrawn (see the section on Reduction or Withdrawal of Material Reception Conditions above). As discussed above, it is almost impossible to receive Basic Care in a province other than the designated province.

There are no special reception centres to accommodate asylum seekers for public interest or public order reasons. One such centre in Carinthia, which was heavily criticised,<sup>220</sup> was closed in October 2012. In practice asylum seekers who violate the house rules may be placed in less favourable reception centres in remote areas, but such sanctions are not foreseen by law.

If grounds arise demanding an asylum seeker's detention, an alternative to detention should be prioritised if there is no risk of absconding. Due to reporting duties – often imposed every day – and exclusion from pocket money allowance, however, asylum seekers subjected to alternatives to detention are in practice not able to make use of their freedom of movement.

---

<sup>219</sup> ORF, 'Flüchtlinge „gegen ihren Willen“ nach Gabcikovo gebracht' (refugees transferred to Gabcikovo against their will), 27 September 2015, available in German at: <http://bit.ly/1JhBH5d>; ORF, 'Slowakei soll 500 Asylwerber versorgen' (Slovakia shall care for 500 asylum-seekers), 9 July 2015, available at: <http://bit.ly/1Rua9Bj>. See also AIDA, 'Austria: Plans to relocate 500 asylum seekers to Slovakia rejected by local population', 3 August 2015, available at: <http://bit.ly/1OyWmZs>.

<sup>220</sup> Ombudsman, Misstände in Kärntner Flüchtlingsunterkünften, 27 March 2013, available in German at: <http://bit.ly/1Ruaq7i>.

## B. Employment and education

### 1. Access to the labour market

#### Indicators: Access to the Labour Market

1. Does the law allow for access to the labour market for asylum seekers?  Yes  No  
❖ If yes, when do asylum seekers have access the labour market? 3 months
2. Does the law allow access to employment only following a labour market test?  Yes  No
3. Does the law only allow asylum seekers to work in specific sectors?  Yes  No  
❖ If yes, specify which sectors: Tourism, agriculture, forestry
4. Does the law limit asylum seekers' employment to a maximum working time?  Yes  No  
❖ If yes, specify the number of days per year
5. Are there restrictions to accessing employment in practice?  Yes  No

The Foreigner Employment Law (AuslBG) states that an employer can obtain an employment permit for an asylum seeker 3 months after the submission date of the asylum application, provided that no final decision in the asylum procedure has been taken prior to that date.<sup>221</sup>

The possibility of obtaining access to the labour market is restricted by a labour market test (*Ersatzkraftverfahren*), which requires proof that the respective vacancy cannot be filled by an Austrian citizen, a citizen of the EU or a legally residing third-country national with access to the labour market (long-time resident status holder, family member etc.).<sup>222</sup>

Applications for an employment permit must be submitted by the employer to the regional Labour Market Service (AMS) office in the area of the district where the envisaged place of employment is located. Decisions are taken by the competent regional AMS office. In the procedure, representatives of the social partners have to be involved in a regional advisory board. The regional advisory board has to recommend such an employment permit unanimously. Appeals have to be made to the Land AMS office that must decide on appeals against decisions of the regional AMS office. There is no further right of appeal.<sup>223</sup> The decision has to be made within 6 weeks; in case of appeal proceedings, the same time-limit must be applied.

In addition, a 2004 ordinance includes further restrictions for the access to the labour market for asylum seekers, by limiting employment to seasonal work either in tourism, agriculture or forestry.<sup>224</sup> These seasonal jobs are limited by a yearly quota for each federal province and can only be issued for a maximum period of 6 months.

A further problem for asylum seekers working as seasonal workers is the regulation in the Basic Care Acts of the state and the federal provinces that requires a contribution to Basic Care, if asylum seekers have an income. In practice, there is only an allowance of €110 left to asylum seekers in most of the federal provinces, while the rest of the money earned contributes to the cost of reception.<sup>225</sup> If they have been receiving an income for more than 3 months, Basic Care support is no longer provided. If the asylum seeker asks for readmission into Basic Care after they have finished the employment, cash contributions

<sup>221</sup> Article 4(1) AuslBG.

<sup>222</sup> *Ibid.*

<sup>223</sup> Article 20(1) and (3) AuslBG.

<sup>224</sup> Ordinance GZ 435.006/6-II/7/2004, 11 May 2004.

<sup>225</sup> In Tyrol, asylum seekers may earn € 240 per month tax-free.

to the provision of Basic Care are demanded. In fact, it is assumed by the authorities that only about €480 (1.5 times the basic provision amount) per month have been spent by the asylum seeker on subsistence and accommodation during the period of employment. Income exceeding this amount is deducted from the allowance received under Basic Care from that time onwards until repaid. This request of contribution causes many problems, as in reality the asylum seekers have spent the money earned and do not have sufficient means to survive the following months.<sup>226</sup>

In fact, only few asylum seekers work. In 2013, Minister of Interior Johanna Mikl-Leitner claimed in an interview with the newspaper Der Standard that 10,000 work permits for asylum seekers are available, but only 500 asylum seekers do such seasonal work.<sup>227</sup>

Moreover, asylum seekers are not registered at the Public Employment Service as unemployed persons. Therefore they are not entitled to vocational trainings provided or financed by the Public Employment Service. It thus very much depends on the initiative of the asylum seeker to find a job offer, as they are not registered as persons searching for work at the Public Employment Service. Asylum seekers often lack money for job-seeking motivated travel for the purpose of job interviews.

