

Asylum Information Database

# National Country Report

# *Austria*

**asylkoordination**  
Österreich



## ACKNOWLEDGMENTS

This report was written by Mag.<sup>a</sup> Anny Knapp, Asylkoordination Osterreich and was edited by ECRE.

The information in this report is up-to-date as of May 2014.

## 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 through the dedicated website [www.asylumineurope.org](http://www.asylumineurope.org). Furthermore the project seeks to promote the implementation and transposition of EU asylum legislation reflecting the highest possible standards of protection in line with international refugee and human rights law and based on best practice.



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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	D	E	B/(B+C+D)%	C/(B+C+D)%	D/(B+C+D)%
<b>Total numbers</b>	17503	4133	1819	15360	2163	19,4%	8,5%	72%
<b><i>Breakdown by countries of origin of the total numbers</i></b>								
Russia	2.841	673	175	2325	389	21,2%	5,5%	73,3%
Afghanistan	2.589	1259	828	1061	317	40%	26,3%	33,7%
Syria	1.991	838	253	195	70	65,2%	19,7%	15,2%
Pakistan	1.037	28	10	2238	156	1,2%	0,4%	98,3%
Algeria	949	2	1	886	117	0,2%	0,1%	99,7%
Kosovo	935	14	31	1198	132	1,1%	2,5%	96,4%
Nigeria	691	10	24	919	90	1%	2,5%	96,4%
Iran	595	520	16	194	28	71,2%	2,2%	26,6%
Maroc	516	1	0	474	80	0,2%	0%	99,8%
Iraq	468	121	125	396	59	18,8%	19,5%	61,7%
Somalia	433	254	133	110	49	50,1	26,8	22,1

Source: Ministry of interior, asylum statistics 2013

**Table 2: Gender/age breakdown of the total numbers of applicants in 2013**

	Number	Percentage
<b>Total number of applicants</b>	<b>17503</b>	
<b>Men</b>	12528	71,6%
<b>Women</b>	4975	28,4%
<b>Unaccompanied children</b>	999	5,7%

**Table 3: Comparison between first instance and appeal decision rates in 2013**

	First instance		Appeal	
	<i>Number</i>	<i>Percentage</i>	<i>Number</i>	<i>Percentage</i>
<b>Total number of decisions</b>			9727	
<b>Positive decisions</b>				
<b>Total</b>	<b>4742</b>		1210	12,4%
<i>Refugee Status</i>	<b>3165</b>		968	9,5%
<i>Subsidiary protection</i>	<b>1577</b>		242	2,5%
<b>Negative decision<sup>1</sup></b>			8519	87,6%

<sup>1</sup> The total number of first Instance negative decisions is not published by the Ministry of Interior. The number of negative decisions in the asylum statistics refer to final decisions.

## Overview of the legal framework

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

<b>Title in English</b>	<b>Original title</b>	<b>Abbreviation</b>	<b>Weblink</b>
Federal Law concerning the Granting of Asylum	Bundesgesetz über die Gewährung von Asyl, StF: BGBl. I Nr. 100/2005	Asylgesetz 2005 - AsylG	<a href="http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20004240/AsylG%2005%2c%20Fassung%20vom%2021.03.2013.pdf">http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20004240/AsylG%2005%2c%20Fassung%20vom%2021.03.2013.pdf</a>
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 Einreisetitel, StF: BGBl. I Nr. 100/2005	Fremdenpolizeigesetz - FPG	<a href="http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20004241/FPG%2c%20Fassung%20vom%2021.03.2013.pdf">http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20004241/FPG%2c%20Fassung%20vom%2021.03.2013.pdf</a>
General Administrative Procedures Act	Allgemeines Verwaltungsverfahrensgesetz 1991, StF: BGBl. Nr. 51/1991	AVG	<a href="http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1991_51/ERV_1991_51.pdf">http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1991_51/ERV_1991_51.pdf</a>
Federal law on the general rules for procedures at the federal office for immigration and asylum for the granting of international protection, the issuing of residence permits for considerable reasons, deportation, tolerated stay and issuing of stay terminating measures, furthermore the issuing of documents for aliens.	Bundesgesetz, mit dem die allgemeinen Bestimmungen über das Verfahren vor dem Bundesamt für Fremdenwesen und Asyl zur Gewährung von internationalem Schutz, Erteilung von Aufenthaltstiteln aus berücksichtigungswürdigen Gründen, Abschiebung, Duldung und zur Erlassung von aufenthaltsbeendenden Maßnahmen sowie zur Ausstellung von österreichischen Dokumenten für Fremde geregelt werden (BFA-Verfahrensgesetz – BFA-VG)	BFA-Verfahrensgesetz – BFA-VG	<a href="https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=20007944&amp;FassungVom=2014-01-01">https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=20007944&amp;FassungVom=2014-01-01</a>
Federal law on the implementation and organisation of the federal immigration and asylum office	Bundesgesetz über die Einrichtung und Organisation des Bundesamtes für Fremdenwesen und Asyl (BFA-Einrichtungsgesetz – BFA-G) idF <a href="#">BGBl. I Nr. 68/2013</a>		<a href="#">BGBl. I Nr. 87/2012</a>
Federal administrative court law	Bundesverwaltungsgerichtsgesetz –	BVwGG	<a href="https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetze">https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetze</a>



			<a href="#">snummer=20008212</a>
Amendment of administrative litigation	Verwaltungsgerichtsbarkeits-Novelle		
Federal law on Procedures at Administrative Courts	Bundesgesetz über das Verfahren der Verwaltungsgerichte StF: <a href="#">BGBl. I Nr. 33/2013</a>	Verwaltungsgerichtsverfahrensgesetz – VwGVG	<a href="https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=20008255">https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=20008255</a>
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	<a href="http://www.unhcr.org/refworld/doc/id/4416ab914.html">www.unhcr.org/refworld/doc/id/4416ab914.html</a>
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	<a href="http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=10005762&amp;ShowPrintPreview=True">http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=10005762&amp;ShowPrintPreview=True</a>

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

<b>Title in English</b>	<b>Original title</b>	<b>Abbreviation</b>	<b>Weblink</b>
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	<a href="http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=20004449">http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=20004449</a>
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	<a href="http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=20006306&amp;ShowPrintPreview=True">http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=20006306&amp;ShowPrintPreview=True</a>
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)	<a href="https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=20004467">https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=20004467</a> <a href="https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2013_II_492/BGBLA_2013_II_492.html">https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2013_II_492/BGBLA_2013_II_492.html</a>

Ordinance of the federal minister of internal affairs, concerning the prohibition of unauthorized 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	<a href="http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=20003889">http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=20003889</a>
Ordinance of the federal minister of internal affairs, concerning the arrest of persons by the security authorities and elements of the public security service	Verordnung der Bundesministerin für Inneres über die Anhaltung von Menschen durch die Sicherheitsbehörden und Organe des öffentlichen Sicherheitsdienstes, StF: BGBl. II Nr. 128/1999	Anhalteordnung – AnhO	<a href="http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=10006102&amp;ShowPrintPreview=True">http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&amp;Gesetzesnummer=10006102&amp;ShowPrintPreview=True</a>
Remuneration for the legal advice in appeal procedures at the asylum court	Entgelte für die Rechtsberatung in Beschwerdeverfahren vor dem Asylgerichtshof		<a href="http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20007474/Entgelte%20f%C3%BCr%20die%20Rechtsberatung%20in%20Beschwerdeverfahren%20vor%20dem%20Asylgerichtshof%2c%20Fassung%20vom%2028.03.2013.pdf">http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20007474/Entgelte%20f%C3%BCr%20die%20Rechtsberatung%20in%20Beschwerdeverfahren%20vor%20dem%20Asylgerichtshof%2c%20Fassung%20vom%2028.03.2013.pdf</a>
Ordinance of the minister of internal affairs on the determination of remuneration for legal advice	Verordnung der Bundesministerin für Inneres über die Festlegung von Entschädigungen für die Rechtsberatung		<a href="https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2011_II_324/BGBLA_2011_II_324.pdf">https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2011_II_324/BGBLA_2011_II_324.pdf</a>  <a href="https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2013_II_457/BGBLA_2013_II_457.html">https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2013_II_457/BGBLA_2013_II_457.html</a>

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

### ***The report was previously updated in December 2013.***

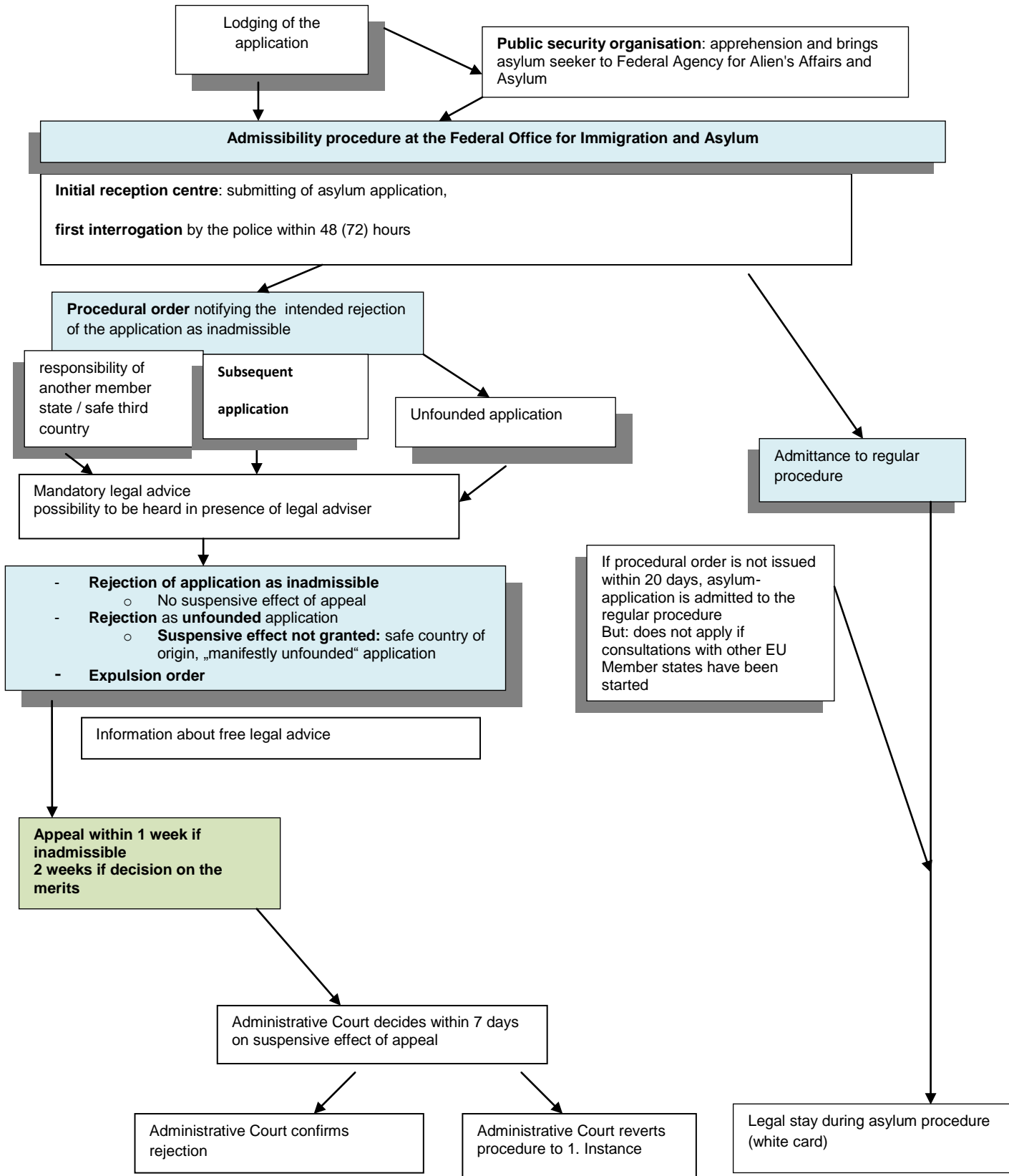
The restructuring of the administrative procedures brought several legal changes as of 1<sup>st</sup> January 2014:

- The Federal Asylum Agency (Bundesasylamt) became the Federal Office for Immigration and Asylum (Bundesamt für Fremdenwesen und Asyl - BFA), which is now also in charge of return orders and detention in the context of immigration laws.
- The Asylum Court (Asylgerichtshof) became the Federal Administrative Court (Bundesverwaltungsgericht – BVwG). It is responsible for decisions on granting international protection as well as return decisions and measures like detention
- While the appeal in the regular procedure has to be submitted within 2 weeks, the legal representative of an unaccompanied asylum seeking child has 4 weeks to appeal the negative decision of the BFA.
- Final decisions by the Administrative Courts can be examined by the Federal Administrative High Court (Verwaltungsgerichtshof – VwGH). The Administrative Court decides whether appeals are allowed. If the Federal Administrative Court does not allow such appeal, asylum seekers can ask for an onward appeal at the Federal Administrative High Court in exceptional cases.
- Right of residence for humanitarian reasons is examined by the federal office for immigration and asylum.
- In case the residence permit of persons with subsidiary protection status is prolonged after one year, it is extended for another two years.
- Persons with subsidiary protection status receive a foreigners' passport if they cannot obtain travel documents from the authorities of their country of origin.
- In accordance with Article 2(j) recast Qualification Directive, the father, mother or other adult responsible for an unmarried child who has refugee or subsidiary protection status, is now considered as a family member and derives from that status a right to family reunification.
- Free legal advice is not granted in case alternatives to detention are applied.
- Asylum-seekers/foreigners cannot benefit anymore from free legal representation in measures and procedures regulated by immigration laws such as detention. Nevertheless, NGOs may visit detained asylum-seekers and represent them in procedures.
- A new detention centre in Styria/Vordernberg for up to 220 persons opened in January 2014 and most of the detention centres are used for an apprehension up to 48 hours only (Bludenz, Innsbruck, Eisenstadt, Villach, Klagenfurt, Graz, Leoben, Wels, Linz, Wiener Neustadt St.Pölten). By the end of February 2014 when the centre opened 10 persons were there.
- The number of detainees decreased significantly, from 150-200 persons to 50 persons detained in February 2014. The decrease has to be seen in light of the new competence of the BFA and IT problems.

# Asylum Procedure

## A. General

### 1. Flow Chart



**Regular procedure – single procedure**

Federal Office for Immigration and Asylum (BFA)

**Refugee status**

**Subsidiary protection status** (residence permit for 1 year, prolongation for 2 years  
residence permit for humanitarian reasons?)

