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Human Rights in the OSCE Region: Europe, Central Asia and North America, Report 2005 (Events of 2004)

Austria

IHF FOCUS: national human rights protection; right to a fair trial and effective remedies; torture, ill-treatment and police misconduct; condition in prisons; discrimination; rights of homosexuals; asylum seekers and refugees.

The human rights climate in Austria in 2004 was reflected by court decisions. The European Court for Human Rights (ECtHR) found violations in numerous cases with regard to excessive length of proceedings, lack of public hearing, as well as defense and witness examination. The European Commission took Austria to the European Court of Justice (ECJ) for failing to comply in time with EU directives on race and employment equality. At the national level, the new asylum law was partly toppled by the Constitutional Court for placing asylum seekers in excessively harsh conditions.

Police misconduct continued to be a central problem. Reports of beatings and excessive use of firearms by the police were of particular concern. Additionally, recruits were mistreated in various barracks across Austria during training for hostage-taking scenarios.

In particular, there was concern about what seemed to be politically motivated prosecution against members of the Human Rights Advisory Board.

While the discriminatory article 209 of the Criminal Code concerning the age of consent for sexual relations was repealed in 2002, it appeared that proceedings at the ECtHR were necessary in order to force Austrian courts to fully rehabilitate the victims of that article and afford them financial compensation.

On the positive side, the new Criminal Procedure Code, which was adopted in March 2004, will provide better protection and status for victims in criminal proceedings and is expected to benefit notably women who are subject to domestic violence.

National Human Rights Protection

The Human Rights Advisory Board (*Menschenrechtsbeirat*, HRAB) monitors and observes the activities of the security services, the agencies under the minister of the interior and all bodies with powers of direct command and compulsion. The board also issues recommendations to the minister of

the interior.¹ However, the question of the HRAB's independence and the limited scope of its competence attracted criticism.

The HRAB's *de facto* ineffectiveness and inability to obtain the previously assured co-operation of the security services was exemplified in 2004 by the refusal of the minister of the interior to include the HRAB in the investigations into the ill-treatment of Cheibani Wague (see below) and the initially chosen tactics to have police investigate alleged police violence themselves.² In addition, the HRAB's independence was called into question as criminal proceedings were initiated against two of its members.

- Following the rejection of 74 Chechnyan refugees who applied for asylum at the border between the Czech Republic and Austria during the night of 31 October 2003, Georg Bürstmayr and Nadja Lorenz, two human rights lawyers, traveled to the Czech Republic to verify the facts of the case.³ Bürstmayr was head of a commission of the HRAB, Lorenz a substitute member of the HRAB. Later, the Federal Office of Criminal Investigations (*Bundeskriminalamt*) initiated a secret investigation into the two lawyers without informing them of its content.⁴ Bürstmayr was accused of people smuggling after he distributed his business cards in the Czech Republic to the Chechen refugees while discussing their cases. The information, which the investigators gathered, was based on interviews with Bürstmayr's clients, the asylum seekers who had had their claims rejected, a policy that eroded lawyer-client confidentiality.⁵ Lorenz was accused of encouraging non-compliance with the law after comments she made in an interview with the newspaper *Der Standard* on 22 September 2004, in her position as chair-person of the NGO SOS Mitmensch. She stated that "people, who are heavily traumatized and face deportation, must be helped."⁶ In both cases, criminal proceedings were terminated by the public prosecutor shortly after reviewing the files.

The investigations into the two human rights defenders raised numerous concerns. First, criminal proceedings were initiated despite the lack of any sustainable evidence; second, the investigations were conducted in secret; and third, the allegations against Bürstmayr's could have been used by the Ministry of Interior to argue against an extension of his contract as head of the HRAB commission.⁷ The minister of interior re-appointed Bürstmayr only after protests from, *inter alia*, the Judges Association and the refusal of the HRAB to nominate another candidate.⁸ For Lorenz, the timing of the initiation of criminal proceedings was also crucial. A hearing in the case of Cheibani Wague (see below) took place in November 2004, in which she as counsel for the widow could have had problems regarding her entitlement to represent her client.⁹

The case as a whole gave rise to strong concerns about the fact that upon an order from the Ministry of the Interior, arbitrary and politically motivated prosecution was initiated so as to intimidate two lawyers acting in accordance with normal procedures and to exert pressure on the HRAB.

¹ See www.menschenrechtsbeirat.at.

² APA OTS, "Posch fordert Weisungsfreistellung des Menschenrechtsbeirates," 26 April 2004, http://www.ots.at/meldung.php?schluessel=OTS_20040430_OTS0173&ch=politik.

³ The consequential complaint filed with the Independent Administrative Tribunal was still pending as of the end of 2004.

⁴ *Falter*, "Verdächtiger Verdacht," 16 October 2004, www.falter.at/print/F2004_44_1.php.

⁵ Harald Bisenz, "Meinung- Achtung: Menschenrechte!" *AI -info, die zeitschrift für Menschenrechte*, No. 4, 2004.

⁶ *Falter*, "Verdächtiger Verdacht," 16 October 2004, www.falter.at/print/F2004_44_1.php.

