



International Organization for Migration (IOM)



European Migration Network

# THE RETURN OF REJECTED ASYLUM SEEKERS FROM AUSTRIA



**Rainer Lukits**

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REPUBLIC OF AUSTRIA  
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The European Migration Network (EMN) is coordinated by the European Commission with National Contact Points (EMN NCPs) established in each EU Member State plus Norway. The National Contact Point Austria in the EMN is financially supported by the European Commission and the Austrian Federal Ministry of the Interior.

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Country Office for Austria  
National Contact Point Austria in the  
European Migration Network  
Nibelungengasse 13/4, 1010 Vienna  
Tel.: +43 1 585 33 22 0  
Fax: +43 1 585 33 22 30  
E-mail: [iomvienna@iom.int](mailto:iomvienna@iom.int), [ncpaustria@iom.int](mailto:ncpaustria@iom.int)  
Internet: [www.iomvienna.at](http://www.iomvienna.at), [www.emn.at](http://www.emn.at)

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# EUROPEAN MIGRATION NETWORK

The European Migration Network (EMN) was launched in 2003 by the European Commission by order of the European Council in order to satisfy the need of a regular exchange of reliable information in the field of migration and asylum at the 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) plus Norway.

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

The NCP for Austria is located in the Research and Migration Law Department of the Country Office for Austria of the International Organization for Migration (IOM) in Vienna, which was established in 1952 when Austria became one of the first members 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 respective national projects and programmes.

The main task of the NCPs is to implement the annual work programme of the EMN including the drafting of the annual policy report and topic-specific focussed and main studies, answering Ad-Hoc Queries launched by other NCPs or the European Commission, carrying out visibility activities and networking in several forums. Furthermore, the NCPs in each country set up national networks consisting 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. Exceptions might occur when existing data and information are not sufficient. EMN studies are elaborated in accordance with uniform specifications valid for all EU Member States plus Norway in order to achieve comparable EU-wide results. Since the comparability of the results is frequently challenging, the EMN has produced a Glossary,

which ensures the application of similar definitions and terminology in all national reports.

Upon completion of national reports, the European Commission with the support of a service provider drafts a synthesis report, which summarizes the most significant results of the individual national reports. In addition, topic-based policy briefs, so-called EMN Informs, are produced in order to present and compare selected topics in a concise manner. All national studies, synthesis reports, informs and the Glossary are available on the website of the European Commission Directorate-General Migration and Home Affairs.

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# INTRODUCTION

This study deals with the voluntary or forced return of rejected applicants for international protection to their country of nationality or (former) habitual residence. Unlike forced return, voluntary return is based on the free will of the returnee and may be assisted or independent (EMN, 2014:300). Return assistance may include logistical, financial or other material assistance (EMN, 2014:31). In Austria, return assistance includes in any case the necessary travel costs for return and may also include further financial support (Art. 52a Federal Office for Immigration and Asylum Procedures Act; see also Chapter 2). For the purposes of this study, rejected applicants for international protection (in the following also referred to as “rejected asylum seekers”) are third-country nationals covered by a first instance decision rejecting their application for international protection, including decisions considering applications as inadmissible or as unfounded (EMN, 2014:236). International protection encompasses refugee status and subsidiary protection status (see EMN, 2014:168). In order for the applicant to qualify as a rejected asylum seeker within the meaning of this study, the decision rejecting the asylum application does not have to be final. Accordingly, the notion of a rejected asylum seeker may be different than in the national context.

According to the statistics of the Austrian Federal Ministry of the Interior and Eurostat, the annual numbers of applications for international protection (also referred to as “asylum applications”) continually increased from 2010 to 2015 both in Austria and at European Union level, especially in the year 2015.<sup>1</sup> In 2015, the numbers of rejected asylum seekers also increased at both levels.<sup>2</sup> According to the European Commission, in 2014

- 1 Federal Ministry of the Interior, *Asylum Statistics 2015*, p. 3, available at [www.bmi.gv.at/cms/BMI\\_Asylwesen/statistik/files/Asyl\\_Jahresstatistik\\_2015.pdf](http://www.bmi.gv.at/cms/BMI_Asylwesen/statistik/files/Asyl_Jahresstatistik_2015.pdf) (accessed on 24 June 2016); Eurostat, *Asylum and first time asylum applicants by citizenship, age and sex, Annual aggregated data (rounded)*, available at [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_asyappctza&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza&lang=en) (accessed on 24 June 2016).
- 2 Eurostat, *First instance decisions on applications by citizenship, age and sex, Annual aggregated data (rounded)*, available at <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do> (accessed on 24 June 2016); see Chapter 8.

less than 40 per cent of irregular migrants ordered to leave the EU actually departed (EC, 2015b:2). In Austria there also seems to be a certain gap between third-country nationals ordered to leave Austria and those who actually return (see for instance Rosenberger/Küffner, 2016:141).<sup>3</sup> Accordingly, the return of irregular migrants and especially of rejected asylum seekers is a political priority at both national level (see Chapter 2) and European Union level (EC, 2015a:9–10; EC, 2015b:2, 5). Recently, the return of rejected asylum seekers has also been discussed quite often in the Austrian media.<sup>4</sup> However, there has obviously been no recent and comprehensive study specifically dealing with the return of rejected asylum seekers in Austria. At European level, specific literature on the return of rejected asylum seekers also seems to be rather sparse.

The Austrian policy on the return of rejected asylum seekers is mainly determined by the European Convention on Human Rights (ECHR), the Common European Asylum System (see Section 1.1) and the Return Directive (2008/115/EC). Within the framework of the ECHR, particularly

- 3 See also Profil, *Abgelehnte Flüchtlinge: Die meisten werden trotzdem bleiben*, 4 January 2016, available at [www.profil.at/oesterreich/abgelehnte-fluechtlinge-die-6177348](http://www.profil.at/oesterreich/abgelehnte-fluechtlinge-die-6177348) (accessed on 25 May 2016); Kurier, *Auf drei „Nein“ zu Asyl kommt einer, der wirklich geht*, 1 December 2015, available at <http://kurier.at/politik/inland/faktencheck-auf-drei-nein-zu-asyl-kommt-einer-der-wirklich-geht/167.048.811> (accessed on 25 May 2016); Die Presse, *SPÖ: Fast alle gegen Niessl*, 1 December 2015, available at [http://diepresse.com/home/politik/innenpolitik/4878732/SPO\\_Fast-alle-gegen-Niessl](http://diepresse.com/home/politik/innenpolitik/4878732/SPO_Fast-alle-gegen-Niessl) (accessed on 25 May 2016).
- 4 See for instance, Der Standard, *Abgelehnte Asylwerber: Die meisten gehen „freiwillig“*, 9 October 2015, available at <http://derstandard.at/2000023436430/Abgelehnte-Asylwerber-Die-meisten-gehen-freiwillig> (accessed on 25 May 2016); Kurier, *Auf drei „Nein“ zu Asyl kommt einer, der wirklich geht*, 1 December 2015, available at <http://kurier.at/politik/inland/faktencheck-auf-drei-nein-zu-asyl-kommt-einer-der-wirklich-geht/167.048.811> (accessed on 25 May 2016); Kurier, *Abschiebe-Pläne: Viel Härte – wenig Nutzen?*, 2 February 2016, available at <http://kurier.at/politik/inland/abschiebe-plaene-viel-haerte-wenig-nutzen/178.454.220> (accessed on 25 May 2016); Die Presse, *Österreich: Schwierige Abschiebung in Krisenländer*, 8 October 2015, available at [http://diepresse.com/home/politik/innenpolitik/4838242/Osterreich\\_Schwierige-Abschiebung-in-Krisenlaender](http://diepresse.com/home/politik/innenpolitik/4838242/Osterreich_Schwierige-Abschiebung-in-Krisenlaender) (accessed on 25 May 2016); Profil, *Abgelehnte Flüchtlinge: Die meisten werden trotzdem bleiben*, 4 January 2016, available at [www.profil.at/oesterreich/abgelehnte-fluechtlinge-die-6177348](http://www.profil.at/oesterreich/abgelehnte-fluechtlinge-die-6177348) (accessed on 25 May 2016); Salzburger Nachrichten, *Faymann will Rückführungen von Flüchtlingen verstärken*, 19 December 2015, available at [www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/faymann-will-rueckfuehrungen-von-fluechtlingen-verstaerken-177659](http://www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/faymann-will-rueckfuehrungen-von-fluechtlingen-verstaerken-177659) (accessed on 25 May 2016).



the principle of non-refoulement (see Section 1.1) and the right to respect for private and family life (Art. 8 ECHR) play a significant role.<sup>5</sup> Within the framework of the Council of Europe, relevant documents have also been adopted, for instance a recommendation on the return of rejected asylum seekers and guidelines on forced return (Council of Europe, 1999; Council of Europe, 2005).

The target readers of this study comprise in particular policy officers and decision-makers at both EU and national levels, practitioners, academic researchers and the general public.

Following the introduction, which includes definitions and the description of the methodology applied, the second chapter provides an overview of the situation in Austria. The third chapter describes the relationship between the asylum procedure and the return of rejected asylum seekers. The following chapter focuses on asylum seekers who have already been rejected by a first-instance decision. Chapter 5 elaborates on challenges to return and whether these are specific to rejected asylum seekers or rather general to return. This is followed by Chapter 6, which deals with rejected asylum seekers who cannot be removed for the time being. Chapter 7 presents practices and policies in Austria that may be regarded as good practices. The last chapter provides a summary of the study and draws some conclusions.

The Annex provides a list of translations and abbreviations and a bibliography including a list of the expert interviews conducted.

## 1.1 Definitions

The study is based on the following definitions from the EMN Asylum and Migration Glossary:

**Absconding:** Action by which a person seeks to avoid legal proceedings by not remaining available to the relevant authorities or to the court (EMN, 2014:10).

**Application for international protection:** A request made by a third-country national or a stateless person for protection from a Member State,

5 See e.g. Art. 50 Aliens Police Act; Art. 9 Federal Office for Immigration and Asylum Procedures Act.

who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of Directive 2011/95/EU, that can be applied for separately (EMN, 2014:29).

**Assisted voluntary return:** Voluntary return or voluntary departure supported by logistical, financial and / or other material assistance (EMN, 2014:31).

**Common European Asylum System:** A framework of agreed rules which establish common procedures for international protection and a uniform status for those who are granted refugee status or subsidiary protection based on the full and inclusive application of the Geneva Convention and which aims to ensure fair and humane treatment of applicants for international protection, to harmonise asylum systems in the EU and reduce the differences between Member States on the basis of binding legislation, as well as to strengthen practical cooperation between national asylum administrations and the external dimension of asylum (EMN, 2014:59).

**Country of nationality:** The country (or countries) of which a person holds citizenship (EMN, 2014:67).

**International protection:** Protection that encompasses refugee status and subsidiary protection status (EMN, 2014:168).

**Non-refoulement:** A core principle of international refugee law that prohibits States from returning refugees in any manner whatsoever to countries or territories in which their lives or freedom may be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion (EMN, 2014:205).

**Refugee:** Either a person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned before, is unable or, owing to such fear, unwilling to return to it (EMN, 2014:230).

**Rejected applicant for international protection:** A person covered by a first instance decision rejecting an application for international protection, including decisions considering applications as inadmissible or

as unfounded and decisions under priority and accelerated procedures, taken by administrative or judicial bodies during the reference period (EMN, 2014:236).

