

European Migration Network

**THE PRACTICES IN AUSTRIA CONCERNING THE GRANTING OF NON-EU
HARMONISED PROTECTION STATUSES**

The opinions presented in this report are those of the NCP Austria and do not represent
the position of the Austrian Ministry of the Interior.

Project co-funded by the European Commission and the Austrian Ministry of Interior



Executive Summary

The Austrian Asylum Act 2005 provides for the granting of asylum if a person fulfils the criteria of Art. 1 A (2) Geneva Refugee Convention and also for the granting of subsidiary protection. Besides these types of status the Austrian legal order also contains other possibilities to grant a kind of status for different reasons or to tolerate the residence of persons whose deportation would be contrary to *non refoulement* obligations.

The decision about the granting of subsidiary protection is rendered within the asylum proceedings. Decisions about other types of status are taken outside the asylum procedure (with the exception of the decision whether a deportation of applicants for international protection whose application has been rejected or dismissed would constitute an unjustified infringement with the right to private or family life).

Over decades Austrian legislation has contained provisions on a prohibition to *refouler* persons to the persecuting state contrary to Art. 3 ECHR or Art. 33 Geneva Refugee Convention. In 2003 a type of subsidiary status was created and amended in 2005. According to Art. 8 Asylum Act 2005 subsidiary protection has to be granted if the asylum application was dismissed (on the merits) or also in cases where the asylum status has been withdrawn and if the alien's or deportation to his country of origin would constitute a real risk of violation of Art. 2 or Art. 3 of the European Convention on Human Rights or of Protocol 6 or Protocol 13 to the Convention or if the deportation "would represent for the alien as a civilian a serious threat to his life or person by reason of indiscriminate violence in situations of international or internal conflicts". This part of the definition intends to transpose Art. 15 Qualification Directive.

In 2009 the Aliens' Police Act, the Asylum Act and the Residence Act were amended in order to define the obligation of the Asylum Authorities and the Aliens' Police Authorities to investigate and decide if a deportation is admissible or if the deportation would be a violation of the right to family life. The provisions are contained in Art. 66 Aliens' Police Act, in Art. 10 (2) Asylum Act and in Art. 11 (3) Residence Act. Art. 44a Residence Act provides for the issuance of residence permits for these persons. According to these norms expulsion or deportation is inadmissible, if it would violate the right to family or private life as guaranteed in Art. 8 ECHR. The Asylum and Aliens' Police Authorities do not grant a right to residence, the provisions to grant a right to reside in Austria are contained in the Residence Act. The authorities responsible according to the Residence Act have to issue a residence permit when deportation is permanently inadmissible as it would violate the right to family or private life.

This recent development with the creation of a further type of residence right also shows that Austrian legislation and practice partly follows the European trend that states tend to create other types of status apart from refugee status and subsidiary protection.

The Aliens' Police Act stipulates the possibility to defer a deportation if the deportation is inadmissible as it would violate the *non refoulement* obligation (Art. 50 Aliens' Police Act) or appears to be impossible for practical reasons. The deferment according to Art. 46 (3) Aliens' Police Act may be decided upon application or *ex officio*. The period for the stay of deportation has to be determined but may not exceed one year. Prolongations are possible. Art. 69a Residence Act provides for the issuance of residence permits for these persons under certain conditions. Such permits also have to be issued for persons who run a risk contrary to Art. 50 Aliens' Police Act and whose deportation has been deferred already more than one time and for a minimum period of one year. If these persons do not get a residence permit they have a kind of tolerated stay in Austria.

Art. 69a Residence Act, which was included into the Residence Act by an amendment in 2009, defines two other cases where a residence permit for special protection has to be granted. The provision also provides for the granting of residence permits "in cases involving punishable acts for the necessary period, for a minimum period of six months, to witnesses, with a view to guaranteeing the outcome of the criminal prosecution, and to victims of the traffic in persons or border-crossing prostitution traffic, with a view to enforcing civil rights claims against the perpetrators". These permits can be issued although the person does not fulfil some of the general requirements for residence permit as stipulated by Art. 11 (1) § 3 to 6 and Art. 11 (2) Residence Act.

Art. 43 Residence Act regulates the possibility to grant settlement permits (unrestricted). Art. 44 (3) and (4) and Art. 44a Residence Act provide for the granting of settlement permits (restricted). Art. 44a stipulates that the authorities have to grant a right to residence *ex officio* in case the expulsion of a person has been prohibited for an unlimited period because it would lead to an unjustified interference with the right to private or family life according to Art. 66 Aliens' Police Act or Art. 10 Asylum Act 2005 (see above). The difference between the conditions for a limited or unlimited settlement permit is that for a limited one the person concerned does not have to comply with a so called integration agreement according to Art. 14 Residence Act. This kind of settlement permit does not fall under the general quota system.

Art. 44 (3) was included into the Residence Act by an amendment 2009. The provision provides for the issuance of restricted settlement permits for persons, who already stayed in Aus-

tria since 1 May 2004 (without interruption) and whose residence was legal at least half time of their stay in Austria. This provision is a kind of “regularisation” for persons who are present in Austria but so far did not have the possibility to apply for a settlement permit. This provision aims to solve “old” cases and thus not create a new type of status.

In September 2009 a Government Bill for an amendment to the Asylum Act, Residence Act and Aliens’ Police Act was presented, which again contains a provision on a further type of tolerated stay called “Duldung”. Person who may not be *refouled* or whose deportation is impossible for practical reasons are tolerated on the territory. They obtain a card confirming their identity but they do not have a right to residence.

1. Introduction: Purpose and Methodology followed

A. Purpose: The aim of the national report on Austria is to contribute to the project carried out by the European Migration Network, which intends to analyse the different national practices concerning the granting of non-EU harmonised protection statuses in the Member States of the European Union. These are the types of status which are not refugee status or subsidiary protection status as defined in the Qualification Directive 2004/83/EC.¹

Thus the main rationale and purpose of the national report on Austria is to identify the types of status resp. the types of tolerated residence for persons who are not granted asylum or subsidiary protection. These persons are identified as persons in need of protection they however do not qualify for asylum or subsidiary protection. They do not fulfil the criteria of the definition of a refugee according to Art. 1 A (2) Geneva Refugee Convention² or according to the Qualification Directive and they do not fulfil the criteria laid down in Art. 15 Qualification Directive and in Art. 8 Asylum Act 2005.³

In order to give a complete picture of the types of status other than the granting of asylum the report also covers the development of the status of subsidiary protection according to Art. 8 Asylum Act 2005 and deals with the rights attached to this status. The provisions on subsidiary protection were included into the Asylum Act in order to transpose the provisions of the Qualification Directive. A status formally called subsidiary protection was created in 2003, when the Asylum Act 1997 was amended.⁴ Though already previous versions of the Asylum Act and the Aliens Act contained the obligation not to *refouler* persons contrary to public international and constitutional obligations, there was no formal status, which was defined as a subsidiary form of status. Apart from the granting of subsidiary protection for persons who may not be *refouled*, the prohibition of *refoulement* is also contained in the Aliens' Police Act.⁵

¹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, p. 12.

² Convention relating to the Status of Refugees, 28.7.1951, 189 UNTS 150, herein after Geneva Refugee Convention. For Austria Federal Law Gazette (FLG) of the Republic of Austria No. 55/1955.

³ Federal Act concerning the Granting of Asylum (Asylum Act 2005 – Asylgesetz 2005), FLG I No. 100/2005, amended by FLG I No. 75/2007, FLG I No. 2/2008, FLG I No. 4/2008 and FLG I No. 29/2009.

⁴ FLG I No. 101/2003.

⁵ Aliens' Police Act, Federal Act on the Exercise of Aliens' Police, the Issue of Documents for Aliens and the Granting of Entry Permits (Aliens' Police Act 2005 – Fremdenpolizeigesetz 2005), FLG I No. 100/2005 as amended by FLG I No. 157/2005, FLG I No. 4/2008 and FLG I No. 29/2009.

The main focus of this report however lies on the description and analysis of other types of protected status, which are not regulated by the provisions of the Qualification Directive and the corresponding national norms. Similar to developments in other Member States of the European Union various types of status were created in order to grant residence rights to persons who fulfil certain criteria, but do not fall under the provisions of the Qualification Directive. These criteria are on the one hand based on the prohibition from *refoulement* and on the other hand on various humanitarian reasons and on the right to family and private life as protected by Art. 8 ECHR. There is also a possibility to defer the deportation of persons for a certain period without granting a right to reside in the country. The deferment of deportation thus creates a kind of tolerated stay.

The provisions of the Qualification Directive are transposed into national law by the Asylum Act 2005. This Act provides for the granting of asylum if a person fulfils the criteria of Art. 1 A (2) Geneva Refugee Convention and the Qualification Directive and for the granting of subsidiary protection. Besides these types of status the Asylum Act and the Residence Act⁶ together with the Aliens' Police Act also contain provisions on a type of status for persons whose right to family life would be violated if the person would have to leave the country. The Residence Act also contains provisions on granting residence permits for special protection needs. The Aliens' Police Act provides for deferments of deportation.

