

# Country Report: Austria



2018  
Update

***asyl****koordination*  
Österreich



## Acknowledgements & Methodology

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

This report draws on information provided by the Ministry of Interior in responses to information requests, publicly available reports and responses to parliamentary questions, jurisprudence of Austrian courts, news items, and observations from the practice of Asylkoordination and other civil society organisations, including Diakonie, Volkshilfe among others.

The information in this report is up-to-date as of 31 December 2018, unless otherwise stated.

## The Asylum Information Database (AIDA)

The Asylum Information Database (AIDA) is coordinated by the European Council on Refugees and Exiles (ECRE). It aims to provide up-to date information on asylum practice in 23 countries. This includes 20 EU Member States (AT, BE, BG, CY, DE, ES, FR, GR, HR, HU, IE, IT, MT, NL, PL, PT, RO, SE, SI, UK) and 3 non-EU countries (Serbia, Switzerland, Turkey) which is accessible to researchers, advocates, legal practitioners and the general public through the dedicated website [www.asylumineurope.org](http://www.asylumineurope.org). The database also 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 Asylum Information Database (AIDA), funded by the European Programme for Integration and Migration (EPIM), a collaborative initiative by the Network of European Foundations and the European Union's Asylum, Migration and Integration Fund (AMIF) and Horizon 2020 research and innovation programme (grant agreement No 770037). The contents of this report are the sole responsibility of ECRE and can in no way be taken to reflect the views of EPIM or the European Commission.



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## 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>AHZ</b>	Pre-removal detention centre   Anhaltezentrum
<b>AMIF</b>	Asylum, Migration and Integration Fund
<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>COI</b>	Country of origin information
<b>EAST</b>	Initial reception centre   Erstaufnahmestelle
<b>ERF</b>	European Refugee Fund
<b>FPG</b>	Aliens Police Act   Fremdenpolizeigesetz
<b>FrÄG</b>	Aliens Law Amendment Act   Fremdenrechtsänderungsgesetz
<b>HAP</b>	Humanitarian Admission Programme
<b>IBF</b>	Interventionsstelle für Betroffene von Frauenhandel
<b>ICMPD</b>	International Centre for Migration Policy Development
<b>LVwG</b>	State Administrative Court   Landesverwaltungsgericht
<b>MSF</b>	Doctors Without Borders
<b>ÖIF</b>	Austrian Integration Fund   Österreichisches Integrationsfonds
<b>ÖVP</b>	Austrian People's Party   Österreichische Volkspartei
<b>PAZ</b>	Police detention centre     Polizeianhaltezentrum
<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

### Overview of statistical practice

Asylum statistics are published on a monthly basis by the Ministry of Interior, providing information on asylum applicants and main nationalities. As of 2016, these monthly reports also provide decisions at first and second instance.<sup>1</sup> The Federal Agency for Immigration and Asylum (BFA) also publishes short annual statistical overviews (*Jahresbilanzen*).<sup>2</sup>

### Applications and granting of protection status at first and second instance: 2018

	Applicants in 2018	Pending at end 2018	Refugee status	Subsidiary protection	Humanitarian protection	Rejection	Refugee rate	Subs. Prot. rate	Hum. Prot. rate	Rejection rate
<b>Total</b>	13,400	38,053	14,379	4,099	1,848	32,208	53,5%	38,1	12,4%	61,3%

Breakdown by countries of origin of the total numbers

Syria	3,307	1,614	4,863	420	9	806	91,4%	82,8%	3,3%	13,2%
Afghanistan	2,053	1,6423	4,853	2,003	332	2,466	56%	52,8%	11,9%	52,9%
Iran	1,097	2,498	1,355	51	17	663	82,9%	26,6%	6,5%	31,8%
Russian Fed	936	1,661	513	100	295	2,140	41,6%	14,8%	25,8%	70,2%
Iraq	727	5,822	725	511	123	2,567	36,3%	49,4%	14,6%	65,2%
Nigeria	670	1,020	18	29	87	2,135	1,7%	5%	13%	96%
Somalia	522	1,459	744	622	9	878	52,2%	91,3%	6,3%	38,3%
Georgia	440	597	3	30	44	1,428	0,6%	7,1%	7,8%	94,9%
Unknown	375	409	633	62	32	259	84,4%	57,9%	28,8%	26,3%
Ukraine	269	556	21	23	53	915	6,6%	8,1%	13%	90,4%

Source: Ministry of Interior, Asylum Statistics, December 2018

<sup>1</sup> Ministry of Interior, *Asylum Statistics*, available in German at: <http://bit.ly/2xmiKOT>.

<sup>2</sup> BFA, *Statistics*, available in German at: <http://bit.ly/1XKnnsy>. These have been published since 2014.

#### Gender/age breakdown of the total number of applicants: 2018

	Number	Percentage
<b>Total number of applicants</b>	1,3400	100%
Men	4,474	33,4%
Women	2,270	16,9%
Children	6,168	46%
Unaccompanied children	488	3,6%

Source: Ministry of Interior.

#### Comparison between first instance and appeal decision rates: 2018

The Ministry of Interior does not disaggregate statistics on decisions between the first and second instance and the Administrative Court does not publish asylum statistics. The Minister of Interior stated that 35% had been positive decisions and 57% negative decision in 2018, while 8 % were other decisions.

First instance	Appeal	Total
Protection granted: 14,484	Protection granted 5,842	20,326
Rejection: 22,885	Rejection: 9,336	32,221
Protection rate (without other decisions): 38,8%	Protection rate (without other decisions): 38,5%	-

Source: Federal Office for Immigration and Asylum, available in German at: <https://bit.ly/2RXC3s6>.



## Overview of the legal framework

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

Title (EN)	Original Title (DE)	Abbreviation	Web Link
Federal Act concerning the Granting of Asylum	Bundesgesetz über die Gewährung von Asyl StF: BGBl. I Nr. 100/2005	Asylum Act (AsylG)	<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	Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetiteln StF: BGBl. I Nr. 100/2005	Aliens Police Act (FPG)	<a href="http://bit.ly/1QkRGqx">http://bit.ly/1QkRGqx</a> (DE)
General Administrative Procedures Act	Allgemeines Verwaltungsverfahrensgesetz 1991 StF: BGBl. Nr. 51/1991	AVG	<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 Procedures Act (BFA-VG)	<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 (BFA-G)	<a href="http://bit.ly/1Fom1KY">http://bit.ly/1Fom1KY</a> (DE)
Federal Administrative Court Act Amendment of administrative litigation	Bundesverwaltungsgerichtsgesetz – Verwaltungsgerichtsbarkeits-Novelle 2012	BVwGG	<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 (VwGVG)	<a href="http://bit.ly/1REw4mM">http://bit.ly/1REw4mM</a> (DE)
Agreement of 15 July 2004 between	Vereinbarung zwischen dem Bund und den Ländern gemäß	Grundversorgungsv	<a href="http://bit.ly/1PYPndi">http://bit.ly/1PYPndi</a>

federal state and states under Article 15a of the Federal Constitution concerning joint action for the temporary basic provision of aliens in need of help and protection in Austria	Art. 15a B-VG über gemeinsame Maßnahmen zur vorübergehenden 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	ereinbarung	(DE)
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	Basic Care Act (GVG-B)	<a href="http://bit.ly/1JdmHcw">http://bit.ly/1JdmHcw</a> (DE)
Agreement between the federal state and states under Article 15a of the Basic Care Act concerning the raise of selected maximum cost rates of Article 9 Basic Care Agreement  <i>Amended by:</i> Agreement between the federal state and states under Article 15a concerning the raise of selected maximum cost rates of Article 9 Basic Care Agreement	Vereinbarung zwischen dem Bund und den Ländern gemäß Artikel 15a B-VG über die Erhöhung ausgewählter Kostenhöchstsätze des Artikel 9 der Grundversorgungsvereinbarung StF: BGBl I 46/2013  <i>Geändert durch:</i> Vereinbarung zwischen dem Bund und den Ländern gemäß Artikel 15a B-VG über eine Erhöhung ausgewählter Kostenhöchstsätze des Art. 9 der Grundversorgungsvereinbarung StF: BGBl 48/2016		<a href="http://bit.ly/2jR2MXQ">http://bit.ly/2jR2MXQ</a> (DE)  <a href="http://bit.ly/2jwNiHN">http://bit.ly/2jwNiHN</a> (DE)
Federal Constitutional Act concerning the Accommodation and Allocation of aliens in need of help and protection	Bundesverfassungsgesetz Unterbringung und Aufteilung von hilfs- und schutzbedürftigen Fremden, BGBl 120/2015		<a href="http://bit.ly/2jwFaqz">http://bit.ly/2jwFaqz</a> (DE)
Federal Act concerning the Implementation of Identity Checks at the instance of Border Crossings	Bundesgesetz über die Durchführung von Personenkontrollen aus Anlass des Grenzübertritts StF: BGBl 435/1996		<a href="http://bit.ly/2kszyO0">http://bit.ly/2kszyO0</a> (DE)
Federal Act on Citizenship	Bundesgesetz über die österreichische Staatsbürgerschaft StF: BGBl. Nr. 311/1985	StbG	<a href="http://bit.ly/2j7KSTL">http://bit.ly/2j7KSTL</a> (DE)
Labour Integration Act	Bundesgesetz zur Arbeitsmarktintegration von arbeitsfähigen Asylberechtigten und subsidiär Schutzberechtigten sowie AsylwerberInnen, bei denen die Zuerkennung des internationalen Schutzes wahrscheinlich ist, im Rahmen eines Integrationsjahres (Integrationsjahrgesetz), BGBl. I No 75/2017, 19. Juni 2017,	IJG	<a href="http://bit.ly/2EXvtPU">http://bit.ly/2EXvtPU</a> (DE)

**Main implementing decrees and administrative guidelines and regulations relevant to asylum procedures, reception conditions, detention and content of protection**

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	Staatendokumentationsbeiratsverordnung	<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	Safe Countries of Origin Ordinance (HStV)	<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 (AsylIG-DV 2005)	<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-Betretungsverordnung 2005 (BEBV)	<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 (AnhO)	<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">http://bit.ly/1FOrP2P</a> (DE) <a href="http://bit.ly/1ENcXOh">http://bit.ly/1ENcXOh</a> (DE)

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

The report was previously updated in **March 2019**.

### *Asylum procedure*

- ❖ **Length of procedures:** The 20-day period for the admissibility procedure was deleted and the in-merit procedure can be carried out during the admissibility procedure. In such cases, the regular procedure will no longer be carried out at the regional directorates and the asylum seekers remain at the reception center of the federal government. Moreover, the extension of the decision period from 6 to 15 months for the Federal Office for Immigration and Asylum (BFA) and to 12 months for the Federal Administrative Court (BVwG) has expired on 31 May 2018. However, it still applies to proceedings that were pending in first instance or in Court at that time.
- ❖ **Appeal:** In 2018, the appeal period had been shortened to 2 weeks for accelerated procedures and in cases in which the application for international protection has been refused and a return decision, along with an order to leave the territory, has been issued. However, the Constitutional Court recently overturned the shortening of the appeal period in several decisions, on the ground that it would be disproportionate to extend the decision-taking period of the authorities beyond 6 months, while asylum seekers can only make an appeal within 1 or 2 weeks.<sup>3</sup>
- ❖ **Suspensive effect:** An appeal has no suspensive effect in cases where an asylum seeker has attempted to mislead the Federal Office by providing false information or documents, by concealing important information or by withholding documents about his/her identity or nationality.
- ❖ **Safe countries of origin:** Five countries have been added to the list of safe countries of origin: Armenia; Ukraine; Benin, Senegal; Sri Lanka. The list now counts 17 countries.
- ❖ **Data storage:** Following the new legal amendments that came into force on 1 September 2018, the Aliens Police Department and the BFA are authorised to analyse the data storage of persons applying for international protection.<sup>4</sup> However, this is only allowed if the identity or the travel route cannot be established on the basis of available evidence.
- ❖ **Afghan nationals:** Many Afghan nationals have seen their asylum application rejected at first and second instance, on the grounds that other internal protection alternatives were available. While assessing the situation on the ground, the authorities also referred to an expert whose judicial expertise was revoked due to massive criticism of NGOs.<sup>5</sup>
- ❖ **Criminal convictions:** As opposed to the previous leniency that was applied in practice, the conviction of a juvenile offender who is an asylum seeker has now an immediate impact on his or her asylum procedure. This includes, for example, the withdrawal of the subsidiary protection status and of the right to residence, as well as the loss of employment and of the access to social benefits.

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<sup>3</sup> VfGH, Decision G 134-2017, 9 October 2017.

<sup>4</sup> Articles 35 and 39a BFA-VG.

<sup>5</sup> Wiener Zeitung, Umstrittener Afghanistan-Gutachter wird gestrichen, 14 September 2018, available in German at: <https://bit.ly/2t8Mdwa>.

### *Detention of asylum seekers*

- ❖ **Grounds for detention:** The grounds for detention under the recast Reception Conditions Directive have now been incorporated into Article 76 FPG, in compliance with the case law of the Administrative Court.<sup>6</sup> Asylum applicants can be detained in detention centres if, in addition to the risk of absconding, there is also a danger for public order and security within the meaning of Article 67 FPG. This is characterised as ‘an actual, present and significant danger’.
- ❖ **Duty to inform the authorities:** In the context of return procedures, hospitals have a duty to inform the BFA without delay on the release date of a person from institutional care. Due to the critics this practice engendered, especially regarding the breach of medical confidentiality, the authorities now request the information to be provided by the hospital’s director instead of the medical staff.
- ❖ **Expulsion date:** The obligation to inform a person about his or her date of expulsion has been deleted.

### *Reception conditions*

- ❖ **Freedom of movement:** According to the basic care agreement, an asylum seeker may not establish his/her residence outside of the federal state which provides him/her basic care. Since 1 September 2018, an exception applies to persons who obtained the legal right to remain. The accommodation arrangement as well as the restriction of residence shall cease to apply if the asylum seeker has been granted a humanitarian or subsidiary protection by the Federal Office.
- ❖ **Financial contributions:** Asylum seekers can be requested to contribute financially to the basic care they receive during the asylum procedure. The maximum amount of this contribution is set at 840€ per person, although asylum seekers should always keep at least 120€. They also have to contribute financially for their family members. Upon termination of the provision of basic care by the state, any difference between the actual costs incurred and the cash seized should be reimbursed.
- ❖ **Access to education:** The previous legal obligation to grant access to German classes to asylum seekers who have a high recognition rate has been limited. As it stands now, they receive integration courses only depending on financial and organisational resources. Moreover, the responsibility in that regard has been shifted from the Ministry of Interior to the Ministry of Foreign Affairs, who is in charge of integration issues.
- ❖ **Vocational training:** The possibility for young asylum seekers (up to the age of 25) to receive vocational training was abolished.
- ❖ **Access to the labour market:** In a judgement of 25 June 2018, the Federal Administrative Court based its decision on the Reception Conditions Directive to conclude that asylum seekers should have effective access to the labour market.<sup>7</sup>

### *Content of international protection*

- ❖ **Citizenship:** The waiting period to apply for a citizenship has been extended from 6 to 10 years for refugees. As a consequence, only one refugee obtained the Austrian citizenship in 2018.

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<sup>6</sup> See for example: VwGH, Decision No 2017/21/0009, 5 October 2017.

<sup>7</sup> BVwG, Decision, No W209 2184750-1, 25 June 2018.

- ❖ **Subsidiary protection:** When beneficiaries of subsidiary protection apply for a prolongation of their right of residence, especially those originating from Afghanistan, a withdrawal procedure of their status is often initiated.
- ❖ **Withdrawal of protection:** A withdrawal procedure is initiated when a beneficiary of international protection entered his or her country of origin or applied for a passport from the country of origin, or if he or she travelled to a neighboring country of the country of origin.
- ❖ **Social benefits:** In 2018, the High Court dealt with the restriction of the minimum wage in the different provinces. The regulation of the province of Lower Austria, which aimed at limiting the social benefits, was ruled unconstitutional.<sup>8</sup> However, the regulation applicable in Vorarlberg, which is more flexible and allows for contributions in kind, was considered constitutional.<sup>9</sup> The CJEU further considered that the reduced benefits that were granted to asylum seekers due to their temporary right of residence in Upper Austria, were not compatible with the recast Qualification Directive.<sup>10</sup> The Ministry of Social Affairs presented a draft of its Social Assistance Basic Law in November 2018, which has been criticised as beneficiaries of subsidiary protection are excluded from social assistance and other substantive restrictions apply to refugees.
- ❖ **Administrative offences:** There has been an extension of the penal provisions in the Aliens Police Act (Articles 119 and 120) as regards the legitimate use of social benefits, which has been massively intensified since 1 September 2018. Pursuant to Article 120, an asylum seeker who knowingly misrepresents his or her identity or origin during an asylum procedure in order to obtain a tolerated or lawful stay in the Federal territory is committing an administrative offense. The fine is set at 1,000€ to 5,000€ and, if the asylum seeker is unable to pay the fine, he or she can be imprisoned for up to three weeks. Moreover, a foreigner who has misled the authorities during an asylum procedure and received social benefits (basic care, health insurance, social assistance) can now receive a prison sentence of up to one year or a fine of up to 360 daily rates. If the value of benefits received exceeds 3,000€, the prison sentence can reach three years.

As of 1 January 2019, "special executive investigation teams" are deployed in all federal states to find alleged "social fraudsters" (the Unit is called V/8/D). The Minister announced that the police will be controlling health insurance cards and the labour market service (AMS). They will further conduct research on persons who receive emergency help and will ensure that they are entitled to it. The aim is to prevent and to control the lawfulness of the reception of Basic Care benefits.

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<sup>8</sup> VfGH, Decision V 101/2017-11, 12 December 2017, available in German at: <http://bit.ly/2EMeAnP>.

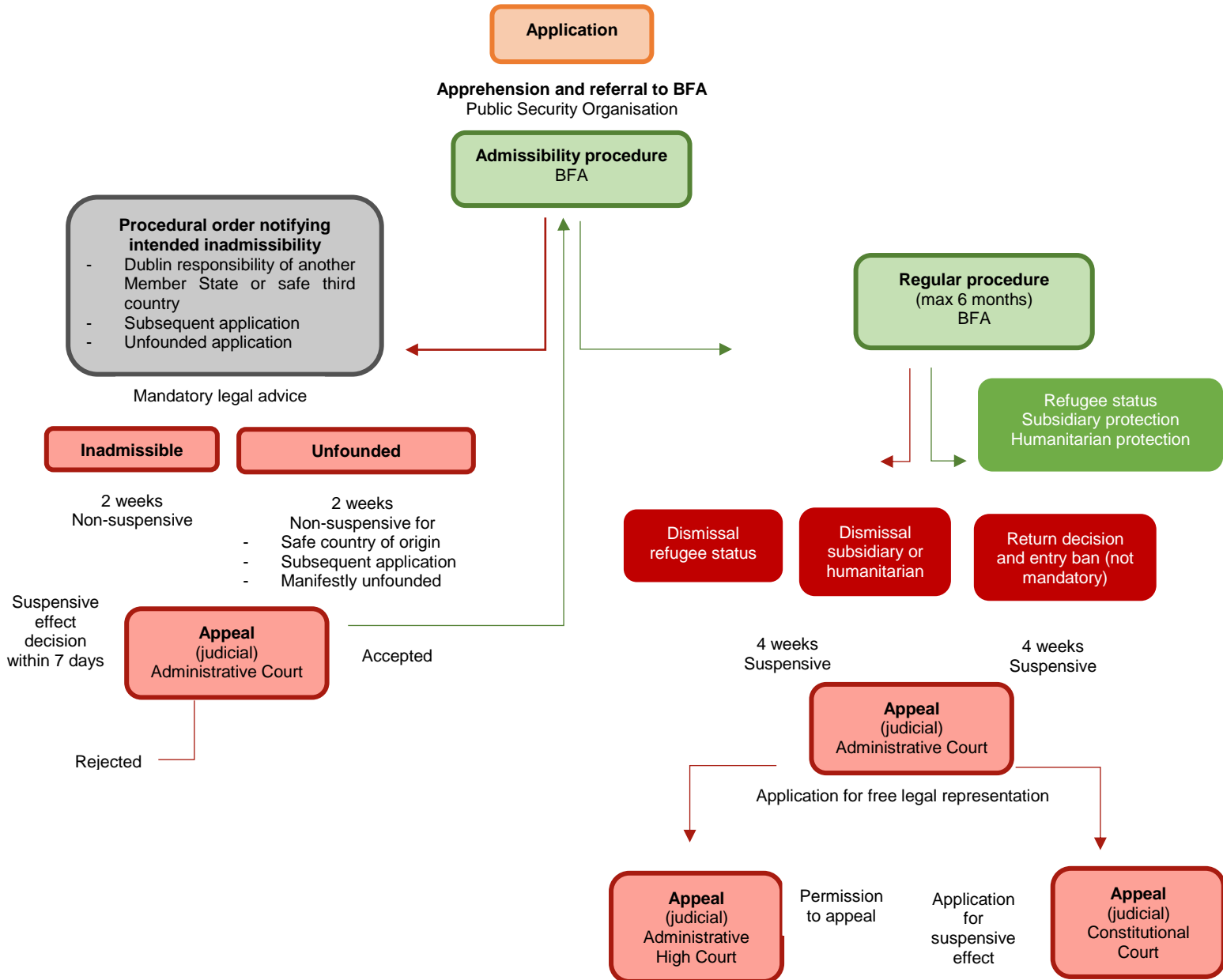
<sup>9</sup> VfGH, Decision G 308/2018-8, 1 December 2018.

<sup>10</sup> CJEU, *Ayubi*, Case C-713/17, 21 November 2018.

# 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>11</sup> | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ▪ Fast-track processing: <sup>12</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>13</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 (EN)	Competent authority (DE)
Application at the border	Police	Polizei
Application on the territory	Police	Polizei
Dublin (responsibility assessment)	Federal Agency for Immigration and Asylum	Bundesamt für Fremdenwesen und Asyl (BFA)
Refugee status determination	Federal Agency for Immigration and Asylum	Bundesamt für Fremdenwesen und Asyl (BFA)
First appeal	Federal Administrative Court	Bundesverwaltungsgericht (BVwG)
Onward appeal	Administrative High Court Constitutional Court	Verwaltungsgerichtshof (VwGH) Verfassungsgerichtshof (VfGH)
Subsequent application	Federal Agency for Immigration and Asylum	Bundesamt für Fremdenwesen und Asyl (BFA)

## 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)	1,355	Ministry of Interior	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

Source: Answer to parliamentary request 3183/AB-BR/2018 – 5 April 2018.

<sup>11</sup> For applications likely to be well-founded or made by vulnerable applicants. See Article 31(7) recast Asylum Procedures Directive.

<sup>12</sup> Accelerating the processing of specific caseloads as part of the regular procedure.

<sup>13</sup> Labelled as “accelerated procedure” in national law. See Article 31(8) recast Asylum Procedures Directive.



## 5. Short overview of the asylum procedure

Asylum and aliens law procedures are administrative procedures. For these procedures, the General Administrative Procedures Act (AVG) applies. The Asylum Act (AsylG) 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 well as for residence permits on exceptional humanitarian grounds and certain Aliens' Police proceedings. The procedure before the Federal Administrative Court (*Bundewertwaltungsgericht*, BVwG) is also regulated by the Asylum Act, the BFA Procedures Act (BFA-VG), by the General Administrative Procedures Act and the Federal Administrative Court Act.<sup>14</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. In 2016, "special provisions to maintain public order during border checks" were added to the Asylum Act. When the provision (discussed publicly as "emergency provision") enters into force through a decree of the federal government, asylum seekers no longer have access to the asylum procedure in Austria. Decisive for denying asylum applications is a maximum number, otherwise a 'quota', of asylum applications to be examined on the merits. This number was set at 35,000 applications for 2017 and was not reached. The limit that had been set at 30,000 applications for 2018 has not been exceeded. The limit has been set at 25,000 applications for 2019, including family reunification cases. The Ombudsman has criticised the fact that the benchmarks set are open to wide interpretation and that the figures in the explanatory notes to the law are not comprehensible.<sup>15</sup>

**First instance procedure:** 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 dismissed 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. There is also an **accelerated procedure** for certain claims.

**Appeal:** Appeals to the Federal Administrative Court are possible against a decision rejecting the asylum application as inadmissible and also against a decision dismissing the application on the merits. The BFA Procedures Act (BGA-VG) regulates the appeal and its effects. Appeals against the decision rejecting the asylum application on the merits have to be submitted within four weeks and have suspensive effect, unless the BFA does not allow for the appeal to have suspensive effect. An appeal against a decision rejecting an application as inadmissible does not have suspensive effect and has to be submitted within two weeks. The ruling from the Constitutional Court, which considered the shortening of the appeal period as justified as long as there are special organisational and procedural measures which also ensure a correspondingly rapid decision, has been annulled by the new law that

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<sup>14</sup> See the section on [Overview of the Legal Framework](#).

<sup>15</sup> Ombudmsan, *Kontrolle der öffentlichen Verwaltung*, March 2017, available in German at: <http://bit.ly/2GOY8Vj>, 115.

came into force on 1 September 2018.<sup>16</sup> 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.

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 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. The reasons must be set out in the appeal decision.

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, or where residence is permitted for other humanitarian reasons.

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>17</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.

**Onward appeal:** The BVwG may decide that the rejection of the application can be appealed before the Administrative High Court (*Verwaltungsgerichtshof*, VfGH). 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. The BFA can also file a complaint with the VfGH in the course of the official revision.

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.

In every stage of the procedure, asylum seekers are informed about the possibility of support for voluntary return. The BFA can also order consultation with regard to return. When an asylum seeker

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<sup>16</sup> The reason for shortening the appeal period was justified by the necessity to effectively carry out and enforce certain measures, such as the order to leave the territory.

<sup>17</sup> Article 20 BFA-VG.

leaves the country in the context of voluntary repatriation to his or her country of origin, the asylum proceeding is filed as redundant.

## B. Access to the procedure and registration

### 1. Access to the territory and push backs

#### Indicators: Access to the Territory

1. 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

#### 1.1. Refusals of entry at the Italian and Slovenian borders

Austria has requested the European Commission to extend border controls at the borders with Hungary and Slovenia from 11 November 2018. Since there has been no objection from Brussels, the exemption will be extended for another 6 months until May 2019. The letter from the Minister of the Interior that was addressed to the Commission, the Council and the Parliament refers to the still high numbers of illegal immigrants, illegal residents and asylum seekers in Austria. The Austrian Government concluded that the situation was therefore not sufficiently stable. However, concrete figures that would demonstrate the latter were not included in the letter.<sup>18</sup>

Slovenia reaffirmed its opposition as regards Austrian border controls. The Slovenian Ministry of the Interior considers border controls unjustified and disproportionate and stressed that there were no statistics demonstrating a risk of secondary migration nor a threat to Austria's internal security. Only 15 people illegally crossing the border from Slovenia were sent back in the first half of 2018, according to Slovenia.<sup>19</sup> The police in the federal province Carinthia reported that only 991 persons without valid travel documents were stopped at the border to Italy and Slovenia in 2018.

In **Burgenland**, which is at the border with Hungary, the state government has welcomed the extension of border controls. The police announced that, until June 2018, only 200 refugees and 9 smugglers had been apprehended in Burgenland. Across Austria, however, there are more than 300 apprehended illegal persons and 250 asylum applications made per week, which justifies border controls according to the federal state.<sup>20</sup> At the bigger border crossing points, the police stopped about 270 illegal entering persons and almost 20 traffickers.<sup>21</sup> In Burgenland, the head of the police announced that 382 persons were apprehended by November 2018, out of which 200 were victims of human trafficking. Another 300 people were rejected at the border and Austria had about 450 persons attempting to cross the border per week.<sup>22</sup> In **Tyrol**, the police has stopped 4,407 illegally entered migrants (including returnees from Germany) by 11 November 2018, which is a sharp decrease compared to 2017. The number of asylum applications decreased from 1,092 in 2017 to this year 497 (11 November 2018).

Austria was confronted with Bavaria's plan to reject illegal entering persons from Austria. In the first half of 2018, 2,500 migrants were apprehended at the border between Italy and Austria - which equals to 15

<sup>18</sup> Salzburger Nachrichten, EU-Kommission erhielt Antrag zu Grenzkontrollen, 11. Oktober 2018; available in German at: <https://bit.ly/2WRsFdg>.

<sup>19</sup> Der Standard, 2015-Trauma-Show als Probe zur Abwehr von Flüchtlingen an Österreichs Grenze, 26 June 2018; available in German at: <https://bit.ly/2NUlhJO>.

<sup>20</sup> Burgenland.orf, Grenzkontrollen: Politik begrüßt Verlängerung, 12 June 2018, available in German at: <https://bit.ly/2Gjxqat>.

<sup>21</sup> Burgenland.orf, Lage an der Grenz: sehr ruhig, 17 July 2018; available in German at: <https://bit.ly/2tpEWIB>.

<sup>22</sup> Mein Bezirk, 'Burgenland remains the safest federal state', 3 December 2018, available at: <https://bit.ly/2HqRTdd>.

persons per day.<sup>23</sup> According to the German police, in the first nine months of 2018, about 7,800 migrants were apprehended on the 820 kilometer long German-Austrian border. About 50 to 60% of them were sent back to Austria.<sup>24</sup>

## 1.2. Special provisions to maintain public order during border checks

With a legal amendment which entered into force on 1 June 2016, “special provisions to maintain public order during border checks” were added to the Asylum Act.<sup>25</sup>

The provision (discussed publicly as “emergency provision”), upon activation by a decree of the federal government, entails that asylum seekers no longer have access to the asylum procedure in Austria. Decisive for denying asylum applications is a maximum number, otherwise a ‘quota’, of asylum applications to be examined on the merits. For 2016 this number was set at 37,500 applications and was not reached.<sup>26</sup> For 2017 the limit was set at 35,000 applications and was not reached either. The limit for 2018 was set at 30,000 applications and was not exceeded. For the year 2019, the maximum has been set at 25,000 asylum applications.

