“Rights and obligations of refugees: a risk of modern slavery?”

I. Rights and obligations

A. General Asylum procedure

- **Appeal:** Following the most recent ruling of the Constitutional Court, the time limit for appealing a negative decision is 4 weeks in all cases. Where an appeal has no automatic suspensive effect, this must be granted *ex officio* if there is a risk of violation of Articles 2, 3 or 8 ECHR and need not be requested by the applicant.

- **Onward appeal:** The new government has announced further restrictions in the asylum procedure, including the abolition of the onward appeal (“extraordinary revision”) before the Administrative High Court. This has been criticised by the Federal Administrative Court and Constitutional Court as an undue departure from uniform rule of law standards in a particularly sensitive human rights area.

- **Medical reports:** A reform entering into force in November 2017 extends the obligations of asylum seekers to cooperate in the procedure. These include the submission of medical reports and relevant findings on their condition.

Reception conditions

- **Freedom of movement:** A reform entering into force in November 2017 introduces a residence restriction for asylum seekers whose claims are deemed admissible. Applicants are only allowed to reside in the federal province in which they have been assigned for Basic Care, even if Basic Care is waived or withdrawn. Moreover, they may be ordered specific accommodation for reasons of public order, public interest or for the swift processing of their application. Violation of residence restrictions can lead to an administrative fine, as well as grounds for detention.

Detention of asylum seekers

- **Duration of detention:** A reform entering into force in November 2017 extends the maximum duration of pre-removal detention from 4 months to 6 for adults, and from 2 months to 3 for children above the age of 14. Extensions allow detention to reach 18 months in exceptional cases.

Content of international protection

- **Withdrawal:** A reform entering into force in November 2017 enables the BFA to start a withdrawal procedure where it is likely that the person has committed a criminal offence.
- **Family reunification**: To be eligible for family reunification, spouses no longer need to be married in the country of origin, as long as the marriage or partnership existed prior to their flight.

- **Social welfare**: Restrictions in the level of social benefits granted to beneficiaries for international protection, as well as conditions such as participation in integration programmes, have been introduced in a number of federal provinces.
B. Types of procedures applied in Austria:

1. Regular procedure
2. Border procedure
3. Admissibility procedure
4. Accelerated procedure
5. Dublin procedure

To 1-4) General (scope, time limits)

The Federal Agency for Immigration and Asylum (BFA) is a specific department of the Ministry of interior, dealing with asylum matters. From 2014 onwards, the tasks of the Agency are extended to cover some immigration law procedures.

According to the General Administrative Procedures Act (AVG), decisions have to be taken within 6 months after the application has been submitted. Within 20 calendar days, the BFA has to decide whether it intends to reject the application as inadmissible due to the responsibility of another Member State under Dublin, the existence of a safe third country or for being a subsequent asylum application, or to dismiss the application for other reasons. If no procedural order is notified to the asylum seeker within 20 days, the asylum application is admitted to the regular procedure – except in Dublin cases if requests to other Member States to take charge or take back the asylum seeker are made within this time frame. An amendment of Article 22 AsylG, entering into force on 1 June 2016, allows for the extension of the duration of procedures at first instance up to 15 months. This exceptional prolongation will cease on 1 June 2018 but will remain applicable to cases pending after 31 May 2018.1

Numbers for asylum applications not decided within 15 months by the BFA are not available. During the first quarter of 2017, the average duration of the procedure reached 12.9 months.2 The average duration of procedure in the first 6 months of 2017 was 14 months,3 and reduced to 6.6 months at the beginning of 2018 for applications made after 1 July 2016. 33,161 cases were pending at first instance at the end of the year, compared to 63,912 at the end of 2016.4 According to experience of NGOs, still a lot of asylum seekers in 2017 waited more than 10 months for an appointment for the first interview. The Austrian Ombudsman has received over 2,000 complaints concerning the duration of the asylum procedure in 2017, in addition to about 1,500 complaints in 2016.5

Whereas the procedure for Syrians and Iraqis seems to be concluded within the 15-month time limit, other nationalities face longer delays for a decision.6

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1 Articles 73(15) and 75(24) AsylG.
4 Ministry of Interior, Reply to parliamentary question 11560/J (XXV.GP), 31 March 2017, available in German at: http://bit.ly/2o1os5Z. According to the Ministry, the average processing times for asylum applications made after 1 July 2016 was 6.6 months. Information provided by the Ministry of Interior, 26 January 2018.
In case of delay of the BFA, the asylum seeker may apply for devolution, upon which the file will be rendered to the Federal Administrative Court for a decision. However, in practice asylum seekers do not frequently apply for such devolution, as they miss a chance of receiving a positive decision at first instance (by the BFA). However, due to the amendments entering into force on 1 June 2016, which have restricted refugees’ right of residence to 3 years (see Residence Permit) and have imposed restrictions on Family Reunification, such complaints were often introduced in the first half 2016. The Administrative High Court held that applications made in 2015 which had not been decided upon by the BFA did not amount to an infringement, given the impact the sharp increase in asylum applications had on the length of the asylum procedure.\(^7\)

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

### Prioritised examination and fast-track processing

The time limit for decisions for the BFA and the Federal Administrative Court are reduced to 3 months in case the asylum seeker is detained pending deportation.\(^8\) \(^{\text{VwGH, Decision Ro 2016/01/0001-0004, 24 May 2016, available in German at: http://bit.ly/2ktbIM2.}}\)

The same maximum time limit applies to the “procedure for the initiation of a measure terminating residence” (see the section on Accelerated Procedure).

The practice of fast-track processing of cases from certain countries of origin which do not fall within the scope of the “safe countries of origin” list and the accelerated procedure was not observed in 2016. This is due to the fact that the list of safe countries of origin has been extended to countries such as \textbf{Algeria, Tunisia, Morocco, Georgia} and \textbf{Ghana} (see Safe Country of Origin). In the second half of 2016, the BFA concentrated on Dublin procedures to keep the option of sending asylum seekers to other EU Member States. In the second half of 2017, NGOs noticed that applications from \textbf{Afghanistan} were given priority following an instruction from the Ministry of Interior.

In relation to refugees from Syria that are resettled in Austria,\(^9\) the Ministry of Interior announced that they will be granted asylum immediately upon arrival (asylum \textit{ex officio}). In 2014 and 2015 most of the resettled refugees received positive decisions within a few days. However, in 2016 and 2017 the procedures took much longer, and they often had to wait for several months for the interview on their case. Generally, Syrians have faced longer procedures in 2017 compared to previous years.\(^10\)

### Personal interview

All asylum seekers must have one personal interview. Asylum seekers are subjected to an interrogation by the public security service shortly after making the application for the purposes of the Dublin and Admissibility Procedure.\(^11\) 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

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\(^7\) \text{VwGH, Decision Ro 2016/01/0001-0004, 24 May 2016, available in German at: http://bit.ly/2ktbIM2.}

\(^8\) \text{Article 22(6) AsylG.}

\(^9\) \text{A total 349 refugees were resettled in 2017, compared to 174 in 2016: Ministry of Interior, Asylum Statistics December 2017, available in German at: http://bit.ly/2CePv2Q, 26.}


\(^11\) \text{Article 19 AsylG.}
seekers who may arrive exhausted and should therefore not be interrogated about their possibly traumatising reasons for flight by uniformed security officers.\textsuperscript{12}

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

Asylum seekers may be accompanied by a person they trust (person of confidence). Unaccompanied children must not be interviewed without the presence of their legal representative.

If the asylum seeker’s fear of persecution is based on infringement of the right to sexual self-determination, they shall be interviewed by an official of the same sex unless they request otherwise. The authorities must prove that they have informed the asylum seeker of such possibility.\textsuperscript{13} 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.\textsuperscript{14}

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

Article 19(3) AsylG allows for tape recording of the interview, which is, however, rarely used in practice. Video conferencing is not foreseen in law.

The transcript is more or less verbatim. Its content may depend on the interpreter’s summarising the answers, choosing expressions that fit for the transcript or translating each sentence of the asylum seeker. Immediately after the interview, the transcript is translated in a language the asylum seeker understands and the asylum seeker has the possibility to ask for corrections and completion immediately after the interview. By signing the transcript, they agree with the content. If asylum seekers find something incorrect in the transcript after having signed it at the end of the interview, they should send a written statement to the BFA as soon as possible. In practice, asylum seekers do not frequently ask immediately after the interview for correction of the report. Some asylum seekers explain that they were too tired to be able to follow the translation of the transcript. Asylum seekers often realise that mistakes in the translation or the transcript were made when they receive a negative first instance decision and a legal adviser explains them the details of the transcript.

 Appeal

 Appeal before the BVwG

Appeals against a negative first instance decision have to be submitted within 4 weeks of the receipt of the decision and the whole file is forwarded by the BFA to the Federal Administrative Court (BVwG).

\textsuperscript{12} VfGH, Decision U 98/12, 27 June 2012.
\textsuperscript{13} Article 20 AsylG.
\textsuperscript{14} VfGH, Decision U 1674/12, 12 March 2013 mentions Conclusions Nr. 64 (XLI) and Nr. 73 (XLIV) of the Executive Committee of UNHCR. The Asylum Court decided by a male and female judge and its decision was thus unlawful.
\textsuperscript{15} Article 16(1) BFA-VG.
Previously, the time limit was 2 weeks. However, the Constitutional Court ruled on 23 February 2016 that the deviation of Article 16(1) BFA-VG from the general 4-week time limit for submitting an appeal to the Federal Administrative Court is unjustified, as it is not necessary in the case of a rejection decision which is not connected with an expulsion order and the applicant is still entitled to remain on the territory. The BFA-VG was amended to reflect the ruling. On 26 September 2017, the Constitutional Court ruled that even for rejection decisions accompanied by a residence-ending measure affecting the legal position of the applicant, the constitutional guarantees before the BVwG are of considerable importance. Against that backdrop, the shortening of the 4-week appeal period is not indispensable to promoting efficiency. Following the ruling, the time limit for appeals is 4 weeks for all cases.

The BFA may make a pre-decision on the appeal within 2 months. This pre-decision may change the decision in any direction (annul, reject or change the decision). The BFA, however, may refrain from deciding and forward the appeal to the Court.

In case refugee status or subsidiary protection status is not granted by the BFA, the asylum applicant will be assigned a free legal adviser provided by the state at the time of notification of the first instance decision (see the section on Legal Assistance below).

Article 18(1) BFA-VG provides that suspensive effect may be withdrawn by the BFA where the application is manifestly unfounded, i.e. where:

1. The applicant comes from a safe country of origin;
2. Has already been resident in Austria for at least 3 months prior to the lodging of the application;
3. The applicant has attempted to deceive the BFA concerning their true identity or nationality or the authenticity of their documents;
4. The asylum seeker has not adduced any reasons for persecution;
5. The allegations made by the asylum seeker concerning the danger they face clearly do not correspond with reality;
6. An enforceable deportation order or an enforceable entry ban was issued against the asylum seeker prior to the lodging of the application for international protection; or
7. The asylum seeker refuses to give fingerprints.

Moreover, the BFA must withdraw the suspensive effect of an appeal where:

1. The immediate departure of the third-country national is required for reasons of public policy or public security;
2. The third-country national has violated an entry ban and has returned to Austrian territory; or
3. There is a risk of absconding.

The BVwG must grant suspensive effect within 1 week from the lodging of the appeal, where it assumes that return would expose the person to a real risk of a violation of Articles 2, 3 and 8 ECHR or Protocols 6 or 13 ECHR, or to a serious threat to life or person by reason of indiscriminate
violence in situations of conflict in line with Article 15(c) of the Qualification Directive.\textsuperscript{21} Appeals against the rejection of an application with suspensive effect have to be ruled by the Court within 8 weeks.\textsuperscript{22} The asylum appeal has suspensive effect as long as the case is pending in court.

The BVwG is organised in chambers, each of which is responsible for certain groups of countries. Most of the judges of the BVwG previously worked at the Asylum Court, before it was replaced. The Court processed 18,760 appeals in 2016 and about 20,000 in 2017. The number of appeals pending at the end of 2017 was 24,516, almost doubling the 12,497 appeals pending at the end of the previous year.\textsuperscript{23} As the number of appeals increased, judges from other areas of law were assigned to decide on asylum procedures in 2017.

The BVwG has only limited competence of review, determined by the content of the appeal. In the view of the Federal Administrative Court and in relation to this link to the grounds and argumentation of the appeal that limits the subject of the appeal, it is necessary to accept an appeal with at least rudimentary grounds during the time limit, in order to handle the appeal at all. An appeal lacking any argumentation or ground is not to be accepted for a process of improvement and has to be rejected immediately.\textsuperscript{24}

The BVwG can call for another hearing and additional examinations if necessary. The BFA-VG allows exceptions from the principle that a hearing shall take place on the appeal. Such hearing must indeed not be held if the facts seem to be established from the case file and appeal submission or if it is established that the submission of the applicant does not correspond with the facts.\textsuperscript{25} 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 BVwG has to take place or not has been brought before the Constitutional Court (VfGH). The Court ruled that not holding a personal hearing in the appeal procedure does not violate Article 47(2) of the EU Charter of Fundamental Rights; Charter rights may be pleaded before the Constitutional Court. The Court stated that Article 41(7) AsylG\textsuperscript{26} is in line with Article 47(2) of the EU Charter if the applicant was heard in the administrative procedure.\textsuperscript{27} However, subsequent rulings of the Administrative High Court and the Constitutional Court have conversely specified the obligation of the Administrative Court to conduct a personal hearing. In the case of an Afghan asylum seeker, the Administrative Court had confirmed the first instance decision which found the asylum seeker’s application to be lacking credibility due to discrepancies in statements about his age. The Constitutional Court ruled that, by deciding without a personal hearing, the Administrative Court had violated the right laid down in Article 47(2) of the EU Charter.\textsuperscript{28} Two rulings to the same effect were delivered by the Constitutional Court in September 2014.\textsuperscript{29}

The Administrative High Court has specified that all relevant facts have to be assessed by the first instance authorities and have to be up to date at the time of the decision of the court.\textsuperscript{30} According to this Court, it was not necessary to explicitly demand an oral hearing if the facts were not

\textsuperscript{21} Articles 17(1) and 18(5) BFA-VG.

\textsuperscript{22} Article 17(2) BFA-VG.


\textsuperscript{25} Article 21(7) BFA-VG.

\textsuperscript{26} Article 41(7) AsylG corresponds with Article 21(7) BFA-VG.


\textsuperscript{30} VwGH, Ra 2014/20/0017, 28 May 2014.
sufficiently clear or if the statements of the applicant in his or her appeal contradicted the statements taken by the first instance authority.\textsuperscript{31}

The possible outcome of this procedure can be the granting of a status, the refusal of status, or a referral by the BVwG back to the BFA for further investigations and a re-examination of the case. Hearings at the Court are public, but the public may be excluded on certain grounds. Decisions of the BVwG are published on the legal information website of the Federal Chancellery.\textsuperscript{32}

Statistics on the number of appeals received and outcomes of decisions in 2017 were not provided by the BVwG. Media reported that the BVwG cancelled or amended at least 36\% of BFA decisions in 2017. In short this means that more than one third of negative decisions have been revised by the court.\textsuperscript{33}

**Onward appeal before the VwGH**

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

The new government has announced further restrictions in the asylum procedure, including the abolition of the onward appeal \textquotedblleft\textquotedblright extraordinary revision\textquoteright before the Administrative High Court. This has been criticised by the Federal Administrative Court and Constitutional Court as an undue departure from uniform rule of law standards in a particularly sensitive human rights area.\textsuperscript{34}

In case the asylum applicant seeks to challenge the decision of the BVwG and if he or she claims it is violating a right that is guaranteed by the constitution, he or she can appeal to the Constitutional Court within 6 weeks, after the ruling of the Federal Administrative Court has become final. Asylum seekers are informed of the possibility to address a complaint to the Constitutional Court in writing; the information is translated in a language the asylum seeker understands. In that context, it has to be mentioned that the ECHR is a part of Austria\’s constitutional law. Therefore the risk of violation of Articles 2, 3 or 8 ECHR could be claimed at the Constitutional Court, while the refusal of refugee status is not covered by the Court\’s competence. The appeal does not have automatic suspensive effect. Only very few decisions of the BVwG have been found unlawful by the Constitutional Court, and in those cases mainly because the decision was found extremely arbitrary to the extent that it amounted to being unlawful.