**Removal:** The enforcement of the obligation to return, namely the physical transportation out of the country (EMN, 2014:238).

**Return:** The movement of a person going from a host country back to a country of origin, country of nationality or habitual residence usually after spending a significant period of time in the host country whether voluntary or forced, assisted or spontaneous (EMN, 2014:246).

**Safe country of origin:** A country where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Art. 9 of Directive 2011/95/EU (Recast Qualification Directive), no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict (EMN, 2014:254).

**Safe third country:** A third country that treats a person seeking international protection in accordance with the following principles:

(a) Life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) There is no risk of serious harm as defined in Directive 2011/95/EU;

(c) The principle of non-refoulement in accordance with the Geneva Convention of 1951 is respected;

(d) The prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

(e) The possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention (EMN, 2014:255).

**Subsidiary protection:** The protection given to a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to their country of origin, or in the case of a stateless person to their country of former habitual residence, would face a real risk of suffering serious harm as defined in Art. 15 of Directive 2011/95/EU, and to whom Art. 17 para 1 and 2 of Directive 2011/95/EU do not apply,

and is unable or, owing to such risk, unwilling to avail themselves of the protection of that country (EMN, 2014:278).

**Third-country national:** Any person who is not a citizen of the European Union within the meaning of Art. 20 para 1 of the Treaty on the Functioning of the European Union (TFEU) and who is not a person enjoying the European Union right to free movement, as defined in Art. 2 para 5 of the Schengen Borders Code (EMN, 2014:283).

**Voluntary return:** The assisted or independent return to the country of origin, transit or third country, based on the free will of the returnee (EMN, 2014:300).

## 1.2 Methodology

The present study follows a common study template with a predefined set of questions developed by the EMN, in order to facilitate comparability of the findings across all European countries participating in the study. The respective national reports and a synthesis report will be published on the website of the European Migration Network (EMN).<sup>6</sup>

The study is based on legal provisions of Austrian law, decisions of the Austrian supreme courts and on publications including legal literature, previous EMN studies, statistics, media reports and various internet sources. Furthermore, the study takes into account several interviews conducted with experts in the field of return and basic welfare support. Interviews were conducted with Bettina Baumgartner and Mara Stjepanovic (Federal Office for Immigration and Asylum), Thomas Mühlhans and Anita Otonicar (Department III/5, Asylum and Alien Matters, Federal Ministry of the Interior), Günter Ecker (Verein Menschenrechte Österreich), Gerlinde Hörl (Caritas Salzburg), Katerina Kratzmann and Agata Foryś (IOM Vienna), Leopold Kraus (IOM Vienna), Gernot Maier (Department III/9, Asylum Care, Federal Ministry of the Interior) and Gerald Dreveny (Department III/5, Asylum and Alien Matters, Federal Ministry of the Interior). The citations of the interviews have been approved by the respective experts.

6 See European Commission, *Reports, Studies, ad-hoc queries and statistics – EMN*, available at [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/index_en.htm) (accessed on 23 May 2016).

The bibliography in the annex provides an overview of the sources of information used. The study was finalized in June 2016, so that information up to this date has been included.

The terminology of this study follows in general the Asylum and Migration Glossary of the European Migration Network (EMN, 2014; see the section above on the European Migration Network).

The present study was compiled by Rainer Lukits (Legal Associate, IOM Country Office for Austria) under the supervision of Julia Rutz (Head of Research and Migration Law, IOM Country Office for Austria). Saskia Koppenberg (Research Associate, IOM Country Office for Austria) provided assistance with statistical issues. Special thanks also go to Katerina Kratzmann (Head of Office, IOM Country Office for Austria) for reviewing the final draft. The author is also grateful to the above-mentioned interviewees for sharing their knowledge and experience. Furthermore, gratitude is also expressed to Olha Bilous and Catherine Buchwald (Interns, IOM Country Office for Austria) for conducting media research and for typing expert interviews.

## 2. OVERVIEW OF THE NATIONAL SITUATION

The return of rejected asylum seekers is considered a major issue in Austria and a national policy priority.<sup>7</sup> According to the work programme of the Austrian Federal Government for the period 2013–2018, a task of the current Federal Government is the promotion of voluntary return.<sup>8</sup> On 20 January 2016, an “Asylum Summit” with representatives of the Federal State, provinces, cities and municipalities took place. It was concluded that the removal of rejected asylum seekers had to be intensified and that voluntary return had to be increased. Furthermore, efficient readmission agreements should be negotiated by the EU and the Member States.<sup>9</sup> The Federal Chancellors recently and currently in office also expressly stated that more rejected asylum seekers had to be returned.<sup>10</sup>

According to the statistics of the Federal Ministry of the Interior, the annual number of final decisions in the first and second instance rejecting applications for international protection as unfounded increased in 2015 by approximately nine per cent to 4,325 decisions (refer to Chapter 8).

- 7 Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016.
- 8 Federal Chancellery, *Arbeitsprogramm der österreichischen Bundesregierung 2013–2018*, p. 81, available at [www.bka.gv.at/DocView.axd?CobId=53264](http://www.bka.gv.at/DocView.axd?CobId=53264) (accessed on 12 April 2016).
- 9 Federal Chancellery, *Asylgipfel am 20. Jänner 2016, Gemeinsame Vorgangsweise von Bund, Ländern, Städten und Gemeinden*, paras 3 and 7, available at <http://bka.gv.at/DocView.axd?CobId=61858> (accessed on 29 March 2016).
- 10 See Der Standard, *Faymann rät Kurz, Asylvorschläge „zu Ende zu denken“*, 1 December 2015, available at <http://derstandard.at/2000026743362/Rote-kalte-Schulter-fuer-Niessl-bei-Ministerrat> (accessed on 25 May 2016); Die Presse, *SPÖ: Fast alle gegen Niessl*, 1 December 2015, available at [http://diepresse.com/home/politik/innenpolitik/4878732/SPO\\_Fast-alle-gegen-Niessl](http://diepresse.com/home/politik/innenpolitik/4878732/SPO_Fast-alle-gegen-Niessl) (accessed on 25 May 2016); Salzburger Nachrichten, *Faymann will Rückführungen von Flüchtlingen verstärken*, 19 December 2015, available at [www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/faymann-will-rueckfuehrungen-von-fluechtlingen-verstaerken-177659](http://www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/faymann-will-rueckfuehrungen-von-fluechtlingen-verstaerken-177659) (accessed on 25 May 2016); Profil, *Abgelehnte Flüchtlinge: Die meisten werden trotzdem bleiben*, 4 January 2016, available at [www.profil.at/oesterreich/abgelehnte-fluechtlinge-die-6177348](http://www.profil.at/oesterreich/abgelehnte-fluechtlinge-die-6177348) (accessed on 25 May 2016); Der Standard, *Kanzler Kern will rasche Arbeitslaubnis für Asylwerber*, available at <http://derstandard.at/2000037591675/Bundeskanzler-Kern-will-rasche-Arbeitslaubnis-fuer-Asylwerber> (accessed on 25 May 2016).

According to the media, many rejected asylum seekers file a complaint and for the time being may stay in Austria.<sup>11</sup> This is due to the fact that in general a complaint has suspensive effect (Art. 13 para 1 Proceedings of Administrative Courts Act). Only under certain circumstances does a complaint not have suspensive effect (refer to Section 4.4). Apparently, many rejected asylum seekers also move to another country or abscond.<sup>12</sup> According to media reports, other main reasons for the non-return of rejected asylum seekers include the lack of identity and travel documents among rejected asylum seekers and the poor cooperation on the part of some third-country authorities in the return of their nationals.<sup>13</sup> Finally, some removals do not succeed due to physical resistance of the returnees.<sup>14</sup>

In general, the Austrian return policy is not specifically targeted at rejected asylum seekers but rather applies to broader categories of third-country nationals. For instance, return counselling may be granted to any foreigner at any stage of legal proceedings according to Art. 52a para 1 Federal Office for Immigration and Asylum Procedures Act (see Section 3.1). Return counselling is mandatory in particular for asylum seekers whose application will probably be rejected (Art. 52a para 2 Federal Office for Immigration and Asylum Procedures Act in conjunction with Art. 29 para 3

- 11 See Kurier, *Auf drei „Nein“ zu Asyl kommt einer, der wirklich geht*, 1 December 2015, available at <http://kurier.at/politik/inland/faktencheck-auf-drei-nein-zu-asyl-kommt-einer-der-wirklich-geht/167.048.811> (accessed on 25 May 2016).
- 12 Kurier, *Abschiebe-Pläne: Viel Härte – wenig Nutzen?*, 2 February 2016, available at <http://kurier.at/politik/inland/abschiebe-plaene-viel-haerte-wenig-nutzen/178.454.220> (accessed on 25 May 2016); Kurier, *Auf drei „Nein“ zu Asyl kommt einer, der wirklich geht*, 1 December 2015, available at <http://kurier.at/politik/inland/faktencheck-auf-drei-nein-zu-asyl-kommt-einer-der-wirklich-geht/167.048.811> (accessed on 25 May 2016).
- 13 Die Presse, *Österreich: Schwierige Abschiebung in Krisenländer*, 8 October 2015, available at [http://diepresse.com/home/politik/innenpolitik/4838242/Osterreich\\_Schwierige-Abschiebung-in-Krisenlaender](http://diepresse.com/home/politik/innenpolitik/4838242/Osterreich_Schwierige-Abschiebung-in-Krisenlaender) (accessed on 25 May 2016); Profil, *Abgelehnte Flüchtlinge: Die meisten werden trotzdem bleiben*, 4 January 2016, available at [www.profil.at/oesterreich/abgelehnte-fluechtlinge-die-6177348](http://www.profil.at/oesterreich/abgelehnte-fluechtlinge-die-6177348) (accessed on 25 May 2016); Kurier, *Abschiebe-Pläne: Viel Härte – wenig Nutzen?*, 2 February 2016, available at <http://kurier.at/politik/inland/abschiebe-plaene-viel-haerte-wenig-nutzen/178.454.220> (accessed on 25 May 2016).
- 14 Profil, *Abgelehnte Flüchtlinge: Die meisten werden trotzdem bleiben*, 4 January 2016, available at [www.profil.at/oesterreich/abgelehnte-fluechtlinge-die-6177348](http://www.profil.at/oesterreich/abgelehnte-fluechtlinge-die-6177348) (accessed on 25 May 2016).

subpara 4 and 5 Asylum Act; refer to Section 3.1). Return assistance may be granted in particular to rejected asylum seekers, but also to regular asylum seekers (Art. 12 Federal Basic Welfare Support Act). Return decisions in particular have to be issued against rejected asylum seekers, but may also be issued against other third-country nationals (Art. 52 Aliens Police Act; Art. 10 para 1 Asylum Act).

In the context of asylum seekers who have been rejected or who will probably be rejected, some changes have recently taken place. Art. 27a Asylum Act providing for accelerated asylum procedures was introduced by the Act Amending the Aliens Law 2015 which entered into force in July 2015.<sup>15</sup> Accelerated asylum procedures generally have to be decided within five months (Art. 27a Asylum Act). The reason for the introduction of accelerated asylum procedures was that according to the recast Procedures Directive, the suspensive effect of an appeal may be lifted if accelerated procedures have been conducted.<sup>16</sup>

In February 2016, 1) Mongolia; 2) Ghana; 3) Morocco; 4) Algeria; 5) Tunisia; and 6) Georgia were added to the list of safe countries of origin in the Regulation on Countries of Origin.<sup>17</sup> A safe country of origin implies that the suspensive effect of a complaint may be lifted (Art. 18 para 1 subpara 1 Federal Office for Immigration and Asylum Procedures Act; Art. 31 para 8 (b) Procedures Directive 2013/33/EU).