## 2. Access to education

### Indicators: Access to Education

1. Does the law provide for access to education for asylum-seeking children?  Yes  No
2. Are children able to access education in practice?  Yes  No

School attendance is mandatory for all children living permanently in Austria until they have finished 9 classes, which are usually completed at the age of 15. Asylum seeking children attend primary and secondary school after their asylum application has been admitted to the regular procedure. As long as they reside in the EAST, school attendance in public schools is not provided, however. In November 2012 two classes were opened in the EAST of Traiskirchen, as many unaccompanied asylum seeking children stayed there for several months due to a lack of adequate places in the federal provinces. Preparatory classes usually do not exist; where many children without knowledge of the German language attend class, they are assisted by a second teacher.

Access to education for asylum seekers older than 15 may become difficult, however, as schooling is not compulsory after the age of 15. Some pupils manage to continue their education in high schools. Children who did not attend the mandatory school years in Austria have difficulties in continuing their education, however. For those unaccompanied children, who have not successfully finished the last mandatory school year, special courses are available free of charge. For children accompanied by their family, this possibility is often not available for free.

The Foreigner Employment Law restricts access to vocational training, because the necessary work permits could only be issued for seasonal work. In July 2012, however, exceptions were introduced for asylum seeking children up to the age of 18. A decree of the Ministry of Social Affairs allowed for children to obtain a work permit as apprentices in professions where there is a shortage of workers.<sup>228</sup> Yet this measure proved to be insufficient in ensuring vocational training, as only 18 children have received such

<sup>226</sup> Asylkoordination Österreich, *Leben im Flüchtlingsquartier* ("Living in an accommodation centre"), December 2010, 37f.

<sup>227</sup> Der Standard, 'Mikl-Leitner will Asylwerber stärker zu Saisonjobs drängen (*Mikl-Leitner wants to pressure asylum seekers more into taking up seasonal jobs*)', 15 February 2013, available at: <http://bit.ly/1RLuTSQ>.

<sup>228</sup> Asylkoordination, *Expansion of employment opportunities for asylum seekers*, 14 June 2012, available in German at: <http://bit.ly/1k7cAuY>.

a permit since July 2012. A further decree of the Ministry of Social Affairs of March 2013 increased the maximum age for benefitting from the exceptions to vocational training restrictions from 18 to 25.<sup>229</sup>

## C. Health care

### Indicators: Health Care

1. Is access to emergency healthcare for asylum seekers guaranteed in national legislation?  
 Yes       No
2. Do asylum seekers have adequate access to health care in practice?  
 Yes       Limited       No
3. Is specialised treatment for victims of torture or traumatised asylum seekers available in practice?  
 Yes       Limited       No
4. If material conditions are reduced or withdrawn, are asylum seekers still given access to health care?  
 Yes       Limited       No

Every asylum seeker who receives Basic Care has health insurance. Treatment or cures that are not covered by health insurance may be paid, upon request, by the federal provinces' departments for Basic Care or the Ministry of Interior. If Basic Care is withdrawn, asylum seekers are still entitled to emergency care and essential treatment.<sup>230</sup>

In practice, this provision is not always easy to apply, however. If an asylum seeker has lost basic care due to violent behaviour or absence from the EAST for more than 2 days, they will not receive medical assistance, because it is assumed that they have the opportunity visit the medical station in the EAST. However, as those asylum seekers are no longer registered in the EAST, they will not be allowed to enter and receive medical treatment there. Without health insurance or access to the medical station of the EAST, asylum seekers may face severe difficulties in receiving necessary medical treatment. Some of them come to the NGO-run health project AMBER MED with doctors providing treatment on a voluntary basis.

The delay in registration as asylum seeker results in delayed registration in the health insurance. **Vienna** has restructured the registration process and issues "Vienna Refugee Aid service cards" to asylum seekers through which it organises the registration in the health insurance system. This is particularly important as asylum seekers who do not claim for asylum in the centre in Vienna may live several weeks without registration in the Basic Care system.

In each federal province, one NGO provides treatment to victims of torture and traumatised asylum seekers. This is partly covered by AMIF funding, partly by the Ministry of Interior and regional medical insurance. However, the capacity of these services is not sufficient. Clients often have to wait several months for psychotherapy.

<sup>229</sup> Austrian Employment Office: *Beschäftigungsmöglichkeiten für Asylwerberinnen und Asylwerber*, November 2015, available in German at: <http://bit.ly/1msi8SL>.

<sup>230</sup> Article 2(4) GVG-B.