⁷ *Ibid.*

⁸ "Decision of the HRAB after a special session," 16 November 2004, http://www.menschenrechtsbeirat.at/de/index_aktuelles.html; "Die weitere Vorgehensweise auf Grund der sicherheitsbehördlichen Ermittlung gegen seine Mitglieder," 30 November 2004, http://www.menschenrechtsbeirat.at/de/index_aktuelles.html.

⁹ IHF Interview with Andrea Huber, AI Austria, on 29 November 2004.

Right to a Fair Trial and Effective Remedies

During 2004, the ECtHR found violations of article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) in regard to excessive lengths of proceedings,¹⁰ lack of a public hearing, defense and witness examination in numerous cases.¹¹

Of particular importance was the case *Alge v. Austria*. In its ruling, the ECtHR recalled that the Austrian reservation in respect to article 6 (1) of the ECHR concerning the requirement that hearings should be open to the public, was invalid.¹² Since the Administrative Court was the only instance in the proceedings which qualified as a tribunal within the meaning of article 6 (1) and the ECtHR could not establish any exceptional circumstances that would have justified dispensing with a public hearing, it ruled that there had been a violation of the applicant's right to a public hearing and thus of article 6 of the ECHR.¹³

In March, a reform of the Criminal Procedure Code (*Strafprozessordnung*) was adopted. The new code will provide better protection and status for victims in criminal proceedings and is expected to benefit notably women who are subject to domestic violence.¹⁴ However, Amnesty International expressed its disappointment over the fact that the new regulations implementing the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings will not come into force – even in the non-procedural aspects – before January 2008.¹⁵

III-Treatment and Police Misconduct

In 2004, many cases raised concern about ill-treatment and misconduct by the police and about the lack of accountability.

- On 13 August, police officers allegedly ill-treated one of the guests at a garden party when they were called to the scene to investigate claims of breach of the peace.¹⁶ In the ensuing fight between an inebriated juvenile and the police officers, the juvenile was heavily beaten and gravely injured. The police officers neglected to call an ambulance, but they proceeded to arrest the juvenile. Following his release the next day, the young man had to be hospitalized where he was diagnosed with a fractured skull and cerebral hemorrhage.¹⁷ The juvenile instituted proceedings before the Independent Administrative Tribunal (*Unabhängiger Verwaltungssenat*, IAT). The Ministry of the Interior accused the young man of fomenting civil disorder and inflicting grievous bodily harm. No criminal proceedings had been brought by the end of 2004 against the police officers concerned. The case was pending a forensic medical examination.

¹⁰ *Wohlmeyer Bau GmbH v. Austria*, Application No. 20077/02, 8 July 2004; *Löffler v. Austria*, Application No. 72159/01, 4 March 2004; *Dirnberger v. Austria*, Application No. 39205/98, 5 February 2004; *Baumann v. Austria*, Application No. 76809/01, 7 October 2004; *Schluga v. Austria*, Applications No. 65665/01, 71879/01 and 72861/01, 19 February 2004; *Ullrich v. Austria*, Application No. 66956/01, 21 October 2004; *Morscher v. Austria*, Application No. 54039/00, 5 February 2004; *Malek v. Austria*, Application No. 16174/02, 21 October 2004; *Alge v. Austria*, Application No. 38185/97, 22 January 2004; *Yavuz v. Austria*, Application No. 46549/99, 27 May 2004.

¹¹ *Yavuz v. Austria*, Application No. 46549/99, 27 May 2004.

¹² Referring to *Eisenstecken v. Austria*, Application No. 29477/95, para. 29; *Alge v. Austria*, Application No. 38185/97, 22 January 2004, para.28.

¹³ *Alge v. Austria*, Application No. 38185/97, 22 January 2004.

¹⁴ For more information, see Ministry of Justice, *Strafprozessreformgesetz*, <http://ris1.bka.gv.at/Authentic/index.aspx?page=doc&docnr=1>, and IHF, *Human Rights In the OSCE Region: Europe, Central Asia and North America, Report 2004 (Events of 2003)*, http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=3860.

¹⁵ Amnesty International, "Defizite im Opferschutz," September 2004.

¹⁶ IHF interview with Andrea Huber, AI Austria, on 29 November 2004.

¹⁷ *Ibid.*

- In the case concerning the death of Nicolae J., a Romanian citizen, after his truck had been stopped by the police in a car chase, the Vienna IAT decided that the use of a firearm by a police officer from a distance of about ten meters was excessive, disproportionate and unlawful due to the lack of a need for self-defense.¹⁸ No criminal proceedings have been initiated against the officer by the end of the year.
- Regarding the death of Cheibani Wague, a 33-year-old Mauretanian, during a police operation in Vienna in 2003, the Vienna IAT decided on 29 January 2004 that the form and extent of the man's "fixation" by police officers and an emergency physician (holding down his feet, pressing him down on to the ground and punching his head, neck and upper back), amounted to unnecessary and unlawful ill-treatment and abuse. The court further stated that medical examination should have been carried out immediately. The Ministry of the Interior appealed against this decision. In its final decision, the IAT strongly criticized the unwillingness of the police officers to answer any questions: the police officers involved were not suspended from duty. As of February 2005, more than a year after the incident, no date had been set for the first trial in the criminal proceedings instituted against the emergency physician and four police officers involved in the incident, the official argument being that a forensic examination was still pending. With proof of guilt being a condition for compensation, the relatives of Cheibani Wague have not yet received any compensation.¹⁹
- Binali Ilter, a schizophrenic 28-year-old Austrian of Kurdish origin, was shot dead by a police officer on 31 August 2002 when Ilter, standing on the pavement and wearing only socks, threw a small bottle of mineral water at the police car and approached the car holding a second bottle.²⁰ The decision of the IAT, which found the police action not to be unlawful, was annulled by the Constitutional Court as completely arbitrary.²¹ The case was remitted to the tribunal where it was still pending as of January 2005.