Recent evaluations and statistics show that Member States tend to create other types of status. Thus the rationale of the study of the European Migration Network is to give an insight into the various types of status or tolerated stay which are not contained in European Community Law and thus are not harmonized on the European Union level. This result was identified by the Commission *Policy Plan on Asylum* Communication (COM(2008) 0360).⁷ The Communication shows that on the EU level an ever-growing percentage of applicants are granted subsidiary protection or other kinds of protection status.

The aim of the present report is to identify how far this trend is also mirrored in Austrian legislation and practice. A certain tendency is to be seen that Austrian legislation and practice follows this trend. This is shown by recent developments. Over decades Austrian legislation

⁶ Federal Act concerning Settlement and Residence in Austria (Residence Act – Niederlassungs- und Aufenthaltsgesetz), FLG I No. 100/2005 as amended by FLG No. 31/2006, by FLG I No. 4/2008, FLG I No. 103/2008 and by FLG I No. 29/2009.

⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Policy plan on asylum - An integrated approach to protection across the EU, COM/2008/0360 final, available on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0360:EN:NOT>.

has contained provisions on a deferment of deportation in case there would be a violation of the obligation not to *refouler* persons to a persecuting state contrary to Art. 3 ECHR or Art. 33 Geneva Refugee Convention. In 2003 a type of subsidiary status was created and amended in 2005.⁸ In 2009 the Asylum, the Aliens' Police Act and the Act on Residence were amended in order to create a kind of status for persons whose right to family or private life requires the granting of a right to residence in Austria. This amendment was seen necessary because the Federal Constitutional Court had declared provisions as violating the Austria Constitution⁹ and also to codify the criteria for the protection of private and family life developed by the Federal Constitutional Court¹⁰ and the European Court of Human Rights (ECtHR). This recent development with the creation of a further type of residence right also shows that Austrian legislation and practice partly follows the European trend.

This development is also confirmed by a Government Bill, which was published in September 2009.¹¹ This Bill contains texts for an amendment to the Asylum Act, Residence Act and Aliens' Police Act. The Proposal provides for a further type of tolerated stay called "Duldung" and for a right to residence for victims of a forced marriage.¹²

A further aim of the national report is to show if persons who are granted another type of status or whose deportation is deferred have less rights than persons who are granted asylum or subsidiary protection. The third part of the report examines the right of residence, its length, the possibility to prolong the right to stay in Austria and the rights attached to the various forms of status.

As already mentioned the conclusion that Member States tend to create other types of status was drawn in the Commission *Policy Plan on Asylum* Communication and further explained in the accompanying *Impact Assessment* document¹³ which notes that "increasingly, people are seeking protection for reasons not foreseen in the traditional refugee regime, i.e. in the

⁸ See below 2. A.

⁹ Federal Constitutional Court G246/07, 27.6.2008, available at http://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_09919373_07G00246_01/JFR_09919373_07G00246_01.pdf. See also below 2. C.

¹⁰ Cf. Government Bill, 88 BlgNR XXIV GP (Gesetzgebungsperiode, period of legislation), explanations to Art. 10 (2) Asylum Act.

¹¹ Government Bill, 330 BlgNR XXIV GP, 16.9.2009, available on http://www.parlament.gv.at/PG/DE/XXIV/ME/ME_00065/pmh.shtml.

¹² See below 2. B.

¹³ Commission staff working document accompanying the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Policy plan on asylum : an integrated approach to protection across the EU - Impact Assessment (COM(2008) 360 final), available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC2029:EN:NOT>.

Geneva Convention and its Protocol, and are receiving protection statuses with lower guarantees". The document identifies the reasons for the granting of other forms of protection: compassionate, humanitarian, medical reasons, results of environmental changes in the country of origin, *non refoulement*. The conclusion is that subsidiary forms of protection have been increasing on a European level. The national report thus aims to show if this trend is similar in Austrian practice and which are the reasons for other forms of protection.

This also goes for the next conclusion drawn in the *Impact Assessment* document published by the Commission. According to this document the most recent data available indicate, that the trend towards an increasing share of subsidiary protection and humanitarian protection statuses within the total number of positive decisions may have stopped. This is based on the data of the last quarter of 2008. The national report covers also the 2008 and 2009 data in order to give insight into recent Austrian developments.

The *Policy Plan on Asylum* states that it will be important during the second phase of the Common European Asylum System (CEAS) to pay particular attention to subsidiary and other forms of protection and that a study will be launched on the possible alignment of national types of protection status which do not currently fall under the EU's regime of international protection. Thus the current study and the national report on Austria contribute to the evaluation of national practices and aim to support if such alignments of national practice are necessary and eligible.

The Commission states two major explanations for the trend that Member States create other types of status. On the one hand, the Commission identifies the criteria of Art. 1 A (2) Geneva Refugee Convention as not fully covering today's refugee situations and on the other hand the Commission also sees that states are willing to protect persons not covered by the Convention. Whereas it is not the rationale of the national report to show how far the Convention still meets today's needs the risks which are attached to recent developments creating other types of status are dealt with in the report.

The Commission draws the conclusion that these risks are the weakening of the general levels of protection and of the amplification of the substantial differences across the EU in terms of practices, procedures and decision-making process for granting protection. Due to the fact that the alternative forms of protection have emerged without any coordination, and are constantly evolving in all the Member States there is no harmonization. The proliferation of such diversity in national practices may appear to be incompatible with the often stated objective of harmonising asylum policy in the EU. As the national report also deals with the rights at-

tached to the different forms of protection types, conclusions can be drawn if the national practice shows a trend to weaken the general level of protection.

A further aim of the national report derives from the Commission's *Impact Assessment* document. The report also refers to the question whether the different protection statuses (namely the EU statuses covered by the definitions of Directive 2004/83/EC and national statuses not covered by this Directive), could fall under the scope of the Long Term Residence Directive,¹⁴ specifically its Arts. 3 (2b and c) and 12 (plus recitals (3) and (16)). Thus the national report shows which category could fall under the Long Term Residence Directive.

B. Methodology: The National Report on Austria was compiled and written by *Ulrike Brandl*, University of Salzburg, Department of Public Law. The report is based on national laws¹⁵ and explanatory reports to national laws, academic literature, NGO reports and statistics available on the website of the Ministry of the Interior¹⁶ and on EUROSTAT. Austrian statistics show the number of asylum applications and the figures about positive and negative decisions, statistics do not show recognition rates. There are no statistics available on the recently created types of status as there is only limited practice so far. The report also takes into account national jurisprudence as far as necessary, and refers to national practice. Other sources which were included in the present report are position papers published by UNHCR.¹⁷

There are a few studies containing information on other types of status granted in Austria. Reports on subsidiary or categorical protection have been compiled and published which include some data and references to the situation in Austria. There is however no comprehensive report so far. There has been a comprehensive analysis on forms of subsidiary protection, this analysis however was already undertaken in 2001/2002 and published in a book with the title "Comparative legal study on subsidiary protection in the fifteen EU member states, Analytical Framework of the Domestic Law of the EU Member States".¹⁸ The study was carried out by the Odysseus Network (Academic Network for legal studies of immigration and asy-

¹⁴ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. OJ L 16, 23.1.2004, p. 44.

¹⁵ Laws are cited in full when they first appear in this report. If texts of national laws are cited, unofficial translations are used, which may be obtained from www.unhcr.at or from <http://www.unhcr.org/refworld/> or else www.ris.bka.gv.at.

¹⁶ See http://www.bmi.gv.at/cms/bmi_service/.

¹⁷ UNHCR comments are available on www.unhcr.at.

¹⁸ Cf. for Austria, *Brandl, U./Feik., R.*, Country report Austria: Comparative legal study on subsidiary protection in the fifteen EU member states, Analytical Framework of the Domestic Law of the EU Member States, in: *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention? Under the Supervision of Daphné Bouteillet-Paquet*, Brussels 2002, p. 267-309.

lum in Europe).¹⁹ Reports also include a study with the title “Study on the Asylum Single Procedure against the Background of a Common European Asylum System and the Goal of a Common Asylum Procedure”.²⁰

Another study was compiled in the Netherlands by an *Advisory Committee on Migration Affairs (ACVZ - The Netherlands)*. This study comprises the issue of categorial protection policy. This study, resp. an advisory letter based on the study, take into account and draw conclusions from preliminary studies on policies to grant other types of status, which were published by ECRE/ICMPD in May 2009.²¹ Both documents refer to the situation in Austria and mention three possibilities of protection. These are “subsidiary protection, inadmissibility of deportation/temporary suspension of deportation and residence permits for humanitarian reasons”. They however could not cover the recently defined status for persons whose deportation is prohibited by an unjustified infringement of Art. 8 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Data used mainly comprise statistics published by the Ministry of the Interior. The use of statistics published by the Ministry however leads to some difficulties. As the legal basis was completely revised or amended several times in recent years also the statistical data published changed and thus annual statistics comprise data which are divided into data based on different provisions and the comparability between data of different years is even more difficult. Though published statistics are quite comprehensive they are difficult to compare and conclusions drawn from the statistics may lead to results which do not fully reflect the situation in the relevant period.