## Detention of Asylum Seekers

### A. General

#### Indicators: General Information on Detention

1. Total number of asylum seekers detained in 2015: <sup>231</sup>	Not available
2. Number of asylum seekers in detention at the end of 2015: <sup>232</sup>	Not available
3. Number of detention centres:	4
4. Total capacity of detention centres:	700

There are 4 detention centres currently operating in Austria. In January 2014, a new detention centre with 200 detention places was opened in Vordernberg/Styria and, as a result, most of the detention centres previously run under the administration of the police have been closed. Besides this new centre, there are approximately 400 places available in 2 detention centres in Vienna and 100 in a detention centre in Salzburg.

For 2014 and 2015, concrete information on detention is not available. NGOs report that according to their experience detention was only ordered very rarely, partly because the new authorities did not have enough capacities. In autumn, asylum seekers were immediately released upon request because there is some uncertainty surrounding detention regulations, a review of which is pending at the Constitutional Court. Only 21 men were in detention in Vordernberg on 19 November 2014, whereas nationally a total of 71 persons were being held in detention that day. Between 18 June and 18 November 116 persons were detained in Vordernberg.<sup>233</sup> The detention centre was also used to hold asylum seekers for some hours to conduct their first interrogation. Since the number of asylum seekers increased in summer 2015, the detention centre Vordernberg is used for the registration of asylum seekers.

Asylum seekers are subject to detention mainly after Dublin procedures in practice. Persons who submit an asylum application while detained may remain detained during the admissibility procedure.

When asylum seekers are detained, the personal interview examining their application is held in the detention centre. Interpreters are present and legal representatives have to be summoned to the interview. The BFA may also order to bring the asylum seeker to the BFA for the interview. A person of confidence has the right to be present at the interview of an asylum seeker, in practice this rarely happens. If the asylum application is processed as an inadmissible application a legal advisor has to visit the asylum seeker before the interview and has to be present at the interview.

<sup>231</sup> Including *both* applicants detained in the course of the asylum procedure and persons lodging an application from detention.

<sup>232</sup> Specify if this is an estimation.

<sup>233</sup> Ministry of Interior, Answer of the Minister of Interior in the Federal Council to the request on "detention centre Vordernberg" 2813/AB-BR/2014, 23 December 2014, available at: <http://bit.ly/1SXE9ES>.

## B. Legal framework of detention

### 1. Grounds for detention

#### Indicators: Grounds for Detention

1. In practice, are most asylum seekers detained
  - ❖ on the territory:  Yes  No
  - ❖ at the border:  Yes  No
2. Are asylum seekers detained in practice during the Dublin procedure?  Frequently  Rarely  Never
3. Are asylum seekers detained during a regular procedure in practice?  Frequently  Rarely  Never

Asylum seekers who register at the police are detained for up to 48 hours, without a detention order. This kind of detention is regarded as apprehension.

The detention of asylum seekers is regulated by the Aliens Police Act (FPG), which has been amended several times to specify the grounds for detention; the last amendment entered into force on 20 July 2015. Detention may be ordered by the BFA to secure a return procedure, if a return procedure or deportation have to be secured in regard of an application for international protection and a “risk of absconding” exists and detention is proportional. Furthermore, the FPG allows detention according to the Dublin III Regulation.

The amended Article 76 FPG now defines the “risk of absconding” on the basis of a number of wide-ranging criteria, namely whether:<sup>234</sup>

- (a) The person has avoided or hampered a deportation order;
- (b) The person has violated a travel ban;
- (c) An expulsion order is made or the asylum application has been withdrawn;
- (d) The person is in pre-deportation detention at the time he or she lodges the application;
- (e) It is likely that another country is responsible under the Dublin Regulation, namely as the person has lodged multiple applications or based on past behaviour intends to travel on to another country;
- (f) The person does not comply with alternatives to detention;
- (g) The person does not comply with cooperation or reporting duties; and
- (h) There is a sufficient link with Austria such as family relations, sufficient resources or secured residence.

The FPG does not refer to a “serious” risk of absconding in line with Article 28(2) of the Dublin III Regulation. However, beyond the wide-ranging scope of the criteria listed above, the factors in Article 76(3) FPG are non-exhaustive, thereby leaving undue discretion to the authorities with regard to identifying a “risk of absconding” and applying detention. This issue remains litigated by NGOs before the Administrative Court.

So far, it is difficult to assess the practice of the authorities with regard to the use of detention grounds, as detention was not ordered very often in 2015. In the new detention centre in Vordernberg, only few persons have been detained although there are capacities for 220 persons. Families with children have

<sup>234</sup> Article 76(3) FPG.

not been detained there so far and since several months the detention centre is used as registration centre for asylum seekers.

Detention is almost systematic during the 24 hours preceding the transfer of an asylum applicant to the responsible Member State under the Dublin Regulation.

## 2. Alternatives to detention

### Indicators: Alternatives to Detention

1. Which alternatives to detention have been laid down in the law?  Reporting duties  
 Surrendering documents  
 Financial guarantee  
 Residence restrictions  
 Other
2. Are alternatives to detention used in practice?  Yes  No

According to Article 76 FPG, the principle of necessity is to be taken into account. Detention has to be necessary to reach one of the stated aims. The principle of proportionality is not explicitly mentioned in the FPG. It is however mentioned that the BFA has to review the proportionality of detention every 4 weeks.<sup>235</sup> Proportionality is also a constitutional principle applicable to all administrative procedures and therefore also to asylum and return proceedings. This is confirmed by the jurisprudence of the VwGH<sup>236</sup> and the Constitutional Court (VfGH).<sup>237</sup> Proportionality means to weigh or balance the interests between the public interest of securing the procedure (mainly expulsion procedure) and the right to liberty of the individual.