Asylum seekers encounter difficulties to access constitutional appeals due to a submission fee of about €240. Furthermore, asylum seekers are not heard in person before the Constitutional Court, which rather requests written statements from the BVwG.

\textsuperscript{31} VwGH Ro 2014/21/0047, 22 May 2014

\textsuperscript{32} Decisions of the Federal Administrative Court are available at: http://www.ris.bka.gv.at/Bvwg/. However, according to the General Administrative Procedures Act, decisions may not be made public if it is necessary for reasons of public order or national security, morality, the protection of children or the private life of the asylum seeker or for the protection of a witness.

\textsuperscript{33} Kurier, \textquoteleft Asylverfahren: Jeder dritte Negativbescheid ist falsch\textquoteright, 7 February 2018, available in German at: http://bit.ly/2G6K5tc.

\textsuperscript{34} VwGH, \textquoteleft Verwaltungsgerichtshof spricht sich gegen den geplanten Ausschluss der außerordentlichen Revisionen in Asylverfahren aus\textquoteright, 19 December 2017, available in German at: http://bit.ly/2oLnL22.
Legal assistance

Legal assistance at first instance

During the regular procedure at the BFA, asylum seekers are offered free legal advice at the branch offices of the BFA. Asylum seekers have to travel to the BFA, which may be difficult when their place of residence is far away from the office or in remote areas.

This legal advice is funded by the Asylum, Migration and Integration Fund (AMIF) and co-funded by the Ministry of Interior. One association, Verein Menschenrechte Österreich, covers legal advice in 6 out of 9 BFA branch offices and also offers counselling at its offices in the federal states. Information on the number of consultation hours funded has been made public for the period 1 July 2015 to 31 December 2016. Verein Menschenrechte Österreich received funding for 20,744 consultation hours, while Caritas offered 9,184 consultation hours in the same period.35

This offer of free legal advice does not meet the needs of asylum seekers, however. Verein Menschenrechte Österreich, which currently receives most of the funding for legal assistance in the first instance procedure,36 is not regarded as very helpful or committed to the protection of the rights of asylum seekers due to its cooperation with the Ministry of Interior.37 For instance, the call for AMIF proposals mentions that legal advice provision should be organised in cooperation with the authorities. Furthermore, these legal advisers have to inform asylum seekers about voluntary return assistance and send asylum seekers to voluntary return projects (which are 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 seekers, but this resource is limited and may not be accessible for asylum seekers living in remote areas. The founder and Director of the organisation has met criticism with the argument that challenging negative decisions has no prospect of success. In addition, the organisation takes a different approach from others, holding that not everyone seeking asylum is entitled to it. However, the task of a legal advisor and/or representative is to represent a client rather than judge in appeal proceedings.38

The tasks are prescribed in the call for AMIF proposals: providing information or assistance for administrative or legal formalities and providing information or advice on possible outcomes of the asylum procedure including voluntary return. One of the goals of legal advice must also be to avoid asylum applications without positive perspective. The requirement to provide advice on return as a condition for submitting a project for legal advice under AMIF funding, as was the case under the European Refugee Fund (ERF), has been criticised by NGOs.39

Legal advisers are usually not present during interviews at first instance, except where they are authorised by the asylum seeker for legal representation. According to the information available to Asylkoordination, legal advisers of Verein Menschenrechte Österreich do not accept to act as legal representatives 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.

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Legal assistance in appeals

When a negative decision is issued, a decision providing for the assignment of a legal counselling organisation is also issued. Such organisation must advise the asylum applicant for free. Yet the asylum applicant may also opt to contact an NGO offering free legal advice to asylum applicants.

The system of free legal aid for the appeal was introduced by amendment of the Asylum Act in 2011 and entered into effect on 1 October 2011. Two organisations, ARGE Rechtsberatung (Diakonie and Volkshilfe) 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. Legal advisers shall be present at hearings before the Administrative Court if the asylum seeker wishes so. Based on procedural guaranties in accordance with the rule of law and respective EU law, asylum seekers should be able to make effective use of their right to legal advice, according to a ruling of the Higher Administrative Court.

Although the role of the legal adviser in such a hearing was unclear following the 2015 amendment, the Constitutional Court clarified on 9 March 2016 that legal advisers who are summoned to the hearing at the Court have to represent the asylum seekers before the Court, if applicants wish so. Asylum seekers may be represented by NGOs, or pay themselves for a private lawyer.

Financial compensation for legal advice ordered by decree seems to be insufficient. The refunding rate per case is €221.55 (excluding VAT) including all other costs (overhead, travel expenses, interpretation). This flat rate is reduced by 25% when the organisation has provided legal advice in asylum and aliens law proceedings in more than 4,001 cases during the year and by 35% when legal advice was provided to more than 7,000 clients. 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 of the organisation avoiding to get in contact with asylum seekers to keep the number of clients below the mark of 4,000 or 7,000. No extra or increased remuneration is granted for cases that are more time-consuming such as unaccompanied children, abused women or other heavily traumatised asylum seekers, negatively affecting the quality of legal counselling provided accordingly. NGOs have long criticised compensation as being too low for providing good standards of legal assistance.

An additional compensation of €159.58 is paid for legal representation in hearings before the BVwG.

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

Legal advisers have to decide whether to help asylum seekers to write an individual appeal (which must be written in German) and assist them with regard to all procedural requests in the appeal procedure. Asylum seekers have no choice as to which organisation will be responsible for

40 BGBl I Nr. 38/2011.
41 Article 52(2) BFA-VG.
42 VwGH, Decision Ro 2016/18/0001, 3 May 2016.
44 See e.g. the AMIF-funded project of Caritas Austria, ‘Representation at hearings before the Federal Administrative Court’, available in German at: http://bit.ly/1OqS5Sr.
providing legal assistance to them. Joachim Stern reports the findings of a short evaluation of decisions of the BVwG in the case law database between 1 April 2014 and 1 April 2016. The evaluation found 139 procedures before the Court with legal representation of the asylum seekers by ARGE Rechtsberatung and 4 cases with legal representation by Verein Menschenrechte Österreich.\footnote{J Stern, ‘Verfahrenshilfe und Rechtsberatung – Neue Entwicklungen und alte Fragen’ in C Filzweiser and I Taucher (eds), Asyl- und Fremdenrecht Jahrbuch 2016 (NWV 2016), 151-168.} This evaluation shows that asylum seekers who are entitled to receive legal advice by Verein Menschenrechte Österreich are in most cases not represented by this organisation.

In 2017, however, NGOs observed improvements in the system of legal advice. The Federal Chancellery evaluated several appeals prepared by Verein Menschenrechte Österreich,\footnote{Federal Chancellery, Reply to parliamentary question 12783/J, 21 June 2017, available in German at: http://bit.ly/2o0oo6R.} among which the case of an 18-year-old Afghan assisted by the organisation who had submitted only three lines in poor German against his deportation to Afghanistan was raised by the media.\footnote{Salzburger Nachrichten, ‘Bundeskanzleramt prüft Vorwürfe gegen Asylverein’, 20 April 2017, available in German at: http://bit.ly/2EnU94z.} It seems that the allegation of insufficient quality in the appeal led to an improvement in the legal assistance provided by Verein Menschenrechte Österreich.

One project run by Caritas Austria offers assistance during the hearing before the Federal Administrative Court, but this resource is limited and therefore only a certain number of cases can be assisted. AMIF funding for the period 2017-2019 was not granted any longer but the project continues on a smaller scale with alternative funding.

Besides this free legal advice funded by the state, NGOs help asylum seekers lodging appeals and submitting written statements, accompany them to personal hearings at the Federal Administrative Court and may act as legal representative. 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” is not foreseen with regard to legal assistance at the appeal stage. Legal assistance free of charge is provided in case of the rejection of a subsequent asylum application on res judicata grounds too.

The Constitutional Court and the Administrative High Court apply a merits test and tend to refuse free legal aid, if the case has little chance of succeeding.

**To 5) Dublin procedure:**

**Dublin statistics: 2017**

<table>
<thead>
<tr>
<th>Outgoing procedure</th>
<th>Incoming procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Requests</td>
<td>Transfers</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>10,490</td>
</tr>
<tr>
<td>Italy</td>
<td>3,347</td>
</tr>
<tr>
<td>Germany</td>
<td>1,763</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>1,490</td>
</tr>
</tbody>
</table>

Source: Ministry of Interior, 26 January 2018.
Partial statistics on the application of the Dublin Regulation during the entire year 2017 were made available by the Ministry of Interior. Austria issued 10,490 outgoing requests and implemented 3,760 transfers. No information has been made available for the main countries receiving outgoing transfers, or the incoming transfers to Austria.

**Application of the Dublin criteria**

If the special regulation due to threats to public security and order comes into effect (see Access to the Territory), third-country nationals will be returned to neighbouring countries. Since it will not be possible to lodge an asylum application, this will completely contravene the Dublin system.\(^\text{50}\) Christian Filzwieser, judge at the Administrative Court, has doubted whether Austria’s neighbouring countries will agree to take persons back under such conditions, whereas under the Dublin III Regulation they are obliged to take charge or take back.

Austria applies the Dublin procedure systematically and, where it proves impossible to transfer an asylum seeker to one country, examines the criteria of the Regulation to determine whether the person can be sent to another country.\(^\text{51}\)

**Documentation and entry**

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 he or she admits that he or she entered the European Union via another Member State or if there is any other suspicion or circumstantial evidence which indicates that he or she 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). Although there are other grounds applicable for determining Member State responsibility under the Dublin III Regulation, these are the most common grounds applied in Austria.

The Administrative High Court (VwGH) has recently interpreted the criteria on documentation and irregular entry in the context of the Western Balkan route, during the period in 2015-2016 where transit through the countries of the route was facilitated by national governments. In relation to a Dublin transfer to Croatia, the VwGH held on 16 November 2016 that procedures concerning asylum seekers who entered Austria during the period of facilitated transfer should be temporarily suspended,\(^\text{52}\) in anticipation of a preliminary ruling of the Court of Justice of the European Union (CJEU) following a Slovenian Supreme Court reference on whether the mode of entry of these persons can be considered as irregular entry under Article 13 of the Dublin III Regulation.

After the CJEU ruling in *Jafari*,\(^\text{53}\) which found that the state-organised transit through the Western Balkan route qualified as “illegal entry” under Article 13 of the Regulation, the VwGH dismissed the appeal. The Court did not indicate that Austria applied the discretionary clauses in these cases.\(^\text{54}\)

**Family unity**

The BFA has put forward remarkable arguments in the context of family reunification under the Dublin Regulation. In the case of an unaccompanied child granted protection in Austria, the Greek Asylum Service submitted a “take charge” request for the parents to be transferred from Greece to Austria. The BFA refused responsibility on the ground that the parents had deliberately accepted the separation from their minor child. Crucially, the rejection of such requests is not considered a formal decision which may be legally challenged before the BVwG. Requests from Greece are also

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\(^\text{52}\) VwGH, Decision Ra 2016/18/0172, 16 November 2016.


\(^\text{54}\) VwGH, Decision Ra 2016/19/0303, 20 September 2017.
handled very slowly, resulting in the takeover by Austria not being decided after one year. According to statistics from the Greek Asylum Service, Austria received 465 requests but only accepted 216 throughout 2017.\footnote{Greek Asylum Service, Dublin statistics, December 2017.}

In 2017, the VwGH examined the question of whether an unaccompanied child could stay in Austria, whilst Italy had been determined as responsible for his family members. Whereas the BVwG had referred to the sovereignty clause of Article 17 of the Dublin Regulation in order to prevent a violation of the right to private and family life, the VwGH stated that Article 11 of the Dublin Regulation prevailed in order to ensure the unity of the family and the best interests of the child.\footnote{VwGH, Decision Ra 2016/20/0384, 22 June 2017.}

To prove 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. Austria requires the original documents, where available, to be sent for verification and does not leave such verification to the other Member States.

DNA tests may be ordered to provide proof of family links but these are not required at the moment. DNA tests have to be paid by the asylum seeker. If a DNA test has been suggested\footnote{It is not possible for the BFA to impose a DNA test. The authorities have to enable such testing, according to Article 13(4) BFA-VG.} by the BFA or the Administrative Court and family links have been verified, asylum seekers may demand a refund of the costs from the BFA. The issue of DNA tests was discussed in the context of a legislative reform affecting Family Reunification but was ultimately not included in the reform.\footnote{Fremdenrechtsänderungsgesetz 2017 – FrÄG 2017, 18 October 2017, available at: http://bit.ly/2Cel0Ku.}

\textit{Unaccompanied children}

Following the judgment of the CJEU in \textit{M.A.} in relation to Article 8(4) of the Dublin III Regulation,\footnote{CJEU, Case C-648/11, M.A. v. Secretary of State for the Home Department, Judgment of 6 June 2013.} for asylum applications lodged by unaccompanied children, the BFA/EAST has ordered age assessments even in cases where there are no reasons for doubts in regard to the age of the asylum seeker. Age assessments were ordered in 2,252 cases in 2017 and 867 in 2017. 59\% of age assessments in 2016 and 61\% of age assessments in 2017 confirmed the minority of the applicant.\footnote{Information provided by the Ministry of Interior, 26 January 2018.}

In one case concerning a transfer to Hungary, the BFA submitted that the deadline for replying to a request is suspended until age assessment is conducted. The VwGH disagreed, however, and ruled that the deadline had expired.\footnote{VwGH, Decision Ra 2017/19/0081, 22 November 2017.}

\textit{The dependent persons and discretionary clauses}

\textit{Dependent persons}

During a Dublin procedure with Italy, the Federal Administrative Court emphasised that Articles 16 (Dependent persons) and 17 (Discretionary clauses) of the Dublin III Regulation determine separate requirements and cannot be reduced to the meaning of Article 8 ECHR. Italy agreed to the Austrian request to take charge of the asylum application only after Austria made several strong protests due to the fact that Italy had already issued a Schengen visa. The asylum seeker in question was over 60 years old and, because of his Chechen origin, considered to be very old. In addition, the asylum seeker suffered from a serious illness and a disability which suggested that he relied on...
support from his son who is legally residing in Austria. The Administrative Court found the decision unlawful and reverted the case back to the first instance authority because Article 16(1) of the Regulation had not been sufficiently considered by that authority. The Court noted, in addition, that Article 17(2) could also be relevant in this case because, due to Chechen culture, the support of the son for his old parents is more likely to be accepted than foreign support.\(^{62}\)

This argumentation can be found in another decision of the Court in the case of a single Afghan mother who sought asylum with a small child and a new-born baby. She had been raped and was suicidal. The judgment held that the authorities should examine which female relatives, living in Austria as recognised refugees, could support her by taking care of the children. Furthermore, the help of females of a family among themselves could be preferred to foreign support based on the applicant’s cultural background.\(^{63}\)

The same argumentation led to the withdrawal of a Dublin decision regarding an Egyptian asylum seeker whose sister required support for her five under-age children after the death of her husband.\(^{64}\)

A further Dublin decision was regarded as unlawful because a Chechen asylum seeker attempted suicide for the second time after enactment of the notice of transfer to Poland. Therefore, her demand for care and the willingness of her sister, who is living in Austria with refugee status, to take care of her should be examined. Due to the recommendation by a specialist to refrain from a transfer to Poland, it would also be a possibility to make use of the sovereignty clause.\(^{65}\)

**Humanitarian clause**

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

**Sovereignty clause**

The asylum applicant has the legal right to request the asylum authorities to implement the sovereignty clause. The Constitutional Court has ruled, on the basis of case law from the European Court of Human Rights (ECtHR), that even in case of responsibility of another Member State under the Dublin Regulation, the Austrian authorities are nevertheless bound by the ECHR.\(^{66}\) This means that, in case of a risk of a violation of human rights, Austria has a duty to use the sovereignty clause. This decision is applicable according to Articles 2 and 3 ECHR as well as Article 8 ECHR following an interpretation consistent with the constitution.

