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Asylum Information
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Asylum Information Database

National Country Report

Austria

asylkoordination
Österreich

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European Council
on Refugees and Exiles

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The AIDA project

The AIDA project is jointly coordinated by the European Council on Refugees and Exiles (ECRE), Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee. It aims to provide up-to date information on asylum practice in 14 EU Member States (AT, BE, BG, DE, FR, GR, HU, IE, IT, MT, NL, PL, SE, UK) which is easily accessible to the media, researchers, advocates, legal practitioners and the general public and includes the development of a dedicated website which will be launched in the second half of 2013. Furthermore the project seeks to promote the implementation and transposition of EU asylum legislation reflecting the highest possible standards of protection in line with international refugee and human rights law and based on best practice.



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Statistics

Table 1: Applications and granting of protection status at first and second instance

| | Total applicants in 2012 | Refugee status | Subsidiary protection | Rejections (in-merit and admissibility) | Otherwise closed / discontinued | Refugee rate | Subs.Pr. rate | Rejection rate |
|--|--------------------------|----------------|-----------------------|---|---------------------------------|-----------------|-----------------|-----------------|
| | A | B | C | E | F | $B/(B+C+D+E)\%$ | $C/(B+C+D+E)\%$ | $E/(B+C+D+E)\%$ |
| Total numbers | 17413 | 3680 | 2050 | 17021 | 1878 | 16% | 9% | 75% |
| Breakdown by countries of origin of the total numbers | | | | | | | | |
| Afghanistan | 4005 | 969 | 816 | 1284 | 321 | 32% | 27% | 42% |
| Russia | 3091 | 839 | 241 | 2998 | 245 | 21% | 6% | 74% |
| Pakistan | 1823 | 14 | 9 | 2780 | 194 | 0% | 0% | 99% |
| Syria | 915 | 542 | 239 | 107 | 22 | 61% | 27% | 12% |
| Iran | 761 | 442 | 25 | 187 | 51 | 68% | 4% | 29% |
| Algeria | 575 | 1 | 8 | 805 | 54 | 0% | 1% | 99% |
| Iraq | 491 | 161 | 197 | 403 | 47 | 21% | 26% | 53% |
| Somalia | 481 | 241 | 216 | 113 | 36 | 42% | 38% | 20% |
| India | 401 | 1 | 1 | 569 | 55 | 0% | 0% | 100% |
| Nigeria | 400 | 13 | 20 | 648 | 131 | 2% | 3% | 95% |

Source: Ministry of interior, asylum statistic 2012

Table 2: Gender/age breakdown of the total numbers of applicants in 2012

| | Number | Percentage |
|-----------------------------------|--------------|------------|
| Total number of applicants | 17413 | |
| Men | 12846 | 73.77% |
| Women | 4567 | 26.23% |
| Unaccompanied children | 1781 | 10.23% |

Table 3: Comparison between first instance and appeal decision rates in 2012

| | First instance | | Appeal | |
|----------------------------------|----------------|-------------------|---------------|-------------------|
| | <i>Number</i> | <i>Percentage</i> | <i>Number</i> | <i>Percentage</i> |
| Total number of decisions | 15 895 | | 11487 | |
| Positive decisions | | | | |
| Total | 4454 | 28% | 1276 | 11.1% |
| <i>Refugee Status</i> | 2 680 | 16.8% | 978 | 8.5% |
| <i>Subsidiary protection</i> | 1775 | 11.2% | 298 | 2.6% |
| Negative decision | 11 440 | 72% | 10211 | 88.9% |

Overview of the legal framework

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

| Title in English | Original title | Abbreviation | Weblink |
|---|---|---|---|
| Federal Law concerning the Granting of Asylum | Bundesgesetz über die Gewährung von Asyl, StF: BGBl. I Nr. 100/2005 | Asylgesetz 2005 - AsylG | http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20004240/AsylG%202005%2c%20Fassung%20vom%2021.03.2013.pdf |
| Federal Act Concerning the Asylum Court | Bundesgesetz über den Asylgerichtshof, StF: BGBl I 2008/4 | Asylgerichtshofgesetz - AsylGHG | http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20005660/AsylGHG%2c%20Fassung%20vom%2021.03.2013.pdf |
| General Administrative Procedures Act | Allgemeines Verwaltungsverfahrensgesetz 1991, StF: BGBl. Nr. 51/1991 | AVG | http://www.ris.bka.gv.at/DokumentE/ErV/ERV_1991_51/ERV_1991_51.pdf |
| Federal Act concerning Settlement and Residence in Austria | Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich, StF: BGBl. I Nr. 100/2005 | Niederlassungs- und Aufenthaltsgesetz - NAG | http://www.ris.bka.gv.at/DokumentE/ErV/ERV_1991_51/ERV_1991_51.pdf |
| 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 | Fremdenpolizeigesetz - FPG | http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20004241/FPG%2c%20Fassung%20vom%2021.03.2013.pdf |
| Agreement between federal state and states under Art. 15a of the Federal Constitution concerning joint action for the temporary basic provision of aliens in need of help and protection in Austria | Vereinbarung zwischen dem Bund und den Ländern gemäß 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 | Grundversorgungsvereinbarung | www.unhcr.org/refworld/docid/4416ab914.html |
| Federal law, with the basic care of asylum seekers in the admission procedure and certain other foreigners is regulated | Bundesgesetz, mit dem die Grundversorgung von Asylwerbern im Zulassungsverfahren und bestimmten anderen Fremden geregelt wird | Grundversorgungsgesetz - Bund 2005 | http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10005762&ShowPrintPreview=True |

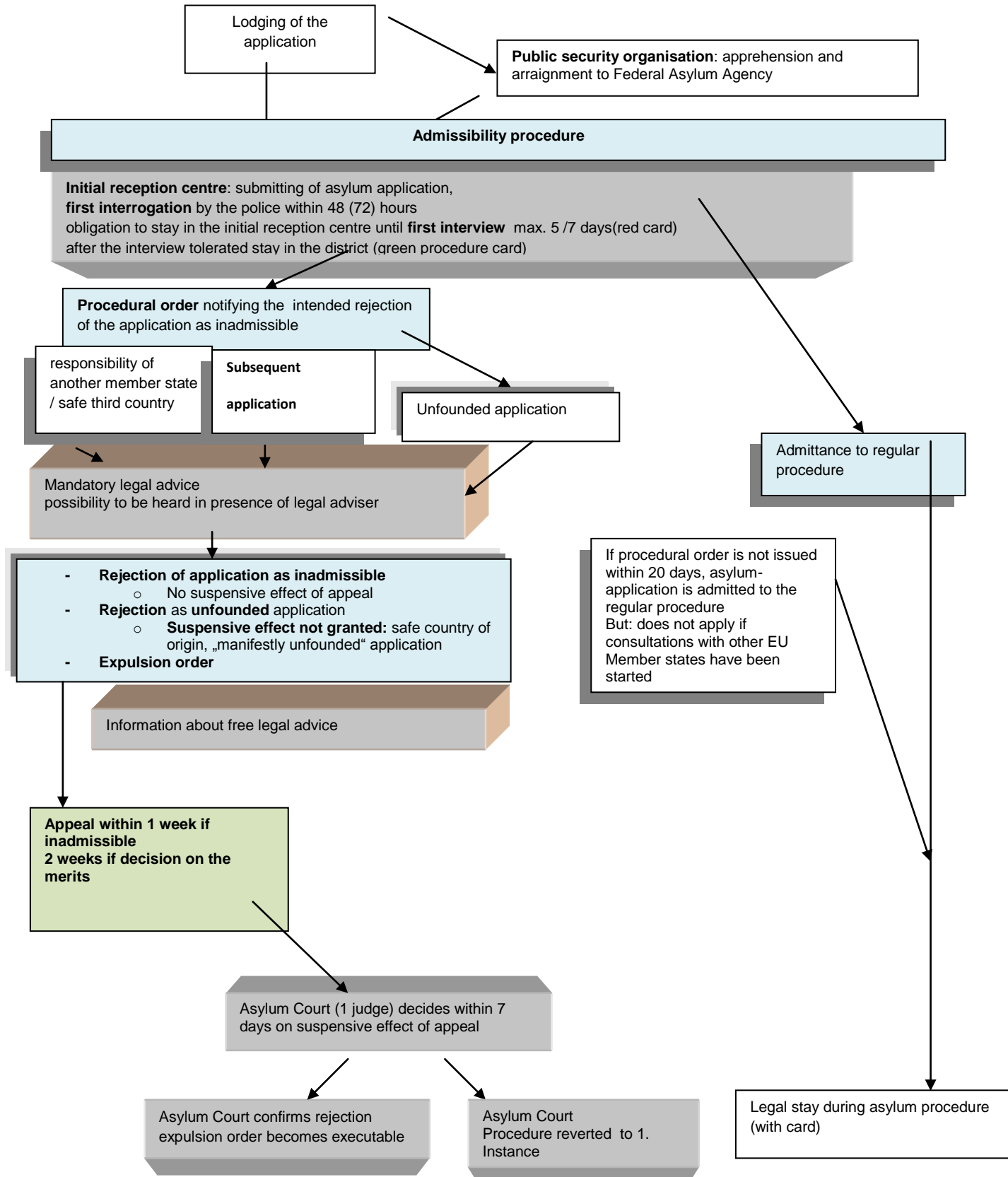
Main implementing decrees and administrative guidelines and regulations relevant to asylum procedures, reception conditions and detention.

| Title in English | Original title | Abbreviation | Weblink |
|---|---|---|---|
| Ordinance by the federal minister of internal affairs concerning the advisory board on the conduction of Country of Origin Information | Verordnung der Bundesministerin für Inneres über den Beirat für die Führung der Staatendokumentation, StF: BGBl. II Nr. 413/2005 | Staatendokumentationsbeirat-Verordnung | http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004449 |
| Ordinance by the federal government, concerning the determination of countries as safe countries of origin | Verordnung der Bundesregierung, mit der Staaten als sichere Herkunftsstaaten festgelegt werden, StF: BGBl. II Nr. 177/2009 | Herkunftsstaaten-Verordnung -HStV | http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20006306&ShowPrintPreview=True |
| 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 - AsylG-DV 2005) | https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004467 |
| 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 2005 | http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20003889 |
| 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 | http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10006102&ShowPrintPreview=True |
| Remuneration for the legal advice in appeal procedures at the asylum court | Entgelte für die Rechtsberatung in Beschwerdeverfahren vor dem Asylgerichtshof | | http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20007474/Entgelte%20f%C3%BCr%20die%20Rechtsberatung%20in%20Beschwerdeverfahren%20vor%20dem%20Asylgerichtshof%2c%20Fassung%20vom%208.03.2013.pdf |
| 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 | | http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2011_II_324/BGBLA_2011_II_324.pdf |

Asylum Procedure

A. General

1. Organigram



Regular procedure – single procedure

Federal Asylum Agency

- Refugee status
 - Subsidiary protection
 - expulsion

Appeal with suspensive effect
2 weeks
Within

Asylum Court 2 judges

New grounds or evidence are only taken into consideration if 1 instance procedure was unlawful or due to individual circumstances asylum-seeker was not able to disclose all grounds

Personal public hearing or decision based on the file and appeal

Refugee status
Permanent residence permit

subsidiary protection status
residence permit for 1 year, prolongation has to be applied

*No violation of non-refoulement but
expulsion not
permissible (Art.8 ECHR)
residence permit*

Expulsion order

Leading judgments
Asylum Court (5 judges) or Ministry of the Interior submits unsolved legal questions or intended change of legislation to Administrative Court

Appeal to Constitutional Court
Application for suspensive effect
Application for free legal aid

2. Types of procedures

Indicators:

Which types of procedures exist in your country? Tick the box:

- | | | |
|----------------------------|---|-----------------------------|
| - regular procedure: | yes <input checked="" type="checkbox"/> | no <input type="checkbox"/> |
| - border procedure: | yes <input checked="" type="checkbox"/> | no <input type="checkbox"/> |
| - admissibility procedure: | yes <input checked="" type="checkbox"/> | no <input type="checkbox"/> |
| - accelerated procedure: | yes <input checked="" type="checkbox"/> | no <input type="checkbox"/> |
| - Dublin Procedure | yes <input checked="" type="checkbox"/> | no <input type="checkbox"/> |

Are any of the procedures that are foreseen in national legislation, not being applied in practice? If so, which one(s)? None

3. List of authorities intervening in each stage of the procedure (including Dublin)

| Stage of the procedure | Competent authority in EN | Competent authority in original language (DE) |
|--|---------------------------|---|
| Application at the border | Federal Asylum Agency | Bundesasylamt |
| Application on the territory | Federal Asylum Agency | Bundesasylamt |
| Dublin (responsibility assessment) | Federal Asylum Agency | Bundesasylamt |
| Refugee status determination | Federal Asylum Agency | Bundesasylamt |
| Appeal procedures: -First appeal -Second (onward) appeal | Asylum Court | Asylgerichtshof |
| Subsequent application (admissibility) | Federal Asylum Agency | Bundesasylamt |

4. Number of staff and nature of the first instance authority (responsible for taking the decision on the asylum application at the first instance)

| Name in English | Number of staff (specify the number of people involved in making decisions on claims if available) | Ministry responsible | Is there any political interference possible by the responsible Minister with the decision making in individual cases by the first instance authority? Y/N |
|-----------------------|---|--------------------------|---|
| Federal Asylum Agency | 88 (2011) at the branch offices (without staff in admissibility procedure) 290 (2011) including administration, Dublin-Unit, COI, administration of Basic Care | Ministry of the Interior | NO. However, see below section 6 on accelerated procedures on the possibility for the Minister of Interior to decide on the application of fast track procedures for certain nationalities. |

5. Short overview of the asylum procedure

Asylum and aliens law procedures are administrative procedures. For these procedures the General Administrative Procedures Act applies. The Asylum and the Aliens' Police Law however contains a number of special procedural rules which regulates the asylum and aliens law proceedings.

The Federal Asylum Agency (*Bundesasylamt – BAA*) is responsible for deciding as the first instance authority in asylum procedures. In 2008 the Federal Asylum Court was established as the second instance in asylum procedures. The procedure before the Asylum Court is also regulated by the Asylum Law and by the General Administrative Procedures Act.

The Asylum Law also contains norms about expulsion procedures in connection with rejection or dismissal of applications, provisions on the rejection of applications because of the existence of a safe third country or the responsibility of another state according to the Dublin II Regulation, norms on family reunification procedures and on airport procedures.

The Austrian Asylum Law 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 about the admissibility. If the application is declared admissible, the authorities decide whether the person is to be granted refugee status. Only where an application for asylum is rejected on the merits, the authorities have to grant subsidiary protection if the person qualifies for that status. A separate application for subsidiary protection is not possible.

