

OVERVIEW OF NATIONAL PROTECTION STATUSES IN AUSTRIA

Maria-Alexandra Bassermann

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EUROPEAN MIGRATION NETWORK

The European Migration Network (EMN) was launched in 2003, by the European Commission and by order of the European Council, in order to satisfy the need for a regular exchange of reliable information in the field of migration and asylum at European level. Since 2008 Council Decision 2008/381/EC has constituted the legal basis of the EMN, and National Contact Points (NCPs) have been established in the EU Member States (with the exception of Denmark, which has observer status) and in Norway.

The EMN's role is to provide up-to-date, objective, reliable and comparable information on migration and asylum to European Union (EU) institutions and Member States' authorities and institutions with a view to supporting policymaking in the EU in these areas. The EMN is also tasked with providing such information to the general public.

The NCP Austria – based on an agreement with the Federal Ministry of the Interior – is located in the Research and Migration Law Department of the Country Office for Austria of the International Organization for Migration (IOM). The IOM office was established in 1952 when Austria became one of the first Member States of the Organization. The main responsibility of the IOM Country Office is to analyse national migration issues and emerging trends and to develop and implement corresponding national projects and programmes.

The main tasks of the NCPs in implementing the work programme of the EMN include drafting the annual policy reports and studies covering specific topics, responding to Ad-Hoc Queries launched by other NCPs or the European Commission, carrying out activities to increase the EMN visibility, and networking within several fora. In addition, the NCPs in each country also set up national networks of organizations, institutions and individuals working in the field of migration and asylum.

In general, the NCPs do not conduct primary research but collect and analyse existing data and information, which are supplemented where necessary through additional information collected directly. EMN studies are prepared in accordance with common study templates in order to achieve comparable results within the EU and Norway. Since comparing results frequently proves challenging, the EMN has produced a Glossary,

which ensures that similar definitions and terminology are used in all national reports.

On completion of national reports, the European Commission with the support of a service provider drafts a synthesis report, which summarizes the most significant results from the individual national reports. In addition, topic-based policy briefs, referred to as EMN Informs, are prepared as succinct summaries and comparisons of national findings on key selected topics. All national studies, synthesis reports, Informs and the Glossary are available on the website of the European Commission Directorate-General for Migration and Home Affairs.

TABLE OF CONTENTS

SUMMARY	7
1. INTRODUCTION	10
1.1 Study aims	10
1.2 Background	12
1.3 Scope of the study	15
1.4 Definitions	15
1.5 Methodology	17
2. OVERVIEW OF DISCRETIONARY GROUNDS AND CONSIDERATIONS IN GRANTING NATIONAL PROTECTION STATUSES	19
2.1 Possible forms of non-EU-harmonized protection statuses	19
2.2 Statuses in the context of admission programmes	21
3. “RESIDENCE TITLE FOR PARTICULARLY EXCEPTIONAL CIRCUMSTANCES”	23
3.1 Statistics	23
3.2 Origin of the status	25
3.3 Changes since 2010	27
3.4 Legal features of the residence title	29
3.5 Details of the residence title and related rights	33
3.6 Comparison with asylum and subsidiary protection status	38
3.7 Relevant court rulings	42
4. NATIONAL PROTECTION STATUSES IN PUBLIC DEBATES	43
5. CHALLENGES AND PLANNED MEASURES	49
6. CONCLUSIONS	51
ANNEXES	53
A.1 List of translations and abbreviations	53
A.2 Bibliography	55

LIST OF FIGURES AND TABLES

Figure 1: Residence Permits (Plus) granted for particularly exceptional circumstances, by recipient's gender (2014–2018)	24
Figure 2: Residence Permits (Plus) granted for particularly exceptional circumstances, by year (2014–2018)	25
Table 1: Non-EU-harmonized protection statuses – practices and legal base in Austria relating to the various grounds and types of cases	20
Table 2: Non-EU-harmonized protection statuses – practices and legal base in Austria relating to statuses granted in the context of admission programmes	22
Table 3: Legal features of the “Residence Title for Particularly Exceptional Circumstances”	29
Table 4: Details of the “Residence Title for Particularly Exceptional Circumstances” and related rights	33

SUMMARY

The subject of this study comprises those national protection statuses that have not been harmonized through legislation of the European Union (EU). It thus differs from previous studies that look into the practices within the EU Member States and Norway in relation to protection statuses that have been EU-harmonized (including asylum and subsidiary protection status). In more precise terms, the study looks at statuses in Austria that are granted on the basis of need for protection and are not defined in the Qualification Directive (2011/95/EU) or the Temporary Protection Directive (2001/55/EC), but are based on provisions of national law. Such statuses are referred to collectively here as “national protection statuses”.

Examples of statuses under study here include statuses granted on humanitarian grounds or based on the principle of *non-refoulement* or the European Convention on Human Rights (ECHR) (for instance, based on the prohibition of torture and inhuman or degrading treatment (Art. 3 ECHR), for medical reasons, after relocation or resettlement, or due to natural disasters). Statuses that have been harmonized through EU legislation do not fall under the study (for example, asylum and subsidiary protection status), nor do statuses granted to individuals in these categories: victims of human trafficking or witnesses of crimes; persons requiring protection on the grounds given in Art. 8 ECHR (right to respect for private and family life); stateless persons; individuals who have applied for a humanitarian visa from outside the country; and persons who, while obliged to return, are unable to be returned. The overall aim of the study is to provide a summary of national statuses, along with related provisions, practices and rights.

The common study template, based on which Member States of the European Migration Network (EMN) prepare their national reports, enquires as to the various grounds or types of case potentially leading to the granting of a national protection status. This study reveals that Austria does not grant any specific national protection status for the grounds or types of cases listed in the study template. Instead, such cases are clarified on the basis of legal provisions during an asylum procedure and, where a positive decision is reached, covered by an EU-harmonized status or one

not discussed in this study. In this context, subsidiary protection plays a key role, since it covers cases relating to the principle of non-refoulement; individuals having to leave their countries due to natural disasters or climatic conditions may also fall under such cases. This similarly applies to persons with serious medical conditions who would face health threats were they to return.

Although there is no specific national protection status in Austria corresponding to the various grounds or types of cases given in the common study template, there is nevertheless one non-EU-harmonized protection status that falls under the definition of the study: the “Residence Title for Particularly Exceptional Circumstances” as set out in Art. 56 of the Asylum Act 2005. This title was first introduced in its current form in 2009, in the Settlement and Residence Act, and subsequently transferred to the Asylum Act 2005 in 2014 as a result of the Aliens Authorities Restructuring Act. The Federal Office for Immigration and Asylum is responsible for applications for a residence title under Art. 56 Asylum Act 2005. Where the request is refused, the applicant can lodge a complaint with the Federal Administrative Court.

This type of residence title, in the form of a Residence Permit or Residence Permit Plus, is granted upon application to third-country nationals who have stayed within Austrian territory for five years and have been lawful residents for at least half that period, and, in case of the Residence Permit Plus, who additionally have completed module 1 of the Integration Agreement or are pursuing legal gainful employment.

Like other third-country nationals, individuals holding a “Residence Title for Particularly Exceptional Circumstances” face no restrictions in terms of access to education or the private housing market, recognition of their qualifications or to participating in general integration measures for third-country nationals. Persons holding such a title do not usually have access to the minimum benefit system or the various types of housing assistance, although this depends on legal arrangements in the province of residence. Only individuals holding a Residence Permit Plus have unrestricted access to the labour market. Persons holding a Residence Permit, in contrast, only receive labour market access under an official permit. Individuals able to access the labour market also have health insurance coverage. Those without such coverage can take out individual health insurance. Persons holding a “Residence Title for Particularly

Exceptional Circumstances” are not entitled to family reunification. The conditions applying to persons holding such a title differ on the whole from those for persons granted asylum or subsidiary protection, while the same conditions apply in some respects.

Such residence titles are limited to 12 months and are not renewable. There is, however, a possibility of subsequently applying for a residence title under the Settlement and Residence Act. Persons holding a “Residence Title for Particularly Exceptional Circumstances” additionally have to meet the general requirements when applying for a Permanent Residence – EU title or for Austrian citizenship.

National protection statuses are also the subject of public debates in Austria, primarily in the context of discussing a residence right for rejected asylum seekers. Specific national protection statuses, such as the “Residence Title for Particularly Exceptional Circumstances” considered here, are discussed in detail in isolated cases only. Challenges involving the “Residence Title for Particularly Exceptional Circumstances” were identified in relation to operational and legal matters, as well as to the rights attached to the residence title.

1. INTRODUCTION

1.1 Study aims

This study looks at those protection statuses granted in Austria that are not harmonized in European Union (EU) legislation. The specific concern is an individual's need for protection, where this is not defined in the Qualification Directive (2011/95/EU)¹ or the Temporary Protection Directive (2001/55/EC).² Thus, national rather than international protection statuses fall within the scope. This study contributes towards compiling a handbook covering all national statuses issued in EU Member States and Norway. In addition to the statistics on national statuses, related legal provisions, practices and rights are covered.

Previous studies compared the Member States and Norway in terms of EU-harmonized protection statuses³ and of specific practices of individual

- 1 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, pp. 9–26.
- 2 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, pp. 12–23.
- 3 See also for example the following EMN studies: EMN, *Integration of beneficiaries of international/humanitarian protection into the labour market: policies and good practices* (European Commission, Brussels, 2015). Available from www.emn.at/wp-content/uploads/2017/01/emn-studies-00_integration_of_beneficiaries_of_international_protection__eu_2015_en_final.pdf (accessed 26 April 2019); EMN, *The Return of Rejected Asylum Seekers: Challenges and Good Practices* (European Commission, Brussels, 2016a). Available from www.emn.at/wp-content/uploads/2016/12/emn-studies-00_synthesis_report_rejected_asylum_seekers_2016.pdf (accessed 26 April 2019); EMN, *Resettlement and Humanitarian Admission Programmes in Europe – what works?* (European Commission, Brussels, 2016b). Available from www.emn.at/wp-content/uploads/2017/01/emn-studies-00_resettlement_synthesis_report_final_en.pdf (accessed 26 April 2019); EMN, *Family Reunification of Third-Country Nationals in the EU plus Norway* (European Commission, Brussels, 2017). Available from www.emn.at/wp-content/uploads/2016/12/00_family_reunification_synthesis_report_final_en_print_ready.pdf (accessed 26 April 2019); EMN, *Changing Influx of Asylum Seekers in 2014–2016* (European Commission, Brussels, 2018a). Available from www.emn.at/wp-content/uploads/2018/01/emn-synthesis-report-2018_changing-influx.pdf (accessed 26 April 2019).

countries in cases of vulnerable groups such as unaccompanied minors.⁴ No current information is available, however, on practices in the context of the individual types of national or non-harmonized protection. The 2010 European Migration Network (EMN) study entitled *The Different National Practices Concerning Granting of Non-EU Harmonised Protection Statuses*⁵ provides a comprehensive summary of the procedures followed at the time in 23 Member States.⁶ As part of that study, the Austrian country report⁷ describes various non-harmonized statuses and related rules in Austria. That study is now out of date, however. Accordingly, this study represents an update of portions of the 2010 EMN study and, as such, fills any gaps in the research findings.

The study is also to be seen in the context of the Common European Asylum System (CEAS),⁸ with efforts aimed at complementing existing

- 4 See also the EMN-Study: EMN, *Approaches to Unaccompanied Minors Following Status Determination* (European Commission, Brussels, 2018b). Available from www.emn.at/wp-content/uploads/2018/07/emn-synthesis-report-2018_-unaccompanied-minors-following-status-determination.pdf (accessed 26 April 2019).
- 5 EMN, *The different national practices concerning granting of non-EU harmonised protection statuses* (European Commission, Brussels, 2019). Available from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/non-eu-harmonised-protection-status/0_emn_synthesis_report_noneuharmonised_finalversion_january2011_en.pdf (accessed 12 April 2019).
- 6 Member States that participated in the 2010 study were Austria, Belgium, Bulgaria, Czechia, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland.
- 7 AT EMN NCP, *The Practices in Austria Concerning the Granting of Non-EU Harmonised Protection Statuses* (IOM, Vienna, 2010). Available from www.emn.at/wp-content/uploads/2017/01/National-Report-Austria-EMN_Non-EU-Harmonized-Protection-Statuses_FINAL.pdf (accessed 9 April 2019).
- 8 Since 1999 the EU has been working on developing the Common European Asylum System (CEAS). In the first phase, up to 2005, various directives were adopted to pursue aims including harmonizing common minimum standards. This was followed by a phase of reflection and evaluation, which was concluded with the Commission Communication entitled *Policy Plan on Asylum – An Integrated Approach to Protection Across the EU* (COM(2008) 360 final) in 2008. According to the plan, the CEAS is based on three pillars: harmonization of protection standards, practical cooperation and solidarity. More recently, new EU rules have been agreed, for example the 2011 recast of the Qualification Directive (Directive 2011/95/EU) or the Dublin III Regulation in 2013 (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining

legal pathways for admission to the EU of those in need of protection.⁹ Building on the EMN studies entitled *Changing Influx of Asylum Seekers 2014–2016* (2018) and *Resettlement and Humanitarian Admission Programmes in Europe – What Works?* (2016), this study aims at informing the proposed EU Resettlement Framework Regulation¹⁰ while also responding to increasing interest in other legal pathways for persons in need of protection (for example, private sponsorship programmes).

1.2 Background

In the EU law-making context, harmonization refers to the approximation of national laws through common (and sometimes minimum) standards set by EU legislation to ensure consistency and convergence of standards and practices across the EU. In the field of asylum, EU legislation requires Member States to harmonize their legislation and practices and bring them in line with the CEAS. From the perspective of protection statuses, the aim of the CEAS was to codify the status of persons needing international protection and to harmonize the scope of protection granted. Consequently, refugee status was included in the 2004 Qualification

the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, pp. 31–59). These define common standards and stronger cooperation, with the aim of ensuring that asylum seekers are treated equally in an open and fair system, irrespective of the country of application (for more about the CEAS at European Commission, see *Common European Asylum System*, available from https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en (accessed 25 April 2019)).

- 9 European Commission, *Communication from the Commission to the European Parliament and the Council towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM (2016) 197, 6 April 2016, available from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards_a_reform_of_the_common_european_asylum_system_and_enhancing_legal_avenues_to_europe_-_20160406_en.pdf (accessed 30 April 2019).
- 10 European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council*, COM (2016) 468, 13 July 2016, available from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/resettlement_system_en.pdf (accessed 26 April 2019).

Directive (2004/83/EC)¹¹ and in its 2011 recast (2011/95/EU)¹² as a means of embracing in EU law the concept of a refugee as defined by the 1951 Refugee Convention (EASO, 2016:13).¹³

The statuses of beneficiaries of subsidiary and temporary protection, in contrast, were introduced in EU legislation independently of the 1951 Refugee Convention. This is because some asylum seekers in need of international protection did not fall within the scope of the Convention, yet were nonetheless considered to be in need of protection based on Member States' obligations under international human rights instruments and/or national practices (EASO, 2016:14–15).¹⁴ Introducing subsidiary protection was specifically aimed at codifying and harmonizing a number of existing practices in Member States. However, subsidiary protection, as now defined in the recast Qualification Directive, does not cover all cases where Member States grant protection.