A new scheme of monetary return assistance is being tested at the moment for nationals of Afghanistan, Morocco and Nigeria. The earlier an asylum seeker decides to return voluntarily, the higher the amount of monetary assistance. If applicants decide to return voluntarily within three months after filing the application, they receive EUR 500, unless they have filed a complaint against the decision of the asylum authority. If an asylum

15 Act Amending the Aliens Law 2015, Federal Law Gazette I No. 70/2015, Art. 3 para 27, available at [www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2015\\_I\\_70/BGBLA\\_2015\\_I\\_70.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2015_I_70/BGBLA_2015_I_70.pdf) (accessed on 1 April 2016).

16 Act Amending the Aliens Law 2015, Government Proposal, Explanatory Notes, p. 13, available at [www.parlament.gv.at/PAKT/VHG/XXV/II/II\\_00582/fname\\_401629.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/II/II_00582/fname_401629.pdf) (accessed on 13 May 2016).

17 Amendment to the Regulation on Countries of Origin, Federal Law Gazette II No. 47/2016, available at [www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2016\\_II\\_47/BGBLA\\_2016\\_II\\_47.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2016_II_47/BGBLA_2016_II_47.pdf) (accessed on 24 March 2016).



seeker decides to return voluntarily within six months, the amount is EUR 250, later on the amount is EUR 50.<sup>18</sup>

Since early 2016, Austria participates in the European Reintegration Network (ERIN), a return and reintegration programme at European level (see also Chapter 5). Since June 2016 Austria is a full member to the programme.<sup>19</sup> Furthermore, the budget for voluntary return was increased recently.<sup>20</sup>

18 Federal Office for Immigration and Asylum, *Neues Rückkehrhilfeprogramm für Asylweber aus Afghanistan, Marokko und Nigeria*, available at [www.bfa.gv.at/presse/thema/detail.aspx?nwid=4F717067766351484946513D&ctrl=2B7947437976465443374D3D](http://www.bfa.gv.at/presse/thema/detail.aspx?nwid=4F717067766351484946513D&ctrl=2B7947437976465443374D3D) (accessed on 12 May 2016).

19 Federal Ministry of the Interior, *ERIN European Reintegration Network*, available at [www.bfa.gv.at/files/formulare/ERIN/ERIN%20Informationsblatt%20zur%20Rueckkehrberatung.pdf](http://www.bfa.gv.at/files/formulare/ERIN/ERIN%20Informationsblatt%20zur%20Rueckkehrberatung.pdf) (accessed on 12 May 2016).

20 Interview with Günter Ecker, Verein Menschenrechte Österreich, 28 April 2016; Interview with Gerlinde Hörl, Caritas Salzburg, 22 April 2016.

## 3. LINKING RETURN POLICY TO THE ASYLUM PROCEDURE

This chapter examines the promotion of return of asylum seekers whose application for international protection will possibly or probably be rejected.

### 3.1 Promotion of voluntary return during asylum procedures

It is part of the Austrian policy to promote the voluntary return of asylum seekers early on and throughout different stages in the asylum procedure. This policy is particularly set out in statutory provisions.

Applicants may receive return counselling at any time during their asylum procedure. Return counselling particularly includes the available options during and after the procedure (Art. 52a para 1 Federal Office for Immigration and Asylum Procedures Act).

If the applicant has received a notice from the Federal Office for Immigration and Asylum that it is intended to reject the application for international protection or to lift the de facto protection from deportation, a session of return counselling is mandatory. In accelerated procedures, return counselling may be ordered even earlier, unless return counselling has already been granted (Art. 52a para 2 Federal Office for Immigration and Asylum Procedures Act). Mandatory return counselling was introduced through the Act Amending the Aliens Law 2015.<sup>21</sup>

Asylum seekers may be granted return assistance including at least the necessary travel costs and often also financial aid (Art. 52a Federal Office for Immigration and Asylum Procedures Act; Art. 12 Federal Basic Welfare Support Act; see also Chapter 2).

Information on the different approaches to inform asylum seekers about voluntary return is available in the Austrian national report of the

21 Act Amending the Aliens Law 2015, Federal Law Gazette I No. 70/2015, Art. 2 para 42, available at [www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2015\\_I\\_70/BGBLA\\_2015\\_I\\_70.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2015_I_70/BGBLA_2015_I_70.pdf) (accessed on 24 March 2016).

EMN study on the dissemination of information on voluntary return (Rutz/Chahrokh, 2015:22–23, 32–40).

### **3.2 Accelerated asylum procedures**

If the rejection of an application for international protection is likely, accelerated asylum procedures may promote a swift return of the applicant.

Austria uses accelerated asylum procedures as stipulated in Art. 31 para 8 of the recast Asylum Procedures Directive.<sup>22</sup> Accelerated asylum procedures are to be decided by the Federal Office for Immigration and Asylum within five months (see Art. 27a Asylum Act). According to Art. 27a first sentence Asylum Act in conjunction with Art. 18 para 1 Federal Office for Immigration and Asylum Procedures Act, accelerated procedures may be conducted in the following cases:

- Where applicants are from a safe country of origin;
- Where asylum seekers may, for serious reasons, be considered a danger to the public security or order;
- Where asylum seekers have tried to mislead the Federal Office for Immigration and Asylum regarding their true identity, nationality or the authenticity of their documents, even though they have been informed about the consequences;
- Where applicants have not asserted grounds for persecution;
- Where the assertions made by asylum seekers regarding a threatening situation are obviously false;
- Where asylum seekers have been issued an enforceable return decision before lodging the application for international protection;
- or
- Where applicants refuse to comply with the obligation to have their fingerprints taken.

22 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 180/60.

In the following cases, Art. 27a Asylum Act in conjunction with Art. 18 para 1 Federal Office for Immigration and Asylum Procedures Act do not provide for accelerated procedures, although this would be permitted under Art. 31 para 8 of the recast Asylum Procedures Directive: where applicants have destroyed documents intentionally (d), where they have filed inadmissible subsequent applications (f) or where they entered the territory of the Member State unlawfully or prolonged their stay unlawfully and, without good reason, have either not presented themselves to the authorities or have not made an application for international protection as soon as possible (h). The Federal Office for Immigration and Asylum or the Federal Administrative Court may, however, initiate return proceedings during the asylum procedure, if the inquiries to date justify the assumption that the application for international protection is to be dismissed as unfounded or rejected as inadmissible in regard to the granting of both asylum status and subsidiary protection status and if there is a specific public interest in an accelerated procedure (Art. 27 para 2 Asylum Act). In that case, the decision has to be taken as soon as possible and in any case within three months after the initiation of the return proceedings or after a complaint has been filed (Art. 27 para 8 Asylum Act).

As indicated above, accelerated procedures may be conducted where the applicant is from a safe country of origin. Austria has a list of safe countries of origin. Art. 19 para 4 Federal Office for Immigration and Asylum Procedures Act includes a list of safe countries of origin. A regulation of the Federal Government has determined further safe countries of origin in accordance with Art. 19 para 5 subpara 2 Federal Office for Immigration and Asylum Procedures Act.<sup>23</sup>

A statutory list of safe countries of origin was introduced in 2004 through Art. 6 para 2 Asylum Act.<sup>24</sup>

23 Regulation on Countries of Origin, Federal Law Gazette II No. 177/2009, in the version of Federal Law Gazette II No. 47/2016.

24 Asylum Law Amendment 2003, Federal Law Gazette I No. 101/2003, available at [www.ris.bka.gv.at/Dokumente/BgblPdf/2003\\_101\\_1/2003\\_101\\_1.pdf](http://www.ris.bka.gv.at/Dokumente/BgblPdf/2003_101_1/2003_101_1.pdf) (accessed on 24 March 2016); Asylum Law Amendment 2003, Government Proposal, Explanatory Notes, p. 14, available at [www.parlament.gv.at/PAKT/VHG/XXII/I/I\\_00120/imfname\\_004503.pdf](http://www.parlament.gv.at/PAKT/VHG/XXII/I/I_00120/imfname_004503.pdf) (accessed on 24 March 2016).

Art. 19 para 4 Federal Office for Immigration and Asylum Procedures Act includes: 1) Australia; 2) Iceland; 3) Canada; 4) Liechtenstein; 5) New Zealand; 6) Norway; and 7) Switzerland. The Regulation on Countries of Origin adds 1) Bosnia and Herzegovina; 2) UNSC resolution 1244-administered Kosovo;<sup>25</sup> 3) Mongolia; 4) the former Yugoslav Republic of Macedonia; 5) Montenegro; 6) Serbia; 7) Albania; 8) Ghana; 9) Morocco; 10) Algeria; 11) Tunisia; and 12) Georgia.<sup>26</sup>

However, Austria does not have an official list of safe third countries. The preconditions for recognizing safe third countries are set out in Art. 4 Asylum Act. Contrary to a safe country of origin, a safe third country is not a reason for accelerated procedures under Art. 27a Asylum Act.

25 Hereinafter referred to as Kosovo/UNSC 1244.

26 Art. 1 Regulation on Countries of Origin.

## **4. THE AUSTRIAN POLICY TOWARDS REJECTED ASYLUM SEEKERS**

This chapter elaborates on the Austrian policy towards applicants for international protection after their asylum application has been rejected by a first-instance decision.

### **4.1 Asylum procedures and return proceedings**

In Austria, asylum procedures and return proceedings are very closely connected.

If an application for international protection is rejected, in general a return decision has to be issued together with the decision on the application for international protection (Art. 10 para 1 Asylum Act; Art. 52 para 2 Aliens Police Act). The Federal Office for Immigration and Asylum is responsible both for the decision on the application for international protection and for measures terminating residence (Art. 3 para 2 subpara 4 Federal Office for Immigration and Asylum Procedures Act).

If no complaint is filed or if a complaint has no suspensive effect, the return decision is enforceable (see Art. 16 para 4 Federal Office for Immigration and Asylum Procedures Act). Rejected applicants may not be removed before the time limit for the lodging of a complaint. If a complaint is lodged, the rejected applicant may only be removed after seven days have passed (Art. 16 para 4 Federal Office for Immigration and Asylum Procedures Act).

A return decision is normally combined with a time limit for voluntary return, unless the suspensive effect of a complaint has been lifted. The time limit is usually 14 days after the decision has become final (Art. 55 Aliens Police Act). A decision is final if the applicant does not file a complaint with the Federal Administrative Court in time, if the applicant waives the right to file a complaint, withdraws a complaint or when the ruling handed down by the Federal Administrative Court based on the merits of the case has

been served on the applicant (Kahl/Weber, 2013:245; Hengstschläger/Leeb, 2014:308–309; Kolonovits/Muzak/Stöger, 2014:270–271).<sup>27</sup>

A complaint is decided on by the Federal Administrative Court (Art. 7 para 1 subpara 1 Federal Office for Immigration and Asylum Procedures Act). An appeal against the decision of the Federal Administrative Court to the Administrative High Court or the Constitutional Court in general has no suspensive effect. However, the appeal may be granted suspensive effect on application (Art. 30 Administrative High Court Act; Art. 85 Constitutional Court Act).