Appeals to the Asylum Court are possible against a decision rejecting the asylum application as inadmissible and also against a decision rejecting the application on the merits. Art. 36 Asylum Law 2005 deals with the suspensive effect of appeals. An appeal against a decision rejecting an application as inadmissible has to be submitted within one week and does not have suspensive effect. Suspensive effect may be granted by the Court to an appeal against an expulsion order issued together with a decision rejecting the asylum application as inadmissible. Appeals against the decision rejecting the asylum application on the merits have to be submitted within two weeks and have a suspensive effect unless the Federal Asylum Agency does not allow for the appeal to have suspensive effect. Art. 37 and 38 Asylum Law 2005 provide for a possibility to allow or not allow suspensive effect of the appeal.

Appeals against a decision rejecting the asylum application on the merits have a suspensive effect unless this is not granted by the Federal Asylum Agency. Art. 38 Asylum Law 2005 provides a number of reasons for suspensive effect not to be allowed. These include *inter alia* if the applicant has attempted to deceive the Federal Asylum Agency concerning their true identity or nationality or the authenticity of their documents, if the asylum-seeker has not adduced any reasons for persecution, if the allegations made by the asylum-seeker concerning the danger they face clearly do not correspond with reality 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 Asylum Court may grant a suspensive effect if otherwise there would be a risk of a violation of the non-*refoulement* principle. The Asylum 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 prohibition of *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 conflicts.

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

The evidential requirements are the same for refugee and subsidiary protection status. In appeal procedures before the Asylum Court new facts and evidence may only be submitted 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 of the BAA was not respected, or if outdated country of origin information was used or evidence is missing to substantiate the reasoning of the BAA); 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 (Article 40 Asylum Law 2005). Article 22 Asylum Law 2005 stipulates that decisions of the Federal Asylum Agency on applications for international protection shall be issued in the form of administrative decisions. Decisions of the Asylum Court shall be issued in the form of judgments and all other decisions, such as 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, shall be issued in the form of resolutions.

Appeals to the Federal Constitutional Court may be lodged in case the applicant claims a violation of a right guaranteed by constitutional law. There is no regular possibility to lodge appeals to the Federal Administrative Court. The Court is only competent to decide on leading cases. These decisions have to be submitted by the Asylum Court to the Federal Administrative Court *ex officio*. Since the Asylum Court was installed in 2008 no leading decision was submitted to the Court.

B. Procedures

1. Registration of the Asylum Application

Indicators :

- Are specific time limits laid down in law for asylum seekers to lodge their application?
 Yes No

An application for international protection can be made to an agent of the public security service or a security authority and at the initial reception centre (EAST “*Erstaufnahmestelle*”) of the Federal Asylum Agency. The application is submitted if the applicant requests for protection at the initial reception centre personally.¹ If the applicant is not transferred to the initial reception centre by the security authorities after consultation with the initial reception centre, the applicant will have the first interrogation by the security authorities and the application is deemed to be submitted. 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.

Persons with legal stay (residence permit) must submit their asylum application in person at the EAST within 14 calendar days if they request for asylum at the police or after they have submitted a written application. Otherwise the application will be terminated as being no longer relevant.

Children who are born in Austria are not obliged to submit their application in person.

2. Regular procedure

General (scope, time limits)

Indicators:

- Time limit set in law for the determining authority to make a decision on the asylum application at first instance (in months): 6
- Are detailed reasons for the rejection at first instance of an asylum application shared with the applicant in writing? Yes No
- As of 31st December 2012, the number of cases for which no final decision (including at first appeal) was taken one year after the asylum application was registered: 984 (1st Instance)

The Federal Asylum Agency (BAA) is a specific department of the Ministry of the Interior, dealing with asylum matters only. From 2014 on the tasks of the Agency will be extended to Aliens’ Law procedures.

According to the General Administrative Procedures Act (AVG), decisions have to be taken within six months after the application was submitted. Within 20 calendar days, the BAA has to decide whether it intends to reject the application due to responsibility of another member state / safe third country, as a subsequent asylum application or to dismiss the application. If no procedural order was 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 were made within this time frame.

Since 1998 the backlog of undecided asylum applications was continuously growing and only after the law amendments of 2005 and 2008 (which established of the Asylum Court) the numbers diminished.

¹ Art.17 Asylum Law.

As per 31 December 2012 984 asylum applications were pending at first instance for more than one year, 127 even longer than 5 years.²

Numbers for the Asylum Court are not available yet. Information about the average duration is not available. It seems that most of the asylum applications are decided at first instance within 6 months. Only a few years ago it was usual that appeals were pending for several years, now most of the cases are decided within one year.

In case of delay of the BAA to decide within 6 months devolution may be applied and the file will be rendered to the Asylum Court for decision. However, in practice this possibility is not used very often. In the case of a delay of the Asylum Court the president of the Asylum Court may be requested to set a time limit to the judge in charge. The decisions of the Asylum Court's president did not lead to a quick decisions, the competent judge was usually allowed 6 to terminate the procedure, although the Court has to decide according to the Administrative Procedures Law - which is applicable for the Asylum Court too - on appeals within 6 months.

The time limit for decisions for the Federal Asylum Agency and the Asylum Court are reduced to 3 months in case the asylum-seeker is in detention. This 3 months reduced time limit also applies if an expulsion procedure has been initiated during the asylum procedure. This may be applied if the BAA intends to dismiss the asylum application, because it seems to be unfounded or there is a specific public interest in the accelerated conduct of the procedure (convicted applicants or applicants who have been caught in the act of committing an offence).

According to the law asylum may also be granted in the admissibility procedure, but so far no case is known.

From time to time applications from specific countries of origin are prioritised. This seems to be a political decision with the intention to discourage other refugees from those countries with higher numbers of applications to request asylum in Austria by rendering a negative decision very quickly.³

So called "fast-track-procedures" even were conducted with asylum-seekers from Afghanistan, who in general qualified for subsidiary protection in 2011. Asylum applications of Afghan asylum-seekers had been rejected the day following the first interview, which clearly indicates that the Asylum Agency did not investigate the individual case and made it impossible for the applicants to submit documents or evidence for their reasons to request for asylum.

Appeal

Indicators:

- Does the law provide for an appeal against the first instance decision in the regular procedure: Yes No
 - o if yes, is the appeal judicial administrative
 - o If yes, is it suspensive Yes No
- Average delay for the appeal body to make a decision: Not available

² Answer of the Minister of Interior Mikl-Leitner to a parliamentary request, 13132/AB XXIV. GP, 18 February 2013.

³ Ministry of the Interior, Johanna Mikl-Leitner explained during the parliamentary hearing on 30 October 2012: „Bei Personen, die aus Drittstaaten kommen, im Speziellen aus den Balkanländern, wissen wir, dass es keine Asylgründe gibt, und da sind wir zu Schnellverfahren übergegangen.“ (We know from persons coming from third countries, especially from Balkan countries, that grounds for asylum don't exist, and we therefore changed to accelerated procedures).

Appeals against the negative first instance decision have to be submitted within two weeks after receipt of the decision and the whole file is forwarded by the Federal Asylum Agency (BAA) to the Asylum Court. In case refugee status or subsidiary protection status is not granted, the asylum applicant will be assigned a free legal advisor provided by the state at the time of notification of the decision. This legal advisor can also help the asylum applicant to lodge an appeal against the decision. But the support from the legal advisors during the asylum procedure is limited as they are not required to accompany an asylum seeker to a court hearing, or to actually draft the appeal which must be submitted in writing and in German language.

Appeals against a decision rejecting the asylum application on the merits have a suspensive effect unless this is not granted by the Federal Asylum Agency. Art. 38 Asylum Law 2005 provides a number of reasons for suspensive effect not to be allowed. These include inter alia if the applicant has attempted to deceive the Federal Asylum Agency concerning their true identity or nationality or the authenticity of their documents, if the asylum-seeker has not adduced any reasons for persecution, if the allegations made by the asylum-seeker concerning the danger they face clearly do not correspond with reality 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.

If the asylum applicant lodges an appeal against the Federal Asylum Agency's decision, the appeal is heard by the Asylum Court. The Asylum law allows exceptions from the principle that as a rule a hearing is organised on the appeal. Such hearing must indeed not be held if the facts seem to be established from the case file and the submitted appeal and that it is established that the submission of the applicant does not correspond with the facts (§ 41 Abs 7 AsylG). This provision must be read in the context of the fact that there are restrictions to submitting new facts in the appeal procedure.

The Constitutional Court ruled that this exception does not violate Art. 47(2) of the EU Charter of Fundamental Rights, because Charter rights may be pleaded before the Constitutional Court. The Court stated that Article 41(7) AsylG is in line with Art. 47 (2) EU Charter if the applicant was heard in the administrative procedure.⁴

The Asylum Court is organised in chambers which are each responsible for certain groups of countries. Within these chambers there are panels consisting of two judges who decide collectively on the appeal. The asylum appeal has a suspensive effect as long as the case is pending in court. The Asylum Court can call for another hearing and additional examinations if necessary. In practice some judges prefer to decide on the appeal without hearing even if it is explicitly requested by the applicant, while other judges usually have a hearing in case questions of credibility arise.

The possible outcome of this procedure can be the granting of a status, the refusal of a status or the Asylum Court can revert it to the Federal Asylum Agency for further investigations and a re-examination of the case. Hearings at the Court are public, but for certain reasons public may be excluded. Decisions of the Asylum Court are published on the legal information website of the Federal Chancellery.⁵

Appeals against the rejection of an application without a suspensive effect have to be ruled by the Court within 8 weeks.

In case the asylum applicant seeks to challenge the decision of the Asylum Court and if they claim it is violating a right that is guaranteed by the constitution, they can appeal to the Constitutional Court. In

⁴ VfGH (Constitutional Court) – 14 March 2012 - U 466/11-18 und U 1836/11-13.

⁵ Decision of the Asylum Court are available [here](#). However, according to the General Administrative Procedures Law decisions may not be made public if it is necessary for reasons of public order or national security, morality, the protection of children or the private life of the asylum seeker or for the protection of a witness.

that context it has to be mentioned that the ECHR is a part of Austria's constitutional law. Therefore the risk of violation of Article 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. The asylum applicant has to be represented by a lawyer at the Constitutional Court. There is a possibility to apply for legal aid to get a lawyer free of charge in case the asylum applicant is not able to pay a lawyer themselves. However, the Constitutional Court tends to refuse free legal aid, if the case has little chances to succeed. Only very few decisions of the Asylum Court 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.

Personal Interview

Indicators:

- Is a personal interview of the asylum seeker systematically conducted in practice in the regular procedure? Yes No
- If so, are interpreters available in practice, for interviews? Yes No
- In the regular procedure, is the interview conducted by the authority responsible for taking the decision? Yes No
- Are interviews ever conducted through video conferencing? Yes No

All asylum-seekers must have one personal interview by the civil servant who will decide the case. Asylum-seekers are subjected to an interrogation by the public security service shortly after lodging the application. 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 admission procedure are accorded increased credibility, notwithstanding the fact that the interrogation is conducted by the police and not by the person responsible for the decision⁶.

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. Audio recording is foreseen by law but not applied in practice. Video conferencing is not foreseen.

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 possibility⁷.

This should also but in practice 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 by a judge of the same sex. The Constitutional Court ruled that UNHCR guidelines have to be applied to male asylum seekers accordingly.⁸

Interpreters are provided by the Federal Asylum Agency. Interpreters for most languages of the countries of origin are available, but interviews may also be conducted in a language the asylum seeker

⁶ VfGH (Constitutional Court) - U98/12, 27 June 2012.

⁷ §20 Asylum Law.

⁸ VfGH (Constitutional Court) - U1674/12, 12 March 2013 mentions in this ruling resolution Nr. 64 (XLI) and Nr. 73 [XLIV] of the Executive Committee of UNHCR. The Asylum Court decided by a male and female judge and was thus unlawful.

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

The transcript is more or less verbatim. It depends on the interpreter whether they summarize the answers, choose expressions that fit for the transcript or translate 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 the interview, they should send a written statement to the Federal Asylum Agency as soon as possible.

Legal assistance

Indicators:

- Do asylum seekers have access to free legal assistance at first instance in the regular procedure in practice?
 Yes not always/with difficulty No
- Do asylum seekers have access to free legal assistance in the appeal procedure against a negative decision?
 Yes not always/with difficulty No
- In the first instance procedure, does free legal assistance cover:
 representation during the personal interview legal advice both Not applicable
- In the appeal against a negative decision, does free legal assistance cover
 representation in courts legal advice both Not applicable

During the regular procedure at the Federal Asylum Agency (BAA), asylum seekers are offered free legal advice at the branch offices of the BAA. This legal advice is funded by the European Refugee Fund (ERF) and co-funded by the Ministry of the Interior. One association “*Verein Menschenrechte Österreich*” covers this legal advice in 6 out of 7 BAA branch offices. This offer of free legal advice is not satisfying the needs of asylum-seekers.

Asylum-seekers have to travel to the BAA, which may be difficult when the place where they are living is far away from the office or in remote areas. The organisation that receives 89 % of the funding is not regarded as very helpful and committed to the protection of the rights of asylum seekers due to its cooperation with the Ministry of the Interior. Even the call for ERF proposals mentions that legal advice should be cleared with the authorities. Furthermore these legal advisers have to inform asylum seekers about voluntary return assistance and send a certain number of asylum seekers to voluntary return projects during the asylum procedure. This funding framework and the activities of the contracted organisation affect the confidence of asylum seekers in free legal advice offered. Asylum applicants may also opt to contact an NGO offering free legal advice to asylum applicants. But this resource is limited and may not be accessible for asylum seekers living in remote areas.

The tasks are prescribed in the call for ERF proposals as providing information or assistance with administrative or legal formalities, providing information or advice on possible outcomes of the asylum procedure including voluntary return. Through legal advice procedures without positive perspective should be avoided but the requirement to provide advice on return as a condition for submitting a project for legal advice under ERF-funding was criticised by NGOs.

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

At the same time as a negative decision is issued, there is also a decision providing for the assignment of a legal counselling organisation, which 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 Law in 2011 and entered into effect on 1 October 2011.⁹ Two organisations, “*Arge Rechtsberatung*” and “*Verein Menschenrechte Österreich*” are contracted by the Federal Chancellery to give legal advice with regard to the appeal procedure.

The task described by law entails the obligation to provide advice in case of dismissal of the application, but does not include legal representation before the Court. So asylum seekers are not represented in court in practice unless they are represented by NGOs¹⁰ or pay themselves for a private lawyer.