Additional grounds for protection were thus defined in the European Convention on Human Rights (ECHR) and by the European Court of Human Rights (ECtHR). Such examples include exceptional medical cases, family reasons and the best interests of the child,¹⁵ or expulsion of persons

- 11 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, pp. 12–23.
- 12 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, pp. 9–26 (Qualification Directive).
- 13 Convention relating to the Status of Refugees, FLG No. 55/1955 (Geneva Refugee Convention).
- 14 In distinction to temporary protection, subsidiary protection is granted after status is determined in the individual case based on clearly defined grounds that relate to the wider application of *non-refoulement* in international human rights law; temporary protection, in contrast, relates to protection granted in cases of highly increased numbers of persons in need of protection (Art. 1 Directive 2001/55/EC).
- 15 Examples of rulings by the European Court of Human Rights (ECtHR): ECtHR, 11 July 2002, Amrollahi vs. Denmark, 56811/00; ECtHR, 30. July 2013, Berisha vs. Switzerland, 948/12; ECtHR, 16. December 2008, Gulijev vs. Lithuania, 10425/03; ECtHR, 06. November 2012, Hode and Abdi vs. The United Kingdom, 22341/09; ECtHR, 12 October 2007, Mubilanzila Mayeka and Kaniki Mitunga vs. Belgium, 13178/03; ECtHR, 10. July 2014, Mugenzi vs. France, 52701/09; ECtHR, 10. July 2014, Senigo Longue and Others vs. France, 19113/09; ECtHR, 10. July 2014, Tanda-Mugenzi vs. France, 2260/10.

excluded from international protection who face the threat of the death penalty or torture in their countries of origin.¹⁶ The latter also plays a role in the recast Qualification Directive (2011/95/EU). Under that Directive, subsidiary protection status is to be granted to categories of individuals including third-country nationals who do not qualify as refugees but nonetheless face a real risk, for example of torture, in their countries of origin. Within the framework of this study, it is important to distinguish between the grounds leading to subsidiary protection, as defined in the Qualification Directive (Article 15), and the principle of non-refoulement, which is derived from the prohibition of torture and inhuman or degrading treatment or punishment as set out in the ECHR (Article 3). Correspondingly, this study also aims to bring to light potential grounds for national protection statuses that are outside of the scope of the Qualification Directive and nonetheless fall under Art. 3 of the ECHR as well as related ECtHR case law.

Member States do in fact grant other forms of protection, based on either international obligations (not covered by the Qualification Directive) or discretionary grounds under national legislation. Specifically, the 2016 proposal for a Qualification Regulation¹⁷ allows Member States to grant national humanitarian status to those who do not qualify for international protection.¹⁸ This study correspondingly looks into the discretionary grounds and humanitarian considerations potentially applicable in Austria as well as the forms of protection granted in this connection.

16 For example, ECtHR, 11. October 2014, *Auad vs. Bulgaria*, 46390/10.

17 European Commission, *Proposal for a Regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, COM(2016) 466 final, 13 July 2016, available from <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-466-EN-F1-1.PDF> (accessed 26 April 2019).

18 *Ibid.*

1.3 Scope of the study

This study analyses non-EU-harmonized national protection statuses (see section 1.4), including statuses granted on humanitarian grounds or based on the principle of non-refoulement or the ECHR (for instance, based on the prohibition of torture and inhuman or degrading treatment):

- Protection status based on constitutional asylum;
- Protection status based on regulations relating to collective protection;
- Protection statuses granted on medical grounds;
- Protection statuses granted for reasons of climatic conditions or natural disasters;
- Protection status for local personnel of the Austrian armed forces;
- Protection status for children, unaccompanied minors (UAM) or UAMs reaching the age of majority;
- Statuses granted in the context of a resettlement programme, EU relocation programme or other (humanitarian) admission programmes;
- Other national protection statuses falling under the definition of the study.

Statuses not falling under the study are those that have been harmonized through EU legislation (for example, asylum and subsidiary protection status) or are granted under any of these circumstances:

- To victims of human trafficking or witnesses of crimes;
- Under Art. 8 ECHR (right to respect for private and family life);
- To stateless persons;
- Following an application made outside the country (humanitarian visas);
- To persons obliged to return who cannot be returned.

The study is also intended as an update to the 2010 EMN study on the same topic, with the period covered now spanning 2010–2018.

1.4 Definitions

The following definitions, which are specified in the common template, are intended to make more comparable the results of the country reports by the EMN Member States. These definitions help additionally to clearly

delineate broad concepts, such as “protection”, used in the study at hand. They also contribute to differentiating various terms from one another, such as “international protection” and “national protection”. For the most part, the following definitions are taken from the EMN Glossary.¹⁹

Protection: A concept that encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of human rights, refugee and international humanitarian law (EMN, 2018d:295). Protection involves creating an environment conducive to respect for human beings, preventing and/or alleviating the immediate effects of a specific pattern of abuse, and restoring dignified conditions of life through reparation, restitution and rehabilitation (UNHCR, 2006:13).

Status: In the context of this study, “status” refers to a legal status which leads directly to the issuing of a residence title granting a long-term right (i.e. for longer than three months)²⁰ to reside in a Member State (EMN, 2019:6).

International protection: In the global context, the actions by the international community on the basis of international law aimed at protecting the fundamental rights of a specific category of persons outside their countries of origin, who lack the national protection of their own countries. In the EU context, international protection encompasses refugee status and subsidiary protection status (EMN, 2018d:222).

National protection status: Any protection status granted by a State to a third-country national on the basis of national provisions that are not related to international protection, as defined in and harmonized by the Qualification Directive 2011/95/EU, nor to temporary protection as defined in the Temporary Protection Directive 2001/55/EC. National protection status is the recognition by a State of a third-country national as a person eligible for national protection (EMN, 2019:6).

19 EMN, *Glossar zu Asyl und Migration 5.0* (European Commission, Brussels, 2018c). Available from www.emn.at/wp-content/uploads/2018/07/emn-glossar-5-0_de.pdf (accessed 26 April 2019); EMN, *Asylum and Migration Glossary 6.0* (European Commission, Brussels, 2018d). Available from www.emn.at/wp-content/uploads/2018/06/emn-glossary-6-0_en.pdf (accessed 26 April 2019).

20 In this context, “long term” is defined in accordance with the provisions of the Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa, OJ L 85, pp. 1–4.

National protection statuses granted in Member States may be conceived as consisting of rights leading to the issuance of residence titles that are granted to a wide range of third-country nationals for a variety of reasons. Such national (or non-harmonized) protection statuses usually lie outside of the asylum procedure and related residence permits are granted as part of (legal) migration policies, and on grounds relating to the situation of the person, including the situation at the time when removal from the EU Member State is imminent (EMN, 2019:6). Grounds may include:

- Statuses for relocated or resettled persons (who are not granted any international protection status harmonized by EU law or equivalent);
- Statuses for beneficiaries of private or community sponsorship programmes;
- Statuses for beneficiaries of other programmes designed to assist, for example, family members (of persons lawfully residing in a state) or others who are in need of protection to enter and reside in the EU;
- Constitutional asylum (that leads to the granting of an international protection status harmonized by EU law or equivalent);
- Collective protection (that leads to the granting of an international protection status harmonized by EU law or equivalent);
- Other (including humanitarian) statuses:
 - Statuses for medical reasons;
 - Statuses for reasons related to climate change and natural disasters;
 - Statuses for local personnel of armed forces (for example, interpreters);
 - Special statuses for unaccompanied minors;
 - Special statuses for children (if different from the protection-related statuses provided to adults for the above-listed reasons) (EMN, 2019:6–7).

1.5 Methodology

The present study was conducted by the National Contact Point (NCP) Austria in the EMN within the framework of the EMN's 2019–2020 Work Programme. The study follows a common study template²¹ with a predefined

21 See EMN, *Comparative overview of national protection statuses in the EU and Norway – Common Template for EMN Study 2019* (European Commission, Brussels, 2019). Available from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_national_protection_common_template_en.pdf (accessed 28 May 2019).

set of questions developed by the EMN, in order to facilitate comparability of the findings across all Member States.

Legislative texts, national and international publications, press releases and websites were used as sources. The study was also able to draw on continuous media monitoring information provided by the Country Office for Austria of the International Organization for Migration (IOM). The statistical data presented here were provided by the Federal Ministry of the Interior and appropriately structured by the IOM Country Office for Austria.

To supplement the information obtained through secondary research, qualitative semi-structured interviews were carried out with experts on aliens law and asylum in Austria. The experts listed below participated in face-to-face and telephone interviews:

- Sabrina Lehner, Unit V/8 – Asylum, Federal Ministry of the Interior;
- Emanuel Matti, director of legal counselling, Diakonie Refugee Service;
- Katharina Sklenicka, legal administrator, Federal Office for Immigration and Asylum.

The study was compiled by Maria-Alexandra Bassermann (Research Associate, IOM Country Office for Austria) under the supervision of Saskia Heilemann (Interim Head of Research and Migration Law Unit, Research Associate, IOM Country Office for Austria). Martin Stiller (Interim Head of Research and Migration Law Unit, Legal Associate, IOM Country Office for Austria) was responsible for responding to legal issues.

The interviewees mentioned above deserve special thanks for sharing their knowledge and experience through personal interviews and written responses. The author also wishes to thank Thomas Rossmüller (Research Intern, IOM Country Office for Austria) for research support.

The study was prepared in close cooperation with the Federal Ministry of the Interior.

2. OVERVIEW OF DISCRETIONARY GROUNDS AND CONSIDERATIONS IN GRANTING NATIONAL PROTECTION STATUSES

The following section examines the practices and the legal situation in Austria to discern the discretionary grounds and humanitarian considerations potentially serving as a basis for granting a national protection status. The issue of constitutional asylum and collective protection is discussed first, followed by a brief examination of the various grounds for granting protection statuses and of the types of case where such protection is granted. This is followed by a section dealing specifically with possible statuses granted in the context of admission programmes.

2.1 Possible forms of non-EU-harmonized protection statuses

The common study template enquires as to the various grounds or types of case potentially serving as a basis for granting a national protection status. In Austria, such cases are considered largely in the context of the general provisions of law applying to asylum procedures. Subsidiary protection plays a special role in this regard. Specifically, subsidiary protection as defined under the Austrian Asylum Act 2005²² concerns cases otherwise referred to as falling under the principle of *non-refoulement* (Hinterberger, 2017:125). Hinterberger (2017:129) describes the system of rules defined in Austrian law as one that, in the context of a procedure to grant international protection, requires an examination of any and every violation of Art. 3 of the European Convention on Human Rights (ECHR) and of the prohibition of torture that “threatens an individual in their country of origin”. Subsidiary protection is to be granted where, after their return, an individual faces a real threat of a violation of Art. 2 (right to life) or Art. 3 (prohibition of torture) ECHR or of Protocols No. 6 or 13 (abolition of the death penalty (in all circumstances)) (Art. 8 para 1 subpara 3 Asylum Act 2005). The table below describes how Austria deals with the various grounds or types of cases and refers to the related legal base.

22 FLG I No. 100/2005, in the version of FLG I No. 56/2018.

Table 1: Non-EU-harmonized protection statuses – practices and legal base in Austria relating to the various grounds and types of cases

Possible types of protection not harmonized by the European Union (EU)	Practice and legal base in Austria
Constitutional asylum ²³	No “constitutional asylum” exists under Austrian law, as the Austrian Federal Constitutional Law ²⁴ does not recognize any right to asylum.
Collective protection ²⁵	A type of “collective protection” exists in Austria as set out in detail in Art. 62 para 1 Asylum Act 2005. This type of protection is, however, based on Directive 2001/55/EC ²⁶ of the European Council (Filzwieser et al., 2016:1026) and thus falls under the EU-harmonized statuses, which are not within the scope of this study. ²⁷
National protection statuses granted on medical grounds	Under relevant case law, it is prohibited to return a person to their country of origin where the individual's application for asylum in Austria is rejected and returning the individual would, for example due to that individual's (impaired) state of health, entail a real risk of violating the person's right to life (Art. 2 ECHR) or the prohibition of torture (Art. 3 ECHR). ^{28,29} In such cases, the

- 23 “Constitutional asylum” is defined as the right to asylum that is embedded in the constitution of a State. The right to asylum is provided for in the constitutions of approximately half of the EU Member States. Only the constitutions of a few Member States (for example, France and Italy) include asylum-related provisions that in scope exceed the refugee protection defined in the Refugee Convention 1951 and in the recast Qualification Directive (for further information, see Meili, 2018:399; EMN, 2019:3).
- 24 FLG No. 1/1930, in the version of FLG No. 14/2019.
- 25 In certain Member States, the concept of “collective protection” exists. In some cases, this form of protection largely corresponds to that set out in the Temporary Protection Directive. In other States, the definition and the legal base relating to temporary protection at national level differ from the EU-harmonized temporary protection concept (EMN, 2019:3).
- 26 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, pp. 12–23.
- 27 In the event of a strong influx of displaced persons, Directive 2001/55/EC allows Member States, amongst other things, to grant temporary protection to categories of persons (Art. 1 Directive 2001/55/EC).
- 28 “If after examining of all relevant information serious doubts remain – pertaining to the general situation in the country of destination and/or the individuals’ situations – regarding the effect of deportation on the persons concerned, the removing State must have received individual and adequate assurances from the country of destination that appropriate treatment options are available and accessible for the persons concerned. If the country of destination cannot provide such assurances or if it is already clear, based on the findings of any previous investigation, that the country will not be able to provide such assurances, removal must not be carried out” (Berthou, 2017:9).
- 29 In accordance with case law of the European Court of Human Rights, the Supreme Administrative Court has also ruled that “very exceptional circumstances” must exist in order to exclude the return of an individual to their country of origin (Supreme Administrative Court of 23 September 2009, 2007/01/0515).

Possible types of protection not harmonized by the European Union (EU)	Practice and legal base in Austria
	individual concerned can be granted subsidiary protection (Art. 8 Asylum Act 2005), which is an EU-harmonized status. ³⁰ Austrian law has no provision for a separate national humanitarian protection status granted on medical grounds. ³¹
National protection statuses granted for reasons of climatic conditions or natural disasters	Austrian law similarly has no separate status for individuals seeking protection who have left their countries due to natural disasters or climatic conditions.
National protection status for local personnel of the Austrian armed forces	In addition, Austrian law does not provide for any separate protection status for third-country citizens who have been employed (for example as translators) by the Austrian armed forces in a third country. Such cases are dealt with in Austria in the context of the general provisions of law applying to asylum procedures. ³²
National protection status for children, unaccompanied minors (UAM) or UAMs reaching the age of majority	No special protection status as defined in this study exists in Austria for children, UAMs or UAMs who have reached the age of majority. Such cases are also dealt with in the context of the general provisions of law applying to asylum procedures, according to a representative of the Federal Ministry of the Interior. The decision as to whether to grant a humanitarian residence title is reportedly taken after considering the special circumstances of the case.³³ When certain conditions are met, a Red-White-Red Card Plus (RWR Card Plus) can be applied for or issued ex officio on behalf of a UAM (Art. 41a para 10 Settlement and Residence Act). Protecting the best interests of the child is a major factor in deciding whether to grant such protection (see Art. 41a para 10 Settlement and Residence Act). While humanitarian considerations do play a role in the RWR Card (Eppel, 2017:register 5, section 2.4.6:1), it is a form of settlement authorization for immigrants that is defined in the Settlement and Residence Act³⁴ and correspondingly does not fall under “protection status” as defined in this study.