**Return decision and entry ban**

**Appeal with suspensive effect**

Within 2 weeks  
Free legal advice

**Administrative Court**

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

Personal public hearing or decision based on the file and written appeal

**Refugee status**

Permanent residence permit

**Subsidiary protection status**

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

**Expulsion order**

Appeal at Administrative High Court allowed by Administrative Court

Application for admission to Administrative High Court  
Application for free legal representation

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



**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 Agency for Immigration and Asylum	About 600 staff including administration, Dublin-Unit, COI, administration of Basic Care	Ministry of the Interior	Yes

**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, contain a number of special procedural rules which regulates the asylum and aliens law proceedings.

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

The Asylum Law contains norms about the granting of international protection, expulsion procedures in connection with the rejection or dismissal of applications, provisions on the rejection of applications because of the existence of a safe third country or on the responsibility of another state according to the Dublin 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 of the application. If the application is declared admissible, the authorities decide whether the person is to be granted refugee status. Only where an application for asylum is rejected on the merits, the authorities have to grant subsidiary protection if the person qualifies for that status. A separate application for subsidiary protection is not possible.

Appeals to the Federal Administrative Court (BVWG) are possible against a decision rejecting the asylum application as inadmissible and also against a decision rejecting the application on the merits. The new Law on procedures at the Federal Office for Immigration and Asylum regulates the appeal and its effects. The system has remained the same: suspensive effect is foreseen in merits procedures, while an appeal against a decision rejecting an application as inadmissible does not have suspensive effect and has to be submitted within one week. Suspensive effect may be granted by the Court to an appeal against an expulsion order issued together with a decision rejecting the asylum application as

inadmissible. Appeals against the decision rejecting the asylum application on the merits have to be submitted within two weeks and have suspensive effect unless the Federal Agency for Immigration and Asylum (BFA) does not allow for the appeal to have suspensive effect.

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

However, the Court may grant suspensive effect if otherwise there would be a risk of a violation of the non-*refoulement* principle. The Court has to grant suspensive effect if an appeal is lodged against an expulsion order issued together with a decision rejecting the asylum application as inadmissible, if it can be assumed that the decision to refuse entry to the alien at the border and the forcible return or deportation to the country to which the expulsion order applies would constitute a real risk of violation of the principle of non-*refoulement* according to Austria's international obligations or would represent a serious threat to their life or person by reason of indiscriminate violence in situations of international or internal 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 Court new facts and evidence may only be submitted in the following cases: if the grounds on which the first instance negative decision was based have undergone any material change; if the first instance procedure was irregular (e.g. if the right to be heard about the findings of the BFA was not respected, or if outdated country of origin information was used or evidence is missing to substantiate the reasoning of the BFA); if such new facts and evidence were not accessible earlier or if the asylum-seeker had been unable to submit such new facts and evidence (Article 20 BFA Procedure Law). Decisions of the Court shall be issued in the form of judgments and all other decisions, such as those allowing the appeal to have suspensive effect, the rejection of an appeal because it was lodged too late, or on the continuation of an asylum procedures that was discontinued (i.e. decisions on procedural issues), shall be issued in the form of resolutions.

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

Appeals to the Federal Constitutional Court may be lodged in case the applicant claims a violation of a right guaranteed by constitutional law.



## 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
- Are there any reports (NGO reports, media, testimonies, etc) of people refused entry at the border and returned without examination of their protection needs?  Yes  No

An application for international protection can be made to an agent of the public security service or a security authority and at the initial reception centre (EAST “*Erstaufnahmestelle*”) of the Federal Agency for Immigration and Asylum. The application is submitted if the applicant requests for protection at the initial reception centre personally.<sup>2</sup> 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. The application is registered as soon as the asylum seeker arrives in the initial reception centre or the security authorities have submitted all documents of asylum seekers who are not transferred to the initial reception centre. Within 48 hours - that may be extended to 72 hours - after the request was made the first interrogation has to take place. 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.

Parents apply for their under age children at the initial reception centre, while there is no obligation for the parents to present their newborn babies at the initial reception centre. Children who are born in Austria do not have to be presented at the initial reception centre for their parent to be able to submit an application for them.

In October 2013 the media reported that 259 refugees from Syria were apprehended at the Austrian-Italian border (region of Tyrol). Only 17 Syrian refugees had applied for asylum and 242 had been returned to Italy<sup>3</sup> based on the readmission agreement between Austria and Italy. According to the aliens' police, since July 2013 1336 persons came to Tyrol (577 from Syria, 108 from Eritrea and 80 from Somalia) who wanted to apply for asylum neither in Italy nor in Austria, as their countries of destination are Germany and Sweden.<sup>4</sup>

<sup>2</sup> Art. 17 Asylum Law.

<sup>3</sup> Südtirol News, [Österreich hat 1500 Flüchtlinge nach Italien zurückgeschickt](#) (*Austria has returned 1500 refugees to Italy*), 6 October 2013.

<sup>4</sup> Die Presse, [577 syrische Flüchtlinge seit Juli zurückgeschoben](#) (*577 syrian refugees returned to Italy since July*), 11 October 2013.

## 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 31<sup>st</sup> December 2013, the number of cases for which no final decision (including at first appeal) was taken one year after the asylum application was registered: 915 (1<sup>st</sup> Instance)

The Federal Agency for Immigration and Asylum (*BFA*) is a specific department of the Ministry of the Interior, dealing with asylum matters. From 2014 on, the tasks of the Agency are 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 BFA has to decide whether it intends to reject the application due to responsibility of another Member State/safe third country or for being a subsequent asylum application, or to dismiss the application for other reasons. If no procedural order is notified to the asylum seeker within 20 days, the asylum application is admitted to the regular procedure – except in Dublin cases if requests to other Member States to take charge or take back the asylum seeker are made within this time frame.

On 31 December 2013, 915 asylum applications were pending at first instance for more than one year, 77 for even longer than 5 years.<sup>5</sup> Minister of the Interior Johanna Mikl-Leiter stated that 80% of the asylum applications are decided within 6 months.<sup>6</sup>

Numbers for the Asylum Court are not available. 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.<sup>7</sup>

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

The time limit for decisions for the BFA and the Federal Administrative Court are reduced to 3 months in case the asylum-seeker is detained. This reduced time limit also applies if an expulsion procedure has been initiated during the asylum procedure. This may be applied if the BFA intends to dismiss the asylum application because it appears to be unfounded or there is a specific public interest in accelerating the procedure (e.g. for convicted applicants or applicants who have been caught in the act of committing an offence). There are no consequences where the BFA or the Federal Administrative Court do not decide within the prescribed 3 months. The reduced time limit for the BFA does not affect the right to appeal.

<sup>5</sup> Answer of the Minister of Interior Mikl-Leitner to a parliamentary request, 306/AB XXV. GP, 18.02.2014.

<sup>6</sup> Answer of the Minister of Interior Mikl-Leitner to a parliamentary request, 13669/AB XXIV. GP, 05.04.2013

<sup>7</sup> Page 3 of the 2012 Report of the Asylum Court states, that 75% of cases were decided within one year.

According to the law, asylum may also be granted in the admissibility procedure, but so far no such case is known. An exception will be made for 500 refugees from Syria, who have been selected for resettlement to Austria on humanitarian grounds. These refugees will be granted asylum *ex officio*.

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.<sup>8</sup>

So called “fast-track-procedures” were even conducted with asylum-seekers from Afghanistan, who in general qualified for subsidiary protection in 2011. Asylum applications of Afghan asylum seekers were 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 processing time for the appeal body to make a decision: Not available

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 Agency for Immigration and Asylum (BFA) to the Federal Administrative Court (BVwG). The new laws entering into effect in 2014 extend the time for appealing to four weeks where the appellant is an unaccompanied child. The new regulations allow for a pre-decision of the appeal within two months by the BFA. This pre-decision may change the decision in any direction (annul, reject or change the decision). The BFA, however, may refrain from deciding and forward the appeal to the Court.

In case refugee status or subsidiary protection status is not granted, the asylum applicant will be assigned a free legal 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. The support from the legal advisors during the asylum procedure is limited though, 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 suspensive effect unless this is not granted by the BFA. Art. 18 BFA Procedures Law provides a number of reasons not to grant suspensive effect. These include, *inter alia*, if the applicant has attempted to deceive the Federal Agency for Immigration and Asylum 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

<sup>8</sup> 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*).

an enforceable deportation order or an enforceable entry ban was issued against the asylum-seeker prior to the lodging of the application for international protection.

If the asylum applicant lodges an appeal against the BFA's decision, the appeal is heard by the Administrative Court (BVwG). The BFA Procedures Law allows exceptions from the principle that a hearing shall take place on the appeal. Such hearing must indeed not be held if the facts seem to be established from the case file and appeal submission or if it is established that the submission of the applicant does not correspond with the facts (§ 21(7) BFA-VG). This provision must be read in light of the restrictions on the submission of new facts in the appeal procedure.

The question whether a personal hearing before the Asylum Court has to take place or not was brought before the Constitutional Court. The Court ruled that not holding a personal hearing in the appeal procedure 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<sup>9</sup> is in line with Art. 47(2) EU Charter if the applicant was heard in the administrative procedure.<sup>10</sup>

The Federal Administrative Court is organised in chambers which are each responsible for certain groups of countries.

The asylum appeal has suspensive effect as long as the case is pending in court. The BVwG can call for another hearing and additional examinations if necessary. Most of the judges of the BVwG have worked at the Asylum Court before.

The possible outcome of this procedure can be the granting of a status, the refusal of a status or the BVwG can refer it back to the BFA 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/BVwG are published on the legal information website of the Federal Chancellery.<sup>11</sup>

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

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

In case the asylum applicant seeks to challenge the decision of the BVwG and if they claim it is violating a right that is guaranteed by the constitution, they can appeal to the Constitutional Court within 6 weeks, after the ruling of the Federal Administrative Court becomes final. The asylum seekers are informed about the possibility to address a complaint to the Constitutional Court in writing; the information is translated into a language the asylum seeker understands. In that context it has to be mentioned that the ECHR is a part of Austria's constitutional law. Therefore the risk of violation of Articles 2, 3 or 8 ECHR could be claimed at the Constitutional Court, while the refusal of refugee status is not covered by the Court's competence. The appeal does not have automatic suspensive effect. The asylum applicant has to be represented by a lawyer at the Constitutional Court. There is a possibility to apply for legal aid

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<sup>9</sup> Art.41 (7) AsylG corresponds with the new Art. 21 (7) BFA-VG

<sup>10</sup> VfGH (Constitutional Court) – 14 March 2012 - U 466/11-18 und U 1836/11-13.

<sup>11</sup> 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.

Decisions of the new Federal Administrative Court are available here: <https://www.ris.bka.gv.at/Bvwg/>

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.

Asylum seekers encounter difficulties to access to constitutional appeals due to costs incurred by doing so; an appeal to the Constitutional Court costs about 240 Euros. Furthermore, asylum seekers are not heard in person before the Constitutional Court which rather requests written statements from the Asylum Court/BVwG.

### Personal Interview

#### Indicators:

- Is a personal interview of the asylum seeker in most cases conducted in practice in the regular procedure?  Yes  No
  - o 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 conducted through video conferencing?  Frequently  Rarely  Never

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 part of the admissibility procedure are accorded increased credibility, notwithstanding the fact that the interrogation is conducted by the police and not by the person responsible for the decision. The Constitutional Court ruled that the provision protects asylum seekers who may arrive exhausted and should therefore not be interrogated about their possibly traumatizing reasons for flight by uniformed security officers.<sup>12</sup>

Asylum seekers may be accompanied by a person they trust (person of confidence). Unaccompanied children must not be interviewed without the presence of their legal representative. 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 possibility.<sup>13</sup> In practice, this is not consistently applied with regard to interpreters. In the appeal procedure, infringements of the right to sexual self-determination have to be expressed in the written appeal in order to have the hearing at the Court held by a judge of the same sex. The Constitutional Court ruled that UNHCR guidelines have to be applied to male asylum seekers accordingly.<sup>14</sup>

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

<sup>12</sup> VfGH (Constitutional Court) - U98/12, 27 June 2012.

<sup>13</sup> Art. 20 Asylum Law.

<sup>14</sup> 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.

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

Art. 19(3) of the Asylum law allows for tape recording of the interview, which is, however, rarely used in practice.

The transcript is more or less verbatim. It depends on the interpreter whether they summarise 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 having signed it at the end of the interview, they should send a written statement to the Federal Agency for Immigration and Asylum as soon as possible. In practice, asylum seeker do not frequently ask immediately after the interview for correction of the report. Some asylum seekers explain that they were too tired to be able to follow the translation of the transcript. Asylum seekers often realise that mistakes in the translation or the transcript were made when they receive a negative first instance decision and a legal adviser explains them the details of the transcript.

### 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 Agency for Immigration and Asylum (BFA), asylum seekers are offered free legal advice at the branch offices of the BFA. This legal advice is funded by the European Refugee Fund (ERF) and co-funded by the Ministry of the Interior. One association “*Verein Menschenrechte Österreich*” covers this legal advice in 9 out of 10 BFA branch offices. This offer of free legal advice is not satisfying the needs of asylum-seekers.

Asylum-seekers have to travel to the BFA, 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. For instance, the call for ERF proposals mentions that legal advice provision should be organised in cooperation with the authorities. Furthermore these legal



advisers have to inform asylum seekers about voluntary return assistance and send a certain number of asylum seekers to voluntary return projects (which is provided by the same organisation) during the asylum procedure. This funding framework and the activities of the contracted organisation affect the confidence of asylum seekers in the free legal advice offered. Asylum applicants may also opt to contact an NGO offering free legal advice to asylum applicants, but this resource is limited and may not be accessible for asylum seekers living in remote areas.

The tasks are prescribed in the call for ERF proposals: providing information or assistance for administrative or legal formalities and providing information or advice on possible outcomes of the asylum procedure including voluntary return. One of the goals of legal advice must also be to avoid asylum applications without positive perspective. The requirement to provide advice on return as a condition for submitting a project for legal advice under ERF-funding 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 act as legal representatives for asylum seekers during interviews.

When a negative decision is issued, a decision providing for the assignment of a legal counselling organisation is also issued. Such organization 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.<sup>15</sup> Two organisations, “*Arge Rechtsberatung*” and “*Verein Menschenrechte Österreich*” are contracted by the Federal Chancellery to give legal advice with regard to the appeal procedure.