2. Protection Statuses granted in Austria

As a reaction to political changes, to changes in refugee creating situations and general changes in migration developments the Austrian Asylum Act as well as the Aliens Act resp. Aliens’ Police Act and other laws relating to aliens have been totally revised in 1991/1992, in 1997/1998 and in 2004/2005.²² Apart from these complete revisions the laws in force have

¹⁹ The study comprises the Member States of the European Union in 2002. The study however not only covers the definition of subsidiary protection now contained in the Qualification Directive but also other forms of protection.

²⁰ The study is available at http://ec.europa.eu/justice_home/doc_centre/asylum/studies/docs/study_gesamtbericht_2002.pdf, Country report Austria, p. 155-172. The study was carried out under the supervision of Prof. *Kay Hailbronner*.

²¹ ECRE/ICMPD, Preliminary studies on categorial protection policy, available on [http://www.acvz.com/publicaties/20090507%20Rapporten%20ECRE%20ICMPD%20\(samengestelde%20versie%20per%20land%20gerangschikt\)%20EN.pdf](http://www.acvz.com/publicaties/20090507%20Rapporten%20ECRE%20ICMPD%20(samengestelde%20versie%20per%20land%20gerangschikt)%20EN.pdf).

²² The Aliens’ Police Act, the Asylum Act 2005 and the Residence Act entered into force on 1.1.2005. These

also been amended several times either to adapt provisions to changing situations or because the Constitutional Court declared provisions as violating the Austrian Constitution. These decisions required changes of the relevant provisions.

The present report mainly comprises the current situation and refers to developments since 2006 when the Asylum Act 2005, the Residence Act and the Aliens' Police Act entered into force. Only where necessary the report also refers to previous developments. This goes mainly for the amendment of the Asylum Act in 2003, where the formal definition of a type of subsidiary protection was enacted into the Asylum Act 1997.

In spring 2009 a draft text for a further amendment to the Asylum Act 2005, to the Residence Act and Aliens' Police Act was published and distributed. Where necessary a short reference to the draft text is made in this report.

The ECHR and its Protocols do have the rank of Constitutional Law in Austria. The Convention has been ratified in 1958, in 1964 a Constitutional Law made clear that the Convention is part of Constitutional Law.²³ The obligations contained in the Convention are also directly applicable in national law. This means that authorities do have to apply the Convention and that they are bound by the Convention obligations and they do have to take the obligations into account when they render any decision. For asylum and aliens law procedures especially Art. 3 ECHR and Art. 2 and Protocols 6 and 13 apply. If the authorities decide about the question whether deportation to a certain country is admissible, they are bound by these obligations and they do have to respect the obligation not to *refouler* persons contrary to these obligations. The authorities are also bound by all other obligations contained in the Convention which might be of relevance in asylum or aliens law proceedings. This is especially true for the right to private and family life as guaranteed in Art. 8 ECHR. Art. 13 ECHR requires the availability of an effective remedy if there is an arguable claim of an infringement of rights guaranteed by the Convention.

Categorical protection types are contained in different national laws. The Austrian laws relating to the status of aliens, their entry and residence and the granting of protection to aliens comprise the Asylum Act 2005, the Residence Act and the Aliens' Police Act. Asylum, subsidiary protection and other types of status are granted upon individual assessment, not on a

laws comprise the so called "Aliens Law package".

²³ FLG No. 59/1964.

specific group. Art. 76 Residence Act is the only provision where an additional protection possibility is assessed on the basis of a specific group.²⁴

The Austrian Residence Act also provides for a right of residence for displaced persons. Section 8 Residence Act transposes provisions of the Temporary Protection Directive.²⁵ In times of armed conflict or other circumstances threatening the safety of entire population groups, the Federal Government, in agreement with the Executive Committee of the National Council, may grant temporary right of residence to displaced persons. Art. 76 Residence Act provides the possibility to issue a ministerial order granting temporary protection. The ministerial order has to regulate the entry of the persons defined and the duration of the residence. If the circumstances prolong and permanent integration becomes necessary as a result of the prolonged duration of the circumstances, it may be stipulated in the ministerial order that specific categories of persons having a right of temporary residence may submit an application for the granting of a settlement permit. They may apply when they are staying in Austria, it is not required (as for other applications for these kinds of settlement permits) that the persons apply from abroad. The settlement permits may be issued notwithstanding the existence of any grounds for refusal. So far there was no practice according to Art. 76 Residence Act. This is the only provision where an additional protection possibility is assessed on the basis of a specific group.

Besides the above mentioned laws the Aliens' Employment Act²⁶ regulates the employment of aliens, the Asylum Court Act regulates the establishment of an Asylum Court as the second instance in asylum proceedings.²⁷ The Basic Welfare Support Act contains norms for the reception of asylum seekers resp. persons who applied for international protection during the admissibility procedure.²⁸ Thus the Basic Welfare Support Act also applies for applicants who may be granted subsidiary protection status. In order to determine competences and in order to regulate the financing of the reception of applicants for international protection an Agree-

²⁴ See below (above 2 A).

²⁵ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001, p. 12.

²⁶ Aliens' Employment Act, FLG No. 218/1975 in the version of FLG I No. 91/2009.

²⁷ Federal Act Concerning the Asylum Court (Asylum Court Act – AsylGHG), FLG I No. 4/2008, amended by FLG I No. 147/2008.

²⁸ Federal Law Regulating Basic Welfare Support of Asylum-Seekers in Admission Procedures and of Certain Other Aliens (Federal Government Basic Welfare Support Act 2005 – GVG-B 2005), FLG No. 405/1991, amended by FLG No. 314/1994, FLG I No. 134/2000, FLG I No. 98/2001, FLG I No. 101/2003, FLG I No. 32/2004, FLG I No. 100/2005, FLG I No. 2/2008 and FLG I No. 4/2008, available at <http://www.unhcr.at/information-in-english/austrian-asylum-legislation/basic-welfare-support.html>.

ment between the Federal Government and the provincial governments, pursuant to Art. 15a Federal Constitution has been concluded.²⁹ The reception of applicants for international protection during the procedure on the merits is regulated by the Basic Welfare Support Acts in the nine Federal States.

The Asylum Act regulates the granting of asylum (meaning that a person fulfils the criteria of Art. 1 A (2) Geneva Refugee Convention) and the granting of subsidiary protection. The latter status may only be granted if the asylum application is dismissed. Furthermore the Asylum Act also provides for a special residence permit for reasons to protect family or private life. This norm together with the corresponding provision in the Aliens' Police Act and the Residence Act was established only recently. The Aliens' Police Act furthermore contains the obligation not to *refouler* persons contrary to international obligations. The Residence Act also creates a special status called "special protection" status. The following part of the report describes and analyses the various forms of status and of tolerated stay.

Other types of status:

A. Subsidiary protection: A type of protected status formally called subsidiary protection was created in 2003 when the Asylum Act 1997 was amended.³⁰ The Asylum Act 1997 in its original version regulated the protection from *refoulement*, but did not create a subsidiary protection status as such. There was no formal definition of a type of subsidiary status and there were no rights attached to the status. In case an asylum application was dismissed on the merits the asylum authorities had to investigate and decide whether the person could be sent back to the country of origin. The authorities had to decide if there was a real risk of being threatened by torture or inhuman or degrading treatment contrary to Art. 3 ECHR or by death penalty (Art. 2 ECHR, Protocol 6 and Protocol 13 to the Convention) or if there would be a risk contrary to Art. 33 Geneva Refugee Convention. This duty to investigate whether there would be risk of *refoulement* contrary to these international obligations has been contained in various provisions of national law and also in previous Asylum Acts and Aliens (Police) Acts. The formulation of the obligation and the procedure to investigate and decide if deportation to a certain country is admissible has been amended several times. Art. 8 Asylum Act 1997 e.g. referred to Art. 57 Aliens Act. This provision regulated the obligation not to *refouler* persons when the Aliens' Police authorities had to decide on the admissibility of deportations carried out under the Aliens Act.

²⁹ Basic Welfare Support Agreement - Art. 15a of the Federal Constitution, FLG I No. 80/2004. available at www.unhcr.org/refworld/docid/4416ab914.html.

³⁰ FLG I No. 101/2003. See also above 1.