Ill-Treatment in the Army

The weekly magazine *News* reported that questionable tactics had been used in the context of training for hostage taking scenarios in the Austrian Federal Army.

- In the Walgau barracks in Bludesch (Vorarlberg), recruits were reportedly overpowered by trainers dressed as terrorists, thrown to the floor and beaten with bamboo sticks. They were then loaded onto tractors, where they were forced to kneel blindfolded with pistols held to their heads while being transported to the barracks. There they were thrown down onto wooden floors again and made to lie there for more than an hour with their hands bound together before being interrogated and beaten once more. The responsible military commander admitted that such exercises had taken place but underlined that no recruit was forced to participate and denied the use of bamboo sticks.²²

¹⁸ *Tiroler Tageszeitung*, "UVS-Urteil zu getötetem Amokfahrer: Polizeieinsatz rechtswidrig," 18 August 2004.

¹⁹ ORF, "Scharfe FPÖ-Kritik am Urteil," http://www.orf.at/040130-70331/index.html?url=http%3A//www.orf.at/040130-70331/70332txt_story.html; *Der Standard*, "Schuldspruch für Wiener Polizei," 2 February 2004; *Der Standard*, "Langes Warten im Fall Cheibani," 18 August 2004, <http://derstandard.at/?url=/?id=1762252>; *Die Presse*, "Den Verwaltungssenat zusperren," 17 January 2004; IHF Interview with Andrea Huber, AI Austria, on 29 November 2004; *Der Standard*, "Langes Warten im Fall Cheibani," 18 August 2004, <http://derstandard.at/?url=/?id=1762252>; *Der Standard*, "Staatsanwalt ermittelt wegen fahrlässiger Tötung," 22 July 2003; *Falter*, No. 42/04; *Der Standard*, "Zu langes Warten auf den Wague-Prozess," 24 February 2005; *Der Standard*, "Langes Warten im Fall Cheibani," 18 August 2004, <http://derstandard.at/?url=/?id=1762252>.

²⁰ IHF Interview with Andrea Huber, AI Austria, on 29 November 2004.

²¹ VfGH, 29 October 2004, B 1452/03.

²² ORF/Vorarlberg, "Keine Schläge in Vorarlberger Kaserne," 10 December 2004, <http://vorarlberg.orf.at/oesterreich.orf?read=detAI l&channel=7&id=357646>.

After initial investigations, the Complaints Commission (*Beschwerdekommission*) of the Federal Armed Forces could not find any evidence to confirm the allegations published by *News*.²³

- There were also allegations that recruits in the Pontlatz barracks in Landeck (Tirol), had been mistreated. In the context of a “war training day” (*Kampftag*) in December 2003, recruits were tied up with cable, deprived of sleep for up to 23 hours,²⁴ and bogus torture had taken place.²⁵ Again, numerous former recruits anonymously spoke up and claimed mistreatment.²⁶ In addition to the investigations by the public prosecutor and the Complaints Commission, an investigation commission was due to be established. The trainers responsible for the recruits had not been suspended as of early 2005.²⁷

In the context of training for hostage taking scenarios, the Complaints Commission of the Federal Army stated, after hearings with high-ranking officers, that the human dignity of recruits had been violated in various barracks across Austria. As of early 2005, the commission was engaged in cases of simulated hostage takings which took place in the Walgau barracks in Bludesch (Vorarlberg), and in the Pontlatz barracks in Landeck (Tirol).²⁸ The commission also carried out investigations in Freistadt (Upper Austria) into a similar case of “training.”

The minister of defense initiated investigations into the allegations and the public prosecutor decided to investigate the alleged crimes against physical integrity and undignified treatment of army trainees.²⁹ As of early 2005, three commanders had been dismissed. Thereupon, numerous other recruits who had served in the Freistadt barracks spoke out about similar training methods.³⁰

Conditions in Prison

Prisons in Austria were overcrowded: as of the end of 2004, 8,800 inmates were serving time in institutions which had an overall maximum capacity of 8,000.³¹ Alternatives to imprisonment, such as electronically supervised house arrest, working in public institutions or the proposal by the then Minister of Justice, Dieter Böhmdorfer, of using a Romanian prison,³² were not introduced. Overcrowding also led to psychologically stressful conditions for the detainees.

In addition, juveniles, mentally disabled persons, and foreigners who were awaiting deportation, were forced to live in unsatisfactory conditions. Only one special detention center existed exclusively for juvenile offenders,³³ which violated legal provisions establishing the principle of strict separation of youths and adults in the penal system.³⁴

²³ Ibid.