No information is available on how often an appeal on a return decision prevents the return of rejected asylum seekers. According to experts of the Federal Office for Immigration and Asylum, asylum seekers appealing their return decision do not have a better chance of a positive decision on their return appeal than other third-country nationals who appeal against the return decision.<sup>28</sup>

In general, asylum seekers who have received an enforceable return decision are also able to file a subsequent asylum application in Austria before being returned. As with other applications for international protection, a subsequent application may be filed in Austria with a public security official or a security authority (Art. 17 para 1 Asylum Act). However, an application for international protection filed during the period in which a complaint against the negative decision on the earlier application may be filed is regarded as a complaint or supplement to a complaint (Art 17 para 7 Asylum Act). If a subsequent application is filed during the complaint proceedings, it is dealt with in these proceedings. A written application for international protection during the complaint proceedings is regarded as a supplement to the complaint (Art. 17 para 8 Asylum Act).

If third-country nationals file an asylum application in Austria, they enjoy *de facto* protection against deportation and may not be deported until an enforceable decision has been issued (Art. 12 Asylum Act). Nevertheless, under certain circumstances a subsequent application does not entail *de facto* protection against deportation (Art. 12a Asylum Act). If the subsequent

27 See also Art. 7 para 2 Proceedings of Administrative Courts Act; Art. 29 para 4 Federal Office for Immigration and Asylum Procedures Act (implying that the first-instance decision on the asylum application is not always final).

28 Interview with Bettina Baumgartner and Mara Stjepanovic, Federal Office for Immigration and Asylum, 10 May 2016.

application is filed later than two days before the date of removal that had already been set, the application may be regarded as no longer relevant if the applicant is no longer staying in Austria (see Art. 25 para 1 subpara 1 Asylum Act).

The fact that a subsequent application was filed after a return decision was issued may be taken into account in assessing the credibility of the subsequent application, but does not necessarily affect the applicant's credibility. In assessing the facts, the authority has to carefully take into account the results of the investigation (see Art. 45 para 2 General Administrative Procedures Act). Accordingly, the assessment of facts always depends on the circumstances. Therefore, the mere fact that a subsequent application was filed after a return decision was issued does not affect the credibility of the subsequent application.<sup>29</sup>

## **4.2 Measures to prevent absconding**

After having received a decision rejecting the application for international protection, applicants may be prone to absconding in order to avoid forced return. If there is a risk of absconding, detention pending removal may be ordered. However, detention may only be ordered if this is proportionate and if there is no alternative to detention (Art. 76 para 1 and 2 Aliens Police Act). Alternatives to detention include the order to take up residence at a certain place, to report periodically at a police station or to deposit an amount with the Federal Office for Immigration and Asylum (Art. 77 para 3 Aliens Police Act).

29 Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016; Interview with Bettina Baumgartner and Mara Stjepanovic, Federal Office for Immigration and Asylum, 10 May 2016.



### 4.3 Use of information from the asylum procedure

In general, information obtained in the asylum procedure may be used for the purposes of facilitating return.<sup>30</sup>

The Federal Office for Immigration and Asylum is responsible both for the asylum procedure and the return proceedings (see Art. 3 para 2 Federal Office for Immigration and Asylum Procedures Act). Accordingly, the Federal Office for Immigration and Asylum may easily use the information obtained in the asylum procedure for the return proceedings.

Under the Federal Constitutional Act, the authorities are bound by confidentiality, if this is “in the preponderant interest of the parties involved” (Art. 20 para 3).<sup>31</sup>

According to Art. 33 Federal Office for Immigration and Asylum Procedures Act, the transmission of personal data on an alien to the country of origin is not admissible unless it involves data required to procure a replacement travel document (para 3). The transmission of personal data on an asylum seeker to the country of origin is in general not admissible. However, data required for the purpose of obtaining the necessary entry authorizations may be transmitted if the asylum application has been rejected – even if not finally – or the asylum seeker is not accorded de facto protection against deportation. The fact that an application for international protection has been filed may under no circumstances emerge in the course of any such transmission (para 4). This complies in principle with Guideline No. 12 on forced return by the Committee of Ministers of the Council of Europe, according to which the host state should not share with the state of return information relating to the asylum application.<sup>32</sup> However, this does not apply if the asylum application already has been finally rejected, because in this case the foreigner is no longer an asylum seeker. Accordingly,

30 Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016; Interview with Bettina Baumgartner and Mara Stjepanovic, Federal Office for Immigration and Asylum, 10 May 2016.

31 Federal Constitutional Act, FLG No. 1/1930 in the version of FLG I No. 102/2014, English translation by the Federal Chancellery, available at [www.ris.bka.gv.at/Dokumente/ErV/ERV\\_1930\\_1/ERV\\_1930\\_1.pdf](http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.pdf) (accessed on 31 March 2016).

32 Council of Europe, *Forced return*, 20 guidelines adopted by the Committee of Ministers, Strasbourg, 4.V.2005, Guideline No. 12 para 4.

in this case even information on the asylum procedure might be provided to the country of origin.

According to Art. 29 para 1 subpara 16 Federal Office for Immigration and Asylum Procedures Act, personal data on aliens may be transmitted to return counsellors to the extent required for the discharge of the duties assigned to them.<sup>33</sup> However, return counsellors usually rely on the information provided by their clients and do not request information from the asylum file. Regarding documents kept by the asylum authority, return counsellors are often given special powers by their clients in order to retrieve the documents required for voluntary return.<sup>34</sup>

In practice IOM also relies on the information provided by the returnees and the return counsellors and does not require information from the asylum file.<sup>35</sup>

#### **4.4 Other measures to ensure swift return**

During the asylum procedure, other measures are also taken in order to ensure the swift return of asylum seekers not entitled to stay in Austria.

For instance, detention pending removal may already be ordered during the asylum procedure, if this is necessary with a view to a return decision or removal (Art. 76 Aliens Police Act). However, the conditions for ordering detention pending removal are rather strict and have to be examined on a case-by-case basis.<sup>36</sup>

Furthermore, the suspensive effect of a complaint against a negative asylum decision may be lifted. In general, this is possible if the enforcement of the administrative decision is urgently required (Art. 13 para 2 and Art. 22 para 2 Proceedings of Administrative Courts Act). The suspensive effect of a complaint against a decision dismissing an application for international protection as unfounded may be lifted in particular in the

33 See the translation of the Federal Office for Immigration and Asylum Procedures Act at [www.unhcr.at/english/austrian-asylum-legislation.html](http://www.unhcr.at/english/austrian-asylum-legislation.html) (accessed on 11 May 2016).

34 Interview with Gerlinde Hörl, Caritas Salzburg, 22 April 2016; Interview with Günter Ecker, Verein Menschenrechte Österreich, 28 April 2016.

35 Interview with Katerina Kratzmann and Agata Foryś, IOM Vienna, 26 April 2016.

36 Interview with Bettina Baumgartner and Mara Stjepanovic, Federal Office for Immigration and Asylum, 10 May 2016.

following cases: if the applicant is from a safe country of origin, if asylum seekers have attempted to deceive the Federal Office for Immigration and Asylum concerning their true identity or nationality or the authenticity of their documents, if asylum seekers have not asserted any grounds for persecution, if the claims made by asylum seekers concerning their situation of danger clearly do not correspond with fact or if asylum seekers refuse to have their fingerprints taken notwithstanding an obligation to do so (Art. 18 para 1 Federal Office for Immigration and Asylum Procedures Act).

#### **4.5 The rights and benefits granted to rejected asylum seekers**

Apart from other factors, the rights and benefits granted to rejected asylum seekers in Austria might also influence their attitude towards return, although there is no clear evidence suggesting this is the case. In particular, this could apply to basic welfare support, employment and education.

The situation of rejected asylum seekers (refer to Chapter 1 for the definition) is quite different legally before the asylum decision becomes final and after this point in time. A decision on an asylum application is final if the applicant does not file a complaint with the Federal Administrative Court in time, if the applicant waives the right to file a complaint, withdraws a complaint or when the ruling handed down by the Federal Administrative Court based on the merits of the case has been served on the applicant (see Section 4.1).

Until a final decision on the asylum application is taken, third-country nationals in general are entitled to what in Austria is referred to as basic welfare support (Art. 2 para 1 subpara 1 Basic Welfare Support Agreement). Basic welfare support includes accommodation, health care, the provision of adequate food, necessary clothing and a monthly allowance for beneficiaries in organized reception facilities (Art. 6 para 1 Basic Welfare Support Agreement). The accommodation has to respect human dignity and take into account family units (Art. 6 para 1 subpara 1 Basic Welfare Support Agreement). The federal state and the provinces may commission humanitarian, religious or private institutions to provide reception benefits to beneficiaries of basic welfare support (see Art. 3 para 5 and Art. 4 para 2 Basic Welfare Support Agreement), which is also very often the case in

practice (see NCP Austria, 2015:49–50).<sup>37</sup> The health care provided includes statutory health insurance under the General Social Insurance Act (Art. 6 para 1 subpara 5 Basic Welfare Support Agreement). Any additional health care required may be granted on a case-by-case basis (Art. 6 para 1 subpara 6 Basic Welfare Support Agreement).

After a negative final decision, rejected applicants in general are entitled to basic welfare support if for legal or factual reasons they cannot be removed (Art. 2 para 1 subpara 2 Basic Welfare Support Agreement). According to the case-law of the Administrative High Court, this is not the case where the third-country national could have been expected to remove existing obstacles to a deportation.<sup>38</sup>

The main basis for basic welfare support is the Basic Welfare Support Agreement between the Federal State and the provinces.<sup>39</sup> Furthermore, basic welfare support is governed by the respective basic welfare support acts of the Federal State and the provinces (see for instance Wessely, 2012:499–500).

According to the majority of the basic welfare support acts, reception benefits may be reduced or withdrawn if beneficiaries do not comply with obligations to cooperate.<sup>40</sup>

In practice, after a final decision rejecting their asylum application, third-country nationals are usually kept in basic care as long as basic welfare support is not actively withdrawn due to lacking cooperation.<sup>41</sup> The

37 Interview with Gerlinde Hörl, Caritas Salzburg, 22 April 2016; Federal Ministry of the Interior, *Grundversorgung/Bundesbetreuung*, available at [www.bmi.gv.at/cms/BMI\\_Asylwesen/betreuung/start.aspx](http://www.bmi.gv.at/cms/BMI_Asylwesen/betreuung/start.aspx) (accessed on 13 May 2016).

38 Administrative High Court, 27 February 2013, 2011/01/0005; 27 February 2013, 2011/01/0237.

39 FLG I No. 80/2005.

40 Art. 3 para 1 subpara 2 Federal Basic Welfare Support Act; Art. 5 para 3 subpara 3 Provincial Social Care Act Burgenland; Art. 3a para 1 lit d Provincial Basic Welfare Support Act Carinthia; Art. 8 para 1 subpara 6 Provincial Basic Welfare Support Act Lower Austria; Art. 3 para 2 subpara 3 and 7 Provincial Basic Welfare Support Act Upper Austria; Art. 9 para 1 subpara 8 Provincial Basic Welfare Support Act Salzburg; Art. 5 para 1 subpara 1 and 3 Provincial Basic Welfare Support Act Styria; Art. 6 para 1 lit a Provincial Basic Welfare Support Act Tyrol; Art. 38 para 4 Provincial Guaranteed Minimum Resources Act Vorarlberg.