The Asylum Act 1997 entered into force on 1 January 1998.³¹ At that time it was not seen necessary to create a specific status called subsidiary protection. Thus the Asylum Act only contained the obligation to decide about the admissibility of a deportation to the country of origin. As already mentioned above the asylum authorities had to decide whether deportation to the country of origin was admissible if an asylum application was dismissed. The amendment of the Asylum Act in 2003³² is to be seen in connection with the drafting phase of the Qualification Directive. The amendment of the Asylum Act created a kind of subsidiary status. The amendment however mainly used the definition subsidiary protection in the heading of the provision. The asylum authorities had to decide *ex officio* whether deportation to the country of origin was admissible and in case they decided that deportation was inadmissible, they had to issue a residence permit. Such a residence permit could not be issued if the application was dismissed because an exclusion clause existed.

The provisions on the granting of subsidiary protection are now provided for by the Asylum Act 2005, which entered into force on 1 January 2006. The Asylum Act 2005 also intended to transpose mandatory provisions of the Qualification Directive. This was clearly stated by the explanatory reports to the Government Bill.³³ The explanations to Art. 8 Asylum Act however refer to the fact that the system of subsidiary protection should remain as it had been already successful.³⁴ The definition of subsidiary status and the rights attached to the status have been changed and also adapted to the definition contained in the Qualification Directive.

Art. 2 (1) § 16 Asylum Act 2005 defines subsidiary protection as a “temporary, renewable right of entry and residence granted by Austria to aliens in accordance with the provisions of the present federal law”. Art. 2 Asylum Act states that the Act regulates the granting of asylum and of subsidiary protection. The Asylum Act defines an application as application for international protection whereas the Asylum Act 1997 contained the definition application for asylum. This change was seen necessary in order to correspond to the Qualification Directive and to ensure uniformity.³⁵ It is only possible to apply for international protection; an application for subsidiary protection alone is not envisaged.

³¹ Federal Law concerning the Granting of Asylum (1997 Asylum Act – Asylgesetz 1997), FLG I No. 76/1997, amended by FLG I No. 106/1998, FLG I No. 110/1998, FLG I No. 4/1999, FLG I No. 41/1999, FLG I No. 196/1999, FLG I No. 82/2001, FLG I No. 126/2002, FLG I No. 101/2003, FLG I No. 105/2003 and FLG I No. 129/2004.

³² FLG I No. 101/2003.

³³ Government Bill, 952 BlgNR XXII GP, p. 2, p. 5.

³⁴ Cf. explanations to Art. 8, Government Bill, 952 BlgNR XXII GP.

³⁵ Government Bill, 952 BlgNR XXII GP, p. 30 f.

Asylum is granted if a person falls under the definition of a refugee as contained in Art. 1 A (2) Geneva Refugee Convention and in the Qualification Directive.³⁶

Art. 8 regulates the granting of subsidiary protection. This status may be granted if a person applied for asylum and the asylum application was dismissed (on the merits) or also in cases where the asylum status has been withdrawn and if the alien's rejection at the border, forcible return or deportation to his country of origin would constitute a real risk of violation of Art. 2 or Art. 3 of the European Convention on Human Rights or of Protocol 6 or Protocol 13 to the Convention or if the deportation "would represent for the alien as a civilian a serious threat to his life or person by reason of indiscriminate violence in situations of international or internal conflicts". This part of the definition intends to transpose Art. 15 Qualification Directive which reads in its § (c) that serious harm consists of "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict". The Asylum Act also contains procedural rules for applications³⁷ and defines exclusion clauses. If the asylum-seeker's country of origin cannot be established, the application for international protection shall be dismissed in regard to subsidiary protection and an expulsion order has to be issued.

Art. 8 (3) Asylum Act determines that applications for international protection have to be dismissed in respect to granting subsidiary protection in case an internal flight alternative exists. Internal flight alternative resp. protection in a part of a country is defined by Art. 11 Asylum Act 2005.³⁸ In order to establish whether an internal flight alternative exists the authorities have to take into account the general circumstances prevailing in the country of origin and the personal circumstances of the asylum-seeker.

³⁶ Art. 3 (1) Asylum Act: "An alien who in Austria has filed an application for international protection shall, unless that application is to be rejected on account of safety in a third country or the responsibility of another State, be granted asylum status if it is satisfactorily established that the alien would in the country of origin be at risk of persecution as defined in article 1 A (2) of the Geneva Convention on Refugees."

³⁷ See below 3.

³⁸ Art. 11 asylum Act 2005: "(1) If asylum-seekers can, in a part of their country of origin, be guaranteed protection by the State or by other actors controlling the State of origin or a substantial part of the territory of the State and if they can reasonably be expected to reside in that part of the territory of the State, an application for international protection shall be dismissed (internal flight alternative). Protection shall be deemed guaranteed if, in regard to that part of the country of origin, there can be no well-founded fear in accordance with article 1 A (2) of the Geneva Convention on Refugees and the requirements for the granting of subsidiary protection status (Art. 8, (1)) are not met in regard to that part of the country of origin.

(2) In the examination of whether an internal flight alternative exists, the general circumstances prevailing in the country of origin and the personal circumstances of the asylum-seeker shall be taken into account at the time when the decision on the application is rendered.

The authorities may withdraw the subsidiary status *ex officio* if the reasons defined in Art. 9 Asylum Act 2005 are fulfilled. These reasons are fulfilled, if the conditions required for the granting of subsidiary protection status cease to exist, if the alien has the centre of his vital interests in another country or if the alien has obtained the nationality of another State. The withdrawal of the status is combined with the withdrawal of the right to residence.

Austrian Law and practice do not provide for the granting subsidiary protection on grounds which are not covered by the Qualification Directive.

The exclusion clauses of the Geneva Refugee Convention do not apply for subsidiary protection status.

The decision about the granting of subsidiary protection is rendered within the asylum proceedings. Decisions about other types of status are taken outside the asylum procedure with the exception of the decision whether a deportation of applicants for international protection whose application has been rejected or dismissed would constitute an unjustified infringement with the right to private or family life.³⁹

B. *Non refoulement provisions in the Aliens' Police Act, deportation deferrals:* The Aliens' Police Act also contains the prohibition not to *refouler* persons. Art. 50 Aliens' Police Act refers to Art. 3 ECHR, to the prohibition of death penalty, to Art. 33 Geneva Convention and to the definition of general violence ("the alien's life and integrity, as a private person, would be seriously threatened as a consequence of arbitrary violence in the course of an international or national conflict") as contained in Art. 15 Qualification Directive. Art. 50 Aliens' Police Act provides for the prohibition from *refoulement* for all administrative acts as defined in the Aliens' Police Act (expulsion, deportation, forcible return and rejection at the border). Furthermore Art. 50 prohibits rejection at the border or forcible return of aliens to a state or prevention of entry from a state if there are reasonable grounds to assume that their life or freedom would be endangered on account of their race, religion, nationality, membership of a particular social group or political opinion (Art. 33 (1) Geneva Refugee Convention). If there is only a risk according to Art. 33 Geneva Refugee Convention and no risk under Art. 3 ECHR deportation is only admissible in case the conditions defined in Art. 33 (2) Geneva Refugee Convention are fulfilled. The persons concerned have to be given the opportunity to put forward reasons to the contrary.

³⁹ See below. 2 C.

The authorities have to decide by administrative order if the criteria are fulfilled and deportation is inadmissible. The decision however does not create a formal status. The persons concerned do not automatically get a residence permit. There are no rights specifically attached to the decision. The result is that the persons are protected from *refoulement*. Consequently one could define their initial residence as a kind of officially tolerated stay in Austria. The Residence Act provides for the issuance of residence permits for these persons under certain conditions. These types of residence permits are dealt with below.⁴⁰

According to Art. 51 Aliens' Police Act a person may also apply for a determination that the expulsion to a certain state is inadmissible because there are reasonable grounds to assume that the person will be in danger according to Art. 50 Aliens' Police Act (*non refoulement*).

The Aliens' Police Act also stipulates the possibility to defer deportations if the deportation is inadmissible as it would violate the *non refoulement* obligation (Art. 50 Aliens' Police Act) or appears to be impossible for practical reasons. The deferment according to Art. 46 (3) Aliens' Police Act may be decided upon application or *ex officio*. The period for the stay of deportation has to be determined but may not exceed one year. Prolongations are possible. Again – as mentioned above for Art. 50 Aliens' Police Act – the Residence Act provides for the issuance of residence permits for these persons under certain conditions. If these persons do not get a residence permit they have a kind of tolerated stay in Austria.

The Government Bill from September 2009, which is based on a draft presented in June, contains a provision providing for a tolerated stay (“Duldung”) of persons who may not be *refouled* or whose deportation is impossible for practical reasons. The persons concerned do not have a right to residence, their sojourn is tolerated. They obtain a card confirming their identity.

According to Art. 69a Residence Act a residence permit has to be issued if the person may not be *refouled* and if the deportation was deferred at least two times and for one year or more. The persons whose deportation has been stayed only once and less than a year are simply tolerated. The same goes for persons who do not fulfil the criteria defined in Art. 69a in combination with Art. 11 Aliens' Police Act, e.g. for persons whose deportation would violate a *non refoulement* obligation but where a residence ban has previously been issued.