²⁴ Militärkommandant Karl Berkold in ORF, “Neue Vorwürfe in der Misshandlungsaffäre,” 9 December 2004, <http://ooe.orf.at/oesterreich.orf?read=detAI l&channel=4&id=357541>.

²⁵ ORF, “Übergriffe auch in Tiroler Kaserne,” 7 December 2004, <http://oesterreich.orf.at/oesterreich.orf?read=detAI l&channel=6&id=357273>; ORF/Vorarlberg, “Immer mehr Rekruten melden sich zu Wort,” 8 December 2004.

²⁶ Ibid.

²⁷ Informationssystem des Bundesministeriums für Landesverteidigung, “Hinweis auf neue Übergriffe,” 6 December 2004, <http://www.bundesheer.at/cms/artikel.php?ID=1314>.

²⁸ *Der Standard*, “Heer: Menschenwürde verletzt,” 15 December 2004; *Der Standard*, “Feindbild Friedensaktivisten,” 9 December 2004.

²⁹ ORF/Vorarlberg, “Keine Schläge in Vorarlberger Kaserne,” 10 December 2004, <http://vorarlberg.orf.at/oesterreich.orf?read=detAI l&channel=7&id=357646>.

³⁰ ORF Oberösterreich, “Konsequenzen in der Folter-Affäre,” 3 December 2004, <http://ooe.orf.at/oesterreich.orf?read=detAI l&channel=4&id=356899>.

³¹ *Der Standard*, “Freude über Soldaten vor Gefängnistüren,” 18/19 December 2004.

³² *Die Presse*, “Gefängnis in Rumänien,” 19 January 2004.

³³ In Gerasdorf since the dissolution of the Vienna Juvenile Court in 2003 and its integration into the Vienna Regional Criminal Court. In the larger prisons in Vienna-Josefstadt, Graz-Jakomini, Innsbruck, Salzburg, Klagenfurt and Schwarzau, special parts of the buildings are reserved and adapted for juvenile offenders.

³⁴ Section 55 (1) and (2) Juvenile Court Act.

As for mentally disabled persons, the Detention Act (*Unterbringungsgesetz*) foresees their detention against their will only if they endanger others or themselves. In every other case, they should receive treatment in day clinics. In practice, the day clinic procedure had been abandoned on financial grounds. As a result, a large number of detainees in Austria were mentally unstable or ill.

- One case of a dubious prison death was re-opened when a judicial commission was mandated by the Minister of Justice, Karin Miklautsch, to re-examine the case of the mentally disabled inmate Ernst K. who died in 2001 in the Krems-Stein prison. Photos were published showing K's corpse in a special prison cell tied to a bed with leather belts, his nose broken and bleeding.³⁵ The official version was that Ernst. K. had died naturally from heart failure.

Foreigners awaiting deportation were detained in normal police detention centers where criminal suspects were also held, and minors were held in solitary confinement. The HRAB recommended that special detention centers should be urgently created for foreigners and minors should not be placed in solitary confinement.³⁶

Discrimination

In 2003, two EU directives came into force, setting minimum standards for legal protection against discrimination: Directive 2000/43/EC ("Race Equality Directive") and Directive 2000/78/EC ("Employment Directive"). The former directive prohibits racial and ethnic discrimination in employment, education, social security and healthcare, access to goods and services and housing. The latter prohibits discrimination in employment on grounds of religion and belief, disability, age and sexual orientation.³⁷

Attempts were made by the government to fulfill the requirements by enacting relevant legal provisions on 26 May 2004, but the transposition into federal law in most of the federal provinces was not carried out on time. As a result of this delay, Austria was brought before the ECJ by the European Commission.³⁸

At the federal level, three separate acts were adopted. The Equal Treatment Act (*Gleichbehandlungsgesetz*) prohibits discrimination on the grounds of gender, race, ethnic origin, religion and belief, age, and sexual orientation as it might occur between private parties. The Federal Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz*) is applied to federal civil servants in the area of employment, and the Act establishing the Equal Treatment Commission and the Ombudsperson's Office for Equal Treatment (*Gesetz über die Gleichbehandlungskommission und die Anwaltschaft für Gleichbehandlungsfragen*) regulates the tasks and composition of these institutions.³⁹

Austria also failed to meet the deadline for transposing into law the provisions of Directive 2000/78/EC concerning the protection of disabled persons; the resulting draft Act for Equal Opportunities for Disabled Persons (*Behindertengleichstellungsgesetz*) had not been adopted by the end of 2004.

It appears that Austria has not been willing to grant protection against discrimination beyond the minimum requirements of the EU directives.

³⁵ See, for example, *Falter*, No. 28/04 and 29/04; *AI report 2002 on Austria*, <http://web.amnesty.org/web/ar2002.nsf/eur/austria?Open>.

³⁶ "Empfehlung des Menschenrechtsbeirates zur Schaffung einer Spezialeinrichtung für den Vollzug der Schubhaft und Anhalteformen in den Polizeianhaltezentren," October 2004, <http://www.menschenrechtsbeirat.at>.