However, the assessment of risks of human rights violation warranting for use of sovereignty clause need be conducted in a manner that does not unreasonably delay the examination of the application. The principle that admissibility procedures should not last too long was reflected in a decision of the Administrative Court. A Chechen family had applied for asylum in Poland, Austria and Switzerland by submitting consecutive applications since 2005. One family member was severely traumatised. Switzerland decided on the merits of the case and issued a deportation order before they re-entered Austria. The Court reverted the procedure back to the 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 Article 3 ECHR through chain deportation. For one family member, the risk of suicide was obvious according to expert statements. The Court, referring to the judgment of the CJEU in the case of \textit{NS & ME.}\(^{67}\) held that the long duration of the admissibility procedure has to be taken into consideration when determining


\(^{63}\) BVwG, Decision W 149 2009673-1, 20 June 2014.

\(^{64}\) BVwG, Decision W149 2001851-1, 3 July 2014.

\(^{65}\) BVwG, Decision W185 2005878-1, 2 July 2014.


\(^{67}\) CJEU, Joined Cases C-411/10 NS v Secretary of State for the Home Department and C-493/10 ME v Minister for Justice, Equality and Law Reform, Judgment of 21 December 2011, para 98.
the Member State responsible for examining the asylum application and that applying a return procedure in such cases might be more effective.\textsuperscript{68}

The sovereignty clause has to be applied in the case of very vulnerable asylum seekers to prevent violations of Article 3 ECHR (Article 4 EU Charter). In the case of a refugee from Syria who arrived in Italy in 2013, where he was fingerprinted, but immediately continued to Austria, the Administrative Court agreed that the situation in his country of origin and his state of worry and uncertainty regarding his wife and three small children led to an exceptional psychological state with the consequence of several stays in hospital.\textsuperscript{69}

In September 2015, in the case of an Afghan mother with 6 minor children had applied for asylum in Hungary in September 2014 and shortly after in Austria too, the Administrative High Court ruled, that due to the change of the situation in Hungary, the presumption of safety is rebutted. The BVwG should have answered the question, whether systemic deficiencies exist in Hungary, and the sovereignty clause should be applied to prevent a violation of Article 3 ECHR / Article 4 of the EU Charter.\textsuperscript{70}

In a ruling of January 2017 concerning the transfer of a family including two children to Croatia, the BVwG found that it was irrelevant that the adult brother was not legally responsible for the custody of his minor siblings. As separation of the adult brother from his minor siblings would constitute an unacceptable interference with the right to family life and the children’s well-being, the application of the sovereignty clause was ordered.\textsuperscript{71}

In December 2017, the BFA successfully appealed a decision of the BVwG concerning an unaccompanied child who had been allowed to remain in Austria under the sovereignty clause, while his younger brother was in Bulgaria. The VwGH ruled that the use of the sovereignty clause to prevent a violation of Article 8 ECHR presupposes a correct determination of Austria’s responsibility. The Corut found that, if the close relationship between the two brothers would result in Austria not being responsible for the application of the elder brother, then the reference to the sovereignty clause by the BVwG to prevent an Article 8 ECHR violation lacked legal basis.\textsuperscript{72}

In another case, the BFA appealed to the VwGH against a decision to transfer a Chechen family to Poland, where the father had already applied and passed the admissibility procedure in Austria. The VwGH found that the applications of the spouse and children should be admitted and the sovereignty clause used in order to preserve family unity.\textsuperscript{73}

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

**Procedure**

Austria has not passed any national legislation to incorporate the Dublin III Regulation, as it is directly applicable, but refers to it in Article 5 AsylG. This provision, together with Article 2(1)(8) BFA-VG, states that the authorities issue an inadmissibility decision when Austria is not responsible for conducting the asylum procedure based on the Dublin III Regulation.\textsuperscript{74} In the same decision, the authorities have to declare which Member State is responsible for the examination of the asylum application on its merits.


\textsuperscript{70} VwGH, Decision Ra 2015/18/0113 to 0120, 8 September 2015.


\textsuperscript{72} VwGH, Decision Ra 2017/01/0068, 5 December 2017.

\textsuperscript{73} VwGH, Decision Ra 2015/18/0192 to 0195, 15 December 2017.

\textsuperscript{74} Article 2(1)(8) BFA-VG.
The law also states that there should also be an inadmissibility decision in case another Member State is responsible for identifying which Member State is responsible for the examination of the asylum application on its merits, that is in cases where the applicant is no longer on Austrian territory.\(^75\)

There are 3 initial reception centres (EAST) which are responsible for the admissibility procedure: one located in **Traiskirchen** near Vienna, one in **Thalham** in Upper Austria and one at the **Airport Vienna Schwechat**. These are specialised in conducting outgoing Dublin procedures, although all BFA branch offices conduct those now.

A central Dublin department in Vienna is responsible for supervising the work of the initial reception centres. Moreover, it conducts all Dublin procedures with regard to incoming Dublin requests (requests to Austria to take back or to take charge of an asylum seeker by another Member State) and, in response to a request of the Aliens Police department, all consultations with Member States concerning foreigners who have not applied for asylum.

Once an application for asylum is made, a preliminary interview by the police (*Erstbefragung*) takes place on the circumstances of entering Austria and the first country of entry in the EU, the personal data and – in a very brief manner – also on the reasons why an applicant left his or her home country. The asylum applicant is fingerprinted and photographed. Fingerprints are taken from all asylum seekers older than 14 years of age. No problems have been reported with regard to the taking of fingerprints. In case an applicant refuses to be fingerprinted, the appeal against a negative decision may not benefit from suspensive effect,\(^76\) but this is not relevant to the Dublin procedure.

The asylum seeker gets a green “procedure card” after the public security officer has consulted the BFA about the further steps in the asylum procedure: admittance to the regular procedure or admissibility procedure. Asylum seekers are transferred or ask to go to the initial reception centre when a Dublin procedure is initiated. The green card permits the asylum seeker to stay in the district of the initial reception centre.

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 experience of NGOs in previous years, consultations with other Member States did not take place if there was no concrete evidence for the responsibility of another Member States. This practice changed from 2015 onwards. Requests were systematically addressed to Slovenia, which systematically responded that the relevant persons were not known. Requests were also sent to Croatia based on the assumption that applicants crossing through the Western Balkan route entered the EU for the first time through Croatia.

The VwGH has determined that the deadline for an outgoing request starts running from the moment the BFA receives the report of the *Erstbefragung*, in line with the CJEU ruling in *Mengesteab*.\(^77\) The case before the VwGH concerned delays in the *Erstbefragung*, as the asylum seeker had applied for asylum in November 2015 but the preliminary interview only took place in January 2016 and the request was issued in March 2016.

The VwGH submitted a reference for a preliminary ruling to the CJEU on 24 November 2017, to assess whether it is possible to accept a “take charge” after the expiry of the deadline where the request has previously been rejected, if it is subsequently determined that the requested Member State is responsible.\(^78\)

\(^{75}\) Article 5(2) AsylG.

\(^{76}\) Article 18 BFA-VG.


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 EAST.

Within 20 calendar days after the application, the BFA has to either admit the asylum applicant to the in merit procedure or inform the applicant formally about the intention to issue an inadmissibility decision on the ground that another state is considered responsible for the examination of the asylum claim. After the requested Member State accepts responsibility, the asylum seeker is given the possibility to be heard. Before that interview, he or she has an appointment with a legal adviser who must be present at the interview. Legal advisers can also access documents in the case file.

**Individualised guarantees**

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

In April 2015, in the case of a Syrian father with his underage daughter, the BVwG allowed the appeal and stated that the father is a vulnerable person due to his hearing defect. A guarantee from Italy should have been requested. In this case his already adult son has received asylum status in Austria. Therefore, further investigation of the question is necessary if the transfer would violate of Article 8 ECHR. However, the BFA has deemed that the obligation to obtain guarantees from Italy on the basis of the Tarakhel v. Switzerland judgment of the ECtHR has been fulfilled following the Italian Ministry of Interior’s Circular letters of 8 June 2015 and 10 February 2016 to all Dublin Units, stating the projects where Dublin returnees would be accommodated. The Constitutional Court pointed out in a ruling of 30 June 2016, in relation to the Circular letter and other procedural steps, that an individual assurance for a vulnerable asylum seeker would have been necessary before implementing a transfer.

The Constitutional Court has also clarified in the context of transfers to Hungary that, given the particular risks faced by vulnerable persons in countries where serious doubts arise as to the provision of reception conditions, it is necessary for Austria to establish more precisely how the asylum seeker would be accommodated and whether his or her special needs would be met.

During the last months of 2016, the BFA requested guarantees from Croatia in limited cases prior to transferring vulnerable groups, including families with young children and persons with severe illness in need of specialised health care, following a number of successful Rule 39 requests to the ECtHR for interim measures against transfers. However, the ECtHR deemed the obligation to obtain individual guarantees as fulfilled after Austria received a letter from the Croatian Dublin

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Unit with a general statement of the applicable legal framework and arrangements made by the authorities for health care in reception centres.\footnote{For a copy of the letter and more information, see ECRE, Balkan Route Reversed: The return of asylum seekers to Croatia under the Dublin system, December 2016, available at: \url{http://bit.ly/2kaeKPB}, 32-34 and Annex IV.}

**Transfers**

Transfers are normally carried out without the asylum applicant concerned being informed of the time and the location he or she are transferred to before the departure from Austria, giving him or her no possibility to return to the responsible Member State voluntarily. There continue to be reports of the BFA informing receiving countries of a Dublin transfer on very short notice, in some cases no more than a week, even for asylum seekers requiring special care.\footnote{ECRE, Balkan Route Reversed: The return of asylum seekers to Croatia under the Dublin system, December 2016, 33.} It could be argued that this practice is questionable under Recital 24 and Article 26(2) Dublin III Regulation according to which a transfer decision must contain the details of the time carrying out the transfer and “if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means.”

In case of an enforced transfer to another EU Member State, the police first apprehends the asylum applicant and transfers him or her to a detention centre (see Detention of Asylum Seekers).\footnote{In some cases, asylum seekers have reportedly been apprehended by the police during the night: Ibid.} There is also a special detention centre for families in Vienna. The asylum applicant has to stay there until the deportation takes place, usually after one or two days. Under the Dublin procedure, asylum seekers can be held for up to 48 hours without detention being specifically ordered. In a less coercive measure, instead of detention asylum seekers may be ordered to stay at a certain place (such as a flat or a reception centre).\footnote{Article 77(5) FPG.} 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.

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

The BFA reported 3,760 Dublin transfers carried out in 2017, an increase from 2,582 transfers in 2016.\footnote{Information provided by the Ministry of Interior, 26 January 2018.}

**Personal interview**

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.\footnote{Article 24(3) AsylG.} If the facts are established, and a decision can be taken, the fact that the asylum seeker has not been interviewed yet by BFA or by the BVwG shall not preclude the taking of a decision. In practice this exception is not applied very often.\footnote{See Asylum Court, S6 430.113-1/2012, 5 November 2012: the Court found that the procedure was unlawful in the case of an unaccompanied minor asylum seeker from Afghanistan, who was interrogated by the police without the presence of his legal representative or a person of trust and disappeared shortly after. The Federal Agency for Aliens’ Affairs and Asylum did not submit the minutes of the first interrogation or give the legal representative the opportunity to be heard before rendering the rejection of the application. However, ct. the negative decision of the Asylum Court in the case of an unaccompanied minor: S2 429505-1/2012, 04 October 2012.} Such relevant facts for a decision in Dublin cases could be a Eurodac hit and the acceptance of the requested Member State to take back the asylum seeker.

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) AsylG, according to which the asylum seeker must have at least 24 hours to prepare for the hearing with the assistance of the legal adviser.

In Dublin procedures, the rules and practice are the same as in the Regular Procedure: Personal Interview.

The record of the Dublin consultation between Austria and the requested state(s) are made available to the asylum seeker and the legal adviser. Sometimes, the requested state has not received all relevant information. One of the judges of the Federal Administrative Court mentioned in a decision regarding a Chechen father whose son was legally residing in Austria that Italy, which had issued a visa for the couple from Chechnya, finally agreed to take charge but was not informed about the severe illness and the disability of the asylum seeker who would rely on the care of his son.\(^91\) The Court noted that the dependency clause should have been applied in this case.

**Appeal**

As Dublin cases are rejected as inadmissible, the relevant rules detailed in the section on Admissibility Procedure: Appeal apply.

The time limit within which the appeal against the BFA’s inadmissibility decisions (including Dublin decisions) must be lodged is 4 weeks. The appeal has no suspensive effect, unless the Federal Administrative Court (BVwG) grants suspensive effect within 7 calendar days after the appeal reaches the court. The expulsion order may not be executed before the time limit for granting suspensive effect expires. The BVwG has to decide *ex officio* if the appeal must be given suspensive effect. In many Dublin cases, asylum applicants never receive a final decision because they are transferred back to the responsible Member State before the Court’s decision.

The BVwG can either refuse the appeal or decide to refer it back to the BFA with the instruction to conduct either an in-merit procedure or investigate the case in more detail (for instance if the Court finds that the BFA has not properly taken into account family ties or that the assessment of the situation in the responsible Member State was based on outdated material or was insufficient with regard to a possible violation of Article 3 ECHR). Usually, the Court decides on the basis of the written appeal and the asylum file without a personal hearing of the asylum seeker.

Asylum seekers whose appeals were given a suspensive effect or were 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 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 also allowed to re-enter.

**Legal assistance**

Free legal assistance during the admissibility procedure was implemented to compensate for the restricted movement of asylum seekers during this type of procedure, as they are obliged to stay within the district of the EAST. 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 €1,000. In case of repeated violation of the restricted residence (*Gebietsbeschränkung*), the fine may amount to €5,000 and even detention may be ordered in case the asylum seeker is unable to pay the fine. A violation of the restriction of movement could furthermore be a reason for pre-expulsion custody. This punishment is not applied very often in practice. The second reason why free legal assistance is provided at this stage of the procedure is

\(^91\) BVwG, Decision W149 209627-1, 21 July 2014
the lack of suspensive effect of an appeal in admissibility procedures, which justifies the incorporation of additional safeguards in the first instance procedure.

As discussed in the section on Regular Procedure: Legal Assistance, the quality of the advice provided by legal aid counsels is problematic because they lack time and because asylum seekers do not trust them, as they are considered being too closely linked to the BFA. They have their offices within the building of the BFA and their task is only to provide objective information about the procedure to the asylum seekers; not to assist them in the procedure and defend their interests.

In case of unaccompanied asylum seeking children, the appointed legal adviser is at the same time their legal representative during the admissibility procedure. Without consent of their legal adviser they are not able to act, for example to choose a legal representative by themselves or to submit an appeal in case the legal adviser fails to do so. Here too, the quality of the assistance provided is considered to be problematic at times. NGOs report that in some cases the legal representative has refrained from lodging an appeal in disregard of the best interests of the child.

Although Article 29(4) AsylG provides that free legal assistance shall be provided to all asylum seekers at least 24 hours before the hearing on the results of the evidentiary findings determining the responsible Member State under the Dublin Regulation, legal advisers 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 adviser must be present at the interview held to give the asylum seeker an opportunity to be heard. At the interview in relation to Dublin with the BFA, the asylum seeker together with the legal adviser may submit written statements with regards to the situation in the Member State deemed responsible or make requests for additional investigations, but they are not allowed to ask questions; this is usually respected by the legal advisers.

**Suspension of transfers**

Under the Dublin III Regulation, all EU Member States are considered safe where the asylum applicant may find protection from persecution. There is an exception in case it is obvious that there will be a lack of protection, especially if it is well-known to the authorities, or if the asylum applicant brings evidence that there is a risk that he or she will not be protected properly. This real risk cannot be based on mere speculations, but has to be based on individual facts and evidence. This statement of risk has to be related to the individual situation of the asylum applicant.

Country reports from various sources such as AIDA, UNHCR, the US Department of State, Amnesty International, Eurostat, as well as information from ACCORD and Austrian liaison officers are taken into consideration, but the threshold for declaring that a country is not in line with its obligations under the acquis is usually the establishment of an infringement procedure launched by the Commission against that country. Recently, letters of UNHCR claiming protection gaps and difficulties to access the asylum procedure have gained more relevance.

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

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

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

**Hungary:** Requests to Hungary continue to be issued but transfers are not carried out. Following the legal reform passed in March 2017, as a result of which all asylum seekers are systematically detained in Hungary, no transfers to Hungary have taken place. Nevertheless, the BVwG continues to dismiss appeals against transfer decisions to Hungary in 2017.