C. Humanitarian right to residence for reasons relating to the protection of the right to family and private life: In 2009 the Aliens' Police Act, the Asylum Act and the Residence

⁴⁰ See also below 2. D.

Act were amended in order to define the obligation of the asylum authorities and the Aliens' Police authorities and the authorities responsible for granting permits according to the Residence Act to investigate and decide if a deportation is admissible or if the deportation would be a violation of the right to family life.⁴¹ The provisions are contained in Art. 66 Aliens' Police Act, in Art. 10 (2) Asylum Act and in Art. 11 (3) Residence Act. According to these norms expulsion or deportation is inadmissible, if it would violate the right to family or private life as guaranteed in Art. 8 ECHR. These amendments defining the criteria which have to be taken into account were included following decisions of the Constitutional Court. The Constitutional Court ruled that a provision, which limited the right to grant residence rights for the protection of the right to family or private life to the *issuance ex officio* and did not allow for applications, violated constitutional provisions.⁴²

Art. 44a Residence Act as amended in 2009 stipulates that the authorities have to grant a right to residence *ex officio* in case the expulsion of a person has been prohibited for an unlimited period because it would lead to an unjustified interference with the right to private or family life according to Art. 10 Asylum Act 2005 or also according to Art. 66 Aliens' Police Act.

The amendments also intend to determine the criteria which are to be taken into account when a decision about deportation is rendered and an infringement with the right to private or family life should be justified according to Art. 8 (2) ECHR.⁴³ The authorities have to take into account the length of the stay in Austria and the kind of residence, especially if the person stayed legally or illegally in the country, the actual existence of family life, necessity to protect private life, the degree of integration, existing ties to the home country, criminal records and the fact, if family life was established at a time when the persons were aware of their uncertain residence status. These criteria have to be taken into account when the authorities have to decide about the admissibility of deportations. According to the intentions of the amendments the criteria were defined following the jurisprudence of the Constitutional Court. The explanatory report refers to constant jurisprudence of the Constitutional Court and especially

⁴¹ Marth, T., Das „Bleiberecht“ im Asylverfahren, migralex 7, 2009, p. 45-50.

⁴² See also below 2. D. Federal Constitutional Court G246/07, 27.6.2008, available at http://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_09919373_07G00246_01/JFR_09919373_07G00246_01.pdf.

⁴³ See Federal Constitutional Court B 1150/07, 29.9.2007, available at http://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_09929071_07B01150_2_00/JFT_09929071_07B01150_2_00.pdf and B 328/07, 29.9.2007, available at http://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_09929071_07B00328_2_01/JFR_09929071_07B00328_2_01.pdf.

to recent judgments. The Constitutional Court rules in line with the jurisprudence of the ECtHR and constantly refers to the ECtHR's judgments.

The jurisprudence of the Constitutional Court and the ECtHR identified a number of criteria which relate to the personal situation of the applicant and to the situation of the family in general. The criteria adhere to each other. They have to be taken into account in coherence. The authorities have to investigate the situation in general which requires complex and extensive enquiries. The Constitutional Court especially refers to the following criteria, which were developed by the jurisprudence of the ECtHR. The Constitutional Court holds that the criteria have to be applied in a way which allows to take the whole situation into account in a kind of comprehensive survey and to provide an overall picture of the situation. These criteria are: length of stay (without any fixed time limits), the fact that an actual family life exists, intensity of the family life, the degree of integration and the need to protect private life. The degree of integration depends on the intensity of ties to relatives and friends, the ability to take care of oneself, school and vocational education, participation in social life, employment, ties to the country of origin, the criminal record resp. integrity and violations of immigration rules. Furthermore requirements of public order have to be taken into account. Another decisive fact is if the family life has been established at a time where the persons concerned were aware of the uncertain residence right.⁴⁴ These criteria have also partly been included into the Asylum Act, Residence Act and Aliens' Police Act. As so far there is only limited practice it is too early to evaluate how the criteria are interpreted and applied in national practice. It seems however that the authorities have to make comprehensive inquiries and that the criteria may be applied in a diverse way.

In asylum proceedings the newly defined status of humanitarian residence is to be granted in connection with a decision on expulsion. The Asylum Act regulates that a decision shall be issued in conjunction with an expulsion order if an application for international protection is rejected or if an application is dismissed on the merits. Furthermore an expulsion order has to be issued if the status is withdrawn. If certain criteria are fulfilled expulsion is inadmissible.⁴⁵ Among other reasons this goes for cases where there would be an unjustified infringement with the right to private or family life and also where there would be a risk of *refoulement*.

⁴⁴ Cf. Federal Constitutional Court, B 328/07, 29.9.2007, available at http://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_09929071_07B00328_2_01/JFR_09929071_07B00328_2_01.pdf.

⁴⁵ Expulsion is also prohibited according to Art. 10 Asylum Act 2005 if an alien is holding a right of residence that other than based on the Asylum Act.

The original version of the Asylum Act 2005 already contained the obligation to respect Art. 8 ECHR, the 2009 amendment then defined the above mentioned criteria.

D. Residence permits for special protection needs, settlement permits: A further possibility to grant a right of residence in Austria for special reasons is provided by the Residence Act. Art. 69a was included into the Residence Act by an amendment in 2009.⁴⁶ Third country nationals who are present in the country may apply for a special residence permit called permit for “special protection”. The provision defines three cases where a residence permit for special protection has to be granted. This type of protection may be granted *ex officio* or also upon application. The possibility to apply was only included into the Residence Act by the amendment in 2009. The Constitutional Court had declared the provision in the Residence Act that only provided for an *ex officio* issuance of permits and did not allow applications as a violation of constitutional provisions.⁴⁷ The Court ruled that concerning the respect for the right to family life according to Art. 8 ECHR the right to an effective remedy according to Art. 13 ECHR has to be provided. Art. 13 requires the availability of an effective remedy in case there is an arguable claim of a violation of the ECHR (in this case Art. 8 ECHR). The authorities have to issue such a permit if the persons fulfil the criteria defined in the law. Such permits have to be issued for persons who run a risk contrary to Art. 50 Aliens’ Police Act and whose deportation has been deferred already more than one time and for a minimum period of one year.⁴⁸ Permits also may be granted “in cases involving punishable acts for the necessary period, for a minimum period of six months, to witnesses, with a view to guaranteeing the outcome of the criminal prosecution, and to victims of the traffic in persons or border-crossing prostitution traffic, with a view to enforcing civil rights claims against the perpetrators”.

These permits can be issued although the person does not fulfil some of the general requirements for residence permit as stipulated by Art. 11 (1) § 3 to 6 and Art. 11 (2) Residence Act. The requirements which can be dispensed are, if: “1. The residence of the alien does not run counter to the public interests; 2. The alien can furnish proof of statutory right to an accommodation in conformity with local accommodation for national residents; 3. The alien holds sickness insurance in respect of all risks normally covered in the federal territory, and the in-

⁴⁶ FLG I No. 38/2009.

⁴⁷ Federal Constitutional Court G246/07, 27.6.2008, available at http://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_09919373_07G00246_01/JFR_09919373_07G00246_01.pdf. See also above 1.

⁴⁸ See above 2. B.

surance authority is liable to pay; 4. The alien's residence does not lead to a financial burden on a territorial entity 5. The alien's residence would not harm the relations between Republic of Austria and another State or another international subject; 6. In case of renewal application, the alien has already complied with the integration agreement pursuant to Art. 44 or one single module of this agreement provided that he has been settled on the federal territory for the period of one year and has not been granted any extension of time according to Art. 14, paragraph 8."⁴⁹ In case a residence ban has been issued a permit for humanitarian reasons cannot be granted.⁵⁰

Art. 43 Residence Act regulates the possibility to grant settlement permits (unrestricted). Art. 44 (3) and (4) and Art. 44a and Art 44b Residence Act provide for the granting of settlement permits (restricted). As mentioned above Art. 44a stipulates that the authorities have to grant a right to residence *ex officio* in case the expulsion of a person has been prohibited for an unlimited period because it would lead to an unjustified interference with the right to private or family life according to Art. 66 Aliens' Police Act or Art. 10 Asylum Act 2005. The difference between the conditions for a limited or unlimited settlement permits is that for a limited one the person concerned does not have to comply with a so called integration agreement according to Art. 14 Residence Act.⁵¹ This kind of settlement permit does not fall under the general quota system.⁵²

Art. 44 (3) was included into the Residence Act by an amendment 2009. The provision provides for the issuance of restricted settlement permits for persons, who already stayed in Austria since 1 May 2004 (without interruption) and whose residence was legal at least half time

⁴⁹ Unofficial translation, available at http://209.85.135.132/search?q=cache:nY0X_RhtvJ0J:www.imldb.iom.int/viewDocument.do%3Fid%3D%257B413B53A1-2B8A-4C72-99D9-50D6895D9CF3%257D+Federal+Law+Gazette+No.+100/2005+in+the+version+Federal+Law+Gazette+No.+31/2006&cd=2&hl=de&ct=clnk&gl=de.