Alternative measures must be applied in all cases, not only if a particular ground for detention exists, if the authorities have good reasons to believe that the object and purpose of detention (i.e. deportation) could be reached by the application of such measures. An individualised examination is provided for in the FPG, but in practice less coercive measures are often regarded as not sufficient to secure the return procedure or expulsion.

Article 77(3) FPG enumerates 3 alternatives to detention: (a) reporting obligations; (b) the obligation to take up residence in a certain place of accommodation and (c) the deposit of a financial guarantee. Details about the deposit and amount of the financial guarantee are regulated by the Ordinance Implementing the Aliens Police Act (FPG-DV). This amount must be determined in each individual case and must be proportionate.<sup>238</sup> The law specifies a maximum of €1,717.46 for financial guarantees (2 x €858.73). The measure is not usually applied in practice, however.<sup>239</sup>

Alternatives to detention are applied in open centres. Such measures are executed in regular reception facilities, facilities rented by the police or property of NGOs, or the private accommodation of the person to be deported. If an alternative to detention is ordered, asylum seekers have reporting duties. They have to present themselves at the police offices of the Federal Police Directorates every day or every second day. If reporting obligations or the obligation to take up residence in a certain accommodation facility are violated, the person is detained.<sup>240</sup>

<sup>235</sup> Article 80(6) FPG.

<sup>236</sup> VwGH, 2013/21/0008, 2 August 2013.

<sup>237</sup> See e.g. VfGH, B1447/10, 20 September 2011.

<sup>238</sup> Article 13 FPG-DV.

<sup>239</sup> EMN, *The use of detention and alternatives to detention in the context of immigration policies in Austria*, July 2014, available at: <http://bit.ly/1Mo6zDs>, 17.

<sup>240</sup> Article 77(4) FPG.

The duration of alternative measures is limited. 2 days in the alternative measure count as 1 day of detention. Asylum seekers benefiting from an alternative to detention are not entitled to Basic Care. Necessary medical treatment must in any case be guaranteed. These costs may be paid by the BFA. Asylum seekers may also receive free emergency medical treatment in hospitals.

Figures relating to alternatives to detention specifically for asylum seekers are not available. While in 2011 alternatives to detention were applied in 13% of all cases relating to all third-country nationals, the rate increased to 17% in 2012 and diminished to 15% in 2013. Overall, the use of both detention and alternatives to detention has gradually diminished since 2010.

### 3. Detention of vulnerable applicants

#### Indicators: Detention of Vulnerable Applicants

1. Are unaccompanied asylum-seeking children detained in practice?
 

<input type="checkbox"/>	Frequently
<input checked="" type="checkbox"/>	Rarely
<input type="checkbox"/>	Never
  
- ❖ If frequently or rarely, are they only detained in border/transit zones?
 

<input type="checkbox"/>	Yes	<input checked="" type="checkbox"/>	No
--------------------------	-----	-------------------------------------	----
  
2. Are asylum seeking children in families detained in practice?
 

<input type="checkbox"/>	Frequently
<input checked="" type="checkbox"/>	Rarely
<input type="checkbox"/>	Never

Children under the age of 14 cannot be detained. Therefore, families with young children are confined only for 24 hours prior to forced return. In general, children over the age of 14 should not be detained and alternatives to detention should apply for minors over the age of 14.<sup>241</sup>

In 2014, the Federal Administrative Court found the detention order for an asylum seeker from Afghanistan who claimed to be 16 years old to be unlawful. The decision of the BFA was based on the improper opinion of the medical officer according to which he was between 18 and 22 years of age and therefore not treated as a child.<sup>242</sup>

### 4. Duration of detention

#### Indicators: Duration of Detention

1. What is the maximum detention period set in the law (incl. extensions): 10 months
2. In practice, how long in average are asylum seekers detained? 20 days

Detention is only permissible for as short a period as possible,<sup>243</sup> and cannot exceed 4 months for adults<sup>244</sup> and 2 months for minors over the age of 14,<sup>245</sup> subject to exceptional extensions of 6-18 months.<sup>246</sup> More particularly in relation to asylum seekers, detention should generally not last longer than 4 weeks following the final decision on the application.<sup>247</sup>

<sup>241</sup> Article 77(1) FPG.

<sup>242</sup> BVwG, W191 2011159-1, 27 August 2014, available at: <http://bit.ly/1ALJF7Q>.

<sup>243</sup> Article 80(1) FPG.

<sup>244</sup> Article 80(2)(2) FPG.

<sup>245</sup> Article 80(2)(1) FPG.

<sup>246</sup> Article 80(4) FPG.

<sup>247</sup> Article 80(5) FPG.