A particular issue relates to persons living in Burgenland with a pending asylum procedure in Austria. These people often take the train to Vienna, which passes through Hungary. They are arrested on the train by the Hungarian police and deported to Serbia, even though it should be clear that the trains come from Austria and the persons concerned hold valid documentation.

**Italy:** The majority of outgoing requests – 3,347 out of 10,490 – concerned Italy in 2017. In relation to Italy, the BFA deems that the obligation to obtain guarantees from Italy on the basis of the *Tarakhel v Switzerland* judgment of the ECtHR has been fulfilled following the Italian Ministry of Interior’s letters of 8 June 2015 and 10 February 2016 to all Dublin Units, stating the projects where Dublin returnees would be accommodated. The Constitutional Court pointed out in a ruling of 30 June 2016, in relation to the Circular letter and other procedural steps, that an individual assurance for a vulnerable asylum seeker would have been necessary before implementing a transfer. Nevertheless, the BVwG has largely allowed the BFA to carry out Dublin transfers to Italy throughout 2017. The Constitutional Court also found that the situation of asylum seekers in Italy has improved and that special safeguards are no longer necessary.

**Bulgaria:** Transfers to Bulgaria are carried out by the BFA and generally upheld by the BVwG. No objections are raised for single asylum seekers or families. However, higher courts have taken a different line. In one case, the Constitutional Court deemed a transfer unlawful on the basis of the vulnerability of an Iraqi family with young children and the deterioration of reception conditions in Bulgaria. The VwGH has also found that the BFA must make a thorough assessment of the conditions in Bulgaria before transferring families.

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

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

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93 See also VfGH, Decision E 1486/2017, 14 June 2017.
94 See e.g. BVwG, Decision W192 2142919-1, 7 August 2017; W243 2170660-1, 25 September 2017.
97 See e.g. BVwG, Decision W243 2140308-1, 27 January 2017; W144 2152033-1, 18 April 2017; W205 2144676-1, 6 June 2017; W192 2162712-1, 13 July 2017; W153 2166538-1, 22 September 2017.
99 See e.g. BVwG, Decision W165 2174429-1, 23 November 2017; W241 2178020-1, 7 December 2017.
100 VfGH, Decision E 484/2017, 9 June 2017. See also VfGH, Decision E 86/2017, 24 November 2017.
101 VwGH, Decision Ra 2017/18/0039, 30 August 2017; Ra 2017/19/0100, 13 December 2017.
102 VwGH, Decision Ra 2017/01/0153, 20 June 2017.
The situation of Dublin returnees

Asylum seekers returning to Austria under the Dublin Regulation, and whose claim is pending a final decision, do not face obstacles if their transfer takes place within two years after leaving Austria. In this case, the discontinued asylum procedure will be reopened as soon as they request for it at the BFA or the BVwG. If a final decision has already been taken on the asylum application upon return to Austria, the new asylum application will be processed as a subsequent asylum application.

So far the BFA has not been requested to provide guarantees to other Member States prior to transfers.
C. Access to the procedure and registration

1. Access to the territory and push backs

Refusals of entry at the Italian and Slovenian borders

**Italian border:** In 2015, Italy, Germany and Austria agreed to common police controls in trains from Italy to Germany between the train stations Trentino and Brenner. Refugees without valid travel documents had to leave the train in Bozen. The government of South Tyrol installed a centre for refugees at the railway station at the Austrian-Italian border of Brenner.\(^{103}\) Italy started border controls in June 2015, reacting to a request from Germany, as reported by Der Spiegel.

Since August 2017, the Austrian army assist the police with controls on the territory, mainly involving inspection of lorries and trains by soldiers. Germany, Italy and Austria signed in November 2017 an agreement for controls which are already taking place in Italy.\(^{104}\) Nevertheless, the Italian police has reported that more migrants and refugees come to Italy from Austria – after coming to Austria via Slovenia – than *vice versa*. This mainly concerns Afghan and Pakistani nationals who arrive in Italy either because they have family members or *en route* to France and Switzerland.\(^{105}\)

**Slovenian border:** At the beginning of 2016, there were a lot of rejections at the Slovenian border. Out of 3,723 rejections, 3,225 concerned Slovenia where 2,246 persons were rejected in January 2016 and 775 in February 2016.\(^{106}\) It turned out that policemen at the border relied on interpreters with poor knowledge of the languages spoken by the people trying to enter.\(^{107}\) After the closure of the so-called Western Balkan route, however, the number of persons apprehended at the Slovenian border has significantly dropped.

There have been two dozen complaints against rejections which were partly upheld by the State Administrative Court (*Landesverwaltungsgericht*, LVwG) of Styria. The Court deemed it unlawful for refugees to be turned away despite their declaration of wanting to seek asylum in Germany or Austria, because these decisions were arbitrary.\(^{108}\) According to Article 14(2) of the Schengen Borders Code, a refusal of entry can only be done through a decision on well-founded grounds. Although refusal of entry documents were issued, the reasons for such rejections employed standard wording e.g. “no war area”, “no humanitarian reason”, or “just wants a better life.”

Special provisions to maintain public order during border checks

With a legal amendment which entered into force on 1 June 2016, “special provisions to maintain public order during border checks” were added to the Asylum Act.\(^{109}\)

The provision (discussed publicly as “emergency provision”), upon activation by a decree of the federal government, entails that asylum seekers no longer have access to the asylum procedure in Austria. Decisive for denying asylum applications is a maximum number, otherwise a ‘quota’, of asylum applications to be examined on the merits. For 2016 this number was set at 37,500

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\(^{109}\) Articles 36-41 AsylG.
applications and was not reached.\textsuperscript{110} For 2017 the limit was set at 35,000 applications and was not reached either. The limit for 2018 will be 30,000 applications.

The possibility of rejection at the border relies on the distinction between “making” and “lodging” an asylum application as per Article 6 of the recast Asylum Procedures Directive. After an application is made before a police officer at the border, or in a registration centre (\textit{Registrierstelle}) if the person is found to be irregularly on the territory, the Aliens Police will be able to reject the person at the border or to issue a return decision during the initial interview (\textit{Erstbefragung}).\textsuperscript{111}

Refusal to register an application is not possible where return would be incompatible with the principle of non-refoulement under Articles 2 and 3 ECHR, or with Article 8 ECHR.\textsuperscript{112}

An asylum seeker is not issued a decision ordering return, and cannot appeal against the refusal to have his or her claim examined. In such a case, the asylum seeker has no right to remain on the territory,\textsuperscript{113} therefore an appeal to the State Administrative Court (LVwG) does not have suspensive effect.\textsuperscript{114}

The amendment has been criticised by UNHCR and civil society organisations,\textsuperscript{115} as it enables police authorities rather than the BFA to deny a person access to the asylum procedure, without procedural guarantees or legal assistance, while an appeal can only be made after the expulsion has been carried out. The activation of the emergency provision also suspends the application of the Dublin Regulation.

2. Registration of the asylum application

An application for international protection can be made before an agent of the public security service or a security authority. Within a period of 48 hours after apprehension by the security authority – that may be extended to 72 hours – after the request was made, the first interrogation (\textit{Erstbefragung}) has to take place.\textsuperscript{1} All documents, including the minutes of the first interrogation, are sent to the asylum authorities, which will have to continue the procedure with the interview. The application is registered as soon as the security authorities have submitted the minutes of the interrogation and all the documents of the asylum seekers to the BFA’s branch office. Currently, applications are forwarded to the BFA without delay. In some cases, some public security offices do not provide correct information and send asylum seekers to the initial reception centre (EAST) of Traiskirchen to make an asylum application.

The application is lodged with the instruction of the branch office of the BFA to the police on the next steps. This could be the transfer of the applicant to EAST by the security authorities. Asylum seekers may otherwise be transferred to a dispersal centre (VQ) or helped to go there. Persons with legal stay (residence permit) must submit their asylum application at the public security service too. The BFA orders to show up before the branch office within 14 calendar days. Otherwise, the application will be terminated as being no longer relevant. Parents apply for their children born in Austria at the branch office of the BFA.

\textsuperscript{110} Out of a total, 42,073 asylum applications registered in 2016, only 27,254 were deemed to be under the responsibility of Austria: Ministry of Interior, Asylum Statistics December 2016, available in German at: \url{http://bit.ly/2k2N2Ue}, 3.

\textsuperscript{111} Article 38 AsylG.

\textsuperscript{112} Article 41(1) AsylG.

\textsuperscript{113} Article 39 AsylG.

\textsuperscript{114} Article 41(2) AsylG.

D. Guarantees for vulnerable groups

1. Identification

Screening of vulnerability

There is no effective system in place to identify asylum seekers in need of special procedural guarantees. During the admissibility procedure in the initial reception centre (EAST), asylum seekers are instructed in the written leaflets to state psychological problems to the doctor and the legal adviser. At the beginning of the interview, they are asked whether they have any health or mental problems that could influence their ability to cooperate in the procedure. Doctors qualified in psychology in the EAST are requested by the BFA to assess if the asylum seeker is suffering from a medically significant stress-related mental disorder as a result of torture or another event which prevents them from defending their interests in the procedure or entails for them a risk of permanent harm or long term effects.116

Victims of trafficking

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

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

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

According to information received, most affected persons in the asylum procedure are women from Nigeria.117

Age assessment of unaccompanied children

Most age assessments are ordered by the EAST during the admissibility procedure, because special safeguards in the Dublin III Regulation apply for unaccompanied children. Age assessments take place even after the application is admitted to the regular procedure. Due to the high number of ordered age assessments, it takes months to get the expert statements. The Dublin Unit starts consultations with other EU Member States with a notice that there is an ongoing age assessment. In the meantime, these child asylum seekers are admitted to the regular asylum procedure too. For

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116 Article 30 AsylG.
the time being, there are no severe delays to get the results of the medical examinations and new medical institutions are involved in age assessments, e.g. the University of Vienna.

It seems that age assessments are ordered systematically. In 2017, 1,751 unaccompanied children applied for asylum and 867 age assessments were conducted, of which 61% concluded on minority and 39% on majority. In 2016, out of 2,252 age assessments, 59% concluded on minority and 41% on majority.\footnote{Ministry of Interior, Reply to parliamentary question 11558/J, 21 March 2017, available in German at: \url{http://bit.ly/2nU4rz4}.}

A department of the BFA Lower Austria in Wiener Neustadt is known for its tendency towards negative decisions and for low quality of decisions. A lot of cases of unaccompanied minors are decided at that department.

Methods for assessing age

In the case of doubt with regard to the age of an unaccompanied asylum-seeking child, authorities may order a medical examination. Several methods might be used. According to the Asylum Act and decrees of the Minister of Interior (which are not public), age assessments through medical examination should be a measure of \textit{ultima ratio}. Other evidence to prove age should be verified first. If doubts remain after investigations and age assessment, the principle of \textit{in dubio pro minore} (the benefit of the doubt) should apply.\footnote{Article 13(3) BFA-VG.}

In practice these principles are not strictly applied, however. 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. The Human Rights Board (\textit{Menschenrechtsbeirat}), NGOs and the Medical Association criticise the age assessment methods used, in regard of their reliability and ethnic acceptance.\footnote{Human Rights Board, Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren, 2011; Stellungnahme der Ärztekammer, FPG 2010, 21 July 2009.} The age assessment examination states a minimum age and consists of three medical examinations: a general medical examination; an X-ray examination of the wrist and a dental examination by a dentist. If the X-ray examination of the wrist is not conclusive (i.e. it shows a high level of ossification), a further X-ray (CT) examination of the clavicle may be ordered.

In one case concerning a Gambian asylum seeker, who was a minor according to his birth certificate from the Gambia but had been determined to be an adult by Norway and Italy, and for whom the BFA expert opinion had given a probably age of 18.44 years but a possible age of 17.04 years at the time of his application, the VwGH applied the benefit of the doubt and ruled that the applicant should be assumed to be a child.\footnote{VwGH, Decision Ra 2017/18/0118, 27 June 2017.}

Challenging age assessment

Age assessments do not consist in an administrative decision but are an expert opinion – the outcome of the medical examination – that is communicated to the applicant. As a result, there is no possibility to appeal against their outcome. The question of whether or not it is possible to appeal the decision to declare an unaccompanied child an adult has been referred to the Constitutional Court (VfGH). In a ruling of 3 March 2014,\footnote{VfGH, Decision U 2416/2013-8, 3 March 2014.} the Court found that the declaration of the BFA that a person is of age and the consequent discharge of the legal representative may not be appealed during the first instance procedure. As a consequence, unaccompanied children who were erroneously declared to be adults have to continue the procedure without legal representation. An article by Daniela & Rainer Lukits presents the ruling of the Constitutional Court as
disappointing. The authors criticise the Court for setting out criteria that are not in line with effective legal safeguards and for misunderstanding the gap in legal protection which presents itself upon such a declaration that an applicant is adult.

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

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

2. Special procedural guarantees

Adequate support during the interview

Article 30 AsylG also states that consideration should be given to the asylum seekers’ specific needs in course of the procedure, although the concept of “adequate support” is not defined or described in the law. However, this does not seem to be applied in first instance procedures in practice. Usually the 15-month time limit for deciding on the application is long enough to gather evidence. In cases concerning unaccompanied children, the BFA often fails to issue a decision within 15 months.

If an asylum seeker bases the fear of persecution on infringements of the right to sexual self-determination, they should be interviewed by an official of the same sex, unless they request otherwise. In the procedure before the BVwG, this rule should apply only if asylum seekers have already claimed an infringement of their right to sexual self-determination before the BFA or in the written appeal. The Constitutional Court (VfGH) has ruled that a judge of the same sex has to decide on the appeal regardless of whether a public hearing is organised or the decision is exclusively based on the file. A similar provision for interpreters is lacking, however.

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

Exemption from special procedures

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

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126 Article 28(4) AsylG.
127 VwGH, Decision Ra 2007/19/0830, 19 November 2010.
128 VwGH, Decision Ra 2006/01/0355, 15 March 2010.
3. Use of medical reports

Asylum seekers undergo a medical examination in the EAST or a federal reception centre.1

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

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

The Administrative Procedures Act (AVG) requires the assessment of all relevant facts and imposes an obligation on the authorities to undertake all necessary investigations. Statements of the applicants have to be credible, persecution need not be proved and preponderant plausibility is sufficient. If the authorities have doubts on whether the applicant has been subjected to torture or other serious acts of violence, a medical examination may be ordered by the authorities. These examinations are paid by the state. Often asylum seekers submit expert opinions e.g. a report of the psychiatric department of a hospital where they have been treated or an opinion of a psychotherapist. In every federal state, an NGO provides psychotherapy for asylum seekers with treatment free of charge, funded by the AMIF, but capacities are not sufficient, clients often have to wait several months to start the treatment.

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

The Administrative High Court (VwGH) delivered a crucial decision in 2010 with regard to the consideration of medical evidence, in which it criticised the first instance authority for:

“[N]eglecting to take into account medical reports as proof of psychological conditions, which consequently deprived the applicants of an objective examination of contentious facts... The responsible authority has thereby judged the applicants' mental state without going into the substance of the individual circumstances.”2

A psychiatric opinion was taken into consideration, which concerned the need to treat the psychiatric illness. Post-traumatic stress disorder (PTSD), illusions and concentration difficulties were diagnosed, but the opinion did not bring evidence of how far those issues would influence the asylum seeker’s statements. Therefore the authority believed that the asylum seeker should remember the exact date of the events reported.

The established jurisprudence of the VwGH requires exhaustive reasoning to deny the causality between alleged torture and visible scars, including through an expert opinion indicating the likelihood of alleged torture causing the visible effects.3 In the same ruling, the Court repeats earlier jurisprudence to the effect that psychiatric illness has to be taken into account in regard to discrepancies that have been identified in the statements of an asylum seeker.

Medical reports are not based on the methodology laid down in the Istanbul Protocol.4
Legal representation of unaccompanied children

A legal representative is appointed as soon as an unaccompanied child applies for asylum. Contrary to adult refugees, unaccompanied minors have to apply for asylum in the initial reception centre (EAST). Unaccompanied children have no legal capacity to act by themselves in the procedure; nevertheless, they are under the same obligation to cooperate in the procedure as adults. Legal representatives have to be present at interviews organised by the BFA (and hearings at the BVwG).