The possibility of rejection at the border relies on the distinction between “making” and “lodging” an asylum application as per Article 6 of the recast Asylum Procedures Directive. After an application is made before a police officer at the border, or in a registration centre (*Registrierstelle*) if the person is found to be irregularly on the territory, the Aliens Police will be able to reject the person at the border or to issue a return decision before the initial interview (*Erstbefragung*).<sup>27</sup>

Refusal to register an application is not possible where return would be incompatible with the principle of *non-refoulement* under Articles 2 and 3 ECHR, or with Article 8 ECHR.<sup>28</sup>

An asylum seeker is not issued a decision ordering return, and cannot appeal against the refusal to have his or her claim examined. In such a case, the asylum seeker has no right to remain on the territory,<sup>29</sup> therefore an appeal to the State Administrative Court (LVwG) does not have suspensive effect.<sup>30</sup>

The amendment has been criticised by UNHCR and civil society organisations,<sup>31</sup> as it enables police authorities rather than the BFA to deny a person access to the asylum procedure, without procedural guarantees or legal assistance, while an appeal can only be made after the expulsion has been carried out. The activation of the emergency provision also suspends the application of the Dublin Regulation.

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<sup>23</sup> Kurier 03.07.2018, Experte: "Zurückweisen dürfen die Deutschen nicht", available in German at: <https://bit.ly/2E4X3tg>.

<sup>24</sup> Tiroler Tageszeit, ‚Flüchtlinge: 2018 bisher deutlicher Rückgang an Aufgriffen in Tirol‘, 21 November 2018, available in German at: <https://bit.ly/2NXqssB>.

<sup>25</sup> Articles 36-41 AsylG.

<sup>26</sup> Out of a total, 42,073 asylum applications registered in 2016, only 27,254 were deemed to be under the responsibility of Austria: Ministry of Interior, *Asylum Statistics December 2016*, available in German at: <http://bit.ly/2k2N2Ue>, 3.

<sup>27</sup> Article 38 AsylG.

<sup>28</sup> Article 41(1) AsylG.

<sup>29</sup> Article 39 AsylG.

<sup>30</sup> Article 41(2) AsylG.

<sup>31</sup> UNHCR Austria, Kurzanalyse zum Gesamtändernden Abänderungsantrag betreffend eine Änderung des Asylgesetzes durch Sonderbestimmungen zur Aufrechterhaltung der öffentlichen Ordnung und des Schutzes der inneren Sicherheit während der Durchführung von Grenzkontrollen, 21 April 2016, available in German at: <http://bit.ly/1MJVVM5>; Asylkoordination Österreich et al, *Stellungnahme zum Entwurf betreffend ein Bundesgesetz, mit dem das Asylgesetz 2005, das Fremdenpolizeigesetz 2005 und das BFA-Verfahrensgesetz geändert werden*, 21 April 2016; available in German at: <http://bit.ly/2jx6Z29>.

## 2. 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?

An application for international protection can be made before an agent of the public security service or a security authority. Within a period of 48 hours after apprehension by the security authority – that may be extended to 72 hours – after the request was made, the first interrogation (*Erstbefragung*) has to take place.<sup>32</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. Currently, applications are forwarded to the BFA without delay. In some cases, some public security offices do not provide correct information and send asylum seekers to the initial reception centre (EAST) of **Traiskirchen** to make an asylum application. As of March 2019, the Ministry of Interior has decided to rename the initial reception centres (EAST) into "departure centre". The legal basis for the change of name is unclear and has been criticised by civil society organisations.

The application is lodged 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 departure centre by the security authorities. Asylum seekers may otherwise be transferred to a distribution centre (VQ) or helped to go there.

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 children born in Austria at the branch office of the BFA.

## C. Procedures

### 1. Regular procedure

#### 1.1. 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?  Yes  No
3. Backlog of pending cases at 31 December 2018: 38,053

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 immigration law procedures.

<sup>32</sup> Article 29(2) AsylG.

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 the application for other reasons. As of September 2018, the admissibility procedure may be prolonged by lifting the 20 days deadline in manifestly unfounded cases. However, if no information about the intention to reject the application is issued within 20 calendar days, the application is automatically admitted into the regular procedure. Thus, the asylum-seeker should receive the preliminary residence permit and be allocated to the reception system of a federal province. To the contrary, if the asylum application is inadmissible the asylum-seeker receives legal assistance and has to be heard in presence of his/her lawyer. There is no legal remedy against this procedural order.

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. An amendment of Article 22 AsylG, entering into force on 1 June 2016, allows for the extension of the duration of procedures at first instance up to 15 months. This exceptional prolongation ceased 1 June 2018 but remains applicable to cases pending after 31 May 2018.<sup>33</sup>

The numbers of asylum applications upon which the BFA has not taken a decision within 15 months are not available. While the average duration of the procedure in the first 6 months of 2017 was 14 months,<sup>34</sup> it reduced to 6,6 months at the beginning of 2018 for applications made after 1 July 2016. According to NGOs, however, many asylum seekers waited more than 10 months for a decision in 2018. The Austrian Ombudsman had received over 2,000 complaints concerning the duration of the asylum procedure in 2017, in addition to the 1,500 complaints of 2016.<sup>35</sup>

Moreover, at the end of 2018, 7,535 cases were pending at first instance compared to 63,912 cases at the end of 2016.<sup>36</sup> The average duration of proceedings at first instance is less than 3 months for applications made as of 1 June 2018.<sup>37</sup> The Minister of Interior explained that, in 2018, the average duration was 6 months for regular procedures and 27 days for fast track procedures (which concerned 750 cases).<sup>38</sup>

Whereas the procedure for Syrians seems to be concluded within the 15-month time limit, other nationalities face longer delays for a decision.<sup>39</sup>

In case of delay of the BFA, 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).

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<sup>33</sup> Articles 73(15) and 75(24) AsylG.

<sup>34</sup> Information provided by the Ministry of Interior, 26 January 2018. See also Der Standard, 'Asyl: Freiwillige Rückkehr ging um ein Drittel zurück', 11 July 2017, available in German at: <http://bit.ly/2D3nDiK>.

<sup>35</sup> FRA, *Monthly data collection on the migration situation in the EU*, January 2017, September 2017, available at: <http://bit.ly/2nZIU8B>, 4.

<sup>36</sup> Ministry of Interior, Reply to parliamentary question 11560/J (XXV.GP), 31 March 2017, available in German at: <http://bit.ly/2o1os5Z>. According to the Ministry, the average processing times for asylum applications made after 1 July 2016 was 6.6 months: Information provided by the Ministry of Interior, 26 January 2018.

<sup>37</sup> BFA, 'Rückstandsabbau erledigt, Verfahrensdauer unter drei Monaten, Abschiebungen gesteigert', 24 January 2019, available in German at: <https://bit.ly/2tX7nOe>.

<sup>38</sup> Orf.at, 'Trendumkehr' Kickl präsentiert Bilanz zu Asylzahlen', 24. January 2019, available in German at: <https://bit.ly/2NVi4pY>.

<sup>39</sup> FRA, *Monthly data collection on the migration situation in the EU*, January 2017, available at: <http://bit.ly/2jUsOcl>, 20, citing information from Caritas Vienna.

In the case of a delay of the Federal Administrative Court, an application to request a deadline may be addressed to the Administrative High Court.

## 1.2. Prioritised examination and 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>40</sup> The same maximum time limit applies to the “procedure for the initiation of a measure terminating residence” (see [Accelerated Procedure](#)).

The 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 was not observed in 2016. This is due to the fact that the list of safe countries of origin has been extended to countries such as **Algeria, Tunisia, Morocco, Georgia** and **Ghana** (see [Safe Country of Origin](#)). Applications from **Afghanistan** were given priority in 2018 following an instruction from the Ministry of Interior in 2017.

In relation to refugees from Syria that are resettled in Austria,<sup>41</sup> the Ministry of Interior announced that they will be granted asylum immediately upon arrival (asylum *ex officio*). In 2014 and 2015 most of the resettled refugees received positive decisions within a few days. However, in 2016 and 2017 the procedures took much longer, and they often had to wait for several months for the interview on their case. Generally, Syrians have faced longer procedures in 2017 and 2018 compared to previous years.<sup>42</sup>

## 1.3. 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>43</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 making the application for the purposes of the [Dublin](#) and [Admissibility Procedure](#).<sup>44</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>45</sup>

A personal interview is always conducted with applicants provided they have legal capacity.

<sup>40</sup> Article 22(6) AsylG.

<sup>41</sup> A total 349 refugees were resettled in 2017, compared to 174 in 2016: Ministry of Interior, *Asylum Statistics December 2017*, available in German at: <http://bit.ly/2CePv2Q>, 26.

<sup>42</sup> FRA, *Monthly data collection on the migration situation in the EU*, January 2017, available at: <http://bit.ly/2jUsOcl>, 20, citing information from the Red Cross.

<sup>43</sup> However, the official conducting the interview is no longer responsible for the decision.

<sup>44</sup> Article 19 AsylG.

<sup>45</sup> VfGH, Decision U 98/12, 27 June 2012.

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.

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>46</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>47</sup>

## Interpretation

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 still 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. UNHCR has published a training manual for interpreters in asylum procedures.<sup>48</sup>

## Recording and transcript

Article 19(3) AsylG allows for tape recording of the interview, which is, however, rarely used in practice. Video conferencing was introduced in 2018. The BFA in Burgenland held interviews to assist the BFA in Vienna and in Vorarlberg.<sup>49</sup> This new practice is based on Art. 51a General Administrative Act, which allows the use of technical facilities for word and image transmission - unless a personal interview is necessary for economical or personal reasons. There are concerns about the practice of conducting video conferences as personal credibility plays a major role in the asylum procedure.

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.

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<sup>46</sup> Article 20 AsylG.

<sup>47</sup> VfGH, Decision 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>48</sup> UNHCR, 'Training manual for translators in asylum procedures', 2015, available in German at: <https://bit.ly/2XYPzQC>.

<sup>49</sup> Information provided by the RD Burgenland.



## 1.4. 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
<input checked="" type="checkbox"/> Judicial	<input type="checkbox"/> Administrative
<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No

  - ❖ If yes, is it
  - ❖ If yes, is it suspensive
2. Average processing time for the appeal body to make a decision: n/a

### 1.4.1. Appeal before the BVwG

Appeals against a negative first instance decision have to be submitted within 4 weeks of the receipt of the decision and the whole file is forwarded by the BFA to the Federal Administrative Court (BVwG).<sup>50</sup> However, following the latest law amendment that came into effect on 1 September 2018, the time limit has been set at 2 weeks for appeals in inadmissibility procedures and in cases of status withdrawals that were initiated along with a return decision.<sup>51</sup>

Previously, the time limit was 2 weeks for regular negative decisions. However, the Constitutional Court ruled on 23 February 2016 that the deviation of Article 16(1) BFA-VG from the general 4-week time limit for submitting an appeal to the Federal Administrative Court<sup>52</sup> is unjustified, as it is not necessary in the case of a rejection decision which is not connected with an expulsion order and the applicant is still entitled to remain on the territory.<sup>53</sup> The BFA-VG was amended to reflect the ruling. On 26 September 2017, the Constitutional Court ruled that even for rejection decisions accompanied by a residence-ending measure affecting the legal position of the applicant, the constitutional guarantees before the BVwG are of considerable importance. Against that backdrop, the shortening of the 4-week appeal period is not indispensable to promoting efficiency. Following the ruling, the time limit for appeals for all cases was 4 weeks.<sup>54</sup>

The BFA may make a pre-decision on the appeal within 2 months.<sup>55</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 by the BFA, the asylum applicant will be assigned a free legal adviser provided by the state at the time of notification of the first instance decision (see [Legal Assistance](#)).

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;

<sup>50</sup> Article 16(1) BFA-VG.

<sup>51</sup> Article 16 (1) BFA-VG.

<sup>52</sup> Article 7(4) BVwG-VG.

<sup>53</sup> VfGH, Decisions G 589/2015-6, G 653/2015-4, G 9/2016-4, 23 February 2016, available in German at: <http://bit.ly/2jwOISx>.

<sup>54</sup> VfGH, Decision G 134/2017, 26 September 2017, available in German at: <http://bit.ly/2EmVJ6Y>.

<sup>55</sup> Article 14(1) Administrative Court Procedures Act (VwG-VG).

- (5) The allegations made by the asylum seeker concerning the danger they face clearly do not correspond with reality;
- (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; or
- (7) The asylum seeker refuses to give fingerprints.

Moreover, the BFA *must* withdraw the suspensive effect of an appeal where:<sup>56</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>57</sup> The reasons must be set out in the main complaint.

Appeals against the rejection of an application with suspensive effect have to be ruled by the Court within 8 weeks.<sup>58</sup> The asylum appeal has suspensive effect as long as the case is pending in court.

The BVwG is organised in chambers, each of which is responsible for certain groups of countries. Most of the judges of the BVwG previously worked at the Asylum Court, before it was replaced. The Court processed 18,760 appeals in 2016 and about 20,000 in 2017. The number of appeals pending at the end of 2017 was 24,516 – which is almost the double compared to the previous year where there were 12,497 pending appeals.<sup>59</sup> This increased in 2018 as there were 30,518 pending cases as of 31 December 2018.<sup>60</sup> Because of this increase, judges from different fields of law were assigned to decide on asylum procedures in 2017. Out of 11,550 asylum decisions from the BFA that were challenged, the Federal Administrative Court (BVwG), as a second instance, repealed or amended 4,900 in 2017. In 42.4 % of the cases, judges granted the persons concerned asylum, subsidiary protection or the right to stay in Austria or prevented their deportation.<sup>61</sup> This temporary practice, which allows judges from other jurisdictions to decide on asylum cases, will stop in 2019.

The BVwG 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>62</sup>

The BVwG can call for another hearing and additional examinations if necessary. 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 submission or if it is established that the submission of the applicant does not correspond with the facts.<sup>63</sup> This provision must be read in light of the restrictions on the submission of new facts in the appeal procedure.

<sup>56</sup> Article 18(2) BFA-VG.

<sup>57</sup> Articles 17(1) and 18(5) BFA-VG.

<sup>58</sup> Article 17(2) BFA-VG.

<sup>59</sup> Ministry of Interior, *Asylum Statistics December 2017*, available in German at: <http://bit.ly/2CePv2Q>, 50.

<sup>60</sup> Ministry of Interior, *Asylum Statistics November 2018*, available in German at: <https://bit.ly/2N1H5mK>.

<sup>61</sup> Answer to parliamentary request No 3186/AB-BR/2018 06 April 2018, available in German at: <https://bit.ly/2TIMMsh>.

<sup>62</sup> BVwG, Decision W208 2007345-1, 22 May 2014, available at: <http://bit.ly/1FOK1th>.

<sup>63</sup> Article 21(7) BFA-VG.

The question whether a personal hearing before 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>64</sup> is in line with Article 47(2) of the EU Charter if the applicant was heard in the administrative procedure.<sup>65</sup> However, subsequent 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>66</sup> Two rulings to the same effect were delivered by the Constitutional Court in September 2014.<sup>67</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>68</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>69</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 BVwG are published on the legal information website of the Federal Chancellery.<sup>70</sup>

Statistics on the number of appeals received and outcomes of decisions in 2018 were published by the BVwG. The BVwG cancelled or amended at least 42% of BFA decisions in 2017. In 6,000 proceedings, the administrative decision was overturned or amended. The reasons for lifting or modifying a decision are diverse. It can be the assessment of facts, in the evidence, in a different legal reasoning or in formal reasons. Especially as decisions may sometimes include several decision points final findings or decisions of the Federal Administrative Court both include confirming and annulling decisions.<sup>71</sup>

#### 1.4.2. Onward appeal before the VwGH

As of 2014, the decision of the BVwG may be appealed before the VwGH. The eligibility to appeal to the VwGH 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.

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<sup>64</sup> Article 41(7) AsylG corresponds with Article 21(7) BFA-VG.

<sup>65</sup> VfGH, Decisions U 466/11-18 and U 1836/11-13, 14 March 2012, available at: <http://bit.ly/1eLj54J>.

<sup>66</sup> VfGH, Decision U 152/13-12, 21 February 2014, available at: <http://bit.ly/1FXmqb6>.

<sup>67</sup> VfGH, Decision 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>68</sup> VwGH, Ra 2014/20/0017, 28 May 2014.

<sup>69</sup> VwGH Ro 2014/21/0047, 22 May 2014.

<sup>70</sup> Decisions of the Federal Administrative Court are available at: <http://www.ris.bka.gv.at/Bvwg/>. However, according to the General Administrative Procedures Act, 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.

<sup>71</sup> Answer to parliamentary request No 3186/AB-BR/2018, 6 April 2018, available in German at: <https://bit.ly/2TIMMsh>.

The new government has announced further restrictions in the asylum procedure, including the abolition of the onward appeal (“extraordinary revision”) before the Administrative High Court. This has been criticised by the Federal Administrative Court and Constitutional Court as an undue departure from uniform rule of law standards in a particularly sensitive human rights area.<sup>72</sup> So far, no proposals have been presented.

In case the asylum applicant seeks to challenge the decision of the BVwG and if he or she claims it is violating a right that is guaranteed by the constitution, he or she 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 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 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 BVwG.

## 1.5. 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

### 1.5.1. 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. 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.

This legal advice is funded by the Asylum, Migration and Integration Fund (AMIF) and co-funded by the Ministry of Interior. One association, [Verein Menschenrechte Österreich](#), covers legal advice in 6 out of 18 BFA branch offices and also offers counselling at its offices in the federal states. In Styria, Caritas has a contract to provide legal advice as well. Updated Information on the number of consultation hours funded are not available and the latest have been made public for the period 1 July 2015 to 31 December 2016. Verein Menschenrechte Österreich received funding for 20,744 consultation hours, while Caritas offered 9,184 consultation hours during the same period.<sup>73</sup> The total consultation hours at

<sup>72</sup> VwGH, ‘Verwaltungsgerichtshof spricht sich gegen den geplanten Ausschluss der außerordentlichen Revisionen in Asylverfahren aus’, 19 December 2017, available in German at: <http://bit.ly/2oLnL22>.

<sup>73</sup> Ministry of Interior, Reply to parliamentary question 14100/J, 8 November 2017, available in German at: <http://bit.ly/2EiMLDx>.

the branch offices of BFA was 3,354 in 2016, according to information of the Ministry of Interior, which shows that a great number of consultation hours are provided in the office of the association, although consultation at the branch office is foreseen in the funding guidelines. Travel expenses for the asylum-seekers are not covered.

This offer of free legal advice does not meet the needs of asylum seekers, however. Verein Menschenrechte Österreich, which currently receives most of the funding for legal assistance in the first instance procedure,<sup>74</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.<sup>75</sup> For instance, the call for AMIF proposals mentions that legal advice provision should be organised in cooperation with the authorities. Furthermore, these legal advisers have to provide information to asylum seekers on voluntary return assistance and send asylum seekers to voluntary return projects (which are organised by the same organisation) during the asylum procedure.

This funding framework and the activities of the contracted organisation affect the trust of asylum seekers in the free legal advice offered. Asylum applicants may also prefer to contact an NGO offering free legal advice, but this resource is limited and may not be accessible for asylum seekers living in remote areas. The founder and Director Verein Menschenrechte Österreich has met criticism with the argument that challenging negative decisions has no prospect of success. In addition, the organisation takes a different approach from others, holding that not everyone seeking asylum is entitled to it. However, the task of a legal advisor and/or representative is to represent a client rather than judge in appeal proceedings.<sup>76</sup>

The tasks are prescribed in the call for AMIF 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 AMIF funding, as was the case under the European Refugee Fund (ERF), has been criticised by NGOs.<sup>77</sup>

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 before the BFA 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.

### 1.5.2. Legal assistance in appeals

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>78</sup> Two organisations, ARGE Rechtsberatung (Diakonie and

<sup>74</sup> Ministry of Interior, *AMIF List of selected projects 2015/2016 (Asylum & Return)*, available in German at: <http://bit.ly/1OqSfsR>; Reply to parliamentary request 14100/J (XXV.GP), 8 November 2017, available in German at: <http://bit.ly/2EiMLDx>.

<sup>75</sup> Asylkoordination Österreich, 'Kritik am VMÖ reißt nicht ab. Was steckt eigentlich dahinter und warum ändert sich nichts?', 22 May 2017, available in German at: <http://bit.ly/2Ej7kzl>.

<sup>76</sup> Die Presse, 'Asylverein im Visier der Behörden', 13 May 2017, available in German at: <http://bit.ly/2slkQkO>.

<sup>77</sup> See S Pferschingner, *Unabhängige Beratung von AsylwerberInnen in Österreich?*, Diplomarbeit, Wien, August 2011, available at: <http://bit.ly/1IHAbnY>, 98.

<sup>78</sup> BGBl I Nr. 38/2011.

Volkshilfe) and Verein Menschenrechte Österreich, are contracted by the Ministry of Justice to give legal advice with regard to the appeal procedure. The government announced to provide legal assistance through a federal agency as of 2020. So far, this initiative has not been put into practice and the implementation seems to be delayed. The Minister of Justice has rejected the allegations of the Minister of Interior according to which his department was the cause of the delay and he further stated that he had not received any information regarding the termination of the contract with the two organisations providing legal services.<sup>79</sup> Theoretically, their contract should have ended already in 2018, if the legal support would be carried out by a new federal organisation as of 2020 – but it is unclear yet whether the latter will be established or not. Several celebrities have supported a campaign of Diakonie promoting independent legal advice.<sup>80</sup>

The task described by law entails the obligation to provide advice in case of dismissal of the application. Legal advisers shall be present at hearings before the Administrative Court if the asylum seeker wishes so.<sup>81</sup> Based on procedural guarantees in accordance with the rule of law and respective EU law, asylum seekers should be able to make effective use of their right to legal advice, according to a ruling of the Higher Administrative Court.<sup>82</sup>

Although the role of the legal adviser in such a hearing was unclear following the 2015 amendment, the Constitutional Court clarified on 9 March 2016 that legal advisers who are summoned to the hearing at the Court have to represent the asylum seekers before the Court, if applicants wish so.<sup>83</sup> Since 1 October 2016, the wording of article 52 BFA-VG is as follows: “at their request, they shall also represent the strangers or asylum seekers concerned in the proceedings, including at a hearing.” Asylum seekers may be represented by NGOs, or pay themselves for a private lawyer.

Financial compensation for legal advice ordered by decree seems to be insufficient. The refunding rate per case is 221.55€ (excluding VAT) including all other costs (overhead, travel expenses, interpretation). 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 long criticised compensation as being too low for providing good standards of legal assistance.<sup>84</sup>

An additional compensation of 221.50€ is paid for legal representation in hearings before the BVwG.

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

Legal advisers have 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. Asylum seekers have no choice as to which organisation will be responsible for providing legal assistance to them. Joachim Stern reports the findings of a short evaluation of decisions of the BVwG in the case law database between 1 April 2014 and 1 April 2016. The evaluation found 139 procedures

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<sup>79</sup> APA ots, Klarstellung des Bundesministers Josef Moser zur Causa "Kündigung der Verträge mit Hilfsorganisationen", 7 January 2019, available in German at: <https://bit.ly/2SrUOc8>.

<sup>80</sup> Diakonie Flüchtlingsdienst, 'Zu Recht unabhängig', available in German at: <https://bit.ly/2Ae0T1r>.

<sup>81</sup> Article 52(2) BFA-VG.

<sup>82</sup> VwGH, Decision Ro 2016/18/0001, 3 May 2016.

<sup>83</sup> VfGH, Decision G 447-449/2015-13, 9 March 2016, available in German at: <http://bit.ly/2jR9OMi>.

<sup>84</sup> See e.g. Agenda Asyl, 'Stellungnahme zur Änderung des... Asylgesetzes 2005 (Comment on the changes to Asylum Law 2005)', 28 January 2011, available in German 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 in German at: <http://bit.ly/1Jp7y6h>.

before the Court with legal representation of the asylum seekers by ARGE Rechtsberatung and 4 cases with legal representation by Verein Menschenrechte Österreich.<sup>85</sup> This evaluation shows that asylum seekers who are entitled to receive legal advice by Verein Menschenrechte Österreich are in most cases not represented by this organisation.

In 2017, however, NGOs observed improvements in the system of legal advice. The Federal Chancellery evaluated several appeals prepared by Verein Menschenrechte Österreich,<sup>86</sup> among which the case of an 18-year-old Afghan assisted by the organisation who had submitted only three lines in poor German against his deportation to Afghanistan was raised by the media.<sup>87</sup> It seems that the allegation of insufficient quality in the appeal led to an improvement in the legal assistance provided by Verein Menschenrechte Österreich. There is still a lack of trust of asylum-seekers and volunteers vis-a-vis this organisation. Some look therefore for assistance from other NGOs or an attorney-at-law in the appeal procedure, although the quality of legal advice provided by Verein Menschenrechte Österreich has reportedly improved in the appeal procedure. However, the association is likely to reduce its legal advice activities, in particular when it comes to appealing a dismissal of refugee status when the person received subsidiary protection status and appeals against detention orders.

One project run by Caritas Austria 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. AMIF funding for the period 2017-2019 was not granted any longer but the project continues on a smaller scale with alternative funding.

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 Federal Administrative Court and may act as legal representative.

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” is not foreseen with regard to legal assistance at the appeal stage. 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 tend to refuse free legal aid, if the case has little chance of succeeding.

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<sup>85</sup> J Stern, ‘Verfahrenshilfe und Rechtsberatung – Neue Entwicklungen und alte Fragen’ in C Filzweiser and I Taucher (eds), *Asyl- und Fremdenrecht Jahrbuch 2016* (NWV 2016), 151-168.

<sup>86</sup> Federal Chancellery, Reply to parliamentary question 12783/J, 21 June 2017, available in German at: <http://bit.ly/2o0o6R>.

<sup>87</sup> Salzburger Nachrichten, ‘Bundeskanzleramt prüft Vorwürfe gegen Asylverein’, 20 April 2017, available in German at: <http://bit.ly/2EnU94z>.

## 2. Dublin

### 2.1. General

#### Dublin statistics: 2018

Outgoing procedure			Incoming procedure		
	Requests	Transfers		Requests	Transfers
<b>Total</b>	5,191	2,285	<b>Total</b>	6,289	996
Italy	1,951	1,103	-	-	-
Germany	1,305	642	-	-	-
France	-	81	-	-	-

Source: Information provided by the Ministry of Interior

Partial statistics on the application of the Dublin Regulation during the entire year 2018 were made available by the Ministry of Interior. In 2018, Austria issued 5,191 outgoing requests and implemented 2,285 transfers. The main countries receiving outgoing transfers from Austria were Italy, Germany and France. In 2018, the number of Dublin procedures has dropped significantly, as only 2,597 final rejections have been issued on the basis of Article 5 AsylG.

#### 2.1.1. Application of the Dublin criteria

If the special regulation due to threats to public security and order comes into effect (see [Access to the Territory](#)), third-country nationals will be returned to neighbouring countries. Since it will not be possible to lodge an asylum application, this will completely contravene the Dublin system.<sup>88</sup> Christian Filzwieser, judge at the Administrative Court, has doubted whether Austria's neighbouring countries will agree to take persons back under such conditions, whereas under the Dublin III Regulation they are obliged to take charge or take back.

Austria applies the Dublin procedure systematically and, where it proves impossible to transfer an asylum seeker to one country, examines the criteria of the Regulation to determine whether the person can be sent to another country.<sup>89</sup>

#### Documentation and entry

The Dublin Regulation may be triggered if there is a so-called "Eurodac hit", i.e. if the asylum applicant has obtained a visa from another Member State, if the asylum applicant admits that he or she entered the EU via another Member State or if there is a suspicion or circumstantial evidence indicating the asylum applicant entered via another Member State. Although there are other grounds applicable for determining a Member State's responsibility under the Dublin III Regulation, these are the most common grounds applied in Austria.

After the CJEU ruling in *Jafari*,<sup>90</sup> which found that the state-organised transit through the Western Balkan route in 2015-2016 qualified as "illegal entry" under Article 13 of the Regulation, the VwGH

<sup>88</sup> Christian Filzwieser 'Asyl und Fremdenrecht 2015 und erste Jahreshälfte 2016 – eine Einführung' in Christian Filzwieser and Isabella Taucher (eds), *Asyl und Fremdenrecht Jahrbuch 2016*, (NWV 2016), 13.

<sup>89</sup> Ministry of Interior, Reply to parliamentary question 10654/J (XXV.GP), 2 January 2017.

<sup>90</sup> CJEU, Cases C-490/16 A.S. and C-646/16 *Jafari*, Judgment of 26 July 2017.



dismissed the appeal against a transfer to Croatia on those grounds. The Court did not indicate that Austria applied the discretionary clauses in these cases.<sup>91</sup>

In a case concerning a person who transited through Bulgaria and following a short stay travelled to Serbia and then entered Hungary, without applying for asylum in any of these countries, the Administrative High Court ruled that the provisions of Article 13(1) in conjunction with Article 19(2) of the Dublin III Regulation and in the light of the *A.S.* ruling of the CJEU, can only be understood as meaning that the criterion of illegal entry, as defined in Article 13(1) of the Dublin III Regulation, is applicable if the asylum seeker did not apply for international protection in that Member State, but if that application was made in another Member State after a short-term voluntary exit to a third country. Bulgaria was therefore deemed responsible for the asylum application.<sup>92</sup>

## Family unity

The BFA has put forward surprising arguments in the context of family reunification under the Dublin Regulation. In a case of an unaccompanied minor to whom a protection was granted in Austria, the Greek Asylum Service submitted a “take charge” request for the parents to be transferred from Greece to Austria. The BFA refused responsibility on the ground that the parents had deliberately accepted the separation from their minor child. The rejection of such requests is not considered a formal decision which may be legally challenged before the BVwG. Requests from Greece are also handled very slowly and take often more than a year, which is why Austria ends up being responsible for the asylum application. According to statistics from the Greek Asylum Service, Austria received 223 requests but only accepted 123 transfers throughout 2018.<sup>93</sup> In 2017, there were 465 requests and 216 transfers were carried out.