41 Interview with Gernot Maier, Federal Ministry of the Interior, 3 May 2016; Interview with Gerlinde Hörl, Caritas Salzburg, 22 April 2016.

withdrawal of reception benefits may sometimes lead third-country nationals to leave Austria.<sup>42</sup>

If detention pending removal is ordered, rejected asylum seekers are generally detained in detention facilities run by the police administration of the particular province (Art. 78 Aliens Police Act). There is no evidence suggesting this contributes to encouraging or deterring return. However, detention pending removal may facilitate return because it prevents absconding.

Until the decision on the asylum application is final,<sup>43</sup> a rejected asylum seeker may be employed after having received a work permit. Once the decision is final, rejected applicants are not entitled to employment any longer (Art. 4 para 1 subpara 1 Act Governing the Employment of Foreigners). There is no evidence suggesting this encourages or deters return. In practice, when the negative asylum decision is final, any existing employment may continue for some time.<sup>44</sup>

Rejected applicants are not entitled to integration assistance, which includes educational programmes. Integration assistance may only be granted to beneficiaries of international protection and to asylum seekers who will most probably be granted international protection (Art. 68 Asylum Act). Only on-going German courses may be completed in practice.<sup>45</sup>

However, children staying in Austria are entitled to attend school, even if the stay is only temporary (Art. 17 Compulsory Schooling Act). They may attend school until they return (see Art. 17 Compulsory Schooling Act). In exceptional cases, e.g. if the end of the school term is approaching, the removal is suspended until the end of the term.<sup>46</sup>

If the applicant is entitled to basic welfare support, this also includes the costs of transportation for school attendance and school supplies (Art. 6 para 1 subpara 10 Basic Welfare Support Agreement).

42 Ibid.

43 See above.

44 Interview with Gerlinde Hörl, Caritas Salzburg, 22 April 2016.

45 Ibid.

46 Ibid.

## 5. CHALLENGES TO RETURN

In general, the challenges for the return of rejected asylum seekers are the same as for the return of other third-country nationals. These challenges are discussed in the following. As will be seen, some challenges seem to be more common with rejected asylum seekers than with other irregular third-country nationals, in particular attempted interventions by supporters.

According to media reports, in particular the lack of cooperation on the part of some third-country authorities has not yet been addressed effectively through any counter-measures.<sup>47</sup> According to experts of the Federal Ministry of the Interior, Austria consistently strives to improve coordination with third-country authorities.<sup>48</sup> Furthermore, poor socioeconomic conditions in return countries is an issue that is very difficult to resolve.<sup>49</sup>

### *Resistance of the returnee to return*

The resistance of returnees against their return appears to be one of the main challenges to return. This may be closely related to the fact that poor socioeconomic conditions in the countries of origin are very difficult to improve.<sup>50</sup> Resistance of returnees may take various forms, e.g. physical resistance, absconding, refusing cooperation, and self-injury. Resistance of returnees may be overcome or mitigated on the one hand by return counselling and return assistance, including programmes for assisted voluntary return and reintegration (AVRR), as well as by the possibility of detention provided for by law, the use of the powers to issue orders and

47 Kurier, *Abschiebe-Pläne: Viel Härte – wenig Nutzen?*, 2 February 2016, available at <http://kurier.at/politik/inland/abschiebe-plaene-viel-haerte-wenig-nutzen/178.454.220> (accessed on 25 May 2016); Profil, *Abgelehnte Flüchtlinge: Die meisten werden trotzdem bleiben*, 4 January 2016, available at [www.profil.at/oesterreich/abgelehnte-fluechtlinge-die-6177348](http://www.profil.at/oesterreich/abgelehnte-fluechtlinge-die-6177348) (accessed on 25 May 2016).

48 Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016.

49 Interview with Günter Ecker, Verein Menschenrechte Österreich, 28 April 2016; Interview with Gerlinde Hörll, Caritas Salzburg, 22 April 2016.

50 Ibid.

exercise force as specified in provisions of law, surprise raids or by delaying or cancelling the return proceedings.

In comparison to regular assisted voluntary return, AVRR programmes also aim at the re-inclusion or re-incorporation of beneficiaries in the society of the country of return, particularly by financing measures that support income-generating activities such as training programmes and the purchase of work equipment (see EMN, 2014:31, 235; NCP Austria, 2015:70; Kratzmann/Petzl/Temesvári, 2010:67–70).

At the moment, an AVRR programme for Afghanistan, Pakistan and the Russian Federation/Chechen Republic is implemented in cooperation with the International Organization for Migration (IOM).<sup>51</sup> In addition, Austria has recently joined the European Reintegration Network (ERIN). Within this framework, Austria currently offers reintegration assistance for e.g. Afghanistan, Nigeria and Morocco.<sup>52</sup> However, these measures do not specifically target the return of rejected asylum seekers.<sup>53</sup>

Return counselling and return assistance are implemented in accordance with Art. 52a Federal Office for Immigration and Asylum Procedures Act and Art. 12 Federal Basic Welfare Support Act (see Section 3.1 and Chapter 1). Return counselling and return assistance are not exclusively targeted at rejected asylum seekers either, but include a broader range of persons (NCP Austria, 2015:58–60; see Chapter 2).<sup>54</sup>

Detention pending removal may only be ordered if there is a risk of absconding and if detention is proportional (Art. 76–81 Aliens Police Act).

51 IOM Country Office for Austria, *RESTART – Reintegration Assistance for Voluntary Returnees to Afghanistan, Pakistan and the Russian Federation/ the Chechen Republic*, available at [www.iomvienna.at/en/restart-reintegration-assistance-voluntary-returnees-afghanistan-pakistan-and-russian-federation](http://www.iomvienna.at/en/restart-reintegration-assistance-voluntary-returnees-afghanistan-pakistan-and-russian-federation) (accessed on 12 May 2016).

52 Federal Ministry of the Interior, *ERIN European Reintegration Network*, available at [www.bfa.gv.at/files/return/Nigeria/ERIN%20Client%20Information.pdf](http://www.bfa.gv.at/files/return/Nigeria/ERIN%20Client%20Information.pdf) (accessed on 12 May 2016); Federal Ministry of the Interior, *ERIN European Reintegration Network – Application*, available at [www.bfa.gv.at/files/formulare/ERIN/ERIN%20Antragsformular.pdf](http://www.bfa.gv.at/files/formulare/ERIN/ERIN%20Antragsformular.pdf) (accessed on 12 May 2016).

53 Interview with Katerina Kratzmann and Agata Foryś, IOM Vienna, 26 April 2016; Federal Ministry of the Interior, *ERIN European Reintegration Network*, available at [www.bfa.gv.at/files/return/Nigeria/ERIN%20Client%20Information.pdf](http://www.bfa.gv.at/files/return/Nigeria/ERIN%20Client%20Information.pdf) (accessed on 12 May 2016); Federal Ministry of the Interior, *ERIN European Reintegration Network – Application*, available at [www.bfa.gv.at/files/formulare/ERIN/ERIN%20Antragsformular.pdf](http://www.bfa.gv.at/files/formulare/ERIN/ERIN%20Antragsformular.pdf) (accessed on 12 May 2016).

54 Interview with Katerina Kratzmann and Agata Foryś, IOM Vienna, 26 April 2016.

Detention pending removal is not specifically for rejected asylum seekers but also applies to other foreigners (Art. 76 para 2 Aliens Police Act). A removal may also involve surprise raids (see Art. 36 para 1 subpara 3 Aliens Police Act).<sup>55</sup> The power to enter premises and rooms applies where there are grounds for assuming that at least five aliens are staying there and that aliens irregularly residing in Austria are among them (Art. 36 para 1 subpara 3 Aliens Police Act). Accordingly, this measure does not only apply to rejected asylum seekers.

The resistance of returnees may also lead to the consideration of a delay or cancellation of the return proceedings, which is also common to return.<sup>56</sup>

The resistance of rejected asylum seekers may also take the form of refusing to cooperate in the acquisition of necessary travel documents.<sup>57</sup> To the extent required, an alien is obliged to cooperate in the measures necessary to obtain a replacement travel document (Art. 46 para 2 Aliens Police Act). This obligation may also be enforced by way of detention (Art. 5 Administrative Enforcement Act; Fasching/Schwartz, 2014:128; Larcher, 2009:77–78).<sup>58</sup> Again, these provisions are not specifically for rejected asylum seekers but also apply to other third-country nationals who have been issued a return decision (Art. 46 para 1 Aliens Police Act).

#### *Cooperation of third-country authorities*

The possible refusal of authorities of the return countries to issue the required documents or to readmit citizens is addressed through readmission agreements, bilateral cooperation with third countries, offering positive incentives, the establishment of good informal relations with representation authorities and talks at diplomatic level.

55 Der Standard, *Abschiebungen: 60 Prozent kehren freiwillig zurück*, 2 February 2016, available at <http://derstandard.at/2000030192102/Abschiebungen-60-Prozent-kehren-freiwillig-zurueck> (accessed on 25 May 2016).

56 Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016.

57 Act Amending the Aliens Law 2015, Government Proposal, Explanatory Notes, p. 18, available at [www.parlament.gv.at/PAKT/VHG/XXV/I/I\\_00582/fname\\_401629.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00582/fname_401629.pdf) (accessed on 12 May 2016).

58 Cf. Act Amending the Aliens Law 2015, Government Proposal, Explanatory Notes, p. 3, 18, available at [www.parlament.gv.at/PAKT/VHG/XXV/I/I\\_00582/fname\\_401629.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00582/fname_401629.pdf) (accessed on 12 May 2016).



In particular, Austria has concluded bilateral readmission agreements with Kosovo/UNSC 1244, Nigeria and Tunisia. These are not specifically targeted at rejected asylum seekers but refer to persons illegally staying in Austria (see Art. II Readmission Agreement with Nigeria; Art. 1 of the readmission agreements with Tunisia and Kosovo/UNSC 1244). Some bilateral readmission agreements have been superseded by readmission agreements concluded by the European Union (cf. Rutz, 2014:47).<sup>59</sup> Austria expressly promotes the conclusion of such agreements by the European Union.<sup>60</sup>

Bilateral cooperation is a main instrument for promoting the return of third-country nationals irregularly staying in Austria. However, diplomatic relations are not established solely for this purpose.<sup>61</sup> In this context, positive incentives are also offered, including intensified efforts for increased cooperation in all areas. However, such incentives are not conditional on good cooperation with respect to return and are not specifically offered in connection with rejected asylum seekers.<sup>62</sup> The actors involved also try to establish good informal relations with representation authorities of third

59 Agreement on Readmission between the Austrian Federal Government and the Government of the Federal Republic of Nigeria, FLG III No. 116/2012, available at [www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20007952](http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20007952) (accessed on 30 March 2016); Agreement between Austria and Tunisia on the Return of Tunisian and Austrian Nationals, FLG No. 255/1965, available at [www.ris.bka.gv.at/Dokumente/BgblPdf/1965\\_255\\_0/1965\\_255\\_0.pdf](http://www.ris.bka.gv.at/Dokumente/BgblPdf/1965_255_0/1965_255_0.pdf) (accessed on 30 March 2016); Readmission Agreement between the Austrian Federal Government and the Government of the Republic of Kosovo, FLG III No. 21/2011, available at [www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2011\\_III\\_21/COO\\_2026\\_100\\_2\\_652966.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2011_III_21/COO_2026_100_2_652966.pdf) (accessed on 30 March 2016); Die Presse, *Österreich: Schwierige Abschiebung in Krisenländer*, 8 October 2015, available at [http://diepresse.com/home/politik/innenpolitik/4838242/Osterreich\\_Schwierige-Abschiebung-in-Krisenlaender](http://diepresse.com/home/politik/innenpolitik/4838242/Osterreich_Schwierige-Abschiebung-in-Krisenlaender) (accessed on 25 May 2016); Der Standard, *Abgelehnte Asylwerber: Die meisten gehen „freiwillig“*, 9 October 2015, available at <http://derstandard.at/2000023436430/Abgelehnte-Asylwerber-Die-meisten-gehen-freiwillig> (accessed on 25 May 2016).