During the admissibility procedure, the legal advisers (who are contracted by the Ministry of Interior) act as legal representatives of the unaccompanied asylum-seeking child. Legal advisers are either from Verein Menschenrechte Österreich or from ARGE Rechtsberatung. According to the Human Rights Board (Menschenrechtsbeirat), it is problematic that these legal advisers are only responsible for the asylum procedure and do not have whole custody of the child. Furthermore, legal advisers are not required to have special expertise on children.

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

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

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

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

Return advice is mandatory since 2016 and unaccompanied children are also advised to return to their country of origin. Legal representatives are not informed about this, as a file note is only available when the application for voluntary return has already been signed. 21 children, including from Afghanistan, Iran and Iraq, have returned voluntarily in 2017.

Unaccompanied children also have the duty to cooperate with family tracing in the country of origin or third countries, regardless of the organisation or person who is undertaking the tracing. Family tracing takes place on the basis of an official order of the BFA and is implemented by Verein Menschenrechte Österreich, which is also responsible for the legal representation of unaccompanied children in the admissibility procedure. It is evident that a conflict of interest arises in these cases, as the organisation acts on behalf of the BFA at the same time as it represents the interests of the child. It has also been reported that the conversation between the child and the family tracing

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129 Menschenrechtsbeirat, Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren, 2011.
130 VwGH, Decision Ra 2017/19/0068, 20 September 2017.
132 BVwG, Decision I403 2173192-1, 19 October 2017.
A counsellor takes place in the child’s mother tongue so that legal representatives are not able to follow. Children searching for family members can also contact the Red Cross.

The number of unaccompanied children seeking asylum in Austria has decreased from 8,277 in 2015 to 4,551 in 2016 and 1,751 in 2017:

<table>
<thead>
<tr>
<th>Country of origin</th>
<th>Number of applicants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Afghanistan</td>
<td>808</td>
</tr>
<tr>
<td>Pakistan</td>
<td>244</td>
</tr>
<tr>
<td>Nigeria</td>
<td>238</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,751</strong></td>
</tr>
</tbody>
</table>


Problems reported prior to 2016 relating to inaction and delays in the procedural treatment of unaccompanied children by the BFA have not been solved in 2017, although many special reception places for unaccompanied asylum seeking children have been opened, thus distributing the file to a branch office of the BFA. There are still unaccompanied children who arrived in Austria in the autumn of 2015 and have not yet received a first instance decision.
E. Subsequent applications

Subsequent applications are defined by the AsylG as further applications after a final decision was taken on a previous asylum application.\textsuperscript{133} If a further application is submitted while an appeal is still pending, the new application is considered as addition to the appeal. Different legal safeguards apply depending on the previous procedure (in-merit or Dublin procedure) and the time of submitting the application. Usually, a subsequent application is not admitted to the regular procedure and is rejected as inadmissible.\textsuperscript{134}

The Federal Administrative Court (BVwG) can either refuse the appeal or decide to revert it back to the BFA with the binding instruction to examine the subsequent asylum application either in a regular procedure or by conducting more detailed investigations.

Within the admissibility procedure, an interview has to take place, except in the case where the previous asylum application was rejected due to the responsibility of another Member State. Such interviews are shorter than in the first application and focus on changed circumstances or new grounds for the application. New elements are not defined by the law, but there are several judgments of the Administrative High Court that are used as guidance for assessing new elements.\textsuperscript{135}

Reduced legal safeguards apply in case an inadmissibility decision was taken within the previous 18 months (rejection is connected to an expulsion order and a re-entry ban of 18 months). In this case, there is generally no suspensive effect either for the appeal or for the application itself. In many cases the asylum applicant does not even undergo a personal interview except for the preliminary interrogation conducted by the police.\textsuperscript{136}

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 suspensive effect is not granted, the file has to be forwarded to the BVwG for review and the Court has to decide within 8 weeks on the lawfulness of not granting suspensive effect.\textsuperscript{137} The expulsion may be effected 3 days after the Court has received the file.

In certain cases, it might be necessary for the person concerned to lodge a subsequent asylum application, due to the inactivity of the authorities or the lack of another possibility to get a legal residence. Family and civil status may have changed since the final decision on the first asylum application, e.g. marriage or birth of a child, and due to the expulsion order issued as a result of that negative decision it is not possible for the person concerned to apply for a residence permit as family member of a legally residing person or of a person with protection status in Austria. A subsequent application for international protection would then include the question of a possible violation of Article 8 ECHR.

Moreover, in Dublin cases, if the asylum seeker has not been transferred to the responsible Member State after the rejection of their first application although another Member State was considered responsible, the asylum seeker will have to submit a new asylum application in Austria, which will be considered as a subsequent asylum application. Where it becomes clear that the situation has changed or the requested Member State does not accept the request for transfer, a regular procedure is initiated to assess the case on the merits.

\textsuperscript{133} Article 2(1)(23) AsylG.
\textsuperscript{134} Article 68 AVG.
\textsuperscript{136} Article 12a(1) AsylG.
\textsuperscript{137} Article 22(1) BFA-VG.
Asylum seekers sent back to Austria by other Member States 2 years after their file has been closed due to their absence have to submit a subsequent application too. The same applies if the decision has become final while the asylum seeker was staying in another Member State.

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

Asylum seekers who submit a subsequent application within 6 months after the previous application has been rejected are not entitled to Basic Care provisions; nevertheless they may receive Basic Care during the admissibility procedure of the subsequent application (see section on Reception Conditions: Criteria and Restrictions to Access Reception Conditions). If Basic Care is not granted, detention or a less coercive measure such as a designated place of living and reporting duties is ordered.

<table>
<thead>
<tr>
<th>Country</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Russia</td>
<td>332</td>
</tr>
<tr>
<td>Nigeria</td>
<td>253</td>
</tr>
<tr>
<td>Afghanistan</td>
<td>247</td>
</tr>
<tr>
<td>Algeria</td>
<td>138</td>
</tr>
<tr>
<td>Morocco</td>
<td>129</td>
</tr>
<tr>
<td>Pakistan</td>
<td>115</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>2,119</strong></td>
</tr>
</tbody>
</table>

Source: Ministry of Interior, 26 January 2018.

138 Article 3(1)(3) Basic Care Act (GVG-B).
139 Articles 76(3)(4) and 77 FPG.
F. The safe country concepts

1. Safe country of origin

Article 19 BFA-VG provides a list of safe countries of origin. The Governmental order of safe countries of origin must take into account primarily the existence or absence of state persecution, protection from persecution by non-state actors and legal protection against human rights violations. The COI department of the BFA has to take various state and non-state sources into consideration. The Federal Government can by ministerial order decide that, in such cases, suspensive effect may no longer be refused and that the BFA and the Court are bound by such decision. The examination by the Ministry of Interior took reports of the COI of the (former) Federal Asylum Agency into consideration and drafted the list following the extension of a safe country of origin list of Switzerland. The list was drafted by the Ministry of Interior, while NGOs had the possibility to submit comments on it.

This list includes all EU Member States, although there is a mechanism to take Member States off the list in case Article 7 of the Treaty on European Union (TEU) would be applied. As a consequence, suspensive effect must be granted for appeals in asylum procedures of nationals of such EU Member State. Other safe countries of origin mentioned in the Asylum Act are: Switzerland, Liechtenstein, Norway, Iceland, Australia and Canada.

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

- Albania;
- Bosnia-Herzegovina;
- FYROM;
- Serbia;
- Montenegro;
- Kosovo;
- Ukraine;
- Benin
- Mongolia;
- Morocco;
- Algeria;
- Tunisia;
- Georgia;


141 Defined as states party to the EU Treaties: Article 2(1)(18) AsylG.

142 Article 7 TEU provides for suspension of certain rights deriving from the application of the Treaties in case of serious breach of the values on which the EU is based, as laid down in Article 2 TEU.

• Armenia.

The 2018 amendment added Benin, Ukraine and Armenia to the list.\textsuperscript{144}

The Accelerated Procedure is applied in cases where the safe country of origin concept is applicable, and the Federal Administrative Court (BVwG) has to decide within 7 calendar days on the suspensive effect of appeals against negative decisions. In such procedures, asylum seekers have access to free legal assistance where applications are rejected. Legal advisers have to organise interpreters. The procedure may be accelerated, but there are no exceptional time limits for deciding such applications.

In 2017, Austria received 324 applications from Moroccan nationals (1.3% of the total number of applications), 347 from Algerian nationals (1.4%) and 436 from Georgian nationals (1.7%).\textsuperscript{145}

2. Safe third country

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

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

If the person cannot be deported within 3 months for reasons unrelated to his or her conduct, the inadmissibility decision ceases to be valid.\textsuperscript{146}

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

Safety criteria

Protection in a safe third country is deemed to exist if a procedure for the granting of refugee status in accordance with the Refugee Convention is available to the person in a country where he or she is not exposed to persecution or serious harm, and the person is entitled to reside in that country during such procedure and has protection there against deportation to the country of origin, provided that the person is exposed to such risk in the country of origin.\textsuperscript{147} There is a presumption that these requirements are met by countries that have ratified the Refugee Convention and established by law an asylum procedure incorporating the principles of that Convention, the ECHR and its Protocols Nos 6, 11 and 13.\textsuperscript{148}

The conditions for the application of the safe third country concept have been clarified by the Constitutional Court and VwGH. The presumption of compliance with safety criteria through ratification of legal instruments was affirmed in 1998 by the Administrative High Court, which has ruled that asylum authorities must first and foremost assess the legal conditions in a third country.\textsuperscript{149} However, the Constitutional Court has ruled that the formal criteria of ratification of the Refugee Convention, the declaration according Article 25 ECHR and the existence of an asylum law are not sufficient to establish safety in a third country, but the granting of protection in practice

\textsuperscript{145} Ministry of Interior, Asylum Statistics December 2017.
\textsuperscript{146} Article 4(5) AsylG.
\textsuperscript{147} Article 4(2) AsylG.
\textsuperscript{148} Article 4(3) AsylG.
\textsuperscript{149} VwGH, Decision 98/01/0284, 11 November 1998.
has to be taken into consideration. Asylum authorities have to be prepared to have up-to-date information of relevant organisations to be able to assess the factual situation.\textsuperscript{150}

\textbf{Connection criteria}

According to the aforementioned Constitutional Court and VwGH rulings, mere transit or stay in a third country is not sufficient to apply the safe third country concept.\textsuperscript{151}

\section*{3. First country of asylum}

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

Article 4a is applied for persons with a protection status applying for asylum in Austria too. A Syrian mother with 3 children gave birth after she arrived in Bulgaria, and suffered from prenatal depression. She was granted subsidiary protection in Bulgaria shortly after her journey to Austria. The Bulgarian authorities denied responsibility under the Dublin system, but were ready to take over as a result of the readmission agreement. The BVwG considered the deportation to Bulgaria as not permissible because of the PTSD from which the children were suffering and which was triggered, among other things, by experiences during the imprisonment in Bulgaria at the end of September 2015, as well as the intensive family relationship with relatives living in Austria.\textsuperscript{152}

The BVwG has also accepted an appeal of an Afghan family who had received subsidiary protection in Hungary, due to the need to clarify whether the current situation of beneficiaries of protection in Hungary raises an Article 3 ECHR risk.\textsuperscript{153} In the case of a single Syrian who got subsidiary protection in Bulgaria, however, the BVwG found no real risk on the ground that he did not belong to a vulnerable group.\textsuperscript{154}

In a case ruled by the Federal Administrative Court, the rejection of the application as inadmissible of a Chechen refugee who was registered in Azerbaijan as “person of concern” to UNHCR was seen as not sufficient. The court missed the opportunity to assess the question whether the status is similar to the status of a recognised refugee or the protection from refoulement is sufficient.\textsuperscript{155}

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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{151} VwGH, Decision 98/01/0284, 11 November 1998; VfGH, Decision U 5/08, 8 October 2008.
\item \textsuperscript{152} BVwG, Decision W192 2131676, 8 September 2016.
\item \textsuperscript{153} BVwG, Decision W205 2180181-1, 21 December 2017.
\item \textsuperscript{154} BVwG, Decision “233 2166376-1, 18 September 2017.
\item \textsuperscript{155} BVwG, Decision L518 2109232-1, 6 August 2015, available at: http://bit.ly/2jIUv9nc.
\end{itemize}
\end{footnotesize}
G. Relocation

Relocation statistics: 22 September 2015 – 31 December 2017

<table>
<thead>
<tr>
<th>Relocation from Italy</th>
<th>Relocation from Greece</th>
</tr>
</thead>
<tbody>
<tr>
<td>Requests</td>
<td>Relocations</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>:</td>
</tr>
<tr>
<td>Eritrea</td>
<td>:</td>
</tr>
<tr>
<td>Syria</td>
<td>:</td>
</tr>
</tbody>
</table>


Austria was required to relocate 1,953 persons from Italy and Greece under the Relocation Decisions and demanded to relocate them in 2016 due to high number of asylum seekers received in 2015. Austria agreed to relocate 50 asylum seekers from Italy. A total of 29 persons had been relocated by the end of 2017.

The intention to relocate unaccompanied children from Italy could not be realised due to the dispersal and guardianship system operated in Italy.

Upon arrival in Austria, relocated asylum seekers follow the regular procedure.
H. Differential treatment of specific nationalities in the procedure

The list of safe countries of origin, based on which the accelerated procedure may be applied, was expanded in 2018 to cover three new countries.

The so-called “fast-track procedure”, applied to swiftly examine and deliver negative decisions on asylum applications, usually from a certain country of origin beyond the safe countries of origin list (see Fast-Track Processing) was not seen in any cases in 2017 known to the author, due to the expansion of the list.

Directives and other CEAS measures transposed into national legislation

<table>
<thead>
<tr>
<th>Directive</th>
<th>Deadline for transposition</th>
<th>Date of transposition</th>
<th>Official title of corresponding act</th>
<th>Web Link</th>
</tr>
</thead>
</table>
II. Risk of modern slavery?

A. Access and forms of reception conditions criteria and restrictions to access reception conditions

Asylum seekers and other persons who cannot be expelled are not entitled to the same social benefits as citizens. In 2004, the Basic Care Agreement between the State and the federal provinces entered into force and has been implemented at national and provincial level. The agreement sets out the duties of the Federal State and the states and describes material reception conditions such as accommodation, food, health care, pocket money, clothes and school material, leisure activities, social advice and return assistance, by prescribing the amount for each.

Asylum seekers are entitled to Basic Care immediately after submitting the asylum application until the final decision on their asylum application in all types of procedures. However, the provision of Basic Care may violate Article 17(1) of the recast Reception Conditions Directive. Contrary to the Directive, Basic Care is foreseen as soon as the person requesting international protection is regarded as an asylum seeker. An asylum seeker is an alien whose request is formally submitted, which is the case after the BFA gives an instruction about the next steps to the public security officer.

Since the amendment of the Asylum Act in July 2015, the registration of the application and the provision of Basic care has changed. Asylum seekers do not submit the application in the EAST, but request for asylum at a police station. As long as the application is not regarded as submitted, the person is not an asylum seeker in the sense of Article 2(14) AsylG. Different entitlements are foreseen in the Basic Care Agreement and the Basic Care Act (GVG-B). While the Agreement declares in Article 2(1) as target group asylum seekers who have requested for asylum, the Basic Care Act of the Federal State defines the responsibility of the Federal State for asylum seekers after having submitted the application during the admissibility procedure in a reception facility of the Federal State. However, Basic Care conditions do not apply in detention or where alternatives to detention are applied. 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). Some NGOs have contracts to care for asylum seekers and other aliens.

Asylum seekers subject to Dublin procedures are entitled to basic care provisions until their transfer to the Member State responsible for the examination of the asylum application is executed. This general rule is not applicable if the asylum seeker is detained or ordered less coercive measures, however. In both cases they are not covered by health insurance but have access to necessary urgent medical treatment. In contrast to asylum seekers subject to the Dublin procedure but accommodated in one of the reception facilities in Austria, those undergoing Dublin procedures whilst in detention or less coercive measures do not receive monthly pocket money (€40). This distinction in the reception conditions available to applicants detained or subject to alternatives to detention does not respect the recast Reception Conditions Directive, which should remain applicable in all Dublin procedures.