The financial compensation for legal advice ordered by decree seems to be insufficient. The refunding rate per case is 211 € all inclusive (overhead, travel expenses, interpretation), which is reduced by 25 % from a certain number of cases per year (4000) and 30 % when the organisation has provided legal advice to more than 7000 clients. This reduction has been justified with reduced overhead expenses, but this argument is not suitable for the main expenses of legal advice, which is staff costs, interpreter, and travel. Such reduction bears the risk that the organisation avoids to get in contact with asylum seekers to keep the number of clients below the mark of 4000 or 7000. 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, which negatively affects the quality of legal counselling provided accordingly. NGOs criticised the compensation as being too low for providing good standards.¹¹

The Commissioner for Human Rights Nils Muižnieks “recommends that the Austrian authorities consider extending the access of asylum-seekers to the labour market. In addition, while commending that since the last reform of 2011, free legal aid is in principle available for asylum-seekers, he notes that quality appears to vary. In this regard the allocated fee appears to be a risk factor as it is rather low taking into account that all costs including transportation and translation services must also be covered and no increase is awarded for cases that are potentially more time consuming. Further efforts would be desirable to ensure that free, independent and confidential legal counselling and representation is ensured during the entire asylum procedure and thereafter, including the deportation procedure.”¹²

⁹ Federal Law Gazette I Nr. 38/2011.

¹⁰ See e.g. ERF funded project of Caritas Austria: representation at hearings before the Asylum Court.

¹¹ Agenda Asyl, [Stellungnahme zur Änderung desAsylgesetzes 2005](#) (*Comment on the changes to Asylum Law 2005*), 28 January 2011; Der Standard, “[Gute Rechtsberatung wäre doppelt so teuer](#)” (*Good legal assistance would be twice as expensive*), 9 November 2011.

¹² Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Austria from 4 to 6 June 2012 (2012), 15.

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

The system of legal advice is not sufficiently implementing the Asylum Procedures Directive, as it is up to the legal advisers to decide, whether they help asylum-seekers to write an individual appeal and assist with regards to all procedural requests in the appeal procedure or whether they provide information only.

One project funded by ERF offers assistance during the hearing before the Asylum Court. 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 Asylum Court and may act as legal representative. However, NGOs cannot represent asylum seekers before the Constitutional Court as this can only be done by an attorney-at-law.

A merits test with regard to legal assistance at the appeal stage is not foreseen. No legal assistance free of charge is provided In case of the rejection of a subsequent asylum application on res judicata grounds.

3. Dublin

Indicators:

- Number of outgoing requests in the previous year: Not Available
- Number of incoming requests in the previous year: Not Available
- Number of outgoing transfers carried out effectively in the previous year: Not available
- Number of incoming transfers carried out effectively in the previous year: Not available

Procedure

Indicator:

- If another EU Member State accepts responsibility for the asylum applicant, how long does it take in practice (on average) before the applicant is transferred to the responsible Member State?
Not available

Austria does not use any national legislation to incorporate the Dublin II Regulation as it is directly applicable but refers to it in § 5 of the Asylum Law. This provision states that the authorities issue an inadmissibility decision when Austria is not responsible for conducting the asylum procedure based on the Dublin II Regulation. 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.

There are two Federal Asylum Offices which are responsible for the admission procedure, called "Erstaufnahmestelle" (initial reception centre), one located in the town Traiskirchen in the south of Vienna, the other in Thalham in Upper Austria. These are specialised in conducting Dublin procedures.

A Dublin department in Vienna is responsible for supervising the work of the initial reception centers. 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 Foreigners Police department, all consultations with Member States concerning foreigners who did not apply for asylum.

Once an application for asylum is made, a preliminary interview by the police takes place on the circumstances on how the person entered Austria and the first country of entry in the EU, the personal data and – in a very brief manner – also on the reasons why they left their home country. The asylum applicant is then fingerprinted, photographed and handed out a “red card”, indicating that they are not allowed to leave the initial reception centre. Fingerprints are taken from all asylum seekers older than 14 years of age. This red card is replaced by the green “procedure card” after the interview by a civil servant of the Federal Asylum Agency (*BAA*) department in the admissibility-procedure, permitting the asylum-seeker to stay in the district of the initial reception center.

In every procedure, the BAA has to consider within the admissibility procedure whether an asylum-seeker could find protection in a safe third country or another EU Member State or Schengen Associated State. According to the experiences of NGOs, consultations with other Member States do not take place if there is no concrete evidence for the responsibility of another Member States. The Dublin Regulation may be triggered if there is a Eurodac hit, if the asylum applicant has a passport with a visa for another Member State of the Dublin II Regulation, or if they admit that they entered the European Union via another Member State or if there is any other suspicion or circumstantial evidence which indicates that they entered via another Member State, for instance if a person is caught by the police close to a border or in a certain train coming from another Member State or any other kind of evidence. Although there are other grounds applicable for determining Member State responsibility under the Dublin II Regulation these are the most common grounds applied in Austria.

To prove the family status – in case family members did not arrive simultaneously in Austria – every asylum applicant must have mentioned the existence of other family members in their respective asylum procedure, i.e. in Austria as well as in the other Member States where they have applied for asylum. Marriage certificates or birth certificates are required on a regular basis. Depending on the country of origin these documents are surveyed by the Federal Bureau of Criminal Investigation to prove authenticity. DNA-tests are often required to provide proof of family links. DNA-tests have to be paid by the asylum-seeker. If a DNA test was suggested¹³ by the Federal Asylum Agency and family links have been verified, asylum-seekers may demand the BAA for refunding of the costs

Humanitarian clause

The humanitarian clause (Art 15 Dublin II Regulation) is not automatically applied to cases where a person applies for asylum in Austria and wants to stay with their relatives, but should be used in principle.¹⁴ Austrian authorities use this clause mostly in cases where the asylum applicant is still in another country and applies for a reunification with relatives in Austria. Siblings, parents of grown up children whatever their age or health condition is, grown up children whose parents live in Austria, and even men who founded a family while they were in theory “aware of the fact that they would not be able to have a durable family life”¹⁵ are usually not admitted to an asylum procedure in Austria if another Dublin Member State is responsible. Only in very few cases of extremely serious health problems the Federal Asylum Office or the Asylum Court are applying the humanitarian clause (in jurisprudence the

¹³ It is not possible for the Federal Asylum Agency to impose a DNA test.

¹⁴ See [Asylum Court c, 28.01.2010](#).

¹⁵ This refers to the possibility under Austrian law according to which an expulsion order may be considered not to violate Article 8 European Convention on Human Rights where the person concerned was aware of their uncertain residence status.

following health problems were for instance considered severe enough: dementia, a very advanced form of hepatitis C; but not a difficult form of epilepsy, cancer in a stable phase, stable HIV-infection). Even the father of a newborn child with refugee status in Austria was expelled to Poland, explaining in the decision that he could apply for a family reunification from Poland according to Art 15 Dublin II Regulation.¹⁶

The main legal problem in such cases is the fact that the Austrian authorities base the legal reasoning of the expulsion order only on Article 10 of the Asylum Law, which itself refers directly to Art 8 ECHR. Although in legal literature it is argued that the strict conditions of Article 8 ECHR are not applied in a Dublin procedure¹⁷, in practice Article 8 European Convention on Human Rights (ECHR) is referred to in the decisions but it is not applied and Article 15 Dublin Regulation is also ignored.

The Asylum Court referred questions concerning the application of Articles 15 and 3 of the Dublin II Regulation to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The CJEU ruled on in the case of *K. v. Bundesasylamt* that “Where family members have duly proved the existence of a situation of dependence within the meaning of Article 15(2), the competent national authorities cannot ignore the existence of that particular situation and the making of a request such as that provided in Article 15(1) becomes redundant”.¹⁸

Sovereignty clause

The asylum applicant has the legal right to request the asylum authorities to implement the sovereignty clause. The Constitutional Court 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 of the Dublin Regulation, the Austrian authorities are nevertheless bound to the ECHR.¹⁹ This means, in case of a risk of a violation of human rights, Austria has to use the sovereignty clause. This decision is applicable according to Art 2 and 3 ECHR as well as Art 8 ECHR following an interpretation consistent with the constitution.

All Member States of the Dublin II Regulation are considered safe where the asylum applicant may find protection from persecution. There is an exception in case it is obvious that there will be a lack of protection, especially if it is well-known to the authorities, or if the asylum applicant brings evidence that there is a risk that they will not be protected properly. This real risk cannot be based on mere speculations, but has to be based on individual facts and evidence. This statement of danger has to be related to the individual situation of the asylum applicant. Currently, the main reason to use the sovereignty clause is with regard to Dublin cases concerning Greece, where there is a threat of a violation of Art 3 ECHR.

There is also the possibility of using the sovereignty clause in case of a real risk of a violation of Art 8 ECHR. These cases could include families falling within the definition of Art. 2 Dublin Regulation but at risk of being separated and those falling under the Humanitarian clause. Such cases are very rare.

Every asylum-seeker receives written information about the first steps in the asylum-procedure, basic care, medical care and the EURODAC and DUBLIN Regulation at the beginning of the procedure in the initial reception centre (*EAST*).

¹⁶ [Asylum Court S5 317.551-2/2010/2E, 24.09.2010.](#)

¹⁷ Filzwieser/Liebming: Dublin II-Verordnung - Das Europäische Asylzuständigkeitssystem, (*Dublin II Regulation – The European system on the responsibility over asylum applications*), (2007), 107 ff.

¹⁸ Court of Justice for the European Union, Case C-245/11, *K. v. Bundesasylamt*, Judgment of 6 November 2012, par. 51.

¹⁹ VfGHG (*Constitutional Court*) - 237/03; 15.10.2004, VfSlg. 16.122/2001.

Within 20 calendar days after the application, the Federal Asylum Agency has to either admit the asylum applicant to the in merit procedure or inform them formally about the intention to issue an inadmissibility decision on the ground that another state is considered responsible for the examination of the asylum claim. A legal advisor is appointed by the BAA in the case it intends to reject the application in the admissibility procedure. The provision of free legal advisors is problematic because of lack of time and due to the fact that asylum seekers lack trust in the legal advisors, as they are considered to be too closely linked to the Federal Asylum Agency. The advisors' offices are within the building of the Federal Asylum Agency and their function is only to pass on information about the procedure objectively - and not to assist the asylum applicant in the procedure and defend their interests.

Transfers are normally carried out without the asylum applicant concerned being informed of the time and the location they are transferred to before the departure from Austria, giving them no possibility to return to the responsible Member State voluntarily. It could be argued that this practice is questionable under Article 19(2) Dublin Regulation according to which a transfer decision must contain the details of the time carrying out the transfer and "if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means.

In case of an enforced return to the responsible Member State the police usually arrives very early in the morning at the place where the asylum seeker resides. The asylum applicant is first transferred to a detention centre and since 2011 there is also a special detention centre for families. The asylum applicant has to stay there until the deportation takes place, usually after one or two days. 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.

Asylum seekers who applied for asylum first in Austria, left Austria before receiving a final decision on their application and travelled on to another EU Member State or Schengen Associated State and who are transferred back from another State to Austria do not face obstacles if their transfer takes place within two years after leaving Austria. In this case the discontinued asylum application will be continued as soon as they request for it at the BAA or the Asylum Court. If the decision on the asylum application is final upon return to Austria, the new asylum application will be processed as a subsequent asylum application.

Appeal

Indicators:

- Does the law provide for an appeal against the decision in the Dublin procedure:
 - Yes No
- o if yes, is the appeal
 - judicial administrative
- o If yes, is it suspensive
 - Yes No
- Average delay for the appeal body to make a decision: N/A

The Asylum Court in Vienna as well as the Asylum Court in Linz has a Dublin chamber. This chamber has in total 18 judges who rule as a single judge on the appeal, contrary to the appeals in the in-merit asylum procedure where two judges decide jointly.

The time limit within which the appeal against the Federal Asylum Agency's inadmissibility decisions (including Dublin decisions) must be lodged is only one week. The appeal has no suspensive effect, unless the Asylum Court grants suspensive effect within seven calendar days after the appeal reaches

the court. The expulsion order may not be executed before the time limit for granting suspensive effect expires. The Commissioner of Human Rights of the Council of Europe criticised that the time limit of one week for appeals lodged against decisions by the Federal Asylum Office to allow for deportation to another EU member state under the Dublin II regulation appears very short.²⁰ The Asylum Court has to decide *ex officio* if the appeal must be given a suspensive effect. In many Dublin cases the asylum applicant never receives a final decision from the Asylum Court because they are transferred back to the responsible Member State before the Court's decision on the Dublin decision is issued.

The Asylum Court can either refuse the appeal or decide to revert it back to the Federal Asylum Agency with the binding instruction to conduct either an in-merit procedure or investigate the case in more detailed (for instance if the Court finds that the Federal Asylum Agency 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 insufficient with regard to a possible violation of Article 3 European Convention on Human Rights). Only in very few cases there is a hearing at the court, usually the court decides on the basis of the written appeal and the asylum file.

All EU Member States and Associated Schengen States are regarded as safe countries that provide protection and fulfill the obligations of the EU asylum *acquis*. Country reports are taken into consideration, but the threshold to declare a country not in line with its obligations under the *acquis* is usually the fact that an infringement procedure has been launched by the Commission vis-à-vis that country. Recently letters of UNHCR claiming protection gaps and difficulties to access to the asylum procedure gained more relevance. In October 2011 UNHCR was asked by a judge of the Asylum Court about its opinion with regard to Hungary, after NGOs have expressed concerns with regard to violations of human rights and failure to protect asylum-seekers.²¹ As it was confirmed by UNHCR that Country of origin information used in Dublin procedure was outdated, suspensive effect was granted to all appeals against the deportation to Hungary.²² Before reports of NGOs and even UNHCR usually were seen as not objective, contrary to reports of fact-finding missions or reports of authorities. This practice was applied even in the case of Greece until the case M.S.S. was decided by the Court of Human Rights. Asylum-seekers, whose appeal was given a suspensive effect or accepted by the Court, have the right to re-enter Austria by showing the decision of the court at the frontier. This is related to the fact that if the court does not decide within 7 days on the suspensive effect, the asylum-seeker may be deported. If no suspensive effect was granted but the court finds that the decision of the BAA was unlawful, the asylum-seeker is allowed to re-enter.

Personal Interview

Indicators:

- Is a personal interview of the asylum seeker systematically conducted in practice in the Dublin procedure? Yes No
- If so, are interpreters available in practice, for interviews? Yes No

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. If the facts are established, and a decision can be taken, the fact that the asylum seeker has not been interviewed yet by the Federal Asylum Agency or by

²⁰ Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Austria from 4 to 6 June 2012 (2012), 8.

²¹ Letter from the UNHCR office Vienna 17 October 2011 to Dr. Filzwieser, Asylum Court.