2.2 Statuses in the context of admission programmes

The study additionally looks at possible national statuses intended for individuals entering the EU as part of a resettlement programme, relocation programme or other (humanitarian) admission programme. The table below summarizes the current situation in Austria in this regard.

30 See Article 15ff Directive 2011/95/EU.

31 Interview with Sabrina Lehner, Federal Ministry of the Interior, 4 April 2019.

32 Ibid.

33 Ibid.

34 FLG I No. 100/2005, in the version of FLG I No. 56/2018.

Table 2: Non-EU-harmonized protection statuses – practices and legal base in Austria relating to statuses granted in the context of admission programmes

Admission programme	Practice and legal base in Austria
Resettlement programme ³⁵	Where Austria enters a commitment based on international law to admit refugees for resettlement, asylum or international protection status is granted ex officio to each individual arriving in Austria, without any additional procedure (Art. 3a Asylum Act 2005; Schrefler-König and Szymanski, 2017:Art. 3a Asylum Act 2005 comment 1). The status entails a residence permit valid for a limited term that can become permanent after three years (Art 3 para 4 Asylum Act 2005). ³⁶ The individuals concerned thus receive a protection status that is harmonized in European legislation.
EU relocation programme ³⁷	Like all other asylum seekers, individuals arriving in Austria under an EU relocation programme submit to an asylum procedure. ³⁸ No information is available as to the type of status they finally receive. ³⁹
Other (humanitarian) admission programmes	From 2013 until 2017, Austria implemented three humanitarian admission programmes for particularly vulnerable Syrian refugees. In total, Austria resettled 1,902 Syrian refugees from Jordan, Turkey and Lebanon as first countries of refuge. ⁴⁰ After their arrival in Austria, they obtained asylum status (Kratzmann 2016:37). ⁴¹ As far as is known, Austria has no special community or private sponsorship programmes to support individuals (such as relatives) in coming to Austria (EMN, 2016b:37).

35 Resettlement: In the global context, the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them as refugees with permanent residence status. In the EU context, the transfer, on a request from the United Nations High Commissioner for Refugees (UNHCR) and based on their need for international protection, of a third-country national or stateless person, from a third country to an EU Member State, (i) refugee status within the meaning of Art. 2(d) of Directive 2011/95/EU (Recast Qualification Directive); or (ii) a status which offers the same rights and benefits under national and EU law as refugee status (EMN, 2018d:326).

36 For further information see Kratzmann, 2016:36–37.

37 Relocation: In the general EU-context, the transfer of persons having a status defined by the Geneva Refugee Convention and Protocol or subsidiary protection within the meaning of Directive 2011/95/EU (Recast Qualification Directive) from the EU Member State which granted them international protection to another EU Member State where they will be granted similar protection, and of persons having applied for international protection from the EU Member State which is responsible for examining their application to another EU Member State where their applications for international protection will be examined. In the context of the EU emergency relocation programme, the transfer of persons in clear need of international protection, as defined in Council Decisions 2015/1601 and 2016/1754, having applied for international protection from the EU Member State, CH or NO where their application for international protection will be examined (EMN, 2018d:318).

38 Interview with Sabrina Lehner, Federal Ministry of the Interior, 4 April 2019.

39 Interview with Katharina Sklenicka, Federal Office for Immigration and Asylum, 4 April 2019.

40 Written input by Federal Ministry of the Interior, 14 June 2019.

41 For further information see Kratzmann, 2016.

3. “RESIDENCE TITLE FOR PARTICULARLY EXCEPTIONAL CIRCUMSTANCES”

Austria has only one not by the European Union (EU) harmonized protection status that falls under the definition given in this study: the “Residence Title for Particularly Exceptional Circumstances”. The provisions applying to this status are set out under Art. 56 of the Asylum Act 2005,⁴² in Chapter 7 (Residence Titles for Exceptional Circumstances). Additionally included under the Residence Titles for Exceptional Circumstances are the “Residence Title on Grounds of Art. 8 ECHR” (Art. 55 Asylum Act 2005) as well as the Residence Permit for Individual Protection (Art. 57 Asylum Act 2005) intended for individuals such as victims of human trafficking (Art. 75 para 2 Asylum Act 2005). Neither of those two titles falls under the definition of a national protection status as given in the study (see section 1.3). The Residence Titles for Exceptional Circumstances are referred to in Austria as humanitarian residence titles and discussed in the context of a humanitarian right of residence.

3.1 Statistics

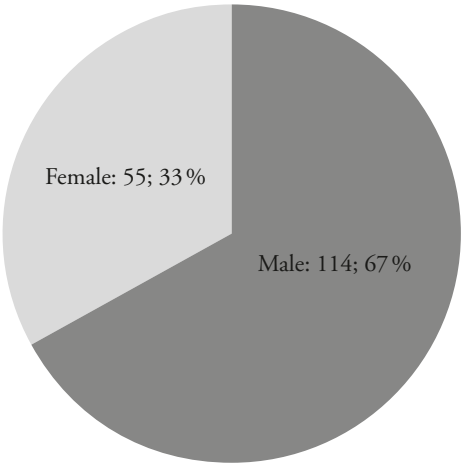
The following section presents statistics on individuals who were granted a “Residence Title for Particularly Exceptional Circumstances” in the form of a Residence Permit or a Residence Permit Plus (see table 3). The data have only been available since 2014, when responsibility for granting the title was transferred to the Federal Office for Immigration and Asylum.⁴³ The data are broken down by number, recipient’s gender, the main countries of origin and the instance granting the title. As only a few “Residence Titles for Particularly Exceptional Circumstances” have actually been granted, the data are not broken down in any greater detail due to data privacy considerations.

42 FLG I No. 100/2005, in the version of FLG I No. 56/2018.

43 Interview with Sabrina Lehner, Federal Ministry of the Interior, 4 April 2019.

A Residence Permit or Residence Permit Plus was granted for particularly exceptional circumstances in a total of 169 cases in 2014–2018. Of the total, 114 (67%) were issued to males and 55 (or 33%) to females (see figure 1).

Figure 1: Residence Permits (Plus) granted for particularly exceptional circumstances, by recipient's gender (2014–2018)



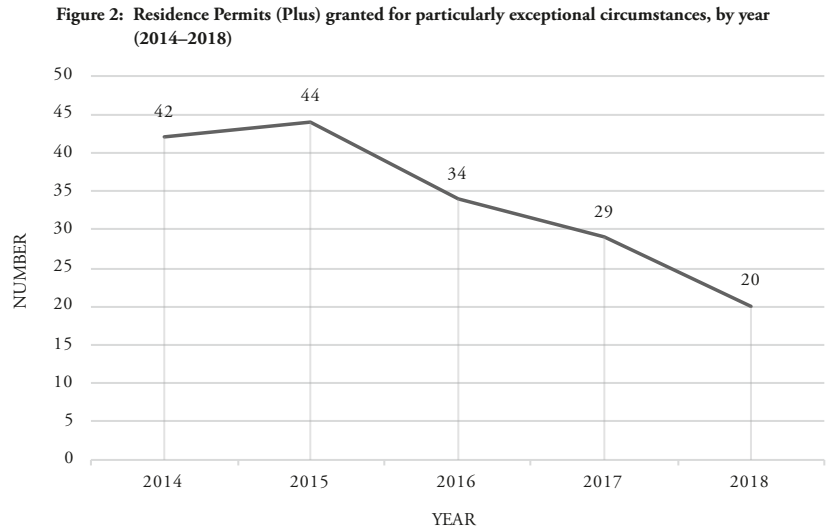
Source: Data provided by the Federal Ministry of the Interior, 4 April 2019, representation by author.

The five most common countries or areas of origin of individuals granted a Residence Permit (Plus) in 2014–2018 were: Mongolia (28 individuals), Kosovo⁴⁴ (20), Nigeria (15), Bosnia and Herzegovina (14), and Pakistan (12). With only five of the 169 decisions issued by authorities in the second instance, it probably needs to be assumed that the large majority of the permits was granted in the first instance, in other words, before any appeal was filed.

Looking at the period of 2014–2018, the number of permits granted can be seen to decline. In 2014 for example, only 42 Residence Permits (Plus) were granted for particularly exceptional circumstances. After a slight increase to 44 granted permits in 2015, the number dropped in the following

44 The reference to Kosovo shall be understood in the sense of United Nations Security Council Resolution 1244 (1999).

years, to 34 in 2016, 29 in 2017 and finally 20 in 2018. The average number granted thus fell by half between 2014 and 2018 (see figure 2).



Source: Data provided by the Federal Ministry of the Interior, 4 April 2019, representation by author.

3.2 Origin of the status

The “Residence Title for Particularly Exceptional Circumstances”, under study here, falls under what is referred to as the “humanitarian right of residence” as referred to in Art. 56 Asylum Act 2005. The title was created as part of the Aliens Law Package 2005,⁴⁵ with the applicable terms set out in the Settlement and Residence Act⁴⁶ (see Articles 72ff Settlement and Residence Act as amended in FLG I 2005/100) (Bachmann, 2010:95–96). The Constitutional Court ruled on 27 June 2008 that “the provisions in the Settlement and Residence Act relating to residence titles for humanitarian reasons [are to be deemed] unconstitutional because such titles are only granted ex officio”.⁴⁷ Objections founded in the rule of law were a factor

45 FLG I No. 100/2005.

46 FLG I No. 100/2005 in the version of federal law FLG I No. 56/2018.

47 Constitutional Court, 27 June 2008, G 246/07.

in the reasoning, considering that a humanitarian residence right could only be granted ex officio and not on application by the individual concerned; this meant that the individual had no influence on the progress of a procedure “leading to such a major decision with serious consequences that affected the individual’s interests and rights so strongly” (Bachmann, 2010:96). As the individual concerned was not provided with any control over the further broad course of their life, the court identified a failure to comply with the principle of the rule of law (ibid.).

That ruling by the Constitutional Court was the main reason for introducing the Federal Act amending the Asylum Act 2005, the Aliens Police Act 2005 and the Settlement and Residence Act, in 2009.⁴⁸ The aim in doing so was “to ensure an arrangement complying with the constitution, while maintaining and duly implementing the alien affairs policy.”⁴⁹ Another aim was to introduce a provision that would cover “former cases”.^{50,51} The amendment created an option allowing individuals to apply for a humanitarian residence right (Bachmann, 2010:96).

The amendment to the Settlement and Residence Act in 2009 established the basis for statuses including the “Residence Title for Particularly Exceptional Circumstances” described above, as referred to in Art. 56 of the Asylum Act 2005.⁵² Along with the other residence titles granted for exceptional circumstances (see section 3), that title was transferred from the Settlement and Residence Act to the Asylum Act 2005

48 FLG I No. 29/2009.

49 Act Amending the Asylum Act 2005, the Aliens Police Act 2005 and the Settlement and Residence Act, Government Proposal – Preamble and Explanatory Notes, p. 1, available from www.parlament.gv.at/PAKT/VHG/XXIV/I/I_00088/fname_150562.pdf (accessed 21 March 2019).

50 Ibid.:11.

51 According to Asylkoordination Österreich et al. (2010:3), authorities were confronted with the problem of “40,000 asylum procedures waiting to be completed, thousands of them for more than five years”, at this time. This resulted in a demand for “a non-bureaucratic residence scheme”, voiced particularly by organizations active in the field of asylum (Asylkoordination Österreich et al., 2010:3).

52 The legislative amendment in 2009 established the basis not only for the currently existing “Residence Title for Particularly Exceptional Circumstances” but for all types of residence titles for exceptional circumstances. Thus, the amendment contributed significantly to defining the current form of the “Residence Title on Grounds of Art. 8 ECHR” (Art. 55 Asylum Act 2005) as well as the Residence Permit for Individual Protection (Art. 57 Asylum Act 2005).

as a result of the Aliens Authorities Restructuring Act⁵³ (Koppenberg 2015a:12). The change entered into force as of 1 January 2014. While transferring the residence title to the Asylum Act 2005 did not alter its content in any significant way, the associated competences were shifted and practical implementation was modified as a result. This is discussed in detail below.

3.3 Changes since 2010

The 2010 European Migration Network (EMN) study entitled *The Different National Practices Concerning Granting of Non-EU Harmonised Protection Statuses*⁵⁴ described a number of statuses that have been adapted several times since then. The 2010 study also describes statuses that fall outside of the scope of the present study, including subsidiary protection status and the status granted to protect family life in accordance with Art. 8 ECHR (see Art. 55 Asylum Act 2005). In line with the limited scope of this study, the discussion below deals only with the main changes affecting the “Residence Title for Particularly Exceptional Circumstances” as set out in Art. 56 Asylum Act 2005, which had been previously examined in the 2010 study.

Since 2010, the main change to that residence title resulted from the Aliens Authorities Restructuring Act, which entered into force in 2014. That change had major impacts at the legal and the operational levels,⁵⁵ on the one hand establishing the Federal Office for Immigration and Asylum, while also transferring the residence title for exceptional circumstances (see section 3) from the Settlement and Residence Act to the Asylum Act 2005 (Koppenberg, 2015a:12). On establishment of the Federal Office for Immigration and Asylum, various competences were combined, with responsibility for granting Residence Titles for Exceptional Circumstances shifted to the Federal State. The settlement and residence authorities in the

53 FLG I No. 87/2012.

54 AT EMN NCP, *The Practices in Austria Concerning the Granting of Non-EU Harmonised Protection Statuses* (IOM, Vienna, 2010). Available from www.emn.at/wp-content/uploads/2017/01/National-Report-Austria-EMN_Non-EU-Harmonized-Protection-Statuses_FINAL.pdf (accessed 9 April 2019).