In 2017, the VwGH examined the question of whether an unaccompanied child could stay in Austria, whilst Italy had been determined as responsible for his family members. Whereas the BVwG had referred to the sovereignty clause of Article 17 of the Dublin Regulation in order to prevent a violation of the right to private and family life, the VwGH stated that Article 11 of the Dublin Regulation prevailed in order to ensure the unity of the family and the best interests of the child.<sup>94</sup>

In 2018, the BvWG had to rule on a case of family reunification concerning parents that had applied for asylum in Austria, while their minor child and the grandmother had applied for asylum in Greece. In accordance with the Dublin III Regulation, Greece requested Austria to be responsible for the applications. However, the BFA had doubts on whether family reunification would be in the best interests of the child and refused to take responsibility. The BvWG confirmed the rejection of the BFA. In the case of refusal of family reunification, the only available option for the requesting Member State is to request a re-examination. As regards the asylum applicant, he or she cannot act directly against the negative decision nor bring it to appeal, as this is a purely intergovernmental procedure. Therefore, in this case, it was the responsibility of Greece as the requesting Member State to challenge Austria's refusal to grant family reunification. The BvWG allowed for a regular revision, as there is currently no specific case-law on the issue.<sup>95</sup>

As a consequence of two cases that Asylkoordination had put forward to the Ombudsman, the Minister of Interior and the Ombudsman agreed that the BFA should involve the Child and Youth Welfare

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<sup>91</sup> VwGH, Decision Ra 2016/19/0303, 20 September 2017.

<sup>92</sup> VwGH, Decision Ra 2017/19 / 0169-9, 5 April 2018, available in German at: <https://bit.ly/2usylbl>.

<sup>93</sup> Greek Asylum Service, *Dublin statistics*, December 2018.

<sup>94</sup> VwGH, Decision Ra 2016/20/0384, 22 June 2017.

<sup>95</sup> BvWG, W175 2206076-1, 1 October 2018.

Agency when it examines family reunification requests under the Dublin III Regulation to UMF living in Austria.<sup>96</sup>

To demonstrate family ties, every asylum applicant must have mentioned the existence of other family members during 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. Austria requires the original documents, where available, to be sent for verification and does not leave such verification to the other Member States.

DNA tests may be required to provide proof of family ties but this is rare in practice. DNA tests have to be paid by the asylum seeker. If a DNA test has been suggested<sup>97</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 issue of DNA tests was discussed in the context of a legislative reform affecting [Family Reunification](#) but was ultimately not included in the reform.<sup>98</sup>

### Unaccompanied children

Following the judgment of the CJEU in *M.A.* which concerned Article 8(4) of the Dublin III Regulation,<sup>99</sup> for asylum applications lodged by unaccompanied children, the BFA/EAST has ordered age assessments even in cases where there are no reasons for doubts in regard to the age of the asylum seeker.

In one case concerning a transfer to Hungary, the BFA considered that the deadline for replying to a request should be suspended until an age assessment is conducted. The VwGH disagreed, however, and ruled that the deadline had expired.<sup>100</sup> In 2018, another case related to the deadline for replying to a transfer request. In accordance with Article 21 (1) of the Dublin III Regulation, a request for transfer had been send to Croatia. Although the request was incomplete as it was missing the results of the medical age assessment of the child, the BFA considered that the available information was sufficient to conclude that the asylum seeker was an adult. However, the six-month transfer period was not triggered until the age report was received and Austria was therefore deemed responsible for the application.<sup>101</sup>

The VwGH further had to rule on a Dublin transfer to Bulgaria. The case concerned two brothers, one of whom was still a minor. Given that Bulgaria was already responsible for the asylum application of the older brother, the BFA concluded that Bulgaria should also be responsible for the asylum application of the minor, in compliance with the principle of family unity as defined in Article 20(3) of the Dublin III Regulation. The BFA had further assumed the minority of the younger brother without conducting any age assessment. The BVwG overturned the decision and stated that Art. 8(4) applied to the accompanied minor and that, subsequently, the adult was allowed to stay on the Austrian territory in accordance with Art. 17(1) of the Dublin III Regulation. However, the VwGH followed the BFA and the adult's asylum application was rejected in first instance, on the grounds that Bulgaria remained responsible for that application.<sup>102</sup>

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<sup>96</sup> Letter from the Ombudsman to Asylkoordination Österreich, Fr. Dr. Glawischnit, 12 June 2018.

<sup>97</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.

<sup>98</sup> Fremdenrechtsänderungsgesetz 2017 – FrÄG 2017, 18 October 2017, available at: <http://bit.ly/2Cel0Ku>.

<sup>99</sup> CJEU, Case C-648/11, *M.A. v. Secretary of State for the Home Department*, Judgment of 6 June 2013.

<sup>100</sup> VwGH, Decision Ra 2017/19/0081, 22 November 2017.

<sup>101</sup> VwGH, Decision Ra 2016/18/0366, 06 November 2018, available in German at: <https://bit.ly/2SUc21D>.

<sup>102</sup> VwGH, Decision Ra 2017/18/0433, 2.May 2018.

### 2.1.2. 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 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>103</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>104</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>105</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>106</sup>

In another case, the BVwG referred to the wording of Art.16(1) of the Dublin III regulation on dependent persons to conclude that this provision also applied to cases in which the asylum applicant provides support to a family member (in the present case, an older brother providing support to his minor sister with special needs). In addition, the Court noted that no investigation on the special needs of the minor was undertaken by the BFA and considered that the responsibility of Italy would breach the ECHR given the particular circumstances of the case.<sup>107</sup>

#### Humanitarian clause

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

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<sup>103</sup> BVwG, Decision W149 2009627-1, 21 July 2014.

<sup>104</sup> BVwG, Decision W 149 2009673-1, 20 June 2014.

<sup>105</sup> BVwG, Decision W149 2001851-1, 3 July 2014.

<sup>106</sup> BVwG, Decision W185 2005878-1, 2 July 2014.

<sup>107</sup> BVwG Decision W233 2177425-2, 23 January 2018, available in German at: <https://bit.ly/2SKvZrn>.

## Sovereignty clause

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>108</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 BFA. 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>109</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>110</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>111</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>112</sup>

In a ruling of January 2017 concerning the transfer of a family including two children to Croatia, the BVwG found that it was irrelevant that the adult brother was not legally responsible for the custody of his minor siblings. As separation of the adult brother from his minor siblings would constitute an unacceptable interference with the right to family life and the children's well-being, the application of the sovereignty clause was ordered.<sup>113</sup>

In December 2017, the BFA successfully appealed a decision of the BVwG concerning an unaccompanied child who had been allowed to remain in Austria under the sovereignty clause, while his

<sup>108</sup> VfGH, Decision 237/03, 15 October 2004, VfSlg. 16.122/2001.

<sup>109</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*, Judgment of 21 December 2011, para 98.

<sup>110</sup> BVwG, Decision W125.1257809-8, 20 January 2014, available at: <http://bit.ly/1Jp8HLh>.

<sup>111</sup> BVwG, Decision W205 1438717-1, 29 April 2014, available at: <http://bit.ly/1EUlw8X>.

<sup>112</sup> VfGH, Decision Ra 2015/18/0113 to 0120, 8 September 2015.

<sup>113</sup> BVwG, Decision W165 2140213-1, 26 January 2017, available at: <http://bit.ly/2meMkAF>.

younger brother was in Bulgaria. The VwGH ruled that the use of the sovereignty clause to prevent a violation of Article 8 ECHR presupposes a correct determination of Austria's responsibility. The Court found that, if the close relationship between the two brothers would result in Austria not being responsible for the application of the elder brother, then the reference to the sovereignty clause by the BVwG to prevent an Article 8 ECHR violation lacked legal basis.<sup>114</sup>

In another case, the BFA appealed to the VwGH against a decision to transfer a Chechen family to Poland, where the father had already applied and passed the admissibility procedure in Austria. The VwGH found that the applications of the spouse and children should be admitted and the sovereignty clause used in order to preserve family unity.<sup>115</sup>

In several cases, the BVwG has argued that the sovereignty clause may only be applied where a third-country national has lodged an asylum application.

In 2018, Austria made use of the sovereignty clause and accepted to be responsible for the asylum application of a Georgian national, for whom the Czech Republic was initially responsible as she had obtained a visa there. Given that she was the legal guardian of her husband who has special needs and who has obtained the subsidiary protection in Austria, the Court concluded that the asylum seeker should not be separated from her husband and referred to Article 16 of the Dublin regulation on dependent persons as well as to Article 8 ECHR on the right to a private and family life.<sup>116</sup>

Another case in which Austria made use of the sovereignty clause concerned a Russian asylum seeker and her two children, who were traveling from Moscow to Vienna. Given that she suffered from different serious illnesses (sclerosis and PTSD), that one of her underage children was mentally ill and that she had relatives in Austria, the BvWG considered that she should stay in Austria and benefit from their support, instead of going to Italy where no one could provide her adequate assistance.<sup>117</sup> In its reasoning, the Court paid particular attention to the child's best interest (e.g. having adequate support in Austria and the presence of family members).

Moreover, the Constitutional Court held in 2018 that single parents with minor children are considered by Article 21 of the recast Reception Conditions Directive as vulnerable persons.<sup>118</sup> The case concerned an Afghan national and the refusal of the Federal Administrative Court to make use of the sovereignty clause. The latter had refused to recognise the existence of a marriage between the Afghan asylum seeker and her Afghan husband who had obtained the subsidiary protection in Austria, as they were married only under the shariah law in Pakistan. Although their child was born in Austria, the BvWG did not address the vulnerability of the single mother nor the one of the new-born child, despite the situation in Bulgaria as assessed in the AIDA report on Bulgaria (to which the BvWG had made reference).

## 2.2. Procedure

### Indicators: Dublin: Procedure

1. On average, how long does a transfer take after the responsible Member State has accepted responsibility? n/a

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, together with Article 2(1)(8) BFA-VG, states that the authorities issue an inadmissibility decision when Austria is not responsible for conducting the

<sup>114</sup> VwGH, Decision Ra 2017/01/0068, 5 December 2017.

<sup>115</sup> VwGH, Decision Ra 2015/18/0192 to 0195, 15 December 2017.

<sup>116</sup> VwGH, Decision W239 2152802-1, 30 July 2018; available in German at: <https://bit.ly/2WYwccqj>.

<sup>117</sup> BVwG, Decision W185 2188585-1, 13 November 2018.

<sup>118</sup> VfGH, Decision E2418/2017, 11 June 2018.

asylum procedure based on the Dublin III Regulation.<sup>119</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>120</sup>

There are 3 departure centres which are responsible for the admissibility procedure: one is located in **Traiskirchen** near Vienna, one is in **Thalham** in Upper Austria and one is at the **Airport Vienna Schwechat**. These centres are specialised in conducting outgoing Dublin procedures. In addition, the legal counsel on the admission procedure provided by (Arge Rechtsberatung and Verein Menschenrechte Österreich) has offices in Traiskirchen and Thalham.

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 Member State) and, in response to a request of the Aliens 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 (*Erstbefragung*) 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 his or her home country. The asylum applicant is fingerprinted and photographed. Fingerprints are taken from all asylum seekers older than 14 years of age. No problems have been reported with regard to the taking of fingerprints. In case an applicant refuses to be fingerprinted, the appeal against a negative decision may not benefit from suspensive effect,<sup>121</sup> but this is not relevant to the Dublin procedure.

Since September 2018, the Aliens Police Department and the BFA are authorised to evaluate the data storage of persons applying for international protection. However, this interference with the right to privacy is only permitted if the identity or travel route cannot be established on the basis of available evidence.

The asylum seeker receives a green “procedure card” after the public security officer has consulted the BFA about the further steps to be taken 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. Cards for asylum seekers – as well as those granted to beneficiaries of protection - should be designed in such a way that they are counterfeit-proof and have a contactless readable data option.

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.

The VwGH has determined that the deadline for an outgoing request starts running from the registration of the application, i.e. the moment the BFA receives the report of the *Erstbefragung*, in line with the CJEU ruling in *Mengesteab*.<sup>122</sup> The case before the VwGH concerned delays in the *Erstbefragung*, as

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<sup>119</sup> Article 2(1)(8) BFA-VG.

<sup>120</sup> Article 5(2) AsylG.

<sup>121</sup> Article 18 BFA-VG.

<sup>122</sup> VwGH, Decision Ra 2016/01/0274, 17 October 2017, citing CJEU, Case C-670/16 *Mengesteab*, Judgment of 26 July 2017.

the asylum seeker had applied for asylum in November 2015 but the preliminary interview only took place in January 2016 and the request was issued in March 2016.

The VwGH submitted a reference for a preliminary ruling to the CJEU on 24 November 2017, to assess whether it is possible to accept a “take charge” after the expiry of the deadline where the request has previously been rejected, if it is subsequently determined that the requested Member State is responsible.<sup>123</sup>

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 departure centres.

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 – through 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.<sup>124</sup> The same applies to so called fast-track in-merits procedures. After the requested Member State accepts responsibility, the asylum seeker is given the possibility to be heard. Before that interview, he or she has an appointment with a legal adviser who must be present at the interview. Legal advisers can also access documents in the case file.

### **Individualised guarantees**

Individualised guarantees are not requested systematically. Their content depends on the individual circumstances of each case according to the BFA. However, latest developments in 2017 indicate that individual guarantees are not requested for vulnerable persons, even where these are requested by legal advisers during the Dublin interview or the appeal before the BVwG. The authorities seem to deem it sufficient to request information from ACCORD or the State Documentation database, in specific cases e.g. access to medical treatment for cancer patients in Italy, and to base their decision thereon.

The sharing of information amongst Member State on the vulnerability and individual guarantees of asylum seekers is still not ensured. In the case of an Iraqi woman in a wheelchair, the BFA obtained a medical report confirming the availability of the necessary medical treatment in Italy. However, Italy had not been informed of the vulnerability in the first round of proceedings, which is why the BVwG granted the appeal and referred the case back to the BFA. The BVwG also rejected the rejection of the BFA in the second stage and stated that Austria was responsible for providing care to avoid a violation of Article 8 of the ECHR under the discretionary clause of Article 17 (1) of the Dublin III Regulation.<sup>125</sup>

### **Transfers**

Transfers are normally carried out without the asylum applicant concerned being informed of the time and the location he or she are transferred to before the departure from Austria, giving him or her no possibility to return to the responsible Member State voluntarily. There continue to be reports of the BFA informing receiving countries of a Dublin transfer on very short notice, in some cases no more than a week, even for asylum seekers requiring special care.<sup>126</sup> 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

<sup>123</sup> CJEU, Case C-657/17 *Hussein*, Reference of 24 November 2017, available in German at: <http://bit.ly/2o3rBIM>.

<sup>124</sup> Article 28 Asylum law has been amended. Since September 2018 the time limit for in-merits procedures may be lifted to enable more decisions during the admissibility procedure.

<sup>125</sup> BVwG, Decision W241 2157798-2, 31 January 2018.

<sup>126</sup> ECRE, *Balkan Route Reversed: The return of asylum seekers to Croatia under the Dublin system*, December 2016, 33.

information on the place and date 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 apprehends the asylum applicant and transfers him or her to a detention centre (see [Detention of Asylum Seekers](#)).<sup>127</sup> 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. As a less coercive measure, asylum seekers may be ordered to stay at a certain place (such as a flat or a reception centre).<sup>128</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.

Regarding detention, the Administrative High Court has stated that the time limit for transfer, which is of 6 weeks, does not start running before the suspensive effect ceases. Furthermore, the period begins running only after the one-week period of the BVwG to award the suspensive effect of the complaint has expired.<sup>129</sup>

No figures on the average duration of the procedure are available. However, the minimum period for a decision to be issued, an appeal to be filed and suspensive effect to be decided upon would be six weeks.

The BFA reported that 2,285 Dublin transfers were carried out in 2018, compared to 3,760 transfers in 2017.<sup>130</sup> This means that, during the same period, the number of asylum seekers has decreased by 45,8% from 2017 to 2018.<sup>131</sup>

### 2.3. 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 (EAST), which are now called departure centres.<sup>132</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>133</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.

<sup>127</sup> In some cases, asylum seekers have reportedly been apprehended by the police during the night: *Ibid.*

<sup>128</sup> Article 77(5) FPG.

<sup>129</sup> VwGH, Decision Ro 2017/21/0010, 26 April 2018.

<sup>130</sup> BFA: “2018-Das Jahr der Neuausrichtung 2.0”, 6 January 2019, available in German at: <https://bit.ly/2RXC3s6>.

<sup>131</sup> Kleine Zeitung: ‚Zahl der Asylwerber 2018 weiter stark gesunken‘, 8 January 2019, available in German at: <https://bit.ly/2Sxi9JB>.

<sup>132</sup> Article 24(3) AsylG.

<sup>133</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



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 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. The provision of § 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 is not applied very strictly in practice.

In Dublin procedures, the rules and practice are the same as in the [Regular Procedure: Personal Interview](#).

The record of the Dublin consultation between Austria and the requested state(s) are made available to the asylum seeker and the legal adviser only after the procedural order of the intention to reject is given and Austria has received the answer from the requested Member State. Sometimes, the requested State has not 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 relied on the care of his son.<sup>134</sup> The Court noted that the dependency clause should have been applied in this case. In another case which involved Bulgaria, Austria did not inform that the asylum-seeker had been in Serbia for more than 3 months, although there was enough evidence.<sup>135</sup>

## 2.4. Appeal

### Indicators: Dublin: Appeal

Same as regular procedure

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

- |                            |  |   |
|----------------------------|--|---|
| ❖ If yes, is it            | <input checked="" type="checkbox"/> Yes      | <input type="checkbox"/> No             |
| ❖ If yes, is it suspensive | <input checked="" type="checkbox"/> Judicial | <input type="checkbox"/> Administrative |
|                            | <input type="checkbox"/> Yes                 | <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 2 weeks. 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 BVwG has decided if the appeal must be given suspensive effect. In Dublin cases, suspensive effect is hardly granted. Sometimes asylum applicants never receive a final decision because they are transferred back to the responsible Member State before the Court's decision.

The VwGH dealt with the expiry of the transfer period in the context of an appeal that had a suspensive effect. In that case, the decision that gave the complaint a suspensive effect was taken by written procedure and was notified only after the expiry of the six-month transfer period, as laid down in Article

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legal representative the opportunity to be heard before rendering the rejection of the application. However, cf. the negative decision of the Asylum Court in the case of an unaccompanied minor: S2 429505-1/2012, 04 October 2012.

<sup>134</sup> BVwG, Decision W149 209627-1, 21 July 2014.

<sup>135</sup> BVwG, Decision W239 2106763-3, 12 October 2018.

29 (1) of the Dublin III Regulation. The Court considered that granting a suspensive effect after the expiration of the transfer period is not possible and, as a result, the transfer period cannot be extended. Austria was therefore deemed responsible for the asylum application.<sup>136</sup>

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 Court decides on the basis of the written appeal and the asylum file without a personal hearing of the asylum seeker. In 2018, the Austrian legal information system (RIS) provided a list of 1,284 Dublin cases before the BVwG. 975 of these cases are unsuccessful appeals and confirmed the order to return of the persons concerned. In only 54 cases, the Court finds that the transfer period has already expired and that the procedure should therefore be admitted. In 6,8% of the cases the decision of the BFA was referred back by the court.<sup>137</sup>

Asylum seekers whose appeals were accepted by the Court have the right to re-enter Austria by showing the decision of the court at the border. 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.

## 2.5. 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/departure centre. If asylum seekers leave the district of the EAST/departure centre 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, they also are the ones providing legal advice for return cases and their task is only

<sup>136</sup> VwGH, Decision Ra 2018/14/0133, 24 October 2018.

<sup>137</sup> The cases are available in German at: <https://www.ris.bka.gv.at/Bvwg/>.

to provide objective information about the procedure to the asylum seekers; 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. NGOs report that in some cases the legal representative has refrained from lodging an appeal in disregard of the best interests of the child.

Although Article 29(4) AsylG provides 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 receive the file 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.

## 2.6. 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? Hungary

Under 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 he or she 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 risk has to be related to the individual situation of the asylum applicant.

Country reports from various sources such as AIDA, UNHCR, the US Department of State, Amnesty International, Eurostat, as well as information from ACCORD and Austrian liaison officers 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.

According to the jurisprudence, notorious severe human rights violations in regard of Article 3 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.

Current practice with regard to selected Dublin countries is illustrated below:

**Greece:** After the ruling of the ECtHR in *M.S.S. v Belgium and Greece*, Austria suspended transfers to Greece. The director of the BFA announced Dublin procedures with Greece will start again in March 2017,<sup>138</sup> in line with the European Commission's recommendation of December 2016. So far Dublin procedures to Greece have not started.

**Hungary:** Requests to Hungary continue to be issued but transfers are not carried out. Following the legal reform passed in March 2017, as a result of which all asylum seekers are systematically detained in Hungary, no transfers to Hungary have taken place.<sup>139</sup> In the period from January to April 2018, there were 229 Eurodac hits with Hungary, according to the Minister of interior. Although there have been intensive discussions with regard to Dublin transfers, including with the Hungarian Ministry of Interior, no transfers to Hungary have been carried out.<sup>140</sup>

**Italy:** The majority of outgoing requests – 1,951 out of 5,191– concerned Italy in 2018. In relation to Italy, the BFA considers that the obligation to obtain guarantees on the basis of the *Tarakhel v Switzerland* judgment of the ECtHR has been fulfilled following the Italian Ministry of Interior's letters of 8 June 2015 and 10 February 2016 to all Dublin Units, stating the projects where Dublin returnees would be accommodated.<sup>141</sup> The Constitutional Court pointed out in a ruling of 30 June 2016, in relation to the Circular letter and other procedural steps, that an individual assurance for a vulnerable asylum seeker would have been necessary before implementing a transfer.<sup>142</sup> Nevertheless, the BVwG has largely allowed the BFA to carry out Dublin transfers to Italy throughout 2018.<sup>143</sup>

In a case concerning a Syrian couple and their three minor children - one of which was born in Austria - the BVwG considered the transfer to Italy admissible as the conditions in Italy have improved and adequate accommodation for families are now provided. The Court also underlined that the Federal Office is informed well in advance of the transfer of families and can therefore ensure the availability of adequate accommodation places.<sup>144</sup> In this case, the BFA had announced the Dublin transfer to the Italian authorities at least 15 days before the scheduled transfer date via DubliNet. If SPRAR accommodation places would not have been available, the Italian authorities would have informed the Federal Office of Aliens and Asylum prior to the transfer. In addition, the Italian Ministry of Interior has now issued a number of letters guaranteeing that all families with minors transferred to Italy under the Dublin III Regulation will remain together and will be accommodated in a facility adapted to their needs. Previous case law have also allowed for the transfer of families to Italy, including of a single mother and her baby;<sup>145</sup> and of a family with four children (out of which two were minors) and their grandparents.<sup>146</sup> The Constitutional Court also found that the situation of asylum seekers in Italy has improved and that special safeguards are no longer necessary.<sup>147</sup>

**Bulgaria:** Transfers to Bulgaria are carried out by the BFA and generally upheld by the BVwG.<sup>148</sup> No objections are raised for single asylum seekers or families. However, higher courts have taken a

<sup>138</sup> See Kurier, 'Griechenland soll ab März wieder Flüchtlinge zurücknehmen', 20 January 2017, available in German at: <http://bit.ly/2kaZVLc>.

<sup>139</sup> See also VfGH, Decision E 1486/2017, 14 June 2017.

<sup>140</sup> Answer to the parliamentary request, No 847/AB, 16 July 2018.

<sup>141</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*, 10 February 2016, available at: <http://bit.ly/1QxxRqJ>.

<sup>142</sup> VfGH, Decision E 449-450/2016 and E 703-704/2016-14, 30 June 2016.

<sup>143</sup> See e.g. BVwG, Decision W243 2140308-1, 27 January 2017; W144 2152033-1, 18 April 2017; W205 2144676-1, 6 June 2017; W192 2162712-1, 13 July 2017; W153 2166538-1, 22 September 2017.

<sup>144</sup> BVwG Decision W153 2169452-2 8 January 2018 .

<sup>145</sup> VfGH, Decision Ra 2016/20/0051, 23 June 2016.

<sup>146</sup> VfGH Ra 2017/20/0061 to 0067, 23 March 2017.

<sup>147</sup> VfGH, Decision E 2646/2016, 7 March 2017.

<sup>148</sup> See e.g. BVwG, Decision W165 2174429-1, 23 November 2017; W241 2178020-1, 7 December 2017.

different line. In one case, the Constitutional Court deemed a transfer unlawful on the basis of the vulnerability of an Iraqi family with young children and the deterioration of reception conditions in Bulgaria.<sup>149</sup> The VwGH has also found that the BFA must make a thorough assessment of the conditions in Bulgaria before transferring families.<sup>150</sup>

**Croatia:** Following the CJEU ruling in *A.S. / Jafari*, the BVwG has rejected the cases previously suspended and the persons concerned have been returned to Croatia. In some cases the applications were admitted in Austria due to the expiry of the time limit for the transfer.

**Slovenia:** There are no indications that would call into question the presumption of safety, according to the VwGH.<sup>151</sup>

## 2.7. The situation of Dublin returnees

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.

So far the BFA has not been requested to provide guarantees to other Member States prior to transfers.

## 3. Admissibility procedure

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

The admissibility procedure starts upon registration of the application with the first interrogation (*Erstbefragung*) 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 departure centre or transferred by the police to the centre.<sup>152</sup> There are three departure centres 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>153</sup>

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

- (1) The person comes from a safe third country;<sup>154</sup>
- (2) The person enjoys asylum in an EEA country or Switzerland;<sup>155</sup>
- (3) Another country is responsible for the application under the Dublin Regulation;<sup>156</sup>
- (4) The person files a subsequent application and “no change significant to the decision has occurred in the material facts”.<sup>157</sup>

<sup>149</sup> VfGH, Decision E 484/2017, 9 June 2017. See also VfGH, Decision E 86/2017, 24 November 2017.

<sup>150</sup> VwGH, Decision Ra 2017/18/0039, 30 August 2017; Ra 2017/19/0100, 13 December 2017.

<sup>151</sup> VwGH, Decision Ra 2017/01/0153, 20 June 2017.

<sup>152</sup> Article 29(1) AsylG.

<sup>153</sup> Article 17(3) AsylG.

<sup>154</sup> Article 4(1) AsylG.

<sup>155</sup> Article 4a(1) AsylG.

<sup>156</sup> Article 5(1) AsylG.

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.

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 him or her 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>158</sup>

The 20-day time limit shall not apply if the BFA intends to reject the application and the asylum seeker does not cooperate in the procedure. The procedure is deemed no longer relevant or the asylum seeker evades the procedure.<sup>159</sup> The duty of asylum seekers 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>160</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 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>161</sup> An admissible application shall nevertheless be rejected if facts justifying such a rejection decision become known after the application was admitted.<sup>162</sup> In practice, this provision is applied in Dublin cases without the precondition that the facts justifying admissibility were not known before.<sup>163</sup>

The information provided by the Ministry of Interior did not include the number of inadmissibility decisions issued in 2018.<sup>164</sup> However, regarding its length, the admissibility procedure lasted for approximately five days in 2018. It should be noted that, especially in the context of family proceedings, the admission often already takes place on the day of the application, which greatly reduces the calculation of the average duration.<sup>165</sup> It should be further noted that, during the admission procedure, asylum seekers are given basic care in federal care facilities. From January to May 2018, this basic care was given during a period of approximately 19 days.

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<sup>157</sup> Article 12a(2)(2) AsylG.

<sup>158</sup> Article 28(2) AsylG.

<sup>159</sup> Article 28(2) AsylG.

<sup>160</sup> Article 28(2) AsylG.

<sup>161</sup> Article 28(2) AsylG.

<sup>162</sup> Article 28(1) AsylG.

<sup>163</sup> VwGH, Decision Ra 2006/20/0624, 25 November 2008.

<sup>164</sup> Information provided by the Ministry of Interior, 26 January 2018.

<sup>165</sup> Answer to parliamentary request, No 3235/AB-BR/2018, 31 July 2018.

### 3.2. 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 registration of the application and by civil servants during the admissibility procedure at the departure centre. 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 departure centre. 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>166</sup> An interview during the admission procedure may be dispensed with if the procedure is admitted.

### 3.3. 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. The time limits within which an appeal against the BFA's inadmissibility decision must be lodged is 2 weeks and the appeal has in general no suspensive effect, except when decided otherwise by the BVwG.

As a first step, the BVwG decides within 1 week 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 seven 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>166</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.

Appeals against a decision rejecting the asylum application as inadmissible do *not* have suspensive effect unless this is granted by the BVwG.<sup>167</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](#).

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.

### 3.4. 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 by procedural order 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.

Free legal advice is foreseen for subsequent asylum applications as well, including in appeals.<sup>168</sup> Most of the cases that are regarded as inadmissible are Dublin cases (see [Dublin: Legal Assistance](#)) and [Safe Third Country](#) cases. Subsequent applications also played an important role in 2018.

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

### 4.1. 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 a first instance decision laid down in the law?  Yes  No
  - ❖ If yes, what is the maximum time limit?<sup>169</sup> 1 week

<sup>167</sup> Article 16(2) BFA-VG.

<sup>168</sup> Article 52(1) BFA-VG.



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 departure centre 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>170</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>171</sup> Otherwise the application is admitted to the regular procedure and the asylum seeker is allowed entry.<sup>172</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](#).

Detention measures – more precisely the measures which require the asylum seeker to stay in the departure centre 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 presumption 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 an expulsion order. Rejection at the border may be enforced only after a final decision on the asylum application.

Most cases processed at the airport were Dublin procedures and most decisions that were considered as manifestly unfounded at the airport were appealed. While only one appeal was successful in 2018,<sup>173</sup> the BVwG rejected 11 appeals of asylum seekers originating from India, Iran, Egypt, Bangladesh and Pakistan.

In 2016, a reform entered into force to allow for special measures at the border for the maintenance of public order during border checks, which will effectively enable police authorities to deprive asylum seekers of access to the asylum procedure (see [Access to the Territory](#)). The measure has not been implemented in practice.

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<sup>169</sup> Time limit to send the file to UNHCR rather than to take a first instance decision.

<sup>170</sup> Article 31(1) AsylG.

<sup>171</sup> Article 32(2) AsylG.

<sup>172</sup> Article 33(2) AsylG.

<sup>173</sup> Information obtained through the legal information system (RIS), Decisions of the BVwG.

## 4.2. 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?  
 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

In procedures at the airport, only one personal interview is conducted.<sup>174</sup> There are no other differences compared to the system for personal interviews under the regular procedure.

## 4.3. Appeal

### Indicators: Border Procedure: Appeal

Same as regular procedure

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

The time limit for lodging appeals against a decision by the BFA in procedures at the airport is 1 week.<sup>175</sup> The BVwG must render its decision within 2 weeks from the submission of the complaint.<sup>176</sup> A hearing in the appeal proceedings must be conducted at the departure centre at the airport,<sup>177</sup> yet this rarely happens in practice.