Figures on the duration of detention of asylum seekers are not available. The average duration of detention in the new detention centre of Vordernberg was 26 days between June and November 2014, according to explanations by the Minister of Interior when asked about this centre.<sup>248</sup> As asylum seekers whose applications are processed under the Dublin procedure are often detained immediately after submitting their applications, they may be kept in detention until they are transferred to the Member State determined to be responsible for the examination of their asylum applications. In Dublin cases, detention may last for some weeks, as suspensive effect of the appeal is hardly ever granted and the transfer can be effected while their appeal is still pending.

## C. Detention conditions

### 1. Place of detention

#### Indicators: Place of Detention

1. Does the law allow for asylum seekers to be detained in prisons for the purpose of the asylum procedure (i.e. not as a result of criminal charges)?  Yes  No
2. If so, are asylum seekers ever detained in practice in prisons for the purpose of the asylum procedure?  Yes  No

Until January 2014, detention of asylum seekers was carried out in police facilities. Third-country nationals with an expulsion order and citizens who serve an administrative sentence are also kept in these buildings. Some of the detention conditions have been criticised by the Human Rights Board and international monitoring institutions.<sup>249</sup> This concerns imprisonment in cells for almost the whole day due to lack of guards or rooms to allow detainees to stay outside the cell during the day; according to the law detainees must stay in open air for at least one hour per day.<sup>250</sup> Another issue of concern is the insufficient medical care due to the lack of interpreters for examinations by doctors.

The detention centres currently operating are:<sup>251</sup>

Detention centre	Capacity
<b>Vordernberg Immigration Detention Centre</b>	220
<b>Vienna Roßauer Lände</b>	108
<b>Vienna Zinnergasse</b>	253
<b>Salzburg</b>	118

The detention centre in Vordernberg, established in January 2014, allows detainees to stay outside the cell during the day. The facility is run by a private security company, G4S. This has raised concern about the division of tasks and accountability between the public security service and this private company.<sup>252</sup>

<sup>248</sup> Ministry of Interior, Answer of the Minister of Interior in the Federal Council to the request on “detention centre Vordernberg”, 2813/AB-BR/2014, 23 December 2014, available at: <http://bit.ly/1SXE9ES>.

<sup>249</sup> Menschenrechtsbeirat beim Bundesministerium für Inneres, *Bericht des Menschenrechtsbeirates über seine Tätigkeit im Jahr 2011* (Human Rights Board with the Federal Ministry of Interior, *Report of the Human Rights Board on its activities in 2011*). There have not been more recent reports.

<sup>250</sup> Ordinance concerning the arrest of persons by the security authorities, BGBl. II Nr. 128/1999, Article 17 has been amended by BGBl. II Nr. 439/2005.

<sup>251</sup> International Detention Coalition, *Global Detention Project – Austria*, December 2014, available at: <http://bit.ly/1QRmJJc>.

<sup>252</sup> Der Standard, Irene Brickner, *Securitys auf Rundgang in der neuen Schubhaft* (Security on tour in the new detention centre), 2 April 2014, available at: <http://bit.ly/1dgpJ1Y>.

The Minister of Interior explained in response to a parliamentary request that G4S is to assist the police.<sup>253</sup> A series of trainings have been organised for the staff of this new centre; according to a report in Der Standard, 36 hours were dedicated to human rights issues.<sup>254</sup>

Women or unaccompanied children are detained in separated cells. One of the detention centres in Vienna, Roßauer Lände, has cells with a playground within the building for mothers with small children. The detention centre in Vienna Zinnergasse is equipped for families with children. One floor of the same building is used for less coercive measures. In December 2014 the centre Zinnergasse was transformed to an open reception centre under the administration of the ministry of interior due to lack of reception places of the federal states and the state.

## 2. Conditions in detention facilities

### Indicators: Conditions in Detention Facilities

- |   |   |   |
|---|---|---|
| 1. Do detainees have access to health care in practice? | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No   |
| ❖ If yes, is it limited to emergency health care?       | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> No                                  |
| 2. Is access to detention centres allowed to            |   |   |
| ❖ Lawyers:  | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Limited <input type="checkbox"/> No            |
| ❖ NGOs:   | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> Limited <input type="checkbox"/> No |
| ❖ UNHCR:  | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Limited <input type="checkbox"/> No            |
| ❖ Family members:                                       | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> Limited <input type="checkbox"/> No |

As of January 2014, as several detention facilities are no longer used since the new detention centre opened, conditions in the detention facilities are satisfactory. Problems such as lack of space or clothes have not been reported. Detention in cells during the day instead of open floors is still a reality for most of the detained persons, however. The Ombudsman (*Volksanwaltschaft*) demanded in an April 2014 report the improvement of detention conditions.<sup>255</sup> The report mentions lack of activities, lack of psychosocial care for juvenile detainees and lack of criteria for keeping detainees in closed cells or open cells. Asylum seekers have the right to stay in the open air courtyard at least for one hour a day. Only few activities are available for those who stay in the open zone: fitness, table tennis, TV and journals.