The task described by law entails the obligation to provide advice in case of dismissal of the application, but does not include legal representation before the Court. Therefore, asylum seekers are not represented in court in practice unless they are represented by NGOs<sup>16</sup> 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,- (excl. VAT) including all other costs (overhead, travel expenses, interpretation). This flat rate is reduced by 25% when the organisation has provided legal advice in Asylum and Aliens Law in more than 4001 cases during the year and by 35% legal advice was provided to more than 7000 clients.<sup>17</sup> This reduction has been justified with reduced overhead expenses, but this argument is not suitable for the main expenses of legal advice, which are staff, interpreter, and travel expenses. Such reduction bears the risk 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, negatively affecting the quality of legal counselling provided accordingly. NGOs criticised the compensation as being too low for providing good standards.<sup>18</sup>

The Council of Europe’s Commissioner for Human Rights Nils Muižnieks “while commending that since the last reform of 2011, free legal aid is in principle available for asylum-seekers, noted that quality

<sup>15</sup> Federal Law Gazette I Nr. 38/2011.

<sup>16</sup> See e.g. ERF funded project of Caritas Austria: [Representation at hearings before the Federal Administrative Court](#).

<sup>17</sup> [BGBl. II Nr. 320/2011](#)

<sup>18</sup> Agenda Asyl, [Stellungnahme zur Änderung des ...Asylgesetzes 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.

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.”<sup>19</sup>

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 satisfactorily implementing the Asylum Procedures Directive, as it is up to the legal advisers to decide whether to help asylum seekers to write an individual appeal and assist them with regards to all procedural requests in the appeal procedure, or to provide information only.

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

A merits test with regard to legal assistance at the appeal stage is not foreseen. 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 (2013): 4120 (partial data, some Member states missing)
- Number of incoming requests in the previous year (2013): 2848 (partial data)
- Number of outgoing transfers carried out effectively in the previous year: 2013 (until Nov): 1059
- Number of incoming transfers carried out effectively in the previous year: (until 30.11.2013): 705<sup>20</sup>

#### 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

<sup>19</sup> 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.

<sup>20</sup> Answer from the Minister of the Interior to the parliamentary request, 185/AB XXV. GP, 05.02.2014.



Austria does not use any national legislation to incorporate the Dublin III Regulation, as it is directly applicable, but refers to it in Art. 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 /Dublin III 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 Offices which are responsible for the admission procedure, called “*Erstaufnahmestelle*” EAST (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 central 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 of entering Austria and the first country of entry in the EU, the personal data and – in a very brief manner – also on the reasons why 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 Agency for Immigration and Asylum (*BFA*) department in the admissibility-procedure, permitting the asylum-seeker to stay in the district of the initial reception center.

In every procedure, the BFA has to consider within the admissibility procedure whether an asylum seeker could find protection in a safe third country or another EU Member State or Schengen Associated State. According to the experiences of NGOs, consultations with other Member States do not take place if there is no concrete evidence for the responsibility of another Member States. The Dublin Regulation may be triggered if there is a Eurodac hit, if the asylum applicant has a passport with a visa for another Member State of the Dublin III Regulation, if they admit that they entered the European Union via another Member State or if there is any other suspicion or circumstantial evidence which indicates that they entered via another Member State (for instance if a person is caught by the police close to a border or in a certain train coming from another Member State) or any other kind of evidence. Although there are other grounds applicable for determining Member State responsibility under the Dublin 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 may be required to provide proof of family links. DNA-tests have to be paid by the asylum-seeker. If a DNA test was suggested<sup>21</sup> by the Federal Agency for Immigration and Asylum or the Administrative Court and family links have been verified, asylum seekers may demand the BFA for refunding of the costs.

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<sup>21</sup> It is not possible for the Federal Agency for Alien's Affairs and Asylum to impose a DNA test, the authorities have according to Art.13 (4) BFA-VG to enable such testings.

### *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.<sup>22</sup> Austrian authorities make reference to this clause mostly in cases where the asylum applicant is still in another country and applies for a reunification with relatives in Austria. 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”<sup>23</sup> 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 have applied the humanitarian clause (in jurisprudence the 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.<sup>24</sup> In a more recent case of a 75 years old widow, whose son was granted asylum and whose family cared for her as she is handicapped and has to use a wheel chair, the Asylum Agency rejected the request of Italy to take responsibility for the examination of the asylum application for humanitarian reasons. In this case the Asylum Court approved the appeal based on Art.8 ECHR.<sup>25</sup>

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 procedure,<sup>26</sup> 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 II 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 “[w]here 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”.<sup>27</sup>

The Court of Justice of the European Union (CJEU) ruled in the case of *Shamso Abdullahi*, in December 2013, that when a Member State accepts to take charge of an asylum applicant on the basis of that State being the Member State of first entry into the EU, this decision can only be overturned if there are systemic deficiencies in the asylum procedure and reception conditions of that Member State. These systemic deficiencies must provide substantial grounds for believing that the asylum applicant

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<sup>22</sup> See [Asylum Court c, 28.01.2010](#).

<sup>23</sup> 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.

<sup>24</sup> [Asylum Court S5 317.551-2/2010/2E](#), 24.09.2010.

<sup>25</sup> Asylum Court S25 437551-1/2013, 18.09.2013

<sup>26</sup> Filzwieser/Liebmingner: Dublin II-Verordnung - Das Europäische Asylzuständigkeitssystem, (*Dublin II Regulation – The European system on the responsibility over asylum applications*), (2007), 107 ff.

<sup>27</sup> Court of Justice for the European Union, Case C-245/11, *K. v. Bundesasylamt*, Judgment of 6 November 2012, par. 51.

would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights.<sup>28</sup>

### *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.<sup>29</sup> This means, in case of a risk of a violation of human rights, that Austria has to use the sovereignty clause. This decision is applicable according to Arts. 2 and 3 ECHR as well as Art. 8 ECHR following an interpretation consistent with the constitution.

The principle that admissibility procedures should not last too long was reflected in a decision of the Administrative Court. A Chechen family had applied for asylum in Poland, Austria and Switzerland by submitting consecutive applications since 2005. One family member is severely traumatized. Switzerland decided on the merits of the case and issued a deportation order before they re-entered Austria. The Court reverted the procedure back to the Federal Agency for Immigration and Asylum (BFA). The Court found that it would have been necessary to ask for the details of the procedure in Switzerland to prevent indirect violations of Art.3 ECHR (chain deportation). For one family member the risk of suicide is obvious according to expert statements. The Court, referring to the judgment of the CJEU in the case of N.S. and M.E., held that the long duration of the admissibility procedure has to be taken into consideration when determining the Member State responsible for examining the asylum application and that applying a return procedure in such case might be more effective.<sup>30</sup>

All Member States of the Dublin II/III 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.

After recommendations of UNHCR not to send back asylum-seekers to Bulgaria, Dublin procedures with Bulgaria have been stopped, suspensive effect was given in some pending cases.

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 II Regulation, at risk of being separated and 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 III Regulation at the beginning of the procedure in the initial reception centre (*EAST*).

Within 20 calendar days after the application, the Federal Agency for Immigration and Asylum (BFA) 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 BFA in case it intends to

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<sup>28</sup> Court of Justice of the European Union, Case C-394/12, *Shamso Abdullahi v. Austria*, judgment of 10 December 2013.

<sup>29</sup> VfGH (*Constitutional Court*) - 237/03; 15.10.2004, VfSlg. 16.122/2001.

<sup>30</sup> BVWG: [W125.1257809-8](#), 20 January 2014.

reject the application in the admissibility procedure. The provision of free legal advisers is problematic because of lack of time for consultation before the hearing at the Agency and due to the fact that asylum seekers lack trust in the legal advisers, as they are considered to be too closely linked to the Federal Agency for Immigration and Asylum. The advisers' offices are within the building of the Federal Agency for Immigration and Asylum and their function is only to pass on objective information about the procedure 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 26(2) Dublin III Regulation according to which a transfer decision must contain the details of the time carrying out the transfer and "if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means."

In case of an enforced transfer to another EU Member State the police is first transferring the asylum applicant to a detention centre. Since 2011 there is also a special detention centre for families in Vienna. The asylum applicant has to stay there until the deportation takes place, usually after one or two days. Under the Dublin procedure, asylum seekers can be held up to 48h without detention being specifically ordered. 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. In 2012, 1030 asylum seekers were transferred to other Member States,<sup>31</sup> while they were 1059 during the first 11 months of 2013. Most transfers were carried out to Hungary, Italy, and Poland.<sup>32</sup>

Asylum seekers who had applied for asylum first in Austria, and then left Austria before receiving a final decision on their application travelling on to another EU Member State or Schengen Associated State and were then 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 procedure will be reopened as soon as they request for it at the BFA or the Federal Administrative Court (BVwG). 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 processing time for the appeal body to make a decision: 4 to 6 months if suspensive effect is not awarded, 1 month for appeals with suspensive effect

The time limit within which the appeal against the Federal Agency for Immigration and Asylum's (BFA) inadmissibility decisions (including Dublin decisions) must be lodged is only one week. The appeal has no suspensive effect, unless the Federal Administrative Court (BVwG) grants suspensive effect within seven calendar days after the appeal reaches the court. The expulsion order may not be executed

<sup>31</sup> [Answer](#) of the minister of the interior to the parliamentary request 14171/AB XXIV. GP, 19.06.2013.

<sup>32</sup> Answer of the minister of the interior to the parliamentary request 185/AB XXV. GP, 4.2.2014

before the time limit for granting suspensive effect expires. The Commissioner for Human Rights of the Council of Europe criticised the time limit of one week for appeals lodged against Dublin deportation decisions by the Federal Asylum Office to be very short.<sup>33</sup> The Federal Administrative Court (BVwG) has to decide *ex officio* if the appeal must be given suspensive effect. In many Dublin cases asylum applicants never received a final decision from the Asylum Court (which was competent for appeal decisions until 31.12.2013) because they were transferred back to the responsible Member State before the Court's decision on Dublin was issued.

The Federal Administrative Court (BVwG) can either refuse the appeal or decide to refer it back to the Federal Agency for Immigration and Asylum (BFA) with the binding instruction to conduct either an in-merit procedure or investigate the case in more detail (for instance if the Court finds that the BFA has not properly taken into account family ties or that the assessment of the situation in the responsible Member State was based on outdated material or was insufficient with regard to a possible violation of Article 3 European Convention on Human Rights). Usually, the Asylum Court decided on the basis of the written appeal and the asylum file without personal hearing of the asylum seeker. This practice is likely to be continued as most of the Asylum Court judges became judges in the new Administrative Court and the Austrian procedural laws remained unchanged in this regard.

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 against that country. Recently, letters of UNHCR claiming protection gaps and difficulties to access 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 had expressed concerns with regard to violations of human rights and failure to protect asylum-seekers.<sup>34</sup> As it was confirmed by UNHCR, that Country of origin information used in Dublin procedure was outdated, and suspensive effect was granted to all appeals against the deportation to Hungary<sup>35</sup> until more accurate information was provided (by the Austrian embassy, the Austrian liaison officer in Hungary and the Hungarian Asylum Office) and integrated in the COI concerning Hungary. Reports of NGOs and even UNHCR usually are seen as not objective, contrary to reports of fact-finding missions or reports of authorities. This practice was applied even in the case of Greece until the *M.S.S.* case was decided by the European Court of Human Rights.

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

Asylum seekers, whose appeal was given a suspensive effect or was 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 BFA was unlawful, the asylum-seeker is allowed to re-enter.

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<sup>33</sup> 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.

<sup>34</sup> Letter from the UNHCR office Vienna 17 October 2011 to Dr. Filzwieser, Asylum Court.

<sup>35</sup> 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.

Asylum seekers are entitled to basic care provisions until their transfer to the Member State responsible for the examination of the asylum application is executed. This general rule is not applicable if the asylum seeker is detained or ordered less coercive measures. In both cases they are not covered by health insurance but have access to necessary urgent medical treatment. Different from asylum seekers subjected to the Dublin procedure but are accommodated in one of the five reception facilities in Austria, those in detention or subjected to less coercive measure do not receive monthly pocket money (€ 40).

### Personal Interview

#### Indicators:

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

A personal interview is required by law. The law permits an exception in case the asylum seeker has evaded the procedure in the initial reception centre. 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 Agency for Immigration and Asylum (BFA) or by the Federal Administrative Court (BVwG) shall not preclude the rendering of a decision. In practice this exception is not applied very often.<sup>36</sup> Relevant facts for a decision in Dublin cases could be a Eurodac hit and the acceptance of the requested Member State to take back the asylum seeker.

An appointed legal adviser must be present at the interview organised to provide the asylum seeker an opportunity to be heard. In practice legal advisers are present at the hearing. Legal advisers are often 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. Interpreters are available in various languages, but the Asylum Agency does not appoint accredited interpreters; usually persons with the requested language knowledge are contracted on a case-by-case basis. In autumn 2012 the police contracted for the first interrogation in the initial reception centre interpreters employed by a security firm. It was obvious that some of these interpreters had not sufficient skills and after protests the cooperation of the police with the security firm was modified and afterwards interpreters have been contracted on an individual basis.<sup>37</sup> Asylum seekers have the right to ask for same-sex asylum officials if they base their application on violations of the right to sexual self-determination.

Audio recording does not take place and video recording is not permitted.

<sup>36</sup> See Asylum Court S6 430.113-1/2012, 5.11.2012: the Court found that the procedures was unlawful in the case of an unaccompanied minor asylum seeker from Afghanistan, who was interrogated by the police without the presence of his legal representative or a person of trust and disappeared shortly after. The Federal Agency for Alien's Affairs and Asylum did not submit the minutes of the first interrogation, not give the legal representative the opportunity to be heard before rendering the rejection of the application. But divergent the negative decision of the Asylum Court in the case of an unaccompanied minor S2 429505-1/2012, 04.10.2012

<sup>37</sup> Der Standard, Interpreters during asylum procedure are 40 % cheaper in Traiskirchen ("Asylübersetzer in Traiskirchen um 40 Prozent billiger"), 23 May 2013.