²² See e.g. AsylGH (Asylum Court) - S21 422.036-1/2011 from 10 November 2011 S3 424089-1/2012 from 13 February 2012; S6 422459-1/2011 from 17 November 2011; S2 422519-1/2011 from 16 November 2011; S15 423561-1/2012 from 09 January 2012; S3 423759-1/2012 from 16 January 2012.

the Asylum Court shall not preclude the rendering of a decision. In practice this exception is not applied very often. The relevant facts for a decision in Dublin cases could be a EURODAC hit and the affirmation of the requested Member State to take back the asylum-seeker.

An appointed legal adviser must be present at the interview organised to provide the asylum seeker an opportunity to be heard. In practice legal advisers are present at the hearing. Legal advisers are often informed only shortly before the interview, which means that they lack time to study the file. Legal advice to asylum-seekers in detention takes place immediately before the hearing in the detention centre, contrary to Article 29 (4) Asylum Law, according to which the asylum seeker must have at least 24 hours to prepare for the hearing with the assistance of the legal advisor.

In Dublin procedures, the rules and practice are the same as in the regular procedure with regard to transcript, quality of the transcript of the interview. Audio recording does not take place and video recording is not permitted.

Usually only parts of the record of the Dublin consultation between Austria and the requested state(s) are made available to the asylum seeker and the legal advisor. Therefore it is not guaranteed that legal advice is given on the basis of all relevant information and it may happen that asylum seekers will be confronted with facts during the hearing concluding the admissibility procedure in the initial reception centre that were not disclosed before.

Legal assistance

Indicators:

- Do asylum seekers have access to free legal assistance at the first instance in the Dublin procedure in practice?
 Yes not always/with difficulty No
- Do asylum seekers have access to free legal assistance in the appeal procedure against a Dublin decision?
 Yes always/with difficulty No

Free legal advice 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 initial reception centre (EAST). If asylum seekers leave the district of the EAST to consult an attorney-at-law or NGOs which have their offices in the bigger cities, they can be given a fine ranging from € 100 to € 1000. In case of repeated violation of the restricted residence (“*Gebietsbeschränkung*”) the fine may amount to € 5000 and even detention may be ordered in the 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 in practice very often. The second reason why free legal advice is provided at this stage of the procedure is the lack of the suspensive effect of an appeal in admissibility procedures, which is why additional safeguards are incorporated in the first instance procedure.

As discussed in the section on legal assistance under the regular procedure above, the quality of the advice provided by free legal advisors is problematic because they lack time and because asylum seekers do not have trust in the legal advisor, as they are considered being too closely linked to the Federal Asylum Agency. They have their offices within the building of the Federal Asylum Agency and their task is only to pass on information about the procedure objectively to the asylum seeker; not to assist the asylum applicant in the procedure and defend their interests.

In the case of unaccompanied asylum seeking children, the appointed legal advisor is at the same time the legal representative of those children during the admissibility procedure. Without consent of their legal advisor they are not able to act, for example to choose a legal representative by their own or to submit an appeal in case the legal advisor fails to do so. Here too, the quality of the assistance provided is considered to be problematic at times. One example is the case of an unaccompanied asylum seeking child from Afghanistan, who submitted a hand written appeal against the rejection of his application and the expulsion to Italy. The Asylum Court rejected the appeal as inadmissible, because his legal representative from *Verein Menschenrechte Österreich* did not sign the complaint.²³ NGOs apprehend that this is not the only case where the legal representative did not lodge an appeal and disregards the interests of the child.

Although the Asylum Law stipulates that free legal advice shall be provided at least 24 hours before the hearing on the results of the investigations, legal advisors are often informed only shortly before the interview, lacking time to study the file. Legal advice of asylum-seekers in detention takes place immediately before the hearing in the detention centre, contrary to Article 29 (4) Asylum Law, according to which the asylum seeker must have at least 24 hours to prepare for the hearing with the assistance of the legal advisor.

The legal advisor must be present at the interview held to afford the parties an opportunity to be heard. At that interview at the Federal Asylum Agency (*BAA*) with regard to the Dublin Regulation they may submit written statements in regard of certain Member States or make requests for additional investigations, but they are not allowed to ask questions, which is usually respected by the legal advisors.

Suspension of transfers

Indicator:

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

After the ruling of the European Court of Human Rights (ECtHR) in the case of *M.S.S. v. Belgium and Greece* Austria suspended transfers to Greece.²⁴ The Asylum Court ruled in some cases of vulnerable asylum seekers that there would be a risk of violation of Art.3 European Convention on Human Rights (ECHR) if returned to Greece and relied on the sovereignty clause before the *M.S.S.* judgment. But in general, outside the context of transfers to Greece, poor general reception conditions do not automatically imply the use of the sovereignty clause. Even in Dublin cases with Greece, it took a lot of discussions with Austrian authorities before they changed the policy following the *M.S.S.* judgment. Currently for Austria the most important country where reception conditions might violate Art 3 ECHR is Italy, which has notorious and severe difficulties.²⁵

²³ Asylum Court S7 424252-1/2012, 09 February 2012.

²⁴ ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011.

²⁵ Bethke Maria Bender Dominik: [Zur Situation von Flüchtlingen in Italien](#) (*On the Situation of Refugees in Italy*), published by Pro Asyl, February 2011
 Doctor without Borders: "Auf der anderen Seite der Mauer" (*On the other side of the wall*), February 2010.
 Swiss Refugee Council: "Asylverfahren und Aufnahmebedingungen in Italien" (*Asylum procedure and Reception Conditions in Italy*), May 2011;
 UNHCR, *Recommendations on important aspects of refugee protection in Italy*, July 2012.

The authorities usually argue in their decisions that there “might be some difficulties” but so far the European Commission has not launched an infringement procedure for a violation of the Reception Conditions Directive against Italy. As a result, the Austrian authorities apply the presumption that the asylum applicants will have their rights protected according to the Reception Conditions Directive. Even with reports from NGOs it is hardly possible to convince the authorities that there are inhuman reception conditions in a certain Member State. The only exceptions to be found in the Asylum Court’s jurisprudence concern the vulnerable persons.²⁶

A suspension of transfer was decided by the Asylum Court in almost all Dublin cases regarding Hungary during a 3 months period at the end of 2011. After reports from NGOs including the report of the Hungarian Helsinki Committee for example, UNHCR sent a letter of concern to the Asylum authorities.²⁷ The Asylum Court granted suspensive effect to the appeal in such cases because the decisions of the EAST were based on outdated country reports.²⁸ Country information was consequently swiftly updated by requesting information from the Hungarian authorities and Austria’s liaison officer in Budapest.

With regard to Hungary an appeal lodged at the Constitutional Court was successful in showing that the responsibility of Hungary under the Dublin Regulation was not clearly established for asylum-seekers entering the EU territory via Greece. Austrian authorities did not regard Greece as the first country of entry in case asylum seekers left Greece and transited via Montenegro and Serbia to Hungary before entering Austria. Contrary to the jurisprudence before Hungary was regarded as the (second) first country of entry. The Constitutional Court ruled that this question whether Greece or Hungary would be the responsible Member State has to be answered by the Court of Justice of the European Union.²⁹ Since that ruling in June 2012 the sovereignty clause is applied in such cases.

4. Admissibility procedures

General (scope, criteria, time limits)

There are three Federal Asylum Offices, which are responsible for the admission procedure, called “*Erstaufnahmestelle*” (EAST – initial reception centre), one located in Traiskirchen near Vienna, one in Thalham in Upper Austria and one at the Vienna airport Schwechat.

All asylum-seekers have to undergo the admissibility procedure except children whose parent(s) has received protection status in Austria or whose application is admitted to the regular procedure. Their applications are admitted immediately to the regular procedure.

There are three types of admission procedures: (1) a Dublin procedure, (2) a procedure because the person comes from a safe country or (3) if a previous asylum application has received a final decision.

Within 20 calendar days after the application is made, the EAST has to either admit the asylum applicant to the in-merit procedure or notify them formally by procedural order about the intention to issue an inadmissibility decision on the basis that another state is considered responsible for the

²⁶ AsylGH (Asylum Court) - S11 404115-1/2009, 25 March 2009; S10 405811-2/2009, 22 June 2009.

²⁷ Letter from the UNHCR office Vienna 17 October 2011 to Dr. Filzwieser, Asylum Court; Hungarian Helsinki Committee: “Zugang zum Schutz in Gefahr. Bericht über die Behandlung von Dublin-Rückkehrern in Ungarn“ (*Access to protection against danger – a report on the treatment of Dublin returnees in Hungary*), December 2011. Hungarian Helsinki Committee: *Stuck in Jail. Immigration Detention in Hungary*. April 2011.

²⁸ AsylGH (Asylum Court) - S1 422134-2/2012, 13 February 2012; S4 422775-1/2011; 30 November 2011; S21 422 036-1/2011, 10 November 2011; S16 422624-1/2011, 24 November 2011.

²⁹ VfGH (Constitutional Court) - U330/12, 27 June 2012. The case C-394/12 Shamsu Abdullahi is pending before the Court of Justice of the European Union.

examination of the asylum claim or that the Federal Asylum Agency intends to revoke the suspensive effect of a subsequent application. This time limit does not apply if consultations with another state take place on the application of the Dublin Regulation. The 20-day time-limit shall not apply if the asylum seeker does not cooperate in the procedure, the procedure is deemed no longer relevant or the asylum seeker evades the procedure. If, for reasons relating to his person (e.g. illness, interview needs to be postponed because the asylum seeker needs to appeal before a court etc.), the asylum seeker is unable to cooperate in the procedure, the computation of the 20 day time limit shall be suspended. The duty of the asylum seeker to cooperate includes among others providing the Asylum Agency 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.

Within the admissibility procedure the application may be dismissed or asylum or subsidiary protection status may be granted. The granting of a status or the dismissal of the application in the admission procedure replaces the admission ruling.

An admitted application shall nevertheless be rejected (Art. 28/1 Asylum Law) if facts justifying such a rejection decision become known after the application was admitted. In practice this provision is applied in Dublin cases without the precondition that the facts were not known before.³⁰

Appeal

Indicators:

- Does the law provide for an appeal against the decision in the admissibility procedure:
 - Yes No
 - o if yes, is the appeal judicial administrative
 - o If yes, is it suspensive? Yes No

For the admission procedure, the appeal stages are the same as in the regular procedure described above, but the time limits within which an appeal against the Asylum Agency's inadmissibility decision must be lodged is only one week and the appeal has in general no suspensive effect, except when decided otherwise by the Asylum Court.

As a first step, the Asylum Court decides within seven days after receiving the appeal whether the appeal will have a suspensive effect during the continuing appeal procedure. If the Asylum Court issues neither a suspensive effect, nor accepts the appeal after seven days, the asylum applicant can be deported to the responsible Member State or safe third country. An appeal that has been granted suspensive effect with regard to the expulsion order must be decided by the Asylum Court within two weeks. This time limit is not in all cases respected in practice

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

The reasons for not granting the suspensive effect to the appeal in inadmissible cases correspond to grounds for declaring claims manifestly unfounded: the asylum seeker comes from a safe country of origin; has already been resident in Austria for at least three months prior to the lodging of the application; has attempted to deceive the BAA concerning their true identity or nationality or the

³⁰ VwGH (Administrative Court) - 2006/20/0624, 25 November 2008.

authenticity of their documents; has not adduced any reasons for persecution or the allegations made by the asylum seeker concerning the danger they are facing clearly do not correspond with reality or 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.

Free legal assistance is not provided for the appeal against the rejection of a subsequent application.

One week to lodge the appeal against the decision rejecting the asylum application as inadmissible is the minimum time according to a ruling of the Higher Constitutional Court from 1998.³¹ This short time limit is in practice very problematic, considering that the applicant may be in detention for instance and that arranging a meeting with the legal adviser could already take a few days. One week also does not seem to be sufficient in practice for submitting an appeal which explains the procedural and/or legal incorrectness of the decision. The appointed legal advisor is not obliged to assist the asylum-seeker with the drawing of the complaint that has to be written in German language and the requested qualification for legal advisers is also not sufficient.

Personal Interview

Indicators:

- Is a personal interview of the asylum seeker systematically conducted in practice in the admissibility procedure?
 Yes No
- If so, are interpreters available in practice, for interviews?
 Yes No
- Are personal interviews ever conducted through video conferencing?
 Yes No

A personal interview is required by law. The asylum-seeker is interrogated by agents of the public security service upon the lodging of the application or during the admission procedure at the initial reception centre (EAST). The police should 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 Asylum Agency for assessing the facts on which the application is based is not always respected in practice. The reasons for fleeing the country of origin may be found incredible if the asylum seeker bases the application on other reasons immediately upon arrival as at the interview before the civil servant of the Asylum Agency.

The law permits an exception from the personal interview in the case the asylum seeker has evaded the procedure in the EAST. If the facts relevant to a decision are established, the fact that they have not been interviewed yet by the Federal Asylum Agency or by the Asylum Court shall not preclude the rendering of a decision. In practice this exception is not applied very often. The relevant facts for a decision in Dublin cases could be a EURODAC hit and the affirmation of the requested Member State to take back the asylum-seeker.

³¹ VfGH (Administrative Court) - G31/98 u.a. 24.06.1998.

Legal assistance

Indicators:

- Do asylum seekers have access to free legal assistance at first instance in the admissibility procedure in practice?
 Yes not always/with difficulty No
- Do asylum seekers have access to free legal assistance in the appeal procedure against an admissibility decision?
 Yes not always/with difficulty No

A legal advisor is appointed by the Federal Asylum Agency (BAA) in case it intends to reject the application in the framework of the admissibility procedure. Free legal advice is not foreseen for subsequent asylum applications. Most of the cases that are regarded as inadmissible are Dublin cases. The time frame of at least 24 hours for providing advice in the procedure is often not respected, resulting in a lack of time for studying the file or consultation with the asylum seekers about their individual case. Asylum seekers also lack trust in the legal advisor, who is considered to be too closely linked to the Federal Asylum Agency. They have their offices within the building of the Federal Asylum Agency and their role is only to pass on information about the procedure objectively and not to assist the asylum applicant in the procedure.

5. Border procedure (border and transit zones)

General (scope, time-limits)

Indicators:

- Do border authorities receive written instructions on the referral of asylum seekers to the competent authorities? Yes No
- Can an application made at the border be examined in substance during a border procedure?
 Yes No

Austria has no land border with third countries. All neighbouring states are Schengen and Dublin-States. 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 “initial reception centre” and the rejection zone. On the basis of the first interview, the Federal Asylum Agency (BAA) decides whether the procedure shall be processed under the special regulations on the airport procedure, or if the case should be considered in a regular procedure and the asylum seeker should be transferred to the initial reception centre (EAST) “Traiskirchen”.