## 4.4. 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 Swiss company ORS, which is contracted by the Ministry of Interior for provision of basic care in the reception centres of the Ministry, will be responsible for caring for asylum seekers in the airport special transit centre.

<sup>174</sup> Article 33(2) AsylG.

<sup>175</sup> Article 33(3) AsylG.

<sup>176</sup> Article 33(4) AsylG.

<sup>177</sup> Article 33(4) AsylG.

## 5. Accelerated procedure

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

The law provides 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>178</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>179</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>180</sup> Public interest exists in particular, albeit not exhaustively, where an applicant:<sup>181</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 on the asylum application shall be taken as quickly as possible and no later than 3 months.<sup>182</sup>

In addition, Article 27a AsylG provides 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 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>183</sup>

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

In 2017, the BFA conducted 1,371 fast-track procedures, according to information provided by the Ministry of Interior following a parliamentary request.<sup>184</sup> The average duration was 22 days and, because of the length of the procedures and the large number of appeals in 2017, the Ombudsman

<sup>178</sup> Article 27(1)(1) AsylG, citing Article 29(3)(4)-(5) AsylG.

<sup>179</sup> Article 27(1)(2) AsylG, citing Article 24(2) AsylG.

<sup>180</sup> Article 27(2) AsylG.

<sup>181</sup> Article 27(3) AsylG.

<sup>182</sup> Article 27(8) AsylG.

<sup>183</sup> Article 18 BFA-VG.

<sup>184</sup> Answer to parliamentary request, No 3183/AB-BR/2018, 5 April 2018.

intervened in some cases, mainly concerning asylum seekers originating from Afghanistan and Iran. Although the BMI explained that, in principle, there is no prioritisation based on citizenship, the law provides for some exceptions in which the BFA will inevitably have to prioritise certain asylum applications.<sup>185</sup>

From 1 January to 31 August 2018, 371 fast track procedures were processed by the Federal Office.<sup>186</sup>

## 5.2. 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 absconded from the procedure.<sup>187</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. No differences are observed from the [Regular Procedure: Personal Interview](#).

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>188</sup>

## 5.3. 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 are the same as in the [Regular Procedure: Appeal](#). The BVwG has to decide on the appeal within 3 months in cases granted suspensive effect.<sup>189</sup> The BVwG has to decide on the appeal against decisions to reject the application including an expulsion order within 8 weeks.<sup>190</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,

<sup>185</sup> Bericht der Volksanwaltschaft an den Nationalrat und an den Bundesrat 2017 - Kontrolle der öffentlichen Verwaltung, März 2018, available in German at: <https://bit.ly/2TNRqVNf>, 117.

<sup>186</sup> Answer to parliamentary request, No 3299/AB-BR/2018, 27 November 2018.

<sup>187</sup> Article 24(3) AsylG.

<sup>188</sup> Article 19(1) AsylG.

<sup>189</sup> Article 27(8) AsylG.

<sup>190</sup> Article 17(2) BFA-VG.

however, as they may have been expelled or transferred before. Nevertheless, the appeal may have suspensive effect.<sup>191</sup>

Difficulties in lodging an appeal against negative decisions in the accelerated procedure are the same as those described under the [Dublin Procedure: Appeal](#) and result mainly from insufficient free legal assistance. Organisations contracted to provide legal assistance have to organise interpreters if necessary.

#### 5.4. 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. Free legal assistance is available for subsequent asylum applications too.<sup>192</sup>

In so-called accelerated procedures under Article 27a AsylG in conjunction with Article 18 BFA-VG, 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 took place from time to time but has not been registered recently. 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 restricted area.

### D. Guarantees for vulnerable groups

#### 1. Identification

**Indicators: Identification**

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. Does the law provide for an identification mechanism for unaccompanied children?
  - Yes       No

The Asylum Law has no definition of vulnerable groups. However, it provides special provisions for victims of harassments, of sexual self-determination (Article 20 Asylum Act) of violence (Article 30

<sup>191</sup> Article 18(2)(5) BFA-VG. See e.g. AsylGH (Asylum Court), A8 260.187-2/2011, 2 August 2011.

<sup>192</sup> Article 49(2) BVA-VG in conjunction with Article 29(3) BFA-VG.

AsylG), and for unaccompanied minors (e.g. family tracing Article 18, legal representation Article 19 Asylum Law). Only a few federal states such as **Burgenland**, **Vorarlberg** or **Upper Austria** have included definitions of vulnerable asylum seekers in their basic care laws.

### 1.1. Screening of vulnerability

There is no effective system in place to identify asylum seekers in need of special procedural guarantees. During the admissibility procedure in the departure centre, 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 departure centre 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 procedure or entails for them a risk of permanent harm or long term effects.<sup>193</sup>

### Victims of trafficking

In the Austrian system, there is no centralised formal identification of victims of trafficking as such, defined as a decision by a competent authority which is binding for other authorities. However, an Austrian authority's assessment of an individual as a (potential) trafficked person has concrete consequences in the process of protection and prosecution. A type of formal classification of an individual as a "victim" is foreseen in the criminal procedure. There, the procedural role of trafficked persons as victims is provided for by the Austrian Code of Criminal Procedure.

In practice, if an Austrian official, such as a caseworker of the BFA, perceives that an individual may be a trafficked person, the official is requested to contact the criminal police office of the respective federal province. If the specialised unit of the police confirms that the suspicion or detection is justified, criminal investigations will be initiated, the individual concerned as well as a specialised NGO will be contacted and informed, a reflection period may be granted, and certain victims' rights in criminal proceedings are provided.

Access to specialised care and support through NGOs is not necessarily dependent on informal identification by police or the presence of criminal or civil proceedings. In the identification process, a central role is thus given to the Federal Criminal Intelligence Service. Together with its offices in the federal provinces, it is responsible for investigating trafficking cases in Austria. In this regard, this authority mainly cooperates with the organisation "LEFÖ-IBF", which is formally assigned by the Austrian Ministry of Interior and the Women's Department of the Federal Chancellery with the task of protecting and caring for trafficked persons on a nationwide basis.

### 1.2. Age assessment of unaccompanied children

Most age assessments are ordered by the EAST/departure centre during the admissibility procedure, because special safeguards in the Dublin III Regulation apply for unaccompanied children. In some cases it takes months to get the expert statements. The Dublin Unit starts consultations with other EU Member States with a notice that there is an ongoing age assessment. In the meantime, these child asylum seekers are admitted to the regular asylum procedure too. For the time being, there are no severe delays to get the results of the medical examinations and new medical institutions are involved in age assessments, e.g. the University of Vienna.

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<sup>193</sup> Article 30 AsylG.

It seems that age assessments are ordered systematically. In 2017, 1,751 unaccompanied children applied for asylum. Moreover, the BFA ordered a carpal x-ray in 1,355 cases. Given that in 867 cases the minority could not be assessed on the basis of the X-rays, 631 age assessment reports were subsequently undertaken. In 249 cases (39%) the age of majority was concluded while in 382 cases (61%) the applicant's minority was confirmed.<sup>194</sup> As a comparison, in 2016, out of 2,252 age assessments, 59% had concluded on minority and 41% on majority.<sup>195</sup>

### Methods for assessing age

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 Asylum Act 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>196</sup> As part of a multifactorial examination methodology, three individual examinations are carried out (physical, dental and x-ray examinations). According to the Ministry of Interior, these examinations are conducted in compliance with the guidelines of the Association for Forensic Age Diagnostics (AGFAD).<sup>197</sup>

However, these principles are not strictly applied in practice. Children undertake age assessment tests but the asylum authorities do not acknowledge the documents that are submitted to them or they do not allocate enough time to obtain these documents. The Human Rights Board (*Menschenrechtsbeirat*), NGOs and the Medical Association have criticised the age assessment methods.<sup>198</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. In a conference of November 2017 (the yearly "politische Kindermedizin" conference), civil society organisations adopted a resolution demanding the termination of unjustified X-Ray tests.<sup>199</sup>

In one case concerning a Gambian asylum seeker, who was a minor according to his birth certificate from the Gambia but had been determined to be an adult by Norway and Italy, and for whom the BFA expert opinion had given a probably age of 18.44 years but a possible age of 17.04 years at the time of his application, the VwGH applied the benefit of the doubt and ruled that the applicant should be assumed to be a child.<sup>200</sup>

### Challenging age assessment

Age assessments do not consist in an administrative decision but are an expert opinion – the outcome of the medical examination – that is communicated to the applicant. As a result, there is no possibility to appeal against their outcome. 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

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<sup>194</sup> Reply to parliamentary request, No 1240/AB, 4 September 2018.

<sup>195</sup> Ministry of Interior, Reply to parliamentary question 11558/J, 21 March 2017, available in German at: <http://bit.ly/2nU4rz4>.

<sup>196</sup> Article 13(3) BFA-VG.

<sup>197</sup> Reply to the parliamentary request No 1240/AB, 4 September 2018.

<sup>198</sup> Human Rights Board, Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren, 2011; Stellungnahme der Ärztekammer, FPG 2010, 21 July 2009.

<sup>199</sup> Politische Kinder Medizin, Newsletter Nr. 34 / 2017, available in German at: <https://bit.ly/2Ohiwjmj>.

<sup>200</sup> VwGH, Decision Ra 2017/18/0118, 27 June 2017.

ruling of 3 March 2014,<sup>201</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>202</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.

The VfGH has confirmed the VfGH position, stating the age assessment should be seen as part of the examination of the asylum application and be included in the decision thereon. Since the age assessment is a mere procedural matter according to the VfGH, the asylum seeker does not lose any rights in the procedure that he or she would otherwise enjoy as an unaccompanied child.<sup>203</sup>

However, the deprivation of legal representation under Article 10(3) BFA-VG denies unaccompanied children of the right to a representative under Article 25(1) of the recast Asylum Procedures Directive and Article 6(2) of the Dublin Regulation, as well as Article 24(1) of the recast Reception Conditions Directive.<sup>204</sup>

## 2. Special procedural guarantees

### Indicators: Special Procedural Guarantees

1. 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

### 2.1. Adequate support during the interview

In cooperation with UNHCR Austria, IOM and LEFÖ BFA, employees are offered training sessions providing them information on vulnerable groups.<sup>205</sup> These trainings further aim to strengthen their comprehension of first-instance decisions and measures to ensure the quality of interpreting.<sup>206</sup> In addition to the trainings that successfully started in 2016 and will be continued, civil servants are also supported in their day-to-day work through the development of certain tools. UNHCR further ensures the quality of the work undertaken by the staff of the BFA and develops, for example, specific assessment methods for the evaluation of asylum procedures.

In 2018, two cases involving homosexual asylum applicants aroused public criticism. Social media reported that their asylum application had been rejected as untrustworthy, which led to an investigation and, subsequently, the responsible civil servant of the BFA lost his license to decide upon asylum applications. The BFA acknowledged that the decision did not meet the qualitative standards, as regards language and wording used.<sup>207</sup>

In that context, the Austrian Queer base counseling center criticised the fact that BFA employees were not trained in that regard. The Ministry of Interior responded that there are ongoing training courses

<sup>201</sup> VfGH, Decision U 2416/2013-8, 3 March 2014.

<sup>202</sup> D Lukits and R Lukits, 'Neues zur Volljährigerklärung im österreichischen Asylverfahren', *FaBl*, January 2014.

<sup>203</sup> VfGH, Decision U 2416/2013-8, 3 March 2014.

<sup>204</sup> Amnesty International, *Studie zur Situation besonders vulnerabler Schutzsuchender im österreichischen Asyl- und Grundversorgungsrecht*, August 2016, available in German at: <http://bit.ly/2EmtoNQ>.

<sup>205</sup> Answer to parliamentary request, No 1571/AB, 2 November 2018, available in German at: <https://bit.ly/2tt2bS5>.

<sup>206</sup> UNHCR, Projekt Bidge, available in German at: <https://bit.ly/2N5zfZ0>.

<sup>207</sup> Wiener Zeitung, "Sie sind nicht homosexuell", 15 August 2018, available in German at: <https://bit.ly/219PtBD>.



offered to BFA staff and highlighted that specific trainings on LGBTI rights were planned even before the aforementioned scandal.<sup>208</sup>

Another similar case concerned an asylum seeker who claimed that he had been threatened in Gambia because of his homosexuality. This claim was considered not credible by the BFA. After having analysed the reasoning of that decision and because the particular circumstances of the case were not considered, the VfGH concluded that the administrative standards required for such a decision were not met.<sup>209</sup>

Article 30 AsylG also states that consideration should be given to the asylum seekers' specific needs in course of the procedure, although the concept of "adequate support" is not defined or described in the law. However, this does not seem to be applied in first instance procedures in practice. Usually the 6month time limit for deciding on the application is long enough to gather evidence. In cases concerning unaccompanied children, the BFA often failed to issue a decision within due time.

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>210</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>211</sup> A similar provision for interpreters is lacking, however.

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.

## 2.2. Exemption from special procedures

If it is deemed highly probable that the applicant has suffered from torture or other serious forms of physical, psychological or sexual violence, the application shall not be dismissed in the admissibility procedure.<sup>212</sup> In practice, it is not likely that applications of vulnerable asylum seekers like victims of torture or violence or unaccompanied children are processed in the airport procedure (the only border procedure), although accelerated procedures for public security reasons may be conducted.

## 3. 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

<sup>208</sup> Wiener Zeitung, Heikle Fragen, Die Verfolgung wegen der sexuellen Orientierung ist ein Fluchtgrund. Für die Behörden ist diese schwer zu ermitteln, 17 September 2018, available in German at: <https://bit.ly/2BxMZYc>.

<sup>209</sup> VfGH, Decision No E2786 / 2018-16, 26 November 2018.

<sup>210</sup> Article 20(1) AsylG.

<sup>211</sup> VfGH, U 688-690/12-19, 27 September 2012.

<sup>212</sup> Article 30 AsylG.

Asylum seekers undergo a medical examination in the EAST/departure centre or a federal reception centre.<sup>213</sup> The Ombudsman highlighted in its 2017 Report that the social care staff present at the EAST/departure centre was also acting as translators for the sessions with psychologists, which impacts their confidentiality. The Ombudsman therefore encouraged the BMI to use professional interpreters for psychological consultations.<sup>214</sup>

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.

Some of the psychiatrists or medical experts are accredited by the courts, but have no special training on torture survivors, do not apply the Istanbul Protocol, 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 AMIF, but capacities are not sufficient, clients often have to wait several months to start the treatment

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 in 2010 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>215</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.

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<sup>213</sup> Article 28(4) AsylG.

<sup>214</sup> Bericht der Volksanwaltschaft an den Nationalrat und an den Bundesrat 2017, March 2018, available in German at: <https://bit.ly/2TNRqVN>.

<sup>215</sup> VwGH, Decision Ra 2007/19/0830, 19 November 2010.

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>216</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>217</sup>

#### 4. Legal representation of unaccompanied children

##### Indicators: Unaccompanied Children

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

A legal representative is appointed as soon as an unaccompanied child applies for asylum. As opposed to adult refugees, unaccompanied minors have to make the asylum application at the police station of **Traiskirchen**, near the departure centre. Unaccompanied children that are between 14 and 17 years old can further make their application at a designated police office in **Schwechat**. 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 BFA (and hearings at the BVwG).

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 the Human Rights Board (*Menschenrechtsbeirat*),<sup>218</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.

In one case concerning an asylum seeker who had repeatedly missed age assessment appointments and for whom custody had been transferred by the court to the Child and Youth Service (*Kinder- und Jugendhilfe*), the BFA had conducted a Dublin interview without the child's legal representative being present and rejected his asylum application, mentioning that he had seriously breached his obligation to cooperate. The BVwG had demanded an original power of attorney and deemed the one send via email as insufficient. The VwGH found that it was not necessary for the Child and Youth Service to bring forward the original power of attorney to a Diakonie lawyer, since the formal requirements had been satisfied.<sup>219</sup>

In the case of siblings, the BFA and BVwG have assumed that an adult sibling has the power to represent his or her underage sibling in the admissibility procedure. The VwGH and VfGH have clarified, however, that legal representation during this procedure is a task for a legal adviser and cannot be performed by a sibling. The transfer of custody requires a court decision and cannot be based on the sole decision of the Child and Youth Service.<sup>220</sup>

<sup>216</sup> VwGH, Decision Ra 2006/01/0355, 15 March 2010.

<sup>217</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.

<sup>218</sup> Menschenrechtsbeirat, *Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren*, 2011.

<sup>219</sup> VwGH, Decision Ra 2017/19/0068, 20 September 2017.

<sup>220</sup> VfGH, Decision E 2923/2016, 9 June 2017; VwGH, Decision Ra 2016/18/0324, 30 August 2017.

After admission to the regular procedure and transfer to one of the federal provinces, the Child and Youth Service (KJH *Kinder- und Jugendhilfe*) takes over the legal representation according to the Asylum Act or by court decision.

Legal presentation services are provided by the KJH in three federal states (**Vienna, Lower Austria, Tyrol**). NGOs provide legal services in other federal states, (**Carinthia, Styria, Vorarlberg**) and the legal representation is divided between different NGOs in the three remaining states (**Upper Austria, Salzburg, Burgenland**). UNHCR conducted a survey and concluded that there was no difference in the quality of the legal representation services provided by the different NGO's.<sup>221</sup> However, critics arouse regarding the legal representation undertaken by a special coordination office in **Lower Austria**, as the best interests of an unaccompanied minor was not sufficiently taken into account. In fact, the asylum application of an unaccompanied minor was rejected and because he was not informed of that rejection he did not seek assistance from another organisation to appeal the decision.<sup>222</sup>

The question of legal representation and capacity of asylum seekers declared as adults by the BFA is the subject of systematic litigation. In one case, where the BFA disregarded a court order granting custody and interviewed the asylum seeker as an adult, the decision was annulled by the BVwG.<sup>223</sup>

Providing advice in return cases is mandatory since 2016 and unaccompanied children are also advised on their return to their country of origin. Legal representatives are not informed about this, as a file note is only available when the application for voluntary return has already been signed. In 2017, 21 children, originating from Afghanistan, Iran and Iraq, have returned voluntarily. In 2018, IOM, provided support to 10 unaccompanied minors for their voluntary return.<sup>224</sup>

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. Family tracing takes place on the basis of an official order of the BFA and is implemented by Verein Menschenrechte Österreich, which is also responsible for the legal representation of unaccompanied children in the admissibility procedure. It is evident that a conflict of interest arises in these cases, as the organisation acts on behalf of the BFA at the same time as it represents the interests of the child. It has also been reported that the conversation between the child and the family tracing counsellor takes place in the child's mother tongue so that legal representatives are not able to follow. Children searching for family members can also contact the Red Cross.

The number of unaccompanied children seeking asylum in Austria has decreased from 8,277 in 2015 to 4,551 in 2016 and 1,751 in 2017. In 2018, the number decreased sharply to 488.

Unaccompanied asylum-seeking children: 2018	
Country of origin	Number of applicants
Afghanistan	183
Nigeria	77
Syria	36
Gambia	22
Pakistan	17

<sup>221</sup> UNHCR, Rechtsvertretung von unbegleiteten Kindern und Jugendlichen im Asylverfahren. April 2018, available in German at: <https://bit.ly/2ByL1GR>.

<sup>222</sup> Information received from volunteers, mentors and NGO staff at Asylkoordination Austria.

<sup>223</sup> BVwG, Decision No I403 2173192-1, 19 October 2017.

<sup>224</sup> IOM, Press release: Freiwillige Rückkehr aus Österreich bleibt 2018 hoch: IOM unterstützt mehr als 3.400 Menschen, 1 January 2019, available in German at: <https://bit.ly/2yEQ1G3>.

Source: Ministry of Interior

Problems reported prior to 2016 relating to inaction and delays in the procedural treatment of unaccompanied children by the BFA have not been solved in 2017, although many special reception places for unaccompanied asylum seeking children have been opened, thus distributing the file to a branch office of the BFA. Most procedures are decided now in due time.

**E. 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>225</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-merit 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>226</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>227</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>228</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

<sup>225</sup> Article 2(1)(23) AsylG.  
<sup>226</sup> Article 68 AVG.  
<sup>227</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>228</sup> Article 12a(1) AsylG.

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 the decision.<sup>229</sup> The expulsion may be effected 3 days after the Court has received the file.

It might sometimes 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 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 Art. 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>230</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>231</sup>

Subsequent applicants in 2018	
Country	Number
Afghanistan	319
Russian Federation	267
Nigeria	271
Pakistan	99
Iraq	94
Algeria	84
Other	853
<b>Total</b>	<b>1,987</b>

Source: Ministry of Interior

<sup>229</sup> Article 22(1) BFA-VG.

<sup>230</sup> Article 3(1)(3) Basic Care Act (GVG-B).

<sup>231</sup> Articles 76(3)(4) and 77 FPG.

## 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 |

### 1. Safe country of origin

Article 19 BFA-VG provides a list of safe countries of origin. 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>232</sup> while NGOs had the possibility to submit comments on it.

This list includes all EU Member States,<sup>233</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>234</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**. In 2018, 22 EU-nationals originating from 12 Member States have applied for asylum in Austria.

Further states are defined as safe countries of origin by Governmental order (HStV). As per the version, amended on 14 February 2018, these are:<sup>235</sup>

- Albania;
- Bosnia-Herzegovina;
- Macedonia (FYROM);
- Serbia;
- Montenegro;
- Kosovo;
- Ukraine;
- Benin;
- Mongolia;
- Morocco;
- Algeria;
- Tunisia;

<sup>232</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>233</sup> Defined as states party to the EU Treaties: Article 2(1)(18) AsylG.

<sup>234</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>235</sup> Verordnung der Bundesregierung, mit der Staaten als sichere Herkunftsstaaten festgelegt werden (Herkunftsstaaten-Verordnung – HStV), as amended on 14 February 2018, available at: <http://bit.ly/2ji71tR>.

- Georgia;
- Armenia.

The 2018 amendment added Benin, Ukraine and Armenia to the list.<sup>236</sup> Sri Lanka and Senegal have further been added in June 2018.<sup>237</sup>

The **Accelerated Procedure** is applied in cases where the safe country of origin concept is applicable, and the Federal Administrative Court (BVwG) has to decide within 7 calendar days on the suspensive effect of appeals against negative decisions. 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.

In 2018, Austria received 440 applications from following nationalities: Georgia (3,3%), Ukraine (279, representing 2% of the total number of applications), Morocco (173, representing 1.3%) and Algeria (164, representing 1.2%).<sup>238</sup> In total 1,190 applications have been submitted in 2018 from asylum seekers of 16 different safe countries of origin, which represents 9% of the total number of applications.

## 2. Safe third country

Article 4 AsylG sets out the safe third country concept. If the concept is applied the application is processed and rejected as inadmissible (see **Admissibility Procedure**).

Article 12(2) BFA-VG also provides that, in case of rejection of the application as inadmissible according to the safe third country concept, the BFA has to add a translation of the relevant articles and a confirmation in the language of the third country that the application was not assessed in the merits and that an appeal has no suspensive effect.

If the person cannot be deported within 3 months for reasons unrelated to his or her conduct, the inadmissibility decision ceases to be valid.<sup>239</sup>

There is no list of safe third countries and the concept is applied rarely.

### 2.1. Safety criteria

Protection in a safe third country is deemed to exist if a procedure for the granting of refugee status in accordance with the Refugee Convention is available to the person in a country where he or she is not exposed to persecution or serious harm, and the person is entitled to reside in that country during such procedure and has protection there against deportation to the country of origin, provided that the person is exposed to such risk in the country of origin.<sup>240</sup> There is a presumption that these requirements are met by countries that have ratified the Refugee Convention and established by law an asylum procedure incorporating the principles of that Convention, the ECHR and its Protocols Nos 6, 11 and 13.<sup>241</sup>

The conditions for the application of the safe third country concept have been clarified by the Constitutional Court and VwGH. The presumption of compliance with safety criteria through ratification of legal instruments was affirmed in 1998 by the Administrative High Court, which has ruled that asylum

<sup>236</sup> BGBl 2018 II/25, available at: <http://bit.ly/2BJvUvh>.

<sup>237</sup> BGBl. II Nr. 130/2018, available in German at: <https://bit.ly/2GI2XJ2>.

<sup>238</sup> Ministry of Interior, *Asylum Statistics December 2017*.

<sup>239</sup> Article 4(5) AsylG.

<sup>240</sup> Article 4(2) AsylG.

<sup>241</sup> Article 4(3) AsylG.



authorities must first and foremost assess the legal conditions in a third country.<sup>242</sup> However, the Constitutional Court has ruled that the formal criteria of ratification of the Refugee Convention, the declaration according to Article 25 ECHR and the existence of an asylum law are not sufficient to establish safety in a third country, but the granting of protection in practice has to be taken into consideration. Asylum authorities have to be prepared to have up-to-date information of relevant organisations to be able to assess the factual situation.<sup>243</sup>

## 2.2. Connection criteria

According to the aforementioned Constitutional Court and VfGH rulings, mere transit or stay in a third country is not sufficient to apply the safe third country concept.<sup>244</sup>

## 3. First country of asylum

The concept of “first country of asylum” is established in Article 4a AsylG. An application will be rejected as inadmissible, if the applicant has found protection in an EEA country state or Switzerland and asylum or subsidiary protection status was granted.

A law amendment that entered into force on 1 September 2019 deleted the 3 months deadline if the person cannot be deported. As a consequence, the inadmissibility decision does no longer cease to be valid and deportation can still be undertaken at a later date.

Rejections for existing protection in another EU state are also made in countries such as Greece or Hungary where Dublin responsibilities are denied, or as is sometimes the case with Bulgaria, where the appeal has suspensive effect.

A Syrian mother with 3 children gave birth after she arrived in Bulgaria, and suffered from prenatal depression. She was granted subsidiary protection in Bulgaria shortly after her journey to Austria. The Bulgarian authorities denied responsibility under the Dublin system, but were ready to take over as a result of the readmission agreement. The BVwG considered the deportation to Bulgaria as not permissible because of the PTSD from which the children were suffering and which was triggered, among other things, by experiences during the imprisonment in Bulgaria at the end of September 2015, as well as the intensive family relationship with relatives living in Austria.<sup>245</sup>

The BVwG has also accepted an appeal of an Afghan family who had received subsidiary protection in Hungary, due to the need to clarify whether the current situation of beneficiaries of protection in Hungary raises an Article 3 ECHR risk.<sup>246</sup> In the case of a single Syrian who got subsidiary protection in Bulgaria, however, the BVwG found no real risk on the ground that he did not belong to a vulnerable group.<sup>247</sup>

In a case ruled by the Federal Administrative Court, the rejection of the application as inadmissible of a Chechen refugee who was registered in Azerbaijan as “person of concern” to UNHCR was seen as not sufficient. The court missed the opportunity to assess the question whether the status is similar to the status of a recognised refugee or the protection from *refoulement* is sufficient.<sup>248</sup>

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<sup>242</sup> VfGH, Decision 98/01/0284, 11 November 1998.

<sup>243</sup> VfGH, Decision U 5/08, 8 October 2008, available at: <http://bit.ly/2jilW73>.

<sup>244</sup> VfGH, Decision 98/01/0284, 11 November 1998; VfGH, Decision U 5/08, 8 October 2008.

<sup>245</sup> BVwG, Decision W192 2131676, 8 September 2016.

<sup>246</sup> BVwG, Decision W205 2180181-1, 21 December 2017.

<sup>247</sup> BVwG, Decision “233 2166376-1, 18 September 2017.

<sup>248</sup> BVwG, Decision L518 2109232-1, 6 August 2015, available at: <http://bit.ly/2jUv9oc>.

As mentioned in [Safe Third Country](#), inadmissibility may be ordered when a person has obtained status in another EU Member State.

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

### 1. Provision of information on the procedure

#### Indicators: Information on the Procedure

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

Asylum seekers must receive written information sheets in a language understandable to them during the first interview.<sup>249</sup> At the beginning of the interview, the applicant must be informed about his or her duties in the procedure.

The BFA has published a brochure about the asylum procedure on the website. This brochure is in German and is aimed at Austrians.<sup>250</sup>

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 BFA.<sup>251</sup> Several NGOs provide information on the procedure on their respective websites, such as Diakonie, Caritas or Asylkoordination. In December 2018, UNHCR published a brochure “ to inform unaccompanied refugee children about their situation and their rights in the asylum system.”<sup>252</sup> This brochure is available in German, English, Arabi, Dari, Pashtu, Somali.

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 Asyl für Menschenrechte](#), an NGO in Tyrol, produced short videos that were available on the internet and give information about the asylum procedure in some languages like German, English, Arabic, Pashto, Dari, French and Somali. At the time of writing the videos were not accessible anymore due to two major law amendment which restrict the rights of asylum seekers in several aspects (e.g. restrictions on freedom of movement, shortening of the appeal deadline; police access to personal devices such as phones; financial contribution to basic care benefits etc.).<sup>253</sup>

<sup>249</sup> These are available at: <http://www.bfa.gv.at/publikationen/formulare/>.

<sup>250</sup> BFA, *Asylverfahren*, available in German at: <http://bit.ly/2l52OeW>.

<sup>251</sup> See: [http://www.bfa.gv.at/bmi\\_docs/1753.pdf](http://www.bfa.gv.at/bmi_docs/1753.pdf).

<sup>252</sup> UNHCR: Your asylum procedure in Austria. December 2018, available at: <https://bit.ly/2Tx5RkS>.

<sup>253</sup> BGBl. I Nr. 145/2017, Alienlaw Amendment 2017, 18 October 2017; available at: <https://bit.ly/2NUmWzc>; BGBl. I Nr. 56/2018: Alienlaw Amendment 2018, 14 August 2018; <https://bit.ly/2SYpBZM>.

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>254</sup> 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>255</sup>

Asylum seekers 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>256</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>257</sup>

For Dublin cases, a project entitled “Go Dublin” – previously under ERF and now continuing under the AMIF – assists the authorities to enable quick transfers.<sup>258</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 organisation also provides information and advice on voluntary return. 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. The information about the project activities that is published on the website of the organisation, however, has not changed since almost 8 years. There is only one case explaining the assistance offered by the organisation to enable the transfer of two Chechen women to Poland.<sup>259</sup> Although this project is funded by the EFF and AMIF since 2006, no further information is available.

At every stage of the procedure, asylum seekers are informed about the possibility of support for voluntary return. In the waiting rooms of departure centres, videos providing information on voluntary return are streamed.