55 Interview with Sabrina Lehner, Federal Ministry of the Interior, 4 April 2019.

provinces had previously been responsible for issuing the title (Koppenberg, 2015a:12). Since the establishment of the Federal Office for Immigration and Asylum, one and the same authority is now responsible for processing applications for international protection and applications for humanitarian residence titles (AT EMN NCP, 2013:8–9). Another change relates to the fact that approval by the Federal Minister for the Interior had previously been required. The minister, in turn, had been advised by a specially appointed board. With the power to grant residence titles for exceptional circumstances now lying with the Federal Office for Immigration and Asylum, meaning it lies with a federal authority, it has been possible to eliminate the need for approval by the minister and the advisory board, according to a representative of the Federal Ministry of the Interior.⁵⁶

The shifting of competences is limited to the Residence Titles for Exceptional Circumstances, while excluding titles granted in the context of regular migration and set out in the Settlement and Residence Act; this delineation is clearly made in the comments on the draft Aliens Authorities Restructuring Act. The resident statuses for exceptional circumstances “represent the logical and necessary steps leading to the asylum procedure or to measures terminating an individual’s stay.”⁵⁷

In establishing the Federal Office for Immigration and Asylum and in shifting decision-making competence, the aim was to accelerate procedures while making them more efficient and less costly.⁵⁸ Transferring the first level of decision-making to the Federal Office for Immigration and Asylum and the second level to the Federal Administrative Court in 2014 has, according to a representative of the Federal Ministry of the Interior, resulted in uniform procedures and implementation practices as well as a clear delineation of competences. Applications can reportedly now be processed more swiftly, consistently and comprehensively.⁵⁹

56 Ibid.

57 Aliens Authorities Restructuring Act, Government Proposal – Preamble and Explanatory Notes, p. 4, available from www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01803/fname_255385.pdf (accessed 9 April 2019).

58 Federal Ministry of the Interior, *Bundesamt für Fremdenwesen und Asyl nimmt am 1. Jänner 2014 Arbeit auf*. Press Release, 7 December 2013, available from www.ots.at/presseaussendung/OTS_20131227_OTS0092/bundesamt-fuer-fremdenwesen-und-asyl-nimmt-am-1-jaenner-2014-arbeit-auf (10 April 2019).

59 Interview with Sabrina Lehner, Federal Ministry of the Interior, 4 April 2019.

3.4 Legal features of the residence title

The table below describes the structure and legal framework of the “Residence Title for Particularly Exceptional Circumstances”. The details covered include eligibility requirements, the granting procedure, complaint procedures, issuing of a Residence Permit, termination of stay as well as possibilities for changing to another status, such as obtaining a Permanent Residence – EU permit or Austrian citizenship.

Table 3: Legal features of the “Residence Title for Particularly Exceptional Circumstances”

Legal basis
The “Residence Title for Particularly Exceptional Circumstances” is defined in Art. 56 of the Asylum Act 2005. In its current form, it was introduced into the Asylum Act 2005 in 2014. In doing so, residence titles previously defined in various provisions of law were simply grouped together (Filzwieser et al., 2016:976). The provisions serving as the basis of the current version of Art. 56 of the Asylum Act 2005 had originally been introduced in 2009, through the Federal Act amending the Asylum Act 2005, the Aliens Police Act 2005 and the Settlement and Residence Act. The “Residence Title for Particularly Exceptional Circumstances” as set out in Art. 56 of the Asylum Act 2005 is a permanent residence title, since no expiry date was set for the provision introducing it.
Eligible persons
The residence title discussed here is granted “in particularly exceptional circumstances”. Legislators have not provided any precise definition of what constitutes such an exceptional circumstance. Art. 56 Asylum Act 2005 applies to cases where failure to grant a residence title would be “unreasonable” (unbillig),⁶⁰ in other words inappropriate, according to a representative of the Federal Office for Immigration and Asylum.⁶¹ In general, the residence title is granted to third-country nationals residing within Austrian territory who meet the following requirements when submitting a justified application: 1. As of the application date, have resided within Austrian territory for five years; 2. Have been lawful residents for at least half that period and in any case three years; 3. Have successfully completed module 1 of the Integration Agreement⁶² as referred to in Art. 9 of the Integration Act⁶³ or, when the application decision is issued, are pursuing lawful gainful employment with monthly pay equalling at least the minimum earnings threshold defined in Art. 5 para 2 of the General Social Insurance Act⁶⁴ (Art. 56 para 1 Asylum Act 2005). The residence title can also be issued when the person concerned is the subject of a procedure pending with the Federal Office for Immigration and Asylum for the purpose of issuing a measure terminating residence (Art. 56 para 1 Asylum Act 2005).

60 Interview with Katharina Sklenicka, Federal Office for Immigration and Asylum, 4 April 2019.

61 Generally, a case can be assumed to be exceptional if it would be highly unreasonable to not issue a residence title, even if grounds for not doing so exist, regardless of any factors rendering the case exceptional (Schrefler-König and Szymanski, 2017:Art. 56 Asylum Act 2005, comment 1).

62 Module 1 of the Integration Agreement is a compulsory language and orientation programme for legally residing third-country nationals (ÖIF, *Integrationsvereinbarung 2017*, available from www.integrationsfonds.at/sprache/integrationsvereinbarung/integrationsvereinbarung-2017 (accessed 10 April 2019); for further information please see Bassermann, 2018:50–55).

63 FLG I No. 68/2017, in the version of federal law FLG I No. 25/2019.

64 FLG No. 189/1955, in the version of federal law FLG I No. 23/2019.

Eligible persons
When deciding the application, the authority is required to consider in particular the degree to which the applicant is integrated, their capability of supporting themselves, level of school education and vocational training, employment and knowledge of the German language (Art. 56 para 3 Asylum Act 2005). The Federal Office for Immigration and Asylum reviews in particular the individual's level of education and training, in addition to labour market integration and other criteria, such as membership in any private associations, according to a representative of the authority.⁶⁵ Certain specified circumstances prevent issuing of the permit (Art. 60 para 1 Asylum Act 2005), while other conditions must be met (Art. 60 para 2 leg. cit.). A residence title as defined in Art. 56 Asylum Act 2005 must not be granted to an individual against whom Austria has issued a valid return decision, or another Member State of the European Economic Area (EEA) or Switzerland has issued a comparable valid decision (Art. 60 para 1 Asylum Act 2005). A title pursuant to Art. 56 Asylum Act 2005 must not be granted to a third-country national whose residence in Austria contradicts public interests, for example due to the individual concerned posing a threat to public order or safety (Art. 60 para 3 subpara 2 Asylum Act 2005). Art. 60 para 2 of the Asylum Act 2005 enumerates the (additional) conditions applicants must meet in order to be granted a residence title as defined in Art. 56 of that act. These are: • Evidence of having accommodation meeting local standards; • Adequate health insurance coverage; • Secure means of subsistence (the individual's residence must not result in a financial burden to a government authority at any level); • Granting a residence title must not significantly impair Austria's relations with another country. Evidence of meeting the first three conditions listed above can be provided in the form of a sponsorship declaration (Art. 56 para 3 Asylum Act 2005).
Application process and granting procedure
The steps in applying for a "Residence Title for Particularly Exceptional Circumstances" are set out in Art. 58 para 5 and 6 of the Asylum Act 2005. The applicant must have resided continuously in Austria for five years as of the application date (Art. 56 para 1 subpara 1 Asylum Act 2005). This means that individuals may apply for a "Residence Title for Particularly Exceptional Circumstances" immediately after entering Austria, yet the application will clearly not be accepted due to the lack of a five-year continuous residence period. The Federal Office for Immigration and Asylum is responsible for processing the application and, in the event of a positive outcome, for granting the "Residence Title for Particularly Exceptional Circumstances" (Art. 3 para 2 subpara 2 Federal Office for Immigration and Asylum Procedures Act).⁶⁶ Applicants are generally obliged to cooperate in the procedure. The application for the residence title is to be refused if the applicant fails to meet the obligation to cooperate. The Federal Office for Immigration and Asylum is required to correspondingly inform the party concerned (second sentence of Art. 58 para 11 Asylum Act 2005). If the application is approved, the Authority has the duty of issuing the residence title to the applicant (Art. 58 para 7 Asylum Act 2005). The Federal Office for Immigration and Asylum also has the duty of informing the individual that the residence title is valid for a limited period only and that it cannot be renewed, and that it is possible to change to a permit under the Settlement and Residence Act (Art. 58 para 12 Asylum Act 2005). If the Federal Office for Immigration and Asylum rejects the application or refuses approval, the authority is required to issue a decision to this effect (Art. 58 para 8 Asylum Act 2005).⁶⁷ Due to the absence of any specific administrative regulations, the authorities are required to decide on an application for a "Residence Title for Particularly Exceptional Circumstances" within the generally applicable period of six months (Art. 73 para 1 General Administrative Procedures Act 1991).⁶⁸ Applications are currently processed within 3.1 months on average, according to a representative of the Federal Office for Immigration and Asylum.⁶⁹ Yet this average apparently refers to all procedures under the Asylum Act 2005.⁷⁰

65 Interview with Katharina Sklenicka, Federal Office for Immigration and Asylum, 4. April 2019.

66 FLG I No. 87/2012, in the version of federal law FLG I No. 56/2018.

67 Grounds for refusal exist in cases including where: the person concerned is the subject of a procedure under the Settlement and Residence Act or has been granted a residence permit under the Settlement and Residence Act or the Asylum Act 2005 (Art. 58 para 9 Asylum Act 2005); the person submits an application subsequent to an application procedure completed with final effect (subsequent application), if the facts of the case have not changed significantly (Art. 58 para 10 sentence 2 Asylum Act 2005); the applicant fails to meet the general obligation to cooperate (Art. 58 para 11 subpara 2 Asylum Act 2005).

68 FLG No. 51/1991, in the version of federal law FLG I No. 58/2018.

69 Interview with Katharina Sklenicka, Federal Office for Immigration and Asylum, 4 April 2019.

70 Interview with Sabrina Lehner, Federal Ministry of the Interior, 4 April 2019.

Appeal procedures
Decisions by the Federal Office for Immigration and Asylum on whether to grant a “Residence Title for Particularly Exceptional Circumstances” are subject to a review by Austrian courts. Such reviews are initially carried out by the Federal Administrative Court and, in a second instance in some cases, by the Supreme Administrative Court or the Constitutional Court. If an application for a “Residence Title for Particularly Exceptional Circumstances” is refused, the applicant can lodge a complaint with the Federal Administrative Court. Under certain circumstances, an appeal requesting a review of the decision by the Federal Administrative Court can be lodged with the Supreme Administrative Court or the Constitutional Court (Art. 133 para 1 subpara 1 and Art. 144 para 1 Federal Constitutional Law).⁷¹ Certain prerequisites nonetheless have to be met before one of the high courts will accept an appeal or complaint: • An appeal to the Supreme Administrative Court against a decision by the Federal Administrative Court is only admissible where the case concerns a legal matter of fundamental significance (Art. 133 para 4 Federal Constitutional Act). • The Constitutional Court can refuse to deal with any complaint that has little likelihood of success or where the court’s ruling would not be expected to clarify a constitutional issue (Art. 144 para 2 Federal Constitutional Act).⁷² A complaint lodged against the decision by the Federal Office for Immigration and Asylum has suspensive effect.⁷³ This means that any negative decision by the Federal Office for Immigration and Asylum does not take effect until a final ruling on the complaint has been handed down. Where the Federal Office for Immigration and Asylum issues a negative decision, rejecting an application for a residence title pursuant to Art. 56 Asylum Act 2005, that decision is to be combined with a return decision as referred to in Chapter 8 of the Aliens Police Act 2005⁷⁴ (Art. 10 para 3 Asylum Act 2005, Art. 52 para 3 Aliens Police Act). If that return decision by the Federal Office for Immigration and Asylum is not contested through a legal remedy, it remains in effect despite any complaints brought before the Federal Administrative Court or the Supreme Administrative Court. It is correspondingly not necessary to subsequently issue another return decision if the legal remedy proceedings are not decided in favour of the complainant.
Granting of a Residence Permit (Plus)
Where the legal provisions set out in Art. 56 para 1 subpara 1 to 3 of the Asylum Act 2005 are met and the application for a “Residence Title for Particularly Exceptional Circumstances” is approved, the third-country national is to be granted a Residence Permit Plus (Art. 56 para 1 Asylum Act 2005). Where the person does not fulfil the Integration Agreement referred to in Art. 56 para 1 subpara 3 of the Asylum Act 2005, or they are not pursuing gainful employment, they can only be issued a Residence Permit (Art. 56 para 2 Asylum Act 2005).⁷⁵ The Residence Permit Plus and the Residence Permit, both issued based on Art. 56 of the Asylum Act 2005, are valid for one year and are not renewable (Art. 54 para 2 Asylum Act 2005).
Termination of stay
In general, a “Residence Title for Particularly Exceptional Circumstances” has a limited validity of 12 months and cannot be renewed (see above in this table). Various other circumstances can result in the residence title becoming irrelevant or invalid or being revoked. A residence title under Art. 56 of the Asylum Act 2005 becomes <i>irrelevant</i> in these cases: • The individual is issued a residence title under the Settlement and Residence Act; • The individual obtains Austrian (or other EU or EEA) citizenship; • The individual is subsequently granted asylum or subsidiary protection status through another legal pathway (Art. 61 para 2 Asylum Act 2005). Subsequently receiving asylum or subsidiary protection status is the most common reason for terminating a residence title in the cases described above, according to Hinterberger and Klammer (2017a: Register 4, section 3.3.7:1).

71 FLG No. 1/1930, in the version of federal law FLG I No. 14/2019.

72 For further information see Stiller, 2018:38–39.

73 Art. 16 para 2 Federal Office for Immigration and Asylum Procedures Act (FLG I No. 87/2012, in the version of federal law FLG I No. 56/2018) enumerates those cases in which an appeal against a decision by the Federal Office for Immigration and Asylum has suspensive effect only under certain circumstances. The residence permit examined here is not mentioned in Art. 16 para 2 Federal Office for Immigration and Asylum Procedures Act.