If the BAA intends to reject the application in the airport procedure, UNHCR has to be informed within one week. An asylum application lodged at the airport can only be rejected by reason of existing protection in a safe third country or if there is no substantial evidence that the asylum seeker should be granted protection status. Other grounds for rejection are that

1. the applicant tried to mislead the authorities about their identity, citizenship or authenticity of their documents although they were informed about the negative consequences of doing so
2. the applicant’s claims relating to the alleged persecution are obviously untrue
3. the applicant did not claim any persecution at all, or

4. the applicant comes from a safe country of origin

For procedures in the initial reception centre of the airport one interview is regarded as sufficient. Furthermore, the rejection has to be approved by the UNCHR otherwise the asylum seeker has to be transferred to the EAST Traiskirchen and the application admitted to the regular procedure.

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

Appeal

Indicators:

- Does the law provide for an appeal against a decision taken in a border procedure?
 Yes No
 - o if yes, is the appeal judicial administrative
 - o If yes, is it suspensive? Yes No

The time limit for lodging appeals against a decision by the Federal Asylum Agency in procedures at the airport is seven calendar days. The Asylum Court must render its decision within two weeks from the submission of the complaint. A hearing in the complaint proceedings must be conducted at the EAST at the airport; the time limit is respected by the Asylum Court.

Otherwise the same system for appeals applies as described in the relevant section under the regular procedure. The short time to appeal causes the same obstacles for asylum seekers in practice as in the admissibility procedure.

Personal Interview

Indicators:

- Is a personal interview of the asylum seeker systematically conducted in practice in a border procedure?
 Yes No
- If so, are interpreters available in practice, for interviews?
 Yes No
- Are personal interviews ever conducted through video conferencing?
 Yes No

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

Legal assistance

Indicators:

- Do asylum seekers have access to free legal assistance at first instance in the border procedure in practice?
 Yes not always/with difficulty No
- Do asylum seekers have access to free legal assistance in the appeal procedure against a decision taken under a border procedure?
 Yes not always/with difficulty No

The same system for legal assistance applies as described under the regular procedure.

6. Accelerated procedures

General (scope, grounds for accelerated procedures, time limits)

The legal framework does not mention accelerated procedures as such, but has 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. An accelerated procedure is used in certain types of cases: (1) Dublin cases, (2) safe third country and safe country or origin cases and (3) in case the asylum application is examined at the airport, (4) in case of public interest.

In general applications have to be decided within 6 months according to the Administrative Procedures Law. Instead of 2 weeks for submitting an appeal in regular procedures, rejections by reason of responsibility of another EU Member State or a safe third country and of a subsequent application have to be appealed within one week. The Asylum Court has to decide on the appeal within 8 weeks if it was awarded a suspensive effect.

An accelerated procedure takes place at the airport, if the applicant is not allowed entry and the application is processed during the decision to reject entry at the border.

An accelerated procedure also applies in case the asylum applicant is a citizen of a safe country of origin (for instance Serbia, Kosovo, Bosnia and Croatia) and in case the asylum seeker already has refugee status in another EU Member State. In the latter case the Dublin Regulation is not applied in Austria but these cases are treated as inadmissible asylum applications.

In case public interest requires that an asylum application is dealt with in an accelerated manner, an expulsion procedure will be initiated. According to the law asylum seekers who have been convicted for a crime by a final judgment or against whom charges have been brought by the Department of Public Prosecution because they are suspected of having committed a criminal offence willfully or who have been caught in the act of committing a criminal offence, are considered as a danger to the public interest and in such cases their asylum application must be examined in an accelerated manner.

In case an expulsion procedure has been initiated a decision shall be taken as quickly as possible on the asylum application and at the latest within three months from initiating the expulsion procedure or from the lodging of an appeal, which has a suspensive effect.

In addition to these accelerated procedures there is national practice of fast processing of cases from certain countries of origin. These procedures are usually decided in the EAST, not in a field office of the BAA. The procedure for asylum seekers who come from a safe country of origin in practice often takes less than a week until a rejection decision is issued. This so-called fast track procedure is a political decision to put asylum applicants, usually from a certain country of origin, during a certain period in such fast procedure, in order to discourage other potential asylum applicants from that country.³² The asylum applicant has, during that time, the same rights as any other asylum applicant in a procedure based on merits, but will receive the negative decision from the Federal Asylum Office within one or two weeks instead of within around six to nine months.

Nevertheless, the appeal that must be lodged within two weeks after the reception of the decision usually has a suspensive effect.³³ The last notable wave of fast track procedures started in summer 2011 and lasted about five months and concerned asylum applicants from Afghanistan and Pakistan. These procedures are even prioritised by the Asylum Court.

Within the admissibility procedure refugee or subsidiary protection status may be granted. This regulation is hardly applied in practice, even family reunification cases are often admitted to the procedure and not decided in the admissibility procedure, although family members are entitled to the same status.

Appeal

Indicators:

- Does the law provide for an appeal against a decision taken in an accelerated procedure?
 - Yes No
 - o if yes, is the appeal: judicial administrative
 - o If yes, is it suspensive? Yes, with exceptions

Instead of two weeks for submitting the appeal in the regular procedures, decision to reject the asylum application on the basis of the responsibility of another EU Member State, the existence of a safe third country or a subsequent application have to be appealed within one week. The Asylum Court has to decide on the appeal against these decisions within two weeks if suspensive effect was granted.

In subsequent applications without protection against deportation the court has to decide within 8 weeks if a suspensive effect was not awarded. This provision has not much effect for the asylum seeker as they may have been expelled or transferred before.

Difficulties to lodge an appeal against negative decisions in the accelerated procedure are the same as described under Dublin-procedure above and result mainly from the short time limit of one week to lodge the appeal and insufficient free legal assistance.

The Asylum Court has to decide on the appeal within 3 months in cases of specific public interest.

³² See for example. Ministry of Interior, Johanna Mikl-Leitner explained during the parliamentary hearing on 30 October 2012: *“Bei Personen, die aus Drittstaaten kommen, im Speziellen aus den Balkanländern, wissen wir, dass es keine Asylgründe gibt, und da sind wir zu Schnellverfahren übergegangen,”* (“We know from persons coming from third countries, especially from Balkan countries, that grounds for asylum do not exist in their case, and we therefore changed to accelerated procedures”).

³³ E.g. AsylGH (Asylum Court) - A8 260.187-2/2011, 02 August 2011.

Personal Interview

Indicators:

- Is a personal interview of the asylum seeker systematically conducted in practice in an accelerated procedure?
 Yes No
- If so, are interpreters available in practice, for interviews?
 Yes No
- Are personal interviews ever conducted through video conferencing?
 Yes No

All asylum-seekers must have one personal interview by the civil servant who will decide the case. The law permits an exception in case the asylum seeker has evaded the procedure in the initial reception centre (EAST). If the facts are established, the fact that they have not been interviewed by the Federal Asylum Agency or by the Asylum Court yet should not preclude the rendering of a decision.

In last minute subsequent applications to prevent an expulsion order and subsequent applications without de facto protection (no suspensive effect and the expulsion order issued after the first asylum application was rejected can be executed) against deportation the Asylum Agency may omit the personal interview.

Legal assistance

Indicators:

- Do asylum seekers have access to free legal assistance at first instance in accelerated procedures in practice?
 Yes not always/with difficulty No
- Do asylum seekers have access to free legal assistance in the appeal procedure against a decision taken under an accelerated procedure?
 Yes not always/with difficulty No

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 advice is not available for subsequent asylum applications with regard to the procedure before the Federal Asylum Agency (BAA).

In fast track procedures the mandatory legal advice for the admissibility procedure is circumvented by forwarding the procedure to the Federal Asylum Agency's branch office without prior admission to the regular procedure. This practice takes place in Traiskirchen where admissibility procedures are conducted in one building (EAST - initial reception centre) and in another building a branch office of the BAA conducts regular procedures. At the time asylum seekers get the invitation for their interview they still have the restriction of movement. Therefore they are not able to consult NGOs or lawyers outside the district of Baden. As they are not notified that their application will be rejected in the admissibility procedure, they are not ordered to consult the legal advisor in the admissibility procedure, who has to give advice if the application will be rejected in the admissibility procedure. It must be noted that in fact such decisions in fast track procedures are not part of the admissibility procedure.

For the appeal a legal adviser is appointed except in case of an appeal against subsequent applications.

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

Indicators:

- Is sufficient information provided to asylum seekers on the procedures in practice?
 Yes not always/with difficulty No
- Is sufficient information provided to asylum seekers on their rights and obligations in practice?
 Yes not always/with difficulty No
- Do asylum seekers located at the border have effective access to NGOs and UNHCR if they wish so in practice? Yes not always/with difficulty No
- Do asylum seekers in detention centres have effective access to NGOs and UNHCR if they wish so in practice? Yes not always/with difficulty No
- 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 not always/with difficulty No

Asylum seekers must receive three different information sheets in a language understandable to them during the first interrogation (1) the orientation information sheet gives a short overview of the course of action in the asylum procedure; (2) the first information sheet explains the procedure in the EAST which includes information about the Dublin Regulation, EURODAC and the Dublin procedure; (3) the information sheet about the rights and duties of an asylum applicant is handed out. The contact details of UNHCR in Austria are included in the information sheets as well as the telephone service number and homepage of the bar association. For the procedure at the airport there are other especially adapted information sheets, which explain the airport procedure.

These information sheets are widely criticized.³⁴ It is considered that for the average asylum applicant there is too much text, the sentences are too long, difficult formulations dominate the text and the content is based on a structure, which is not logical.

This information package is available in almost all languages needed. In the initial reception center asylum seekers may also see a short video in some of the main languages about the first steps in the procedure, but the terminals are rarely used and partly out of service.

At the beginning of the interview the applicant must be informed about their duties in the procedure. An asylum-seeker against whom an enforceable but not yet final expulsion order is enforced shall be informed in a suitable manner (if available a leaflet is provided in a language understandable to them) that, for the service of decisions in the asylum procedure, he may avail himself of the services of a legal representative and that he is obliged to inform the authority of his place of residence and address, including outside Austria.

Written information about the different steps of the procedure, the rules and obligations does not exist so far. As asylum legislation changes very often, it does not seem to be affordable to NGOs to have brochures or other written information in the various languages.

As described before, the system of free legal advice should, at least, provide information during the mandatory consultation with the appointed legal adviser in case the Asylum Agency intends to reject the

³⁴ Plutzer, Verena, "Sie brauchen RICHTIGE Information, von jemand, dem sie vertrauen." Eine Analyse der Weitergabe rechtlicher Informationen im Asylverfahren Stichproben (*They need CORRECT information from someone that they trust – an analysis and testing of the transmission of legal information during the asylum procedure*), In: Wiener Zeitschrift für kritische Afrikastudien (in: *Vienna Journal for critical African studies*), No. 19/2010, 10. Jg., 175-196.

asylum application as inadmissible or on the merits of the application in the EAST. The Federal Asylum Agency has to add to its decision information 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 Asylum Court, reference shall also be made, in a language understandable to the asylum seeker, to the possibility of filing a complaint with the Constitutional Court.

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

According to the law UNHCR has access to all facilities and is allowed to get in contact with asylum seekers. NGOs have in seven of the nine federal provinces contracts for providing social counselling and visit reception centres of asylum-seekers regularly. NGOs without contract usually have to apply at the responsible office of the federal province for a permit to visit an asylum seeker. For NGOs access to asylum seekers in detention is difficult as long as they are not the authorised legal representative of the asylum seeker. The two contracted organisations for providing legal advice “*Arge Rechtsberatung*” and “*Verein Menschenrechte Österreich*” are bound by secrecy and by this hindered to pass on information about clients who wish to contact NGOs.

D. Subsequent applications

Indicators:

- Does the legislation provide for a specific procedure for subsequent applications?
 Yes No
- Is a removal order suspended during the examination of a first subsequent application?
 Yes No last minute application
- Is a removal order suspended during the examination of a second, third, subsequent application?
 Yes No last minute application

Subsequent applications are defined by the Asylum Law as applications after a final decision was taken on a previous asylum application. Usually, a subsequent application is not admitted to the regular procedure and rejected by the initial reception centre (EAST) according to § 68 General Administrative Law. In these cases free legal advice for the appeal is not provided. The Asylum Court decides on the appeal by a single judge. The Asylum Court can either refuse the appeal or decide to revert it back to the Federal Asylum Office with the binding instruction to examine the subsequent asylum application either in a regular procedure or conduct more detailed investigations.

Within the admission 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 or new grounds for the application. New elements are not defined by the law, but there are several judgments of the Administrative Court that are used as guidance for assessing new elements.

Reduced legal safeguards apply in case an inadmissibility decision was taken within the last 18 months (the rejection is connected to an expulsion order and a re-entry ban of 18 months). In this case there is generally no suspensive effect, neither for the appeal, nor by the application itself. In many cases the asylum applicant does not even receive a personal interview except for the preliminary interrogation by the police.

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

In certain cases, it is 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 private life may have changed since the final decision on the first asylum application, e.g. marriage, 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 include the question of threat of a violation of Art. 8 European Convention on Human Rights.

In Dublin cases, when the asylum seeker was not 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 which will be considered as a subsequent asylum application. When it becomes clear that meanwhile the situation has changed or the requested Member State does not accept the request for transfer, the regular procedure to assess the case on the merits starts. Asylum-seekers sent back to Austria by other Member States two years after their file has been closed due to their absence have to submit a subsequent application too. The same applies if the decision became final while the asylum seeker stayed in another Member State.

Asylum-seekers who submit a subsequent application are not entitled to Basic Care provisions; nevertheless they may receive Basic Care during the admissibility procedure of the subsequent application (see below section on Reception Conditions). If Basic Care is not granted, detention or a more lenient measure (designated place of living and reporting duties) is ordered.

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

1. Special Procedural guarantees

Indicators:

- Is there a specific identification mechanism in place to systematically identify vulnerable asylum seekers?
 Yes No Yes, but only for some categories
- Are there special procedural arrangements/guarantees for vulnerable people?
 Yes No Yes, but only for some categories

There is no effective system in place to identify asylum seekers in need of special procedural guarantees. During the admissibility procedure in the initial reception centre (EAST), asylum-seekers are instructed in the written leaflets that they should state psychological problems to the doctor and the legal advisor. Doctors in the initial reception centre have a psychology diploma. They are requested by the Federal Asylum Agency 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 (§30 AsylG 2005). If such effects are highly probable, the application shall not be dismissed in the admission procedure. The Article also states, that in the further course of the procedure, consideration should be given to the asylum seekers' specific needs. However this seems not to be applied in first instance procedure in practice.

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

If an asylum seeker bases the fear of persecution on infringement of the right to sexual self-determination, they should be interviewed by an official of the same sex, unless they request otherwise.