³⁷ Directive 2000/43/EC, http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_180/l_18020000719en00220026.pdf. Directive 2000/78/EC <http://www.migpolgroup.com/uploadstore/en.framework%20directive.pdf>.

³⁸ *Der Standard*, "EU klagt Österreich," 21 December 2004.

³⁹ For the acts, see Federal Law Gazette (BGBl.) I, No. 66/2004.

Contrary to the EU directives that intend to fully shift the burden of proof to the perpetrator when discrimination is established *prima facie*,⁴⁰ the Austrian Equal Treatment Act provides that the alleged perpetrator can refute the charges merely by showing the “plausibility” that the different treatment was not motivated by discrimination or that a special justification applies to his/her specific case.⁴¹ It is also questionable whether the sanction system fulfils the directives’ demand to be effective, proportionate and sufficiently dissuasive. Whereas provisions exist for reparation by compensation claims for pecuniary and non-pecuniary damages, a punitive element is lacking.⁴²

The lack of an appropriate anti-discrimination law hampered attempts by the victims of racial discrimination to take effective measures to defend themselves. In addition, the jurisdiction of competent institutions led to unsatisfactory results.

Regarding the recognized Slovene minority, despite a decision by the Constitutional Court in December 2001, the required additional signposts in the Slovene language in the Federal Province of Carinthia had not been erected by the end of 2004.⁴³

Rights of Homosexuals

In 2002, article 209 of the Criminal Code was repealed. This article had provided for a different age of consent (18) for men engaging in same-sex relations than that for people in lesbian or heterosexual relations (14).⁴⁴ Due to the transitional provisions of the Austrian Criminal Code, it appeared that proceedings at the ECtHR were necessary in order to force Austrian courts to fully rehabilitate the victims of article 209 and afford them financial compensation. This possibility was only open to victims whose cases were still pending at the moment of the annulment of article 209 in 2002 or whose convictions date back no longer than six months from that date.

Despite the clear jurisdiction of the ECtHR in *L. and V. v. Austria*⁴⁵ of 9 January 2003 and *Woditschka and Wilfing v. Austria*⁴⁶ of 21 October 2004,⁴⁷ Austria was not willing to adjudicate pecuniary and non-pecuniary damage and rehabilitation to those who were not covered by the six month regulation: according to NGO information, this affected 15,000 individuals in 2002.⁴⁸ As a result, those whose convictions were upheld or whose mitigation or release was rejected continued to have criminal records.⁴⁹

⁴⁰ Article 10 of Directive 2000/78/EC and article 8 of Directive 2000/32/EC.

⁴¹ “Dem/der Beklagten obliegt es [...] zu beweisen, dass es bei Abwägung aller Umstände wahrscheinlich ist, dass ein anderes vom/von der Beklagten glaubhaft gemachtes Motiv für die unterschiedliche Behandlung ausschlaggebend war [...] oder ein Rechtfertigungsgrund [...] vorliegt.“

⁴² IHF Interview with Dieter Schindlauer, ZARA, on 29 November 2004.

⁴³ *Der Standard*, “Noch immer keine Ortstafeln,“ 14 December 2004.

⁴⁴ Federal Law Gazette (BGBl.), No. 134, 2002.

⁴⁵ In the case *L. and V. v. Austria*, the court held that there had been a violation of articles 8 and 14 ECHR and ordered the Austrian state to pay the applicants pecuniary damages plus expenses for non-pecuniary damage, noting “that a decision or measure favorable to the applicant is not in principle sufficient to deprive him of his status as a victim unless the national authorities have acknowledged [...] and then afforded redress for the breach of the Convention.” *L. and V. v. Austria*, Application No. 39392/98 and 39829/98, 9 January 2003.

⁴⁶ *Woditschka and Wilfing v. Austria*, Application No. 69756/01 and 6306/02, 21 October 2004.

⁴⁷ *L. and V. v. Austria*, Application No. 39392/98 and 39829/98, 9 January 2003,

<http://hudoc.echr.coe.int/Hudoc2doc2/HEJUD/200301/1.-v.%20v.%20austria%20-%2039392jv.ch1b%2009012003e.doc>

⁴⁸ Platform Against Art. 209, “Austria is free (soon)! Constitutional Court Strucks Down anti-gay Art. 209,” 24 June 2002, www.rklambda.at/dokumente/news/News-en-PA-020624.pdf; IHF Interview with Andrea Huber, AI Austria, 29 November 2004.

⁴⁹ Platform Against Art. 209, “Austria is free (soon)! Constitutional Court Strucks Down anti-gay Art. 209,” 24 June 2002, www.rklambda.at/dokumente/news/News-en-PA-020624.pdf (last visited 3 March 2005).