60 See, for instance, *Asylgipfel am 20. Jänner 2016, Gemeinsame Vorgangsweise von Bund, Ländern, Städten und Gemeinden*, para 3, available at <http://bka.gv.at/DocView.axd?CobId=61858> (accessed on 29 March 2016).

61 Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016.

62 Interview with Gerald Dreveny, Federal Ministry of the Interior, 3 October 2016.

countries.<sup>63</sup> Generally speaking, in negotiations with third countries on the return of their citizens, the European Union plays or could play a significant role, which potentially includes exercising political pressure.<sup>64</sup>

From a legal point of view, if rejected asylum seekers cannot be removed due to the refusal of third-country authorities, their stay in Austria may be tolerated (refer to Chapter 6).

#### *Other problems in the acquisition of travel documents*

Another challenge for return is the fact that sometimes the identity of third-country nationals is not clear. This may raise difficulties in the acquisition of necessary travel documents. In such cases, language experts may also be used in order to detect cases of assumed nationalities. This measure is not limited to rejected asylum seekers but is general to return.<sup>65</sup> However, the repeated taking of fingerprints and the use of special software to capture damaged fingerprints are not deemed necessary in Austria for these purposes.<sup>66</sup>

#### *Administrative and organizational challenges*

In the field of return, the budgetary means provided are increasing. However, it is a challenge to use these as flexible as possible according to the respective developments. Again, this challenge is not limited to the category of rejected asylum seekers. In general, the National Council passes a federal budget for each year (Art. 51 Federal Constitutional Act) which has to be complied with. It is, however, possible to a certain extent to shift funds between budget items within the ministries (Art. 53 para 1 Federal Budget Act). To some extent, the budget may be exceeded with the approval of the Minister of Finance (Art. 54 Federal Budget Act).<sup>67</sup> Accordingly, organizations providing return counselling have to enter into negotiations with the Federal Ministry of the Interior if the budget is to be exceeded.

63 Interview with Gerlinde Hörl, Caritas Salzburg, 22 April 2016; Interview with Günter Ecker, Verein Menschenrechte Österreich, 28 April 2016.

64 Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016.

65 Interview with Bettina Baumgartner and Mara Stjepanovic, Federal Office for Immigration and Asylum, 10 May 2016.

66 Ibid.

67 Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016.

This was the case for instance in the second half of 2015.<sup>68</sup> With regard to voluntary return projects co-funded by AMIF as well, budget flexibility is rather limited.<sup>69</sup>

No use is made of any special coordination arrangements between authorities to deal with administrative or organizational challenges in the field of return. According to experts, cooperation between authorities is sufficiently determined by legislation.<sup>70</sup> Furthermore, most authorities in the field of asylum and return are under the Federal Ministry of the Interior, which additionally promotes good cooperation.<sup>71</sup>

Administrative and organizational challenges could also be addressed by designating service providers or establishing diplomatic representations. Service providers in third countries have been and continue to be employed particularly in the area of reintegration, although in some cases it proves a challenge to identify suitable organizations with sufficient capacities and experience.<sup>72</sup> Diplomatic representations have not been established solely for facilitating return, but existing representations may also be used for this purpose.<sup>73</sup>

### *Medical challenges*

Medical issues may also pose challenges to return. These may be dealt with particularly by providing medical supervision during travel, medical transfers or medical support in the country of destination. Medical supervision, in particular by a doctor, can be provided during travel.<sup>74</sup> Flights chartered for the purpose of forced return are always accompanied

68 Interview with Gerlinde Hörl, Caritas Salzburg, 22 April 2016; Interview with Günter Ecker, Verein Menschenrechte Österreich, 28 April 2016.

69 Ibid.

70 Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016.

71 Interview with Bettina Baumgartner and Mara Stjepanovic, Federal Office for Immigration and Asylum, 10 May 2016.

72 Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016.

73 Ibid.

74 Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016; Interview with Gerlinde Hörl, Caritas Salzburg, 22 April 2016; Interview with Katerina Kratzmann and Agata Forýš, IOM Vienna, 26 April 2016.

by a doctor.<sup>75</sup> In addition, medical transfers may be organized for return purposes, e.g. transfer including a wheelchair.<sup>76</sup> Especially in the framework of reintegration projects, (short-term) medical support in the country of destination may also be provided.<sup>77</sup> Furthermore, a delay or cancellation of the return procedure may be chosen as a means of resolving medical challenges, e.g. if the returnee is pregnant.<sup>78</sup> Before any removal by airplane, returnees have to pass a medical examination.<sup>79</sup> The measures mentioned are general to return and not specific to rejected asylum seekers.

### *Language barriers*

Another challenge is difficulty in communication with returnees due to language barriers, particularly in cases of voluntary return. According to experts, the budget for return counselling sometimes does not include interpretation services.<sup>80</sup> This challenge is mitigated to some extent by the employment of return counsellors who speak the languages used in the main destination countries.<sup>81</sup> Again, this issue is not specific to rejected asylum seekers.

75 Interview with Bettina Baumgartner and Mara Stjepanovic, Federal Office for Immigration and Asylum, 10 May 2016.

76 Interview with Bettina Baumgartner and Mara Stjepanovic, Federal Office for Immigration and Asylum, 10 May 2016; Interview with Katerina Kratzmann and Agata Foryś, IOM Vienna, 26 April 2016; Interview with Leopold Kraus, IOM Vienna, 23 May 2016.

77 IOM Country Office for Austria, *RESTART – Reintegration Assistance for Voluntary Returnees to Afghanistan, Pakistan and the Russian Federation/ the Chechen Republic*, available at [www.iomvienna.at/en/restart-reintegration-assistance-voluntary-returnees-afghanistan-pakistan-and-russian-federation](http://www.iomvienna.at/en/restart-reintegration-assistance-voluntary-returnees-afghanistan-pakistan-and-russian-federation) (accessed on 12 May 2016); Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016; Interview with Katerina Kratzmann and Agata Foryś, IOM Vienna, 26 April 2016; Interview with Gerlinde Hörl, Caritas Salzburg, 22 April 2016.

78 Interview with Gerlinde Hörl, Caritas Salzburg, 22 April 2016; Interview with Günter Ecker, Verein Menschenrechte Österreich, 28 April 2016.

79 Interview with Bettina Baumgartner and Mara Stjepanovic, Federal Office for Immigration and Asylum, 10 May 2016.

80 Interview with Gerlinde Hörl, Caritas Salzburg, 22 April 2016; Interview with Günter Ecker, Verein Menschenrechte Österreich, 28 April 2016.

81 Interview with Günter Ecker, Verein Menschenrechte Österreich, 28 April 2016.

### *Interventions by supporters*

In some cases, supporters try to prevent the removal or transfer of third-country nationals to their countries of origin or to other Dublin countries. Those supporters have different backgrounds and come e.g. from political or religious institutions or from NGOs.<sup>82</sup>

### *Retrieval of documents kept by the authorities*

Identity documents of aliens may be taken into custody by public security officials who are required to hand them over to the Federal Office for Immigration and Asylum or to the police administration of the province (Art. 39 Federal Office for Immigration and Asylum Procedures Act; Art. 38 Aliens Police Act). When the documents are needed for the purposes of return, in some cases it takes some time until a document can be retrieved, especially due to the very high number of asylum procedures.<sup>83</sup>

Documents may be taken from aliens for various types of proceedings (Art. 39 Federal Office for Immigration and Asylum Procedures Act; Art. 38 Aliens Police Act). Furthermore, voluntary return is also possible before a negative asylum decision is taken. Accordingly, this challenge is rather general to return.

### *Detention*

As long as a third-country national is detained due to a punishable act, the return decision is not enforceable (Art. 59 para 4 Aliens Police Act). This provision applies not only to rejected asylum seekers but to any alien against whom a return decision has been issued. Therefore, this challenge is general to return.

In some cases, returnees may be detained upon return for criminal or administrative offences, e.g. for illegal departure from the country. Such a prospect could deter rejected asylum seekers from returning voluntarily to their home country. Furthermore, organizations involved in the voluntary

82 Interview with Gerald Dreveny, Federal Ministry of the Interior, 3 October 2016.

83 Interview with Günter Ecker, Verein Menschenrechte Österreich, 28 April 2016; Interview with Gerlinde Hörl, Caritas Salzburg, 22 April 2016.

return of rejected asylum seekers may be reluctant to provide their assistance if detention in the home country is probable.<sup>84</sup>

This issue is general to return. Other aliens may also be detained upon return for criminal or administrative offences.

### *Minors*

A further challenge regards minors. If a minor wants to return voluntarily, approval by a legal representative or guardian may be necessary (see Kratzmann/Petzl/Temesvári, 2010:63).<sup>85</sup> In practice, however, it can be very difficult to establish whether a rejected applicant is actually a minor (cf. Lukits/Lukits 2011:17, 19) and who the competent legal representative or guardian is.<sup>86</sup> This issue is also general to return.

### *Refusal of carriage by the airline*

The airline may refuse to carry returnees, for instance if this would affect the safety, health or comfort of other passengers or if the mental or physical condition presents a hazard or risk to the returnee, to other passengers, to the crew or to property. Furthermore, the airline may refuse to carry unaccompanied children, persons with limited legal capacity or pregnant women. This challenge is also general to return.<sup>87</sup>

### *Pretense of voluntary return*

According to Günter Ecker from Verein Menschenrechte, in rare cases third-country nationals try to avoid or delay forced return by pretending to be willing to return voluntarily.<sup>88</sup> There is no evidence as to whether this issue is general to return or more common to the return of rejected asylum seekers. However, if third-country nationals try to delay forced return, they

84 Interview with Günter Ecker, Verein Menschenrechte Österreich, 28 April 2016; Interview with Gerlinde Hörl, Caritas Salzburg, 22 April 2016; Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016.

85 See also Art. 195 Criminal Code; Art. 158 para 1 and Art. 162 para 1 General Civil Code.

86 See, for instance, Lukits, *Die Obsorge für unbegleitete minderjährige Asylwerber*, EF-Z 2016 (forthcoming).

87 See e.g. Art. 7 General conditions of carriage for passengers and baggage of the Austrian Airlines AG.

88 Interview with Günter Ecker, Verein Menschenrechte Österreich, 28 April 2016.

will probably also apply for international protection. For this reason, this issue might be more common to the return of rejected asylum seekers.<sup>89</sup>

89 Interview with Gerlinde Hörl, Caritas Salzburg, 22 April 2016.

## 6. IMPOSSIBILITY OF RETURN

Sometimes, the return and especially the removal (see Section 1.1) of a rejected asylum seeker may not be possible due to legal or factual reasons (see for instance Rosenberger/Küffner, 2016; N.N., 2013).

For instance, a removal may not be lawful due to the returnee's right to a private and family life under Art. 8 ECHR. Under Austrian law, a return decision may only be issued if this does not violate the individual's right to a private and family life under Art. 8 ECHR (Art. 9 para 1 Federal Office for Immigration and Asylum Procedures Act). The authority has to issue a decision giving grounds for the admissibility of any return decision. Where a return decision is inadmissible, the authority has to determine whether the decision is temporarily or permanently inadmissible (Art. 9 para 3 Federal Office for Immigration and Asylum Procedures Act).