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 assistance during the admissibility procedure was implemented to compensate for the restricted movement of asylum seekers during this type of procedure as they are obliged to stay within the district of the initial reception centre (EAST). If asylum seekers leave the district of the EAST to consult an attorney-at-law or NGOs -which normally have their offices in the bigger cities- they can be given a fine ranging from € 100 to € 1000. In case of repeated violation of the restricted residence (“*Gebietsbeschränkung*”) the fine may amount to € 5000 and even detention may be ordered in case the asylum seeker is unable to pay the fine. A violation of the restriction of movement could furthermore be a reason for pre-expulsion custody. This punishment is not applied very often in practice. The second reason why free legal assistance is provided at this stage of the procedure is the lack of suspensive effect of an appeal in admissibility procedures, which is why additional safeguards are incorporated in the first instance procedure.

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

In case of unaccompanied asylum seeking children, the appointed legal 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 themselves 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.<sup>38</sup> NGOs report that this is not the only case where the legal representative did not lodge an appeal disregarding the interests of the child.

The question whether the decision to declare an unaccompanied child of full age can be appealed was referred to the Constitutional Court. In a ruling (U 2416/2013-8) of 3 March 2014, the court found that

<sup>38</sup> Asylum Court S7 424252-1/2012, 09 February 2012.



the declaration of the BFA that a person is of age and the consequent discharge of the legal representative may be appealed.

Although Article 29 (4) of the Asylum Law stipulates that free legal assistance shall be provided at least 24 hours before the hearing on the results of the investigations, legal advisers are often informed only shortly before the interview, therefore lacking time to study the file and prepare for the hearing. Asylum seekers in detention do not normally receive legal advice until immediately before the hearing in the detention centre.

The legal advisor must be present at the interview held to give the asylum seeker an opportunity to be heard. At the interview in relation to Dublin with the Federal Agency for Immigration and Asylum (BFA), the asylum seeker together with the legal advisor may submit written statements with regards to the situation in the Member State deemed responsible or make requests for additional investigations, but they are not allowed to ask questions, 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, Bulgaria

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.<sup>39</sup> The Asylum Court ruled in some cases of vulnerable asylum seekers that there would be a risk of violation of Article 3 of the European Convention on Human Rights (ECHR) if returned to Greece and relied on the sovereignty clause established in the *M.S.S.* judgment. Though 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 country where reception conditions most severely violate Article 3 ECHR is Italy, which has notorious and established difficulties.<sup>40</sup> However, the Austrian authorities consider that the Italian asylum system is in line with the EU asylum acquis and human rights.

The authorities usually argue in their decisions that there “might be some difficulties” in Italy, and that so far the European Commission has not launched an infringement procedure for a violation of the Reception Conditions Directive against Italy.<sup>41</sup> 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

<sup>39</sup> ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011.

<sup>40</sup> 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.

<sup>41</sup> However, a letter of formal notice as part of an infringement procedure with regard to the Reception Conditions Directive, Asylum Procedures Directive and the Dublin Regulation was sent to the Italian authorities by the Commission - see. [Procedure 2012/2189](#).



there are inhuman reception conditions in a certain Member State. The few exceptions to be found in the Asylum Court's jurisprudence concern vulnerable persons.<sup>42</sup>

In the case of a Syrian family with Italy the BVwG reasoned the decision to revert the case back to the BFA, that the Commissioner for Human Rights appealed not to send back Syrian refugees to Member States with problematic reception systems like Bulgaria, Greece, Italy and Malta.<sup>43</sup>

On 3 January 2014 UNHCR has called for temporary suspension of Dublin transfers of asylum-seekers back to Bulgaria.<sup>44</sup> This recommendation of UNHCR is respected by Austrian authorities. The newly established Administrative Court ruled on 24 February 2014 that additional and up to date information would be necessary after UNHCR's report.<sup>45</sup> In May the BFA continued to apply the Dublin III regulation with Bulgaria. The BVwG granted suspensive effect in one case<sup>46</sup> because the risk of a violation of Art 3 ECHR cannot be excluded.

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.<sup>47</sup> The Asylum Court granted suspensive effect to the appeal in such cases because the decisions of the EAST were based on outdated country reports.<sup>48</sup> 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 previous jurisprudence, 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.<sup>49</sup> After that ruling in June 2012, the sovereignty clause was applied in such cases. The Court of Justice of the European Union (CJEU) ruled in the Abdullahi case that a Member State may become the responsible state even when it is not the country of first entry, upon acceptance of the take charge request.<sup>50</sup>

Based on the judgment of the Court of Justice of the European Union in *MA and Others*<sup>51</sup> in relation to Art 6 of the Dublin II Regulation, for asylum applications lodged by unaccompanied children, the BAA/EAST ordered age assessments even in cases where there are no reasons for doubts in regard to the age of the asylum seeker.<sup>52</sup> In several cases unaccompanied children have even been declared to be above 18 years old, without a medical age assessment being performed as prescribed by law. Legal

<sup>42</sup> AsylGH (Asylum Court) - S11 404115-1/2009, 25 March 2009; S10 405811-2/2009, 22 June 2009.

<sup>43</sup> "[Syrian refugees: a neglected human rights crisis in Europe](#)", Human Rights Comments.

<sup>44</sup> UNHCR, [UNHCR calls for temporary halt to Dublin transfers of asylum-seekers back to Bulgaria](#), January 2014.

<sup>45</sup> BVwG: [W211 2000025-1](#), 24 February 2014.

BVwG [W168 1439304-1](#), 06 March 2014.

<sup>46</sup> BVwG W185 2008238-1, 28 May 2014.

<sup>47</sup> 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.

<sup>48</sup> 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.

<sup>49</sup> VfGH (Constitutional Court) - U330/12, 27 June 2012.

<sup>50</sup> CJEU, Case C-394/12, *Shamso Abdullahi v. Bundesasylamt*, Judgment of 10 December 2013.

<sup>51</sup> C-648/11, *MA and Others v Secretary of State for the Home Department*, 6 June 2013.

<sup>52</sup> According to information from the BAA, from January until Mai 2013 456 UMA applied for asylum. The age assessment was ordered in 274 cases and further medical examinations have been ordered in 171 cases.

representatives have been informed about the cessation of their legal representation by informal email notice without any procedural guarantees (legal information, possibility to submit a written statement or personal hearing).

Suspensive effect of appeals was allowed in about 90 cases from the period of 1 January until the end of October 2013.

#### 4. Admissibility procedures

##### *General (scope, criteria, time limits)*

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

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

There are three types of admissibility procedures: (1) a Dublin procedure, (2) a procedure because the person comes from a safe (third) 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 ground that another state is considered responsible for the examination of the asylum claim or that the Federal Agency for Immigration and Asylum (BFA) intends to revoke the suspensive effect of a subsequent application. This time limit does not apply if consultations with another state on the application of the Dublin Regulation take place. 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 has to comply with summons etc.), the asylum seeker is unable to cooperate in the procedure, the computation of the 20 day time limit shall be suspended. In practice the time limit is respected. If the BFA does not notify the applicant the intention to issue an inadmissibility decision within 20 days the application is admitted to the regular procedure. The duty of the asylum seeker to cooperate includes, among others, providing the Asylum Agency (BFA) with information and evidence about their identity and reasons for applying for asylum, to come to hearings in time and to notify the authorities of their address.

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.<sup>53</sup>

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<sup>53</sup> VwGH (Administrative Court) - 2006/20/0624, 25 November 2008.

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

## 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 admissibility procedure, the appeal stages are the same as in the regular procedure, but the time limits within which an appeal against the Asylum Agency's (BFA) inadmissibility decision must be lodged is only one week and the appeal has in general no suspensive effect, except when decided otherwise by the Federal Administrative Court (BVwG).

As a first step, the Federal Administrative Court (BVwG) decides within seven days after receiving the appeal whether the appeal will have suspensive effect during the continuing appeal procedure. If the BVwG issues neither suspensive effect, nor accepts the appeal after seven days, the asylum applicant can be deported to the responsible Member State or safe third country.

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

The reasons for not granting 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 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 1998 ruling of the Higher Constitutional Court.<sup>54</sup> This short time limit is in practice very problematic, considering that the applicant may be in detention for instance and that arranging a meeting with the legal advisor could already take a few days. One week does not seem to be sufficient in practice also for submitting an appeal explaining the procedural and/or legal incorrectness of the decision. The appointed legal adviser is not obliged to assist the asylum seeker with writing the complaint that has to be written in German language and the requested qualification for legal advisers is also not sufficient.

<sup>54</sup> VfGH (Administrative Court) - G31/98 u.a. 24.06.1998.

## Personal Interview

### Indicators:

- Is a personal interview of the asylum seeker conducted in most cases in practice in the admissibility procedure?  Yes  No
- If yes, is the personal interview limited to questions relating to nationality, identity and travel route?  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 admissibility 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 not credible at the interview before the civil servant of the Asylum Agency if the asylum seeker has based the application on other reasons immediately upon arrival.

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 Agency for Immigration and Asylum or by the Federal Administrative Court shall not preclude the rendering of a decision. In practice this exception is not applied very often.

In the admissibility procedure, the rules and practice are the same as in the regular procedure with regard to transcripts and quality of transcripts of interviews. Interpreters are available in various languages, but the Asylum Agency does not appoint accredited interpreters; usually persons with the requested language knowledge are contracted on a case-by-case basis. In autumn 2012 the police contracted for the first interrogation in the initial reception centre interpreters employed by a security firm. It was obvious that some of these interpreters had not sufficient skills and after protests the cooperation of the police with the security firm was modified and interpreters have been contracted on an individual bases afterwards.<sup>55</sup> Asylum seekers have the right to ask for same-sex asylum officials if they base their application on violations of their right to sexual self-determination.

Audio recording does not take place and video recording is not permitted.

<sup>55</sup> Der Standard, [Interpreters during asylum porcedure are 40 % cheaper in Traiskirchen](#) ("Asylübersetzer in Traiskirchen um 40 Prozent billiger"), 23 May 2013.

## 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 adviser is appointed by the Federal Agency for Immigration and Asylum (BFA) 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. Legal advice during the procedure is often not provided at least 24 hours before the hearing, as the law prescribes, 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 adviser, who is considered to be too closely linked to the Federal Agency for Immigration and Asylum. They have their offices within the building of the BFA 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 Member States, party to the Dublin Regulation.

Asylum seekers who apply for international protection at the airport are transferred after the interview by the police to the building of the police station with the “initial reception centre” and the rejection zone. On the basis of the first interview, the Federal Agency for Immigration and Asylum (BFA) 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 BFA intends to reject the application in the airport procedure, UNHCR has to be informed within one week, a time limit which is generally respected. In the context of Dublin procedures at the airport, UNHCR is not involved.

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 and

1. the applicant tried to mislead the authorities about their identity, citizenship or authenticity of their documents and they were previously informed about the negative consequences of doing so;

2. the applicant's claims relating to the alleged persecution are obviously unfounded;
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 asylum seeker at the border is conducted automatically. Therefore, at this stage a decision rejecting the asylum application on the merits or as inadmissible is issued without expulsion order. Rejection at the border may be enforced only after a final decision on the asylum application.

### 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 Agency for Immigration and Asylum (BFA) in procedures at the airport is seven calendar days. The Federal Administrative Court (BVwG) 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. No information is available about the practice of the BVwG, which started to work on 1 January 2014.

In all other cases the same system for appeals applies as described in the relevant section under the regular procedure. The short time to appeal causes in practice asylum seekers the same obstacles as in the admissibility procedure. One NGO – Caritas – is present at the airport and assists asylum-seeker to prepare the appeal.

### Personal Interview

#### Indicators:

- Is a personal interview of the asylum seeker conducted in most cases in practice in the border procedure?  Yes  No
  - o If yes, is the personal interview limited to questions relating to nationality, identity and travel route?  Yes  No
  - o If so, are interpreters available in practice, for interviews?  Yes  No
- Are interviews conducted through video conferencing?  Frequently  Rarely  Never

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. Caritas Vienna, which provides care to asylum seekers at the airport, may help them with legal questions too.

## 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, (3) in case the asylum application is examined at the airport, and (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 as 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 Federal Administrative Court (BVwG) has to decide on the appeal in these cases within 8 weeks if suspensive effect was not awarded; but in case suspensive effect was awarded, the Federal Administrative Court (BVwG) has to rule within two weeks. However, there is no consequence if the decision is not rendered in time.

An accelerated procedure takes place at the airport if the applicant is not allowed entry and the application is processed during the procedure 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 with a final judgment or against whom charges have been brought by the Department of Public



Prosecution because they are suspected of having willfully committed a criminal offence, 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 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 field office of the Federal Agency for Immigration and Asylum (BFA) Traiskirchen during the stay of the asylum seekers in the initial reception centre Traiskirchen. 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 process asylum applicants, usually from a certain country of origin and during a certain period, through such fast procedure, in order to discourage other potential asylum applicants from that country to apply for asylum in Austria.<sup>56</sup> The asylum applicant has, during that time, the same rights as any other asylum applicant in a procedure based on merits, but will receive the negative decision from the BFA immediately after the interview, usually within one or two weeks instead of within around six to nine months.

Nevertheless, the appeal that must be lodged within two weeks after the service of the decision usually has suspensive effect.<sup>57</sup> 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 were 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, and family reunification cases are often admitted to the regular procedure and not decided under the admissibility procedure, even if family members are in principle entitled to the same status.

In relation to refugees from Syria that will be resettled in Austria, the Ministry of the interior announced that they will get asylum immediately upon arrival (asylum *ex officio*). Some Syrian refugees who arrived individually in the last months quickly received positive decisions, but others are waiting for several months for the interview on their case, which resulted in uprisings and a hunger strike.<sup>58</sup>

## 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  No

<sup>56</sup> See for example, Ministry of Interior, Johanna Mikl-Leitner explained during the parliamentary hearing on 30 October 2012: *“Bei Personen, die aus Drittstaaten kommen, im Speziellen aus den Balkanländern, wissen wir, dass es keine Asylgründe gibt, und da sind wir zu Schnellverfahren übergegangen.”* (“We know from persons coming from third countries, especially from Balkan countries, that grounds for asylum do not exist in their case, and we therefore changed to accelerated procedures”).

<sup>57</sup> E.g. AsylGH (Asylum Court) - A8 260.187-2/2011, 02 August 2011.

<sup>58</sup> Orf Morgenjournal, Cornelia Krebs, [Burgenland: Asylwerber im Hungerstreik](#) (Asylum-seekers in hungerstrike), 25 February 2014 and ORF Tirol, [Flüchtlinge: Langes Warten auf Bescheide](#) (Refugees: waiting long for decisions), 18 February 2014.