In August 2004, a complaint was filed with the ECtHR by two men who had unsuccessfully argued in proceedings before the Austrian Constitutional Court that the provision restricting the right to marry to persons of different sex was discriminatory and hence unconstitutional.⁵⁰

- On 14 October, the Constitutional Court rejected a case of a same-sex married couple concerning family reunification and residence permit in Austria. At issue should have been the recognition of a same-sex marriage between a German and a US citizen that had legally taken place in the Netherlands. As one of the partners wanted to accept a job in Vienna, he claimed his right to freedom of movement pursuant to article 39(1) EC Treaty and residence including the right to family reunification for his spouse, a third state national. However, Austrian authorities denied the American partner a residence permit on the basis of article 47 (2) and (3) of the Aliens Act (*Fremdengesetz*) because Austria did not recognize same-sex marriages. The Austrian Constitutional Court failed to rule on the main issue of the case, i.e. the recognition of the validity of a marriage concluded in another EU member state. Instead, it considered the issue of equal treatment of marriage with other than heterosexual relationships, concluded that no discrimination had taken place and negated the applicant's submission to initiate a preliminary procedure.⁵¹
- When the gay and lesbian association "Homosexual Initiative" (Homosexuelle Initiative, HOSI) on the occasion of its 25th anniversary wanted to purchase train patronage offered by the Austrian Federal Railways (Österreichische Bundesbahnen, ÖBB), the ÖBB rejected their order for two trains. The patronage would have meant that the trains would have been named after HOSI.⁵² The fact that HOSI had no legal remedies available against the refusal of the Austrian Railway Company shows that the EU anti-discrimination directives and their implementation in national law were not sufficient in the context of access to goods and services.

Asylum Seekers and Refugees

Between January and October 2004, 20,936 asylum applications were filed, a decline of 25.9% compared to 2003.⁵³ Even more drastically, the numbers of asylum claims decreased to 53% of the 2003 figures after the entry into force of the new asylum law on 1 May 2004.

The regional government of Upper Austria, the government of Vienna and the Independent Federal Asylum Review Board (*Unabhängiger Bundesasylsenat*, IFARB) appealed against this law even before it came into force. In its decision of 15 October 2004, the Constitutional Court abolished some provisions and sections on the grounds of unconstitutionality.⁵⁴ The court declared unconstitutional the practice of deporting individuals who appealed against the rejection of their asylum claims in the first instance on the grounds that another EU state was competent. This was especially important because, as statistics showed, the number of first instance decisions overturned by the IFARB on appeal increased by 67.5% in 2004 (2,700 of 4,000 decisions).⁵⁵ In addition, it stated that in practice persons who have suffered asylum-relevant persecution often do not wish to talk about their ordeal immediately.⁵⁶ Therefore, it found the provision that prohibited the submission of new evidence and motives for flight at the appeal stage except in very restricted cases to be unconstitutional.

⁵⁰ VfGH, 12 December 2003, B 777/03.

⁵¹ VfGH 14 October 2004, B 1512/03, http://www.sbg.ac.at/oim/orig/04_5/VfGH_B1512_03.pdf

⁵² IHF Interview with Kurt Krickler, HOSI, 15 November 2004.

⁵³ *Der Standard*, "Um ein Viertel weniger Asylanträge," 27 and 28 November 2004.

⁵⁴ VfGH, "Asylgesetz: Vieles verfassungskonform auslegbar, einige Bestimmungen jedoch aufgehoben," 15 October 2004, <http://www.vfgh.gv.at/neu/PMAylgesetz.pdf>.

⁵⁵ Wahrnehmungsbericht Forum Asyl (AI Austria, Asylkoordination Österreich, Caritas Österreich, Diakonie, Integrationshaus, SOS Menschenrecht, Volkshilfe), "Evaluierung der Erstaufnahmestellen, Asylgesetz-Novelle 2003," 10 December 2004.

⁵⁶ Asylkoordination Österreich, "Presseaussendung der Asylkoordination Österreich zur Asylrechtsänderung," 5 May 2003.

The Constitutional Court also gave instructions to the responsible agencies on how to interpret several provisions of the law. First, it ruled on the concepts of “safe country of origin” and “safe third countries,” underlining that all cases must still be examined on an individual basis. This ruling was especially important because, since May 2004, Austria is surrounded only by EU countries and Switzerland, all officially regarded as “safe”. Until May 2004, the standard jurisdiction of the IFARB had denied some neighboring EU countries the status of a “safe third country,” especially Slovakia, the Czech Republic and Italy.⁵⁷ Until the end of August 2004, 109 asylum seekers were deported to Slovakia⁵⁸ despite the fact that Slovakia had deported Chechnyan asylum seekers to Russia and despite indications that the Slovakian authorities had collaborated with the Russian secret service.⁵⁹ Hence, it appeared that the Federal Asylum Offices (*Bundesasylämter*, FAOs) may have violated the prohibition of *refoulement* by acting on the unexamined assumption of safety in the new EU countries.⁶⁰ In the cases of 42 Chechnyans, they were even refused entry into Austria at the Czech Republic border notwithstanding their obvious intentions to apply for asylum in Austria.⁶¹

In the context of the Dublin-procedures, detention pending deportation was routinely mandated. The special police force in charge of foreigners (*Fremdenpolizei*) made such decisions and took the persons concerned into detention to later be deported. If the person had already been detained, a deportation order was delivered instantly, without any possibility of appeal.⁶² Moreover, Austrian asylum NGOs were aware of cases in which persons were taken into custody pending deportation for crossing the border illegally although they had applied for asylum.⁶³

In general, the time taken to complete asylum proceedings was reduced, but decisions were regularly made without sufficiently detailed consideration of the individual case.⁶⁴