The BFA can also order consultation with regard to return. This is systematically done when a return decision is issued. When an asylum seeker leaves the country in the context of voluntary repatriation to his or her country of origin, the asylum proceeding is filed as redundant.

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<sup>254</sup> ‘Asylterminologieführer Deutsch/Russisch’, Deutsch/Englisch, Deutsch/Arabisch available at: <http://bit.ly/211wsFj>.

<sup>255</sup> UNHCR, ‘Your Asylum Procedure in Austria’, available at: <http://bit.ly/1ljRCDT>.

<sup>256</sup> Articles 15(1)(4) and 14(4) AsylG explaining the duty to register even for delivering letters abroad.

<sup>257</sup> Article 133(4) B-VG; Article 30 VwG-VG.

<sup>258</sup> Ministry of Interior, *List of AMIF funded projects 2017-2019 (Asylum and Return)*, available in German at: <https://bit.ly/2BJO8Mv>; Verein Menschenrechte Österreich, *Information on Dublin Procedures*, available at: <http://bit.ly/1NrSLac>.

<sup>259</sup> The website is available in German at: <https://bit.ly/1NrSLac>.

## 2. Access to NGOs and UNHCR

### Indicators: Access to NGOs and UNHCR

1. 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

According to the law, UNHCR has access to all facilities and is allowed to get in contact with asylum seekers.<sup>260</sup> NGOs have contracts in 7 out of 9 federal provinces for providing social counselling and visit reception centres of the federal provinces regularly. In two federal provinces, **Carinthia** and **Tyrol**, the social advice is provided by the federal administration. 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.

In 2018, restriction of freedom of movement was not considered as a major problem by NGOs to get in contact and provide assistance to asylum seekers, as long as they also received care by the federal province. However, NGOs noticed that fines have been imposed and those having received a final rejection of their asylum application are ordered to live in the reception centre **Fieberbrunn**, which is located in a very remote area. Moreover, access of NGOs to the centre in **Schwechat Airport** was not allowed and so far no suitable room for consultation were found in the surrounding of the centre.

## H. Differential treatment of specific nationalities in the procedure

### Indicators: Treatment of Specific Nationalities

1. Are applications from specific nationalities considered manifestly well-founded?  Yes  No  
❖ If yes, specify which: Syria
2. Are applications from specific nationalities considered manifestly unfounded?<sup>261</sup>  Yes  No  
❖ If yes, specify which: Bosnia-Herzegovina, North Macedonia, Serbia, Montenegro, Kosovo, Albania, Mongolia, Morocco, Algeria, Tunisia, Georgia, Ghana, Benin, Armenia, Ukraine

The list of safe countries of origin, based on which the accelerated procedure may be applied, was expanded in 2018 to cover five new countries. The so-called “fast-track procedure”, 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 (see [Fast-Track Processing](#)) was not seen in any cases in 2017 known to the author, due to the expansion of the list. From 1 January to 31 August 2018, however, 371 fast track procedures were processed by the BFA. Applications of asylum seekers originating from Afghanistan were prioritised, but not processed as fast track procedure.<sup>262</sup>

<sup>260</sup> Article 63(1) AsylG.

<sup>261</sup> Whether under the “safe country of origin” concept or otherwise.

<sup>262</sup> Answer to parliamentarian request, No 3299/AB-BR/2018, 27 November 2018.

## 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 lodging the asylum application until the final decision on their asylum application in all types of procedures. 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 an asylum seeker. An asylum seeker is an alien whose request is formally lodged, which is the case after the BFA gives an instruction about the next steps to the public security officer.

Since asylum seekers do not make the application in the departure centre, but request for asylum at a police station, as long as the application is not regarded as lodged, the person is not an asylum seeker in the sense of Article 2(14) AsylG. 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* asylum, the Basic Care Act of the Federal State defines the responsibility of the Federal State for asylum seekers after having *lodged* the application during the admissibility procedure in a reception facility of the Federal State.<sup>263</sup> However, Basic Care conditions do not apply in detention or where alternatives to detention are applied.<sup>264</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).

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

<sup>263</sup> Articles 1(1) and 2(1) GVG-B.

<sup>264</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.

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>265</sup>

If the suspensive effect of an appeal has been denied, Basic Care is terminated after the first instance decision becomes enforceable. Asylum seekers receive Basic Care in the case the court has awarded suspensive effect or if they wish to leave Austria voluntarily until their departure.<sup>266</sup>

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

### The assessment of resources

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>267</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>268</sup> This exclusion clause is applied very strictly, even when the sponsor is unable to care for the asylum seeker. Exceptions 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>269</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, an income beyond 1.5 times the amount of Basic Care benefits (547€) are deemed to be without need of Basic Care. In **Salzburg**, the regulation for Basic Care in force since 1 July 2016 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; for an apprentice the respective amount is 150€.<sup>270</sup> This practise is applied in other federal provinces as well.

Asylum seekers have to declare whether they hold resources or any source of income during the first interrogation with the police upon registration of the application. Since September 2018, asylum seekers

<sup>265</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>266</sup> Article 2(7) GVG-B.

<sup>267</sup> Article 2(1) Basic Care Agreement (GVV)-Art 15a.

<sup>268</sup> Article 5(1)(c) Schengen Borders Code.

<sup>269</sup> Articles 6, 7 and 9 Grundversorgungsvereinbarung (GVV); Art. 15a B-VG.

<sup>270</sup> Salzburg Basic Care Regulation LBGl. 57/2016, available in German at: <http://bit.ly/2kGpQma>.

are obliged to contribute to the basic care of the federal state they reside in. As a result, up to 840€ per person can be withheld by the police when a person asks for asylum and is found to carry such an amount of money. However, out of these 840€, asylum seekers always keep 120€. <sup>271</sup> Upon termination of the provision of basic care, any difference between the actual costs incurred and the cash seized is reimbursed.

Furthermore, EU and EEA (European Economic Area) citizens are excluded from the basic care.

By the end of 2018, 43,140 asylum seekers and beneficiaries of international protection received basic care. <sup>272</sup> Figures refer to 27,005 asylum seekers (63%), out of which 4,843 (18%) awaited a first-instance decision, 242 (5%) were in the Dublin procedure and 21,648 (80,2%) waited for the outcome of the appeal procedure. 1,519 persons (3,5%) were unaccompanied asylum seeking children and 13,251 (31%) were beneficiaries of international protection.

The number of persons receiving basic care decreased significantly by 30% from 61,310 to 43,140.

## 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 2018 (in original currency and in €): |          |
| ❖ Accommodated, incl. food  | €40      |
| ❖ Accommodated without food   | €150-200 |
| ❖ Private accommodation   | €320-365 |

Basic Care may be provided in three different forms. <sup>273</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 €21 maximum compensation for the costs per day, depending on the standards of the facility. All federal provinces agreed by June 2016 to raise the daily rates for care providers, nevertheless this is not implemented in all federal provinces. **Carinthia** for example has decided to provide €21 from 2019 on; in the meantime the daily rate is €20. **Burgenland** has introduced a maximum daily rate of €20.50, while **Styria** has not raised the daily rate and considers € 19 to be sufficient. The monthly pocket money of €40 will be allowed in **Upper Austria** only to persons staying in full-service accommodations. In self-catering reception facilities, families with children up to the age of 3 years old receive a pocket allowance of €20 per month per child.
- (2) Basic Care can be provided in reception centres where asylum seekers cook by themselves. In that case, asylum seekers receive between €150 and 200 per month mainly in cash. Alternatively, as is practice in Tyrol, they receive €215 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 €100
- (3) Basic Care can be provided for asylum seekers in private rented accommodation. In this case asylum seekers receive €365 in cash. The benefits are lower in **Carinthia**, where €290 (€110 for the flat and €180 for subsistence) for a single adult is regarded as sufficient to cover daily expenses. The allowance for a child is set at €80 per month, which is extremely low.

<sup>271</sup> Article 2 Abs 1 basic care law.

<sup>272</sup> Information provided by the Ministry of Interior, 26 January 2019.

<sup>273</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.

All asylum seekers receive an additional €150 per year for clothes in vouchers and pupils get €200 a year for school material, mainly as vouchers.<sup>274</sup>

Asylum seekers living in private rented flats receive 43% of the needs-based minimum allowance (*bedarfsorientierte Mindestsicherung*) for citizens in need of social welfare support, which is about €863 per month (€648 for subsistence and €215 for accommodation for a single person in **Vienna**). The level of the needs-based minimum allowance varies across the federal provinces, as political agreement to prolong an Austrian-wide regulation after its expiry by December 2016 was not reached. The sum given to a care provider, €630 per month (€21 per day) for accommodation and subsistence of asylum seekers, is below the level of welfare support for citizens, although staff and administrative costs have to be covered by the care provider.

For children, the daily rate in reception centres is the same as for adults. If families receive financial support for their daily subsistence, some federal provinces provide a lower amount for children (€80--100) instead of about €180.

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 €40.50 to €95, depending on the intensity of psychosocial care. In some federal provinces like **Styria** the maximum amount is not given to care providers, although it is evident that only a smaller group are not in need of much guidance and care. Styria has set up a daily special support of €18 for children with special needs, in addition to the maximum amount of €77. In **Upper Austria**, the government provides for €88 which should cover legal assistance as well.

### 3. 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

#### 3.1. 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>275</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. This is requested without a formal procedure. 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.

Unjustified Basic Care benefits may also be prescribed after the termination of Basic Care. A few former asylum seekers have been requested to pay back several thousand euros although their monthly Basic Care benefits had already been reduced due to the fact that they had a job and income.

Material reception conditions may be withdrawn where the asylum seeker:<sup>276</sup>

<sup>274</sup> Article 9(10) and (14) GVV-Art 15a.

<sup>275</sup> Article 2(1) B-VG Art 15a.

<sup>276</sup> Article 2(4)-(5) GVG-B.



- (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) Has had his or her application rejected or dismissed and suspensive effect was excluded according to Article 18(1) BFA-VG. If the applicant cooperates to return voluntarily, he or she is eligible to material reception conditions until his departure.<sup>277</sup> This rule 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>278</sup>

In relation to cases where asylum seekers unduly benefit from reception conditions by providing false information on their age – namely to benefit from specific care for children – three persons were accused to have obtained social benefits by fraudulently posing as unaccompanied children in 2017, thus receiving higher care standards amounting to approximately €50,000. In one case where the conviction had already been issued, the Higher Regional Court (*Oberlandesgericht*, OLG) reversed the decision of the lower court and referred back the case, finding that the undue use of reception conditions is only punishable if the person commits fraud in order to obtain a right of residence.<sup>279</sup> Criminal sanctions are not applied if the applicant would have been granted a residence permit anyway. Nevertheless, the reform that entered into force on 1 November 2017 sets out sanctions for false information provided not only to the BFA and the BVwG but also to the police in the context of the first interview (*Erstbefragung*).<sup>280</sup> However, this did not have much impact in practice so far.

There are no special reception centres to accommodate asylum seekers for public interest or public order reasons. In Lower Austria, a refugee centre was opened right on the border with the Czech Republic for unaccompanied minor refugees who had become maladjusted. This reception centre in Drasenhofen had to be closed due to public protests and a report by the child and juvenile Ombudsstelle.<sup>281</sup>

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. Although the freedom of movement is considered as not being limited in this case, presence at night is compulsory.

### 3.2. Procedure for reduction or withdrawal

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

<sup>277</sup> Article 2(7) GVG-B.

<sup>278</sup> Article 3(1) GVG-B.

<sup>279</sup> OLG Linz, Decision 9 Bs 150/17y, 1 June 2017.

<sup>280</sup> Articles 119-120 FPG.

<sup>281</sup> Kurier, Skandal-Asylquartier Drasenhofen wird geschlossen, 30 November 2019, available in German at: <https://bit.ly/2SGQN3d>.

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 of the recast Reception Conditions Directive. 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, if the hearing imposes a disproportionate burden. 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 Act 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 provided in the law and is now implemented in all federal provinces.

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, or at least it takes some time to receive it again. Asylum seekers who endanger the security of other inhabitants 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 he or she has an income, 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.

In 2018, the VwGH has stated that the non-provision of benefits in kind can nevertheless allow for the authorities the possibility to grant cash benefits. This money substitute can also be claimed at a later stage through a formal request. The case concerned an asylum applicant whose application had been admitted by the Land Upper Austria which did not grant him cash benefits. The VwVG considered that, if no accommodation is available, other arrangements should be found to grant the applicant the material benefits he is entitled to.<sup>282</sup> The reason behind this decision is the lack of care that asylum seekers faced back in autumn of 2015, as they did not receive any benefits under the basic federal care and were supported by private initiatives instead. Therefore, it only applies in cases where there is a massive influx of displaced persons, in accordance with Article 5 of Directive 2001/55 / EC.

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<sup>282</sup> VwGH, Decision Ra 2018/21/0154-8, 20 December 2018.

## 4. 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

The freedom of movement of asylum seekers may be restricted for reasons of public order, public interest, or for the swift processing of the asylum application. Applicants coming from a [Safe Country of Origin](#) or those who received a return decision before making an application may be affected. The necessity of assigned residence must be demonstrated on a case-by-case basis.<sup>283</sup> However, this restriction on freedom of movement is not a formal decision that can be appealed *per se*; it can only be challenged together with the asylum decision.

### 4.1. Restricted movement during the admissibility procedure

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/departure centre or to a distribution centre.<sup>284</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. Dublin cases that are usually cared for in the departure centres of the Ministry of Interior may also be transferred to reception centres of the federal provinces.<sup>285</sup> 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.

At the end of 2018, 1,042 persons received Basic Care in federal reception centres.<sup>286</sup>

### 4.2. Dispersal across federal provinces

A residence restriction applies from 1 November 2017 onwards. Asylum seekers who have been admitted to the regular procedure are only allowed to reside in the federal province assigned to them. even if the Basic Care provision is waived or withdrawn, they are not allowed to change federal provinces without authorisation from the provincial administration. Consecutive breaches of the residence restriction are punishable by an administrative fine of up to €5,000 or a three-week non-custodial sentence.<sup>287</sup> Asylum seekers can be arrested and detained for 24 hours to secure this administrative fine.<sup>288</sup> Since the law amendment that entered into force on 1 September 2018, the residence restriction was lifted for persons with subsidiary protection status.

<sup>283</sup> Article 15b AsylG, in force since 1 November 2017.

<sup>284</sup> Article 43(1) BFA-VG.

<sup>285</sup> Article 2(1)(2) GVG-B.

<sup>286</sup> Information provided by the Ministry of Interior, 26 January 2018.

<sup>287</sup> Article 121(1a) FPG.

<sup>288</sup> Article 39 FPG.

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 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.

The distribution of Basic Care recipients – including some beneficiaries of protection – across the provinces at the end of 2018 was as follows:

Dispersal of recipients of Basic Care: 31 December 2018			
Federal province	Quota	Number	Actual share
Vienna	21,2%	15,345	35,6
Upper Austria	16,7%	6,822	15,8
Lower Austria	19%	5,431	12,6
Styria	14,1%	4,742	11
Tyrol	8,5%	3,113	7,2
Carinthia	6,4%	2,007	4,6
Salzburg	6,2%	1,927	4,5
Vorarlberg	4,4%	1,629	3,8
Burgenland	3,3%	1,082	2,5
<b>EAST/Departure centre East</b>	-	<b>723</b>	<b>1,7</b>
<b>EAST/Departure centre West</b>	-	<b>319</b>	<b>0,7</b>
<b>Total</b>	<b>100</b>	<b>43,140</b>	<b>100</b>

Source: Care information system

Many basic care facilities, which were opened in 2016, are now vacant and are being used as preventive centres, while others have been closed completely. As of August 2017, the Ministry of Interior had established 32 reception centers, but their number was reduced to 20 centers as of July 2018. Out of them, 3 centers are special care units, 3 are initial reception centers, 7 are distribution centers and 7 are federal reception centres.<sup>289</sup> However, given the low occupation in these centers, the Ministry of Interior has announced that 7 out of the 20 federal centres will be closed until the end of 2019.<sup>290</sup>

The province of **Vienna** offers many more reception places than those foreseen by the quota system (see [Types of Accommodation](#)), while other provinces such as **Lower Austria** 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. In 2015 the lack of reception places caused homelessness and overcrowded initial reception centres, leading to inhuman living conditions. All federal states opened a lot of new facilities

<sup>289</sup> Answer to parliamentary request, No 3235/AB-BR/2018, 31 July 2018, available in German at: <https://bit.ly/2lcUgm3>.

<sup>290</sup> Der Standard, Jede dritte Asyl-Erstbetreuungsstelle soll geschlossen werden, 1 October 2018, available in German at: <https://bit.ly/2S1ZrEI>.

and the Ministry of Interior made use of its power to run reception centres in regions that host less refugees than 1.5% of their population. Since 2017, many reception places are no longer needed and closed gradually.

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 allowance for those living in reception centres is only €40. If they stay away from their designated place (reception facility) without permission for more than 2 nights, Basic Care will be withdrawn (see [Reduction or Withdrawal of Material Reception Conditions](#)). As discussed above, it is almost impossible to receive Basic Care in a province other than the designated province.

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.

## B. Housing

### 1. Types of accommodation

Indicators: Types of Accommodation	
1. Number of reception centres: <sup>291</sup>	Not available
❖ Ministry of Interior	13
❖ Carinthia	103
❖ Upper Austria	278
❖ Salzburg	85
❖ Lower Austria	420
❖ Tyrol	84
❖ Vorarlberg <sup>292</sup>	400
❖ Vienna	88
2. Total number of persons in Basic Care:	43,140
3. Total number of places in private accommodation:	17,350
4. Type of accommodation most frequently used in a regular procedure:	
<input checked="" type="checkbox"/> Reception centre	<input checked="" type="checkbox"/> Hotel or hostel
<input type="checkbox"/> Emergency shelter	<input checked="" type="checkbox"/> Private housing
	<input type="checkbox"/> Other
5. Type of accommodation most frequently used in an accelerated procedure:	
<input checked="" type="checkbox"/> Reception centre	<input type="checkbox"/> Hotel or hostel
<input type="checkbox"/> Emergency shelter	<input type="checkbox"/> Private housing
	<input type="checkbox"/> 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>293</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,

<sup>291</sup> Both permanent and first arrivals. Information provided by the federal provinces.

<sup>292</sup> Some of the reception facilities are very small, e.g. hosting only two families.

<sup>293</sup> Article 1(4) GVV-Art.15a.

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.

### 1.1. Federal reception capacity

The departure centre serves 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 asylum-seeking children as long as they are not transferred to reception facilities of the federal provinces. Instead of streaming all asylum seekers to the departure centre, they should have their first accommodation in the so-called distribution centres (VQ), which should be set up in 7 federal provinces. Traiskirchen serves as a VQ too. The reception centre in **Fieberbrunn** is used for rejected asylum seekers, and another former reception centre that was opened at the Vienna airport serves as a departure centre. NGOs report that the VQ in **Ossiach/Carinthia** hosts rejected asylum-seekers too. As already mentioned, the Ministry of Interior announced in October 2018 the closure of 7 of the remaining 20 reception facilities, including the special care centre in **Upper Austria** and the distribution center in **Styria-Graz Puntigam**. The number of hosted asylum seekers subject to the admissibility procedure was 3,247 in July 2018.<sup>294</sup>

Newly arrived asylum seekers stay only 4 to 5 days in the distribution centres according to information from the Centre in **Ossiach**. From January to May 2018, asylum seekers spent an average of 19 days in the course of the basic admission procedure in federal care facilities.<sup>295</sup>

Only a few asylum seekers are provided care in distribution centres (VQ). The number of asylum seekers in the departure centre of **Traiskirchen**, which reportedly has inhuman living conditions,<sup>296</sup> has also sharply decreased, from 5,000 asylum seekers to about 500 at the end of 2018.<sup>297</sup>

At the end of 2018, there were 13 federal reception centres hosting 1,042 persons.<sup>298</sup> The law allows the Ministry of Interior 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 adapted to host asylum seekers specifically and home, where special safeguards apply like fire protection or building regulations.<sup>299</sup> By the end of 2018, however, these centres were not needed anymore.

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.

The Ministry of Interior plans to establish a federal agency that will provide basic services in the future.<sup>300</sup> Changes in the admission procedure (elimination of the 20-day admission period) could lead

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<sup>294</sup> Answer to parliamentarian request, No 3235/AB-BR/2018, 31 July 2018.

<sup>295</sup> Ibid.

<sup>296</sup> Tages-Anzeiger, 'Endstation Traiskirchen', 30 June 2015, available in German at: <http://bit.ly/1Zdotj3>.

<sup>297</sup> NÖN.at, Flüchtlingsbewegung als Herkulesaufgabe, 20 November 2018; available in German at: <https://bit.ly/2GvcayP>.

<sup>298</sup> Basic care system, unpublished.

<sup>299</sup> Bundesverfassungsgesetz: Unterbringung und Aufteilung von hilfs- und schutzbedürftigen Fremden. BGBl 120, 28 September 2015, available at: <http://bit.ly/1JdszhK>.

<sup>300</sup> Ministry of Interior, Press release: Asyl-Betreuungsagentur, Neukodifikation des Fremdenrechts und Migrationsstrategie sind wesentliche Projekte 2019, 7 January 2019; available in German at: <https://bit.ly/2DBHzM3>.

to an increase of in-merits procedures during the admission procedure and asylum-seekers would remain in the reception centre of the state, thus avoiding a dispersal to the care system of the federal provinces.

## 1.2. Reception capacity at provincial level

In practice, most federal provinces do not provide the number of places required under their quota, which is partly due to the fact that provinces such as **Vienna** exceed their quota. According to recent information from the Ministry of Interior, the entire Austrian reception system hosted 43,140 persons at the end of 2018. The distribution across the federal provinces is detailed in [Freedom of Movement](#). While **Vienna** continues to exceed its relative reception share, other federal provinces have had several empty places. Consequently, several centres have free capacity and are planned to close as they are not able to cover the general costs of rent, heating, staff etc.

According to earlier figures referring to 31 December 2018, 62.6% of persons receiving Basic Care were asylum seekers.

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. 82% of asylum seekers in **Styria** and 94% in **Burgenland**), private accommodation is more often used in others states such as **Vienna**, where 71% of applicants lived in private accommodation as of 1 January 2019.<sup>301</sup>

## 2. 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

The Ministry of Interior, which is responsible for Basic Care during the admissibility procedure, subcontracts their day-to-day management to a company, while remaining the responsible authority. ORS, a company running accommodation centres for asylum seekers in Switzerland, provides Basic Care in the reception centres under the responsibility of the Ministry. This company was criticised because it generated considerable profits through the care of needy asylum seekers.

Conditions in the reception centres of the federal provinces vary, though they have constantly improved with the reduction of persons staying in the centres. According to the standards of the facility, NGOs or the landlord receive up to €21 per person a day for providing housing, food and other services like linen or washing powder. There are still some reception centres, such as the one in **Styria**, that get only €19 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>302</sup> The main problems detected were the overcrowding of centres, severe sanitary issues and asylum seekers complained about the poor and unhealthy meals.

<sup>301</sup> Information provided by the federal provinces.

<sup>302</sup> Dossier, 'Asyl – Ein Jahr Danach', 3 November 2014, available at: <http://bit.ly/1cyZZNB>, contains reports on each of about 100 facilities visited.

Racist behaviour and bad conditions led to the closure of a reception centre in **Lower Austria** in September 2016; after years of complaints.<sup>303</sup>

Systematic research on the standards in the basic care system of the federal provinces has not been carried out since then. The search platform 'Dossier.at', who had reported the maladministration in asylum accommodations, was convicted for entering a private property without permission. The judges dealt only with the question of whether asylum seekers have the right to receive visitors, without informing the administration. The Court concluded that journalists had to obtain permission from the federal province to enter the property.<sup>304</sup> The asylum seekers' right to visit, the freedom of the press and the interest of the public in the conditions of asylum accommodations were ignored.<sup>305</sup>

The federal provinces agreed on a minimum standard of 8m<sup>2</sup> for each person and 4m<sup>2</sup> for each additional person in September 2014.<sup>306</sup> Systematic research on conditions has not been undertaken in the last year.

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 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 €2,5 to €5 per hour.

There is a trend of allowing 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 the quantity and the quality of the food served and the religious requirements are being ignored.<sup>307</sup>

In **Burgenland** and **Styria**, meals are often served by the centre, while in **Tyrol** asylum seekers can cook in the reception centres. The amount given to asylum-seekers if meals are not provided differ in the federal provinces. **Burgenland, Carinthia, Upper Austria, Tyrol** und **Vorarlberg** give a lower amount for the nutrition of children (€80-100), while other federal provinces make no difference between minors and adults. In **Styria** asylum seekers in reception centres get €150 for subsistence but are no longer entitled to €40 pocket money, which means that in fact the monthly amount for food is €110. In **Tyrol** adult asylum seekers are given € 200 to organise meals by themselves.

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

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<sup>303</sup> Profil, 'Flüchtlingsheim in Annaberg: Ein Haus mit schiefem Segen', 26 September 2016, available in German at: <http://bit.ly/2kRZAOo>.

<sup>304</sup> Landesgericht Eisenstadt, available at: <https://bit.ly/2XPmC9A>.

<sup>305</sup> Die Presse, Dossier.at wegen Bericht über Asyl-Missstände verurteilt, 14 December 2015, available in German at: <https://bit.ly/2BCt627>.

<sup>306</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>307</sup> Dossier, 'Asyl – Ein Jahr Danach', 3 November 2014, available at: <http://bit.ly/1cyZZNB>.



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. Internet is accessible in the meanwhile.<sup>308</sup> The centre was closed by the Tyrolian government but was reopened by the Ministry of Interior to operate as a so-called departure centre for rejected asylum seekers.<sup>309</sup>

## C. 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?<br>❖ If yes, when do asylum seekers have access the labour market? | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No<br>3 months |
| 2. Does the law allow access to employment only following a labour market test?  | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No             |
| 3. Does the law only allow asylum seekers to work in specific sectors?<br>❖ If yes, specify which sectors: Tourism, agriculture, forestry    | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No             |
| 4. Does the law limit asylum seekers' employment to a maximum working time?<br>❖ If yes, specify the number of days per year                 | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No<br>180 days |
| 5. Are there restrictions to accessing employment in practice?   | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No             |

The Aliens Employment Act (AuslBG) states that an employer can obtain an employment permit for an asylum seeker 3 months after the asylum application is admitted to the regular procedure, provided that no final decision in the asylum procedure has been taken prior to that date.<sup>310</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>311</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 Federal State AMS office that must decide on appeals against decisions of the regional AMS office. There is no further right of appeal.<sup>312</sup> The decision has to be made within 6 weeks; in case of appeal proceedings, the same time limit must be applied.

<sup>308</sup> Profil, 'Nächtlicher Angriff auf Asylwerber in tiroler Bergen' 30 October 2014, available at: <http://bit.ly/1G8a8MZ>.

<sup>309</sup> Bezirksblätter, 'Heim am Bürglkopf wird zur Rückkehrreinrichtung', 24 August 2017, available in German at: <http://bit.ly/2H8o5j2>.

<sup>310</sup> Article 4(1) AuslBG.

<sup>311</sup> *Ibid.*

<sup>312</sup> Article 20(1) and (3) AuslBG.

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>313</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>314</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 to the provision of Basic Care are demanded. In fact, it is assumed by the authorities that only about €550 (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>315</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.

Until October 2018, asylum seekers below the age of 25 had the right to get a work permit for an apprenticeship in shortage occupations. However, the ministerial decrees of 2012 and 2013 were revoked, and asylum seekers below the age of 25 are not offered this possibility anymore. Those who are still apprentices are allowed to continue working as long as they stay in Austria. In **Upper Austria**, where a particularly large number of young asylum-seekers are apprentices, a broad protest has been formed against this "disintegration policy".

The Federal Administrative Court found that restricting access to the labor market is contrary to Article 15(2) of the recast Reception Conditions Directive and concluded that asylum seekers should have effective access to the labor market.<sup>316</sup> They may also be self-employed under the general conditions as soon as they are registered as asylum seekers.

Since 1 April 2018, asylum seekers admitted to the regular procedure for 3 months or more can also be employed through service vouchers in private households (e.g. for gardening, cleaning or child care etc.). Vouchers can be bought at the post office or online.<sup>317</sup> However, in practice, the necessary registration seems to be complicated and this possibility is not very known nor used.

Asylum seekers can carry out non-profit activities and receive an acknowledgment of their contributions. The amount of this remuneration was debated, however. While previous provisions provided for a sum of €2,5 to €5 and the Social Referees of the federal provinces regarded €5 as more appropriate, former Minister of Interior Sobotka proposed a sum of €2.50 per hour. Meanwhile, the Austrian People's Party (ÖVP) representatives also demand to pay only €1 or not to pay any recognition fees. Minister Sobotka

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<sup>313</sup> Ordinance GZ 435.006/6-II/7/2004, 11 May 2004.

<sup>314</sup> In Tyrol, asylum seekers may earn €240 per month without contribution to the cost of basic care.

<sup>315</sup> Asylkoordination Österreich, *Leben im Flüchtlingsquartier*, December 2010, 37f.

<sup>316</sup> BVwG, Decision, No W209 2184750-1, 25 June 2018.

<sup>317</sup> Dienstleistungsscheckgesetz, 12 February 2018, available at: <http://bit.ly/2nSSz0m>.

published a list of such non-profit jobs, e.g. administrative messenger or office assistance, translation services, support for parks and sports facilities, playgrounds, care for the elderly, assistance in nursery schools, school attendance services, assistance in animal shelters, or support for minor resettlements in the municipality.<sup>318</sup> From April 2018 onwards, the Minister of Interior has the power to regulate which NGOs will be able to enlist asylum seekers on a voluntary basis for charitable activities and to set the maximum amount for such work.<sup>319</sup> The minimum fee is regulated for each sector e.g. €11.75 an hour for gardening. The monthly income for this kind of employment is limited to €600.

On 25 January 2017, the Ministry of Social Affairs submitted a decree to the Labour Market Service (AMS). The Decree clarifies that:<sup>320</sup>

- a. Asylum seekers are allowed to complete practical experience and internships within the framework of their training in vocational schools or secondary schools;
- b. Adult asylum seekers are also allowed to do unpaid volunteer work for companies. An asylum seeker may take 3 months in a one-year period with several companies.