In the procedure before the Asylum Court, this rule should apply only if asylum seekers have already claimed an infringement of their right to sexual self-determination before the Federal Asylum Agency or in the written appeal. The Constitutional Court ruled that the competence of the judge of the same sex exists regardless of whether a public hearing is organised or a decision taken which is exclusively based on the file.³⁵ A similar provision for interpreters is lacking. In practice it even turned out that this provision could be a disadvantage. One of the female judges of the Asylum Court deciding on applications of Russian applicants never granted refugee status, compared to other female judges for the same country of origin.

The Asylum Court lists in its yearly report 2009, one training of a Psychiatrist on the issue „Trauma/Pseudotrauma“, in 2010 and 2011 no such lectures are quoted.

2. Use of medical reports

Indicators:

- Does the legislation provide for the possibility of a medical report in support of the applicant's statements regarding past persecution or serious harm?
 Yes Yes, but not in all cases No
- Are medical reports taken into account when assessing the credibility of the applicant's statements?
 Yes No

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

³⁵ VfGH (Constitutional Court) - U688-690/12-19 of 27 September 2012.

The determining authority requests medical reports from psychiatrists that are partly criticised by NGOs and psychotherapists.³⁶ Therefore asylum seekers also submit opinions by experts of their own choice.

The Administrative Procedures Law requires the assessment of all relevant facts and the obligation of the authorities to undertake all necessary investigations. Statements of the applicants have to be credible, persecution has not to be proved and preponderant plausibility is sufficient. If the authorities have doubts that 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 psychotherapists. In every federal state, a NGO provides psychotherapy for asylum seekers funded by the European Refugee Fund (ERF) with therapy free of charge. Statements of psychotherapists requested by the asylum seekers themselves are taken into consideration, but usually their opinions are regarded as less competent than those from psychiatrists registered at the Courts.

The Higher Administrative Court rendered a crucial decision with regard to the consideration of medical evidence, in which it basically criticised the first instance authority for “neglecting 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.”³⁷ A psychiatric opinion was taken into consideration, which concerned the need of treatment of the psychiatric illness. It diagnosed PTSD, illusions and concentration difficulties, but did not answer the question in how far they influence the asylum seeker's statements. The authority believed, that the asylum seeker should remember the exact date, because of the kind of the events relied upon.

The established jurisprudence of the Higher Administrative Court³⁸ requires exhaustive reasoning to be able to deny the causality between asserted torture and visible scars, in case through an expert opinion indicating the likelihood of torture which causes visible effects of the wounding has been submitted. In the same ruling, the court repeats former jurisdiction that psychic illness has to be taken into account in regard to discrepancies that have been identified in the statement of an asylum-seeker.

Medical reports are not based on the methodology laid down in the Istanbul Protocol.

3. Age assessment and legal representation of unaccompanied children

Indicators:

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

In the case of doubt with regard to the age of an unaccompanied asylum-seeking child authorities may order a medical examination consisting of several methods. According to the amendment of the Asylum

³⁶ Klaus Ottomeyer: [Genereller Simulationsverdacht](#) (*General suspicion of simulation*). In: Zebratl 5/2006; Weltverband für Psychiatrie, Sektion psychologische Folgen von Folter & Verfolgung: Expert opinion on two psychiatric opinions, 29. November 2002.

³⁷ VwGH (Administrative court) - 007/19/0830, 19 November 2010.

³⁸ VwGH (Administrative court) - 2006/01/0355, 15 March 2010.

Law 2009 and decrees of the Minister of the 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.

In practice these principles are not strictly applied. Children have to undergo the age assessment without the asylum authorities acknowledging submitted documents or giving enough time to obtain documents. If the child is deemed to be at least 18 years old according to the age assessment they are declared to be adults. *Menschenrechtsbeirat* (Human Rights Board), NGOs and the Medical Association criticise the methods used in regard of their reliability and ethnic acceptance.³⁹ In 2012 698 age assessments have been ordered and 556 expert opinions have been rendered. 336 asylum-seekers have been declared to be 18 or older as a result of age assessment. In case an asylum applicant is declared being of full age, his birth date will be “corrected” to 1st January of the fictive year the age has been diagnosed. This has been widely criticised, as this may cause the asylum applicant to be even one year older than the age determined by the medical examination.

A legal representative is appointed as soon as an unaccompanied asylum-seeking child applies for asylum: Unaccompanied children have no legal capacity to act by themselves in the procedure, but nevertheless they are under the same obligation to cooperate in the procedure as adults. Legal representatives have to be present at interviews organised by the Federal Asylum Agency (and hearings by the Asylum Court). In the admissibility procedure the legal advisers (who are contracted by the Ministry of the Interior) are legal representatives for unaccompanied asylum-seeking children. Legal advisers are either from *Verein Menschenrechte Österreich* or from *ARGE Rechtsberatung*. Due to *Menschenrechtsbeirat* (Human Rights Board)⁴⁰ 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 with children.

After admission to the regular procedure and transfer to one of the federal provinces the local Youth Welfare Agency takes over the legal representation according to the Asylum Law or by court decision. During his visit the Commissioner for Human Rights of the Council of Europe learned however that gaps remain for children at the admissibility stage and for those whose cases have been declared inadmissible or who are subject to being returned to another EU member state under the Dublin II regulation.⁴¹

Children of 16 years of age are not legally represented in procedures according to the Foreigner Police Law. This is crucial as this means that measures such as a detention order or certain procedures such as the withdrawal of the residence permit during the asylum procedure or fines due to violation of the restricted area of stay by the Foreigner Police may be imposed which may have severe consequences for the child. However, the Foreigner Police has at least to inform the Youth Welfare Agency in case of detention of a child. From 2014 on all children shall have a legal representative in Foreigner Police procedures. This legal provision has been adopted in 2012.⁴²

³⁹ Menschenrechtsbeirat (Human Rights Board): [Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren](#) (Report of the Human Rights Board on children and adolescents in cross-border procedures), (2011); Stellungnahme der Ärztekammer (Comment by the Medical Council), FPG 2010, 21 July 2009.

⁴⁰ Menschenrechtsbeirat: (Human Rights Board): [Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren](#) (Report of the Human Rights Board on children and adolescents in cross-border procedures), (2011).

⁴¹ Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Austria from 4 to 6 June 2012 (2012), 7.

⁴² BGBl (Federal Law Gazette). 87/2012 16 August 2012: Fremdenbehördenneustrukturierungsgesetz –FNG.

The number of unaccompanied children in Austria increased in the last years, from 934 in 2010 to 1346 in 2011 to 1781 in 2012, which is an increase of almost 90 % in two years. Children from Afghanistan are the largest group (58% in 2012)⁴³.

F. The safe country concepts (if applicable)

Indicators:

- Does national legislation allow for the use of safe country of origin concept in the asylum procedure?
 Yes No
- Does national legislation allow for the use of safe third country concept in the asylum procedure?
 Yes No
- Does national legislation allow for the use of first country of asylum concept in the asylum procedure?
 Yes No
- Is there a list of safe countries of origin?
 Yes No
- Is the safe country of origin concept used in practice?
 Yes No
- Is the safe third country concept used in practice?
 Yes No

The list of safe countries of origin (Article 38 AsylG) includes all EU Member States and there is a mechanism to take Member States off the list according to EU law (Art 7 EU Treaty) which has as a consequence, that suspensive effect of appeal in asylum procedures of nationals of such EU Member State must be granted. Other safe countries of origin mentioned in the Asylum law are Switzerland, Liechtenstein, Norway, Island, Australia and Canada. States waiting for accession to the EU are defined as safe countries of origin by governmental order; these are Bosnia-Herzegovina, Croatia, Serbia, Montenegro, Kosovo and Albania. The suspensive effect of an appeal may not be granted in such cases by the Federal Asylum Agency, and in such case the Asylum Court has to decide within 7 calendar days on the suspensive effect.

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 Federal Government can by ministerial order decide that in such cases suspensive effect may no longer be refused and that the Asylum Agency and the Court are bound by such decision. The order takes regard of the existence of persecution by the state or non-state actors and legal safeguards in case of human rights violations. The list was drafted by the Ministry of the Interior, NGOs could comment on it. The list of safe countries of origin is applied in practice.

G. Treatment of specific nationalities

The so-called fast track procedure is applied on the basis of a political decision to examine asylum applications, usually from a certain country of origin, during a certain period in such procedure, in order

⁴³ Federal Minister for Interior: [Asylstatistik](#) (Asylum statistics) for 2012.

to discourage other potential asylum applicants from the same country. The asylum applicant has, during that time, the same rights as any asylum applicant in a procedure in which the merits of the claim are examined (regular procedure), but will receive the negative decision from the Federal Asylum Agency within one or two weeks instead of around six to nine months.

Nevertheless, the appeal filed within two weeks after the notification of the decision usually has a suspensive effect. The last notable wave of fast track procedures started in summer 2011 and lasted about five months and concerned asylum applicants from Afghanistan and Pakistan. Appeals in these procedures are often prioritised by the Asylum Court too. A judge of the Court usually is responsible for a region of origin, including several countries. The judge may decide for a certain period of time applications from one specific country of origin.

Asylum seekers from Syria receive protection status, if refugee status is not granted in first instance they get subsidiary protection status.

Reception Conditions

A. Access and forms of reception conditions

1. Criteria and restrictions to access reception conditions

Indicators:

- Are asylum seekers entitled to material reception conditions according to national legislation :
 - o During the accelerated procedure?
 Yes Yes, but limited to reduced material conditions No
 - o During admissibility procedures:
 Yes Yes, but limited to reduced material conditions No
 - o During border procedures:
 Yes Yes, but limited to reduced material conditions No
 - o During the regular procedure:
 Yes Yes, but limited to reduced material conditions No
 - o during the Dublin procedure:
 Yes Yes, but limited to reduced material conditions No
 - o During the appeal procedure (first appeal and onward appeal):
 Yes Yes, but limited to reduced material conditions No
 - o In case of a subsequent application:
 Yes Yes, but limited to reduced material conditions No
- 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 could not be expelled are not entitled to the same social benefits like citizens. In 2004 the Basic Care Agreement between the State and the federal provinces entered into force and following this agreement laws on national and provincial level have implemented the agreement. The agreement sets the duties of the state and the federal states and describes the material reception conditions such as accommodation, food, clothing, 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 until a final decision on the asylum application in all types of procedures. However, Basic Care legislation does not apply in detention or an alternative to detention. 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). A precondition for Basic Care is the need for support. This is defined by law: a person who is unable to cover subsistence by own resources or by donations from third parties. Although the amount of material reception conditions is specified in the Basic Care Agreement⁴⁴, the level of income or values relevant to assess lack of need for Basic Care is not specified by law except in the Basic Care law of Tyrol. In practice the level of income in the law of Tyrol is applied in other federal provinces too: asylum seekers who have an income beyond 1.5 x the amount of Basic Care benefits (€ 465) are deemed to be without need of Basic Care. Legislation does not lay down the amount of means of subsistence below which a

⁴⁴ Article 6, 7 and 9 Grundversorgungsvereinbarung – Art. 15a B-VG BGBl (*Federal Law Gazette*). I Nr. 80/2004, 15 July 2004.

person is entitled to Basic Care. The amounts for subsistence and accommodation are prescribed by law. Asylum-seekers who leave the assigned place of residence lose their entitlement to Basic Care.

2. Forms and levels of material reception conditions

Indicators:

- Amount of the financial allowance/vouchers granted to asylum seekers on 31/12/2012 (per month, in original currency and in euros): € 302

Basic Care may be provided in three different forms. First asylum seekers can be accommodated in reception centers where catering is provided. Asylum-seekers in such reception centers receive € 40 pocket money per month, the care provider (NGOs, private companies contracted by the Governments) receives 19 € maximum per day, depending on the standards of the facility.

Secondly Basic Care can be provided in reception centers where asylum seekers cook by themselves. In that case asylum seekers receive between € 150 and 180 /month mainly in cash. In some federal provinces the amount for minors is less.

Thirdly, Basic Care can be provided in private rented accommodation. In this case asylum seekers receive € 320 in cash. In addition they, like asylum seekers accommodated in reception centers, receive € 150 a year for clothes in vouchers and 200 € a year for school material for pupils.

Asylum seekers living in private rented flats receive 41 % of the needs-based minimum allowance (*bedarfsorientierte Mindestsicherung*) for citizens in need of social welfare support, which is about € 800 per month (600 - for subsistence, 200 - for accommodation).

Even € 570 (= € 19 x 30 days) per month for accommodation and subsistence is below the level of welfare support for citizens, although staff and administrative costs have to be covered by the provider. After a positive decision, refugees may stay up to four months in the reception centre. For persons with subsidiary protection status, no maximum time period exists, which means that they stay in reception centers as long as they are not able to cover subsistence and accommodation costs by their own.

After a final negative decision on the asylum application the law provides for Basic Care until departure from Austria, if they cannot leave (e.g. inability to get a travel document). Usually they remain in the same reception facility. While in Vienna Basic Care after a negative decision usually is prolonged, other Federal States cease the support. Depending on available places rejected asylum seekers may stay in the reception centre on the basis of an agreement with the landlord/NGO.

Unaccompanied asylum-seeking children must be accommodated according to their need of guidance and care. The daily fee for NGOs hosting unaccompanied asylum-seeking children ranges from € 39 to 72. Unaccompanied asylum-seeking children with higher need of care are accommodated in groups, those who are not able to care for themselves are accommodated in dorms. The third group, which is instructed and care for themselves live in supervised flats.

Social educational and psychological care for unaccompanied asylum-seeking children shall stabilize their psychic constitution and create a basis of trust according to the description in some of the Federal provinces Basic Care Laws. Further, daily structure (e.g. education, sport, group-activities, and homework) is foreseen, dealing with questions of age, identity, origin and residence of family members, perspective for the future and integration measures.

The Basic Care laws of Lower Austria and Vorarlberg include provisions for the special needs of vulnerable persons. The elderly, pregnant woman, single parents and victims of torture, rape or other forms of severe psychic, physic or sexual violence are considered as vulnerable persons (NÖ § 6 (4)). In the laws of the federal provinces Vienna, Carinthia, Upper Austria, Salzburg, Tyrol and Burgenland vulnerable asylum-seekers are not mentioned.

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 obligations of the parties and the benefits asylum seekers are entitled to. The medical needs of ill and handicapped asylum seekers and asylum seekers who require nursing care is not sufficiently met in practice. 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.