Furthermore, a removal may be inadmissible on grounds of non-refoulement. If a return decision is issued according to Art. 52 Aliens Police Act, the Federal Office for Immigration and Asylum has to determine at the same time that a removal of the third-country national to one or more certain countries is admissible, unless this is not possible due to reasons for which the third-country national is responsible (Art. 52 para 9 Aliens Police Act). Accordingly, where no such a determination is made, this implies that the third-country national cannot be removed. In particular, a removal is inadmissible if it would lead to a violation of Art. 2 or 3 ECHR or of the abolition of the death penalty or to a serious threat to the life or the integrity of the third-country national as a civilian due to arbitrary violence in the course of an international or national conflict. Furthermore, a removal is inadmissible, if the life or freedom of the third-country national would be threatened on account of the race, religion, nationality, membership of a particular social group or political opinion within the meaning of Art. 33 para 1 of the Geneva Refugee Convention, unless an alternative for flight exists within the particular country (Art. 50 Aliens Police Act).



A return may also be impossible due to factual reasons. Factual reasons especially include no possibility of obtaining the necessary travel documents (refer to Chapter 5).<sup>90</sup>

## 6.1 Tolerated stay

When a removal is not possible, the stay of the third-country national can be tolerated in certain cases. The Federal Office for Immigration and Asylum may issue a Card for Tolerated Stay if a removal is inadmissible or impossible due to factual reasons for which the third-country national is not responsible (Art. 46a Aliens Police Act; see above). This also increases legal certainty for authorities and officers.<sup>91</sup> In particular, the Card for Tolerated Stay serves as evidence of the identity of the third-country national in procedures with the Federal Office for Immigration and Asylum (Art. 46a para 4 third sentence Aliens Police Act). Furthermore, toleration may be combined with obligations intended to prevent absconding (Art. 46a para 2 in conjunction with Art. 56 Aliens Police Act).

The stay is not tolerated if a removal is not possible on account of reasons for which the third-country national is responsible (Art. 46a para 1 and Art. 52 para 9 Aliens Police Act). According to the explanatory notes to the Act Amending the Aliens Law 2009, where it is factually impossible to remove a foreigner, toleration of stay should “of course” (*naturgemäß*) only ensue if the reasons are not within the foreigner’s sphere of influence.<sup>92</sup> This would appear to refer to the general legal principle of *nemo auditur turpitudinem suam allegans*, according to which nobody should be rewarded for behaviour that is illegal or in bad faith (see Lukits, 2015:144).

90 See for instance Aliens Law Package 2005, Government Proposal, Explanatory Notes, p. 94, available at 62 (accessed on 23 June 2016); Act Amending the Aliens Law 2015, Government Proposal, Explanatory Notes, p. 18–19, available at [www.parlament.gv.at/PAKT/VHG/XXV/I/I\\_00582/fname\\_401629.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00582/fname_401629.pdf) (accessed on 24 March 2016).

91 Act Amending the Aliens Law 2015, Government Proposal, Explanatory Notes, p. 18–19, available at [www.parlament.gv.at/PAKT/VHG/XXV/I/I\\_00582/fname\\_401629.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00582/fname_401629.pdf) (accessed on 24 March 2016).

92 Act Amending the Aliens Law 2009, Government Proposal, Explanatory Notes, p. 29, available at [www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_00330/fname\\_167909.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_00330/fname_167909.pdf) (accessed on 20 May 2016).

Furthermore, the granting of a tolerated stay for uncooperative third-country nationals would engender a significant and undesirable pull factor.<sup>93</sup>

Pursuant to Art. 46a para 3 Aliens Police Act, third-country nationals are in any case responsible for the reasons preventing their removal, if they conceal their identity, if they fail to comply with a summons for the purpose of clarifying their identity or procuring a replacement travel document, or if they fail to cooperate in the steps necessary to obtain a replacement travel document or frustrate such steps being taken. Against this background, the question is decided by the authorities on a case-by-case basis. Some guiding principles have been established through case-law handed down by the Austrian supreme courts (see Hinterberger/Klammer, 2015:79–80). For instance, a notification from the embassy that the identity or nationality of a person could not be determined does not necessarily mean that this person has concealed his or her identity.<sup>94</sup> Furthermore, the fact that a third-country national has not contacted the embassy on his or her own initiative for the purpose of obtaining a replacement travel document does not imply that removal is impossible due to reasons for which the third-country national is responsible.<sup>95</sup>

If the stay is tolerated for at least one year and the requirements for tolerated stay are still met, third-country nationals may be issued a Residence Permit for Individual Protection on application or ex officio, unless they constitute a danger for the community or the security of the Republic of Austria or have been sentenced for a crime (Art. 57 para 1 subpara 1 Asylum Act). A Residence Permit for Individual Protection entitles the holder to pursue self-employed activities or employment after having obtained a work permit (Art. 54 para 1 subpara 3 Asylum Act). A Residence Permit for Individual Protection is valid for 12 months (Art. 54 para 2 Asylum Act). Afterwards, the third-country national may obtain a Red-White-Red Card Plus with free access to the labour market (Art. 41a para 3 and Art. 8 para 1 subpara 2 Settlement and Residence Act).

93 Interview with Gernot Maier, Federal Ministry of the Interior, 3 May 2016.

94 Administrative High Court, 30 June 2015, Ra 2014/21/0040.

95 Administrative High Court, 28 August 2012, 2011/21/0209.

## **6.2 Rights and benefits granted to rejected asylum seekers who cannot be returned**

The rights and benefits granted to rejected asylum seekers who cannot be (immediately) returned correspond to those of rejected asylum seekers in general (refer to Section 4.5). Accordingly, rejected asylum seekers in general who have received a negative first-instance decision receive basic welfare support benefits until the decision is final. Afterwards, basic welfare support is granted if a removal is not possible due to legal or factual reasons for which the applicant is not responsible. Rejected asylum seekers can be employed under a work permit until the negative decision is final. Rejected asylum seekers are not entitled to integration assistance. However, children are entitled to attend school under the Compulsory Schooling Act (see Section 4.5).

## **6.3 Later return of rejected asylum seekers who could not be removed**

The fact that removal is not possible does not mean that a third-country national cannot be removed at a later stage. Once the requirements for removal are met, third-country nationals have to be removed as soon as possible (Art. 46 para 1 and 3 Aliens Police Act). Accordingly, the file will not be closed until the third-country national has returned or until the return decision becomes void.<sup>96</sup> Furthermore, in order to ensure a very broadly coordinated approach, the authorities involved (the Federal Ministry of the Interior, the Federal Ministry for Europe, Integration and Foreign Affairs, and the Federal Office for Immigration and Asylum) hold regular meetings, at which recent developments in the field of return are also discussed.<sup>97</sup> These consultations are not restricted to the return of rejected asylum seekers.

According to experts with the Federal Office for Immigration and Asylum, in recent years there have definitely been cases of rejected asylum

96 Interview with Bettina Baumgartner and Mara Stjepanovic, Federal Office for Immigration and Asylum, 10 May 2016.

97 Interview with Thomas Mühhlans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016.

seekers who could not be returned immediately but only eventually. However, statistics in this regard are not available.<sup>98</sup>

98 Interview with Bettina Baumgartner and Mara Stjepanovic, Federal Office for Immigration and Asylum, 10 May 2016.

## 7. GOOD PRACTICES AND POLICIES

In Austria, several good approaches and policies can be identified in the area of the return of rejected applicants for international protection.

For instance, it seems to make a great deal of sense to have a decision on international protection and a return decision to generally be issued at the same time and by the same authority (Art. 10 para 1 Asylum Act; refer to Section 4.1). This encourages coherent decisions and efficient procedures.

It also appears to make sense to deal with subsequent applications within the framework of complaint proceedings (Art. 17 paras 7 and 8 Asylum Act; refer to Section 4.1). This additionally favours a concentration of proceedings in relation to the status of a third-country national.

The provision of return counselling and return assistance in general appears to be advantageous. Within this area, having return assistance administered by non-governmental and international organizations is seen as good practice, because irregular migrants may be reluctant to deal with state authorities.<sup>99</sup> Furthermore, it is seen as good practice to promote voluntary return in principle at any time until the flight for removal is booked by the authorities, even if the third-country national is detained pending deportation or no proceedings are pending.<sup>100</sup> It is also regarded as beneficial to allow Dublin transfers to be replaced by voluntary travel, as has been the case since 2011.<sup>101</sup>

99 Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016.

100 Interview with Thomas Mühlhans and Anita Otonicar, Federal Ministry of the Interior, 27 April 2016; Interview with Günter Ecker, Verein Menschenrechte Österreich, 28 April 2016.

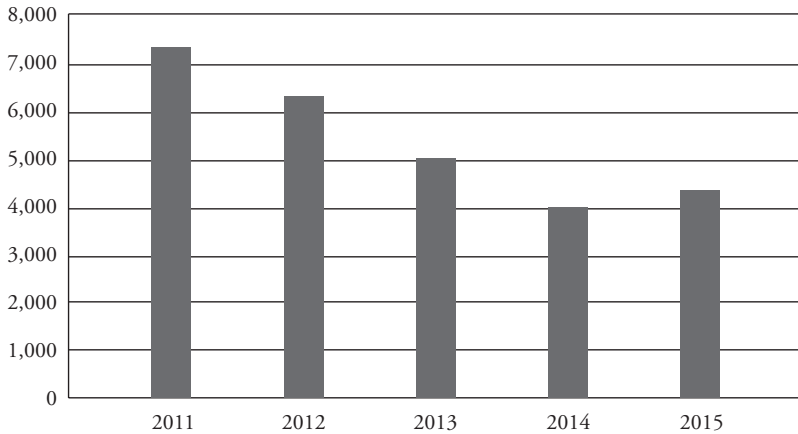
101 Interview with Günter Ecker, Verein Menschenrechte Österreich, 28 April 2016.

## 8. STATISTICS

Statistical data published by the Austrian Federal Ministry of the Interior provide information about the number of final decisions taken by the first and second instance on an application for international protection. Legislation requires the authorities to first decide whether the asylum seeker is to be granted refugee status. If that decision is negative, it has to be decided whether the asylum seeker is to be granted subsidiary protection status. If that decision is also negative, then the application for international protection is rejected as unfounded (NCP Austria, 2015:45, 47). Thus, the statistical data published by the Austrian Federal Ministry of the Interior do not correspond to the definition of a rejected applicant for international protection as used within the framework of this study, because the statistics also include decisions in the second instance. Furthermore, the definition according to the present study also includes decisions declaring applications to be inadmissible which are apparently not included in the negative decisions on subsidiary protection status.

According to the statistics of the Federal Ministry of the Interior, over the past five years (2011–2015) a total of 26,856 final negative decisions (first and second instance) on subsidiary protection status were issued in Austria. As shown in Figure 1, the number decreased from 7,301 in 2011 to 3,973 in 2014 (-46%). After this downward trend, the number of final negative decisions (first and second instance) on subsidiary protection status increased in 2015 to reach 4,325 (+9%).

**Figure 1: Rejected applications for international protection (i.e. final negative decisions in first and second instance on subsidiary protection status) in Austria (2011–2015)**



*Source:* Federal Ministry of the Interior, Asylum Statistics, n.d., own presentation.