Instead of two weeks -as applicable for submitting an appeal during the regular procedure- decisions 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 Federal Administrative 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 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 the Dublin procedure and result mainly from the short time limit of one week to lodge the appeal and insufficient availability of free legal assistance. Organisations contracted to provide legal assistance have to organise interpreters if necessary. Asylum seekers receive written information about the first steps in the procedure and their obligations and rights when applying for asylum. Nevertheless, according to experience of NGOs, asylum seekers are often not sufficiently informed about the procedure.

The Federal Administrative Court (BVwG) has to decide on the appeal within 3 months in cases of specific public interest.

### Personal Interview

#### Indicators:

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

All asylum seekers must have one personal interview with 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, not having been interviewed by the Federal Agency for Immigration and Asylum or by the Federal Administrative Court yet should not preclude the rendering of a decision.

In last minute subsequent applications to prevent the execution of an expulsion order and subsequent applications without *de facto* protection against deportation (no suspensive effect and the expulsion order issued after the rejection of the first asylum application can be executed) the Asylum Agency (BFA) 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 assistance is not available for subsequent asylum applications with regard to the procedure before the Federal Agency for Immigration and Asylum (BFA).

In fast-track procedures the mandatory free legal advice for the admissibility procedure is circumvented by forwarding the procedure to the Federal Agency for Immigration and Asylum'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 in which a branch office of the BFA 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.

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 the asylum procedure; (2) the "first information sheet" explains the procedure in the initial reception centre (EAST) including information about the Dublin Regulation and procedure, and Eurodac; (3) the third information sheet explains the rights and duties of asylum applicants. The contact details of UNHCR in

Austria are included in the information sheets, as well as the telephone number and website details 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 criticised.<sup>59</sup> Main criticisms include excessive length of text and complex language, as well as non-user-friendly logic structure.,

This information package is available in almost all languages needed. In the initial reception center asylum seekers may also watch a short video about the first steps in the procedure in some of the main languages, but the video 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 an appropriate manner (if available a leaflet is provided in a language understandable to them) that, for the notification of decisions in the asylum procedure, they may avail themselves of the services of a legal representative and that they are obliged to inform the authority of their place of residence and address, including outside Austria.

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.

The system of free legal advice should, at least, provide information and counselling during the mandatory consultation with the appointed legal adviser in case the BFA intends to reject the asylum application as inadmissible or on the merits in the EAST. The Federal Agency for Immigration and Asylum (BFA) 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 Federal Administrative Court, reference shall also be made, in a language understandable to the asylum seeker, to the possibility of filing a complaint with the Administrative High Court and 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, 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 contracts in seven of the nine federal provinces for providing social counselling and visit reception centres of asylum-seekers regularly. NGOs without contract may have to apply at the responsible office of the federal province for a permit to visit an asylum seeker. Access to asylum seekers in detention is difficult for NGOs, as long as they are not the authorised legal representative of the asylum seeker. The two contracted organisations for providing legal advice "*Arge Rechtsberatung*"

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<sup>59</sup> Plutzar, 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.

and “*Verein Menschenrechte Österreich*” are bound by secrecy and for this reason are 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?
  - At first instance  Yes (depending on whether the subsequent application was submitted shortly before the date of deportation and not in case of a negative admissibility decision)  No
  - At the appeal stage  Yes  No
- Is a removal order suspended during the examination of a second, third, subsequent application?
  - At first instance  Yes (depending on whether the subsequent application was submitted shortly before the date of deportation and not in case of a negative admissibility decision)  No
  - At the appeal stage  Yes  No

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 is 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 Federal Administrative Court (BVwG) can either refuse the appeal or decide to revert it back to the Federal Office for Immigration and Asylum (BFA) with the binding instruction to examine the subsequent asylum application either in a regular procedure or conduct more detailed investigations.

Within the admissibility procedure, an interview has to take place except in the case where the previous asylum application was rejected due to the responsibility of another Member State. Such interviews are shorter than in the first application and focus on changed 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 previous 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 for 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 granted for an application following a rejection of the application on the merits or a safe-third-country decision, if the execution of the expulsion order of the previous asylum procedure could violate the non-*refoulement* principle. If a suspensive effect is not granted, the file has to be forwarded to the Federal Administrative 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 civil status may have changed since the final decision on the first asylum application, e.g. marriage or birth of a child, and due to the expulsion order issued as a result of that negative decision it is not possible for the person concerned to apply for a residence permit as family member of a legally residing person or of a person with protection status in Austria. A subsequent application for international protection would then include the question of a possible violation of Art. 8 of the 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, a regular procedure is initiated to assess the case on the merits. 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.

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

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 section on Reception Conditions). If Basic Care is not granted, detention or a less coercive 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 adviser. At the beginning of the interview they are asked whether they have any health or mental problems that could influence their ability to cooperate in the procedure. Doctors in the initial reception centre with a psychology diploma are requested by the Federal Agency for Immigration and Asylum 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 deemed to be highly probable, the application shall not be dismissed in the admissibility 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. Usually the 6 month time limit for deciding the application is long enough to gather evidence and could be extended without any consequences.

In an appeal against a decision by the Federal Agency for Immigration and Asylum (BFA), new facts and evidence may be submitted only if the asylum seeker had been unable to submit such facts and evidence before the BFA. Negative first instance decisions are often based on the lack of credibility of the facts presented. To convince the Federal Administrative Court of the credibility, expert opinions (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 Federal Administrative Court (BVG), this rule should apply only if asylum seekers have already claimed an infringement of their right to sexual self-determination before the BFA or in the written appeal. The Constitutional Court ruled that a judge of the same sex has to decide on the appeal regardless of whether a public hearing is organised or the decision is exclusively based on the file.<sup>60</sup> A similar provision for interpreters is lacking. The Asylum Court lists in its yearly report 2009, a training of a Psychiatrist on the issue "*Trauma/Pseudotrauma*", however, in 2010 and 2011 no such lectures were reported.

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

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

## 2. Use of medical reports

### Indicators:

- 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.

<sup>60</sup> 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.<sup>61</sup> Some of these psychiatrists or medical experts are accredited by the courts, but have no special training on torture survivors, do not allow a person of confidence to be present during the examination or are biased. Therefore asylum seekers also submit opinions of experts of their own choice, which they normally pay themselves, although sometimes these opinions are covered by the health insurance.

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 a psychotherapist. In every federal state, a NGO provides psychotherapy for asylum seekers funded by the European Refugee Fund (ERF) with treatment free of charge.

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.”<sup>62</sup> A psychiatric opinion was taken into consideration, which concerned the need to treat the psychiatric illness. PTSD, illusions and concentration difficulties were diagnosed, but the opinion did not evidence how far those issues would influence the asylum seeker's statements, therefore authority believed that the asylum seeker should remember the exact date of the events reported.

The established jurisprudence of the Higher Administrative Court<sup>63</sup> requires exhaustive reasoning to deny the causality between asserted torture and visible scars, in case through an expert opinion indicating the likelihood of the asserted torture to causes the visible effects. 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

<sup>61</sup> 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.

<sup>62</sup> VwGH (Administrative court) - 007/19/0830, 19 November 2010.

<sup>63</sup> VwGH (Administrative court) - 2006/01/0355, 15 March 2010.

In the case of doubt with regard to the age of an unaccompanied asylum-seeking child authorities may order a medical examination. Several methods might be used. According to the amendment of the Asylum 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 an age assessment examination, 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.<sup>64</sup> The age assessment examination states a minimum age and consists of three medical examinations: the general medical examination, the x-ray examination of the wrist and the examination by a dentist. If the x-ray examination of the wrist is not conclusive (i.e. it shows a high level of ossification), a further x-ray (CT) examination of the clavicle may be ordered. In 2012, 698 age assessment have been ordered and 556 expert opinions have been rendered. 336 asylum-seekers (60%) have been declared to be 18 or older as a result of age assessment and in 220 cases underage was confirmed.<sup>65</sup> During the first half of 2013, 206 age assessments have been ordered and 178 examinations took place. In 128 cases the conclusion was that the asylum seekers were of full age (74%) and 44 were still children (26%).<sup>66</sup> In case an asylum applicant is declared being of full age, his birth date will be "corrected" to 1st January of the year of birth that 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. Most of the age assessments are ordered by the EAST during the admissibility procedure, because special safeguards in the Dublin II/III Regulation apply for unaccompanied children. In some cases the Asylum Court ordered age assessment in cases in which their need remains unclear.

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; nevertheless, they are under the same obligation to cooperate in the procedure as adults. Legal representatives have to be present at interviews organised by the Federal Agency for Immigration and Asylum (and hearings at the Federal Administrative Court). During the admissibility procedure, the legal advisors (who are contracted by the Ministry of the Interior) act as legal representatives of the unaccompanied asylum-seeking child. Legal advisors are either from *Verein Menschenrechte Österreich* or from *ARGE Rechtsberatung*. According to *Menschenrechtsbeirat* (Human Rights Board)<sup>67</sup> it is problematic that these legal advisers are only responsible for the asylum procedure and do not have whole custody of the child. Furthermore, legal advisers are not required to have special expertise on children.

After admission to the regular procedure and transfer to one of the federal provinces the 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

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<sup>64</sup> Menschenrechtsbeirat (*Human Rights Board*): Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren (*Report of the Human Rights Board on children and adolescents in cross-border procedures*), (2011); Stellungnahme der Ärztekammer (*Comment by the Medical Council*), FPG 2010, 21 July 2009.

<sup>65</sup> Answer of the Minister of the Interior to the parliamentary request 13129/AB XXIV. GP, 18.2.2013

<sup>66</sup> Answer of the Minister of the Interior to the parliamentary request 1590/AB XXIV. GP, 3.9.2013

<sup>67</sup> Menschenrechtsbeirat: (*Human Rights Board*): Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren (*Report of the Human Rights Board on children and adolescents in cross-border procedures*), (2011).



inadmissible or who are subject to being returned to another EU member state under the Dublin II regulation.<sup>68</sup>

Since January 2014, all children shall have a legal representative in Foreigner Police Law procedures. This legal provision has been adopted in 2012.<sup>69</sup> Before, children of 16 years of age were not legally represented in procedures according to the Foreigner Police Law, e.g. an expulsion order or detention. Furthermore, legal safeguards for unaccompanied children have improved. The time limit for submitting the appeal is extended to 4 weeks (instead of 2 weeks in the regular procedure).

As of 1 January 2014, unaccompanied children have the duty to cooperate with family tracing in the country of origin or third countries, regardless of the organisation or person who is undertaking the tracing.<sup>70</sup> For the time being it seems that tracing in countries of origin or third countries is not applied. The same amendment of the law implements the extended definition of family members and legal representatives of children introduced by the recast Qualification Directive and the recast Dublin Regulation.

The number of unaccompanied children in Austria has 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).<sup>71</sup> In 2013 their number decreased. According to the figures released by the Ministry of the Interior,<sup>72</sup> 999 unaccompanied children applied for asylum in 2013.

## 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

<sup>68</sup> 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.

<sup>69</sup> BGBl (Federal Law Gazette). 87/2012 16 August 2012: Fremdenbehördenneustrukturierungsgesetz –FNG.

<sup>70</sup> BGBl (Federal Law Gazette) 68/2013 17. April 2013, FNG Adoption Law, § 13 Abs 6.

<sup>71</sup> Federal Minister for Interior: [Asylstatistik \(Asylum statistics\)](#) for 2012.

<sup>72</sup> BMI: [Asylstatistik Dezember 2013](#).

The list of safe countries of origin (Article 19 BFA-VG) includes all EU Member States<sup>73</sup> and there is a mechanism to take Member States off the list in case Article 7 of the Treaty on the European Union would be applied (suspension of certain rights deriving from the application of the Treaties in case of serious breach of the values on which the EU is based as laid down in Article 2 TEU).. As a consequence, suspensive effect must be granted for appeals in asylum procedures of nationals of such EU Member State. Other safe countries of origin mentioned in the Asylum 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.<sup>74</sup> The suspensive effect of an appeal may not be granted in such cases by the Federal Agency for Immigration and Asylum (BFA), and the Federal Administrative Court (BVG) 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<sup>75</sup>, NGOs could comment on it. The list of safe countries of origin is applied in practice and has not been changed since 2010.

In 2012 941 (5.4%) asylum applications of persons from safe countries of origin were registered, most of them from Serbia and Kosovo.

In such procedures asylum seekers have access to free legal assistance where applications are rejected. Legal advisers have to organise interpreters. The procedure may be prioritised, but there are no exceptional time limits for deciding such applications.

## G. Treatment of specific nationalities

The so-called fast track procedure is applied to examine asylum applications, usually from a certain country of origin and during a certain period, on the basis of a political decision, in order 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 Agency for Immigration and Asylum within one or two weeks instead of around five to six 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, Pakistan and Bangladesh. 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.

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<sup>73</sup> § 2 Abs.1 Ziffer 18 AsylG: member state: each state that is party of the EU treaty.

<sup>74</sup> [BGBl. II Nr.405/2013](#), 03 December 2013.

<sup>75</sup> According to information from the ministry of interior, human rights standards have been assessed by the ministry of interior based on the country of origin information of the Federal Asylum Agency. See "[Fremdenwesen](#)" (Alien Affairs) June 2009.

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

According to the law, asylum may also be granted during the admissibility procedure; however, Asylkoordination is not aware of any such cases. An exception will now be made for 500 refugees from Syria, who will be resettled to Austria. These refugees will be granted asylum *ex officio*.<sup>76</sup>

From January to September 2013, 1,006 Syrians applied for asylum in Austria. During the same period, 131 applications for asylum from Syrians have been rejected (this figure includes Dublin decisions), 408 have received refugee status and 226 received subsidiary protection status.<sup>77</sup> Refugees fleeing Syria have quickly received positive decisions. In response to a request submitted by the Parliament,<sup>78</sup> the Minister of Interior reported that 26 asylum seekers from Syria, whose applications had been rejected due to inadmissibility, were transferred to Italy (24) and Cyprus (2).

From 2011 to 2012, 42 asylum seekers from Syria received a negative in-merits decision. Among those whose application had been rejected, one returned voluntarily, four went to other EU Member States (due to the presence of their spouse or a residence permit), four were granted leave to remain in Austria. In four cases the expulsion was declared unlawful – which means that leave to remain will be issued, and four rejected asylum seekers disappeared.