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156 Articles 1(1) and 2(1) GVG-B.
157 Article 2(2) Basic Care Agreement; Article 2(3) GVG-B. Note that this not in conformity with Article 3 recast Reception Conditions Directive.
159 Recital 11 Dublin III Regulation. See also CJEU, Case C-179/11 Cimade & GISTI v Ministre de l’Intérieur, 27 September 2012, para 46.
If the suspensive effect of an appeal has been denied, basic care is terminated after the first instance decision becomes enforceable. Asylum seekers receive basic care in the case the court has awarded suspensive effect or if they wish to leave Austria voluntarily until their departure.160

A precondition for Basic Care is the need for support. This is defined by law as applicable where a person is unable to cover subsistence by their own resources or with support from third parties.161 Asylum seekers arriving in Austria with a visa are thus not entitled to Basic Care due to the precondition of having “sufficient means of subsistence” for the purpose of obtaining a Schengen visa.162 This exclusion clause is applied very strictly, even when the sponsor is unable to care for the asylum seeker. Exception may be made if the asylum seeker has no health insurance and gets seriously ill and needs medical treatment. Although the amount of material reception conditions is specified in the Basic Care Agreement,163 the level of income or values relevant to assessing the lack of need for Basic Care is not specified by law. Legislation does not lay down the amount of means of subsistence below which a person is entitled to Basic Care, even though the amounts for subsistence and accommodation are prescribed by law. In practice, an income beyond 1.5 times the amount of Basic Care benefits (€547) are deemed to be without need of Basic Care. In Salzburg, the regulation for Basic Care in force from 1 July 2016 sets out that income up to €110 is not taken into account; for any family member in a household, a further €80 of income should not lead to a reduction of basic care support; for an apprentice the respective amount is € 150.164

Furthermore, EU and EEA (European Economic Area) citizens are excluded from Basic Care.

Special documents for the entitlement to Basic Care are not foreseen. All asylum seekers and other persons who cannot be deported are registered in a special database, the Grundversorgungssystem. National and local authorities, as well as contracted NGOs, have access to the files. Asylum seekers returned to Austria from other Member States may face obstacles to getting full Basic Care after arrival. Sometimes free places in the Federal province they are assigned to are not available. Therefore it happens that they stay in the transit zone of the airport (Sondertransit) voluntarily and wait for the renewal of their entitlement to Basic Care, although they stay in a closed centre in the meantime.

After a final negative decision on the asylum application, the law provides for Basic Care until departure from Austria, if the rejected applicant cannot leave e.g. due to inability to obtain a travel document. Usually, rejected asylum seekers remain in the same reception facility. While in Vienna, Basic Care after a negative decision is usually prolonged, other federal provinces cease support. Depending on available places, rejected asylum seekers may stay in the reception centre on the basis of a private agreement with the landlord or NGO.

By the end of 2017, 61,310 asylum seekers and beneficiaries of international protection received Basic Care.165 Figures refer to: 43,273 (71%) asylum seekers, of whom 61% awaited a first-instance decision and 1.9% were in the Dublin procedure, 15,415 wait for the outcome of the appeal and 14,044 (23%) beneficiaries of international protection. 2,969 persons were unaccompanied children.

160 Artice 2(7) GVG-B.
161 Article 2(1) Basic Care Agreement (GVV)-Art 15a.
162 Article 5(1)(c) Schengen Borders Code.
163 Articles 6, 7 and 9 Grundversorgungsvereinbarung (GVV); Art. 15a B-VG.
165 Information provided by the Ministry of Interior, 26 January 2018.
1. **Forms and levels of material reception conditions**

Basic Care may be provided in three different forms.\textsuperscript{166}

1. Asylum seekers can be accommodated in reception centres where catering is provided. Asylum seekers in such reception centres receive €40 pocket money per month, while the care provider (NGOs, private companies contracted by the Government) receives €21 maximum compensation for the costs per day, depending on the standards of the facility. All federal provinces agreed by June 2016 to raise the daily rates for care providers, nevertheless this is not implemented in all federal provinces. Carinthia for example has decided to provide €21 from 2019 on; in the meantime the daily rate is €20. Burgenland has introduced a maximum daily rate of €20.50, while Styria has not raised the daily rate.

2. Basic Care can be provided in reception centres where asylum seekers cook by themselves. In that case, asylum seekers receive between €150 and 200 per month mainly in cash. Alternatively, as is practice in Tyrol, they receive €215 for subsistence (which equals the amount given for subsistence to those living in private flats). In some federal provinces the amount for children is reduced, e.g. in Tyrol children receive €100. The amounts in Carinthia in the next two years will be lower, €205 for adults and €95 for children.\textsuperscript{167}

3. Basic Care can be provided for asylum seekers in private rented accommodation. In this case asylum seekers receive €320 and 365 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.\textsuperscript{168}

Asylum seekers living in private rented flats receive 43% of the needs-based minimum allowance (bedarfsorientierte Mindestsicherung) for citizens in need of social welfare support, which is about €860 per month (€645 for subsistence and €215 for accommodation for a single person in Vienna). The level of the needs-based minimum allowance varies across the federal provinces, as political agreement to prolong an Austrian-wide regulation after its expiry by December 2016 was not reached. The sum given to a care provider, €630 per month (€21 per day) for accommodation and subsistence of asylum seekers, is below the level of welfare support for citizens, although staff and administrative costs have to be covered by the care provider.

For children, the daily rate in reception centres is the same as for adults. If families receive financial support for their daily subsistence, some federal provinces provide a lower amount for children (€90-100) instead of about €180.

Unaccompanied asylum-seeking children must be accommodated according to their need of guidance and care. The daily fee for NGOs hosting unaccompanied asylum-seeking children ranges from €40.50 to €95, depending on the intensity of psychosocial care. In some federal provinces like Styria the maximum amount is not given to care providers, although 400 unaccompanied children were cared for by the end of 2017 and it is evident that only a smaller group are not in need of much guidance and care. Styria has set up a daily special support of €18 for children with special needs, in addition to the maximum amount of €77. In Upper Austria, the government provides for €88 which should cover legal assistance as well.

\textsuperscript{166} Article 9(1)-(3) GVV-Art 15a and the respective Basic Care Acts of the federal provinces. See also Article 17(1) recast Reception Conditions Directive.

\textsuperscript{167} Carinthia Basic Care Act, LBGl. 71/2016, available in German at: http://bit.ly/2kRJJzb.

\textsuperscript{168} Article 9(10) and (14) GVV-Art 15a.
2. Reduction or withdrawal of reception conditions

Grounds for reduction or withdrawal

Material reception conditions are reduced if the asylum seeker has an income, items of value or receives support from a third party.\textsuperscript{169} For the first phase of the asylum procedure (the admission stage), this rule is not applicable. If an asylum seeker earns money or receives support from other sources, they are allowed to keep €110; or €240 in Tyrol, there is no common practice across all federal provinces. All additional income will be requested as a financial contribution for the asylum seeker’s Basic Care. This is requested without a formal procedure. Reduction could also consist in not granting the monthly pocket money for subsistence or the support for the child if the child is entitled to child benefits, which mainly applies to those who have received refugee status.

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

Material reception conditions may be withdrawn where the asylum seeker:\textsuperscript{170}

a. Repeatedly violates the house rules and/or his or her behaviour endangers the security of other inhabitants;

b. Leaves the designated place for more than 3 days, as it is assumed that they are no longer in need of Basic Care;

c. Has submitted a subsequent application;

d. Has been convicted by court for a crime on a ground which may exclude him or her from refugee status according to Article 1F of the Refugee Convention. This ground for withdrawal is not in line with Article 20 of the recast Reception Conditions Directive but does not seem to be applied or relevant in practice.

e. Has had his or her application rejected or dismissed and suspensive effect was excluded according to Article 18(1) BFA-VG. If the applicant cooperates to return voluntarily, he or she is eligible to material reception conditions until his departure.\textsuperscript{171} This rule makes a reference to Article 20(5) of the recast Reception Conditions Directive according to this article a dignified living standard and access to medical treatment have to be provided.

In some federal provinces and the state, the laws also permit the exclusion of asylum seekers who fail to cooperate with establishing their identity and need of basic care, although this is not applied in practice.\textsuperscript{172}

In relation to cases where asylum seekers unduly benefit from reception conditions by providing false information on their age – namely to benefit from specific care for children – three persons were accused to have obtained social security by fraudulently posing as unaccompanied children in 2017, thus receiving higher care standards amounting to approximately €50,000. In one case where the conviction had already been issued, the Higher Regional Court (Oberlandesgericht, OLG) reversed the decision of the lower court and referred back the case, finding that the undue use of reception conditions is only punishable if the person commits fraud in order to obtain a right of residence.\textsuperscript{173} Criminal sanctions are not applied if the applicant would have been granted a residence

\textsuperscript{169} Article 2(1) B-VG Art 15a.
\textsuperscript{170} Article 2(4)-(5) GVG-B.
\textsuperscript{171} Article 2(7) GVG-B.
\textsuperscript{172} Article 3(1) GVG-B.
\textsuperscript{173} OLG Linz, Decision 9 Bs 150/17y, 1 June 2017.
permit anyway. Nevertheless, the reform entering into force on 1 November 2017 sets out sanctions for false information provided not only to the BFA and the BVwG but also to the police in the context of the first interview (Erstbefragung).\textsuperscript{174}

**Procedure for reduction or withdrawal**

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

Procedural safeguards in case of withdrawal or reduction do not fully meet the requirements set out in Article 20 of the recast Reception Conditions Directive. In some federal provinces, reduction or withdrawal of reception conditions may be ordered without prior hearing of the asylum seeker and without written notification of the decision. In some federal provinces, the latter is only rendered upon request of the asylum seeker. It has also happened that the reception conditions of all asylum seekers involved in a violent conflict in a reception facility were withdrawn without examination of the specific role of all individuals concerned in the conflict.

A legal remedy in the Basic Care Act of the Federal State is foreseen in case material reception conditions are withdrawn. Such decisions to withdraw or reduce Basic Care provision can be appealed at the Administrative Court (the Federal Administrative Court in case of a BFA decision, the Administrative Court of the federal provinces in case of decisions of the provincial government). Free legal assistance for appeal is provided in the law and is now implemented in all federal provinces.

Asylum seekers whose Basic Care has been terminated or reduced may re-apply for the provision of basic care in the federal province they have been allocated to. In practice, it is difficult to receive Basic Care again after it has been terminated, or at least it takes some time to receive it again. Asylum seekers who endanger the security of other inhabitants are sometimes placed in other reception centres with lower standards. Asylum seekers who have left their designated place of living may get a place in another reception centre in the same federal province after applying for Basic Care.

If Basic Care is withdrawn because the asylum seeker is no longer considered to be in need of benefits, for example because he or she has an income, they may receive Basic Care if it is proven that they are again in need of it. However, asylum seekers may end up homeless or in emergency shelters of NGOs mainly because they do not succeed in obtaining Basic Care after withdrawal or they have left the federal province for various reasons such as presence of community, friends or family in other federal provinces, unofficial job offers and so forth.

### 3. Freedom of movement

The freedom of movement of asylum seekers may be restricted for reasons of public order, public interest, or for the swift processing of the asylum application. Applicants coming from a Safe Country of Origin may who have a return decision before making an application are also affected. The necessity of assigned residence must be demonstrated on a case-by-case basis.\textsuperscript{175} However, this

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\textsuperscript{174} Articles 119-120 FPG.

\textsuperscript{175} Article 15b AsylG, in force since 1 November 2017.
A restriction on freedom of movement is not a formal decision that can be appealed *per se*; it can only be challenged together with the asylum decision.

**Restricted movement during the admissibility procedure**

After requesting asylum at the police, asylum seekers are apprehended for up to 48 hours, until the BFA branch office decides whether the asylum seeker should be transferred or advised to go to the EAST or to a distribution centre. During the admissibility procedure, they receive a green card also known as procedure card, which indicates the tolerated stay in the district of the reception centre of the state. Asylum seekers are allowed to leave the district for necessary medical treatment or to appear in court. Dublin cases that are usually cared for in the initial reception centres (EAST) of the Ministry of Interior may also be transferred to reception centres of the federal provinces. Violations of this restriction of movement may be punished with fines between €100 and €1,000 or with detention of up to 2 weeks if payment of the fine cannot be enforced. These restrictions of movement impede asylum seekers’ access to family members or friends and consultations with legal advisers of trust or lawyers.

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

At the end of 2017, 1,692 persons received Basic Care in federal reception centres.

**Dispersal across federal provinces**

A residence restriction applies from 1 November 2017 onwards. Asylum seekers who have been admitted to the regular procedure are only allowed to reside in the federal province assigned to them. even if the Basic Care provision is waived or withdrawn, they are not allowed to change federal provinces without authorisation from the provincial administration. Consecutive breaches of the residence restriction are punishable by an administrative fine of up to €5,000 or a three-week non-custodial sentence. Asylum seekers can be arrested and detained for 24 hours to secure this administrative fine.

Every federal province has to offer reception places according to its population. Asylum seekers are dispersed throughout the country to free reception places and according to their needs, for instance in places for unaccompanied minor asylum seekers, single women or handicapped persons. Governments of federal provinces have claimed that information about necessary medical treatment or handicap are not always communicated, with the result that asylum seekers are transferred to inadequate places. However, asylum seekers have no possibility to choose the place where they will be accommodated according to the dispersal mechanism, although family ties are taken into consideration and usually asylum seekers can be transferred to the federal province where the family lives. Moreover, it is not possible to appeal the dispersal decision because it is an informal decision taken between the Ministry of Interior and the respective federal province.

The distribution of Basic Care recipients – including some beneficiaries of protection – across the provinces at the end of 2017 was as follows:

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176 Article 43(1) BFA-VG.
177 Article 2(1)(2) GVG-B.
178 Information provided by the Ministry of Interior, 26 January 2018.
179 Article 121(1a) FPG.
180 Article 39 FPG.
In the summer of 2015, Austria signed an agreement with the Slovak Republic to provide reception places for 500 asylum seekers in Gabčíkovo. Transfer to this centre outside of Austria should be on a voluntary basis and asylum seekers have the possibility to travel to Austria if this is necessary for the asylum procedure. Their stay in Slovakia is tolerated.\textsuperscript{181} The contract with the Slovak government from summer 2015 was concluded for 2 years. The former university building was only used for the basic care of Syrian refugees.\textsuperscript{182} 13 asylum seekers were placed there at the beginning of 2017, but by the end of the year the centre was no longer used.

The province of Vienna offers many more reception places than those foreseen by the quota system (see Types of Accommodation), while other provinces such as Salzburg have failed to provide enough places for several years. This discrepancy leads to negotiations between the responsible departments of the federal provinces, while the malfunctioning of the dispersal system overall raises public reactions. In 2015 the lack of reception places caused homelessness and overcrowded initial reception centres, leading to inhuman living conditions. All federal states opened a lot of new

\begin{table}
\centering
\begin{tabular}{|l|c|c|c|}
\hline
Federal province & Quota & Number & Actual share \\
\hline
Vienna & 21.2\% & 19,316 & 31.4\% \\
\hline
Upper Austria & 16.7\% & 10,204 & 16.6\% \\
\hline
Lower Austria & 19\% & 9,284 & 15.1\% \\
\hline
Styria & 14.1\% & 7,431 & 12.1\% \\
\hline
Tyrol & 8.5\% & 4,745 & 7.7\% \\
\hline
Carinthia & 6.4\% & 3,225 & 5.2\% \\
\hline
Salzburg & 6.2\% & 3,135 & 5.1\% \\
\hline
Vorarlberg & 4.4\% & 2,521 & 4.1\% \\
\hline
Burgenland & 3.3\% & 1,669 & 2.7\% \\
\hline
Total & & 61,530 & \\
\hline
\end{tabular}
\caption{Dispersal of recipients of Basic Care: 31 December 2017}
\end{table}

Source: Ministry of Interior, 26 January 2018.
facilities and the Ministry of Interior made use of its power to run reception centres in regions that host less refugees than 1.5% of their population. In 2017, many reception places are no longer needed and closed gradually.

Asylum seekers who are allocated to a province after admission to the asylum procedure are usually not transferred to other federal provinces, even if they wish so. Within the same province, asylum seekers may be placed in other reception centres for different reasons, for instance if another reception centre is better equipped to address the needs of the asylum seeker.

Often asylum seekers do not have enough money for travelling, as the monthly allowance for those living in reception centres is only €40. If they stay away from their designated place (reception facility) without permission for more than 2 nights, Basic Care will be withdrawn (see Reduction or Withdrawal of Material Reception Conditions). As discussed above, it is almost impossible to receive Basic Care in a province other than the designated province.