The majority of final negative decisions (first and second instance) on subsidiary protection status over the past five years (2011–2015) were issued in response to applications for international protection filed by citizens of Kosovo/UNSC 1244 (3,409 final negative decisions or 13 per cent of all final negative decisions). Kosovo/UNSC 1244 ranked first in 2015 and 2014, third in 2013 and fourth in 2012 and 2011. Also citizens of the Russian Federation were always amongst the top five nationalities (see Table 1).

**Table 1: Rejected applications for international protection (i.e. final negative decisions in first and second instance on subsidiary protection status) in Austria by citizenship, top five (2011–2015)**

2011	
Russian Federation	942
Serbia	877
Turkey	593
Kosovo/UNSC 1244	572
Nigeria	526

2012	
Pakistan	1,323
Russian Federation	999
Serbia	491
Kosovo/UNSC 1244	346
Turkey	297

2013	
Pakistan	851
Russian Federation	730
Kosovo/UNSC 1244	489
India	343
Nigeria	266

2014	
Kosovo/UNSC 1244	663
Russian Federation	615
India	291
Afghanistan	253
Pakistan	246

2015	
Kosovo/UNSC 1244	1,339
Russian Federation	522
Afghanistan	247
Nigeria	240
Serbia	211

Source: Federal Ministry of the Interior, Asylum Statistics, n.d., own presentation.

No information is available on the number of rejected asylum seekers who were issued an enforceable return decision and who were effectively returned or who returned voluntarily. This means that while it is known, for example, how many persons were removed or returned voluntarily in 2015<sup>102</sup> and while it is generally assumed in public debate that these persons

102 Federal Office for Immigration and Asylum, „2015 – Das Jahr der Steigerungen“, available at [www.bfa.gv.at/files/Statistiken/BFA\\_Jahresbilanz2015\\_web.pdf](http://www.bfa.gv.at/files/Statistiken/BFA_Jahresbilanz2015_web.pdf) (accessed on 3 June 2016).



were asylum seekers,<sup>103</sup> it is not exactly known how many of them actually were asylum seekers. Available data for 2013 broken down according to the legal grounds for removal indicates that persons other than rejected asylum seekers were also removed from Austria,<sup>104</sup> while data from 2012 show that not all voluntary returnees were former asylum seekers.<sup>105</sup> In fact, the category of persons eligible to receive assistance for voluntary return includes individuals with no legal residence status as well as asylum seekers whose asylum procedure is still pending, in addition to persons granted asylum, beneficiaries of subsidiary protection and other persons with a legal residence (Götzmann, 2016:186).

- 103 See, for example, Medien-Serviceestelle Neue Österreicher/innen, *AsylwerberInnen: Freiwillige Ausreisen gestiegen*, available at [http://medienserviceestelle.at/migration\\_bewegt/2016/02/10/asylwerberinnen-freiwillige-ausreisen-gestiegen/](http://medienserviceestelle.at/migration_bewegt/2016/02/10/asylwerberinnen-freiwillige-ausreisen-gestiegen/) (accessed on 3 June 2016); Wiener Zeitung Online, *Immer mehr Flüchtlinge wollen zurück*, 2 February 2016, available at [www.wienerzeitung.at/nachrichten/oesterreich/politik/798717\\_Immer-mehr-Fluechtlinge-wollen-wieder-zurueck.html](http://www.wienerzeitung.at/nachrichten/oesterreich/politik/798717_Immer-mehr-Fluechtlinge-wollen-wieder-zurueck.html) (accessed on 3 June 2016).
- 104 Federal Ministry of the Interior, *Fremdenpolizei Visawesen 2013*, available at [www.bmi.gv.at/cms/BMI\\_Niederlassung/statistiken/files/ErP\\_Massnahmen\\_Jahresstatistik\\_2013.pdf](http://www.bmi.gv.at/cms/BMI_Niederlassung/statistiken/files/ErP_Massnahmen_Jahresstatistik_2013.pdf) (accessed on 3 June 2016).
- 105 Federal Ministry of the Interior, *Reply to parliamentary request regarding „Abschiebungen und freiwillige Rückkehr“*, 14171/AB of 19 June 2013, 14455/J (XXIV. GP), available at [www.parlament.gv.at/PAKT/VHG/XXIV/AB/AB\\_14171/imfname\\_310571.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/AB/AB_14171/imfname_310571.pdf) (accessed on 3 June 2016).

## 9. SUMMARY AND CONCLUSIONS

The return of rejected asylum seekers is a major issue in Austria. In general, the return decision is taken simultaneously with the decision on the application for international protection. The Federal Office for Immigration and Asylum decides both on the asylum application and on the return decision. Therefore, the Federal Office for Immigration and Asylum may easily use the information obtained in the asylum procedure for the purposes of return proceedings.

In order to prevent absconding, detention pending removal may be ordered. Alternatively, less coercive measures may be taken. For instance, the third-country national may have to take up residence at a certain place, deposit an amount or report periodically at a police station. Detention pending removal may already be ordered during the asylum procedure. Under certain conditions, it is possible to conduct accelerated procedures. Applicants may receive return counselling at any stage of their asylum procedure. If a rejection of the application is probable, return counselling may even be mandatory.

The suspensive effect of a complaint against the decision rejecting the asylum application may be excluded. A subsequent application may also be dealt with in the framework of complaint proceedings. Once the decision on the asylum application is final, the rejected applicant still receives reception benefits unless these are withdrawn for failure to cooperate. However, once the decision is final, employment is no longer permitted in general.

In addition to the usual challenges involved with return, the challenges for the return of rejected asylum seekers may include resistance by supporters. If rejected asylum seekers cannot be immediately returned, their stay may be formally tolerated. In this case, after one year a regular residence title may be issued.

In general, the Austrian return policy does not seem to be only targeted at rejected asylum seekers but rather applies to a broader range of migrants which are not legally residing in Austria. However, return counselling is mandatory in particular for asylum seekers who are informed that their application will probably be rejected.

Recently, Austria joined the European Integration Network (ERIN). Furthermore, a new scheme of monetary return assistance is being tested at the moment for certain countries. Under this scheme, the earlier an applicant decides to return voluntarily, the higher the amount of monetary return assistance. Mandatory return counselling was introduced in 2015.

A good practice appears to be to issue the asylum decision and the return decision usually at the same time. The same holds true for the practice to deal with subsequent applications within the framework of complaint proceedings. Return counselling by non-governmental organizations is also seen as a good practice because migrants may be reluctant to deal with state authorities. In addition, voluntary Dublin transfers have come to be recognized as good practice.

# ANNEX

## A.1 List of translations and abbreviations

English term	English abbreviation	German term	German abbreviation
Act Governing the Employment of Foreign Nationals	–	Ausländerbeschäftigungsgesetz	AuslBG
Administrative Enforcement Act	–	Verwaltungsvollstreckungsgesetz	VVG
Administrative High Court Act	–	Verwaltungsgerichtshofsgesetz	VwGG
administrative offence	–	Verwaltungsübertretung	–
Aliens Law Package 2005	–	Fremdenrechtspaket 2005	–
Aliens Police Act	–	Fremdenpolizeigesetz	FPG
aliens/foreigners	–	Fremde	–
Asylum Act	–	Asylgesetz	AsylG
basic welfare support	–	Grundversorgung	–
Basic Welfare Support Agreement	–	Grundversorgungsvereinbarung	–
complaint	–	Beschwerde	–
Constitutional Court Act	–	Verfassungsgerichtshofsgesetz	VfGG
Council of Europe	–	Europarat	–
de facto protection against deportation	–	faktischer Abschiebeschutz	–
departure	–	Ausreise	–
detention pending removal	–	Schubhaft	–
enforceable	–	durchsetzbar	–
EU Member State	–	EU-Mitgliedstaat	–
European Convention on Human Rights	ECHR	Europäische Menschenrechtskonvention	EMRK
European Economic Area	EEA	Europäischer Wirtschaftsraum	EWR
European Migration Network	EMN	Europäisches Migrationsnetzwerk	EMN
European Union	EU	Europäische Union	EU
Federal Administrative Court	–	Bundesverwaltungsgericht	BVwG
Federal Basic Welfare Support Act	–	Grundversorgungsgesetz – Bund	GVG-B
Federal Budget Act	–	Bundeshaushaltsgesetz	–
Federal Chancellery	–	Bundeskanzleramt	BKA
Federal Chancellor	–	Bundeskanzler	–
Federal Constitutional Act	–	Bundesverfassungsgesetz	B-VG
Federal Law Gazette	FLG	Bundgesetzblatt	BGBl.

English term	English abbreviation	German term	German abbreviation
Federal Ministry for Europe, Integration and Foreign Affairs	–	Bundesministerium für Europa, Integration und Äußeres	BMEIA
Federal Ministry of the Interior	–	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
final	–	rechtskräftig	–
forced return	–	erzwungene Rückkehr	–
General Civil Code	–	Allgemeines Bürgerliches Gesetzbuch	ABGB
General Social Insurance Act	–	Allgemeines Sozialversicherungsgesetz	ASVG
internal flight alternative	–	innerstaatliche Fluchtalternative	–
International Organization for Migration	IOM	Internationale Organisation für Migration	IOM
Judiciary Law Collection	JLC	Justizgesetzsammlung	JGS
legal representative	–	gesetzlicher Vertreter	–
Member State	MS	Mitgliedstaat	–
National Contact Point	NCP	Nationaler Kontaktpunkt	NKP
National Council	–	Nationalrat	NR
no date	n.d.	ohne Jahr	o.J.
no name/nomen nescio	N.N.	ohne Name/nomen nescio	N.N.
non-governmental organization	NGO	Nichtregierungsorganisation	NRO
organ of the public security service	–	Organ des öffentlichen Sicherheitsdienstes	–
police administration(s) of the provinces	–	Landespolizeidirektion(en)	LPD
province	–	Bundesland	–
Provincial Guaranteed Minimum Resources Act Vorarlberg	–	Vorarlberger Mindestsicherungsgesetz	–
Provincial Social Care Act Burgenland	–	Burgenländisches Landesbetreuungsgesetz	–
punishable act	–	strafbare Handlung	–
readmission agreement	–	Rückübernahmeabkommen	–
Red-White-Red Card (Plus)	RWR Card	Rot-Weiß-Rot – Karte (plus)	RWR – Karte
reintegration assistance	–	Reintegrationsunterstützung	–
removal	–	Abschiebung	–
replacement travel document	–	Ersatzreisedokument	–
Residence Permit for Individual Protection	–	Aufenthaltsberechtigung besonderer Schutz	–
return assistance	–	Rückkehrhilfe	–
return counselling	–	Rückkehrberatung	–

English term	English abbreviation	German term	German abbreviation
return counsellor	–	Rückkehrberater	–
return decision	–	Rückkehrentscheidung	–
security authority	–	Sicherheitsbehörde	–
Settlement	–	Niederlassung	–
Settlement and Residence Act	–	Niederlassungs- und Aufenthaltsgesetz	NAG
subsequent application	–	Folgeantrag	–
supreme courts	–	Höchstgerichte	–
suspensive effect	–	aufschiebende Wirkung	–
third-country national	–	Drittstaatsangehöriger	–
tolerated stay <i>Card for Tolerated Stay</i>	–	Duldung <i>Karte für Geduldete</i>	–
unaccompanied minors	UAM	unbegleitete Minderjährige	–
United Nations High Commissioner for Refugees	UNHCR	Flüchtlingshochkommissariat der Vereinten Nationen	UNHCR
voluntary return	–	freiwillige Rückkehr	–

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