Consideration of Traumatization

A positive amendment to the asylum law was the introduction of the exception of inadmissibility in the Dublin procedure where asylum seekers are traumatized or victims of torture. However, in practice, in some cases, no opportunity was provided to establish whether they were traumatized or not.⁶⁵ In other cases, accelerated proceedings led to problems in establishing trust between asylum seekers and doctors - often working without a translator. As a result, it was very difficult to medically diagnose trauma.⁶⁶ Moreover, medical investigation often took place too late and was therefore of no use,⁶⁷ and in a number of cases, a medical diagnosis was ignored and deportation carried out.⁶⁸

⁵⁷ This applies to Slovakia, the Czech Republic and Italy; the latter was repeatedly declared unsafe following a leading decision in 2002 for the lack of an adequate judicial review in the appeals procedure and the material danger of “domino deportations” (UBAS, 17 October 2002, GZ: 220.884/30-II/04/02).

⁵⁸ Anny Knapp, “Schneller, effizienter oder zurück an den Start,” in *asyl aktuell*, “Zurück an den Start”, Vol. 3, 2004, p.12.

⁵⁹ Michael Genner, “Hinter der Scheibe,” in *asyl aktuell*, “Zurück an den Start,” Vol. 3, 2004, p.11; the negative asylum policy is reflected by the fact that in Slovakia, only one single Chechnyan asylum seeker was granted asylum in the first half of 2004.

⁶⁰ *Human Rights Watch World Report 2005: EU*, <http://hrw.org/english/docs/2005/01/13/eu9851.htm>.

⁶¹ Stoitsits, “Warum wurden 42 TschetschenInnen an der Grenze zurückgewiesen?” 16 January 2004, http://www.ots.at/meldung.php?schluessel=OTS_20040115_OTSO164&ch=politik.

⁶² Wahrnehmungsbericht Forum Asyl (AI Austria, Asylkoordination Österreich, Caritas Österreich, Diakonie, Integrationshaus, SOS Menschenrecht, Volkshilfe), “Evaluierung der Erstaufnahmestellen, Asylgesetz-Novelle 2003, 10 December 2004.

⁶³ See, for example, decision of the Constitutional Court, 28 September 2004, B292/04.

⁶⁴ *Human Rights Watch World Report 2005: EU*, <http://hrw.org/english/docs/2005/01/13/eu9851.htm>.

⁶⁵ See, for example, the case of Ruslan M. in Michael Genner, “Sand ins Getriebe,” *Asyl in Not- Rundbrief*, September 2004.

⁶⁶ According to AI, medical examinations are sometimes only carried out during the second interview, although the diagnosis of traumatization is a condition for Austria to consider the asylum case in question. *AI -gesprächstext*, p.4; Anny Knapp, “Schneller, effizienter oder zurück an den Start,” *asyl aktuell*, “Zurück an den Start”, Vol. 3, 2004.

⁶⁷ Wahrnehmungsbericht Forum Asyl (AI Austria, Asylkoordination Österreich, Caritas Österreich, Diakonie, Integrationshaus, SOS Menschenrecht, Volkshilfe), “Evaluierung der Erstaufnahmestellen, Asylgesetz-Novelle 2003,” 10 December 2004.

⁶⁸ Anny Knapp, “Schneller, effizienter oder zurück an den Start,” *asyl aktuell*, “Zurück an den Start”, Vol. 3, 2004.

- Diana, a seven year old Chechnyan girl, and her father Salman fled from Chechnya through Slovakia to Austria where they applied for asylum. A medical examination of Diana established that she had not suffered traumatization in the sense of post-traumatic stress disorder (PTSD), but suffered from a failure of adaptation leading to sleep disorder, bedwetting and a state of anxiety. The responsible adjudicator failed to identify this as another form of traumatization and declared the claim inadmissible.⁶⁹ Diana and her father were deported to Slovakia. When they tried a second time to enter Austria, the father was detained pending deportation and Diana was accommodated in a children's home; they were again deported.⁷⁰ The IFARB decided that traumatization was already established during the first examination of the girl; furthermore, re-traumatization due to the deportations and separation from her father could not be excluded.⁷¹ Hence, Diana and her father were admitted to Austria and the asylum procedure.

Consideration of Evidence

As to the consideration of evidence, not a single one of the 56 primary reception sites (*Erstaufnahmestellen*, PRSs) decisions issued between 26 May and 1 October 2004 that were randomly chosen by Forum Asylum for analysis, made reference to sources of evidence such as witnesses, experts or correspondence with consulates. In some cases, documents brought forward by the asylum seeker had not been recognized. In other cases, the conclusions failed to align with either the submission of the asylum seeker or the results of the preliminary proceedings or even referred to statements that had never been made.⁷²

Right to Family Life

Family reunification and residence prohibitions were a contentious issue as far as the right to family life was concerned. Regarding family reunification, Austria as an EU member state must comply with the Council Directive of 22 September 2003 on the right to family reunification.⁷³ This means allowing family members of the successful asylum seeker to join him/her no later than three years since the beginning of his/her lawful stay in the country.⁷⁴ The provisions of this directive must be implemented by 3 October 2005.⁷⁵

However, the immigration quota including family reunification was reduced for 2005 from 8,050 to 7,500 and only 5,460 permits will be issued in order to reduce the existing backlog.⁷⁶ Hence, it is essential to adopt new provisions on family reunification, which would separate the legally claimable cases of family re-unification from the general annual quota of new Austrian immigrants.