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 in October 2012. 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.

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

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B. Housing

1. Types of accommodation

Asylum seekers are accommodated in facilities of different size and capacity. A quota system requires the federal provinces to provide places according to their population.\(^{184}\)

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

Federal reception capacity

The EAST serves as centre for asylum seekers with an admmissibility procedure likely to be rejected. The 2 initial reception centres in Traiskirchen and in Thalham are therefore reserved for asylum seekers in the admmissibility procedure and for unaccompanied minor asylum seekers as long as they are not transferred to reception facilities of the federal provinces. Instead of streaming all asylum seekers to the EAST, they should have their first accommodation in the so-called distribution centres (VQ), which should be set up in 7 federal provinces. Some of the VQ are located in remote areas. The government of Tyrol closed the reception centre in Fieberbrunn, but it was reopened by the Ministry of Interior as distribution centre. The Ministry now uses this centre for rejected asylum seekers and has established a distribution centre in Innsbruck. Newly arriving asylum seekers stay only 4 to 5 days in the distribution centres according to information from the Centre in Ossiach.

Only a few asylum seekers are cared for in distribution centres (VQ). The number of asylum seekers in initial reception centre (EAST) of Traiskirchen has also sharply decreased, from 5,000 asylum seekers under inhuman living conditions in August 2015,\(^{185}\) to about 449 at the end of 2017.\(^{186}\)

There are 26 federal reception centres, which hosted 1,692 persons at the end of 2017.\(^{187}\) The law allows the Ministry of Interior to open reception facilities in federal provinces that do not fulfil the reception quota. Such centres may be opened even when the facility is not dedicated as refugee home, where special safeguards apply like fire protection or building regulations.\(^{188}\) Immediately after the law entered into effect in October 2015, the Ministry started to prepare three bigger centres and started negotiations with 15 municipalities.\(^{189}\)

In case of larger numbers of arrivals and difficulties in transferring asylum seekers to reception facilities in the federal provinces, the Federal State may host asylum seekers even after their asylum application is admitted to the regular asylum procedure for a maximum period of 14 days.

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\(^{184}\) Article 1(4) GVV-Art.15a.


\(^{187}\) Information provided by the Ministry of Interior, 26 January 2018.


At the Vienna Schwechat Airport, the EAST is under the responsibility of the border police. Caritas Vienna had a contract to provide care for asylum seekers waiting for transfer to Traiskirchen or for the final decision on their application. The contract was not prolonged in 2017 and ORS, the company contracted by the Ministry of Interior to provide care to asylum seekers, now provides care at the airport.190

**Reception capacity at federal province level**

In practice, most federal provinces do not provide the number of places required under their quota, which is partly due to the fact that provinces such as Vienna exceed their quota. According to recent information from the Ministry of Interior, the entire Austrian reception system hosted 61,530 persons at the end of 2017. The distribution across the federal provinces is detailed in Freedom of Movement. While Vienna continues to exceed its relative reception share, other federal provinces have had several empty places. Consequently, several centres have free capacity and are planned to close as they are not able to cover the general costs of rent, heating, staff etc. Volkshilfe has announced the closure of several centres in Upper Austria, similar to Vorarlberg, where Caritas has started closing the big halls.

According to earlier figures referring to 1 December 2017, 71.5% of persons receiving Basic Care were asylum seekers.

NGOs or owners of hostels and inns, who run reception centres under the responsibility of the federal provinces, have contracts with the governmental department of the respective federal provinces. While in some federal provinces almost all asylum seekers are placed in reception centres (e.g. 82% of asylum seekers in Styria and 93.6% in Burgenland), private accommodation is more often used in others such as Vienna, where 67% of applicants lived in private accommodation as of 1 January 2018.191

2. Conditions in reception facilities

The Ministry of Interior, which is responsible for Basic Care during the admissibility procedure, subcontracts their day-to-day management to a company, while remaining the responsible authority. 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 reception centres under the responsibility of the Ministry.

Conditions in the reception centres of the federal provinces vary, though they have constantly improved with the reduction of persons staying in the centres. According to the standards of the facility, NGOs or the landlord receive up to €21 per person a day for providing housing, food and other services like linen or washing powder. There are still some reception centres that get only €19 per person refunded due to low standards, e.g. because there is no living room or more people have to share the bathroom and toilet. A survey by journalists in summer 2014 showed big differences in the reception centres of three federal provinces.192 One of the centres was overcrowded, while others had severe sanitary problems and asylum seekers complained about the poor and unhealthy meals. Racist behaviour and bad conditions led to the closure of a reception centre in Lower Austria in

September 2016 after years of complaints. The federal provinces agreed on a minimum standard of 8m² for each person and 4m² for each additional person in September 2014. Systematic research on conditions has not been undertaken in the last year.

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

There is a trend of allowing asylum seekers to cook for themselves because it is evident that this contributes to the well-being of the asylum seeker and reduces tensions. In the reception centres of the state, cooking is not possible and even taking food into the living room or bedroom is not allowed. If meals are served, dietary or religious requirements have to be respected, but there are complaints about quality and some failures to take religious requirements into account. In Burgenland and Styria, meals are often served by the centre, while in Tyrol asylum seekers can cook in the reception centres.

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

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

Hotels and inns usually do not have staff besides personnel for the kitchen, administration and maintenance of the buildings. These reception centres are visited by social workers, most of them staff of NGOs, on a regular basis (every week or every second week). Reception centres of NGOs have offices in the centres. The capacities foreseen by law – 1 social worker for 140 clients - are not sufficient, especially when social workers have to travel to facilities in remote areas or need the assistance of an interpreter. NGOs work with trained staff. Some of the landlords host asylum seekers since many years and may have learned by doing, but have not received specific training.

The system of dispersal of asylum seekers to all federal provinces and within the federal provinces to all districts results in reception centres being located in remote areas. One of these centres in the mountains of Tyrol, a former military camp, cannot be reached by public transport, a shuttle bus brings the asylum seekers two times a week to the next village, two and a half hour walking distance. Internet is accessible in the meanwhile. The centre was closed by the Tyrolian government but was reopened by the Ministry of Interior to operate as a so-called departure centre for rejected asylum seekers.

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C. Employment and education

1. Access to the labour market

The Aliens Employment Act (AuslBG) states that an employer can obtain an employment permit for an asylum seeker 3 months after the asylum application is admitted to the regular procedure, provided that no final decision in the asylum procedure has been taken prior to that date.\(^\text{198}\)

The possibility of obtaining access to the labour market is restricted by a labour market test (Ersatzkraftverfahren), which requires proof that the respective vacancy cannot be filled by an Austrian citizen, a citizen of the EU or a legally residing third-country national with access to the labour market (long-time resident status holder, family member etc.).\(^\text{199}\)

Applications for an employment permit must be submitted by the employer to the regional Labour Market Service (AMS) office in the area of the district where the envisaged place of employment is located. Decisions are taken by the competent regional AMS office. In the procedure, representatives of the social partners have to be involved in a regional advisory board. The regional advisory board has to recommend such an employment permit unanimously. Appeals have to be made to the Federal State AMS office that must decide on appeals against decisions of the regional AMS office. There is no further right of appeal.\(^\text{200}\) The decision has to be made within 6 weeks; in case of appeal proceedings, the same time limit must be applied.

In addition, a 2004 ordinance includes further restrictions for the access to the labour market for asylum seekers, by limiting employment to seasonal work either in tourism, agriculture or forestry.\(^\text{201}\) These seasonal jobs are limited by a yearly quota for each federal province and can only be issued for a maximum period of 6 months.

A further problem for asylum seekers working as seasonal workers is the regulation in the Basic Care Acts of the state and the federal provinces that requires a contribution to Basic Care, if asylum seekers have an income. In practice, there is only an allowance of €110 left to asylum seekers in most of the federal provinces, while the rest of the money earned contributes to the cost of reception.\(^\text{202}\) If they have been receiving an income for more than 3 months, Basic Care support is no longer provided. If the asylum seeker asks for readmission into Basic Care after they have finished the employment, cash contributions to the provision of Basic Care are demanded. In fact, it is assumed by the authorities that only about €550 (1.5 times the basic provision amount) per month have been spent by the asylum seeker on subsistence and accommodation during the period of employment. Income exceeding this amount is deducted from the allowance received under Basic Care from that time onwards until repaid. This request of contribution causes many problems, as in reality the asylum seekers have spent the money earned and do not have sufficient means to survive the following months.\(^\text{203}\)

Moreover, asylum seekers are not registered at the Public Employment Service as unemployed persons. Therefore they are not entitled to vocational trainings provided or financed by the Public Employment Service. It thus very much depends on the initiative of the asylum seeker to find a job offer, as they are not registered as persons searching for work at the Public Employment Service. Asylum seekers often lack money for job-seeking motivated travel for the purpose of job interviews.

\(^{198}\) Article 4(1) AuslBG.
\(^{199}\) Ibid.
\(^{200}\) Article 20(1) and (3) AuslBG.
\(^{202}\) In Tyrol, asylum seekers may earn €240 per month without contribution to the cost of Basic Care.
\(^{203}\) Asylkoordination Österreich, Leben im Flüchtlingsquartier, December 2010, 37f.
Asylum seekers below the age of 25 may be granted a work permit for an apprenticeship in shortage occupations. They may also be self-employed under the general conditions as soon as they are registered as asylum seekers.

Since 1 April 2018, asylum seekers admitted to the regular procedure for more 3 months or more can also be employed with service vouchers in private households for jobs such as gardening, cleaning or child care. Vouchers can be bought at the post office or online.\footnote{Dienstleistungsscheckgesetz, 12 February 2018, available at: \url{http://bit.ly/2nSSz0m}.}

Asylum seekers can carry out non-profit activities and receive an acknowledgment of their contributions. The amount of this remuneration was debated, however. While previous provisions provided for a sum of €3 to €5 and the Social Referees of the federal provinces regarded €5 as more appropriate, Minister of Interior Sobotka proposed a sum of €2.50 per hour. Meanwhile, the Austrian People’s Party (ÖVP) representatives also demand to pay only €1 or not to pay any recognition fees. Minister Sobotka published a list of such non-profit jobs, e.g. administrative messenger or office assistance, translation services, support for parks and sports facilities, playgrounds, care for the elderly, assistance in nursery schools, school attendance services, assistance in animal shelters, or support for minor resettlements in the municipality.\footnote{Oberösterreichische Nachrichten, ‘Asylwerber dürfen nun in Firmen schnuppern’, 1 February 2017, available in German at: \url{http://bit.ly/2k2eEtz}. From April 2018 onwards, the Minister of Interior has the power to regulate which NGOs will be able to enlist asylum seekers on a voluntary basis for charitable activities and to set the maximum amount for such work.\footnote{Article 7(3a) GVG-B.} The minimum fee is regulated for each sector e.g. €11.75 an hour for gardening. The monthly income for this kind of employment is limited to €600.


a. Asylum seekers are allowed to complete practical experience and internships within the framework of their training in vocational schools or secondary schools;

b. Adult asylum seekers are also allowed to do unpaid volunteer work for companies. An asylum seeker may take 3 months in a one-year period with several companies.

Companies have to register asylum seekers for internships at the AMS no later than 14 days before the start of the internship. Interns are also entitled to reasonable remuneration.\footnote{Ministry of Labour, Anzeigebestätigungen gem. § 3 Abs. 5 AuslBG für Ferial- und Berufspraktika und Volontariate von AsylwerberInnen, 25 January 2017, available in German at: \url{http://bit.ly/2oTXfjU}.}

1,526 work permits have been issued in 2017, of which 697 concerned apprentices. By the end of 2017, 908 asylum seekers had a valid work permit, of which 727 were apprentices.\footnote{Information provided by AMS, January 2018.}
2. Access to education

School attendance is mandatory for all children living permanently in Austria until they have finished 9 classes, which are usually completed at the age of 15. Asylum seeking children attend primary and secondary school after their asylum application has been admitted to the regular procedure. As long as they reside in the EAST, school attendance in public schools is not provided, however. Preparatory classes usually are set up where many children without knowledge of the German language attend class, otherwise they are assisted by a second teacher. Schools often register pupils without sufficient knowledge of the German language as extraordinary pupils for a maximum period of 12 months.

Access to education for asylum seekers older than 15 may become difficult, however, as schooling is not compulsory after the age of 15. Some pupils manage to continue their education in high schools. Children who did not attend the mandatory school years in Austria have difficulties in continuing their education, however. For those unaccompanied children, who have not successfully finished the last mandatory school year, special courses are available free of charge. For children accompanied by their family, this possibility is often not available for free.

The Aliens Employment Act restricts access to vocational training, because the necessary work permits could only be issued for seasonal work. In July 2012, however, exceptions were introduced for asylum seeking children up to the age of 18. A decree of the Ministry of Social Affairs allowed for children to obtain a work permit as apprentices in professions where there is a shortage of workers. Yet this measure proved to be insufficient in ensuring vocational training, as only 18 children have received such a permit since July 2012. A further decree of the Ministry of Social Affairs of March 2013 increased the maximum age for benefitting from the exceptions to vocational training restrictions from 18 to 25.

Young people under the age of 18 who have completed the 9-year schooling and who are permanent residents in Austria are obliged to pursue education or training, under a law entering into force on 1 August 2016. This law, however, is not applied to asylum seekers, despite criticism from NGOs and the Chamber of Employment for failing to address a problematic aspect of integration and education policy.

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210 Asylkoordination, Expansion of employment opportunities for asylum seekers, 14 June 2012, available in German at: http://bit.ly/1k7cAuY.
211 AMS, Beschäftigungsmöglichkeiten für Asylwerberinnen und Asylwerber, November 2015, available in German at: http://bit.ly/1msi8SL.
C. Health care

The initial medical examination of asylum seekers after their initial admission to a reception centre is usually conducted within 24 hours. A general examination is made through a physical examination including vital signs, skin lesion, injuries, including TBC-X-ray and questions on their state of health by means of a standardised medical history. If, within the scope of the investigation, circumstances become known which require further investigations, asylum seekers are transferred to specialist doctors or a hospital.213

Every asylum seeker who receives Basic Care has health insurance. Treatment or cures that are not covered by health insurance may be paid, upon request, by the federal provinces’ departments for Basic Care or the Ministry of Interior. If Basic Care is withdrawn, asylum seekers are still entitled to emergency care and essential treatment.214

In practice, this provision is not always easy to apply, however. If an asylum seeker has lost basic care due to violent behaviour or absence from the EAST for more than 2 days, they will not receive medical assistance, because it is assumed that they have the opportunity to visit the medical station in the EAST. However, as those asylum seekers are no longer registered in the EAST, they will not be allowed to enter and receive medical treatment there. Without health insurance or access to the medical station of the EAST, asylum seekers may face severe difficulties in receiving necessary medical treatment. Some of them come to the NGO-run health project AMBER MED with doctors providing treatment on a voluntary basis.

The delay in registration as asylum seeker results in delayed registration in the health insurance. In cases where urgent treatment is required, registration in the health insurance system will backdated. In some federal provinces such as Vienna, asylum seekers receive an insurance card in the same way as other insured persons and can thus access health care with their insurance contracts without complications. In others like Styria or Salzburg, they must first request a replacement document in order to visit doctors.

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

Specialised treatment

In each federal province, one NGO provides treatment to victims of torture and traumatised asylum seekers. This is partly covered by AMIF funding, partly by the Ministry of Interior and regional medical insurance. However, the capacity of these services is not sufficient. Clients often have to wait several months for psychotherapy.

One of such specialised therapy projects in Vienna has announced that the waiting period for an initial consultation is 1-3 months, and 1 year for a therapy place. Around 400 people are waiting for a place, including 70 children.215 Similar problems are reported in the Zebra project in Styria, Ankyra in Tyrol and Jefira in Lower Austria.

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214 Article 2(4) GVG-B.

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

The new government plans to restrict the obligation of confidentiality of doctors in the case of Basic Care concerning relevant diseases or other disabilities.
D. Special reception needs of vulnerable groups

The laws relating to the reception of asylum seekers include no mechanism for identifying vulnerable persons with special needs. Article 2(1) GVG-B states that regard should be given to special needs when the asylum seeker is registered in the Basic Care System. Basic Care conditions shall safeguard human dignity at least. After the asylum seeker has submitted the asylum application, a general health examination is carried out and asylum seekers are obliged to undergo this examination, including a TBC (Tuberculosis) examination. All asylum seekers have health insurance. For necessary medical treatment they may be transferred to a hospital.