74 FLG I No. 100/2005, in the version of federal law FLG I No. 56/2018.

75 For further information please see Stiller, 2018:45.

Termination of stay
If a decision to terminate residence becomes enforceable or takes final legal effect, the residence title granted under Art. 56 of the Asylum Act 2005 becomes <i>invalid</i> (Art. 61 para 1 Asylum Act 2005). In cases of misuse, the authority initiates procedures to terminate residence, according to a representative of the Federal Office for Immigration and Asylum.⁷⁶ A “Residence Title for Particularly Exceptional Circumstances” can be <i>revoked</i> if another EEA signatory State issues a final return decision and a threat for public security and order or other circumstances defined in detail under law exist⁷⁷ (Art. 61 para 4 Asylum Act 2005). Apparently it is rare for residence titles to be revoked in response to such a return decision by another EEA country, according to Hinterberger and Klammer (2017a: Register 4, section 3.3.7:1). Furthermore, we are not aware of any provisions of law that would require such a status to be revoked where the prerequisites are no longer met. In regard to renewing the title, applications for a “Residence Title for Particularly Exceptional Circumstances” that are submitted subsequent to an application completed with final effect (subsequent application) or to a final decision are to be rejected as inadmissible if the facts of the case have not significantly changed (Art. 58 para 10 Asylum Act 2005). Any new application is consequently to be rejected where the facts of the case have not significantly changed. As one of the reasons for this rule, a representative of the Federal Ministry of the Interior points to the provision in legislation allowing a change of residence status in such cases (from one under the Asylum Act 2005 to the Settlement and Residence Act).⁷⁸
Change of residence status
An application for international protection can be made at any time in Austria; this equally applies to cases where an application for a “Residence Title for Particularly Exceptional Circumstances” is rejected. Similarly, an application for international protection can be submitted after expiry of the residence title.⁷⁹ The residence title expires after 12 months (Art. 54 para 2 Asylum Act 2005), although the individual concerned can be issued a residence title under the Settlement and Residence Act and is to be informed of this option (Art. 58 para 12 Asylum Act 2005; Hinterberger and Klammer, 2017b: Register 4, section 3.3:1). This means that individuals can change from the status regime under the Asylum Act 2005 to the Settlement and Residence Act, provided they have held a residence title as referred to in Art. 56 of the Asylum Act 2005 for 12 months and meet the eligibility requirements (Eppel, 2017: Register 5, section 2.4.6:1). Such persons can apply for a Settlement Permit, as referred to in Art. 43 para 3 of the Settlement and Residence Act, or a Red-White-Red Card Plus, as specified in Art. 41a para 9 subpara 1 and 2 of that act.⁸⁰ Such a status change from the Asylum Act 2005 to the Settlement and Residence Act is generally intended by legislation, according to a representative of the Federal Ministry of the Interior.⁸¹
Granting of a Permanent Residence – EU permit
When applying for a Permanent Residence – EU permit, persons holding a “Residence Title for Particularly Exceptional Circumstances” also have to meet the general requirements. This means that individuals can apply for and obtain a Permanent Residence – EU title after five continuous years of settlement, providing they meet the general and specific eligibility requirements.^{82,83} It is to be assumed that any period during which a person holds a

- 76 Interview with Katharina Sklenicka, Federal Office for Immigration and Asylum, 4 April 2019.
- 77 These include a criminal conviction involving a sentence of at least one year’s imprisonment on account of an offence committed with intent, reasonable suspicion that the individual concerned committed or intended to commit such an offence, as well as any breach of the entry and residence provisions of the State issuing the decision (Art. 61 para 4 Asylum Act 2005).
- 78 Written input by Sabrina Lehner, Federal Ministry for the Interior, and Katharina Sklenicka, Federal Office for Immigration and Asylum, 24 April 2019.
- 79 Interview with Sabrina Lehner, Federal Ministry for the Interior, 4 April 2019.
- 80 For further information please see Buschek-Chauvel and Chahrokh, 2015:59–60.
- 81 Written input by Sabrina Lehner, Federal Ministry for the Interior, and Katharina Sklenicka, Federal Office for Immigration and Asylum, 24 April 2019.
- 82 Interview with Sabrina Lehner, Federal Ministry for the Interior, 4 April 2019.
- 83 General requirements include the individual’s stay not conflicting with public interest, proof of accommodation, and health insurance cover (Art. 11 para 2 subpara 1 to 3 Settlement and Residence Act). Special requirements include completion of module 2 of the Integration Agreement (Art. 45 para 1 subpara 2 Settlement and Residence Act).

residence title as referred to in Art. 56 of the Asylum Act 2005 will be recognized as a period of settlement (Peyrl et al., 2017:Art. 45 Settlement and Residence Act margin number 6); such periods are, therefore, to be counted in full towards the five-year qualification period when applying for a Permanent Residence – EU title (Art. 45 para 2 second sentence Settlement and Residence Act). ⁸⁴
Granting of citizenship
The general provisions for obtaining Austrian citizenship also apply to persons holding a “Residence Title for Particularly Exceptional Circumstances”. ⁸⁵ To be eligible, the individual concerned must have lawfully resided in Austria for a continuous period of 10 years and have had settlement status for at least five of those years (Art. 10 para 1 subpara 1 Citizenship Act 1985). ⁸⁶

3.5 Details of the residence title and related rights

The table below summarizes the rights associated with the “Residence Title for Particularly Exceptional Circumstances”. These include the option of applying for a travel document, as well as potential access to accommodation, family reunification, the labour market, social assistance, health care, education and integration programmes.

Table 4: Details of the “Residence Title for Particularly Exceptional Circumstances” and related rights

Issuing of a travel document
Individuals holding a Residence Permit or Residence Permit Plus are not generally issued a travel document. It is at least theoretically possible for the individuals concerned to have travel documents issued by their home countries. ⁸⁷ Stateless persons may apply for an Alien’s Passport ⁸⁸ as referred to in Art. 88 para 2 of the Aliens Police Act 2005. An Alien’s Passport can also be issued for the person concerned if this is in the interests of the Republic of Austria (Art. 88 para 1 Aliens Police Act 2005). This occurs very rarely, though, according to a representative of the Federal Office for Immigration and Asylum. ⁸⁹
Accommodation
Persons holding a “Residence Title for Particularly Exceptional Circumstances”, in common with Austrian citizens and other third-country nationals, have unrestricted access to the private housing market (Koppenberg, 2015b:65–66).

84 For further information please see Koppenberg, 2015b:18.

85 Interview with Sabrina Lehner, Federal Ministry for the Interior, 4 April 2019.

86 For further information please see Koppenberg, 2015b:19–20.

87 Interview with Sabrina Lehner, Federal Ministry for the Interior, 4 April 2019; Interview with Katharina Sklenicka, Federal Office for Immigration and Asylum, 4 April 2019.

88 An Alien’s Passport is also issued, for example, to beneficiaries of subsidiary protection. It is designed to comply with common international requirements for such travel documents and is defined in a regulation issued by the Federal Minister of the Interior (Art. 88 para 3 Aliens Police Act). Alien’s Passports are normally valid for five years. No renewal is permitted (Art. 90 para 1 and 3 Aliens Police Act).

89 Interview with Sabrina Lehner, Federal Ministry for the Interior, 4 April 2019; interview with Katharina Sklenicka, Federal Office for Immigration and Asylum, 4 April 2019.

Austria additionally has various programmes to provide housing-related assistance. Such measures include housing subsidies, subsidized private flats, housing assistance and municipal housing. These programmes fall within the responsibility of the provinces or the towns and municipalities. The benefits provided as well as the eligibility criteria vary correspondingly.⁹⁰ In most cases, registering for municipal housing or receiving access to subsidized private flats, for example, presupposes Austrian citizenship or citizenship of an EU/EEA Member State or Switzerland, or a Permanent Residence – EU permit or a protection status in accordance with the Geneva Refugee Convention and Protocol.⁹¹ The same applies to housing assistance.⁹² As they do not meet these prerequisites, persons holding a “Residence Title for Particularly Exceptional Circumstances” are for the most part excluded from housing-related support measures.

Family reunification

Only family members of persons granted asylum, of beneficiaries of subsidiary protection and of asylum seekers are entitled to family reunification, as set out in Art. 34 of the Asylum Act 2005. Family reunification under the Asylum Act 2005 cannot, therefore, be granted to individuals entitled to a Residence Permit (Plus) based on Art. 56 of the Asylum Act 2005.

- 90 Österreich.gv.at, *Allgemeines zum geförderten Wohnungseigentum*, available from www.oesterreich.gv.at/themen/bauen_wohnen_und_umwelt/wohnen/8/3/Seite.210171.html (accessed 4 April 2019); Österreich.gv.at, *Gemeindewohnungen*, available from www.oesterreich.gv.at/themen/bauen_wohnen_und_umwelt/wohnen/Seite.210240.html (accessed 4 April 2019).
- 91 Österreich.gv.at, *Gemeindewohnungen*, available from www.oesterreich.gv.at/themen/bauen_wohnen_und_umwelt/wohnen/Seite.210240.html (accessed 15 April 2019); Österreich.gv.at, *Voraussetzungen zum Erlangen einer geförderten Eigentumswohnung*, available from www.oesterreich.gv.at/themen/bauen_wohnen_und_umwelt/wohnen/8/3/Seite.210174.html (accessed 15 April 2019).
- 92 In Burgenland, Carinthia and Lower Austria, for example, only persons holding Austrian citizenship or equivalent citizenship, based on the laws of the European Union or a State treaty, have access to housing assistance. In Styria, persons with a Permanent Residence – EU also have access. In Upper Austria and Tyrol, for example, third-country nationals must have legally had their main residences in the respective province without interruption for more than five years, and in Upper Austria they must additionally have paid income tax or statutory social insurance contributions in Austria and be proficient in German. In Vorarlberg, third-country nationals are entitled to housing assistance who, for example, “have been living in Austria for more than 10 years or who can provide evidence of having worked for at least 8 years in employment subject to social insurance” (Province of Burgenland, *Wohnbeihilfe*, available from www.burgenland.at/themen/wohnen/wohnbeihilfe/ (accessed 15 April 2019); Province of Lower Austria, *Wohnbauförderung Wohnzuschuss/ Wohnbeihilfe*, available from www.noe.gv.at/noe/Wohnen-Leben/Foerd_Wohnzuschuss_Wohnbeihilfe.html (accessed 15 April 2019); Province of Styria, *Information zur Wohnunterstützung*, available from www.soziales.steiermark.at/cms/dokumente/10363956_53612e6668e1/Info_Wohnunterst%C3%BCtzung_Verst%C3%A4ndlich_2019.pdf (accessed 15 April 2019); Province of Tyrol, *2. Wer bekommt die Wohn-Beihilfe?*, available from www.tirol.gv.at/leicht-lesen/bauen-und-wohnen/wohn-beihilfen/2-wer-bekommt-die-wohn-beihilfe/ (accessed 15 April 2019); Province of Upper Austria, *Wohnbeihilfe*, available from www.land-oberoesterreich.gv.at/wohnbeihilfe.htm (accessed 15 April 2019); Province of Vorarlberg, *Wohnbeihilfe – Voraussetzungen*, available from https://vorarlberg.at/web/land-vorarlberg/contentdetailseite/-/asset_publisher/qA6AJ38txu0k/content/voraussetzungen-fuer-eine-wohnbeihilfe?article_id=83271 (accessed 15 April 2019)).

Family reunification under Art. 46 of the Settlement and Residence Act requires the sponsor to hold a specified residence title. The residence title discussed here, granted on the basis of Art. 56 of the Asylum Act 2005, is not among the titles enumerated in Art. 46 of the Settlement and Residence Act. This means that, in the case of individuals holding a Residence Permit (Plus), no provision exists for any type of family reunification. Nonetheless, as described in section 3.4, it is possible to change to the status regime under the Settlement and Residence Act, for instance by being issued an RWR Card. Such a residence title entails the right to family reunification (Lukits, 2016:66).⁹³

Labour market access and programmes related to the recognition of qualifications

With regard to labour market access for individuals holding a “Residence Title for Particularly Exceptional Circumstances”, a distinction needs to be made between those holding a Residence Permit and those granted a Residence Permit Plus.

- Persons holding a Residence Permit only receive labour market access under an official permit (Art. 3 para 1 Act Governing the Employment of Foreign Nationals).⁹⁴ The official permit granted in the large majority of such cases is usually the work permit under Art. 4 of the Act Governing the Employment of Foreign Nationals. Such a permit is to be granted under specified conditions⁹⁵ after in carrying out a labour market test. The permit is only valid for one specified employment position and for a maximum of 12 months (Art. 6 para 1 and Art. 7 para 1 Act Governing the Employment of Foreign Nationals).
- Individuals holding a Residence Permit Plus, in contrast, have unrestricted access to the labour market (Art. 17 Act Governing the Employment of Foreign Nationals), without having to obtain any additional approval from labour market authorities (Kind, Art. 17 Act Governing the Employment of Foreign Nationals margin number 1).⁹⁶

The recognition of qualifications in Austria does mostly not depend on an individual’s residence title, but on the particular type of qualification to be recognized and, to an extent, on the rules in the province of residence. Distinctions are made for example, depending on what is to be recognized, whether it be a diploma, a completed apprenticeship or graduation from a university (Bichl, 2015:1–2). Universities are, for example, responsible for the international recognition of academic degrees (termed *Nostrifizierung* in Austria). To be admitted to the procedure, individuals must demonstrate that recognition is a compulsory prerequisite for the desired job position in Austria.^{97,98}

Access to social assistance

In Austria, Needs-Based Guaranteed Minimum Resources,⁹⁹ in other words social assistance, is intended to ensure a minimum income level to cover subsistence, housing needs and social security, for example, in the event of illness (Koppenberg, 2015b:71). Such social assistance, in the case of persons holding a “Residence Title for Particularly

93 Interview with Sabrina Lehner, Federal Ministry of the Interior, 4 April 2019.

94 FLG Nr. 218/1975, in the version of federal law FLG Nr. 25/2019.

95 A work permit may be granted only if a labour market test reveals that the employment of the third-country national does not conflict with public or macroeconomic interests and that the statutory requirements specified in Art. 4 para 1 subpara 1 to 11 of the Act Governing the Employment of Foreign Nationals are fulfilled (Art. 4 para 1 Act Governing the Employment of Foreign Nationals).

96 For further information please see Koppenberg, 2015b:21.

97 Federal Ministry of Education, Science and Research, *Wie verläuft eine Nostrifizierung?*, available from www.bmbwf.gv.at/studium/academic-mobility/enic-naric-austria/wie-verlaeuft-eine-nostrifizierung/ (accessed 18 April 2019).

98 For further information please see Bassermann, 2018:58–62 and 69–73; Bassermann, 2019:44–45; Koppenberg, 2015b:40–51.

99 In November 2018 the Federal Ministry of Labour, Social Affairs, Health and Consumer Protection submitted for review the draft Federal Act on principles for social assistance (General Social Assistance Act) and the draft Federal Act concerning comprehensive nationwide statistics on social assistance (Social Assistance Statistics Act; both available from www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00104/fname_724088.pdf (accessed 12 April 2019)). The goals pursued included a harmonization of social welfare. Planned changes also concern third-country nationals (Heilemann, 2019:14–15).

Exceptional Circumstances”, is not limited to core benefits.¹⁰⁰ Even so, they are only entitled to such benefits under specific conditions. Third-country nationals – including individuals with this type of residence title – must have lawfully resided in Austria for more than five years in order to qualify.¹⁰¹ Whether such social assistance is granted varies among the provinces depending on the type of residence status. To be eligible, individuals may have to be permanent residents (as is the case in Burgenland,¹⁰² Lower Austria,¹⁰³ and Styria)¹⁰⁴ or have resided there for a specified minimum period (the case in Carinthia).¹⁰⁵ This means that individuals holding a “Residence Title for Particularly Exceptional Circumstances” usually do not have any claim to Needs-Based Guaranteed Minimum Resources. This can be a challenge especially for individuals with a Residence Permit, as they only have to a limited extent access to the labour market and thus to support themselves (Koppenberg, 2015b:72).

Access to health care

In Austria, health insurance is part of the social insurance scheme, which additionally includes accident insurance and pension insurance (Art. 2 General Social Insurance Act).^{106,107} Health insurance provides extensive coverage, not just emergency health care. It covers costs including (medical) treatment and therapeutic aids.