Companies have to register asylum seekers for internships at the AMS no later than 14 days before the start of the internship. Interns are also entitled to reasonable remuneration.<sup>321</sup>

In 2017, 1,526 work permits have been issued, out of which 697 concerned apprentices. By the end of 2018, 1,249 asylum seekers had a valid work permit, out of which 1,070 were apprentices and, during that same year, 1,615 additional work permit have been issued to asylum seekers, out of which 757 concerned apprentices.<sup>322</sup>

## 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 departure centre of the state, school attendance in public schools is not provided, however. Preparatory classes usually are set up where many children without knowledge of the German language attend class, otherwise they are assisted by a second teacher. Schools often register pupils without sufficient knowledge of the German language as extraordinary pupils for a maximum period of 12 months.

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.

<sup>318</sup> Ministry of Interior, 'Sobotka: Leistungskatalog für Hilfstätigkeiten von Asylwerbern erstellt', 28 October 2016, available in German at: <http://bit.ly/2kS0dHB>.

<sup>319</sup> Article 7(3a) GVG-B.

<sup>320</sup> Oberösterreichische Nachrichten, 'Asylwerber dürfen nun in Firmen schnuppern', 1 February 2017, available in German at: <http://bit.ly/2k2eEz>.

<sup>321</sup> Ministry of Labour, *Anzeigebestätigungen gem. § 3 Abs. 5 AuslBG für Ferial- und Berufspraktika und Volontariate von AsylwerberInnen*, 25 January 2017, available in German at: <http://bit.ly/2oTXTjU>.

<sup>322</sup> Information provided by the Labour Market Service (AMS) on February 2019.

The Aliens Employment Act 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>323</sup> Yet this measure proved to be insufficient in ensuring vocational training, as only 18 children have received such 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>324</sup> However, in 2018, the possibility for asylum seekers to complete an apprenticeship in a profession with a shortage of apprentices has been deleted.<sup>325</sup>

Young people under the age of 18 who have completed the 9-year schooling and who are permanent residents in Austria are obliged to pursue education or training, under a law that entered into force on 1 August 2017. This law, however, is not applied to asylum seekers, despite criticism from NGOs and the Chamber of Employment for failing to address a problematic aspect of integration and education policy.<sup>326</sup> Nevertheless, they can benefit from a wide range of language and literacy courses. In Vienna, the educational hub arranges course places for literacy courses, German courses, and basic education. There are also special courses available for women and mothers. At a few high schools transitional courses are organised in order to prepare for regular classes. Free language courses are further offered in refugee homes and also by NGOs. However, these courses are not always sufficient in terms of time and quality.

Initially, a right to German courses was further granted to asylum seekers who have a high recognition rate, who have been admitted to the regular procedure, who can prove their identity beyond doubt and who did not come from a safe country of origin. This applied particularly to Syrian nationals, while Iraqis and Afghans no longer have a high recognition rate. However, this practice was abolished and language courses are only open to asylum seekers when the government has sufficient financial resources.

## D. Health care

### Indicators: Health Care

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

The initial medical examination of asylum seekers after their initial admission to a reception centre (departure centre or VQ) is usually conducted within 24 hours. A general examination is made through a physical examination including vital signs, skin lesion, injuries, including Tuberculosis (TBC) X-ray and questions on their state of health by means of a standardised medical history. If, within the scope of the

<sup>323</sup> Asylkoordination, *Expansion of employment opportunities for asylum seekers*, 14 June 2012, available in German at: <http://bit.ly/1k7cAuY>.

<sup>324</sup> AMS, *Beschäftigungsmöglichkeiten für Asylwerberinnen und Asylwerber*, November 2015, available in German at: <http://bit.ly/1msi8SL>.

<sup>325</sup> Salzburger Nachrichten, *Ende der Lehre für Asylbewerber fix - Betroffene dürfen begonnene Lehre abschließen*, 27 August 2018; available in German at: <https://bit.ly/2TOA3Ev>.

<sup>326</sup> Employment Office of Upper Austria, 'Ausbildungspflicht bis 18: AK fordert Nachbesserungen', 19 August 2016, available in German at: <http://bit.ly/2kNmJSc>.

investigation, circumstances become known which require further investigations, asylum seekers are transferred to specialist doctors or a hospital.<sup>327</sup>

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>328</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/departure centre for more than 2 days, they will not receive medical assistance, because it is assumed that they have the opportunity to visit the medical station in the EAST/departure centre. 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 departure centre, 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.

In some federal provinces such as **Vienna**, asylum seekers receive an insurance card in the same way as other insured persons and can thus access health care with their insurance contracts without complications. In others like **Styria** or **Salzburg**, they must first request a replacement document in order to visit doctors.

After the asylum seeker has submitted the asylum application, a general health examination is carried out and asylum seekers are obliged to undergo this examination, including a TBC (Tuberculosis) examination. The Ministry of the Interior has commissioned the company ORS to carry out the medical examination, which is part of the admission procedure. The company has contracts with general practitioners and nurses to provide health care in the federal reception centres.

As already mentioned, the Ombudsmann reported that the social care staff at the departure centre East was also acting as translators for psychological consultations, which limits the confidentiality of the discussion. In addition, the Ombudsman found that asylum seekers were easily given addictive drugs without diagnosis and adequate grounds. The operating company promised to raise awareness among medical staff and encourage additional training.<sup>329</sup>

Asylum seekers are obliged to submit medical findings and expert opinions, if those help to assess the presence of a mental disorder or other special needs (§ 2 Abs. 1 GVG-B).<sup>330</sup>

Hospitals have been obliged since September 2018 to inform the BFA of the upcoming release date of a foreigner against whom a procedure for a residence-ending measure has already been initiated.<sup>331</sup>

### **Specialised treatment**

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 even

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<sup>327</sup> Ministry of Interior, Reply to parliamentary question 8774/J (XXV.GP), 17 May 2016, available in German at: <http://bit.ly/2lq2GHj>.

<sup>328</sup> Article 2(4) GVG-B.

<sup>329</sup> Bericht der Volksanwaltschaft an den Nationalrat und an den Bundesrat 2017, March 2018, available in German at: <https://bit.ly/2TNRqVN>.

<sup>330</sup> Article 15 (1)3 Asylum Law.

<sup>331</sup> § 46 (7) Aliens police Law 2005.

longer than 6 months in **Vienna, Styria and Tyrol** for psychotherapy, while in other federal states they wait approximately 3 months.

In the Basic Care systems of the federal provinces there are various possibilities of health care. In some federal provinces, asylum seekers are also cared for in regular special care facilities (see **Special Reception Needs**). “Increased care” for special needs must be requested by the asylum seeker. A prerequisite to receiving additional care is the submission of up-to-date specialist medical findings and assessments of need for care, as well as social reports not older than 3 months; these form part of the asylum seeker’s obligation to cooperate in the procedure. Reports from NGOs are also taken into account when examining the additional need for care.

## E. Special reception needs of vulnerable groups

### 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, 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.

The Basic Care laws of **Lower Austria, Salzburg, Tyrol and Vorarlberg, Burgenland, Carinthia, Upper Austria** mention special needs of vulnerable persons. The elderly, handicapped, pregnant women, single parents, children, victims of torture, rape or other forms of severe psychological, physical or sexual violence are considered as vulnerable persons, victims of trafficking. In the laws of the federal province of **Vienna**, vulnerable asylum seekers are not mentioned. Nevertheless, the federal provinces have to respect national and international law, including the recast Reception Conditions Directive. 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. Approximately 200 special care centres were available by the end of 2017 for people with special needs, mainly disabled people.<sup>332</sup>

Not all federal provinces have special care centres for vulnerable groups besides unaccompanied children. Special care needs are often determined only after an asylum seekers has be placed to a reception center of the federal province. For example, the Burgenland Court of Auditors stated that the allocation to a centre was made by the social department and was based on a departmental list of criteria, which include inter alia marital status, gender, nationality, religion and age.

<sup>332</sup> Ministry of Labour, Social Affairs and Consumer Protection, *Nationaler Aktionsplan Behinderung - Zwischenbilanz 2012-2015*, available in German at: <http://bit.ly/2lbWTXQ>, 198.

## 1. Reception of unaccompanied children

There exist several facilities for unaccompanied asylum-seeking children, 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>333</sup>

### 1.1. Federal centres

There are 2 reception centres for unaccompanied children managed by the Ministry of Interior, out of which one is a separate facility for unaccompanied children in the Federal Reception East in **Traiskirchen**.<sup>334</sup> The private company ORS is responsible for the care of unaccompanied children.

As of 31 December 2018, there were 40 unaccompanied children accommodated in special federal reception centres, while another 1,479 were accommodated in specialised facilities in the different federal provinces.<sup>335</sup>

### 1.2. Reception of unaccompanied children at federal province level

The Ministry of Interior and the competent department of the federal provinces have agreed on a quota system for unaccompanied children.<sup>336</sup>

The number of unaccompanied children, including asylum seekers, rejected asylum seekers and persons with a protection status, receiving Basic Care on 29 November 2017 was as follows:

Unaccompanied children receiving Basic Care: 31 December 2018		
Federal province	Unaccompanied children	Total Basic Care recipients
Vienna	427	15,345
Upper Austria	169	6,822
Lower Austria	246	5,431
Styria	204	4,742
Tyrol	134	3,113
Carinthia	111	2,007
Salzburg	92	1,927
Vorarlberg	40	1,629
Burgenland	56	1,082
Departure centre	40	1,042
<b>Total</b>	<b>1,519</b>	<b>43,140</b>

Source: Ministry of Interior, GVS Statistics

In some cases the transfer of an unaccompanied asylum-seeking child from the departure centre to Basic Care facilities of the federal provinces takes place randomly, without knowledge of the specific needs of the child.

<sup>333</sup> Der Standard, *Frequently Asked Questions on Unaccompanied children*, 3 August 2015, available in German at: <http://bit.ly/1gGuyE3>.

<sup>334</sup> Information provided by the Ministry of Interior, 26 January 2018.

<sup>335</sup> Information of the Basic care system, unpublished.

<sup>336</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>.

Numerous facilities set up after 2015 have been phased out after the number of unaccompanied children arriving in Austria dropped. The type of facilities available in the different provinces varies from one province to another:

**Carinthia, Tyrol and Burgenland** only offer accommodation in residential groups.

**Lower Austria and Upper Austria** generally offer accommodation in residential groups, subject to a few exceptions. The daily rate of 95€ for unaccompanied minors residential groups applies in Upper Austria only for groups of up to 20 people.<sup>337</sup> Larger facilities receive a daily rate of 88€. This amount should also cover the legal representation of the minors.

**Salzburg:** Children over the age of 14 are first housed in residential groups but may be assigned to other types of accommodation if deemed necessary by the care provider.

**Vienna:** Since 2015 only residential groups have been opened. There are still a few places for unaccompanied children with a lower level of care, however.

**Styria:** Styria has no residential groups for unaccompanied children. All children over the age of 14 are accommodated in dormitories or in assisted living. The situation in Styria is criticised by the Ombudsman, who recommends the establishment of residential groups in the future.

Since 2016, unaccompanied children may also live with families. Several federal provinces offer such possibilities. About 95 children lived with families in December 2018.

The Child and Youth Agency is responsible for providing adequate guidance and care to these children. However, it is unclear who is responsible for their legal representation during the admissibility procedure or during their stay in the reception centre, or for any other legal issue that may arise. A legal adviser has to fulfil these tasks as legal representative in the departure centre, or the Child and Youth Agency, which becomes responsible after the child is allocated to a federal province.

Social educational and psychological care for unaccompanied asylum-seeking children shall stabilise 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.

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 hosted according to their need for guidance and care. The daily fee for NGOs hosting unaccompanied asylum-seeking children ranges from €40.50 to €95 depending on the intensity of psychosocial care. Additional support may be provided by the Child and Youth Agency of the federal province. 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.

A report on the legal situation of unaccompanied children in Austria was published in October 2016 by SOS Children's Villages. The report points out that the relevant Austrian laws do not differentiate

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<sup>337</sup> Oberösterreichischer Landesrechnungshof, June 2017, available in German at: <https://bit.ly/2SyZLzZ>.



between Austrian and non-Austrian nationals,<sup>338</sup> and therefore asylum-seeking children are entitled to child and youth welfare to the same extent as Austrian children. It also states that the regulations on basic care (*Grundversorgung*) are not specific to child and youth welfare regulations, and therefore must be applied cumulatively; child and youth welfare must provide the required educational and psychological help in addition to the basic care regime, which aims to address basic living needs. The legal opinion concludes that the daily rates (*Tagsätze*) for unaccompanied children, which are lower than child and youth welfare provisions for Austrian children, are a problem, since unaccompanied children are entitled to the same services as Austrian children. This does not necessarily mean, however, that the daily rates need to be equivalent.<sup>339</sup> Similar concerns have previously been raised by the Ombudsman expressed in a report on **Burgenland** published in June 2015<sup>340</sup> as well as in a report on a visit in **Styria** published in March 2018.<sup>341</sup> The latter report states that, since mid-2017, Styria has improved the staff code with other federal provinces, reduced the benchmark for approved places from 40 to 30 minors and introduced a slightly higher daily rate for crisis care places.

However, there are neither nationwide nor sufficient special socio-therapeutic care places for unaccompanied minors. The report demonstrates that, in 2017, unaccompanied minors with a highly problematic background changed facilities in a relatively short period of time. Furthermore, despite clear indications of mental illnesses or solid addictive behaviors requiring treatment, they showed no interest in undertaking psychiatric examinations or couldn't do so because of the lack of offers.

The report further criticizes the lack of staff in many institutions and the lack of qualified staff, especially regarding pedagogical care that is needed to deal with an emerging risk of radicalization and to deal with persons with psychic issues. The responsible institutions reacted accordingly. Also, the Ombudsman described a shared apartment that it had visited as being incompatible with pedagogical standards and qualified it as a humiliating treatment. The shared flat was closed shortly after the Commission's visit and the young persons living there were transferred. In that regard, other basic care facilities were visited by the commissions and considered as impersonal, empty and/or cramped. Dorm rooms were sometimes so small that no retreat or visit opportunities existed and the environment was not adequate for learning. Minors were therefore sometimes found in a neglected state. As follow-up visits demonstrated, many issues were corrected after the NPM's intervention.

Regarding the access to education, the report indicates that - apart from the minors that are enrolled in schools and attend lessons - young persons do not receive adequate training or further education everywhere. German courses are offered in some regions only once or twice a week and the communication is difficult, because most of the staff does not have the necessary foreign language skills

In **Lower Austria**, 14 unaccompanied minor asylum seekers were transferred to a closed camp on the order of FPÖ politician (Landesrat), who is since 2018 responsible for Basic Care and Integration. After several protests, the reception centre – which had no qualified staff - was eventually closed and the asylum seekers were transferred to other places.<sup>342</sup>

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<sup>338</sup> Austrian Civil Code (ABGB) and Federal Child and Youth Welfare Act (B-KJHG).

<sup>339</sup> SOS Kinderdorf, *Gutachten zu Rechtsproblemen von SOS-Kinderdorf – Österreich mit unbegleiteten minderjährigen Flüchtlingen*, Innsbruck, 27 October 2016, available in German at: <http://bit.ly/2kr5LIB>.

<sup>340</sup> Ombudsman, *Bericht der Volksanwaltschaft an den burgenländischen Landtag, Bericht 2013-2014*, June 2015, available at: <http://bit.ly/1PbKxG7>.

<sup>341</sup> Bericht der Volksanwaltschaft an den Nationalrat und an den Bundesrat 2017, March 2018, available in German at: <https://bit.ly/2BvhoGz>.

<sup>342</sup> Wiener Zeitung, Drasenhofen.Flüchtlingsquartier nicht für Jugendliche geeignet, 30 November 2018; <https://bit.ly/2SNOgEi>.

## Aged-out children

A few places are available for those children who have reached the age of 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 Child and Youth Agency will care for young adults up to the age of 21. Usually, transitional homes for aged-out children offer higher care than adult centres, yet NGOs receive the adult rate for care.

The Ombudsman observes that the situation of those affected from the age of 18 can be particularly precarious if they have to leave the unaccompanied minors' homes and are not sufficiently prepared for an independent life.

## Children with special needs

There are still very few places for unaccompanied children with special needs, in **Vienna Lower Austria** and **Salzburg**. This is by no means sufficient to meet demand.

Information gathered by Asylkoordination in the fall of 2016,<sup>343</sup> from 40 NGOs caring for unaccompanied minors, showed that 10.6% of accommodated children need medication ordered by a psychiatrist: some suffer from depression ranging up to danger of suicide, others from borderline and adjustment disorder. A further 9% are thought to be suffering from a mental illness, but there is no diagnosis yet because the young people refuse an investigation for fear of stigma, or due to delays an assessment has not yet taken place. About 5% are in therapy and do not take medication. According to the opinion of the caregivers, about 15% were in urgent need of therapy. 8% were moved to another facility due to their striking behaviour (threats, violence against staff or other residents), but in one third of cases the behavioural problems were not improved.

The Ombudsman has criticised **Lower Austria** for not providing additional funding for children with mental illness. The federal province responded that the higher daily rate of €95 paid for Basic Care since July 2016 should cover any additional costs. Following criticism from the Ombudsman, the province of **Styria** has introduced a supplementary package of €18 from July 2018 onwards for unaccompanied children with special care needs. This brings the daily rate in Styria to €95.<sup>344</sup> NGOs from Styria reported that families with severely ill children were not placed in reception facilities for persons with special needs, on the grounds that their parents should have enough resources to take care for them.

## 2. Reception of women and families

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

For single women, there are some specialised reception facilities 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>345</sup> For family members who arrived in the framework of **Family Reunification** and receive Basic Care as asylum seekers, there is no satisfactory solution if the person with refugee status does not have a suitable private flat. The family may be separated until the status is granted, because recognised

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<sup>343</sup> Unpublished survey. These 40 reception centres cared for 924 unaccompanied child asylum seekers.

<sup>344</sup> Verordnung der Steiermärkischen Landesregierung vom 27. Oktober 2016, mit der das Steiermärkische Grundversorgungsgesetz durchgeführt wird (StGVG-DVO), available in German at: <http://bit.ly/2EKGW22>.

<sup>345</sup> See e.g. Article 2 of the Basic Care Act Salzburg, Official Gazette Salzburg Nr 35/2007, 30 May 2007 or Official Gazette Upper Austria Nr. 15/2007, 15 February 2007.

refugees can no longer live in the Basic Care centre. It is also problematic that provinces such as **Styria** refrain from granting any basic care to asylum seekers in the family reunification process. According to information from Caritas Styria, the person with asylum status is no longer in basic care, but usually receives minimum benefits (*Mindestsicherung*). This income is taken into consideration when calculating the benefits to be allocated to the family members coming to Austria within the framework of family reunification. As a result, the arriving family members are not entitled to basic care.<sup>346</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 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 bigger facilities are 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 but separate toilets and bathrooms are foreseen. Vienna also has centres for victims of trafficking and LGBTI persons. **Salzburg** also has a reception centre for single women and single parents, and one for LGBTI persons.

### 3. Reception of handicapped and seriously ill persons

#### 3.1. Federal centres

Traumatised or ill asylum seekers may be cared for in facilities of the state and 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. There is one special care centre for people in need of special medical care at the federal level:

- ❖ The special care centre is located in **Graz Andritz** with a maximum capacity of 100 persons;
- ❖ the centre in **Gallspach** with a capacity of 110 persons has been closed beginning 2019

In addition, where necessary, persons with special needs are accommodated in separate rooms or houses in the Federal Reception Centre in **Traiskirchen** during the admissibility procedure.<sup>347</sup> Special care centres for 25 persons in a barrier-free building (house 1) are provided in Traiskirchen.

The specific allocation of a person in need of special care to the particular special care centre is clarified in each individual case on the basis of the specific health situation. On the basis of a specific care concept, the medical cases are placed in the appropriate care facility.

The special care centre **Graz Andritz** offers the best possible medical care for patients with regular or special care and treatment needs e.g. cancer patients, persons with cardiovascular diseases, epileptics, diabetics, patients in the drug replacement program etc., due to the optimal accessibility of the Graz Country Hospital. It has a specially equipped doctor's station. In addition to medical staff, the care provider ORS is responsible for the care of the asylum seekers who are housed there, and also offers an operational manager, 22 social assistants as well as a trained clinical psychologist.

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<sup>346</sup> FRA, *Monthly data collection: September 2016*, available at: <http://bit.ly/2k2wcko>, para 1.5.3.  
<sup>347</sup> Information provided by the Ministry of Interior, 26 January 2018.

### 3.2. Centres at provincial level

Special care centres exist in different provinces:

**Vorarlberg:** has places for persons with need of special treatment in a nursing home and in facilities of NGOs like *Kolpinghaus*.

**Lower Austria:** There are some places in an emergency centre and 6 centres for severely traumatised unaccompanied children.

**Tyrol:** The Basic Care system does not offer special care places. The concerned persons are looked after by a Case & Care team in various accommodation facilities. The most common criteria for support from the Case & Care team are psychiatric, mental and physical conditions or disabilities.

**Upper Austria:** People who do not need special accommodation but have an increased need for care (e.g. dialysis patients) are housed exclusively in reception facilities of nonprofit organizations. Depending on the need for care, the "regular" daily rate increases up to €23. As of 9 March 2017, there were 252 people with special needs accommodated in Upper Austria.<sup>348</sup> Moreover, in April 2017, a total of 12,500 persons received Basic Care in Upper Austria.

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 daily rate of increased care varies in the federal provinces. Organisations providing reception receive a maximum €44 according to the number of hours of care provided per week. The need has to be assessed by a medical report. Caritas Styria has received several asylum-seekers with severe illnesses (cancer, handicap) but does not receive more than the regular daily rate of €19.

## F. Information for asylum seekers and access to reception centres

### 1. Provision of information on reception

The information leaflets in the departure centre 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 obligation to declare resources or source of income, the restricted movement and the meaning of the different documents such as the green card. Information leaflets are available in most of the languages spoken by asylum seekers.

The residence restriction applicable since 1 November 2017 is notified in writing in all federal provinces. Asylum seekers are required to sign the notice (see [Freedom of Movement](#)). NGOs and private operators produced information sheets in most needed languages. There have been a number of cases where asylum seekers have been sanctioned for violating their residence restrictions, including in cases where the concerned person was visiting friends in Vienna and did not change his or her residence. Apparently, the police was not sufficiently informed about this new restriction of residence. Apart from cases in Vienna and Lower Austria, the residence restriction may be of little relevance.

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<sup>348</sup> Regional Court of Audit of Upper Austria: Flüchtlingshilfe – Grundversorgung, June 2017; available in German at: <https://bit.ly/2SyZLzZ>.

The government plans to issue a compulsory presence order at federal reception centres. This restriction of freedom of movement should be enforced by the house rules. Asylum seekers should not leave the reception center during the night between 22:00pm and 6:00am. Although concerns on the breach of fundamental rights have been raised, the Ministry of Interior has announced it will control more strictly the compliance with the house rules.<sup>349</sup>

In the reception centres, asylum seekers are informed about the house rules, including information about their duties and sanctions.<sup>350</sup> The house rules in the reception centres of **Styria** for example are available at the legal information system. Information is 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 the asylum seeker. The federal province of **Carinthia** has published the latter on its website.<sup>351</sup> In the states of **Lower Austria**,<sup>352</sup> **Salzburg**,<sup>353</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>354</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**. 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>355</sup> Although they have been reduced in number, volunteers are still active in 2018 and assist asylum seekers in various aspects, such as German language lessons and conversation, explaining duties and rights, helping with the family reunification procedure or to get an affordable flat or a job after the asylum procedure is terminated. Some initiatives organise petitions and press reports against deportations to Afghanistan and other countries.

## 2. 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/departure centre, 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

<sup>349</sup> Orf, 17. Dezember 2018: Asyl: Verfassungsjuristen zu Anwesenheitspflicht skeptisch; available in German at: <https://bit.ly/2HsbGJl>.

<sup>350</sup> Stmk. Grundversorgungsgesetz-Durchführungsverordnung, available in German at: <https://bit.ly/2CfJ2rs>.

<sup>351</sup> Province of Carinthia, *Erstinformation für Asylwerber. Grundversorgung Kärnten*, available at: <http://bit.ly/1lfb7h>.

<sup>352</sup> City of Vienna, *Grundversorgung Wien*, available at: <http://bit.ly/1YqTAVV>. The Basic Care brochure for Lower Austria is available in 16 languages.

<sup>353</sup> Province of Salzburg, *Grundversorgung*; available at <http://bit.ly/1UKUkol>.

<sup>354</sup> Fonds Soziales Wien, *Wiener Grundversorgung. Die Beratungsstellen*, available at: <http://bit.ly/1cz0cQP>.

<sup>355</sup> E.g. information about accommodation: <http://asylwohnung.at/faq/>.

the Minister of Interior ("*Betreuunseinrichtung-Betreungsverordnung*") intending to secure order and preventing assaults to life, health or freedom and protecting the facility.<sup>356</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.

### G. Differential treatment of specific nationalities in reception

Basic Care is provided until the final decision is made, and then until departure or deportation. Authorities in **Lower Austria** requested asylum seekers who had received a final negative decision but had not left the country and lived in private accommodation, to move to an organised asylum centre, without the possibility to legally challenge this request. If they refused to do so, their social benefits would be cut. The official press release of the responsible provincial member of parliament of the Freedom Party stated that the aim of this measure was to ensure a "noticeable break in living conditions" as a consequence of non-participation in the return.

Asylum seekers who have not complied voluntarily within the 14-day deadline will receive an order from the BFA to go to a return center. Currently, there is a center at the airport in **Vienna / Schwechat** as well as in **Tyrol / Fieberbrunn** and both centers are run by the Ministry of the Interior. Increased return counseling should be carried out in these centers.

For asylum seekers whose application has been rejected and for whom the appeal has no suspensive effect, the right to basic care was removed during the appeal proceedings (see [Criteria and Restrictions to Access Reception Conditions](#)). Asylum seekers from safe countries of origin are particularly affected by this restriction. If an asylum seeker participates to the voluntary return, the entitlement to the Basic Care will be granted until the departure.

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<sup>356</sup> BGBl. II Nr. 2005/2 and 2008/146.

## Detention of Asylum Seekers

### A. General

#### Indicators: General Information on Detention

1. Total number of persons detained in 2018: <sup>357</sup>	5,252
2. Number of persons in detention at the end of 2018:	not available
3. Number of detention centres:	15
4. Total capacity of detention centres:	1,484 <sup>358</sup>

A total of 5,252 persons were detained throughout 2018.<sup>359</sup> Out of them, 4,803 were male detainees and 439 were female detainees. According to NGOs, detention of asylum seekers was ordered rarely.

There are 4 main detention centres currently operating in Austria: Vordernberg, Styria; Police Apprehension Centres (PAZ) Vienna Hernalser Gürtel, PAZ Vienna Rossauer Lände and Familienunterbringung Vienna Zinnergasse.

There are 11 smaller Detention Centres (PAZ) under the responsibility of the police – Bludenz, Eisenstadt, Graz, Innsbruck, Klagenfurt, Linz, Salzburg, St Pölten, Villach, Wels and Wiener Neustadt – that are now used for short term arrests. In most cases, detainees are transferred to the main centres after an average of 7 days.

In practice, asylum seekers are subject to detention mainly under Dublin procedures. Persons who submit a follow-up asylum application are detained as well. If a person applies for asylum while in detention, he or she may be detained during the admissibility procedure. Uncertainty surrounding detention regulations has been resolved following a ruling of the High Administrative Court regarding detention under the Dublin Regulation (see [Grounds for Detention](#)).

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. If the asylum application is processed as an inadmissible application a legal advisor has to counsel the asylum seeker before the interview and has to be present at the interview.

<sup>357</sup> There is no distinction between rejected asylum seekers and other foreigners without a residence permit. Detained asylum seekers include *both* applicants detained in the course of the asylum procedure and persons lodging an application from detention.

<sup>358</sup> This is the maximum capacity, which is however never reached. See: Court of Auditors (Rechnungshof): 'Vollzug der Schubhaft mit Schwerpunkt Anhaltezentrum Vordernberg', 2016, p.130

<sup>359</sup> Answer to parliamentary request, No.2633/AB, 21 March 2019.

## 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 apply for international protection at the police may be detained for up to 48 hours, without a detention order for safeguarding the first steps of the procedure and a security check.

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 1 September 2018. Detention may be ordered by the BFA to secure a return procedure, if a return procedure or deportation has to be secured in regard of an application for international protection and a “risk of absconding” exists and detention is proportionate. Furthermore, the FPG allows detention according to the Dublin III Regulation. Since September 2018 asylum seekers can be detained if they are considered as a threat to the public order or security. The recast Article 76 (2) FPG states: “Detention may only be ordered to enable the issuing of a measure terminating residence, provided that detention is appropriate and that the foreigner’s stay endangers public order or security in accordance with Article 67, and that there is a risk of absconding.”

Article 76 FPG defines the “risk of absconding” on the basis of a number of wide-ranging criteria, namely whether:<sup>360</sup>

1. The person has avoided or hampered a deportation order;
  - 1a. The person has not complied with the obligation to obtain a travel document for his or her removal;<sup>361</sup>
2. The person has violated a travel ban;
3. An enforceable expulsion order exists and the person has absconded during the asylum procedure or during the removal procedure;
4. The person makes a subsequent application without right to remain;
5. The person is in pre-deportation detention at the time he or she lodges the application;
6. It is likely that another country is responsible under the Dublin Regulation, namely as the person has lodged multiple applications, tried to travel to another member state, or it can be assumed that, based on past behaviour he or she intends to travel on to another member state;
7. The person does not comply with alternatives to detention;
8. The person does not comply with residence restrictions, reporting duties and designated accommodation or similar instructions;<sup>362</sup>
9. 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

<sup>360</sup> Article 76(3) FPG.

<sup>361</sup> Article 76(3)(1a) FPG, in force as of 1 November 2017, citing Article 46(2)-(2a) FPG.

<sup>362</sup> Article 76(3)(8) FPG, in force as of 1 November 2017.



76(3) FPG are non-exhaustive, thereby leaving undue discretion to the authorities with regard to identifying a “risk of absconding” and applying detention.