UNHCR has access to asylum seekers without restrictions, while lawyers can visit their clients during working hours in a special visitor room. NGOs have access if they have obtained authorisation to act as legal representative to the detainee, which most NGOs known by the police may get without delay. In other cases, NGOs or relatives or friends of detainees must get the same authorisation during regular visiting hours on the weekend to have access to detainees during office hours.

Other visitors such as relatives or friends have restricted possibilities to visit. Visits have to be allowed by the police for at least 30 minutes per week. In addition, restrictions may be imposed to detainees who are separated from other detainees and are put in security cells due to their behaviour, such as suicide

<sup>253</sup> In her answer to the parliamentary request 11/AB XXV. GP from 30 December 2013, Minister Mikl-Leitner described the tasks of G4S as follows: "Verwaltungshelfer, die keine hoheitlichen Handlungsbefugnisse haben, sondern nur unterstützend für die Behörde tätig werden. Es liegt zwar eine Aufgaben-, jedoch keine Verantwortungsteilung vor. Die Bediensteten haben daher die im Rahmen der Schubhaft erforderlichen technisch-humanitären Hilfsdienste in Unterordnung und nach Weisung der Behörde und der dieser beigegebenen Organe des öffentlichen Sicherheitsdienstes zu erledigen." ("Administration assistants do not have powers of a public authority but have a supporting role for the authority. Tasks are shared, but not responsibility. Therefore the employees have to supply in the context of detention the necessary technical-humanitarian help in subordination to the authority and under the instruction of the public security authorities.")

<sup>254</sup> I Brickner, *Security on Rundgang in der neuen Schubhaft (Security on tour in the new detention centre)*, Der Standard, 2 April 2014, available at: <http://bit.ly/1dgpJ1Y>.

<sup>255</sup> Volksanwaltschaft, *Mängelbehebungen in Polizeianhaltezentren (Ombudsman, Remedy deficiencies in police detention centres)* 2 April 2014, available at: <http://bit.ly/1FVutnw>.

attempts, hunger strike or violence. Visiting hours are limited to the weekend and early evening hours, and direct contact is not possible as the visit takes place in a room where the asylum seeker is separated from the visitor by a glass window. In the new centre in Vordernberg, direct contact should be possible, as all rooms and floors are video monitored. Family members may stay overnight in a visitor cell with their relative. Visits of media or politicians are usually not permitted. This new centre has been presented to the public as an example of improvement of Austria's return policy.

Representatives of the churches have agreements with the police to visit detainees on a regular basis.

Social counselling is not foreseen. Nevertheless, the information leaflet provided to detainees calls the activities taking place in the centre "social counselling".<sup>256</sup> NGOs receive funding under the European Return Fund to provide advice on voluntary return in detention centres.<sup>257</sup> Verein Menschenrechte Österreich provides such advice in the detention centres in **Vienna** and **Salzburg**, while Caritas Styria is active in **Vordernberg**. These NGOs are present in detention centres on a regular basis. Furthermore, asylum seekers are visited by the appointed legal adviser in the admissibility procedure, to assist with the appeal against the rejection of the asylum application or complaints against the detention order. UNHCR is not regularly present in detention centres.

Detainees have the right to call a lawyer and inform their relatives about their apprehension and arrest. Telephones on the floors may be used with prepaid cards; the cell phones of the organisations providing return counselling may be used too. Private belongings are stored. Detainees may keep a small amount of money (€40 per week) for buying food, cigarettes or telephone cards in the canteen.

Medical treatment is provided in all detention centres by the public medical officer. Special treatment may be organised by transferring detainees in hospitals. In the detention centres in Vienna, psychiatric treatment is provided. In Vienna, detainees on hunger strike may be transferred to the medical station of the prison, but forced feeding is not allowed.<sup>258</sup> In case there is a high probability of a health risk due to hunger strike, asylum seekers are usually released from detention.<sup>259</sup> A Syrian asylum seeker went on hunger strike in 2014 after he received the decision of the BFA to send him back to Bulgaria which ordered detention on the same day. After 19 days in hunger strike, he was transferred to the medical station of the prison in Vienna. The medical officer found after one day that the asylum seeker was in good health and no longer in need of special medical treatment.<sup>260</sup>

There is no mechanism to identify vulnerable people while in detention.

## D. Procedural safeguards

### 1. Judicial review of the detention order

#### Indicators: Judicial Review of Detention

- |   |   |                             |
|---|---|-----------------------------|
| 1. Is there an automatic review of the lawfulness of detention?             | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| 2. If yes, at what interval is the detention order reviewed? <sup>261</sup> | 4 months                                |                             |

<sup>256</sup> Ministry of Interior, *Zusatzinformation für Schubhäftlinge im Polizeianhaltezentrum Roßauer Lände*, April 2014, available at: <http://bit.ly/1FvJbPB>.

<sup>257</sup> Datum, 'Mission Impossible', 1 February 2013, available at: <http://bit.ly/1H36Rzv>.

<sup>258</sup> Nowak Manfred, *Rechtsgutachten zur Frage der Zwangsernährung von Schubhäftlingen in Österreich*, 3 February 2006, available at: <http://bit.ly/1FwraQt>.

<sup>259</sup> M Sterkl. 'Starvation for the doctor's visit' (2011) *Der Standard* 25 May 2011.