Some submitted subsequent asylum applications: three received subsidiary protection status, 17 refugee status, and one application is still pending.<sup>79</sup>

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

In October 2013, the media reported that 259 refugees from Syria were apprehended at the Austrian-Italian border (region of Tyrol). Of those 259 refugees, only 17 had applied for asylum and 242 had been returned to Italy<sup>80</sup> based on a re-admission agreement between Austria and Italy. According to the Aliens' Police, 1336 persons went to Tyrol since July 2013: 577 from Syria, 108 from Eritrea and 80 from Somalia. They did not intend to apply for asylum neither in Italy nor in Austria, as their countries of destination were Germany and Sweden.<sup>81</sup>

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<sup>76</sup> Wiener Zeitung, 26.9.2013: [Until Monday the first Syrian refugees will arrive](#) ("Bis Montag kommen die ersten syrischen Flüchtlinge").

<sup>77</sup> Those were both first Instance and appeal decisions.

<sup>78</sup> Response by the Minister of Interior to a request submitted by the Parliament, 14841/AB XXIV. GP, 14 August 2013.

<sup>79</sup> See response to parliamentary request 14841/AB XXIV. GP

<sup>80</sup> Südtirol News, [Österreich hat 1500 Flüchtlinge nach Italien zurückgeschickt](#) (Austria has returned 1500 refugees to Italy), 6 October 2013.

<sup>81</sup> Die Presse, [577 syrische Flüchtlinge seit Juli zurückgeschoben](#) (577 syrian refugees returned to Italy since July), 11 October 2013; Südtirol News, [Österreich hat 1500 Flüchtlinge nach Italien zurückgeschickt](#) (Austria has returned 1500 refugees to Italy), 6 October 2013.

## 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 cannot be expelled are not entitled to the same social benefits as citizens. In 2004 the Basic Care Agreement between the State and the federal provinces entered into force and 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 the final decision on the asylum application in all types of procedures. However, Basic Care legislation does not apply in detention or during alternatives 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 support from third parties. Asylum seekers arriving in Austria with a visa are not entitled to Basic Care due to the precondition of having obtained a Schengen visa (i.e. showing that the person has sufficient means to travel). Although the amount of material reception conditions is specified in the Basic Care Agreement,<sup>82</sup> the level of income or values relevant to assess lack of need for Basic Care is not specified by law. Legislation does not lay down the amount of means

<sup>82</sup> Article 6, 7 and 9 Grundversorgungsvereinbarung – Art. 15a B-VG BGBl (*Federal Law Gazette*). I Nr. 80/2004, 15 July 2004.

of subsistence below which a person is entitled to Basic Care, while the amounts for subsistence and accommodation are prescribed by law. In practice, the level of income in the law of Tyrol is applied in other federal provinces too: asylum seekers who have an income beyond 1.5 times the amount of Basic Care benefits (€ 465) are deemed to be without need of Basic Care. In Salzburg, the regulation for Basic Care sets out that income up to €110 is not taken into account; for any family member in a household a further € 80 of income should not lead to a reduction of basic care support.<sup>83</sup>

Asylum seekers who leave the assigned place of residence lose their entitlement to Basic Care. It is assumed that they are not in need of Basic Care support. Asylum seekers who submit a subsequent application may be excluded from Basic Care.

## 2. Forms and levels of material reception conditions

### Indicators:

Amount of the financial allowance/vouchers granted to asylum seekers on 31/12/2013 (per month, in original currency and in euros): € 332,-

Basic Care may be provided in three different forms

(1) Asylum seekers can be accommodated in reception centers where catering is provided. Asylum seekers in such reception centers receive € 40 pocket money per month, while the care provider (NGOs, private companies contracted by the Government) receives € 19 maximum compensation for the costs per day, depending on the standards of the facility.

(2) Basic Care can be provided in reception centers where asylum seekers cook by themselves. In that case asylum seekers receive between € 150 and 180/month mainly in cash or -as in Tyrol- € 200 for subsistence(= the amount for those living in private flats). In some federal provinces the amount for children is reduced, e.g. in Tyrol € 90.

(3) Basic Care can be provided for asylum seekers in private rented accommodation. In this case asylum seekers receive € 320 in cash.

All asylum-seekers receive additionally € 150 a year for clothes in vouchers and pupils get 200 € a year for school material, mainly as vouchers.

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).

€ 570 (= € 19 x 30 days) per month for accommodation and subsistence, given to a provider, is below the level of welfare support for citizens, although staff and administrative costs have to be covered by the care 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 rejected asylum seekers 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 a private agreement with the landlord/NGO.

<sup>83</sup> Verordnung (Regulation) 53/2013, Landesgesetzblatt Land Salzburg, 24.Mai 2013

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, depending on the intensity of psychosocial care. Unaccompanied asylum-seeking children with higher need of care are accommodated in groups with one social pedagogue responsible for the care of 10 children; those who are not able to care for themselves are accommodated in dorms where one social pedagogue takes care of 15 children. A third group, which is that of unaccompanied children who are able to care for themselves, live in supervised flats. In this case one social pedagogue is responsible for 20 children.

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

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

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 are 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): about 12.780
- Type of accommodation most frequently used in a regular procedure :
 

<input checked="" type="checkbox"/> Reception centre	<input type="checkbox"/> Hotel/hostel	<input type="checkbox"/> Emergency shelter
<input checked="" type="checkbox"/> private housing	<input type="checkbox"/> other (please explain)	
- Type of accommodation most frequently used in an accelerated procedure :
 

<input checked="" type="checkbox"/> Reception centre	<input type="checkbox"/> Hotel/hostel	<input type="checkbox"/> Emergency shelter
<input type="checkbox"/> private housing	<input type="checkbox"/> other (please explain)	
- Number of places in private accommodation: 7000
- Number of reception centres: 730
- Are there instances of asylum seekers not having access to reception accommodation because of a shortage of places?  Yes  No
- Are there instances of asylum seekers not having access to reception accommodation because of a shortage of places?  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

As of 29 December 2013, 21,902 persons, out of which 14,371 asylum seekers,<sup>84</sup> were supported by Basic Care. 4,042 persons received Basic Care after their asylum application had been rejected. Asylum seekers are accommodated in more than 700 facilities of different size and capacity. A quota system requires the federal provinces to provide places according to their population.

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

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 often 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. By the end of 2013, 950 asylum seekers lived in EAST Traiskirchen and 309 in the EAST West, the initial reception centres provided by the federal state.

The Commissioner for Human Rights of the 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 resulting in a lack of special places with adapted services foreseen for unaccompanied children in the Federal Reception Centre East. This raised the issue of whether all unaccompanied asylum-seeking children benefit from the child-adapted services as originally planned for.<sup>85</sup>

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 enrollment 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.

The Ministry of Interior, which is responsible for Basic Care during the admissibility procedure, subcontracts their day-to-day management to companies, while remaining the responsible authority. Until 2012, European homecare, which is mainly active in Germany, was providing federal care to asylum seekers. Since 2012, ORS, a company running accommodation centres for asylum seekers in Switzerland, provides basic care in the five reception centers under the responsibility of the Ministry (two initial reception centers and three reception centers for asylum seekers in the admissibility procedure).<sup>86</sup>

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

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<sup>84</sup> Answer of the minister of the interior to the parliamentarian request 14759AB/XXIV.GP, 12.8.2013

<sup>85</sup> 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.

<sup>86</sup> Reception centres for asylum-seekers in the admissibility procedure are located in Reichenau, Bad Kreuzen and Vienna.



At the Vienna airport, 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 for the final decision on their application.

For single women, there are some specialised reception facilities, one in the EAST and a few others run by NGOs. In bigger facilities of NGOs, separated rooms or floors are dedicated for single women. There may also be floors for families. The protection of family life of core family members is laid down in the law of the federal provinces.<sup>87</sup> If the asylum application is processed as inadmissible (Dublin II) application, detention may be ordered. While in the past families often had been separated by ordering pre expulsion detention to one or more adult family member and less coercive measures to minor family members, this practice ceased with the establishment of a special closed facility for families. There are only a few reception facilities with more than 80 or 100 places, almost all of these are run by NGOs. Hostels and inns have between 20 and 40 places; therefore separation from 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*) ran out of places and unaccompanied children were hosted in buildings for adults. In 2013 NGOs provided for new reception places for unaccompanied asylum seeking children. All federal states have reception places for unaccompanied asylum seeking children although standards differ. The concept of foster families is not foreseen in Austrian law. Nevertheless, the Youth Welfare Agency may place small children with foster families or facilities of the Youth Welfare Agency.

Traumatised or ill asylum seekers may be cared for in facilities of NGOs with places for persons with higher need of care ("*Sonderbetreuungbedarf*"). In the last years, the number of places for asylum seekers with disabilities or other special needs of care increased; approximately 600 places are available.

#### 4. Conditions in reception facilities

Conditions in the reception centres vary. According to the standards of the facility, NGOs or the landlord receive up to € 19,- per person/day for providing housing, food and other services like linen or washing powder. There are still some reception centres that get only € 16 or 17 refunded due to low standards, eg. because there is no living room or more people have to share the bathroom and toilet. A survey by journalist showed big differences in the reception centres of three federal provinces.<sup>88</sup> One of the centres was overcrowded, others had severe sanitary problems and asylum-seekers complained about the poor and unhealthy meals.

Additionally the Ombudsman released a report about grievances in reception centres in Carinthia and Burgenland. After the partly very poor and unhealthy living conditions became public, a working group of the federal states was established to define standards in reception centres and some centres were closed.

Depending on the former use of the buildings, asylum-seekers may live in an apartment and have their own kitchen and sanitary facilities, which is sometimes the case in former guest houses. Usually single persons share the room with other people. In most reception centres asylum-seekers have to keep their room clean, but they could also be responsible to keep the floor, living rooms and toilets and showers clean. This work in the centre may also be remunerated (€ 3 to 5 per hour).

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<sup>87</sup> E.g. Art.2 of the Basic Care law Salzburg, law gazette Salzburg Nr 35/2007. from 30. Mai 2007 or law gazette Upper Austria Nr. 15/2007 from 15. Februar 2007

<sup>88</sup> Reports of each of the about 100 facilities visited are available [here](#).



There is a trend to allow asylum-seekers to cook for themselves because it is evident that this contributes to the well-being of the asylum-seeker and reduces tensions. In the reception centres of the state cooking is not possible, even taking food into the living/sleeping room is not allowed. If meals are served, dietary or religious requirements have to be respected, but there are complaints about the quality and the fact that religious reasons are not always taken into account<sup>89</sup>. In Burgenland and Styria meals are often served by the centre, while in Tyrol the three remaining reception centres where asylum seekers get the meals from the central kitchen will be closed.

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

Hotels and inns usually do not have staff besides personnel for the kitchen, the administration and the maintenance of the buildings. These reception centres are visited by social workers, most of them staff of NGOs, on a regular basis (every week or every second week). Reception centres of NGOs have offices in the centres. The capacities foreseen by law – one social worker for 170 clients - are not sufficient. NGOs work with trained staff. Some of the landlords host asylum seekers since many years and may have learned by doing, but have not received specific training.

The system of dispersal of asylum-seekers to all federal provinces and within the federal provinces to all districts results in reception centres being located in remote areas.

## 5. 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

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

Other emergency measures were not applied but under discussion. The ministry of the interior suggested the idea of establishing reception centres in former military camps, but this was not implemented. A federal reception centre in Vienna was opened in 2012 because the number of asylum-seekers in the initial reception centre has increased.

Material reception conditions are reduced, if the asylum seeker has an income, items of value or receives 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 keep € 110 (or € 240 in Tyrol - there is no common practice in all federal provinces); all additional income will be requested as a financial contribution for the asylum seeker's Basic Care. Reduction could also consist in not granting the monthly pocket money or the support for the child (if the child is entitled to child benefits) which mainly applies to those who have received refugee status.

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<sup>89</sup> See dossier reports

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 assumed 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 of basic care, but this is not applied in practice. Asylum-seekers whose basic care has been terminated or reduced may re-apply for the provision of basic care in the federal province they have been allocated to. In practice it is difficult to receive basic care again after it was terminated. Asylum-seekers who endanger the security of other inhabitants are sometimes placed in other reception centres with lower standards. Asylum-seekers who have left their designated place of living may get a place in another reception centre after applying for basic care.

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, the latter 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.

If basic care is withdrawn because the asylum-seeker is no longer considered to be in need of benefits, for example because they earn some money, they may receive basic care if it is proven that they are again in need of basic care. Asylum seekers may end up homeless or in emergency shelters of NGOs mainly because they do not succeed to obtain basic care after withdrawal or they have left the federal province for various reasons (community, friends or family in other federal provinces, unofficial job offers,..)

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

It has happened that the reception conditions of all asylum-seekers involved in a violent conflict in a reception facility were withdrawn without examination of the specific role of all individuals concerned in the conflict.

Such decisions to withdraw or reduce Basic Care provision can be appealed at the Administrative Court (the Federal Administrative Court in case of a BFA-decision, the Administrative Court of the federal provinces in case of decisions of the provincial government). Legal assistance for appeal is not foreseen.

Asylum seekers who submit a subsequent asylum application and asylum seekers who have been convicted by court for a crime on a ground which may exclude the asylum seeker from refugee status according to Article 1F Refugee Convention are not entitled to basic care. 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, therefore the person inviting the asylum seeker is responsible to cover all costs).

## 6. 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 (EAST) access of legal advisers and NGOs to the reception buildings is not allowed, based on the argument that it would disrupt the private life of other asylum seekers. This restriction is laid down in a regulation introduced by the Minister of Interior ("*Betreuungseinrichtung-Betretungsverordnung*")<sup>90</sup> intending to secure order and preventing assaults to life, health or freedom and protecting the facility. The restriction of access to the facilities does not apply to lawyers or legal representatives in order to meet their clients. Family members may meet their relatives in the visitor room and legal advisers and NGOs in the premises of the Federal Agency for Immigration and Asylum. 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 adviser should be paid by the organisations that provide legal advice *Verein Menschenrechte Österreich* and *ARGE Rechtsberatung*. In the majority of cases, asylum seekers are only reimbursed by the organisations for one journey to meet their appointed legal adviser.

## 7. Addressing special reception needs of vulnerable persons

### Indicators:

- 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. After the asylum seeker has submitted the asylum application in the Initial Reception Centre, a general health examination is carried out and asylum seekers are obliged to undergo this examination, including a TBC (Tuberculosis) examination. All asylum seekers have health insurance. For necessary medical treatment they may be transferred to a hospital.