- 100 Core benefits: in the context of EU law, the term “core benefits” is understood as covering at least minimum income support, assistance in the case of illness, or pregnancy, and parental assistance, in so far as those benefits are granted to nationals under national law (see recital 45 of the recast Qualification Directive).
- 101 Oesterreich.gv.at, *Mindestsicherung – Ausländische Staatsbürger*, available from www.oesterreich.gv.at/themen/soziales/armut/3/2/Seite.1693906.html (accessed 3 April 2019).
- 102 In Burgenland, persons have access to the minimum benefit system who “are entitled to permanent residence in Austria and have their principal residence” or “their centre of vital interests in Burgenland and must pursue their livelihood in Burgenland” (Art. 4 Guaranteed Minimum Resources Act of Burgenland (PLG No. 76/2010, in the version of provincial law PLG No. 82/2018)). Thus, persons granted the “Residence Title for Particularly Exceptional Circumstances” are not eligible for minimum benefit, not being entitled to permanent residence in Austria but only to residence for 12 months. However, services under the minimum benefit system can be provided to such persons where such services appear warranted in order to avoid social hardship on account of the individual’s personal, family or economic circumstances (Art. 4 para 3 Guaranteed Minimum Resources Act of Burgenland).
- 103 See Art. 5 para 1 subpara 3 Guaranteed Minimum Resources Act of Lower Austria (PLG 9205-3, in the version of provincial law PLG No. 23/2018).
- 104 Art. 4 para. 1 subpara 3 Guaranteed Minimum Resources Act of Styria (PLG No. 14/2011, in the version of provincial law PLG No. 63/2018).
- 105 In Carinthia, persons are eligible for minimum benefit, “who have their principal residence, or, if they have none, their current residence, in Carinthia and are entitled to reside in Austria for longer than four months” (Art. 4 Guaranteed Minimum Resources Act of Carinthia (PLG No. 15/2007, in the version of provincial law PLG No. 71/2018)). Thus, persons granted a “Residence Title for Particularly Exceptional Circumstances” are eligible for minimum benefit, as they are entitled to stay for 12 months.
- 106 Oesterreich.gv.at, *Checkliste Sozialversicherung und weitere soziale Leistungen in Österreich für Drittstaatsangehörige*, available from www.help.gv.at/Portal.Node/hlpd/public/content/12/Seite.120756.html (accessed 3 April 2019).
- 107 Furthermore, Austria has other social insurance laws applying to specific occupational groups, for example, the Social Insurance Act for Trade and Industry (FLG No. 560/1978, in the version of federal law FLG No. 7/2019) and the Civil Servants Health and Accident Insurance Act (FLG No. 200/1967, in the version of federal law FLG No. 7/2019).

Access to health insurance in Austria depends primarily on being gainfully employed and only indirectly on holding a specific residence title. Austria has a compulsory insurance system for all gainfully employed persons (Art. 1 General Social Insurance Act). Individuals are obliged to pay into the system from the moment they meet the legal requirements, which include gainful employment.¹⁰⁸ Yet access to gainful employment and, in turn, to social insurance presuppose a residence title that allows access to the labour market. While the Residence Permit Plus allows full labour market access, only limited access is available under a Residence Permit. Besides through gainful employment, social insurance is available by insuring oneself, which is an option especially for individuals with no compulsory insurance but who nonetheless reside in Austria (Art. 16 ff General Social Insurance Act). Individuals with no gainful employment and who hold a Residence Permit (Plus) could accordingly take out their own insurance.¹⁰⁹ No specific support or programmes are offered by the State for individuals with special needs (for example, victims of sexual or other forms of psychological or physical violence, or of torture) who hold a “Residence Title for Particularly Exceptional Circumstances”.¹¹⁰
Access to education Schooling is compulsory for all children staying permanently in Austria (Art. 1 para 1 Compulsory Schooling Act 1985).¹¹¹ Within the meaning here, individuals are considered as staying permanently if they “stay in one place indefinitely, that is, not just temporarily” or they clearly have the intention of staying in that place (Federal Ministry of Education, 2017:6). Children only staying temporarily in Austria are entitled to attend school under the same requirements as children staying permanently in Austria (Art. 17 Compulsory Schooling Act 1985).¹¹² Hence, children holding a “Residence Title for Particularly Exceptional Circumstances” are similarly entitled to schooling regardless of the length of their stay. As part of the Adult Education Initiative, individuals with basic education needs are provided with “basic education” as well as, where specified requirements are met, with the opportunity to complete compulsory schooling (Art. 4 Support for Education Measures in 2018–2021 (federal State and provinces)).¹¹³ Such measures are open to individuals holding a “Residence Title for Particularly Exceptional Circumstances” who meet the required conditions (Koppenberg, 2015b:42–44). Access to university-level education in Austria is similarly not tied to a specific residence title; rather, it depends on various criteria, such as having completed an appropriate course of (academic) studies or demonstrating the required language skills (Bassermann, 2019:44–49). No additional educational support is provided to individuals holding a “Residence Title for Particularly Exceptional Circumstances”.
Access to integration measures Austria pursues an overall strategy for integration policy, as seen, for example, in the 2010 National Action Plan for Integration (Bassermann, 2018:8). In line with the strategy, integration support can be provided to third-country nationals lawfully settled in Austria, which includes individuals holding a “Residence Title for Particularly Exceptional Circumstances”. As set out in the Integration Act,¹¹⁴ the Austrian Integration Fund can “provide guidance counselling, identify special integration needs and recommend specific steps towards improving integration” (Art. 17 para 1 Integration Act). Measures to support integration are also defined, including language courses, education and training courses, presentations to introduce participants to Austrian culture and history, and joint events with Austrian citizens (Art. 16 para 2 Integration Act). After opting to switch to a status under the Settlement and Residence Act, third-country nationals who have not yet done so are required to complete module 1 of the Integration Agreement in accordance with Art. 7 of the Integration Act. To obtain a Permanent Residence – EU title, module 2 of the Integration Agreement also has to be completed.

108 Oesterreich.gv.at, *System der Pflichtversicherung (ASVG, GSVG, FSVG, BSVG)*, available from www.oesterreich.gv.at/themen/arbeit_und_pension/pension/1/Seite.270110.html (accessed 3 April 2019).

109 For certain groups, such as those in marginal employment, self-insurance is subject to special rules, such as lower contribution levels (Oesterreich.gv.at, *Selbstversicherung*, available from www.help.gv.at/Portal.Node/hlpd/public/content/99/Seite.990298.html (accessed 3 April 2019)).

110 Interview with Sabrina Lehner, Federal Ministry of the Interior, 4 April 2019.

111 FLG No. 76/1985, in the version of federal law FLG No. 101/2018.

112 For further information please see Bassermann and Spiegelfeld, 2018:63–66; Koppenberg, 2014a:64–67.

113 FLG I No. 160/2017.

114 FLG I No. 68/2017, in the version of federal law FLG I No. 25/2019.

The Public Employment Service also offers language and skills training. All individuals registered with the Public Employment Service (that is, registered as unemployed or jobseekers) have access to such course programmes.¹¹⁵ Those holding a Residence Permit Plus under Art. 56 of the Asylum Act 2005 enjoy unrestricted access to the labour market and can register with the Public Employment Service. This contrasts with individuals holding a Residence Permit, who do not have unlimited labour market access and are not registered as active with the Public Employment Service. Such individuals are barred from the course programmes (Koppenberg, 2015b:37–39).

3.6 Comparison with asylum and subsidiary protection status

The section below briefly discusses whether individuals holding a “Residence Title for Particularly Exceptional Circumstances” enjoy more or less favourable conditions than those granted asylum or subsidiary protection, when viewed on the basis of the legal terms as well as the rights and details associated with the particular residence status. A brief comparison follows.

Like the provisions applying to the “Residence Title for Particularly Exceptional Circumstances”, the Asylum Act 2005 equally sets out the provisions governing asylum (Art. 3 Asylum Act 2005) and subsidiary protection status (Art. 8 Asylum Act 2005). The **categories of individuals eligible** for the specific status vary significantly. Stated in simple terms, asylum status is granted to protect individuals threatened by persecution as defined in Art. 1 Section A subpara 2 of the 1951 Geneva Convention¹¹⁶ (see Art. 3 para 1 Asylum Act 2005). Subsidiary protection status is intended to protect individuals from returning to their countries of origin in the face of a real risk involving, for example, a violation of Art. 3 ECHR or a serious threat to the individual’s life (see Art. 8 para 2 subpara 2 Asylum Act 2005). In granting a “Residence Title for Particularly Exceptional Circumstances”, on the other hand, factors including the length of a person’s stay and their degree of integration are considered.

The Federal Office for Immigration and Asylum is responsible for the **procedure** to grant a “Residence Title for Particularly Exceptional Circumstances” (Art. 3 para 2 subpara 2 Federal Office for Immigration and Asylum Procedures Act). That authority is also tasked with processing applications for international protection (for example, asylum procedures;

115 Public Employment Service, *Aus- und Weiterbildungshilfen*, available from www.ams.at/arbeitsuchende/aus-und-weiterbildung/so-foerdern-wir-ihre-aus--und-weiterbildung-aus-und-weiterbildungshilfen (accessed 3 April 2019).

116 Convention relating to the Status of Refugees, FLG No. 55/1955, 15 April 1955.

Art. 3 para 2 subpara 1 Federal Office for Immigration and Asylum Procedures Act). Whereas the asylum procedure additionally comprises the procedure for granting subsidiary protection (AT EMN NCP, 2015:47), the procedure to grant a “Residence Title for Particularly Exceptional Circumstances” is carried out only on application and independently of the procedure for international protection. Applications for a “Residence Title for Particularly Exceptional Circumstances” must be made in person to the Federal Office for Immigration and Asylum, while applications for international protection are to be submitted to a public security official or a security authority.¹¹⁷

In Austria, the Federal Administrative Court is generally responsible for ruling on **complaints** lodged against decisions by the Federal Office for Immigration and Asylum (Art 7 para 1 subpara 1 Federal Office for Immigration and Asylum Procedures Act). This means among other things that the Federal Administrative Court is responsible for complaints lodged against decisions passed by the Federal Office for Immigration and Asylum both on asylum cases as well as on the cases under study here involving a “Residence Title for Particularly Exceptional Circumstances”.¹¹⁸

Asylum status in Austria entails a **right of residence** initially limited to a three-year period, and potentially renewable for an indefinite period (Art. 3 para 4 Asylum Act 2005). Beneficiaries of subsidiary protection are granted a one-year limited Residence Permit that can be renewed for a further two years (Art. 8 para 4 Asylum Act 2005). This contrasts with the residence status conferred on individuals holding a “Residence Title for Particularly Exceptional Circumstances”, which is limited to one year and is non-renewable.

When compared in relation to **termination of stay**, the terms applying to the residence title and to asylum or subsidiary protection status are at once similar and differ. It is beyond the scope of this study to compare the statuses in detail, so the following description is provided by way of illustration. The Federal Office for Immigration and Asylum has the duty, for example, of revoking protection status from beneficiaries who meet the conditions for status withdrawal (Stiller, 2018:33–34). Both the residence

117 Interview with Katharina Sklenicka, Federal Office for Immigration and Asylum, 4 April 2019.

118 For further information please see AT EMN NCP, 2015:47–48.

title under discussion here as well as subsidiary protection status become irrelevant or expire when the individual is granted asylum. Similarly, that residence title expires when subsidiary protection status is granted (Art. 8 para 7 and Art. 61 para 2 Asylum Act 2005). On the other hand, all three types of status, including the residence title, can be revoked in cases of misuse or forgery.¹¹⁹

In principle, it is possible for beneficiaries of international protection who meet all requirements to **change to a residence title under the Settlement and Residence Act**.¹²⁰ Individuals holding a “Residence Title for Particularly Exceptional Circumstances” who meet the requirements are also permitted to change to a title under the Settlement and Residence Act (for example, an RWR Card Plus), and this option is even explicitly intended by legislators.¹²¹ When acquiring **citizenship**, the same conditions apply to individuals holding a “Residence Title for Particularly Exceptional Circumstances” and to those with international protection status.

When comparing individual rights, a distinction needs to be made between those holding a Residence Permit Plus and those with a Residence Permit.

On request, persons granted asylum in Austria are issued a Convention Passport (Art. 94 para 1 Aliens Police Act 2005)¹²² to serve as a **travel document**.¹²³ Beneficiaries of subsidiary protection who are unable to procure a travel document from their countries of origin can be issued an Alien’s Passport, as specified in Art. 88 para 2a of the Aliens Police Act 2005.¹²⁴ While individuals holding a “Residence Title for Particularly Exceptional Circumstances” (see chapter 3) may apply for an Alien’s Passport, they are only issued one when meeting certain requirements (for example, when stateless).

When compared in terms of **labour market access**, it should be noted that individuals with a Residence Permit additionally require an official

119 For further information on withdrawal procedures of asylum and subsidiary protection status please see Stiller, 2018.

120 Federal Office for Immigration and Asylum, *Frequently Asked Questions*, available from www.bfa.gv.at/faq/start.aspx (accessed 26 April 2019).

121 Written Input by Sabrina Lehner, Federal Ministry for the Interior, and Katharina Sklenicka, Federal Office for Immigration and Asylum, 24 April 2019.

122 FLG I No. 100/2005, in the version federal law of FLG No. 56/2018.

123 For further information please see Stiller, 2018:24–26.

124 Ibid.:28–29.

permit. This means that, in the case of such individuals, accessing support measures offered by the Public Employment Service as well as social insurance, including **health insurance**, indirectly depends on possession of an official permit (see section 3.5). This is not the case with individuals holding a Residence Permit Plus or those granted asylum or subsidiary protection status, who enjoy unrestricted access to the labour market (Art. 17 para 3 Act Governing the Employment of Foreign Nationals) and are not subject to the Act Governing the Employment of Foreigners (Art. 1 para 2 (a) Act Governing the Employment of Foreigners).

Persons who hold a Residence Permit (Plus) are normally unable to claim **municipal housing, social benefits, family reunification** or any of the **integration measures** (see chapter 3.5) that are specifically or additionally aimed at persons granted asylum or beneficiaries of subsidiary protection.^{125,126} In other respects, such as in access to the private housing market or to **general integration programmes**, Residence Permit holders are on an equal footing with those granted asylum or subsidiary protection status. The same applies to accessing **schooling, adult education and university education**: access to education does not generally depend on an individual's residence status.

On the whole, the conditions applying to individuals holding a "Residence Title for Particularly Exceptional Circumstances" – and especially those with just a Residence Permit – are different than for those granted asylum or international protection status. Some of the conditions are, however, the same. Conditions can improve where individuals use the option of changing to a status under the Settlement and Residence Act; an RWR Card Plus, to cite an example, allows family reunification as well as unrestricted labour market access.

125 The ÖIF focus its services on persons granted asylum and persons granted subsidiary protection. Persons granted a "Residence Title for Particularly Exceptional Circumstances" usually do not have access to measures that are specifically provided for the category of persons granted international protection (see for example ÖIF, *Werte- und Orientierungskurse*, available from www.integrationsfonds.at/kurse/werte-und-orientierungskurse/werte-und-orientierungskurse (accessed 3 April 2019)).

126 For further information on specific integration measures for persons granted asylum and beneficiaries of subsidiary protection, see AT EMN NCP, 2017:27–32 and Koppenberg, 2015b:35–74.

