



**Convention against Torture
and Other Cruel, Inhuman
or Degrading Treatment
or Punishment**

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COMMITTEE AGAINST TORTURE

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 19 OF THE CONVENTION**

**Comments by the Government of Austria^{* **} to the conclusions and
recommendations of the Committee against Torture**

[24 November 2006]

* To consult the Committee's conclusions and recommendations see document
CAT/C/AUT/CO/3

** In accordance with the information transmitted to States parties regarding the processing of
their reports, the present document was not formally edited before being sent to the United
Nations translation services.

Paragraph 7

1. Parliament responded extensively to the mentioned ruling of the Constitutional Court, which was delivered on 15 October 2004 and decided, *inter alia*, to meet the demand for regulation not by amending the Asylum Act but by creating a new Federal Asylum Act (Asylgesetz 2005 - AsylG 2005 - Asylum Act 2005), BGBl I 100/2005, so as to make the Act easier to read, especially since the Asylum Act 1997 had already been amended several times, the Constitutional Court had overruled provisions and EU law, in particular the so-called “Status Directive”, was to be included.

2. In this process, established rules which the Constitutional Court has upheld were included and some detailed adjustments were carried out as a result of an evaluation. Since a new Aliens’ Police Act was to be created at the same time, the opportunity was taken to identify provisions relating to aliens’ police matters which had hitherto formed part of the Asylum Act and instead incorporate them in the Aliens’ Police Act (Fremdenpolizeigesetz 2005 (FPG)), BGBl I 157/2005.

3. Regarding the committee’s concern, Austria wishes to point out that in an appeal against a decision denying asylum the Asylum Act 2005 does indeed not provide for suspensive effect. Such negative decisions are decisions on procedure for which a suspensive effect is not foreseen, as the position of the asylum-seeker on appeal is not changed in the appellate procedure. However the Independent Federal Asylum Senate (Unabhängiger Bundesasylsenat) as appellate authority may still grant suspensive effect to the appeal in individual cases for possible non-refoulement reasons within seven days of filing.

4. If, on the other hand, an appeal is made against a decision in the subject matter, this has suspensive effect.

5. A number of additional detailed provisions in the Act enable the competent authority (the Federal Asylum Office or the Independent Federal Asylum Senate) to take all decisions in a family procedure at the same time. If, for example, one family member’s appeal is granted suspensive effect, this shall automatically apply also to the corresponding appeals of the remaining family members.

Paragraph 8:

6. With regard to expulsions not carried out for the reasons outlined by the Committee, figures are available only on the cases where the expulsion procedure was preceded by an asylum procedure. Asylum is granted on a case-by-case basis and the question of non-refoulement is considered only if no asylum is granted. In 2005, in 271 cases asylum was denied but a positive decision as regards non-refoulement issued. These 271 cases are not broken down statistically as regards reasons of torture, ill treatment or death penalty, but a breakdown by states of origin is available, as follows:

63 cases referred to nationals from Afghanistan, 56 from the Russian Federation, 37 from Iraq, 18 from Serbia and Montenegro, 15 from Georgia and 13 cases referred to stateless aliens. The remaining 69 cases involved 21 nationalities and were all reflected in single-digit figures.

7. As for extradition cases, they lie within the jurisdiction of the regional courts and courts of appeal. If there are substantial grounds to believe that the proceedings in the requesting State will not comply or have not complied with the principles of Articles 3 and 6 of the Convention for the Protection of Human Rights (ECHR) or Article 3 of the UN-Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment the request is to be dismissed. As the domestic legislation on extradition (Section 19 of the Federal Law on Extradition and Mutual Assistance in Criminal Matters) directly refers to Article 3 ECHR — which forms part of the Austrian Constitutional Law — any court decision granting extradition has to take into consideration the prohibition of torture. Section 19 paragraph 2 of the Federal Law on Extradition and Mutual Assistance in Criminal Matters reads as follows:

“Extradition is prohibited if there is cause to suspect that the penalties or preventive measures imposed or expected in the requesting country would be enforced in a manner not consistent with the provisions of the Convention for Human Rights and Fundamental Freedoms, Federal Law Gazette No.210/1958”.

8. Austria has never carried out an extradition on the basis of a diplomatic assurance. Therefore, so far no relevant practice of Austrian authorities exists.

9. Austria notes that attempts to define diplomatic assurances have as yet not produced results meeting uniform and general acceptance.

10. In the course of some extradition proceedings, Austria asked requesting states for additional information.

11. In relation to countries, where bilateral or multilateral treaties on extradition are applicable, Austria does not, in principle, deem it appropriate to ask for additional information (for example in order to ensure the rule of speciality, etc.), as the parties are obliged to observe the contractual obligations undertaken by them. In this regard, it is noted that bilateral treaties on extradition have only been negotiated with States where the respect for the rule of law and for human rights is granted. This is valid also for requesting States bound to rights enshrined in the ECHR or the UN-Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. In the vast majority of cases, extradition takes place in relation to countries where bilateral or multilateral treaties on extradition are in force. Nevertheless Austria may — according to domestic law — also grant extradition based on the principle of reciprocity. In any event, the competent court has to dismiss a request of extradition if it considers that there is a substantial risk of torture; no room is left for diplomatic assurances.