Basic Care provisions for unaccompanied asylum-seeking children reflect the need of care with regard to accommodation and psychosocial care. Unaccompanied asylum-seeking children must be accommodated according to their need for guidance and care. The daily fee for NGOs hosting unaccompanied asylum-seeking children ranges from € 39 to 72,- depending on the intensity of psychosocial care. Unaccompanied asylum-seeking children with higher need of care are accommodated in groups with one social pedagogue responsible for the care of 10 children; those who are not able to care for themselves must be accommodated in dorms, where one social pedagogue takes care of 15 children.. A third group, which is that of those who are instructed and able to care for themselves live in supervised flats. For this group, one social pedagogue is responsible for 20 children. In most cases the transfer of an unaccompanied asylum-seeking child from the initial reception centre to Basic Care facilities of the federal provinces takes place without knowledge of the specific needs of the

<sup>90</sup> Federal Law Gazette II 2005/2 and 2008/146

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

The Basic Care laws of Lower Austria and Vorarlberg include provisions for the special needs of vulnerable persons. The elderly, pregnant women, single parents and victims of torture, rape or other forms of severe psychological, physical or sexual violence are considered as vulnerable (NÖ § 6 (4)). In the laws of the federal provinces Vienna, Carinthia, Upper Austria, Salzburg, Tyrol and Burgenland vulnerable asylum seekers are not mentioned. A Special monitoring mechanism is not in place. It is up to the asylum-seeker, social adviser, social pedagogue or the landlord to ask for adequate reception conditions.

The monthly amount of € 2.480 for nursing care in specialised facilities is included in the Basic Care Agreement between the State and the federal provinces, which describes the material reception conditions. The needs of ill, handicapped asylum seekers and asylum seekers with nursing care are not sufficiently met. There is no allowance to cover extra costs as long as nursing care is provided by relatives or friends. NGOs have to employ professionals if they offer places for asylum seekers with special – mainly medical – needs.

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

## 8. Provision of information

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

In the reception centers, asylum seekers are informed about the house rules, including information about their duties and sanctions. These are either posted in the most common languages (like English, Russian, French, Arabic, Farsi, Urdu, Serbian) or a paper containing brief written instructions has to be signed by the asylum seeker. In the federal states Lower Austria,<sup>91</sup> Salzburg and Tyrol a brochure, which is also available on the Internet, describes the Basic Care system.<sup>92</sup> Advice from social workers 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). Organisations providing social advice usually have also departments for legal advice to asylum seekers.

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<sup>91</sup> Basic Care [brochure](#) for Lower Austria is available in 16 languages.

<sup>92</sup> Publication by the County of Salzburg on "[Grundversorgung](#)" (*Basic needs*), [Website](#) of Asylum authority in Tirol.

Asylum seekers living in rented flats have to go to the offices of the social advice organisations. The system of information is not satisfactory, because one social worker is responsible for 170 asylum seekers, which means that the standards for social work are not met. Some federal provinces provide for more effective social advice (e.g. 50 clients per social worker in Vorarlberg or 70 in Vienna). 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.

## 9. Freedom of movement

After submitting their asylum application 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 takes 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 are allowed to leave the initial reception centre for necessary medical treatment or treatment of their under age child or to appear in court. Family life has to be respected. Family members may visit newly arrived family members in the initial reception centre and family ties should be taken into consideration when asylum seekers are dispersed. Violations of this restriction of movements may be punished with fines between € 100 and € 1000 or with detention up to 2 weeks if payment of the fine cannot be enforced. Those still holding a red card may be punished for the non-compliance with his duty in the asylum procedure by being detained. These restrictions of movement impede asylum-seekers' visits of family members or friends and consultations with legal advisers of trust or lawyers.

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

Every federal state has to offer reception places according to its population. Asylum-seekers are dispersed throughout the country to free reception places and according to their needs. Not every federal state has places for asylum-seekers in need of special treatment. The federal state Vienna offers much more reception places than foreseen by the quota system, while other federal states such as Salzburg fail to provide enough places since several years. This discrepancy leads to negotiations of the responsible departments of the federal states and the malfunctioning of the dispersal system raises public awareness.

Asylum seekers who are allocated to a federal state after admission to the asylum procedure are usually not transferred to other federal states, even if they wish so. Within a federal state asylum-seekers may be placed in other reception centres for different reasons such as if another reception centre is better equipped to address the needs of the asylum-seeker but they may also be transferred to less attractive centres as a kind of punishment due to their behaviour.

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 a state other than the designated federal state.

During the admissibility procedure asylum-seekers have to stay in the first reception centre. If their application are examined on the merits they are dispersed to reception centres of the federal provinces. The federal provinces should provide reception places according to their population. In all federal provinces places for unaccompanied children exist and in some there are places for single women. Some facilities are better equipped to host families, others for single persons. Asylum-seekers have no possibility to choose the place where they will be accommodated according to the dispersal mechanism. Family ties are taken into consideration and usually asylum-seekers can be transferred to the federal province where the family lives.

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

It is not possible to appeal the dispersal decision.

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

## 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/*Ersatzkraftverfahren*), 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.).<sup>93</sup>

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) and (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 province and can only be issued for a maximum period of six months.

<sup>93</sup> “§ 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)”.

Asylum-seekers are not registered at the Public Employment Service as unemployed persons. Therefore they are not entitled to vocational trainings provided or financed by the Public Employment Service.

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 € 110 left to the asylum seekers in most of the federal provinces, while the rest of the money earned contributes to the cost of reception.<sup>94</sup> If they have been receiving 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 are demanded. In fact, it is assumed that only about € 480 (1.5 x the basic provision amount) per month 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 have spent the money earned and do not have sufficient means to survive the following months.<sup>95</sup>

In fact only few asylum-seekers work. Minister of Interior Johanna Mikl-Leitner claimed 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.<sup>96</sup>

It depends very much on the initiative of the asylum seeker to find a job offer, as they are not registered as persons searching for work at the Public Employment Service. Asylum seekers often lack money for work-seeking motivated travel for the purpose of job interviews.

## 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

School attendance is mandatory for all children living permanently in Austria until they have finished 9 classes (which they usually have finished at the age of 15 years). 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 in public schools is not provided. If the asylum seeker is admitted to the regular procedure, they stay a few days in the initial reception centre. 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 usually do not exist; if many children without German language knowledge attend class a second teacher is assisting these children.

<sup>94</sup> In Tyrol. Asylum seekers may earn € 240 per month tax-free.

<sup>95</sup> Asylkoordination österreich: Leben im Flüchtlingsquartier ("Living in an accommodation centre"), December 2010, p. 37f.

<sup>96</sup> 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.







## Detention of Asylum Seekers

### A. General

#### *Indicators:*

- Total number of asylum seekers detained in the previous year (including those detained in the course of the asylum procedure and those who applied for asylum from detention): 741
- 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: 4
- Total capacity: 700

In 2013, 741 asylum seekers have been detained in one of the 17 detention centres in Austria. In January 2014 a new detention centre with 200 detention places was opened in Vordernberg/Styria and consequently most of the detention centres under the administration of the police have been closed. There are currently 4 detention centres. Besides the new centre, there are about 400 places available in Vienna (2 detention centres) and 100 in Salzburg.

In 2013, the total number of foreigners detained was 4,171. The percentage of detained asylum seekers remained stable in the last three years (17.8%). Figures show that in 2013 the aliens' police ordered detention more often immediately after the submission of the asylum application compared to the year before.

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

Overcrowding in detention centres was not reported.

## B. Grounds for detention

### Indicators:

- In practice, are most asylum seekers detained
  - o on the territory:  Yes  No
  - o at the border:  Yes  No
- Are asylum seekers detained in practice during the Dublin procedure?  
 Frequently  Rarely  Never
- Are asylum seekers detained during a regular procedure in practice?  
 Frequently  Rarely  Never
- Are unaccompanied asylum-seeking children detained in practice?  
 Frequently  Rarely  Never
- If frequently or rarely, are they only detained in border/transit zones?  
 Yes  No
  - o Are asylum seeking children in families detained in practice?  
 Frequently  Rarely  Never
- 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 for asylum-seekers, for all detained persons including foreigners without asylum application it is about 20 days.

The detention of asylum seekers is regulated in the Aliens' Police Law (*Fremdenpolizeigesetz 2005, FPG*), which was amended several times with the effect that the reasons for the detention of asylum-seekers were specified and extended. 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:

- A. In case there is an inadmissibility decision which can be executed, even if it is not yet in force; meaning that the Federal Agency for Immigration and Asylum has already issued an inadmissibility decision on the asylum application but logistical enforcement is still pending
- B. 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
- C. In case a return decision, a residence prohibition or an expulsion order was issued before the asylum application was lodged
- D. In case it seems likely, based on various kinds of evidence, that an inadmissibility decision will be taken
- E. 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

- F. 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)
- G. 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 admissibility 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 BFA 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, 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 request there are cases where persons in a Dublin procedure were detained for six months.<sup>97</sup>

The reasons for the detention of asylum-seekers in 2013 were as follows:

Executable expulsion order	133
Initiated return procedure	142
Executable return decision prior to asylum application	78
Likely expulsion order	229
Executable return decision in Dublin cases	116
Subsequent asylum application in Dublin cases	19
Violation of restriction of movement	14
Violation of registration duty	1
Violation of obligation to comply with the procedure	1
Subsequent asylum application	8
Unauthorised leave of initial reception centre	0

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-operate with the Ministry of the Interior. While

<sup>97</sup> [Parliamentarian request NR 10892/AB \(XXIV.GP\) from 16 May 2012.](#)

before the Alien's Law contained an obligation to act as legal representative for detained asylum seekers if they wish so, the new amended Law which came into effect in 2014 deleted this obligation and now contains only the obligation for the legal adviser to take part in hearings if the asylum-seekers wishes his presence (§ 51 Aliens Police Law).

Under the law detention is possible if the asylum seeker left the initial reception center without having a valid reason)<sup>98</sup> and also when one of the requirements stipulated in paragraph 76 (2) 1 to 4 is fulfilled. The Aliens Police Law does not refer to the risk of absconding, but to the fact that the asylum seeker left the initial reception center without having a valid reason, which can also be seen as a risk that the person would abscond.<sup>99</sup> In 2013 this regulation was not applied in practice.

§ 34 (4) Act on Procedures before the Federal Agency on Asylum and Immigration (BFA) allows the apprehension of asylum seekers if they evaded the procedure or if they left the initial reception center without having a justified reason (§ 24 (4)2 Asylum Act). § 34 (2) Act on Procedures before the BFA uses the term "evading" the procedure and refers to § 24 (1) Asylum Act. § 24 (1) Asylum Act defines the situation where an asylum seeker evades the procedure: it is the case if the authorities are not informed about an asylum seeker's place of stay or if this place is not easily identifiable. Reference is made to § 15 Asylum Act: this Article contains the obligation for asylum seekers to cooperate with the authorities and enumerates a number of duties, including the duty to inform the authorities about the place of stay.

The Administrative High Court has ruled in several decisions that will be binding for the BFA and the Federal Administrative Court (BVwG) on the risk of absconding. The criteria to determine whether detention is necessary to secure deportation and prevent absconding are the following: previous attempts to abscond; behavior of the applicant (such as not complying with the obligation to leave); previous criminal law violations; illegal entry; illegal entry shortly after deportation; entry despite residence ban; attempts to hinder the expulsion and escape the authorities' administrative power; having dependent children in Austria; or having a health condition.<sup>100</sup>

So far it is not possible to assess the practise of the authorities as the new laws have only been in force for a few months.

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 regular prisons.<sup>101</sup> For the time being it is not clear whether the detention conditions have improved due to the closure of several detention centres and the new facility which offers more opportunities for activities outside the cells.<sup>102</sup> Concerning detention conditions for children, the *Menschenrechtsbeirat* has criticised the fact that children under 14 years are kept in detention centres with their family when their parents agree to keep the child with them rather than being separated from them.<sup>103</sup>

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

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<sup>98</sup> Aliens Police Law § 76 (2a) 6 and (§ 24 (4) Asylum Act.

<sup>99</sup> See § 76 (2a).

<sup>100</sup> See VwGH 2007/21/0246 from 28.05.2008, 2011/21/0247 from 18.04.2013, 2007/21/006 from 19.6.2008

<sup>101</sup> 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.

<sup>102</sup> Der Standard, [Im Wartezimmer Vater Staats](#) (*In the waiting room of father state*), 14 January 2014.

<sup>103</sup> Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren (*Report of the Human Rights Board on Children and Adolescents in alien's law procedures*), 2011, P VII.

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 mother 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 very limited possibilities for leisure activities and medical treatment have remained areas of concern. Two doctors under contract of the police have been found guilty of insufficient medical treatment of a detained Chechen, who died from cardiac infarction in 2012 although he had asked for medical help about 60 times.<sup>104</sup>

Figures on the duration of detention of asylum seekers are not available. As asylum seekers whose applications are processed under the Dublin procedure are often detained immediately after submitting their applications, they may be kept in detention for months until they are transferred to the Member State determined to be responsible for the examination of their asylum applications. In other Dublin cases detention may last for some weeks, as suspensive effect of the appeal is hardly ever granted and the transfer can be effected while their appeal is still pending.

The Aliens Police Act (§ 77) enumerates three alternatives to detention: reporting obligations, the obligation to take up residence in a certain place of accommodation and the deposit of a financial guarantee. Details about the deposit and amount of the financial guarantee are regulated by an Ordinance Implementing the Aliens Police Act.<sup>105</sup> This amount (§ 13) has to be decided in each individual case and has to be proportionate. The law specifies a maximum of 2 x € 858,73 (= € 1.717,46). The measure is not applied in practice.

Alternatives to detention are open centres. Such measures are executed in regular reception facilities, facilities rented by the police or houses of NGOs, or the private flat of the person to be deported. If an alternative to detention is ordered, asylum seekers have reporting duties. They have to present themselves at the police offices of the Federal Police Directorates every day or every second day. If reporting obligations or the obligation to take up residence in a certain accommodation facility are violated, the person is detained. § 77 (3) Aliens Police Act contains the obligation to detain persons who do not fulfill the requirements stipulated the provision on alternatives to detention.

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

With regard to children in detention, the Austrian Human Rights Advisory Board, in its report on children in the Austrian Aliens' law, quotes 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 show that the number of children between 16 and 17 years of age in detention was

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<sup>104</sup> Die Presse, [Tod in Schubhaft: Zwei Amtsärzte verurteilt](#) (Death in detention: two doctors convicted), 17 March 2014.