So far, it is difficult to assess the practice of the authorities with regard to the use of detention grounds. Official statistics do not distinguish between the different detention grounds. In the detention centres of **Vordernberg** and **Vienna**, the numbers of detentions have doubled in 2017 and have further increased in 2018.<sup>363</sup>

Arrest (i.e. detention without official order) is almost systematic during the 72 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.<sup>364</sup> When examining the proportionality of detention, criminal offences committed by the applicant must be taken into account, to assess whether the public interest is affected by the seriousness of the offences and to whether the public interest in speedy deportation outweighs the personal liberty of the individual.<sup>365</sup>

It is, however, mentioned that the BFA has to review the proportionality of detention every 4 weeks.<sup>366</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>367</sup> and the Constitutional Court (VfGH).<sup>368</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

<sup>363</sup> Parliamentary request, 15 November 2018, available in German at: <https://bit.ly/2tPKUm6>.

<sup>364</sup> Article 76(2) FPG.

<sup>365</sup> Article 76(2a) FPG, in force as of 1 November 2017, citing Articles 2 and 28 Dublin III Regulation.

<sup>366</sup> Article 80(6) FPG.

<sup>367</sup> VwGH, Decision Ra 2013/21/0008, 2 August 2013.

<sup>368</sup> See e.g. VfGH, Decision B1447/10, 20 September 2011.

and must be proportionate.<sup>369</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>370</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>371</sup>

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.

However, in practice, alternatives to detention are very rarely used. Alternatives to detention were applied only in 270 cases per year between 2016 and 2018.<sup>372</sup>

In **Vienna Zinnergasse**, alternatives to detention are provided for vulnerable persons, especially for families. However, families are detained 72 hours prior to their removal and other vulnerable persons (e.g. people with mental illnesses) are detained in regular detention facilities, unless a psychiatrist certifies that this is not appropriate. Verein Menschenrechte Österreich (VMÖ) is contracted to provide care and advice to these detainees.

### 3. Detention of vulnerable applicants

#### Indicators: Detention of Vulnerable Applicants

1. Are unaccompanied asylum-seeking children detained in practice?  
 Frequently  Rarely  Never
- ❖ If frequently or rarely, are they only detained in border/transit zones?  Yes  No
2. Are asylum seeking children in families detained in practice?  
 Frequently  Rarely  Never

Children under the age of 14 cannot be detained. Therefore, families with young children are confined for 72 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>373</sup> Between 2016 and 2018, an average of 26 minors aged between 16 and 18 years old were detained.<sup>374</sup> In 2018, 27 minors aged between 16 and 18 years old were detained, out of which 25 were male and 2 were female.<sup>375</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

<sup>369</sup> Article 13 FPG-DV.

<sup>370</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>371</sup> Article 77(4) FPG.

<sup>372</sup> Parliamentary request, 9 September 2018, available in German at: <https://bit.ly/2SGqZQR>.

<sup>373</sup> Article 77(1) FPG.

<sup>374</sup> Parliamentary request, 15 November 2018, available in German at: <https://bit.ly/2tPKUm6>.

<sup>375</sup> Answer to parliamentary request, No 2633/AB, 21 March 2019.

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>376</sup>

In the case of a child who was stopped by police and taken to the **Zinnergasse** centre, the age examinations carried out by the public medical officer resulted in setting an age of 18 years with a fluctuation range of 2 years, without a multifactor medical age assessment. The minor was transferred to the detention centre, applied for asylum and authorised Diakonie for his legal representation. However, the complaint against detention was dismissed in August 2016, arguing that he could not give power of attorney as a minor.<sup>377</sup> Since the relevant interrogation of the police, in which deportation (*Schubhaft*) was ordered before his application for asylum was submitted, his legal representative for all further proceedings before the BFA and the Federal Administrative Court were the youth welfare agencies in whose district the minor is staying is competent. However, the latter did not wish to join the complaint lodged by Diakonie.

#### 4. Duration of detention

##### Indicators: Duration of Detention

- |  |           |
|--|-----------|
| 1. What is the maximum detention period set in the law (incl. extensions): | 18 months |
| 2. In practice, how long in average are asylum seekers detained?           | n/a       |

Detention is only permissible for as short a period as possible,<sup>378</sup> and cannot exceed 6 months for adults,<sup>379</sup> and 3 months for children over the age of 14.<sup>380</sup> Prior to November 2017, these maximum time limits were 4 months and 2 months respectively. There is also a possibility of exceptional extensions up to 18 months while before November 2017 it was 6 months within 18 months.<sup>381</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>382</sup>

Figures on the average duration of detention of asylum seekers in general are not available. The average duration of detention in the detention centre of **Vordernberg** was 25 days from 1 January to 7 May 2017.<sup>383</sup> In 2018, the average duration of detention of minors between 16 and 18 years of age was 25,4 days.<sup>384</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.

<sup>376</sup> BVwG, Decision W191 2011159-1, 27 August 2014, available at: <http://bit.ly/1ALJF7Q>.

<sup>377</sup> BVwG, Decision W117 2131589-1, 10 August 2016, available at: <http://bit.ly/2lnqwlZ>.

<sup>378</sup> Article 80(1) FPG.

<sup>379</sup> Article 80(2)(2) FPG.

<sup>380</sup> Article 80(2)(1) FPG.

<sup>381</sup> Article 80(4) FPG.

<sup>382</sup> Article 80(5) FPG.

<sup>383</sup> Ministry of Interior, Reply to parliamentary question 12937/J (XXV.GP), 27 June 2017, available in German at: <http://bit.ly/2Cc6bfT>.

<sup>384</sup> Answer to parliamentary request, No 2633/AB, 21 March 2019.

## 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

The detention centres currently operating are:

Number of detainees in the main detention centres			
Centre	Male	Female	Minors aged 16-18 years old
Vordernberg Immigration Detention Centre	1,664	–	3
Vienna Roßauer Lände	980	432	4
Vienna Hernalser Gürtel	3,844	102	23
Zinnergasse	4	1	1

Source: Answer to parliamentary request, No 2633/AB, 21 March 2019.

Furthermore, other police facilities (PAZ) that have previously been used as detention places are now used for arrest for a period not exceeding 7 days. Following table provides an overview of their activities, although the numbers are often overestimated as the same person might have been detained in different PAZ facilities.

Number of arrested persons in the different police facilities (PAZ)		
Centre	Male	Female
PAZ Bludenz	101	8
PAZ Eisenstadt	29	1
PAZ Graz	124	10
PAZ Innsbruck	538	29
PAZ Klagenfurt	494	37
PAZ Linz	204	9
PAZ Salzburg	816	54
PAZ St. Pölten	26	-
PAZ Villach	330	23
PAZ Wels	38	4

Source: Answer to parliamentary request, No 2633/AB, 21 March 2019.

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>385</sup> The Minister of Interior explained in response to a parliamentary request that G4S is to assist the police.<sup>386</sup> A series of trainings have been organised for the staff of the centre; according to a report in Der Standard, 36 hours were dedicated to human rights issues.<sup>387</sup>

The original goal of the Federal Government to set up a “competence centre” for detention with 250 detention places and thus to ensure efficiency improvements in aliens police measures has not been achieved, according to a 2016 report of the Court of Auditors. The decision for the location of **Vordernberg** was not based on “traceable strategic and economic planning”, the auditors said. Around 80% of deportations were carried out via border crossing points in close proximity to the police stations in **Vienna**. This alone led to clear disadvantages of the location for the profitability and practicality of the centre located in **Styria**. The average occupancy rate of the police detention centres fell by 86%, between 357 and 52 people per day, between 2010 and 2015. Compared to other detention centres, such as **Vienna** where the daily cost of detention is 207€, the costs per day of imprisonment in **Vordernberg** are significantly higher, reaching 834€. The Court recommended a new approach to the detention system.<sup>388</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 and unaccompanied children. In twelve family apartments, families are detained after their deportation date has already been established. They spend as much as 48 hours there.

One floor of the same building is used for less coercive measures and has 17 housing units, one of which is equipped for disabled persons. They are allowed to leave the centre during the day.<sup>389</sup>

At the **Vienna Schwechat Airport**, the EAST/departure centre is under the responsibility of the border police. Caritas Vienna had a contract to provide care for asylum seekers waiting for transfer to **Traiskirchen** or for the final decision on their application. The contract was not prolonged in 2017 and ORS, the company contracted by the Ministry of Interior to provide care to asylum seekers, now provides care at the airport.<sup>390</sup>

## 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 |

<sup>385</sup> Der Standard, *Securitys auf Rundgang in der neuen Schubhaft*, 2 April 2014, available at: <http://bit.ly/1dgpJ1Y>.

<sup>386</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>387</sup> Der Standard, *Securitys auf Rundgang in der neuen Schubhaft (Security on tour in the new detention centre)*, 2 April 2014, available at: <http://bit.ly/1dgpJ1Y>.

<sup>388</sup> Court of Auditors, *Vollzug der Schubhaft mit Schwerpunkt Anhaltezentrum Vordernberg*, 2016/22, available at: <http://bit.ly/2kNGiKi>.

<sup>389</sup> Sonja Jell, ‘Alternative zur Schubhaft’, *Öffentliche Sicherheit* 5-6/12, available at: <http://bit.ly/2klLKVq>.

<sup>390</sup> Der Standard, ‘Aus für Caritas-Flüchtlingsbetreuung am Flughafen’, 13 January 2017, available in German at: <http://bit.ly/2kmxmsn>.

There were still important differences between the different detention facilities in 2018. While no major dysfunction or maladministration was reported in **Vordernberg**, there have been only few positive developments in the two major **Viennese** detention facilities. Of particular concern is the fact that people are still being detained in cells during the day, instead of open areas.

Moreover, social counselling is not foreseen. Nevertheless, the information leaflet provided to detainees calls the activities taking place in the centre “social counselling”. NGOs receive funding under the AMIF to provide advice on voluntary return in detention centres. Verein Menschenrechte Österreich (VMÖ) provides such advice in the detention centres in Vienna, Vordernberg. VMÖ is present in detention centres on a regular basis. Furthermore, asylum seekers and other foreigners subject to a removal order are visited by the appointed legal adviser, to assist with the appeal against the rejection of the asylum application, removal order or complaints against the detention order. UNHCR is not regularly present in detention centres.

The Austrian Ombudsman Board (AOB) has been responsible for protecting and promoting human rights in the Republic of Austria since 1 July 2012 and figures as the Austrian National Preventive Mechanism (NPM). In 2017, the NPM Commissions conducted 21 visits, including to police detention centres, the **Vordernberg** detention centre, the **Eisenstadt** competence centre and the **Zinnergasse** family shelter. In 2018 the NPM published a report in which it criticised the detention conditions in police detention centres.<sup>391</sup> In its report, the NPM made several recommendations on the detention in single cells and specially secured cells, on the detention of persons awaiting their forced return in open centres, as well as on visiting rules and visiting hours. The NPM found that the recommendations of May 2016 had not been fully implemented in 2017..

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. In case there is a high probability of a health risk due to hunger strike, asylum seekers are usually released from detention. Detainees on hunger strike should only be placed in isolation if the necessary medical treatment cannot be provided at the open detention center. In **Vordernberg**, there are two types of doctors: doctors who work alongside police authorities and help determining whether detention can be continued or not, and regular doctors who only provide care to the detainees. The system of having different doctors should be extended to other detention facilities, but is not applied in practice yet. The AOB (NPM) has further criticised the fact that medical treatment is not provided immediately in cases of mental illness or suicide risk.

As of January 2019, there is still no mechanism to identify vulnerable people in detention.

For many years and including in 2018, the conditions in the detention centres in **Vienna Hernalser Gürtel** and **Vienna Rossauer lände** are inappropriate, due to structural dysfunctions and cases of maladministration.

In its 2017 Annual Report that was published in 2018, the AOB formulated a list of recommendations necessary for the improvement of the detention facilities:<sup>392</sup>

- All police detention centres must have a sufficient number of single cells that are suitable for detainees in accordance with Section 5 or 5b (2) (4) of the Detention Regulation.

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<sup>391</sup> AOB, Annual Report 2017, available at: <https://bit.ly/2SLaenu>

<sup>392</sup> AOB, Annual Report 2017, available at: <https://bit.ly/2SLaenu>.

- The initial medical examination of prisoners held in specially secured cells must be conducted as soon as possible.
- Specially secured cells should have natural light, and all single cells must have natural and mechanical ventilation.
- All single cells must have an alarm button, which can be activated at any time.
- Single cells under Section 5 of the Detention Regulation must be equipped with a sink, hot and cold water, a sit-down toilet, a bed and a table with chairs.
- Security cells with tiles must have a (squat) toilet with flushing function, a heatable reclining surface, a mattress and firmly mounted furniture (bed, table, chairs).
- The technical surveillance of specially secured inmate cells should be carried out through video surveillance that is independent of any light source and protects the prisoner's privacy.
- Padded cells should be subject to a constant personal surveillance
- Security cells with tiles should be subject to surveillance at least every 15 minutes, and other single cells should be subject to surveillance at least every hour.
- The reason, commencement and end of detention in a single cell and the presence of a doctor during detention in a specially secured cell must be documented.
- Persons in detention pending forced return must be transferred to the open detention centre of the police station within 48 hours of admission. Exceptions should be applied only in cases agreed upon with the NPM. The doors in open detention centres should be open from 8 a.m. to 9 p.m.
- Detainees in hunger strike that are subject to a forced return measure should only be placed in isolation if the necessary medical treatment cannot be provided at the open detention center.
- Section 5a of the Detention Regulation should be amended to codify and clarify the principles for detention pending forced return in open detention centres.
- The Federal Ministry of Interior must ensure that all detainees receive 30-minute visits at least twice a week. Visits during the weekend should also be authorised.
- Unless there are certain security concerns or unless prisoners in court custody are involved, visits with detainees should be in form of table visits. Measures should be taken to ensure that table visits are not disturbed – including by structural conditions.
- Physical contact of non-sexual nature should be allowed with visitors. A separate room with a table should be provided for visits with relatives who are minors.
- All detainees should be granted access to the outside world through radios and TV sets in collective rooms and by offering printed media (including in foreign languages).
- Except for detainees in specially secured cells, detained persons should be able to use their own personal radio and TV set in their cells.
- Detainees should be offered at least one hour of outdoor exercise per day. The interior and exterior areas of the police detention centre should be equipped for this purpose.
- Adequate and functioning (sports) equipment and board games should be provided, and detainees should be allowed to use leisure-time offered externally.
- The access of detainees to hygienic sanitary facilities should be ensured.
- Privacy must be ensured through structural or organisational measures.
- Toilets used by several inmates must be separate from the rest of the inmate's cell.
- The mattresses and textiles issued to detainees must be clean.
- Detainees should be able to shower at least twice a week or to shower on a daily-basis under special circumstances. Detainees must be informed of their opportunity to shower.
- All detainees must be given access to hygiene articles and women must be provided with the necessary hygiene articles during menstruation.”

It remains to be seen whether these recommendations will be implemented throughout 2019.

### 3. Access to detention facilities

#### Indicators: Access to Detention Facilities

1. 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 |

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 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 centre of **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 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.

## 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?  Yes  No
2. If yes, at what interval is the detention order reviewed?<sup>393</sup> 4 months, then 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>394</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*.

<sup>393</sup> This refers to judicial review of detention conducted by the BVwG. The BFA reviews detention every 4 weeks.

<sup>394</sup> Article 76(3) FPG.



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>395</sup>

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>396</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 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-operates with the Ministry of Interior. The law contains only the obligation for the legal adviser to take part in hearings and to represent the asylum applicant, if the person wishes so.<sup>397</sup> This was also underlined in a recent ruling of the Supreme Administrative Court, which concluded that the legal provision according to which lawyers have to attend the oral proceedings at the request of the foreigner "can only be understood as meaning that the lawyer's participation in the hearing must be" on behalf of the applicant", and thus has to act as a representative.<sup>398</sup>

Legal advice shall be appointed according to Articles 51-52 BFA-VG in return procedures, detention and apprehension orders.<sup>399</sup> However, the right to receive legal advice for people benefiting from alternative measures to detention was cancelled as of 1 January 2014.

<sup>395</sup> Article 22a(3) BFA-VG.

<sup>396</sup> VfGH, Decision E4/2014-11, 26 June 2014.

<sup>397</sup> Article 52(2) BVA-VG.

<sup>398</sup> VwGH, Decision No Ra 2016/21/0152, 23 February 2017.

<sup>399</sup> VfGH, Decision E4/2014-11, 26 June 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>400</sup> As discussed above, this organisation also receives funding from the Ministry of Interior for providing assistance to authorities in Dublin proceedings and in cases of voluntary return.

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>401</sup> NGOs in Austria suspect that detainees were not fully informed about the possibility of legal 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). This was also a particular concern in 2018. 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 2 weeks. 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 2 weeks for the appeal, it could be difficult to organise effective legal assistance.

## E. Differential treatment of specific nationalities in detention

No differential treatment on the basis of nationality has been reported.

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<sup>400</sup> Edith Meinhart: Mr. Gongo. Profil 40, October 2007.

<sup>401</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 Verein Menschenrechte Österreich who prepares detainees for the return had no legitimacy to give legal advice. See also VfGH, Decision U489/2013, 26 February 2014.

## Content of International Protection

### A. Status and residence

#### 1. Residence permit

##### Indicators: Residence Permit

1. What is the duration of residence permits granted to beneficiaries of protection?
  - ❖ Refugee status 3 years
  - ❖ Subsidiary protection 1 year, renewable by 2 years
  - ❖ Humanitarian protection 1 year

Persons who are recognised as **refugees** in Austria obtain a residence permit for three years.<sup>402</sup> If the situation in the country of origin is more or less the same and the status still needed, it is prolonged to an unlimited residence permit *ex officio*. If the country of origin information (COI) indicate that the refugee may return safely, the **Cessation** procedure starts.<sup>403</sup>

Persons with **subsidiary protection** status get a residence permit for one year.<sup>404</sup> Renewal has to be applied for at the BFA, if protection needs continue to exist, the residence permit is prolonged for two years.<sup>405</sup>

The renewal of residence permits can take time, but the right to remain exists until the BFA decides on an application for renewal. The subsidiary protection status used to be prolonged, but this practise has changed in 2018. The lack of valid documentation pending renewal could have a negative impact on access to jobs or accommodation. The renewal has to be applied before the right to remain expires, but should not be applied more than 3 months before that date. If the application is not submitted in time, the stay becomes illegal. This may result in a longer waiting period for the long term residence permit.

#### 2. Civil registration

Registration of child birth takes place at the district administrative or municipal authority. This is done directly by state hospitals as soon as a child is born. If the parents of the new born are not married, or if the husband is not the father, an affidavit is required from the biological father to recognise paternity. Both parents are given joint custody of the child if they are married; if not, custody is granted to the mother unless the parents decide on joint custody.

As regards marriage registration, the Register must determine the capacity of the future spouses to enter into marriage during a hearing, on the basis of the documents submitted. These include: an official identification document with a photograph; a document equivalent to a copy of the birth certificate; and proof of citizenship. An affidavit may be given if the person cannot provide these documents. Practice varies between local Registers, with some demanding all the aforementioned documents while others are more flexible.

Civil registration in Austria is necessary for people to have access to health insurance, child and family allowances and other social rights. In addition, the family allowance is granted only after asylum has been granted to the baby. This procedure may take several months.

<sup>402</sup> Article 3(4) AsylG.

<sup>403</sup> *Ibid.*

<sup>404</sup> Article 8(4) AsylG.

<sup>405</sup> *Ibid.*

### 3. Long-term residence

#### Indicators: Long-Term Residence

1. Number of long-term residence permits issued to beneficiaries in 2018: 498

Long-term resident status for third-country nationals is called “*Daueraufenthalt EU*”.

To obtain it, a beneficiary of international protection must fulfil the following conditions:

- ❖ Lawful residence in Austria for the last 5 years preceding the application. Half of the period between the application for international protection and the awarding of the refugee status or subsidiary protection is counted for the five year period. When the duration of the asylum procedure, was longer than 18 months, the whole period is counted.<sup>406</sup>
- ❖ Successful completion of “Module 2” of the so-called agreement on integration (“*Integrationsvereinbarung*”), entailing knowledge of German at B1 level.
- ❖ General requirements for obtaining a residence permit, namely:
  - A regular income of €933 or more if the cost of rent is higher than €295 for a single person in 2019;
  - Sufficient health insurance;
  - Suitable accommodation; and
  - The person must not present a security risk.

There is no difference between refugee status and subsidiary protection status.

In practice the responsible authority is usually the district council (*Bezirkshauptmannschaft*). There are exceptions for some cities such as **Vienna** where the responsible authority is MA 35, whereas in **Graz** it is the Styrian Land government. The costs for the procedure amount to about €170.

498 beneficiaries of international protection obtained a long-term resident status in 2018.<sup>407</sup>

### 4. Naturalisation

#### Indicators: Naturalisation

1. What is the waiting period for obtaining citizenship?
  - ❖ Refugees 10 years
  - ❖ Subsidiary protection beneficiaries 15 years
2. Number of citizenship grants to beneficiaries in 2018: 11,086

**Refugees** are entitled to naturalisation after 10 years of lawful and uninterrupted residence in Austria, which includes the period of stay during the asylum procedure.<sup>408</sup> The length of the legal stay has been extended from 6 to 10 years in September 2018.<sup>409</sup> UNHCR and NGOs criticized this prolongation, because the prospect of rapid naturalization promotes a successful integration process and is desirable for strengthening the cohesion of society as a whole.<sup>410</sup> Citizenship must be granted to a person entitled to asylum after 10 years of residence if the Federal Office for Aliens and Asylum, upon request, notifies that no cessation procedure under the Asylum Act 2005 has been initiated nor are the conditions for initiating such a procedure. For beneficiaries of subsidiary protection, the waiting period is 15 years.

<sup>406</sup> Article 45(12) Residence Act.

<sup>407</sup> Ministry of Interior, *Residence permit statistics*, 2018, available at: <https://bit.ly/2UxMXqJ>.

<sup>408</sup> Article 11a(4)(1) and (3) Citizenship Act (StbG).

<sup>409</sup> Article 11(7) Naturalization Act.

<sup>410</sup> *Tiroler Tageszeitung*, UNHCR kritisiert österreichische Flüchtlingsnovelle, 9 May 2018, available in German at: <https://bit.ly/2UYyHad>.

In order to be naturalised, a beneficiary of protection must also demonstrate:

- Sufficient income in the last 3 years;
- Proof of knowledge (B1) of the German language;
- Successful completion of integration course (*Werteskurs*);
- Absence of a criminal record (*Unbescholtenheit*).

Refugees and Beneficiaries of subsidiary protection may have faster access to naturalisation in less than 15 years of residence under certain conditions. They may shorten their waiting period if: (a) they have acquired B2-level knowledge of German; or (b) have acquired B1-level knowledge and can prove efforts of personal integration. The at least three-year voluntary work or activity in the social field must serve the common well-being and represent an integration-relevant added value in Austria. If they fulfil these criteria and the general conditions, they may apply after 6 years of residence. In any other case, it is easier for beneficiaries of subsidiary protection to obtain naturalisation by obtaining long-term resident status after 5 years (see [Long-Term Residence](#)); then, they may be naturalised after 10 years.

As opposed to 2016 and 2017 where respectively 1,244 and 1,252 refugees received citizenship after 6 years of residence due to integration efforts,<sup>411</sup> only one person with asylum-status has received citizenship in 2018 under the new law which extended the waiting period from 6 to 10 years. 1,086 refugees received citizenship in 2018.

## 5. Cessation and review of protection status

### Indicators: Cessation

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the cessation procedure?  Yes  No
2. Does the law provide for an appeal against the first instance decision in the cessation procedure?  Yes  No
3. Do beneficiaries have access to free legal assistance at first instance in practice?  Yes  With difficulty  No

The Asylum Act contains the provisions on cessation and withdrawal of international protection in a single provision: Article 7 for refugees and Article 9 for subsidiary protection beneficiaries.

**Refugee status** can be ceased if the conditions in Article 1C of the Refugee Convention are met, or if the refugee is established in another country.<sup>412</sup> **Subsidiary protection** can be ceased where the conditions on which status was granted no longer exist, where the person is established in another country, or obtains the nationality of another country and return thereto would not violate the principle of *non-refoulement*.<sup>413</sup>

### Cessation procedure

Where the BFA deems that the conditions in the country of origin have undergone a change relevant to a beneficiary's fear of persecution, it shall inform the person *ex officio* of the initiation of a cessation procedure, irrespective of whether the person has a permanent or temporary residence permit.<sup>414</sup>

<sup>411</sup> Statistics Austria, Einbürgerungen, available in German at: <https://bit.ly/2TOTPzJ>.

<sup>412</sup> Article 7(2)-(3) AsylG.

<sup>413</sup> Article 9(1) AsylG.

<sup>414</sup> Article 7(2a) AsylG.

The authorities must assess whether return would be contrary to Articles 2, 3 or 8 ECHR and, in such a case, issue a residence permit. Where return would amount to *refoulement*, or in case of practical obstacles, the BFA is responsible for issuing a tolerated status card (*Duldungskarte*). In 2016, 279 *Duldungskarten* were issued, although it is not clear how many of those were issued following cessation of international protection. There were 15 tolerations for Afghan citizens, who were previously probably entitled to protection.<sup>415</sup> In 2018, 179 persons received a tolerated status card.<sup>416</sup>

If a person has held refugee status for 5 years, refugee status may be terminated only after the person has received a residence permit under a different immigration status.

Cessation procedures for beneficiaries of the subsidiary protection are often initiated by the BFA when they apply for a prolongation of their residence permit. Persons originating from Afghanistan are particularly concerned by these procedures. The Administrative Court stated that a subsidiary protection status, that was granted because of the minority of a person, can be withdrawn once the minor becomes an adult and commits a crime.<sup>417</sup>

A withdrawal procedure is further initiated when entering the country of origin or applying for a passport from the country of origin. The entry of persons entitled to protection in Austria with a Convention or Foreigner passport is reported by the border police to the BFA. As of today, it is not clear yet if every case of entry from third countries is reported.

From January to October 2018, 3,869 withdrawal procedures were initiated.<sup>418</sup> Persons originating from following countries were concerned:

- Afghanistan: 1,202
- Russia: 775
- Syria: 656
- Iraq : 346
- Somalia: 239
- Iran: 139
- Stateless persons: 94
- Armenia: 45
- Georgia: 37
- Serbia: 35
- Turkey: 33
- Kosovo: 32
- DRC: 20
- Ukraine: 19
- Azerbaijan: 15
- Other: 182

In 2018 the refugee status was terminated in 450 cases and the subsidiary protection status in 475 cases.<sup>419</sup>

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<sup>415</sup> Ministry of Interior, Reply to parliamentary question 12114/AB, 30.05.2017(XXV.GP18 April 2016, available in German at: <http://bit.ly/2kmW2Ri>.

<sup>416</sup> Answer to parliamentarian request 2483/AB XXVI. GP, 27 February 2019.

<sup>417</sup> VwGH, Decision Ra 2018/18/0343, 21 June 2018.

<sup>418</sup> Answer to parliamentarian request, No 3299/AB-BR/2018, 27 November 2018.

<sup>419</sup> Information provided by the Ministry of Interior on 1 February 2019.

## 6. Withdrawal of protection status

### Indicators: Withdrawal

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the withdrawal procedure?  Yes  No
2. Does the law provide for an appeal against the withdrawal decision?  Yes  No
3. Do beneficiaries have access to free legal assistance at first instance in practice?  
 Yes  With difficulty  No

**Refugee status** is withdrawn where the refugee should have been excluded under the exclusion clauses,<sup>420</sup> or is convicted of a criminal offence.<sup>421</sup> Subsidiary protection is withdrawn if the exclusion clauses in Article 1F apply, or the beneficiary poses a threat to public order or national security, or has been convicted of a serious crime.<sup>422</sup> A withdrawal procedure shall be initiated by the BFA where a subsidiary protection beneficiary is under prosecution for such a crime, and the application of the withdrawal provisions is likely.<sup>423</sup> To that end, the BFA as well as the BVwG receive information on the prosecution from the Prosecutor's Office and the Court.

Article 7(2) AsylG, as amended by the alien law reform (FrÄG 2017) entering into force on 1 November 2017, permits withdrawal proceedings to be initiated where the beneficiary is suspected of having committed a criminal offence.<sup>424</sup>

As mentioned in [Cessation](#), there is no systematic distinction between the two procedures. When initiating a withdrawal procedure following a conviction, the BFA must weigh the individual situation of the beneficiary upon return against the implications of his or her continued residence for public order and security. The same procedural guarantees are applied as for the [Regular Procedure](#) for granting protection. Since 1 September 2018, young offenders are no longer protected from losing their protection status.

The VwGH referred a preliminary ruling to the CJEU asking whether the subsidiary protection can be withdrawn if the authorities' knowledge of the circumstances that led to the grant of a protection have changed – even though these circumstances did not change themselves.<sup>425</sup>

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<sup>420</sup> Article 7(1)(1) AsylG.

<sup>421</sup> Article 7(2) AsylG.

<sup>422</sup> Article 9(2) AsylG.

<sup>423</sup> Article 9(3) AsylG.

<sup>424</sup> For a critique, see Diakonie, *Stellungnahme der Diakonie Österreich zum Entwurf betreffend ein Fremdenrechtsänderungsgesetz 2017*, 18 January 2017, available in German at: <http://bit.ly/2kwEDoK>.

<sup>425</sup> CJEU, *Bilali*, Case C-720/17, 2 March 2018.

## B. Family reunification

### 1. Criteria and conditions

#### Indicators: Family Reunification

- |  |   |
|--|---|
| 1. Is there a waiting period before a beneficiary can apply for family reunification?  |   |
| ❖ Refugee status   | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| ❖ Subsidiary protection  | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |
|  | 3 years   |
| 2. Does the law set a maximum time limit for submitting a family reunification application?<br>For refugees be exempt from material conditions | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |
| ❖ If yes, what is the time limit?  | 3 months  |
| 3. Does the law set a minimum income requirement?  |   |
| ❖ Refugee status   | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| ❖ Subsidiary protection  | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |

#### 1.1. Eligible family members

Family members eligible for family reunification include:<sup>426</sup>

- Parents of a minor child;
- Spouses and registered partners, where the marriage / partnership existed before fleeing the country of origin. In case concluded in another country, the marriage / partnership must be legally valid in the country of origin;
- Children who are minors at the time of the application;

According to the VwGH, siblings are not considered a family member eligible for reunification.<sup>427</sup>

Beneficiaries of international protection who only marry post-flight cannot reunite with their spouses under the AsylG. In addition to the material conditions set out below, spouses must also pass a German exam before entering Austria. They are also subject to the annual quota on family reunification.