12. In one recent case, concerning Egypt as the requesting State (to which Austria is not linked by any extradition treaty), Austria sought the fulfilment of a number of conditions:

13. After a hearing, the competent court granted the extradition request on condition that the sentence of imprisonment, which was issued by a special court of the requesting State (due to the fact that the person to be surrendered was suspected of belonging to an illegal association), be declared null and void and that the person concerned be retried before an ordinary court. Furthermore, the decision was subject to the condition that the person would not be persecuted or suffer restrictions on his personal freedom, or be extradited to a third country for an offence committed before his surrender and which was not covered by the extradition request. According

to the findings of the court, there were no obstacles with regard to Articles 3 and 6 ECHR. The Minister of Justice approved the extradition subject to the conditions set out in the court's decision. Moreover he stated that the extradition would only take place on the further condition that the person concerned would be allowed to leave the territory of the requesting State within 45 days in case of acquittal. The wish was also expressed to allow Austrian officials to carry out a visit to the prison where the surrendered person is detained. Corresponding information was obtained by the requesting State. The extradition however has not taken place until now, as the person concerned filed an application with the European Court of Human Rights. Following an indication of the European Court to the Austrian Government under Rule 39 of the Rules of the Court, that the person concerned should not be extradited until further notice, extradition is suspended in the interest of the proper conduct of the proceedings before the Court. The question whether a violation of Article 3 of the ECHR must be feared when extraditing a person to the requesting State is determined primarily on the basis of topical reports published by renowned international organisations, which are easily accessible for courts on the website www.staatendokumentation.at.

14. In 2004 Austrian courts refused to extradite an Azerbaijan citizen to Azerbaijan, a Brazilian citizen to Brazil, an Uzbek citizen to Uzbekistan. In 2005 extradition of two Georgian nationals to Georgia was denied by invoking Section 19 of the Federal Law on Extradition and Mutual Assistance in Criminal Matters, as there was cause to suspect that the rights under Article 3 and 6 ECHR would not be fully respected.

Paragraph 10 b:

15. In the case "Cheibani WAGUE", the emergency physician and a police officer were found guilty of the offence of negligent homicide (Section 80 Austrian Penal Code) on 9 November 2005 and were convicted to seven months imprisonment each. The sentence was conditionally suspended. The other accused persons were acquitted. The public prosecutor's office in Vienna has lodged an appeal against the acquittals, the two convicted persons have done the same. The decision of the Higher Court of appeal has not yet been rendered.

Paragraph 12:

16. Following the recommendation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment to establish "a fully fledged and properly funded system of legal aid for persons in police custody who are not in a position to pay for a lawyer" "as a matter of urgency and be applicable as from the very outset of police custody", the Austrian Ministry of Justice has already entered into a process of consultations with representatives of the Austrian Bar Association.

17. It is the aim of these talks to establish a system of legal aid for persons in police custody that should apply immediately after the arrest. However, the Ministry of Justice believes that it ought to be possible at this stage of the proceedings that the arrested person can abstain voluntarily from being assisted by a defence council after being informed of this right. Before such a waiver, the arrested person should have the right to contact a defence lawyer and discuss the matter with him or her.

18. In any case, the system to be established will not alter the existing law concerning legal representation of a person to be detained or already in detention by a defence counsel.

19. That means that legal representation will - after the implementation of a legal aid system for persons in police custody - still become mandatory, as soon as and as long as a person is remanded in judicial custody (compulsory assistance by a defence counsel, “notwendige Verteidigung“).

20. When implementing such a system of legal aid for persons in police custody, the involvement of the Austrian Bar Association and their active support of the system to be implemented are important for several reasons. The most relevant in the given context is the fact that in some Austrian provinces (Bundesländer) the local Bar Associations already organise legal aid to indigent suspects during police custody (in terms of an on-call legal service by defence lawyers, according to which a first guidance via telephone is normally free of charge). Although the factual situation might not be comparable between all provinces and these systems often lack adequate financial funds and 24- hours availability, experiences gained thereby should be taken into account when establishing a nation-wide system.

Paragraph 15 b:

21. Data on cases where the aggravating factors as stated in Section 33 of the Austrian Penal Code have been invoked in the context of ill-treatment are unfortunately not available.

Paragraph 17a:

22. The agreement between the Federal Government and the provinces pursuant to Art.15a B-VG (Federal Constitutional Act) about joint measures for providing preliminary basic assistance to aliens in need of help and protection (asylum-seekers, persons entitled to asylum, displaced persons and other persons who cannot be deported for legal or factual reasons) in Austria (Grundversorgungsvereinbarung – Art. 15a B-VG) was adopted in December 2003 between the Federal Government and all provinces. Upon ratification by the respective legislative bodies of these parties to the agreement it took effect as at 1 May 2004.

23. Transposition into provincial law was effected in the following provinces at the following dates:

Vienna - 13 October 2004, Styria - 19 October 2005, Vorarlberg - 25 January 2006 and Tyrol - 1 March 2006.

24. In the remaining five provinces the provincial laws are currently being drafted or are already being appraised and in all probability will take effect still in 2006.

25. The agreement on basic assistance to aliens in need of help and protection therefore ensures that the target group’s basic needs are protected.

Paragraph 17b:

26. The amendment of the Federal Assistance Act (Bundesbetreuungsgesetz) included a change in the title of the act and now reads “Federal Act Regulating Basic Assistance to Asylum-

Seekers in the Admission Procedure and to Specific Other Aliens” (Grundversorgungsgesetz - Bund 2005 - GVG-B-2005).

27. This Federal Act does not reduce the guarantee of the basic needs but, rather, considerably extends it. As of admission to the asylum procedure, i. e. when responsibility for providing assistance to the target group shifts to the provinces, the Federal Government may provide such assistance for a maximum period of 14 days to close a possible supply gap if immediate admission to provincial care cannot be ensured. In transposing EU law, any decision on the withdrawing or granting of services with conditions attached must not restrict access to medical emergency care, and this unrestricted access is guaranteed.