3.7 Relevant court rulings

No major changes have been made to the “Residence Title for Particularly Exceptional Circumstances” since it was introduced in its present form in 2009. Correspondingly, no relevant court rulings on this residence title exist – that is, none substantially affecting the form or content of the residence title or the procedure for granting it. This observation was confirmed by the interviewed experts from the Federal Ministry of The Interior and the Federal Office for Immigration and Asylum.¹²⁷

127 Interview with Sabrina Lehner, Federal Ministry of the Interior, 4 April 2019; interview with Katharina Sklenicka, Federal Office for Immigration and Asylum, 4 April 2019.

4. NATIONAL PROTECTION STATUSES IN PUBLIC DEBATES

Topics relating to national protection statuses play a role in public debates in Austria that especially concern the humanitarian residence right, which includes Art. 56 of the Asylum Act 2005¹²⁸ as discussed here. The latter subject is discussed both in the media as well as by civil society organizations and policymakers.

A potential right to residence was a topic of public discussion even prior to the period under study here, 2010–2018. The right to residence actually took the centre-stage of public debate in 2007. The discussion was triggered by the case of Arigona Zogaj, a well-integrated 15-year-old third-country national who had absconded in the face of imminent removal. A gathering number of civil society initiatives and organizations formed, demanding a right to residence for well-integrated asylum seekers (Sonderegger, 2011). With increasing frequency since 2010, the media have reported on “cases of hardship”, involving asylum seekers who, though well integrated, are threatened with removal. Cases like the one involving the Komani family¹²⁹ have received nationwide attention (AT EMN NCP, 2011:15).¹³⁰ In response, the Austrian Parliament has also discussed residence rights issues and the individual cases reported in the media.¹³¹

128 FLG I No. 100/2005, in the version of federal law FLG I No. 56/2018.

129 See for example Österreichische Nachrichten, *Familie Komani wieder in Österreich: Zwillinge freuen sich auf ihre Mutter*, 22 October 2010, available from www.nachrichten.at/oberoesterreich/Familie-Komani-wieder-in-OEsterreich-Zwillinge-freuen-sich-auf-ihre-Mutter;art4,490120 (accessed 1 April 2019).

130 See for example Der Standard, *Umstrittene Abschiebungen*, 2 December 2010, available from <https://derstandard.at/1289609395003/Chronik-Umstrittene-Abschiebungen> (accessed 1 April 2019).

131 Parliament of the Republic of Austria, *Bleiberecht für integrierte Familien (6/M)*, available from www.parlament.gv.at/PAKT/VHG/XXIV/M/M_00006/index.shtml (accessed 28 March 2019); Parliament of the Republic of Austria, *Gründe für den humanitären Aufenthalt (6669/J)*, available from www.parlament.gv.at/PAKT/VHG/XXIV/J/J_06669/index.shtml (accessed 28 March 2019); Parliament of the Republic of Austria, *Überprüfung der Ablehnung des humanitären Aufenthalts auf seine Rechtmäßigkeit (6677/J)*, available from www.parlament.gv.at/PAKT/VHG/XXIV/J/J_06677/index.shtml (accessed 28 March 2019).

In 2009 and during the years thereafter, a discussion and accompanying evaluation took place of the amendment to the provisions governing the right of residence (see section 3.2), with the participation of the media and, in particular, civil society organizations and law researchers (AT EMN NCP, 2011:15). Initially, the amendment was presented and evaluated in general terms,¹³² while later, following implementation, discussions focused on evaluating the change in terms of its effectiveness for protecting individuals as well as on statistics relating to the residence titles generally being granted (see, by way of example, Asylkoordination et al., 2010; Bachmann, 2010; Kürthy, 2009). Criticism was expressed specifically because, as it was claimed, fewer individuals were obtaining a residence title on humanitarian grounds as a result of the changed law (Kürthy, 2009:14–16). Correspondingly, the number of residence titles granted on humanitarian grounds was repeatedly the subject of questions raised in Parliament.¹³³

Between 2000 and 2014, Austrian media reported regularly on (in some cases rejected) asylum seekers who either had been granted a humanitarian residence status¹³⁴ or had placed their hopes on the status as a last resort to avert their scheduled removals. Public discussion of such

132 See Die Presse, *Bleiberecht: Die neue Regelung im Detail*, 24 February 2009, available from https://diepresse.com/home/politik/innenpolitik/455369/Bleiberecht_Die-neue-Regelung-im-Detail (accessed 2 April 2019).

133 Parliament of the Republic of Austria, *Bleiberechtsanträge (2803/J)*, available from www.parlament.gv.at/PAKT/VHG/XXIV/J/J_02803/index.shtml (accessed 28 March 2009); Parliament of the Republic of Austria, *fragwürdige Bleiberechtszahlen (6647/J)*, available from www.parlament.gv.at/PAKT/VHG/XXIV/J/J_06647/index.shtml (accessed 28 March 2019); Parliament of the Republic of Austria, *humanitärer Aufenthalt (5883/J)*, available from www.parlament.gv.at/PAKT/VHG/XXIV/J/J_05883/index.shtml (accessed March 2019); Parliament of the Republic of Austria, *Langzeitasylwerber/innen und Vergabe humanitärer Aufenthaltsgenehmigungen (625/J)*, available from www.parlament.gv.at/PAKT/VHG/XXIV/J/J_00625/index.shtml (accessed 28 March 2019).

134 Vorarlberger Nachrichten, *Ein Stein ist vom Herzen gefallen*, 21 December 2012, available from www.vn.at/vorarlberg/2012/12/21/ein-stein-ist-vom-herzen-gefallen.vn (accessed 1 April 2019).

residence rights mostly centred on individual cases.^{135,136} The main topics here were integration,¹³⁷ how to deal with “cases of hardship”,¹³⁸ and the protests and campaigns launched by civil society actors,¹³⁹ town mayors¹⁴⁰ and provincial governors¹⁴¹ to support those affected by the law.

In the wake of introducing the Federal Office for Immigration and Asylum in 2014, the focus of public discussions shifted to the Aliens

- 135 See Der Standard, *Dulal d'Costa, der Mann, der 18 Jahre auf Asyl wartete*, 11 November 2014, available from <https://derstandard.at/2000008015143/Dulal-d-Costa-der-Mann-der-18-Jahre-auf-Asyl> (accessed 1 April 2019); Die Presse, *Asyl: Zwölfjährige hofft auf humanitäres Bleiberecht*, 11 December 2012, available from <https://diepresse.com/home/panorama/integration/1322908/Zwoelfjaehrige-hofft-auf-humanitaeres-Bleiberecht> (access 1 April 2019).
- 136 Also the occupation of the Votivkirche in Vienna in spring 2013 attracted quite some attention (see Kurier, *Besetzung wurde zum Bumerang*, 15 February 2013 available from <https://kurier.at/chronik/wien/votivkirche-besetzung-wurde-zum-bumerang/3.531.437> (accessed 1 April 2019); orf.at, *Votivkirchen-Flüchtlinge: Eine Chronologie*, 19 February 2013, available from <https://wien.orf.at/news/stories/2572156/> (accessed 1 April 2019)).
- 137 See Der Standard, *Herr Ibisi und die Willkür der Integration*, 8 September 2011, available from <https://derstandard.at/1315005901401/Kritik-am-Bleiberecht-Herr-Ibisi-und-die-Willkuer-der-Integration> (accessed 1 April 2019).
- 138 See Der Standard, *Umstrittene Abschiebungen*, 2 December 2010, available from <https://derstandard.at/1289609395003/Chronik-Umstrittene-Abschiebungen> (accessed 1 April 2019).
- 139 See Der Standard, *In Salzburg droht 50 Kindern Abschiebung*, 16 December 2013, available from <https://derstandard.at/1385171264249/In-Salzburg-droht-50-Kindern-Abschiebung> (accessed 1 April 2019); Der Standard, *Wie 59 Flüchtlinge Montafoner wurden*, 9 March 2014, available from <https://derstandard.at/1392687529402/Wie-59-Fluechtlinge-Montafoner-wurden> (accessed 1 April 2019); Vorarlberg Online, *„Asad darf nicht abgeschoben werden“*, 20 June 2013, available from www.vol.at/asad-darf-nicht-abgeschoben-werden/3612501 (accessed 1 April 2019).
- 140 See Kurier, *Bürgermeister rettet Tschetschenen vor der Abschiebung*, 15 January 2013, available from <https://kurier.at/chronik/niederoesterreich/waidhofen-an-der-ybbs-buergermeister-rettet-tschetschenen-vor-der-abschiebung/2.568.286> (accessed 1 April 2019); Kurier, *Bürgermeister will Asylwerber im Rathaus unterbringen*, 15 November 2013, available from <https://kurier.at/chronik/oesterreich/wolfsberg-buergermeister-will-asylwerber-im-rathaus-unterbringen/35.870.887> (accessed 1 April 2019).
- 141 See Der Standard, *Dörfler fordert Bleiberecht für mongolische Familie*, 6 November 2010, available from <https://derstandard.at/1288659690005/Abschiebungen-Doerfler-fordert-Bleiberecht-fuer-mongolische-Familie> (accessed 1 April 2019).

Authorities Restructuring Act¹⁴² (Koppenberg, 2014b:26).^{143,144} One of the effects of the act was to introduce the Federal Office for Immigration and Asylum with responsibility for Residence Titles for Exceptional Circumstances, including the residence title under study here (see chapter 3). The changes resulted in “significant improvements” in relation to Residence Titles for Exceptional Circumstances, according to a civil-society umbrella organization (Agenda Asyl, 2012:10). After the changes were introduced, the main points discussed were the lack of complete statistics¹⁴⁵ and the difficulties experienced in setting up the Federal Office for Immigration and Asylum, along with the resulting negative impact for applicants. Items criticized included the lengthy procedures and the lack of clarity as to the administrative personnel responsible for cases (Knapp, 2014a:22; Knapp, 2014b:2).

142 FLG I No. 87/2012.

143 See for example the debate in the media: Der Standard, *Asylnovelle bringt neues Bleiberecht*, 20 May 2012, available from <https://derstandard.at/1336697357181/Aufenthaltsberechtigung-Asylnovelle-bringt-neues-Bleiberecht> (accessed 2 April 2019); Der Standard, *In Salzburg droht 50 Kindern Abschiebung*, 16 December 2013, available from <https://derstandard.at/1385171264249/In-Salzburg-droht-50-Kindern-Abschiebung> (accessed 5 April 2019); Vorarlberger Nachrichten, *Asyl trotz Fürsprache und Jobs verweigert*, 18 July 2014, available from www.vn.at/titelblatt/2014/07/17/asyl-trotz-fuersprache-und-jobs-verweigert.vn (accessed 1 April 2019); Vorarlberger Nachrichten, *„Entscheidungen liegen beim BFA“*, 23 February 2014, available from www.vn.at/vorarlberg/2014/02/23/entscheidungen-liegen-beim-bfa.vn (accessed 5 April 2019).

144 See for example opinions of civil society organizations: Agenda Asyl, *Stellungnahme zum Entwurf eines Bundesgesetzes, mit dem ein BFA Einrichtungsgesetz und ein BFA-Verfahrensgesetz erlassen sowie das Asylgesetz 2005, das Fremdenpolizeigesetz 2005, das Niederlassungs- und Aufenthaltsgesetz, das Staatsbürgerschaftsgesetz 1985, das Grundversorgungsgesetz – Bund 2005 und das Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 2008 geändert werden*, 16 May 2012, available from www.parlament.gv.at/PAKT/VHG/XXIV/SNME/SNME_09072/imfname_253597.pdf (accessed 3 April 2019); Caritas, *Stellungnahme zum Entwurf eines Bundesgesetzes, mit dem ein BFA-Einrichtungsgesetz und ein BFA-Verfahrensgesetz erlassen sowie das Asylgesetz 2005, das Fremdenpolizeigesetz, das Niederlassungs- und Aufenthaltsgesetz, das Staatsbürgerschaftsgesetz 1985, das Grundversorgungsgesetz – Bund 2005 und das Einführungsgesetz zu den Verwaltungsverfahrensgesetzen geändert werden*, 15 May 2012, available from www.parlament.gv.at/PAKT/VHG/XXIV/SNME/SNME_09058/imfname_253132.pdf (accessed 3 April 2019).

145 The initial lack of extensive statistical data was justified by the Federal Ministry of the Interior with data transfer problems (Koppenberg, 2015a:11).

The frequency of reports concerning cases involving humanitarian residence rights dropped after 2014, only to increase again in 2018. The rise was triggered by reported plans to remove asylum seekers who had recently completed apprenticeships,¹⁴⁶ as well as by the provinces' demand for a say in cases involving a right of residence.¹⁴⁷ A lively public discussion ensued, with various movements founded. Surveys showed for example that the large majority of Austrians were in favour of a right of residence for asylum seekers completing an apprenticeship.¹⁴⁸ Supporters included prominent public personalities,¹⁴⁹ or the Archbishop of Vienna, Cardinal Schönborn.¹⁵⁰ In addition, in late 2018, a parliamentary citizens' initiative under the banner of a "right of residence for refugees accepted into families" was brought before the National Council, demanding that the provisions applying to the humanitarian right of residence be broadened to include well-integrated refugees who were accepted into families (Asylkoordination, 2018:32–33).¹⁵¹ An alliance with the name of *Menschen. Würde. Österreich* launched an online petition for a "modern right of residence", achieving

146 See Der Standard, *Wirtschaft macht gegen Abschiebung von Lehrlingen mobil*, 10 August 2018, available from <https://derstandard.at/2000085142406/Wirtschaft-macht-gegen-Abschiebung-von-Lehrlingen-mobil> (accessed 1 April 2019).

147 See Orf.at, *Keine Einigung beim humanitären Bleiberecht*, 17 November 2018, available from <https://vorarlberg.orf.at/news/stories/2947907/> (accessed 1 April 2019).

148 See for example Die Presse, *Mehrheit der Österreicher für Bleiberecht von Asylwerbern in Lehre*, 18 October 2018, available from <https://diepresse.com/home/innenpolitik/5515486/Mehrheit-der-Oesterreicher-fuer-Bleiberecht-von-Asylwerbern-in-Lehre> (accessed 1 April 2019); Wiener Zeitung, *Mehrheit der Österreicher für Bleiberecht*, 18 October 2018, available from www.wienerzeitung.at/themen-channel/integration/ausbildung-und-arbeitswelt/996859-Mehrheit-der-Oesterreicher-fuer-Bleiberecht.html (accessed 1 April 2019).

149 Kronen Zeitung, *Künstler fordern Abschiebestopp für Lehrlinge*, 29 March 2019, available from www.krone.at/1893547 (accessed 1 April 2019).

150 Kleine Zeitung, *Kardinal Schönborn: Humanitäres Bleiberecht häufiger anwenden*, 23 December 2018, available from www.kleinezeitung.at/politik/innenpolitik/5551069/Kardinal_Schoenborn_Humanitaeres-Bleiberecht-haeufiger-anwenden (accessed 9 April 2019).