<sup>260</sup> BVwG, W137 2014279-1, 21 November 2014, available at: <http://bit.ly/1Gm521M>.

<sup>261</sup> This refers to judicial review of detention conducted by the BVwG. The BFA reviews detention every 4 weeks.

When a person is placed in detention, they must receive a written decision relating to their individual situation and circumstances and the grounds for detention.<sup>262</sup> The main parts of such a decision, which are the decision of detention and the information on the right to appeal, have to be in a language the asylum applicant is able to understand. In each case, the detained asylum applicant is appointed a legal adviser provided by the state.

Detention is ordered by the BFA. The BFA has to review the lawfulness of detention every 4 weeks. After 4 months the Federal Administrative Court (BVwG) must review the lawfulness of detention *ex officio*.

There is a possibility to submit an appeal to the BVwG against a detention order, subject to no time-limit. The BVwG has to decide on the lawfulness of the detention order according to the appeal of the asylum seeker and whether at the time of its decision reasons for continuation of detention exist.

The Court must decide within 7 calendar days in cases where a person is still detained and within 6 months in cases where the person is no longer detained (which is the general time limit for decisions in administrative procedures).<sup>263</sup> If the BVwG does not decide within 7 days in cases where the asylum seeker is still detained, an appeal may be lodged to the Administrative High Court (VwGH) to challenge the fact that no decision was taken within the maximum time-limit. In that case, the VwGH sets a time-limit for the BVwG within which a decision must be taken. In a recent case, the VwGH ordered the Independent Administrative Board (UVS) to decide within 3 calendar days.<sup>264</sup>

Time-limits were usually respected by the former competent UVS of the provinces. The same can be said for practice at the newly installed Federal Administrative Court. One case was found eligible for review by the VwGH, because the law does not explicitly state where the complaint against the detention order has to be submitted: at the BFA which ordered detention or at the Administrative Court. The Constitutional Court decided in March 2015 that the unclear procedural character of the apprehension and detention order that should be appealed with a single appeal violates constitutional rights and Article 5(4) ECHR.<sup>265</sup> Appeals against the detention order have to be submitted at the Administrative Court within 6 week.

Decisions on cases where the asylum seeker is no longer detained were often made by the Independent Administrative Board shortly before the expiration of the 6 month time-limit. Asylum seekers who had been transferred in the meantime to another Member State in application of the Dublin Regulation or deported were thus hampered from requesting compensation for unlawful custody.

If the detention or its duration are recognised as unlawful, the asylum applicant is entitled to a financial compensation of €100 for each unlawful day in detention. In case the appeal is rejected, there is a possibility to submit an appeal to the VwGH and to the VfGH. However, if the Federal Administrative Court (BVwG) rules on an appeal and finds that the detention order was correct and at the time of the decision of the court there is still the need to continue detention, the detained person lacks any possibility to contest this decision as unlawful.<sup>266</sup> The Constitutional Court (VfGH) is set to assess whether the relevant provision, Article 22a(1)(3) BFA-VG, which sets this limitation is in line with the constitution or not.

With the implementation of the Returns Directive, legal safeguards for persons in detention have improved. Nevertheless, judicial review *ex officio* after 4 months does not seem to be sufficiently periodic. NGOs also consider that one of the organisations contracted by the Ministry of Interior for providing free

---

<sup>262</sup> Article 76(3) FPG.

<sup>263</sup> Article 22a(3) BFA-VG.

<sup>264</sup> VwGH, (2011/21/0126, 24 January 2013.

<sup>265</sup> VfGH, G151/2014 ua, 12 March 2015; Petra Sussner, ‚Ausgestaltung der Schubhaftbeschwerde verfassungswidrig‘ *Migralex* 03/2015, 88-89.

<sup>266</sup> VfGH, E4/2014-11, 26 June 2014.

legal assistance, Verein Menschenrechte Österreich, is not qualified for challenging the legality of detention regularly. The organisation has contracts with the Ministry of Interior for advice on voluntary return and for Dublin returns as well, which seems to be in conflict with the task of legal advisers. Concrete information on whether this organisation lodges appeals against detention orders if the asylum seeker wishes to do so is not available, but it is assumed that this rarely happens. On the other hand, lawyers have successfully challenged detention orders.

## 2. Legal assistance for review of detention

### Indicators: Legal Assistance for Review of Detention

1. Does the law provide for access to free legal assistance for the review of detention?  
 Yes  No
2. Do asylum seekers have effective access to free legal assistance in practice?  
 Yes  No

The detained asylum applicant is appointed a legal adviser provided by the state, either from the organisation ARGE Rechtsberatung or Verein Menschenrechte Österreich, which closely co-operate with the Ministry of Interior. While aliens' law previously contained an obligation to act as legal representative for detained asylum seekers if they wish so, the amendment of the FPG in 2014 deleted this obligation and now contains only the obligation for the legal adviser to take part in hearings if the asylum seekers wishes his presence.<sup>267</sup>

Legal advice shall be appointed according to Articles 51-52 BFA-VG in return procedures, detention and apprehension orders.<sup>268</sup> However, the right to receive legal advice for people benefiting from alternative measures to detention was cancelled as of 1 January 2014.