<sup>105</sup> Verordnung der Bundesministerin für Inneres zur Durchführung des Fremdenpolizeigesetzes 2005 (Fremdenpolizeigesetz-Durchführungsverordnung – FPG-DV).

double the number of children subjected to alternatives to detention, demonstrating that alternative measures to detention are in practice not applied. This is thus not in line with the principles of the UN Convention on the Rights of the Child.<sup>106</sup>

Figures relating to alternatives to detention of asylum seekers are not available. While in 2011 alternatives to detention were applied in 13% of all cases (all foreigners), the percentage increased to 17% in 2012 and diminished to 15% in 2013.

Year	Detained foreigners	Alternatives to detention
2010	6.153	1403
2011	6.657	1012
2012	4.561	924
2013	4.171	741

Detention has to be proportionate to its aim. Alternative measures (so called less coercive measures) have to be applied in all cases (not only if a particular ground for detention exists) if the authorities have good reasons to believe that the object and purpose of detention (i.e. deportation) could be reached by the application of such measures. An individualized examination is provided for in the legal basis, but in practice less coercive measures are often regarded as not sufficient measure to secure the return procedure/expulsion.

According to § 76 Aliens Police Act, the principle of necessity is to be taken into account. Detention has to be necessary to reach one of the aims, e.g. securing a procedure or the execution of a deportation order. The principle of proportionality is not explicitly mentioned in the provisions regulating the reasons for detention and detention orders in the Aliens Police Act. It is however mentioned that the BFA has to review the proportionality of detention every four weeks. Proportionality is also a Constitutional Principle applicable to all administrative procedures and therefore also to Aliens' Law proceedings. This is confirmed by the jurisprudence of the Administrative Court<sup>107</sup> and the Constitutional Court.<sup>108</sup> Proportionality means to weigh or balance the interests between the public interest of securing the procedure (mainly expulsion procedure) and the right to liberty of the individual.

<sup>106</sup> Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren (*Report of the Human Rights Board on Children and Adolescents in alien's law procedures*), 2011, p 40 showed that in 2010 18 children aged 14-16 years were detained; 154 children between 16 and 18 years of age were detained; in 2010 365 between the age of 14 and 16 were subjected to alternatives to detention and 84 between the ages of 16 and 18 years of age.

<sup>107</sup> Administrative Court VwGH, [2013/21/0008](#), 2 August 2013.

<sup>108</sup> See e.g. Constitutional Court, [VfGH B1447/10\\_10](#), 20 September 2011: "Wie der Verfassungsgerichtshof nämlich ... klarge stellt hat, sind die Behörden unter Bedachtnahme auf das verfassungsrechtliche Gebot der **Verhältnismäßigkeit** (proportionality) verpflichtet, im Einzelfall die verfassungsrechtlich gebotene Abwägung zwischen dem öffentlichen Interesse an der Sicherung des Verfahrens und der Schonung der persönlichen Freiheit des Betroffenen vorzunehmen."

## C. Detention conditions

### Indicators:

- Does national legislation allow for asylum seekers to be detained in prisons for the purpose of the asylum procedure (i.e. not as a result of criminal charges)?  
 Yes  No
- 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  
If yes, is it limited to emergency health care?  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
  - o Family members:  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 monitoring institutions.<sup>109</sup> 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)<sup>110</sup> 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.

The new detention centre in Vordernberg will allow detainees to stay outside the cell during the day. The facility is run by a private security company, G4S. This raised concern about the division of tasks between the public security service and this private company.<sup>111</sup> The Minister of the Interior explained to a parliamentary request that G4S will assist the Police.<sup>112</sup> For the staff of this new centre trainings have been organised: according to a report in Der Standard 36 hours were dedicated to human rights issues.<sup>113</sup>

<sup>109</sup> Menschenrechtsbeirat beim Bundesministerium für Inneres: Bericht des Menschenrechtsbeirates über seine Tätigkeit im Jahr 2011 (*Human Rights Board with the Federal Ministry of Interior, Report of the Human Rights Board on its activities in 2011*).

<sup>110</sup> Ordinance concerning the arrest of persons by the security authorities Section 17, BGBI. II Nr. 128/1999 has been changed by BGBI. II Nr. 439/2005.

<sup>111</sup> Der Standard, Irene Brickner, [Securitys auf Rundgang in der neuen Schubhaft](#) (Security on tour in the new detention centre), 2 April 2014.

<sup>112</sup> In her answer to the parliamentary request 11/AB XXV. GP from 30.12.2013 minister Mikl-Leitner describes the task of G4S as follows: "Verwaltungshelfer, die keine hoheitlichen Handlungsbefugnisse haben, sondern nur unterstützend für die Behörde tätig werden. Es liegt zwar eine Aufgaben-, jedoch keine Verantwortungsteilung vor. Die Bediensteten haben daher die im Rahmen der Schubhaft erforderlichen technisch-humanitären Hilfsdienste in Unterordnung und nach Weisung der Behörde und der dieser beigegebenen Organe des öffentlichen Sicherheitsdienstes zu erledigen." ("Administration assistants do not have powers of a public authority but have a supporting role for the authority. Tasks are shared, but not responsibility. Therefore the employees have to supply in the context of detention the necessary technical-humanitarian help in subordination to the authority and under the instruction of the public security authorities.")

<sup>113</sup> Der Standard, Irene Brickner, [Securitys auf Rundgang in der neuen Schubhaft](#) (Security on tour in the new detention centre), 2 April 2014.



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 § 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 § 1 if they are older than 16 years. In this case detention must not take longer than 2 months, and 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.

Currently (as several detention facilities are no longer used since the new detention centre opened) conditions in the detention facilities are satisfying. Problems like lack of space or clothes have not been reported. Detention in cells during the day instead of open floors is still a reality for most of the detained persons. The Ombudsman (Volksanwaltschaft) demands in its report to improve the conditions in detention. The report mentions the lack of activities, lack of psychosocial care for juvenile detainees and lack of criteria for keeping detainees in closed cells or open cells was criticised.<sup>114</sup> Asylum seekers have the right to stay in the courtyard in fresh air at least for one hour a day. Only few activities are available for those who stay in the open zone: fitness, table tennis, TV and journals.

UNHCR has access to asylum seekers without limitation; lawyers can visit their clients during working hours in a special 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 during regular visiting hours on the weekend to have access to detainees during office hours.

Other visitors such as relatives or friends have restricted possibilities to visit. Visits have to be allowed for at least 30 minutes per week. In addition, restrictions may be imposed to detainees who are separated from other detainees and are put in security cells due to their behavior, such as suicide attempts, hunger strike or violence. Visiting hours are limited to the week-end and early evening hours, direct contact is not possible as the visit takes place in a room where the asylum seeker is separated from the visitor by a glass window. In the new centre in Vordernberg direct contact should be possible as all rooms and floors are video monitored. Family members may stay overnight in a visitor cell with their relative. Visits of media or politicians usually are not permitted. The new centre was presented to the public as an example of improvement of Austria's return polity.

Representatives of the churches have agreements with the police to visit detainees on a regular basis. Social counselling is not foreseen. NGOs received funding (under the European Return Fund) to provide advice on voluntary return in detention centres.<sup>115</sup> *Verein Menschenrechte Österreich* provides this advice in the detention centres in Vienna and Salzburg, while *Caritas Styria* is active in Vordernberg. These NGOs are present in detention centres on a regular basis. Furthermore asylum-seekers are visited by the appointed legal adviser in the admissibility procedure, to assist with the appeal against the rejection of the asylum application or complaints against the detention order. UNHCR is not regularly present in detention centres.

Detainees have the right to call a lawyer and inform their relatives about their apprehension and arrest. Telephones on the floors may be used with prepaid cards; the cell phones of the organisations providing return counselling may be used too.

Private belongings are stored. Detainees may keep a small amount of money (€ 40 per week) for buying food, cigarettes or telephone cards in the canteen.

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<sup>114</sup> [Volksanwaltschaft: Mängelbehebungen in Polizeianhaltezentren](#) (Ombudsman press release: remedy deficiencies in police detention centres, 2. April 2014.

<sup>115</sup> [Mission impossible](#). Datum issue 2/2013.



One of the detention centres in Vienna, Roßauer Lände, has cells for mothers with small children. The detention centre in Vienna Zinnergasse is equipped for families with children. One floor of the same building is used for less coercive measures.

Medical treatment is provided in all detention centres by the public medical officer. Special treatment may be organised by transferring detainees in hospitals. In the detention centres in Vienna psychiatric treatment is provided. In Vienna, detainees on hunger strike may be transferred to the medical station of the prison, but forced feeding is not allowed. In case there is a high probability of a health risk due to hunger strike, asylum-seekers are usually released from detention.<sup>116</sup>

There is no mechanism to identify vulnerable people while in detention. Detained persons can be visited by NGOs (Verein Menschenrechte Österreich or Caritas) that are contracted to prepare them for return. These activities, which are funded by the Ministry of Interior and the European Return Fund, do not include social counselling.

Children under 14 must not be detained. Families may be detained, but not their children under 14. Therefore, families with children are confined only for 24 hours prior to forced return.

Alternatives to detention shall be applied to children between 14 and 16 years, who have to attend school until the age of 15 years. Children from 16 to 18 years may be detained up to 2 months.

#### D. Procedural safeguards and judicial review of the detention order

##### Indicators:

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

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 a decision, which are the decision 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 appointed a legal advisor provided by the state.

Detention is ordered by the Federal Office for Immigration and Asylum (BFA). The BFA has to review the lawfulness of detention every 4 weeks. After 4 months the Federal Administrative Court (BVwG) (replacing since 1 January 2014 the Independent Administrative Board- UVS) must review the lawfulness of detention *ex officio*.

There is a possibility to submit an appeal to the Administrative Court (BVwG) against detention without any time limit. The Federal Administrative Court has to decide on the lawfulness of the detention order according to the appeal of the asylum seeker and whether at the time of its decision reasons for continuation of detention exist.

The Court must decide within 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 for decisions in administrative procedures). Time limits were usually respected by the former Independent Administrative Board of the provinces, while there is almost no experience yet of the practice of the newly installed Administrative Court. One case was found eligible for review by the Administrative High Court, because the law does not explicitly state where the complaint against the detention order has to

<sup>116</sup> Maria Sterkl: Starvation for the doctor's visit, Der Standard, 25 May 2011.

be submitted, at the BFA, which ordered detention, or at the Administrative Court. The issue has not been decided yet by the Administrative High Court.t.

Decisions on cases where the asylum seeker was no longer detained were often made by the Independent Administrative Board shortly before the expiration of the 6 month time limit. Asylum seekers who had been transferred in the meantime to another Member State in application of the Dublin Regulation or deported were thus hampered to request compensation for unlawful custody. If the Court does not decide within 7 days in cases where the asylum seeker is still detained, an appeal may be lodged to the Administrative High Court (*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 Court within which a decision must be taken. In a recent case the VwGH ordered the Independent Administrative Board (UVS) to decide within three calendar days and as UVS failed to render the decision within that time limit, the VwGH ruled in favour of the asylum seeker, and as a result the asylum seeker was released.<sup>117</sup>

In case the appeal is rejected there is a possibility to submit an appeal to the Administrative High Court and to the Constitutional Court. If the detention or its duration are recognised as unlawful, the asylum applicant is entitled to a financial compensation of € 100 for each unlawful day in detention.

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 late. NGOs also consider that one of the organisations contracted by the Ministry of the Interior for providing free legal assistance, *Verein Menschenrechte Österreich*, is not qualified for this task. The organisation has contracts with the Ministry of the Interior for advice on voluntary return and for Dublin returns as well, which seems to be in conflict with the task of legal advisers. Concrete information 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.

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

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

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<sup>117</sup> VwGH (Administrative Court) - 2011/21/0126 from 24 January 2013.

## 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 51 and 52 of the Federal Office for Immigration and Asylum Procedures Law in return procedures, detention and apprehension orders. The right to receive legal advice for people benefiting from alternative measures to detention was cancelled as of 1 January 2014.

Detained asylum seekers have the right to legal advice and may ask for the legal adviser to be present at hearings; however, there is no obligation on the legal adviser to legally represent the asylum seeker upon his request to file a complaint or to be present at hearings (as it was before the latest law amendments). Two organisations, *Verein Menschenrechte Österreich* and *Arge Rechtsberatung*, are contracted to provide free legal assistance. The funding per case for those services does not seem to be sufficient (€ 191 per case), and the two organisations have a different understanding of what their role is with regard to providing legal advice to those detained. The organisation *Verein Menschenrechte Österreich* is closely cooperating with the Ministry of the Interior and thus avoids conflicts with the authorities.<sup>118</sup> 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 voluntary return assistance.

This has resulted in situations undermining asylum seekers' right to appeal as is illustrated by the following example. VMÖ staff responsible for "preparation for return in detention" advised asylum seekers, who were legally represented by legal advisers of Diakonie, to withdraw their right to appeal against a Dublin decision without the consent or involvement of the legal representative from Diakonie. The question whether the appeal was submitted or not was ruled by the Constitutional Court.<sup>119</sup> NGOs in Austria suspect that detainees were not fully informed about the right to legal representation by this organisation<sup>120</sup> and that this organisation hardly accepts to represent the detained person (whereas the legal adviser should write an appeal against the detention order if the detention order appears to be unlawful). Since 2014 this suspicion has reduced relevance, as the obligation to legally represent the detained person upon their request was cancelled. *Arge Rechtsberatung*, on the other hand, is committed to the safeguard of the Human Rights of detainees and has successfully appealed detention orders.

<sup>118</sup> Edith Meinhart: Mr. Gongo. Profil 40, Oktober 2007

<sup>119</sup> VwGH U1286/2013 from 12.03.2014. The asylum seeker from Afghanistan had already experienced 18 months detention in Hungary. When he received the decision to send him back to Hungary he signed a form in which he declared that he will not submit an appeal against the Dublin decision. The following day he gave power of attorney to his legal adviser from Diakonie refugee service and wanted to have the decision appealed. The Asylum Court ruled that the appeal is ineligible. The Constitutional Court declared that legal counselling has to include all aspects of the administrative procedure and the procedure at the Asylum Court including the submitting of an appeal. The asylum seeker has to be informed about the withdrawal of the right to appeal by the appointed legal adviser. The employee of VMÖ who prepares detainees for the return had no legitimacy to give legal advice. Similar case U489/2013 from 26.02.2014

<sup>120</sup> 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.

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