151 Asylkoordination Österreich, *Bürgerinitiative fordert Aufenthaltsrecht für neue „Familienmitglieder“*. Press Release, 5 September 2018, available from www.asyl.at/de/information/presseaussendungen/2720unterschriftenfuerbleiberechtanparlamentspaesidentenuebergeben/ (accessed 28 March 2019); Parliament of the Republic of Austria, *Bleiberecht für in Familien aufgenommene Flüchtlinge (48/BI)*, available from www.parlament.gv.at/PAKT/VHG/XXVI/BI/BI_00048/index.shtml#tab-Uebersicht (accessed 28 March 2019).

over 27,000 of the envisaged 30,000 signatures by the end of the first quarter of 2019. Support for the initiative came from quarters including aid organizations Caritas, Diakonie and Volkshilfe as well as Austrian industry representatives.¹⁵²

A question was raised in Parliament concerning the provinces' say in such cases.¹⁵³ The Federal Government came out against redistributing powers to decide cases involving humanitarian right of residence, pointing to potential discrepancies in decision-making practices and the need to keep responsibility for deciding asylum cases and those involving the humanitarian residence right with the same authority.¹⁵⁴

In summary, it can be observed that, during the period of 2010 to 2018, it was primarily within the context of a right of residence for rejected asylum seekers that national protection statuses were publicly discussed in Austria. Discussion centred in detail on individual cases involving families or persons facing removal who were well integrated after living in Austria for a number of years. The topic was also discussed on an abstract plane, in particular in the context and wake of statutory amendments in 2009 and 2014, as well as, since 2018, in relation to demands to shift decision-making powers to the provinces and municipalities. However, specific national protection statuses, such as the "Residence Title for Particularly Exceptional Circumstances" being considered here, were only discussed in detail in isolated cases.

152 Aufstehn.at, „*Modernes Bleiberecht*“ – *Miteinander zahlt sich aus!*, available from <https://mein.aufstehn.at/petitions/modernes-bleiberecht-miteinander-zahlt-sich-aus> (accessed 28 March 2019); Catholic Church in Austria, *Onlinepetition will neuen Aufenthaltstitel für gut Integrierte*, 30 November 2018, available from www.katholisch.at/aktuelles/123892/onlinepetition-will-neuen-aufenthaltstitel-fuer-gut-integrierte (accessed 28 March 2019).

153 Parliament of the Republic of Austria, *Kardinal Schönborn zum humanitären Bleiberecht (3582/J-BR/2018)*, available from www.parlament.gv.at/PAKT/VHG/BR/J-BR/J-BR_03582/index.shtml (accessed 28 March 2019).

154 Die Presse, *Kickl gegen Einmischung der Länder bei humanitärem Bleiberecht*, 6 November 2018, available from <https://diepresse.com/home/innenpolitik/5525097/Kickl-gegen-Einmischung-der-Laender-bei-humanitaerem-Bleiberecht> (accessed 9 April 2019); ORF.at, *Regierung gegen Änderung bei Bleiberecht*, 7 November 2018, available from <https://orf.at/stories/3099521/> (accessed 9 April 2019); Salzburger Nachrichten, *Kickl gegen Einmischung der Länder bei Bleiberecht*, 6 November 2018, available from www.sn.at/politik/innenpolitik/kickl-gegen-einmischung-der-laender-bei-bleiberecht-59940901 (accessed 9 April 2019).

5. CHALLENGES AND PLANNED MEASURES

This study identified several challenges relating to national protection statuses and to the “Residence Title for Particularly Exceptional Circumstances”. These operational and legal challenges, as well as the challenges relating to the rights associated with the residence title, are described in the following with reference to examples.

A main operational challenge, identified by a representative of the Federal Office for Immigration and Asylum, involves establishing individuals’ identities.¹⁵⁵ As in asylum procedures, individuals in procedures for granting humanitarian residence titles often do not have adequate identity documents, which poses a considerable hindrance to establishing their identities (Lukits, 2017:32). According to a representative of the Federal Office for Immigration and Asylum, there is a focus on establishing the identities of foreigners. Accordingly, concerted measures, such as analysing storage media, are being implemented to meet challenges related to establishing individuals’ identities, according to the representative.¹⁵⁶

Another challenge, observed by a representative of the Diakonie Refugee Service, is that the “Residence Title for Particularly Exceptional Circumstances” is granted restrictively in practice. As a result, legal counsellors reportedly do not advise clients to apply for the title, considering the small likelihood of obtaining it and the fact that the persons concerned are eligible for a title under Art. 55 of the Asylum Act 2005¹⁵⁷ anyway after five years’ residence. Such persons are apparently more likely to be issued a Residence Title on Grounds of Art. 8 ECHR in accordance with Art. 55 Asylum Act 2005. The “Residence Title for Particularly Exceptional Circumstances” is waning in importance, it is observed.¹⁵⁸ This is also reflected in the figures, with the number of individuals granted a “Residence Title for Particularly Exceptional Circumstances” falling by more than half, from 42 to 20, between 2014 and 2018 (see section 3.1). Nevertheless,

155 Interview with Katharina Sklenicka, Federal Office for Immigration and Asylum, 4 April 2019.

156 Ibid.

157 FLG I No. 100/2005, in the version of federal law FLG I No. 56/2018.

158 Interview with Emanuel Matti, Diakonie Refugee Service, 18 April 2019.

Austria is not currently planning either to introduce a new protection status or to withdraw or modify any existing status.¹⁵⁹

The restricted access to the labour market for individuals holding a Residence Permit is identified as an additional challenge (see, for example, Hinterberger, 2018:111; OECD, 2016:21). To enter the employment market, such individuals require an official permit, which presupposes among other things a labour market test (see section 3.5). The latter reportedly poses the main practical barrier to meeting the requirement, according to Hinterberger (2018:111). Research by the Organisation for Economic Co-operation and Development (OECD) indicates that, while being a potential tool for controlling labour market access, the labour market test nonetheless represents a barrier to integrating persons with a humanitarian residence title into the employment market and can later have a negative impact on their integration (OECD, 2016:21). We are not aware of any planned measures that would affect this situation.

Finally, currently valid legal provisions have been criticized from various perspectives. Moving the Residence Title for Exceptional Circumstances from the Settlement and Residence Act¹⁶⁰ to the Asylum Act 2005 is one of the items criticized by Hinterberger and Klammer (2017c). Even though, it is observed, this residence title is in principle conferred on humanitarian grounds and not for reasons relating to asylum law, a clear legal distinction should nonetheless be ensured between international protection [in accordance with the Asylum Procedures Directive 2013/32/EU¹⁶¹ and the Status Directive 2011/95/EU¹⁶²] and other residence titles on humanitarian grounds” (Klammer and Hinterberger, 2017c: Register 4, section 3.1:1). Shifting the title to the Asylum Act 2005 has blurred this distinction, it is criticized (ibid.). We are not aware of any legal changes planned in this regard either.

159 Interview with Sabrina Lehner, Federal Ministry of the Interior, 4 April 2019.

160 FLG I No. 100/2005, in the version of federal law FLG I No. 56/2018.

161 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, pp. 60–95.

162 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, pp. 9–26.

6. CONCLUSIONS

On the whole, Austria does not appear to have any special focus on national protection statuses. Among the facts supporting this conclusion is the lack of any current plans either to introduce a new protection status or to withdraw or modify any existing status. The only existing national non-EU-harmonized protection status that falls under the definition given in this study has also not been significantly modified in form or content since 2010. The available statistics additionally suggest that, with a mere 169 Residence Permits (Plus) issued in 2014–2018, the “Residence Title for Particularly Exceptional Circumstances” has played only a minor role and waned in significance in recent years (2014: 42 permits issued; 2018: 20 permits). This concurs with observations by one of the interviewed experts, noting that the “Residence Title for Particularly Exceptional Circumstances” is granted restrictively in practice.¹⁶³ The title only achieved a certain degree of prominence within the public discussion of a humanitarian right of residence and in the context of the provinces’ demand for a say in granting humanitarian residence titles.

Beyond that, the grounds for conferring any such status and the related types of case queried in the common study template are dealt with in Austria largely in the context of the general provisions of law applying to asylum procedures. Such grounds may thus lead to conferment of an EU-harmonized protection status or a status not falling under the definition of a national protection status as given in this study. Due to a lack of any national protection status applicable to the grounds and categories of cases queried in the template, such grounds and cases are covered by subsidiary protection status in numerous instances. Consequently, subsidiary protection can be granted to categories of individuals that include those who have fled their countries in the face of natural disasters or climatic conditions, or for whom returning might pose a threat due to their impaired state of health. Individuals are usually eligible for subsidiary protection where threatened by potential violations of Art. 2 ECHR (right to life) and Art. 3 ECHR (prohibition of torture), provided that the other requirements are met,

163 Interview with Emanuel Matti, Diakonie Refugee Service, 18 April 2019.

according to a representative of the Federal Ministry of the Interior. Also included here are cases where a person's "means of subsistence is affected, in other words, the food supply, drinking water, medical care or housing". Yet a poor economic situation does not fall into this category, it is stated.¹⁶⁴

The study identified only one non-EU-harmonized protection status in Austria that falls under the definition given in this study: the "Residence Title for Particularly Exceptional Circumstances" as defined in Art. 56 Asylum Act 2005.¹⁶⁵ Asylum and subsidiary protection status are also defined in the Asylum Act 2005 and granted by the Federal Office for Immigration and Asylum. Compared with those statuses, individuals holding a "Residence Title for Particularly Exceptional Circumstances" under Art. 56 of the Asylum Act 2005 – and especially those with only a Residence Permit – are found on the one hand to be subject to varying conditions. This is true both with respect to the legal features of the residence title and the associated rights. The same conditions apply to both categories, in contrast, with respect to the complaint procedure, changing to a residence title under the Settlement and Residence Act,¹⁶⁶ obtaining citizenship and access to education.

164 Interview with Sabrina Lehner, Federal Ministry of the Interior, 4 April 2019.

165 FLG I No. 100/2005, in the version of federal law FLG I No. 56/2018.

166 FLG I No. 100/2005, in the version of federal law FLG I No. 56/2018.

ANNEXES

A.1 List of translations and abbreviations

English term	English abbreviation	German term	German abbreviation
Act Establishing the Federal Office for Immigration and Asylum	–	BFA-Einrichtungsgesetz	BFA-G
Aliens Authorities Restructuring Act	–	Fremdenbehördenneustrukturierungsgesetz	FNG
Aliens Law Package	–	Fremdenrechtspaket	–
Aliens Police Act 2005	–	Fremdenpolizeigesetz 2005	FPG
appeal (on point of law)	–	Revision	–
Asylum Act 2005	–	Asylgesetz 2005	AsylG 2005
Austrian Integration Fund	–	Österreichischer Integrationsfonds	ÖIF
beneficiary of subsidiary protection status	–	subsidiär Schutzberechtigter	–
best interests of the child	–	Kindeswohl	–
Citizenship Act 1985	–	Staatsbürgerschaftsgesetz 1985	StbG
common study template	–	gemeinsame Studienvorlage	–
Compulsory Schooling Act 1985	–	Schulpflichtgesetz 1985	–
Constitutional Court	–	Verfassungsgerichtshof	VfGH
EU relocation programme	–	Umverteilungsprogramm	–
European Economic Area	EEA	Europäischer Wirtschaftsraum	EWR
European Commission	–	Europäische Kommission	–
European Convention on Human Rights	ECHR	Europäische Menschenrechtskonvention	EMRK
European Court of Human Rights	ECtHR	Europäischer Gerichtshof für Menschenrechte	EGMR
European Migration Network	EMN	Europäisches Migrationsnetzwerk	EMN
Federal Administrative Court	–	Bundesverwaltungsgericht	BVwG
Federal Basic Care Act 2005	–	Grundversorgungsgesetz – Bund 2005	GVG-B 2005
Federal Constitutional Law	–	Bundes-Verfassungsgesetz	B-VG
Federal Law Gazette	FLG	Bundesgesetzblatt	BGBL
Federal Ministry of Labour, Social Affairs, Health and Consumer Protection	–	Bundesministerium für Arbeit, Soziales, Gesundheit und Konsumentenschutz	BMASGK
Federal Ministry of the Interior	MoI	Bundesministerium für Inneres	BMI
Federal Office for Immigration and Asylum	–	Bundesamt für Fremdenwesen und Asyl	BFA
Federal Office for Immigration and Asylum Procedures Act	–	BFA-Verfahrensgesetz	BFA-VG
General Administrative Procedures Act 1991	–	Allgemeines Verwaltungsverfahrensgesetz 1991	AVG

English term	English abbreviation	German term	German abbreviation
General Social Assistance Act	–	Sozialhilfe-Grundsatzgesetz	–
General Social Insurance Act	–	Allgemeines Sozialversicherungsgesetz	ASVG
Geneva Refugee Convention	–	Genfer Flüchtlingskonvention	GFK
Integration Act	–	Integrationsgesetz	IntG
International Organization for Migration	IOM	Internationale Organisation für Migration	IOM
Introductory Act to the Administrative Procedure acts 2008	–	Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 2008	EGVG
National Contact Point	–	Nationaler Kontaktpunkt	–
National Council	–	Nationalrat	–
Needs-based Guaranteed Minimum Resources	BMS	Bedarfsorientierte Mindestsicherung	BMS
non-refoulement	–	Nichtzurückweisung	–
Organisation for Economic Co-operation and Development	OECD	Organisation für wirtschaftliche Zusammenarbeit und Entwicklung	OECD
Permanent Residence – EU	–	Daueraufenthalt – EU	–
persons granted asylum	–	Asylberechtigte	–
province	–	Bundesland	–
Provincial Law Gazette	PLG	Landesgesetzblatt	LGBl.
Public Employment Service	–	Arbeitsmarktservice	AMS
Red-White-Red Card (Plus)	RWR Card	Rot-Weiß-Rot – Karte (plus)	RWR – Karte
rejection at the border	–	Zurückweisung	–
resettlement programmes	–	Neuansiedlungsprogramme	–
residence permit (plus)	–	Aufenthaltsberechtigung (plus)	–
Residence Permit for Individual Protection	–	Aufenthaltsberechtigung besonderer Schutz	–
residence title	–	Aufenthaltsstitel	–
residence title for exceptional circumstances	–	Aufenthaltsstitel aus berücksichtigungswürdigen Gründen	–
residence title for particularly exceptional circumstances	–	Aufenthaltsstitel in besonders berücksichtigungswürdigen Fällen	–
return decision	–	Rückkehrentscheidung	–
removal	–	Abschiebung	–
Settlement and Residence Act	–	Niederlassungs- und Aufenthaltsgesetz	NAG
Social Insurance Act for Trade and Industry	–	Gewerbliches Sozialversicherungsgesetz	–
Supreme Administrative Court	–	Verwaltungsgerichtshof	VwGH
termination of residence	–	Aufenthaltsbeendigung	–
third-country nationals	–	Drittstaatsangehörige	–
tolerated stay	–	Duldung	–
unaccompanied minors	UAM	unbegleitete Minderjährige	–
work permit	–	Beschäftigungsbewilligung	–

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