⁵⁰ The general requirements as stipulated in Art. 11 (1) recital 1 and 2 have to be fulfilled. "Article 11. (1) The granting of residence titles to an alien shall be refused if: 1. A final and legally binding residence ban pursuant to Art. 60 of the Aliens' Police Act has been imposed on him ; 2. A residence ban of another EEA Member State is effective against him".

⁵¹ Article 14 Residence Act: "(1) The integration agreement shall be for the purpose of integration of permanently or long-term settled third-country nationals. Its object shall be the acquisition of basic knowledge of German language, especially the capability of reading and writing and the ability to participate in social, economic and cultural life in Austria. (2) The integration agreement shall consist of 2 modules: 1. Module 1 'acquisition of the ability to read and write' and 2. Module 2 'acquisition of knowledge of the German language and becoming capable to participate in the social, economic and cultural life in Austria'."

⁵² Though the possibility to issue settlement permits according to Art. 72 Residence Act has been deleted in 2009 the provision is mentioned here to give a complete picture of developments in Austria and also because previous studies and *ad hoc* queries referred to the possibility to issue settlement permits based on that provision. According to Art. 72 (deleted) the authority was allowed to issue a settlement permit to third-country nationals on humanitarian grounds. This provision was deleted and the content partly replaced by the present Art. 44 (3) and (4).

of their stay in Austria. This provision is a kind of “regularisation” for persons who are present in Austria but so far did not have the possibility to apply for a settlement permit. This provision aims to solve “old” cases and thus not create a new type of status.⁵³

3. Procedure(s) followed and rights provided:

A. Procedures followed: Asylum and aliens law procedures are administrative procedures. For these procedures the General Administrative Procedures Act⁵⁴ applies. The Asylum Act, the Aliens’ Police Act and the Residence Act however contain a number of special procedural rules which regulate the asylum and aliens law proceedings. In case there are special provisions the general procedural rules do not apply.

The Federal Asylum Agency is responsible to decide as the first instance authority in asylum procedures. In 2008 the Federal Asylum Court was established as the second instance in asylum procedures. The Court was enacted by the Asylum Court Act, which was set in force by 1 July 2008.⁵⁵ Before 2008 the Independent Asylum Senate was the second instance in these procedures. The procedure before the Federal Asylum Court is also regulated by the Asylum Act and by the General Administrative Procedures Act.

The following section focuses on procedural rules for granting and withdrawing the different types of status as outlined in 2. above. The Asylum Act also contains norms about expulsion procedures in connection with rejection or dismissal of applications, provisions on the rejection of applications because a safe third country exists or because another state is responsible according to the Dublin II Regulation, norms on family procedures and on airport procedures.

a. Subsidiary protection: The Austrian Asylum Act provides for applications for international protection. If such an application is filed the authorities have to decide about the question whether the application is to be rejected on account of safety in a third country or the responsibility of another State. In the first stage of the procedure – called admissibility procedure – the authorities have to decide about the admissibility. If the application is declared admissible the authorities decide whether the person is to be granted asylum status. Only where an application for asylum is dismissed on the merits the authorities have to grant subsidiary

⁵³ See for further details *Klingenbrunner, A.*, Die Fremdenrechtsnovelle 2009, *migralex* 7, 2009, p. 38-44, p. 42.

⁵⁴ General Administrative Procedures Act 1991 (Allgemeines Verwaltungsverfahrensgesetz AVG), FLG No. 51/1991 as amended by FLG I No. 117/2002.

⁵⁵ The Federal Law Concerning the Asylum Court explicitly establishes that unless otherwise stipulated in the 2005 Asylum Act the provisions of the 1991 General Administrative Procedures Act apply *mutatis mutandis* to proceedings before the Asylum Court. The word “appeal” shall be replaced with the word “complaint”.

protection if the person qualifies for that status. A separate application for subsidiary protection is not possible.

Complaints to the Asylum Court are possible against a decision rejecting the application and also against a decision dismissing the application on the merits. Art. 36 Asylum Act 2005 regulates the effects of complaints with regard to suspensive effect. A complaint against a decision rejecting an application does not have suspensive effect. A complaint against an expulsion order issued in conjunction with such ruling may be granted suspensive effect by the Court. Complaints against the dismissal of the application for asylum and also for subsidiary protection have suspensive effect unless it is disallowed. Art. 37 and 38 provide for allowance or disallowance of suspensive effect.

Complaints against decisions on a dismissal of an application have suspensive effect unless this effect is disallowed. Art. 38 provides for a number of reasons for disallowance. These are i.a. if the applicant has attempted to deceive the Federal Asylum Agency concerning his true identity or nationality or the authenticity of his documents, the asylum-seeker has not adduced any reasons for persecution, the allegations made by the asylum-seeker concerning his situation of danger clearly do not correspond with reality or if an enforceable deportation order and an enforceable residence ban was issued against the asylum-seeker prior to the filing of the application for international protection. The Asylum Court however may grant suspensive effect if otherwise there would be a risk of a violation of the *non refoulement* principle. The Asylum Court has to grant suspensive effect if a complaint is filed against an expulsion order issued in conjunction with a rejection ruling on an application for international protection, if it can be assumed that the alien's rejection at the border, forcible return or deportation to the country to which the expulsion order applies would constitute a real risk of violation of the prohibition of *refoulement* according to the international obligations already mentioned or would represent a serious threat to his life or person by reason of indiscriminate violence in situations of international or internal conflicts.

The requirements on evidence are the same for asylum and subsidiary protection. In complaint procedures before the Asylum Court new facts and evidence may only be submitted, if the grounds on which the ruling was based have undergone any material change, if the first instance procedure was irregular, if such new facts and evidence were not accessible earlier or if the asylum-seeker had been unable to submit such new facts and evidence (Art. 40 Asylum Act 2005).

Art. 22 Asylum Act stipulates that decisions of the Federal Asylum Agency on applications for international protection shall be issued in the form of administrative decisions. Decisions of the Asylum Court shall be issued in the form of judgments and all other decisions shall be issued in the form of resolutions.

Complaints to the Federal Constitutional Court may be filed in case the applicant states a violation of a right guaranteed by constitutional law. There is no regular possibility to file complaints to the Federal Administrative Court. The court is only competent to decide about leading cases. These decisions have to be submitted to the Court *ex officio*.

b. Deportation deferrals and *non refoulement*: The Aliens' Police Act (as well the previous Aliens Acts) stipulates that the *non refoulement* obligations have to be respected when decisions on the rejection at the border, on forcible return or on expulsion are rendered. Art. 51 also stipulates that upon application the Aliens' Police authority has to determine if there are reasonable grounds to assume that an alien will be in danger under Art. 50 (1) or (2) in a state specified by him or her (*non refoulement*).

As mentioned above aliens law proceedings are administrative proceedings and the General Administrative Procedures Act applies. The appeals authorities are the Directorates of Security or security headquarters (according to the unofficial translations) in the Federal States. Complaints to the Federal Administrative Court are possible. The Court is competent to decide about the illegality of administrative decisions.⁵⁶ The Court however does not decide on the merits.

c. Humanitarian right to residence for reasons relating to the protection of the right to family and private life: In asylum proceedings the newly defined status of humanitarian residence is to be granted in connection with a decision on expulsion. The provisions are contained in Art. 10 (2) Asylum. According to this provision deportation is inadmissible, if it would violate the right to family or private life as guaranteed in Art. 8 ECHR. Procedures are governed by the Asylum Act and General Administrative Procedures Act.

Settlement and residence permits according to the Residence Act may be issued *ex officio* or upon application. The authorities have to inform the Ministry of the Interior if they grant a settlement permit according to Art. 43 (2) and (3) and Art. 44 (3) Residence Act, about the issuance of a residence permit accord to Art. 69a Residence Act and about applications for a permit according to Art. 44 (4) Residence Act. For the issuance of a permit according to Art. 44 (4) Residence Act the consent of the Ministry of the Interior is required.

⁵⁶ Art. 130 Federal Constitution.

For decisions according to the Residence Act the provincial governor is the competent authority (Art. 3 Residence Act). If appropriate in the interests of administrative simplification, expediency or economy, the provincial governor may, by provision, authorize the district administrative authorities to render decisions on his behalf in all or specific cases. The Federal Minister of the Interior is the appeals authority.

d. Residence permits for special protection needs, settlement permits: For the issuance of these permits the same procedural rules apply as mentioned above under 3. A. c.

B. Rights attached to the different types of “status”:

a. Length of authorisation to reside: The length of residence in case subsidiary protection is regulated by Art. 8 Asylum Act. The person gets a limited right of residence as a person eligible for subsidiary protection. The right of residence is valid for one year and shall, upon application, be extended by the Federal Asylum Agency if the conditions for granting subsidiary protection continue to exist. As long as the status continues to exist, the asylum authorities do have to prolong the residence permit.⁵⁷ The persons who were granted subsidiary protection get a card to confirm their status (“Karte für subsidiär Schutzberechtigte”).