The Basic Care laws of Lower Austria, Salzburg, Tyrol and Vorarlberg, Burgenland, Carinthia, Upper Austria mention special needs of vulnerable persons. The elderly, handicapped, pregnant women, single parents, children, victims of torture, rape or other forms of severe psychological, physical or sexual violence are considered as vulnerable persons, victims of trafficking. In the laws of the federal province of Vienna, vulnerable asylum seekers are not mentioned. Nevertheless, the federal provinces have to respect national and international law, including the recast Reception Conditions Directive. A special monitoring mechanism is not in place. It is up to the asylum seeker, social adviser, social pedagogue or the landlord to ask for adequate reception conditions.

The monthly amount of €2,480 for nursing care in specialised facilities is included in the Basic Care Agreement between the State and the federal provinces, which describes the material reception conditions.

Approximately 200 special care centres were available by the end of 2017 for people with special needs. Not all federal provinces have special care centres for vulnerable groups besides unaccompanied children.

Reception of unaccompanied children

Since 2014 several new facilities for unaccompanied asylum-seeking children opened, some of them run by private companies or the Children and Youth Assistance. Those under 14 years are cared for in socio-pedagogic institutions of the federal provinces.

Federal centres

There are 3 reception centres for unaccompanied children managed by the Ministry of Interior. In addition to a separate facility for unaccompanied children in the Federal Reception East in Traiskirchen. The private company ORS is responsible for the care of unaccompanied children.

As of 29 December 2017, there were 126 unaccompanied children accommodated in special federal reception centres, while another 3,066 were accommodated in specialised facilities in the different federal provinces.

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218 Information provided by the Ministry of Interior, 26 January 2018.
219 Information provided by the Ministry of Interior, 26 January 2018.
Reception of unaccompanied children at federal province level

The Ministry of Interior and the competent department of the federal provinces have agreed on a quota system for unaccompanied children.\textsuperscript{220}

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

<table>
<thead>
<tr>
<th>Federal province</th>
<th>Unaccompanied children</th>
<th>Total Basic Care recipients</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vienna</td>
<td>712</td>
<td>19,316</td>
</tr>
<tr>
<td>Upper Austria</td>
<td>350</td>
<td>10,204</td>
</tr>
<tr>
<td>Lower Austria</td>
<td>642</td>
<td>9,284</td>
</tr>
<tr>
<td>Styria</td>
<td>403</td>
<td>7,431</td>
</tr>
<tr>
<td>Tyrol</td>
<td>241</td>
<td>4,745</td>
</tr>
<tr>
<td>Carinthia</td>
<td>190</td>
<td>3,225</td>
</tr>
<tr>
<td>Salzburg</td>
<td>225</td>
<td>3,135</td>
</tr>
<tr>
<td>Vorarlberg</td>
<td>120</td>
<td>2,521</td>
</tr>
<tr>
<td>Burgenland</td>
<td>183</td>
<td>1,669</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>3,066</strong></td>
<td><strong>61,530</strong></td>
</tr>
</tbody>
</table>

Source: Ministry of Interior, 26 January 2018.

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

Approximately 125 centres for unaccompanied children operated across the federal provinces by the end of 2017. Numerous facilities set up after 2015 have been phased out after the number of unaccompanied children arriving in Austria dropped. The type of facilities available in the different provinces varies from one province to another:

- **Carinthia, Tyrol** and **Burgenland** only offer accommodation in residential groups.
- **Lower Austria** and **Upper Austria** generally offer accommodation in residential groups, subject to a few exceptions.
- **Salzburg**: children over the age of 14 are first housed in residential groups but may be assigned to other types of accommodation if deemed necessary by the care provider.
- **Vienna**: Since 2015 only residential groups have been opened. There are still 60 places for unaccompanied children with a lower level of care, however.
- **Styria** has no residential groups for unaccompanied children. All children over the age of 14 are accommodated in dormitories or in assisted living. The situation in Styria is criticised by the Ombudsman, who recommends the establishment of residential groups in the future.

\textsuperscript{220} Die Presse, ‘Länder beschließen Quote für unbegleitete Minderjährige’ (Federal provinces agree on quota for unaccompanied minors), 6 May 2015, available in German at: http://bit.ly/1ZgsjrH.
Since 2016, unaccompanied children may also live with families. Several federal provinces offer such possibilities; in Styria this is the case for children over the age of 14. The responsibility remains at the Child and Youth Agency.

The Child and Youth Agency is responsible for providing adequate guidance and care. It is unclear who is responsible for the legal representation of those children; the legal adviser who has to fulfil their tasks in the EAST, or the Child and Youth Agency, which becomes responsible after the child is allocated to a federal province. Social educational and psychological care for unaccompanied asylum-seeking children shall stabilise their psychic constitution and create a basis of trust according to the description of the Basic Care provisions for unaccompanied asylum seeking children in some of the federal provinces’ Basic Care Laws. Furthermore daily organised activities (e.g. education, sport, group activities, and homework) and psychosocial support are foreseen, taking into account age, identity, origin and residence of family members, perspective for the future and integration measures.

Basic Care provisions for unaccompanied asylum-seeking children reflect the need of care with regard to accommodation and psychosocial care. Unaccompanied asylum-seeking children must be hosted according to their need for guidance and care. The daily fee for NGOs hosting unaccompanied asylum-seeking children ranges from €40.50 to €95 depending on the intensity of psychosocial care. Unaccompanied asylum-seeking children with higher need of care are accommodated in groups with one social pedagogue responsible for the care of 10 children; those who are not able to care for themselves must be accommodated in dorms, where one social pedagogue takes care of 15 children. A third group, which is that of those who are instructed and able to care for themselves live in supervised flats. For this group, one social pedagogue is responsible for 20 children.

A report on the legal situation of unaccompanied children in Austria was published in October 2016 by SOS Children’s Villages. The report points out that the relevant Austrian laws do not differentiate between Austrian and non-Austrian nationals, and therefore asylum-seeking children are entitled to child and youth welfare to the same extent as Austrian children. It also states that the regulations on basic care (Grundversorgung) are not specific to child and youth welfare regulations, and therefore must be applied cumulatively; child and youth welfare must provide the required educational and psychological help in addition to the basic care regime, which aims to address basic living needs. The legal opinion concludes that the daily rates (Tagsätze) for unaccompanied children, which are lower than child and youth welfare provisions for Austrian children, are a problem, since unaccompanied children are entitled to the same services as Austrian children. This does not necessarily mean, however, that the daily rates need to be equivalent. Similar concerns have previously been raised by the Ombudsman expressed in a report on Burgenland published in June 2015.

**Aged-out children**

A few places are available for those children who have reached the age of 18, responding to their higher need of care compared with older adults. This possibility corresponds to youth welfare regulations, stating that under special circumstances the Child and Youth Agency will care for young adults up to the age of 21. Usually, transitional homes for aged-out children offer higher care than adult centres, yet NGOs receive the adult rate for care.

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221 Parliament of Styria, Reply to question 496/1 on “Quality of reception of child refugees”, 24 February 2016, available in German at: http://bit.ly/2l0kJ3X.

222 Austrian Civil Code (ABGB) and Federal Child and Youth Welfare Act (B-KJHG).


Children with special needs

There are still very few places for unaccompanied children with special needs, including 6 places in Vienna and 10 places in Lower Austria. This is by no means sufficient to meet demand. A new facility for traumatised children and one emergency centre were opened in Lower Austria, while Salzburg has also opened up an emergency centre.

Information gathered by Asylkoordination in the fall of 2016,\textsuperscript{225} from 40 NGOs caring for unaccompanied minors, showed that 10.6\% of accommodated children need medication ordered by a psychiatrist: some suffer from depression ranging up to danger of suicide, others from borderline and adjustment disorder. A further 9\% are thought to be suffering from a mental illness, but there is no diagnosis yet because the young people refuse an investigation for fear of stigma, or due to delays an assessment has not yet taken place. About 5\% are in therapy and do not take medication. According to the opinion of the caregivers, about 15\% were in urgent need of therapy. 8\% were moved to another facility due to their striking behaviour (threats, violence against staff or other residents), but in one third of cases the behavioural problems were not improved.

The Ombudsman has criticised Lower Austria for not providing additional funding for children with mental illness. The federal province responded that the higher daily rate of €95 paid for Basic Care since July 2016 should cover any additional costs. Following criticism from the Ombudsman, the province of Styria has introduced a supplementary package of €18 from July 2018 onwards for unaccompanied children with special care needs. This brings the daily rate in Styria to €95 as well.\textsuperscript{226}

Reception of women and families

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

For single women, there are some specialised reception facilities, 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 for core family members is laid down in the law of the federal provinces.\textsuperscript{227} For family members who arrived in the framework of Family Reunification and receive Basic Care as asylum seekers, there is no satisfactory solution if the person with refugee status does not have a suitable private flat. The family may be separated until the status is granted, because recognised refugees can no longer live in the Basic Care centre. It is also problematic that provinces such as Styria refrain from granting any basic care to asylum seekers in the family reunification process. According information from Caritas Styria, the person with asylum status is no longer in basic care, but usually receives minimum benefits (Mindestsicherung). This income is taken into consideration when calculating the benefits to be allocated to the family members coming to Austria within the framework of family reunification. As a result, the arriving family members are not entitled to basic care.\textsuperscript{228}

If the asylum application is declared inadmissible under the Dublin III Regulation, detention may be ordered. While in the past families had often been separated when pre-expulsion detention was ordered to one or more adult family members and less coercive measures were applied to children family members, this practice ceased with the establishment of a special closed facility for families.

\textsuperscript{225} Unpublished survey. These 40 reception centres cared for 924 unaccompanied child asylum seekers.
\textsuperscript{227} See e.g. Article 2 of the Basic Care Act Salzburg, Official Gazette Salzburg Nr 35/2007, 30 May 2007 or Official Gazette Upper Austria Nr. 15/2007, 15 February 2007.
There are only a few reception facilities with more than 80 or 100 places, almost all run by NGOs in Vienna. Hostels and inns have between 20 and 40 places. Therefore separation of single women from single men is not the rule but separate toilets and bathrooms are foreseen. Vienna also has centres for victims of trafficking and LGBTI persons. Salzburg also has a reception centre for women and one for LGBTI persons.

Reception of handicapped and seriously ill persons

Federal centres

Traumatised or ill asylum seekers may be cared for in facilities of the state and NGOs with places for persons with higher need of care (“Sonderbetreuungsbedarf”). In the last years, the number of places for asylum seekers with disabilities or other special needs of care increased. There are two special care centres for people in need of special medical care at the federal level:

- **Sonderbetreuungszentrum Graz Andritz** with a maximum capacity of 100 persons;
- **Gallspach** with a capacity of 110 persons.

In addition, where necessary, persons with special needs are accommodated in separate rooms or houses in the Federal Reception Centre East in Traiskirchen during the admissibility procedure.\(^{229}\) Special care centres for 25 persons in a barrier-free building (house 1) are provided in Traiskirchen.

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

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

The special care centre in Upper Austria Gallspach is completely handicapped-accessible and has the necessary equipment for the accommodation of physically impaired asylum seekers. The centre is mainly for the accommodation of asylum seekers with physical afflictions, as well as with psychiatric disorders or psychosomatic diagnoses due to the proximity to the clinic in Wels-Grieskirchen, specialised in the treatment of psychosomatic diseases. Of the 12 social care providers of ORS, four have a relevant education in the health and care sector, one is a trained clinical psychologist. In addition, medical staff will be involved in the care.

Centres at federal province level

Special care centres exist in different provinces:

- **Vorarlberg**: a total of 6 people received special treatment by the end of 2017, including 2 people in a nursing home and 4 people in a Kolpinghaus.

- **Lower Austria**: There are 6 places in an emergency centre and another 6 in a centre for severely traumatised unaccompanied children.

- **Tyrol**: The Basic Care system does not offer special care places. Currently, Tyrol has approximately 350 clients looked after by a Case & Care team in a wide range of accommodation

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\(^{229}\) Information provided by the Ministry of Interior, 26 January 2018.
facilities. The most common criteria for support from the Case & Care team are psychiatric, mental and physical conditions or disabilities.

The needs of ill, handicapped asylum seekers and asylum seekers with nursing care are not sufficiently met. There is no allowance to cover extra costs as long as nursing care is provided by relatives or friends. NGOs have to employ professionals if they offer places for asylum seekers with special – mainly medical – needs.

The daily rate of increased care varies in the federal provinces. In Upper Austria the organisation providing reception receives a maximum of €42 and differentiates the need for care according to the number of hours of nursing care per week, while in Vienna and Salzburg it is a maximum €44, and in Tyrol and Carinthia €40.
E. Information for asylum seekers and access to reception centres

1. Provision of information

The information leaflets in the EAST provide brief information about obligations and entitlements with regard to reception conditions e.g. the possibility and obligation to visit a doctor, the possibility to contact UNHCR, the restricted movement and the meaning of the different documents such as the green card. Information leaflets are available in most of the languages spoken by asylum seekers.

The residence restriction applicable since 1 November 2017 is notified in writing in all federal provinces. NGOs and private operators receive information sheets in 52 languages. Asylum seekers are required to sign the notice (see Freedom of Movement).

In the reception centres, asylum seekers are informed about the house rules, including information about their duties and sanctions. Information is either posted in the most common languages (like English, Russian, French, Arabic, Farsi, Urdu, Serbian) or a paper containing brief written instructions has to be signed by the asylum seeker. The federal province of Carinthia has published the latter on its website. In the states of Lower Austria, Salzburg a brochure, which is also available on the internet, describes the Basic Care system, although information is not up to date. In other provinces like Vienna, the information brochure contains the issues of the Basic Care system and contact details of NGOs providing information and advice. Advice from social workers is included in the reception provisions laid down by law. Social advisers visit reception centres on a regular basis, but have to fulfil at the same time administrative tasks such as handing over the monthly pocket money or the vouchers for clothes and school material. Organisations providing social advice usually also have departments for legal advice to asylum seekers.

Asylum seekers living in rented flats have to go to the offices of the social advice organisations. The system of information is not satisfactory, because one social worker is responsible for 170 asylum seekers. This entails that the standards for social work are not met in practice. Some federal provinces provide for more effective social advice than others; for instance, 50 clients per social worker in Vorarlberg or 70 in Vienna. It has to be taken into consideration that reception centres in remote areas cannot be visited very often by the social workers because of insufficient funding.

Since summer 2015 a lot of volunteers and communities help asylum seekers. They share information via social networks. Although they have been reduced in number, volunteers are still active in 2017 and assist asylum seekers in various challenges such as German language lessons and conversation, explaining duties and rights, helping with the family reunification procedure or to get an affordable flat or a job after the asylum procedure is terminated. Some initiatives organise petitions and press reports against Dublin transfers to Croatia or Bulgaria, while others are active against deportations to Afghanistan.

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231 City of Vienna, Grundversorgung Wien, available at: http://bit.ly/1YqTAVV. The Basic Care brochure for Lower Austria is available in 16 languages.
234 E.g. information about accommodation: http://asylwohnung.at/faq.
2. Access to reception centres by third parties

UNHCR has unrestricted access to all reception centres. In the 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”) 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 BFA. In the federal provinces, NGOs with a contract for providing advice in social matters have access to the reception centres, while other NGOs have to apply for permission, sometimes on a case-by-case basis. Asylum seekers living in reception centres in remote areas usually have difficulties to contact NGOs, because they have to pay the tickets for public transport from their pocket money (which amounts to €40 per month). Travel costs for meetings with the appointed legal adviser should be paid by the organisations that provide legal advice, Verein Menschenrechte Österreich and ARGE Rechtsberatung. In the majority of cases, asylum seekers are only reimbursed by the organisations for one journey to meet their appointed legal adviser.

F. Differential treatment of specific nationalities in reception

Basic Care is provided until the final decision is made, and then until departure or deportation. For asylum seekers whose appeal has no suspensive effect, the right to basic care was removed during the appeal proceedings (see Criteria and Restrictions to Access Reception Conditions). Asylum seekers from safe countries of origin are affected by this restriction.

235 BGBl. II Nr. 2005/2 and 2008/146.