Regarding residence prohibitions, insufficient attention was paid to the family situation of the person concerned.

- In the case of *Radovanovic v. Austria*, the ECtHR found that Austria had violated article 8 of the ECHR when imposing a residence prohibition of unlimited duration against Jovo Radovanovic after a conviction of aggravated robbery and burglary. This was held to be an

⁶⁹ Michael Genner, "Hinter der Scheibe," *asyl aktuell*, Vol. 3, 2004.

⁷⁰ Ibid.

⁷¹ Michael Genner, *Asyl in Not*, "Diana darf zurück," 27 October 2004.

⁷² Wahrnehmungsbericht Forum Asyl (AI Austria, Asylkoordination Österreich, Caritas Österreich, Diakonie, Integrationshaus, SOS Menschenrecht, Volkshilfe), "Evaluierung der Erstaufnahmestellen, Asylgesetz-Novelle 2003-Bescheidanalyse," 10 December 2004.

⁷³ Council Directive 2003/86/EC.

⁷⁴ Article 8 of the Council Directive 2003/86/EC.

⁷⁵ Article 20 of the Directive.

⁷⁶ ORF, "Zuwandererquote wird deutlich gesenkt,"

<http://www.orf.at/index.html?url=http%3A//www.orf.at/ticker/160906.html%3Ftmp%3D16541>.

overly rigorous measure considering his level of integration in Austria and the lack of such connections to Serbia and Montenegro.⁷⁷

Extradition

- Serious concerns were raised regarding the extradition of Akhmet A., a Russian national, to the Russian Federation on 24 February 2004 after the Russian chief public prosecutor had requested his extradition on the grounds of kidnapping allegations and the illegal purchase and possession of weapons. Despite the prosecutor's claims to the opposite, extradition contradicted the jurisdiction of the ECtHR prohibiting extraditions where a material risk exists that the person will suffer from inhuman or degrading treatment. Additional critique arose from the fact that Akhmet A.'s asylum proceedings were still pending in the course of which the applicant stated that he had been persecuted and threatened with torture.⁷⁸

In late 2004, a refoulement zone (*Zurückweisungszone*) was created in the special transit area of Vienna International Airport. Neither the social service of Caritas nor translators nor any NGO or other institution that could inform, advise, legally represent or monitor events within the zone, was allowed access to it. Hence, it was not clear if there was a possibility to claim asylum within the zone.⁷⁹

Federal Care for Asylum Seekers

Although the Supreme Court had already in 2003 held that a legal obligation exists to care for asylum seekers in need, the federation and the provinces were unable to agree on a proportional quota system to accommodate asylum seekers.⁸⁰ As a result, Carinthia unilaterally declared the agreement invalid in November 2004. In practice, the provinces lacked the organizational and logistic preconditions, as the necessary federal laws were not yet in place.⁸¹ As of the end of 2004, each province had set up a center, which coordinates the implementation of federal care provided by NGOs, private enterprises or accommodation facilities. As a result of this delay, up to 3,000 places in care facilities were not available in June 2004.⁸²

There were also problems regarding health insurance: the registration of asylum seekers who were previously under the care of the federation and now under the care of a province, was not renewed by the coordination centers. As a result, the asylum seekers did not always have access to adequate medical care.⁸³

The amended Alien Employment Act (*Ausländerbeschäftigungsgesetz, AuslBG*) that came into force on 1 May allows asylum seekers to work but limits their access to the labor market. Asylum seekers rarely received an employment permit (*Beschäftigungsbewilligung*) in Upper Austria and almost never in Vienna and Lower Austria.⁸⁴

On 18 November, the entitlement of asylum seekers to receive a family allowance was quietly terminated. This financial aid, which retrospectively follows a positive asylum decision, had been an important starting help for families who are now even more dependent on provincial welfare.

⁷⁷ *Radovanovic v. Austria*, Application No. 42703/98, 22 April 2004, <http://www.echr.coe.int/Eng/Press/2004/April/Chamberjudgments22404.htm>.

⁷⁸ IHF Interview with Andrea Huber, AI Austria, 29 November 2004.

⁷⁹ Wahrnehmungsbericht Forum Asyl (AI Austria, Asylkoordination Österreich, Caritas Österreich, Diakonie, Integrationshaus, SOS Menschenrecht, Volkshilfe), "Evaluierung der Erstaufnahmestellen, Asylgesetz-Novelle 2003," 10 December 2004.

⁸⁰ Federal Law Gazette (BGBl) I 80/2004, in force since 1 May 2004; "Debatte über Asylrecht im Innenausschuss," 14 January 2004.

⁸¹ Herbert Langthaler, "Chaotischer Start", *asyl aktuell*, "Das neue Asylsystem," Vol. 2, 2004.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Heinz Fronek, "Tür auf-Tür zu," *asyl aktuell*, "Das neue Asylsystem," Vol.2, 2004.