The draft text presented in spring 2009 contains a provision that the prolongation shall be limited again to one year with the possibility to further prolong. The UNHCR comment to this proposal refers to the fact that subsidiary protection and the reasons for protection usually continue as long as reasons for Convention Status. Thus UNHCR criticises the draft and also sees unnecessary time, efforts and expenses for administration if the right to residence may only be prolonged just for one year.⁵⁸

Length of deportation deferrals and residence rights: The period for the stay of a deportation has to be determined but may not exceed one year. Prolongations are possible. The Residence Act provides for the issuance of residence permits for these persons under certain conditions. If these persons do not get a residence permit they have a kind of tolerated stay in Austria. According to Art. 69a Residence Act a residence permit has to be issued if the person may not be *refouled* and if the deportation was deferred at least two times and for one year or more. Such a residence permit has to be issued for a minimum period of six months and may be prolonged.

⁵⁷ Putzer, J./Rohrböck, J., *Asylrecht*, Vienna 2007, p. 100.

⁵⁸ UNHCR, *Analyse des Entwurfs für Änderungen des Asylgesetzes 2005, des Fremdenpolizeigesetzes 2005, Grundversorgungsgesetzes – Bund 2005, Niederlassungs- und Aufenthaltsgesetzes und Staatsbürgerschaftsgesetzes 1985*, 22.7.2009, p. 6 f., available at unhcr.at.

Art. 43 Residence Act regulates the possibility to grant settlement permits (unrestricted). Art. 44 (3) and (4) and Art. 44a and Art 44b Residence Act provide for the granting of settlement permits (restricted). As mentioned above Art. 44a stipulates that the authorities have to grant a right to residence *ex officio* in case the expulsion of a person has been prohibited for an unlimited period because it would lead to an unjustified interference with the right to private or family life according to Art. 66 Aliens' Police Act or Art. 10 Asylum Act 2005. The difference between the conditions for a limited or unlimited settlement permits is that for a limited one the person concerned does not have to comply with a so called integration agreement according to Art. 14 Residence Act.⁵⁹ This kind of settlement permit does not fall under the general quota system.⁶⁰

b. Renewal obligations: The residence permit for persons under subsidiary protection has to be prolonged in case the conditions continue to exist. The status itself remains and could only be withdrawn.⁶¹

The period for the stay of a deportation has to be determined but may not exceed one year. Prolongations are possible if the conditions in the respective country continue to exist.

Residence permits according to Art. 69a Residence Act have to be issued for a minimum period of six months and may be prolonged if the need to grant special protection continues.

c. After renewal of the right to a residence permit under Articles 3 (2b & c) and 12 of Directive 2003/109/EC (Long-Term Residents): The provisions of the Long-Term Residents Directive do not apply for subsidiary protection and for residence permits issued for these persons. The Directive explicitly regulates that the provisions do not apply and thus there is no need to transposition. According to the content of the provisions they would be suitable to apply for persons under subsidiary protection as well as for persons with an unrestricted settlement permit.

⁵⁹ Article 14 Residence Act: "(1) The integration agreement shall be for the purpose of integration of permanently or long-term settled third-country nationals. Its object shall be the acquisition of basic knowledge of German language, especially the capability of reading and writing and the ability to participate in social, economic and cultural life in Austria. (2) The integration agreement shall consist of 2 modules: 1. Module 1 'acquisition of the ability to read and write' and 2. Module 2 'acquisition of knowledge of the German language and becoming capable to participate in the social, economic and cultural life in Austria'."

⁶⁰ Though the possibility to issue settlement permits according to Art. 72 Residence Act has been deleted in 2009 the provision is mentioned here to give a complete picture of developments in Austria and also because previous studies and *ad hoc* queries referred to the possibility to issue settlement permits based on that provision. According to Art. 72 (deleted) the authority was allowed to issue a settlement permit to third-country nationals on humanitarian grounds. This provision was deleted and the content partly replaced by the present Art. 44 (3) and (4).

⁶¹ Putzer, J./Rohrböck, J., Asylrecht, Vienna 2007, p. 100.

d. Medical assistance: Medical assistance is available for all persons staying in Austria. Medical assistance is generally provided and is not limited to emergency care, some medical treatment however may not be available unless the person pays for the costs. Employed and self-employed persons do have an obligatory health insurance.

e. Education: For all types of status (and also for a tolerated stay) access to education is available and obligatory up to the age of 15 (nine years school attendance), access to higher education is available as well.

f. Access to the labour market: Persons under subsidiary protection do have access to the labour market. No work permits are required. For persons under subsidiary protection as well as for persons who were granted asylum the Aliens' Employment Act does not apply (Art. 1 (2) a) Aliens' Employment Act).

In general access to the labour market for third country nationals is regulated by the Aliens' Employment Act. According to the Aliens' Employment Act persons who do have a right of residence under the Residence or Aliens' Police Act, which does not prohibit employment, are allowed to work. They must fulfil the conditions laid down in the Aliens' Employment Act. They need a work permit. The Aliens' Employment Act stipulates that persons with a restricted settlement permit also need a work permit whereas an unrestricted permit gives the possibility to work. Persons who do have an unrestricted permit have unrestricted access to the labour market whereas persons with a restricted residence permit need a work permit and have to fulfil the requirements defined in the Aliens' Employment Act.⁶²

Persons whose deportation has been deferred for less than a year and for the first time are not allowed to work as they do not have the possibility to get a residence or settlement permit.

g. Travel: Persons who are granted asylum in Austria have to get a Convention Passport upon application (Art. 94 Aliens' Police Act). For persons who are granted subsidiary protection an Alien's Passport may be issued. The requirement is that their presence in any other state is required for humanitarian reasons unless this is not appropriate for reasons of public order and security. This provision thus limits the possibility to issue passports to cases where the person has to travel to another country for humanitarian reasons and allows a discretionary decision by the authorities. The reasons are not defined clearly, the law only says if their presence in another country is necessary for humanitarian reasons.

⁶² *Klingenbrunner, A., Die Fremdenrechtsnovelle 2009, migralex 7, 2009, p. 38-44, p. 39.*

The Aliens' Police Act generally provides for the issuance of Alien's Passports for persons who do not have Austrian nationality. Alien's Passports may be issued upon application, if it is in the interests of the Republic with regard to the person concerned. Such passports may be issued for stateless persons or persons with unknown nationality, who do not hold a valid travel document, for foreign nationals who are entitled to unlimited residence in the federal territory and are not in a position to obtain a valid travel document of their country of origin, for foreign nationals who are not in a position to obtain a valid travel document of their country of origin and who otherwise comply with the requirements for the issue of a permanent residence permit, for foreign nationals who are not in a position to obtain the travel document of their country of origin required for emigration from the federal territory and for foreign nationals who have had their principal place of residence in the federal territory for a continuous period of at least four years, provided that the competent federal minister or the provincial government certifies that the issue of the Alien's Passport is in the interests of the federal republic or the province on account of the services the alien has rendered or is expected to render.

NGOs report that – due to the number of restrictions possible – only in very few cases Alien's Passports are issued⁶³ and that the criteria are interpreted and applied in a narrow way.

h. Family reunification (and family formation): Family formation is not limited.

The Asylum Act contains provisions on family procedures. Art. 34 Asylum Act stipulates that if a family member as defined by Art. 2 § 22 Asylum Act⁶⁴ of a person who has been granted asylum or subsidiary protection files an application for international protection, such application shall be deemed to be an application for the granting of the same protection. Art. 34 (3) regulates the granting of subsidiary status to family members. The authority has to grant subsidiary protection where the family member is present in the country, unless it is possible to continue an existing family life, within the meaning of Art. 8 ECHR in another country. Applications for family reunification can also be filed with diplomatic authorities. The family member is allowed to enter unless it may be assumed, on the basis of certain facts that the conditions required for the granting of subsidiary protection status no longer exist or will no longer exist in three months.

⁶³ ECRE, *The Impact of the EU Qualification Directive in International Protection*, p.254.

⁶⁴ Art. 2 recital 22 Asylum Act: "Family member" means the parent of an under-age child, the spouse or the, at the time of filing the application, under-age unmarried child of an asylum-seeker or of an alien to whom subsidiary protection status or asylum status has been granted, insofar as in case of spouses the family already existed in the country of origin".

For persons whose deportation has been stayed family reunification is not provided.

For persons who have a restricted settlement permit family reunification has to be granted upon application and upon the fulfilment of the criteria specified in the Residence Act. For persons with an unrestricted settlement permit family reunification is possible.

i. Building up rights for) naturalisation: The Austrian Nationality Act⁶⁵ regulates the granting of nationality. The acquisition of nationality requires a certain duration of legal residence in Austria and the fulfilment of a number of criteria. There are no special provisions for persons under subsidiary protection or another status. Persons who have been granted asylum may acquire nationality after only six years of residence (usually minimum ten years).