The funding per case for those services does not seem to be sufficient (€200.55 per case), and the two legal aid organisations have a different understanding of what their role is with regard to providing legal advice to those detained. The organisation Verein Menschenrechte Österreich closely cooperates with the Ministry of Interior and thus avoids conflicts with the authorities.<sup>269</sup> As discussed above, this organisation also receives funding from the Ministry of Interior for providing assistance to authorities to transfer asylum seekers to the Member State responsible for the examination of the asylum application according to the Dublin Regulation, as well as funding for counselling on voluntary return assistance.

This has resulted in situations undermining asylum seekers' right to appeal as is illustrated by the following example. Verein Menschenrechte Österreich staff responsible for "preparation for return in detention" advised asylum seekers, who were legally represented by legal advisers of Diakonie, to withdraw their right to appeal against a Dublin decision without the consent or involvement of the legal representative from Diakonie. The question whether the appeal was submitted or not was ruled by the Constitutional Court.<sup>270</sup> NGOs in Austria suspect that detainees were not fully informed about the possibility of legal

<sup>267</sup> Article 52(2) BVA-VG.

<sup>268</sup> VfGH, E4/2014-11, 26 June 2014.

<sup>269</sup> Edith Meinhart: Mr. Gongo. Profil 40, October 2007.

<sup>270</sup> VwGH U1286/2013, 12 March 2014. The asylum seeker from Afghanistan had already experienced 18 months detention in Hungary. When he received the decision to send him back to Hungary he signed a form in which he declared that he will not submit an appeal against the Dublin decision. The following day he gave power of attorney to his legal adviser from Diakonie refugee service and wanted to have the decision appealed. The Asylum Court ruled that the appeal is inadmissible. The Constitutional Court declared that legal counselling has to include all aspects of the administrative procedure and the procedure at the Asylum Court including the submitting of an appeal. The asylum seeker has to be informed about the withdrawal of the right to appeal by the appointed legal adviser. The employee of VMÖ who prepares detainees for the return had no legitimacy to give legal advice. See also: U489/2013, 26 February 2014.

representation by Verein Menschenrechte Österreich and that this organisation hardly accepts to represent the detained person (whereas the legal adviser should write an appeal against the detention order if the detention order appears to be unlawful). Since 2014, this suspicion has reduced relevance, as the obligation to legally represent the detained person upon their request was cancelled by the FPG. Arge Rechtsberatung, on the other hand, is committed to the safeguard of the human rights of detainees and has successfully appealed detention orders.

Legal advisers can meet their clients in the visitor room during office hours. Appointed legal advisers have to arrange for an interpreter. As their service is included in the lump sum for legal advice, it can be assumed that interpreters are not always present.

Moreover, asylum seekers are usually detained in the admissibility procedure. Member states requested to take back or take charge of the applicant have to respond to the request within 1 month, according to the recast Dublin Regulation. In this way, the responsibility for processing the asylum application is decided much faster, but asylum seekers may have more difficulties to organise effective legal assistance and/or may fail to appeal against the rejection of their asylum application as inadmissible within 7 days. Detained asylum seekers may have more difficulties to appeal a rejection of their application as inadmissible because they may find out that the appointed legal adviser will not assist them to write an appeal. Within the short time limit of 7 days for the appeal, it could be difficult to organise effective legal assistance.

## ANNEX I – Transposition of the CEAS in national legislation

### Directives and other CEAS measures transposed into national legislation

Directive	Deadline for transposition	Date of transposition	Official title of corresponding act	Web Link
<b>Directive 2011/95/EU</b> Recast Qualification Directive	21 December 2013	1 January 2014	Federal Act concerning the Granting of Asylum	< <a href="http://bit.ly/1QjH2M7">http://bit.ly/1QjH2M7</a> >
<b>Directive 2013/32/EU</b> Recast Asylum Procedures Directive	20 July 2015 Article 31(3)-(5) to be transposed by 20 July 2018	20 July 2015	Aliens Law Amendment BGBl 70/2015 from 18 June 2015	< <a href="http://bit.ly/1SzV6Du">http://bit.ly/1SzV6Du</a> >
<b>Directive 2013/33/EU</b> Recast Reception Conditions Directive	20 July 2015	20 July 2015	Aliens Law Amendment BGBl 70/2015 from 18 June 2015	< <a href="http://bit.ly/1SzV6Du">http://bit.ly/1SzV6Du</a> >
<b>Regulation (EU) No 604/2013</b> Dublin III Regulation	Directly applicable 20 July 2013	20 July 2015	Aliens Law Amendment BGBl 70/2015 from 18 June 2015	< <a href="http://bit.ly/1SzV6Du">http://bit.ly/1SzV6Du</a> >

#### *Procedure*

- The definition of persons with special needs has not been fully implemented.

#### *Reception conditions*

- The reform implemented the right to an appeal with legal aid in case of reduction or withdrawal of reception conditions, however this is not implemented in all federal provinces.
- Provisions on asylum seekers with special needs has not been fully implemented.