On 12 April 2018, the CJEU ruled in case *A. and S.*, which concerned a request for a preliminary ruling from the Dutch Court of The Hague on the right to family reunification of unaccompanied children who reach the age of majority after lodging an asylum application. The CJEU concluded that an asylum applicant who is below the age of 18 at the time of his or her entry into the territory of a Member State and of the introduction of his or her asylum application in that State, but who, in the course of the asylum procedure, attains the age of majority and is thereafter granted refugee status, must still be regarded as a “minor” for the purposes of that provision.<sup>428</sup> This judgement of the CJEU was implemented by the VwGH in its decision of 3 May 2018.<sup>429</sup> However, the VwGH saw no basis for changing its previous decision-making practice. If an unaccompanied minor attains the age of majority during the asylum procedure, the family status of the parents and thus the conditions for joining an asylum-entitled child who is an adult at the time of the decision, cease to apply.

The refusal to grant an entry title in the context of family reunification refers to proceedings that are regulated under the Settlement and Residence Act (NAG). The NAG further regulates the legal route for third-country nationals seeking to obtain a residence permit in Austria. Family members of persons

<sup>426</sup> Article 35(5) AsylG.

<sup>427</sup> VwGH, Decision Ra 2015/21/0230 to 0231, 28 January 2016; Ra 2016/20/0231, 26 January 2017.

<sup>428</sup> CJEU, Case C-550/16 *A. and S.*, Opinion of AG Bot of 26 October 2017.

<sup>429</sup> VwGH, Decision No Ra 2017/19/0609, 3 May 2018.



entitled to asylum may be granted, under certain conditions, a residence permit called "Red-White-Red-Card-Plus" in accordance with Article 46 NAG. This card allows the access to the labour market, is valid for one year and can be prolonged to 3 years.

Following on from reforms to restrict the right to family reunification in 2016, discussed below, a draft law on alien law reform (FrÄG 2017) included measures to require family members to cover the costs of proving family links, for instance through DNA tests, in order to be reunited with beneficiaries of international protection. The amendment, criticised for imposing more onerous hurdles on family members and for creating risks of rendering family reunification ineffective in practice,<sup>430</sup> was not adopted. Costs of DNA tests are refunded where these are ordered by the BFA.

The Administrative High Court emphasised that an application for family reunification cannot be dismissed on the ground that there are doubts on the family ties, without having informed the concerned persons about the possibility to undertake a DNA test.<sup>431</sup>

## 1.2. Waiting periods and material conditions

Family members of **refugees** can apply for an entry visa immediately after the status recognition of the sponsor. However, a number of restrictions have been put in place as of 1 June 2016. If the application is submitted to an Austrian representation within 3 months, no further requirements are imposed.<sup>432</sup> If it is submitted after the 3-month time limit has lapsed, a number of conditions are imposed: (a) sufficient income; (b) health insurance; and (c) stable accommodation.<sup>433</sup> These are material requirements set in line with requirements for other third-country nationals. No language knowledge is required for family reunification.

**Subsidiary protection** beneficiaries' family members can only submit an application after at least 3 years of the sponsor's recognition.<sup>434</sup> The aforementioned requirements – sufficient income, health insurance and accommodation – in force since 1 June 2016 are always applicable to subsidiary protection beneficiaries,<sup>435</sup> with the exception of unaccompanied children holders of subsidiary protection.<sup>436</sup>

The fact that a beneficiary of subsidiary protection has to wait three years before initiating a family reunification procedure has been ruled as non-discriminatory by the Constitutional Court<sup>437</sup>. The case concerned a 13-years-old unaccompanied minor from Syria who had received subsidiary protection in July 2016 and who had therefore to wait for 3 years to benefit from family reunification instead of 1 year. In its ruling, the Constitutional Court considered that differentiating between persons entitled to asylum and persons entitled to subsidiary protection did not pose a risk of unequal treatment, as they are evident differences between these two groups (e.g. with regards to the temporary right of residence).

NGOs have expressed concerns in relation to the time limit for submitting an application for family reunification, given that applications must be submitted personally to an Austrian embassy. However, waiting times for submitting an application at the moment are way over 3 months. In practice, applications submitted in writing are considered to be timely.

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<sup>430</sup> See e.g. Diakonie, *Stellungnahme der Diakonie Österreich zum Entwurf betreffend ein Fremdenrechtsänderungsgesetz 2017*, 18 January 2017, available in German at: <http://bit.ly/2kwEDoK>.

<sup>431</sup> VfGH, Decision Ra 2017/18/0131, 22 February 2018.

<sup>432</sup> Article 35(1) AsylG.

<sup>433</sup> *Ibid*, citing Article 60 AsylG.

<sup>434</sup> Article 35(2) AsylG.

<sup>435</sup> Article 35(2) AsylG.

<sup>436</sup> Article 35(2a) AsylG.

<sup>437</sup> VfGH, Decision E 4248-4251/2017-20, 10 October 2018.

This is despite the fact that the reform makes explicit reference to Article 8 ECHR in Article 35(4) AsylG, and the explanatory notes cite a ruling of the Administrative High Court that an application for a visa for family reunion with a person entitled to protection should be granted if this is necessary to maintain private and family life.<sup>438</sup>

It should be further noted that, in order to benefit from family reunification, the family members of persons entitled to asylum or subsidiary protection make an application at the Austrian embassy. In that regard, the BFA conducts a probability diagnostic for the granting of family reunification, during which the families ties are particularly examined. In 2018, the BFA has conducted a total of 3,068 of these probability evaluations.

The BFA processed 9,495 family reunification applications in 2016 and 7,612 in 2017.<sup>439</sup> In 2018, a total of 2,247 family reunification applications were processed and concerned following nationalities: Syria (946), Afghanistan (567), Somalia (263), Iraq (149), Iran (114), Others (235).<sup>440</sup>

The Austrian Red Cross, who also supports the family reunification of persons benefitting from a protection status, assisted 1,355 families in 2017, out of which 56% originated from Syria, 18% from Afghanistan and 9% from Somalia. However, the number of visas being delivered has fallen sharply in 2018: around 5,600 visas were issued in 2017, but the number decreased by 65% in 2018. There are currently around 750 applications under consideration.<sup>441</sup>

## 2. Status and rights of family members

Family members are entitled to at least the same status as the sponsor. However, upon arrival in Austria, they submit an application to the police to obtain such protection, and an assessment is carried out to inquire whether they may have their own reasons for seeking international protection.

In a ruling of November 2017, the VwGH stated that the principles of the Family Reunification Directive need not be complied with in the family procedure set out in Article 35 AsylG and that the BFA was not obliged to grant the family members international protection in the particular case, since Article 35 AsylG offers more favourable standards to the Directive.<sup>442</sup>

## C. Movement and mobility

### 1. Freedom of movement

Persons who were granted international protection are free to move and settle throughout the Austrian territory. However, in practice, freedom of movement might be restricted for certain beneficiaries when they depend on specific services (see Social Welfare). The restriction of residence that used to be applied to beneficiaries of subsidiary protection who were awaiting an appeal has been deleted by the recent amendment.

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<sup>438</sup> VwGH, Decision Ra 2013/22/0224, 11 November 2013.

<sup>439</sup> BFA, '2017: Das Jahr der Aufarbeitung', 11 January 2018, available in German at: <http://bit.ly/2FnCV4G>.

<sup>440</sup> Information provided by the Ministry of Interior.

<sup>441</sup> Die Presse, Familienzusammenführung: Immer weniger wollen nach Österreich, 6 February 2019, available in German at: <https://bit.ly/2GN3SBH>.

<sup>442</sup> VwGH, Decision Ra 2017/19/0218, 22 November 2017.

## 2. Travel documents

Since 2015, travel documents for beneficiaries of international protection are issued for a period of up to 5 years.<sup>443</sup> Refugees obtain a Convention travel document without further conditions, unless there are compelling reasons in terms of national security and public order against the issuance of a document,<sup>444</sup> whereas subsidiary protection beneficiaries must establish that they are unable to obtain a travel document from their country of origin.<sup>445</sup> A geographical limitation to travel covering the country of origin applies to documents for both protection statuses.

Article 94(2) FPG allows persons recognised as refugees in another country to apply for a Convention travel document in Austria.

The number of travel documents issued in 2018 is not available.

## D. Housing

### Indicators: Housing

1. For how long are beneficiaries entitled to receive basic care?	
❖ Refugee status	4 months
❖ Subsidiary protection	No time limit
2. Number of beneficiaries receiving basic care as of 31 December 2018	12,753

**Refugees** are entitled to Basic Care in the first 4 months after the recognition of their status. Beneficiaries of **subsidiary protection** have no temporal limit on receiving Basic Care. The only precondition is need.

Basic Care is organised accommodation in inns, boarding houses, reception centres of NGOs or of the respective federal province, or a rent subsidy when an asylum seeker rents a flat him or herself. The prevailing form of Basic Care is organised accommodation, except for **Vienna** where private accommodation prevails (see [Reception Conditions: Forms and Levels](#)).

At the end of 2018, a total of 3,007 refugees and 9,746 subsidiary protection beneficiaries received Basic Care, of which 57% resided in **Vienna**:

Beneficiaries of international protection in Basic Care: 31 December 2018			
Province / Federal centre	Refugee status	Subsidiary protection	Total
Departure centre Traiskirchen	0	1	1
Departure centre Thalham	3	0	3
Burgenland	55	152	207
Carinthia	117	322	439
Lower Austria	274	782	1,056
Upper Austria	450	812	1,262
Salzburg	68	255	323

<sup>443</sup> Article 90(1) FPG.

<sup>444</sup> VwGH, Decision 2013/21/0003, 16 May 2013. One example of such reasons was found in the case of a person convicted of international drug dealing: VwGH, Decision 2009/21/0340, 29 April 2010.

<sup>445</sup> Article 88(2a) FPG.

Styria	292	533	825
Tyrol	315	264	579
Vorarlberg	143	403	546
Vienna	1,290	6,222	7,512
<b>Total</b>	<b>3,007</b>	<b>9,746</b>	<b>12,753</b>

Source: Ministry of Interior, GVS statistics.

Support after the end of Basic Care is insufficient. Although there are some consultation services which give advice on searching for a flat and concluding a rental contract, there are no financial resources to actively help for a solution to the virulent accommodation problem. The rents in the private accommodation market have significantly risen. Recipients of Basic Care, which includes **beneficiaries of subsidiary protection** in a several provinces, cannot find adequate accommodation with a subsidy of €150 per month for renting a flat. Families in Basic Care receive €300. Financial support for refugees and beneficiaries of subsidiary protection who receive needs-oriented minimum basic income are slightly better off; the size of a family is taken into account and it is possible to either completely subsidise the rent (as is the case in **Tyrol**) or receive subsidies for the rent.

In **Vorarlberg**, refugees who receive a minimum income do not receive a housing compensation but are transferred to landlords directly through the social department. Single refugees receive the minimum income only if they live in shared flats. If a person entitled to asylum decides to live in his or her own apartment, the compensation will amount only to the costs of a shared room. Single persons receive up to 503€ for their rent. This is significantly higher compared to other federal states, where only 210€ are granted.<sup>446</sup> In **Tyrol**, housing costs are capped and are awarded as a contribution in kind. The benefits are based on the real estate price table. In **Vorarlberg**, there have been cuts in the allowances of people residing in shared apartments: they now receive 473€ instead of the previous 633€.

Moreover, refusing a flat assigned by the country's social department may result in the loss of housing benefits. This measure should also help the city of **Innsbruck**, which is currently preferred by refugees as a place of residence.

**Refugees** can also apply for social housing, when they are at risk of becoming homeless. Nevertheless, the waiting lists are long and an emergency flat is only sometimes available. Conditions like residence of 2 years at the same address in the city of **Vienna** make it more difficult to get a cheaper community flat. In many regions of Austria, there are not even any social housing schemes available. Refugees are usually excluded from the second possibility of cheap accommodations, co-operative flats, because they have to contribute to the construction cost and they lack the necessary capital.

In **Upper Austria**, the Landrat responsible for integration has announced that subsidised housing will also be available to recognised refugees<sup>447</sup>

In **Styria**, Caritas has developed a project to finance the housing costs of asylum seekers. A major hurdle is the deposit that refugees cannot afford when they have to move out of the basic care 4 months after their protection has been granted. Caritas Styria offers persons benefitting from a protection or holding a humanitarian residence permit interest-free loan guarantees. This is granted, however, only after verification of the financial situation and must be repaid in individually agreed rates.

<sup>446</sup> Der Standard, Vorarlberg und Tirol beschließen Westlösung für Mindestsicherung, 17 January 2017, available in German at: <https://bit.ly/2tkJb83>.

<sup>447</sup> OÖ Nachrichten, Leere Wohnungen für Asylberechtigte, 27 October 2018, available in German at: <https://bit.ly/2SUhaT6>.

Experience shows that persons benefitting from a protection status often change their flat in the first year(s) after recognition and the costs for rent are much higher than those prescribed by law. The introduction of a time limited **Residence Permit** of 3 years for refugees has also been criticised by NGOs and experts as it makes it more difficult to rent a flat without perspective to stay.

A study conducted by the Technical University of Vienna found that, due to several obstacles, refugees are extensively excluded from the benefit of municipal accommodations in practice and beneficiaries of the subsidiary protection do not have access to municipal housing at all. Cases of exploitation and discrimination in the private sector have also been reported. A worrying informal sub-market has emerged, offering housing at inflated prices, such as sleeping places – that are not even real rooms – and cost about 200 to 350€ per month.<sup>448</sup> Facilities for homeless persons are also sometimes visited by refugees.

## E. Employment and education

### 1. Access to the labour market

Starting with the recognition of their protection status, refugees and beneficiaries of subsidiary protection have free access to the labour market. To be successfully integrated in the labour market, however, many obstacles have to be overcome. Frequently cited obstacles are inadequate language proficiency, lack of qualifications or lack of proof thereof. The budget for language courses was increased significantly and in most federal provinces language courses are already offered during the asylum procedures, albeit in limited amounts. The organisation SOS Mitmensch found these differences in its latest survey, between October 2016 and January 2017.<sup>449</sup> Funding for language courses has furthermore been largely reduced in 2019. While the federal states still offer classes to asylum-seekers originating from Syria, other nationals are regarded as not having enough prospects of obtaining a positive decision upon their asylum procedure.

There have been some improvements through targeted assessment of qualifications and facilitated recognition of work experience. The Act on Recognition and Evaluation entered into force on 12 July 2016 and intends to accelerate the procedure for the recognition of education and professional qualifications obtained outside Austria.<sup>450</sup> This decision aims at facilitating access to the labour market for refugees. Refugees or asylum seekers could also apply for recognition of their academic and professional qualifications, even if they cannot provide the documents as proof.

A study conducted in 2016-2017 involving 1,200 beneficiaries of international protection found group-specific differences in labour market integration. Despite the shortage of skilled workers in Austria, it is former technicians in particular who have had very little chances of finding work until now. The mismatch between qualifications and employment is high: more than 75% of respondents worked in an area which did not or only partially fit with their education. 25% of respondents had participated in a competence check by the AMS, but participation in the check and value courses had had no direct impact on the integration of their previous work experience; the potential effects of these recent measures are only expected to be made visible in the medium term.<sup>451</sup>

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<sup>448</sup> Anita Aigner, Housing entry pathways of refugees in Vienna, a city of social housing, Housing Studies, 2018, available at: <https://bit.ly/2N7A57J>.

<sup>449</sup> SOS Mitmensch, *Deutschkurse für Asylsuchende – Ein Bundesländervergleich*, January 2017, available in German at: <http://bit.ly/2kHqM0a>.

<sup>450</sup> Anerkennungs- und Bewertungsgesetz (AuBG), BGBl. I Nr 55/2016, available at: <http://bit.ly/2lkdc5S>.

<sup>451</sup> ICMPD, *Integrationsmassnahmen und Arbeitsmarkterfolg von Flüchtlingen und subsidiär Schutzberechtigten in Österreich*, November 2017, available in German at: <http://bit.ly/2Fj7S9h>.

Austria has set up a number of counselling and contact points, as well as an information portal (AST). It is too early to assess the effect of these services in practice. In **Vienna**, however, all beneficiaries now undergo a competency evaluation. Where recognised beforehand, highly qualified persons in regulated profession e.g. doctors are sent to “Check In Plus” immediately to receive assistance in the recognition process.

Beneficiaries have to consult the Austrian Integration Fund (ÖIF) after they have received the protection status. The ÖIF places these persons to language and Austrian value courses. They have to register with the job centre and can then take part in job-related assistance measures, if their language proficiency is sufficient, or in language-related assistance measures. Surveys of the job centres found that 10% of the persons with protection status can be integrated into the labour market within the first year.

The qualification checks are concluded with a certificate about the attested knowledge. The Austrian Federal Chamber of Commerce has also initiated projects to help refugees to obtain a training relevant for the Austrian labour market.<sup>452</sup>

On the other hand, since September 2017, beneficiaries of international protection who are able to work but cannot secure employment are required to complete a one-year standardised integration programme focusing on language acquisition, career orientation and vocational qualification (see [Social Welfare](#)).

As of 31 March 2018, a total of 18,845 beneficiaries of international protection received support from the Public Employment Service (AMS) as part of the so-called integration year. This was introduced in September 2017 and concerned people who had received the refugee status or the subsidiary protection in Austria since 1 January 2015. 4,344 recognised refugees got a job offered by the employment offices. In **Lower Austria** for example, out of the 1,614 persons benefitting from international protection and who had completed the integration year, 294 persons obtained a job. For comparison, in Vienna there were about 12,000 people affected, out of which 1,388 could have started a job.<sup>453</sup>

The imbalanced distribution of supply and demand within Austria also presents a challenge to integration into the labour market. Many persons with protection status relocate into urban centres, especially **Vienna**, where the unemployment rate is also higher than in the western federal provinces. There is a great demand for workers in the tourism regions of the West. In the public debate, the tense situation of the Austrian labour market is one area which militates for the closing of borders.

At the end of December 2018, 32,346 beneficiaries of the Public Employment Service (AMS) were registered as unemployed. Out of them, 20,994 were seeking work and 11,352 were in training. The main nationalities concerned were Syrians (13,370), followed by Afghans (7,034) and refugees from Russia (3,414).

The majority of the unemployed beneficiaries of protection resided in Vienna (19,369). Out of the 10,000 job-seeking beneficiaries of international protection who came to Austria in 2015, 37% were employed as of December 2018. In 2016, out of the 11,6000 beneficiaries of international protection, 31% were employed. The relatively favorable employment rate of the refugees who arrived in 2016 can be attributed to the improved economy, but also to broader support, according to the AMS.

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<sup>452</sup> Chamber of Commerce of Salzburg, ‘Für zügige Integration in Arbeitsmarkt und Wirtschaft’, 15 December 2016, available in German at: <http://bit.ly/2kSsRbK>.

<sup>453</sup> Answer to parliamentary request, No 546/AB, 22 May 2018, available in German at: <https://bit.ly/2TPXNYy>.

## 2. Access to education

Access to education is the same for beneficiaries as for asylum seekers (see [Reception Conditions: Education](#)). However, there is no restriction with regard to apprenticeships for beneficiaries. **Refugees** can receive a public grant including support for public transport in order to study, which is not available for asylum seekers. As of 1 January 2017, all minors, including refugees and beneficiaries of subsidiary protection, are under the duty to attend either a higher school, to do an apprenticeship or to prepare for an apprenticeship through other courses (*Ausbildungspflicht*).<sup>454</sup> The violation of the mandatory training is punishable since 1 August 2018 with a fine ranging from 100 to 1000 euros in case of recurrence.

Although the awareness on the difficulties that refugee children experience has increased and more resources are made available, these are not sufficient to support the children in regular schools until they obtain sufficient language proficiency.

## F. Social welfare

### 1. Forms and levels of social benefits

#### 1.1. Needs-based minimum benefit

Access to social benefits is not the same for refugees and subsidiary protection beneficiaries. Holders of **subsidiary protection** have the right to Basic Care, which is significantly lower than the needs-based minimum benefit (*bedarfsorientierte Mindestsicherung*, BMS) to which **refugees** are entitled. Eligibility for the needs-based minimum benefit is derived directly from Article 29 of the recast Qualification Directive for subsidiary protection beneficiaries who do not receive Basic Care but reside in a rented flat. Currently, however, some federal provinces (**Burgenland, Lower Austria, Salzburg and Styria**) do not provide needs-based minimum benefits to beneficiaries of subsidiary protection at all, but only provide so-called “core benefits” under their Basic Care legislation.

Beneficiaries of subsidiary protection represent the largest group of the Basic Care beneficiaries, except in Tyrol. As a rule, they can remain in the Basic Care system after being granted the protection status. However, as long as they live in an organised accommodation, they will only receive the basic care provided for these type of accommodation (food, pocket money, clothing, school fees).

The Constitutional Court has dismissed a complaint from a beneficiary of subsidiary protection against this differentiation in **Lower Austria**, on the ground that subsidiary protection is more provisional a status than refugee status, thereby justifying differential treatment in social benefits.<sup>455</sup>

In addition, **refugees** who apply for the needs-based minimum benefit are no longer on equal terms with nationals in some federal provinces. In 2019, nationals received €885 (€664 for subsistence and €221 for rent)

**Lower Austria:** Since 2016, refugees receive lower amounts of needs-based benefits than nationals. Nationals receive €889.84, while refugees receive €522.50, including a bonus of €155 granted when they take part in integration measures such as language courses. The Administrative Court (LVwG) of Lower Austria has challenged the maximum amounts introduced by the reform before the Constitutional Court.

<sup>454</sup> Ausbildungspflichtgesetz (ApfIG), BGBl. I Nr 120/2016, available at: <http://bit.ly/2lkgXsh>.

<sup>455</sup> VfGH, Decision E 3297/2016, 7 July 2017, available in German at: <http://bit.ly/2EOPIFB>.

The fact that **Burgenland** decided to cap the minimum benefits per household, by limiting it at € 1,500 per household regardless of its size and the number of persons concerned has been considered as unconstitutional by the Constitutional court. The Court considered that, even if the cost of living per person may decrease depending on the size of the household, additional expenses are still required for each additional person.<sup>456</sup>

In Burgenland, just as in Lower Austria, a waiting period for obtaining social benefits had been envisaged: those who had not been in Austria for at least five years within the last six years had received less social benefits. The Constitutional Court ruled that this waiting period constitutes a different treatment of Austrian citizens and aliens. Regarding persons entitled to asylum, the scheme was considered particularly unjustified as they had to leave their country of origin and cannot return there. They must therefore not be assimilated to other strangers (EU citizens and third-country nationals) who are free to return to their country of origin. The length of stay in Austria should not lead to a differentiation of the amount of benefits granted and does not allow for assumptions on the willingness to work of a person.<sup>457</sup>

**Upper Austria:** The general level of needs-based benefits is €921,30 per month, including for refugees with a permanent **Residence Permit**. Refugees with a temporary residence permit granted from 1 July 2016 onwards and subsidiary protection holders only receive core benefits of €405 per month, as well as an additional amount of €155 (integration bonus) per month subject to compliance with integration measures. The total amount of benefits granted per month is €560.

The Administrative Court (LVwG) of Upper Austria has made a preliminary reference to the CJEU to ask: whether Article 29 of the recast Qualification Directive is directly applicable; and whether it is possible to differentiate the level of benefits granted on the basis of the duration of the right of residence.<sup>458</sup> On 21 November 2018, the CJEU concluded that EU law precludes national legislation, which provides that refugees with a temporary right of residence in a Member State are to be granted social security benefits which are less than those received by nationals of that Member State and refugees who have a permanent right of residence in that Member State.<sup>459</sup>

For all minimum income beneficiaries, there is a maximum amount of €1,512 granted per household, which is a regulation that was not contested by the Constitutional Court. For larger families, the minimum standards of all persons of a household community will be reduced evenly in percentage terms. In addition, in assessing whether a sufficient amount is available to avoid social distress, minor dependent persons may also take into account the basic amount of the family allowance and the child deduction amount. These services serve to secure livelihoods, the Constitutional Court decided.<sup>460</sup>

**Vorarlberg:** Restrictions have been introduced as of 1 January 2017 for refugees and subsidiary beneficiaries. Cash benefits may be replaced by benefits in kind if this better suits the purpose of the guaranteed minimum income. Different minimum personal security rates are introduced depending on the type of accommodation; single or in shared flats, because in shared apartments “regular cost savings, especially in the area of household effects, heating and electricity” are assumed. The maximum flat rate for housing needs for six people is €772 per month. The changes were contested by the Ombudsman of Vorarlberg as unconstitutional before the Constitutional Court, as these maximum rates for rent are too low in view of the situation on the Vorarlberg housing market. The Constitutional

<sup>456</sup> VfGH, Decision E1277/2018, 12.12.2018, available in German at: <https://bit.ly/2UO2EtQ>.

<sup>457</sup> VfGH, Decision G 308/2018-8, 1 December 2018.

<sup>458</sup> LVwG Upper Austria, ‘Bedarfsorientierte Mindestsicherung für befristet Asylberechtigte: Landesverwaltungsgericht Oberösterreich legt EuGH Fragen zur Vorabentscheidung vor’, 19 December 2017, available in German at: <http://bit.ly/2GDxyOl>.

<sup>459</sup> CJEU, *Ayubi*, Case C-713/17, 21 November 2018.

<sup>460</sup> VfGH, Decision G 156/2018, 11 December 2018.



Court upheld most restrictions and only found the retroactive application of the measure to be unconstitutional.<sup>461</sup>

In November 2018, the Ministry of Social Affairs presented a draft law on social benefits.<sup>462</sup> The proposal sets a maximum amount of benefits that federal provinces are obliged to grant and drastically reduces subsidies for households with several children. It also promotes compensation in kind rather than in cash. The draft law further sets certain conditions to receive the full amount of social benefits, which includes knowledge of German (level B1) or alternatively of English (C1). Refusing to integrate the labor market will also lead to cuts of about 300 euros for single persons. While Austrian citizens will hardly be concerned by these new measures, refugees will be strongly affected. As regards beneficiaries of subsidiary protection, they will be excluded from the new social benefits law, which is contrary to Article 29 (2) of the Qualification Directive and the obligation to treat aliens equally with nationals.

## 1.2. Other social benefits

Beneficiaries of subsidiary protection are also treated differentially with regard to the family and child care allowances, to which they are only entitled if they do not receive Basic Care. An additional condition for child care allowance for these persons is to earn an income.

A particular difficulty emerges when delays occur in the extension of the right of residence of beneficiaries of the subsidiary protection. In fact, the family allowance for the children will no longer be granted if the right of residence is not extended in due time, i.e. before its expiry. This practice of the tax offices was unsuccessfully criticized by the Ombudsman Board, and the relevant case law has not been complied with yet.

## 2. Conditions for social benefits

The main condition for the needs-based minimum benefit is the need for assistance, which also applies to nationals. However, this is likely to change in 2019 as Austria is expecting legislative changes in that regard.

Additional requirements have further been introduced in some federal provinces in the last 2 years. These include an integration contract and participation in integration measures. Since September 2017, beneficiaries of international protection who are able to work and have not secured employment must complete a standardised integration programme of one year. This obligation applies to refugees and subsidiary protection holders who were granted status after 31 December 2014. As of April 2018, asylum seekers that have a high recognition rate should also be able to participate to the integration programme.<sup>463</sup> According to information provided by the Austrian Integration Fund (ÖIF), this applies particularly to Syrians.

In **Styria**, benefits can be cut up to 25% already for small misdemeanours, e.g. missing an appointment. In **Lower Austria**, where German language courses are mandatory for persons in the needs-based minimum benefit system, the allowance can be reduced by up to 50% if the person refuses to attend. Conversely, in **Vorarlberg**, where beneficiaries are obliged to sign an integration agreement since January 2016, benefits can be reduced or withdrawn when refugees do not adhere to the integration agreement which they have to enter, e.g. by refusing to attend a language course.

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<sup>461</sup> VfGH, Decision V 101/2017-11, 12 December 2017, available in German at: <http://bit.ly/2EMeAnP>.

<sup>462</sup> Entwurf Sozialhilfe-Grundsatzgesetz, Sozialhilfe-Statistikgesetz (104/ME), <https://bit.ly/2GshdzV>.

<sup>463</sup> Labour Integration Act, BGBl. I No 75/2017, 19 June 2017, available in German at: <http://bit.ly/2EXvtPU>.

Social assistance is distributed by the Social Department of the federal province. The Tax Office is responsible for the family allowance, while health insurance is responsible for the child care allowance. The needs-based minimum benefit is granted in the respective federal province where the beneficiary resides. Beneficiaries may transfer their residence to another federal province, however. In one case, **Upper Austria** reduced benefits by 15% due to the beneficiary's relocation to **Tyrol**. The Administrative Court of Tyrol found the reduction unlawful, as it was necessary for the person to move to Tyrol in order to find employment.<sup>464</sup>

**Lower Austria** has also introduced a 5-year residence requirement, which has been appealed by the LVwG before the Constitutional Court. This precondition is violating constitutional rights (see decision above).

## G. Health care

As **beneficiaries of subsidiary protection** have no maximum time limit on basic care, they always enjoy health insurance similar to asylum seekers (see [Reception Conditions: Health Care](#)). Meanwhile, **refugees** enjoy basic care for 4 months after the recognition of their status. When participating in courses of the job centres, they are also covered by health insurance. As soon as they start to work more than a few hours, the mandatory health insurance takes effect. When refugees are considered to be without resources and receive needs-oriented minimum basic benefits, they also have health insurance.

Access to psychological therapy of traumatised refugees and torture survivors is possible as a transitional measure within AMIF projects when the therapy was already begun during the asylum procedure. Although such projects exist in every federal province, their capacities barely cover the demand. Other costs of psychological therapy are only partly covered by health insurances.

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<sup>464</sup> LVwG Tyrol, Decision 2016/41/0301-1, 24 February 2016.

## 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 (AsylG) Aliens Law Restructuring Law - Adjustment Law	<a href="http://bit.ly/1QjH2M7">http://bit.ly/1QjH2M7</a> <a href="http://bit.ly/2lyUjvp">http://bit.ly/2lyUjvp</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 Act (FrÄG 2015) BGBl 70/2015 of 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 Act (FrÄG 2015) BGBl 70/2015 of 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 Act (FrÄG 2015) BGBl 70/2015 of 18 June 2015	<a href="http://bit.ly/1SzV6Du">http://bit.ly/1SzV6Du</a>