3. Types of accommodation

Indicators:

- Number of places in all the reception centres (both permanent and for first arrivals): 10824
- Number of places in private accommodation: 2922
- Number of reception centres: 730
- Are there any problems of overcrowding in the reception centres? Yes No
- What is, if available, the average length of stay of asylum seekers in the reception centres? Not available
- Are unaccompanied children ever accommodated with adults in practice? Yes No

At the end of 2012, 20.000 persons, out of which 12.445 asylum seekers, were supported by Basic Care. Asylum seekers are accommodated in more than 700 facilities of different capacities. A quota system requires the federal provinces to provide places according to their population size. In practice, most federal provinces do not provide for the demanded number of places, consequently asylum seekers cannot be dispersed according to the law and stay longer in the Initial reception centre (EAST - *Erstaufnahmestelle*). This was high on the political agenda in autumn 2012, when, instead of 480 asylum seekers (the number agreed between the Minister of the Interior and the major of Traiskirchen), around 1500 asylum seekers were hosted in the EAST Traiskirchen.

The Commissioner for Human Rights of Council of Europe noted after his visit in Austria in June 2012 that since 2011 the number of unaccompanied children from Afghanistan has increased considerably. Their number is reported to be currently about twice as high as the number of special places with adapted services foreseen for unaccompanied children in the Federal Reception Centre East. This raises the issue of whether all unaccompanied asylum-seeking children under the current circumstances benefit from the child-adapted services as originally planned for.⁴⁵

Due to the lack of adequate places in the federal provinces, 600 unaccompanied asylum-seeking children lived in Traiskirchen without proper assistance and care and without inscription in school of children younger than 15 years who are obliged to attend school. After public criticism, classes were installed in the initial reception centre.

⁴⁵ REPORT by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following his visit to Austria from 4 to 6 June 2012. Strasbourg, 11 September 2012 CommDH(2012)28, p 8.

Reception Centers are run by NGOs or by owners of hostels and inns. Since 2012, the Ministry of Interior has a contract with ORS, an enterprise hosting asylum-seekers in Switzerland, which provides basic care in the five reception centers under the responsibility of the ministry (two initial reception centers and three reception centers for asylum seekers in the admissibility procedure).⁴⁶ For Austrian NGOs it was impossible to submit an offer due to the conditions in the call for tender. Other basic care providers 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, private accommodation is more used in others, like in Vienna.

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

For single women, there are some specialised reception facilities, one in the EAST and a few others are run by NGOs. In bigger facilities of NGOs, separated rooms are dedicated for single women. There may also be floors for families. There are only a few reception facilities with more than 80 or 100 places, almost all of these are run by NGOs. Hostels and inns have between 20 and 40 places, therefore separation of single men is not the rule.

Unaccompanied asylum-seeking children are placed in facilities run by NGOs. This provision was not respected in 2011 and 2012 in Traiskirchen because the EAST (*initial reception centre*) run out of places and the unaccompanied children were hosted in buildings for adults. Exceptionally unaccompanied asylum-seeking children were hosted in two federal provinces in reception centers for adults. The concept of foster families is not foreseen in the Austrian law. Nevertheless, the Youth Welfare Agency may place small children with foster families or facilities of the Youth Welfare Agency.

Traumatized or ill asylum seekers may be cared for in facilities of NGOs with places for persons with higher need of care (*“Sonderbetreuungsbedarf”*).

4. Reduction or withdrawal of reception conditions

Indicators:

- Does the legislation provide for the possibility to reduce material reception conditions?
 Yes No
- Does the legislation provide for the possibility to withdraw material reception conditions?
 Yes No

Material reception conditions are reduced, if the asylum-seeker has an income, items of value or support from a third party. 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 have € 110 (or € 100, there is no common practice in all federal provinces), all additional income will be requested as financial contribution of the asylum seeker to Basic Care. Reduction could also consist of not granting of the monthly pocket money or the support for the child, if the child is entitled to child benefits, which mainly applies to those who have received refugee status.

⁴⁶ Reception centres for asylum-seekers in the admissibility procedure are located in Reichenau, Bad Kreuzen and Vienna.

Material reception conditions may be withdrawn, if an asylum seeker repeatedly violates the house rules and/or if the asylum seeker's behaviour endangers the security of other inhabitants. If an asylum seeker leaves the designated place for more than 3 days, it is estimated that they are no longer in need of basic care. 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 or basic care, but this is not applied in practice.

Legal provisions in case of withdrawal or reduction do not meet the requirements set for in the Reception Conditions Directive. In some Federal provinces, reduction or withdrawal of reception conditions may be ordered without hearing the asylum seeker and no written decision is notified. In some Federal provinces, it is only rendered upon request of the asylum seeker. A legal remedy in the Basic Care Law of the Federal State is foreseen in case material reception conditions are withdrawn.

Withdrawal or reduction of Basic Care provisions should be decided by the Federal Asylum Agency as long as asylum seekers are in the admissibility procedure and by the governmental office of the federal province if the asylum seeker is admitted to the procedure in merits and Basic Care is provided by one of the federal provinces. In practice there are only few procedures with regard to reduction or withdrawal of Basic Care. This is partly because NGOs manage to arrange a solution for their client, partly because the competent offices are unwilling to make a written decision. Such decisions can be appealed at the Independent Administrative Senate of the federal provinces. Legal assistance for appeal is not foreseen.

Not entitled to basic care are asylum seekers, who submit a subsequent asylum application, if the asylum seeker has been convicted by the court, which gives rise to the assumption that a ground to exclude the asylum seeker from refugee status according to Article 1F Refugee Convention exists. This exclusion is not in line with the EU Reception Conditions Directive but does not seem to be applied or relevant in practice.

Furthermore EU and EEA (European Economic Area) citizens are excluded. Asylum seekers entering Austria legally with a visa will not receive Basic Care, because visas are only issued after proof of sufficient means is provided, in most cases an invitation. The persons inviting the asylum seeker are responsible to cover all costs.

5. Access to reception centres by third parties

Indicators:

- 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 initial reception centres (EASTs) generally access of legal advisors and NGOs to the reception buildings is not allowed. Family members may meet their relatives in visitor rooms and legal advisors and NGOs in the premises of the Federal Asylum Agency. 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 (€ 40 per month). Travel costs for meetings with the appointed legal advisor should be paid by the organisations *Verein Menschenrechte Österreich* and *ARGE Rechtsberatung*.

6. Addressing special reception needs of vulnerable persons

Indicators:

- 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. Basic Care conditions shall safeguard human dignity at least.

Basic Care provisions for unaccompanied asylum-seeking children reflect the need of care with regard to accommodation and psychosocial care. Unaccompanied asylum-seeking children must be accommodated according to their need of guidance and care. The daily fee for NGOs hosting unaccompanied asylum-seeking children ranges from € 39 to 72. Unaccompanied asylum-seeking children with higher need of care are accommodated in groups, those who are not able to care for themselves must be accommodated in dorms. The third group, which is instructed and care for themselves live in supervised flats. In most cases the transfer of an unaccompanied asylum-seeking child from the initial reception centre to Basic Care facilities of the federal provinces takes place without knowledge of the specific needs of the child. In Vienna with several accommodation facilities for unaccompanied asylum-seeking children NGOs may arrange a type of accommodation suitable for their client, in federal provinces without different facilities their needs could not be adequately met. The Youth Welfare Agency is responsible for providing adequate guidance and care.

Social educational and psychological care for unaccompanied asylum-seeking children shall stabilize their psychic constitution and create a basis of trust according to the description in some of the Federal provinces' Basic Care Laws. Further daily structure (e.g. education, sport, group-activities, and homework) is foreseen, dealing with questions of age, identity, origin and residence of family members, perspective for the future and integration measures.

The Basic Care laws of Lower Austria and Vorarlberg include provisions for the special needs of vulnerable persons. The elderly, pregnant woman, single parents and victims of torture, rape or other forms of severe psychic, physic or sexual violence are considered as vulnerable (NÖ § 6 (4)).

In the laws of the federal provinces Vienna, Carinthia, Upper Austria, Salzburg, Tyrol and Burgenland vulnerable asylum seekers are not mentioned.

The monthly amount of € 2.480 for nursing care in specialised facilities is included in the Basic Care Agreement between the State and the federal provinces, which describes the material reception conditions. The needs of ill, handicapped asylum seekers and asylum seekers with nursing care is 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.

7. Provision of information

The information leaflets in the initial reception centers provide brief information about obligations with regard to reception conditions – e.g. visit a doctor, traumatic experience, possibility to contact UNHCR or restricted movement.

In the reception centers, asylum seekers are informed about the house rules, which contain information about their duties and sanctions. These are either posted in the most common languages or a short written instruction has to be signed by the asylum seeker. In two federal states, Lower Austria and Salzburg, a brochure describes the Basic Care system which is available on the internet as well⁴⁷.

⁴⁷ Publication by the County of Salzburg on "[Grundversorgung](#)" (Basic needs).

Social advice is included in the reception provisions laid down by law. Social advisors visit reception centres on a regular basis, but have to fulfill at the same time administrative tasks (hand over the monthly pocket money or the vouchers for clothes and school material). Organisation, providing social advice usually have departments for legal advice of asylum seekers too.

Asylum-seekers living in rented flats have to go to the offices of the social advice organizations. The system of information is not satisfactory, because one social worker is responsible for 170 asylum seekers, which means that the standards for social work are not met. Some federal provinces provide for more effective social advice (e.g. 50 in Vorarlberg or 70 clients in Vienna for one social worker). It has to be taken into consideration that reception centers in remote areas cannot be visited very often by the social workers because of insufficient funding.

8. Freedom of movement

After submitting the application for international protection at the initial reception centre (EAST), asylum seekers are obliged to stay within the centre for up to 120 hours (exceptionally 148 hours), until the first interview on the asylum application took place. During this first phase of the admissibility procedure, they receive a red card, which shall be replaced by a green card (procedure card) after the first interview, which indicates the tolerated stay in the district of the reception centre.

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 allowing free movement on the entire territory of Austria. Often asylum seekers do not have enough money for travelling. If they stay away from their designated place (reception facility) without permission for more than 3 days, basic care will be withdrawn. It is almost impossible to receive basic care in another than the designated federal state.

If grounds arise for the detention of an asylum seeker, an alternative to detention should be applied if there is no risk of absconding. Due to reporting duties – often every day – and exclusion from pocket money allowance asylum seekers may not make use of free movement in the case of alternatives to detention being applied.

B. Employment and education

1. Access to the labour market

Indicators:

- Does the legislation allow for access to the labour market for asylum seekers?
 Yes No
- If applicable, what is the time limit after which asylum seekers can access the labour market:
3 months
- Are there restrictions to access employment in practice?
 Yes No

The Foreigner Employment Law states that an employer can obtain an employment permit for an asylum seeker, three months after the submission date of the asylum application, provided that no final decision in the asylum procedure has been taken prior to that date.

The possibility of obtaining access to the labour market is restricted by a procedure (Labour Market Test/*Ersatzkräfteverfahren*), which requires proof that the respective vacancy cannot be filled by an

Austrian citizen, citizens of the EU or a legally residing third country national with access to the labour market (longtime resident, family member etc.).⁴⁸

Applications for an employment permit must be submitted by the employer with the regional AMS (Labour Market Service) 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 (regional advisory board). The regional advisory board has to recommend such an employment permit unanimously. Appeals have to be made to the Land AMS office that must decide on appeals against decisions of the regional AMS office. There is no further right of appeal (AuslBG § 20 (1) und (3)). The decision has to be made within six weeks; in case of appeal proceedings the same time limit must be applied.

In addition, in 2004 the ordinance GZ 435.006/6-II/7/2004 (11 May 2004) was passed. It includes further restrictions for the access to the labour market for asylum seekers, by restricting it to seasonal work either in tourism, agriculture or forestry. These seasonal jobs are limited by a yearly quota for each federal state and can only be for a maximum length of six 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 stipulate a contribution to basic care, if asylum seekers have an income. In practice, there is only an allowance of € 100 for the asylum seekers in most of the federal provinces. If they have had an income for more than three months, the basic care support comes to an end. If the asylum seeker asks for readmission into basic care after they have finished the employment, cash contributions to the provision of basic care to the asylum seeker are demanded. Then it is assumed, that only € 435 (1.5 x the basic provision amount) have been spent for subsistence and accommodation during the period of employment. Income exceeding this amount is deducted from the allowance received under Basic Care in the following months. This request of contribution causes many problems, as in reality the asylum seekers spend the earned money and do not know how to survive the following months.⁴⁹

In fact only few asylum-seekers work. Minister of Interior Johanna Mikl Leitner explained in an interview for the newspaper Der Standard that 10.000 working permits for asylum-seekers are available, but only 500 asylum-seekers do such seasonal work.⁵⁰

2. Access to education

Indicators:

- Does the legislation provide for access to education for asylum seeking children?
 Yes No
- Are children able to access education in practice?
 Yes No

⁴⁸ "§ 4. (1) An employer shall be granted an employment permit upon request for the foreign national indicated in the request if the situation and the development of the labour market permit such an employment (labour market test), and if it does not conflict with important public or overall economic interests, and
1. (...) if the foreign national has been admitted to asylum procedure, with admission dating back three months, and enjoys factual protection from deportation or holds a residence title pursuant to §§12 or 13 of the 2005 Asylum Act (AsylG 2005) or enjoys exceptional leave to remain in Austria (*Duldung*). (admitted has to be understood as the foreign national has submitted the application)".

⁴⁹ Asylkoordination österreich: Leben im Flüchtlingsquartier. Dezember 2010, p 37f.

⁵⁰ Der Standard, "[Mikl-Leitner will Asylwerber stärker zu Saisonjobs drängen](#)" (*Miki-Leitner wants to pressure asylum seekers more into taking up seasonal jobs*), 15 February 2013.

School attendance is mandatory for all children living permanently in Austria until they have finished 9 classes. 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 initial reception centre (EAST), school attendance is not provided. In November 2012 two classes were opened as many unaccompanied asylum-seeking children stayed in the centre in Traiskirchen for several months due to a lack of adequate places in the Federal provinces. Preparatory classes do not exist; if many children without German language knowledge attend class a second teacher is assisting these children.

Access to education for asylum seekers older than 15 who are no longer obliged to attend school may become difficult. Some pupils manage to continue their education in high schools. For those who have not successfully finished the last mandatory school year special courses are available free of charge for unaccompanied asylum-seeking children. Until July 2012 the Foreigner Employment Law restricted professional education, because the necessary working permits could only be issued for seasonal work. This restriction is still in force but exceptions were introduced for asylum-seeking children up to 18 years. A decree of the ministry of Social Affairs, allowing for a working permit as apprentice to children in professions with a shortage of workers proved insufficient, only 18 got the working permit since July 2012 which is the precondition to become apprentice. A new decree from March 2013 increased the age to 25 years.

C. Health care

Indicators:

- Is access to emergency health care for asylum seekers guaranteed in national legislation?
 Yes No
- In practice, do asylum seekers have adequate access to health care?
 Yes with limitations No
- Is specialised treatment for victims of torture or traumatised asylum seekers available in practice?
 Yes No

Every asylum-seeker who receives Basic Care has a health insurance. Treatment or cure that is not covered by health insurance may be paid upon request by the federal provinces or Ministry for the Interior departments for Basic Care to the asylum seeker. If Basic Care is withdrawn, asylum seekers are still entitled to emergency care and essential treatment. In practice, this provision is not always easy to apply. If an asylum seeker has lost basic care due to the absence of more than 2 days or violent behaviour in the *initial reception centre* (EAST), they will not receive medical help, because it is assumed that they could visit the medical station in the EAST. However, as those asylum seekers are no longer registered in the EAST, they will not be allowed to enter and receive medical treatment there.

In each federal province one NGO provides treatment to victims of torture and traumatised asylum seekers. This is partly covered by European Refugee Fund funding, partly by the Ministry of the Interior and regional medical insurance. However, the capacities of these services are not sufficient.

Detention of Asylum Seekers

A. General

Indicators:

- Number of asylum seekers who entered detention in the previous year: 919
- Number of asylum seekers detained or an estimation at the end of the previous year (specify if it is an estimation): Not available
- Number of detention centres: 17
- Total capacity: 950

In 2012 919 asylum seekers have been detained in one of the 17 detention centres in Austria. These centers with 950 places are under the administration of the police. Overcrowding in detention centres was not reported.

B. Grounds for detention

Indicators:

- In practice, are asylum seekers automatically detained
 - o on the territory: Yes No
 - o at the border: Yes No
- Are asylum seekers detained in practice during the Dublin procedure?
 Yes No
- Are asylum seekers ever detained during a regular procedure?
 Yes No
- Are unaccompanied asylum-seeking children ever detained?
 Yes Yes, but only in border/transit zones No
- Are asylum seeking children in families ever detained?
 Yes Yes, but rarely No
- What is the maximum detention period set in the legislation (inc extensions):
10 months
- In practice, how long in average are asylum seekers detained?
Not available

Practice concerning the detention of asylum applicants varies a lot in the different regions. The detention of asylum seekers is regulated in the Foreigners Police Law (*Fremdenpolizeigesetz* 2005 (FPG), which was also amended several times since it entered into force. The various grounds for detention are laid down in § 76 FPG. Detention is limited to those cases where it seems necessary to safeguard the examination of the applicant's asylum claim or to undertake the Dublin transfer:

1. In case there is an inadmissibility decision which can be executed, even if it is not yet in force; meaning that the Federal Asylum Agency has already issued an inadmissibility decision on the asylum application but logistical enforcement is still pending

2. In case an inadmissibility procedure is being undertaken meaning in case the asylum applicant received information indicating that the Austrian authorities are consulting other Member States to verify whether another Member State is responsible under the Dublin Regulation
3. In case a return decision, a residence prohibition or an expulsion order was issued before the asylum application was lodged
4. In case it seems likely, based on various kinds of evidence, that an inadmissibility decision will be taken
5. In case an inadmissibility decision was already issued or when the asylum applicant submitted a subsequent application which did not have an actual protection against deportation
6. In case an asylum applicant who had been informed that the claim was the subject of Dublin consultations does not respect the territorial restriction (obligation to remain within the district where the asylum seeker receives reception conditions)
7. In case an asylum applicant registered as “homeless” violates the duty to report to the police on a regular basis (more than once) or does not report that they are registered as homeless to the police within two weeks while they are in an admission procedure. If an asylum-seeker is not entitled to Basic Care (for example when they submitted a subsequent asylum application or they left the designated place of residence, they have either to inform the Asylum Agency about their address or to organise a “homeless address” where letters or decisions can be delivered.

If a person is taken to a detention centre at an early stage of the procedure (a decision was not yet issued on the asylum application) it is mostly because of their behaviour in the past and their individual characteristics: such as if the asylum applicant previously absconded or is likely to do so; the asylum applicant was in several other Dublin Member States before; it concerns a subsequent asylum application; if the asylum applicant confirms their travel route to Austria or not (asylum seekers are often detained after the preliminary interview to establish identity and nationality and travel route).

Detention is almost systematic during the 24 hours preceding the transfer of an asylum applicant to the responsible Member State under the Dublin Regulation. According to a response to a parliamentary question there are cases where persons in a Dublin procedure were detained for six months.⁵¹

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. The main parts of such decision, which are the verdict of detention and the information about the right to appeal against detention, have to be in a language the asylum applicant is able to understand. In each case, the detained asylum applicant is granted a legal advisor provided by the state, either from the organization *ARGE Rechtsberatung* or *Verein Menschenrechte Österreich*, which closely co-operates with the Ministry of the Interior.

The Human Rights Advisory Board (*Menschenrechtsbeirat*) and UNHCR have criticised the detention conditions for asylum seekers and irregular migrants for being even worse than in prisons.⁵² Concerning detention conditions for children, the *Menschenrechtsbeirat* has criticised the fact that

⁵¹ [Parliamentarian request NR 10892/AB \(XXIV.GP\) from 16 May 2012.](#)

⁵² Menschenrechtsbeirat beim Bundesministerium für Inneres: Bericht des Menschenrechtsbeirates über seine Tätigkeit im Jahr 2011, S. 57 (*Human Rights Board with the Federal Ministry of Interior, Report of the Human Rights Board on its activities in 2011, p. 57*); Menschenrechtsbeirat beim Bundesministerium für Inneres: Haftbedingungen in Anhalteräumen der Sicherheitsbehörden (*Human Rights Board with the Federal Ministry of Interior, Detention conditions in back rooms of security services*), October 2009.

children under 14 years are kept in detention centres with their family when their parents agree to keep the child with them in the detention centre rather than being separated from them.⁵³

While unaccompanied children are separated from adults in the detention centre, they are often kept alone in their cell, which has very negative psychological consequences. However, there was a small improvement in 2010. Since then there is a special detention centre in Vienna for unaccompanied children and families, which is located in a house formerly sheltering recognized refugees. This means that in practice the whole family waits for their deportation in an apartment, without the possibility of leaving it, while previously the family was usually separated by ordering an alternative measure to detention for the woman and the children while the father was detained.

Many persons awaiting their expulsion are still being held, in some cases for months, in police detention centers, which have been regularly criticised for their poor material conditions. Regular inspections by different bodies have noted some improvements but limited access to legal counsel and information on legal remedy and very limited possibilities for leisure activities and medical treatment have remained areas of concern.

C. Detention conditions

Indicators:

- Does the law allow to detain asylum seekers in prisons for the purpose of the asylum procedure (i.e. not as a result of criminal charges)?
 Yes (exceptionally after a criminal imprisonment) No
- If so, are asylum seekers ever detained in practice in prisons for the purpose of the asylum procedures? Yes No
- Do detainees have access to health care in practice? Yes No
- Is access to detention centres allowed to
 - o Lawyers: Yes Yes, but with some limitations No
 - o NGOs: Yes Yes, but with some limitations No
 - o UNHCR: Yes Yes, but with some limitations No

Detention of asylum seekers is executed in facilities of the police. Migrants with an expulsion order and citizens who serve an administrative fine are arrested in these buildings. Some of the detention conditions are regularly criticised by the Human Rights Board and international monitor institutions.⁵⁴ This concerns the imprisonment in cells for almost the whole day (according to the law detainees must stay in open air for at least one hour per day)⁵⁵ due to lack of guards or rooms to allow detainees to stay outside the cell during the day. Another concern is the insufficient medical care due to the lack of interpreters for examinations by doctors.

For families with children a special facility exists in Vienna with a playground within the building. Woman or unaccompanied children are detained in separated cells. In general children should not be detained (FPG Article 76 para. 1a) and alternatives to detention should apply. With the amendment of the Foreigner Police Law 2011 detention of children is explicitly foreseen in Article 77 para. 1 if they are 16

⁵³ Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren (*Report of the Human Rights Board on Children and Adolescents in cross-border procedures*), 2011, P VII.

⁵⁴ Menschenrechtsbeirat beim Bundesministerium für Inneres: Bericht des Menschenrechtsbeirates über seine Tätigkeit im Jahr 2011 (*Human Rights Board with the Federal Ministry of Interior, Report of the Human Rights Board on its activities in 2011*).

⁵⁵ Anhalteordnung Section 17, [BGBl. II Nr. 128/1999](#) has been last changed by [BGBl. II Nr. 439/2005](#).

years old. In this case detention must not take longer than 2 months, nevertheless all other conditions must apply such as the principle that no other less coercive measures would safeguard the expulsion. (Legal) provisions for education do not exist.

UNHCR has access to asylum seekers without limitation; lawyers can visit their clients during the day in the visitor room. NGOs have access if they have power of attorney, which most of NGOs known by the police may get without delay. In other cases NGOs or relatives/friends of detainees must get this power of attorney in order to visit detainees during regular visiting hours on the weekend to have access to detainees during office hours.

Alternatives to detention are open centres. Such measures are ordered in regular reception facilities, facilities rent by the police or houses of NGOs, but could also be a private flat of the person who should be deported. If an alternative to detention is ordered by the police, asylum seekers have reporting duties. They have to present themselves at the police every day or every second day. In regard of the time limits set for detention the alternative measure counts only half. During an alternative to detention measure asylum seekers are not entitled to Basic Care provisions. Necessary medical treatment must in any case be guaranteed. These costs may be paid by the police or free necessary medical treatment is provided by hospitals.

With regard to children in detention, the Human Rights Board quotes in its report on children in the Austrian foreigner law the Human Rights Commissioner Hammarberg, explaining that “the use of detention for minors should be kept to the absolute minimum in accordance with the provisions of the UN Convention on the Rights of the Child. ... While the detention of children for a matter of hours or days prior to a certain expulsion might exceptionally fall within the permissible scope of these provisions, anything much longer would be of serious concern...” Figures on detention of children in the year 2010 with the relation 2:1 of children 16 and 17 years of age in detention to those in alternative measures to detention indicate that alternatives to detention are not applied. This list is not in line with the principles of the Convention of the child.⁵⁶

Figures relating to alternatives to detention of asylum seekers are not available. While in 2011 in 13% of the cases the alternative to detention was applied, the percentage increased in 2012 to 17%.

| | Detained foreigners | Alternative to detention |
|------|---------------------|--------------------------|
| 2010 | 6.153 | 1403 |
| 2011 | 6.657 | 1012 |
| 2012 | 4.561 | 924 |

D. Judicial Review of the detention order

Indicators:

- Is there an automatic review of the lawfulness of detention? Yes No

Detention is ordered by the Foreigner Police and must be reviewed by the Independent Administrative Board (*Unabhängiger Verwaltungssenat - UVS*) after 4 months *ex officio*. If detention is found lawful a review has to take place every 4 weeks. UVS 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 the reasons for continuation of detention exist.

⁵⁶ Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren (*Report of the Human Rights Board on Children and Adolescents in cross-border procedures*), 2011, p 40: children in detention 2010: 14-16 years: 18; 16 – 18 years: 154 children in alternatives to detention 2010: 14 – 16 years: 365; 16 – 18 years: 84.

There is a possibility to submit an appeal to the UVS against detention without any time limit. UVS must decide within seven calendar days in cases where a person is still detained and within six months in cases where the person is no longer detained (which is the general time limit in administrative procedures. The UVS must in any case decide on the appeal). Time-limits are usually respected in practice, although it should be mentioned that decisions in case the asylum seeker is no longer detained often are made shortly before the 6 months time limit expires. Asylum seekers who had been transferred in the meantime to another Member State in application of the Dublin Regulation or deported are thus hampered to request compensation for unlawful custody. If UVS does not decide within 7 days in case the asylum seeker is still detained, an appeal may be lodged to the Administrative Court (*Verwaltungsgerichtshof* - VwGH) to challenge the fact that no decision was taken within the maximum time limit. In that case the VwGH sets a time limit for the UVS within which a decision must be taken or decides on the appeal. In a recent case the VwGH ordered the UVS to decide within three calendar days and as UVS failed to render the decision within that time limit. The VwGH decided the appeal in favour of the asylum-seeker, and as a result the asylum seeker was released.⁵⁷

In case the appeal is rejected there is a possibility to submit an appeal to the Administrative Court and to the Constitutional Court. If the detention or its duration are recognized as illegitimate by UVS, the asylum applicant is entitled to a financial compensation of € 100 per day the asylum seeker was detained.

With the implementation of the Return Directive the legal safeguards of persons in detention have improved. Nevertheless the judicial review *ex officio* after 4 months seems to be rather later. NGOs also consider that one of the organisations contracted by the ministry of the interior for giving the free legal advice *Verein Menschenrechte Österreich* is not qualified for this task. The organisation has contracts with the Ministry of the Interior for advice to voluntary return and for Dublin returns as well, which seems to be in conflict with the task of legal advisors. Concrete information 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.

E. Legal assistance

Indicators:

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

Legal advice shall be appointed according to Articles 84 to 86 Foreigner Police Law in return procedures, detention and less coercive measures and other forcible measures and orders.

Contrary to legal assistance in the asylum procedure the legal advisor (which could be the same person who is appointed for providing legal advice in the asylum procedure) has to represent the detainee upon request. Two organisations *Verein Menschenrechte Österreich* and *Arge Rechtsberatung* are contracted to provide legal assistance. The funding per case for those services does not seem to be sufficient (€ 191 per case) and also the two organisations mentioned have a different understanding of what their role is with regard to providing legal advice to those detained. The organisation *Verein*

⁵⁷ VwGH (Administrative Court) - 2011/21/0126 from 24 January 2013.

Menschenrechte Österreich is closely cooperating with the Ministry of the Interior and thus avoids conflicts with the authorities. This organisation receives funding from the Ministry of the Interior for providing assistance to authorities to transfer asylum seekers to the Member State responsible for the examination of the asylum application according to the Dublin Regulation as well as funding for counselling on return. NGOs in Austria suspect that detainees are not fully informed about the right to legal representation by this organisation⁵⁸ and that this organisation hardly accepts to represent the detained person (meaning that the legal advisor should write an appeal against the detention order if the detention order seems to be unlawful). *Arge Rechtsberatung* is committed to the Human Rights of detainees and has successfully appealed detention orders.

⁵⁸ See also Menschenrechtsbeirat beim Bundesministerium für Inneres: Bericht des Menschenrechtsbeirates über seine Tätigkeit im Jahr 2011 (*Human Rights Board with Federal Ministry of Interior, Report of the Human Rights Board on its activities in 2011*), p 58. The Human Rights Board criticises in the yearly reports the lack of information of detainees about their rights, although *Verein Menschenrechte* should provide psychosocial advice.