4. Statistics on Protection:⁶⁶

Statistics are available on the website of the Ministry of the Interior. Other sources where data are available are the UNHCR website and EUROSTAT. The most comprehensive data however are available on the website of the Ministry of the Interior. Up to 2005 statistics were published as asylum and aliens statistics, from 2006 onwards two separated statistics are available. The statistics also show decisions under the provisions of previous Asylum and Aliens Acts as the transition rules stipulated that previous norms applied for certain cases.

Asylum statistics do not show the age of a person for the types of status granted. There are figures available on the gender of the persons who applied for asylum, but not on decisions. Statistics however show the numbers of applications of unaccompanied minors. Statistics covering the Aliens Act include figures showing the age of persons (age categories: up to 18, 19 to 30, 31 to 40, 41 to 50, 51 to 60, over 60). Statistics also comprise data covering so called family procedures.

Detailed figures showing the nationality of the persons who were granted a status are annexed to the present report.

Asylum applications resp. applications for international protection since 2004:⁶⁷

⁶⁵ Federal Law concerning the Austrian Nationality (Nationality Act 1985), FLG No. 311/1985, amended by FLG No. 386/1986, FLG No. 685/1988, FLG No. 521/1993, FLG No. 505/1994, FLG I No. 109/1997, FLG I No. 30/1998, FLG I No. 123/1998, FLG I No. 124/1998, FLG I No. 37/2006, FLG I No. 2/2008 and FLG I No. 4/2008.

⁶⁶ Comprehensive statistics are contained in Annex 2.

⁶⁷

See http://www.bmi.gv.at/cms/BMI_AsyIwesen/statistik/files/Entwicklung_der_Zahl_der_AsyIwerber_von_1999_2008.pdf.

Year	Applications for asylum resp. applications for international protection ⁶⁸
2004	24.634
2005	22.461
2006	13.349
2007	11.921
2008	12.841
2009	8.857 (January to July)

Status granted other than asylum status:

Non refoulement decisions and subsidiary protection:

Year	<i>Non refoulement</i> decisions according to Art. 8 Asylum Act 2005, subsidiary protection: The first figure shows decisions under the original version of the Asylum Act 1997. The second figure shows the decision under the 2003 amended version of the Asylum Act.
2004	1994 (925 and 69)
2005	772 ((271 and 501)
2006	909
2007	1638
2008	1628
2009 (January to end of July)	826

In 2004 the main countries of origin of persons who were granted subsidiary protection were Russian Federation (348), Iraq (251), Afghanistan (158), Serbia and Montenegro (62). 4 stateless persons were granted subsidiary protection. In 2005 the main countries of origin were again Iraq (56), Afghanistan (164) and the Russian Federation (216), Serbia and Montenegro (91). 13 stateless persons were granted subsidiary protection. In 2006 the main countries were Afghanistan (231), Iraq 44, Russian Federation 200, Serbia, 149. 16 stateless persons were granted subsidiary protection. 2007: Afghanistan 331, Armenia: 72, Georgia: 92, Iraq: 158, Russia: 459, Serbia: 348, Somalia: 21, stateless: 22. 2008: Afghanistan 387, Armenia: 95, Georgia: 22, Iraq: 175, Kosovo: 31, Russia: 476, Serbia: 140, Somalia: 53, stateless: 29. 2009

⁶⁸ From 2006 onwards applications are defined as applications for international protection.

January to the end of July): Afghanistan 377, Armenia: 26, Georgia: 30, Iraq: 73, Kosovo: 47, Russia: 208, Serbia: 45, Somalia: 43, stateless: 12.

There are no data available *for non refoulement* decisions according to the Aliens Act and the Aliens' Police Act.

Year	Humanitarian residence permits The first figure shows the number of valid permits, not the number of permits issued in 2004. The second number shows the permits issued.
2004	477 + 175 (This figure shows still valid permits under a previous version of the Aliens Act.)
2005	365 + 3 254 total (118 male, 136 female)
2006	290 95 and 62 family members
2007	272 Total (188 male 84, female 104) and 134 for family members
2008	7 + 75 for family members Total 90 (55 male, 35 female)
2009	200

The Aliens Act 1997 also provided the possibility to grant humanitarian settlement permits. Statistics show permits granted. They also show the gender of the persons. Data up to 2006 (inclusive) are divided into permits valid for humanitarian reasons in general and for reasons of protection of the right to family life.

Year	Settlement permits Humanitarian reasons (general)	Family life
2004	Total 196 (119 male, 77 female)	Total 667 (339 male, 328 female)
2005	Total 112 (57 male, 55 female)	Total 478 (229 male, 249 female)
2006	Total 5 (3 male, 2 female)	Total 61 (23 male, 38 female)
2007	Total 93 issued in 2007 93 total (57 male, 35 female) for family members 150 total (72 male, 78 female)	see left
2008	Issued in 2008 7 and 75 for family members	see left
2009	44 (23 male, 21 female)	see left

5. National opinions on the granting of protection

Austrian asylum legislation and legislation relating to aliens has been totally revised three times since 1991/1992 and in between there were a number of amendments. These changes mainly intended to adapt the situation to changing migration and refugee situations. Since 1992, when for the first time a kind of Immigration Act (Residence Act) was set in force there has been the intention to separate asylum and aliens legislation. Though this intention could not be upheld the intention still is to protect persons in need of protection and to have a separate channel of controlled immigration. Recent developments again show that a strict separation is not possible.

The Asylum Act transposes the provisions of the Qualification Directive and provides for a status of subsidiary protection. The formal transposition as well as the practice interpreting the refugee definition and the definition of subsidiary protection contained in Art. 15 Qualification Directive in national practice and jurisprudence is mainly seen to be in line with international and community law requirements. There is however so far nor jurisprudence which takes the recent jurisprudence of the ECJ into account. Though Austrian jurisprudence constantly refers to the *Elagfaji* judgment⁶⁹ of the ECJ, it is still not possible to draw the conclusion how far the authorities follow the line that they have to grant subsidiary protection in cases where in a situation of armed conflict a civilian would face a real risk of being subject to a threat according to Art. 15 Qualification Directive solely on account of his or her presence on the territory of the country or region.

In its *Elagfaji* judgment⁷⁰ the Court ruled that Art. 15(c) of the Qualification Directive must be interpreted as meaning that: “the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances”. Furthermore the Court held that “the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level

⁶⁹ ECJ, C-465/07, Judgment (Grand Chamber), *M. Elgafaji, N. Elgafaji v Staatssecretaris van Justitie*, 17.2.2009.

⁷⁰ ECJ, C-465/07, Judgment (Grand Chamber), *M. Elgafaji, N. Elgafaji v Staatssecretaris van Justitie*, 17.2.2009.

that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.”

It is required in Austrian literature that the asylum authorities follow this jurisprudence.⁷¹ As a consequence it is suggested that the asylum authorities do have to interpret Art. 8 Asylum Act 2005 in accordance with the judgment. If there is an armed conflict where the intensity of the threat is overwhelming subsidiary protection has to be granted even if there is no individual threat. As mentioned recent Austrian jurisprudence constantly refers to the judgment, it is not possible to draw the conclusion that the authorities grant subsidiary protection in cases where in a situation of armed conflict a civilian would face a real risk of being subject to a threat according to Art. 15 Qualification Directive solely on account of his or her presence on the territory of the country or region.

The fact that a subsidiary status was created which transposes the provisions of the Qualification Directive is to be seen as national measure which relates to asylum policy. The subsidiary status implements international and Community Law obligations and also aims to guarantee that persons are not *refouled* contrary to international obligations. The obligation not to *refouler* persons as stipulated by the Aliens' Police Act is also seen as a measure to implement international obligations.

The recent amendments to the Asylum Act, the Residence Act and the Aliens' Police Act defining a status for persons who may not be deported because their deportation would lead to an unjustified infringement of their right to private or family life is to be seen as a measure of general migration policy.

As the ECHR has the rank of Constitutional Law in Austria and has self executing character its provision and thus also Art. 8 ECHR have to be respected in all proceedings, the protection of private and family life is also explicitly contained in the Asylum Act, the Residence Act and the Aliens' Police Act. The recent amendments in 2009 aim to further specify and determine the criteria for the decision whether an infringement of the right is justified under Art. 8 (2) ECHR. Recent literature however also expresses some criticism.

The amendments defining the criteria for the protection of family or private life have been caused by jurisprudence, especially by decisions of the Constitutional Court. There were however also several cases where long time applicants for international protection resp. long

⁷¹ Maier, G., Kein zwingender Nachweis der spezifischen individuellen Betroffenheit erforderlich, Besprechung von EuGH 17. 2. 2009, C-465/07, *Elgafaji*, FABL 2/2009, available at <http://www.fabl.at/>.

time asylum seekers should leave the country or should be deported or where parts of the family should be deported where others were allowed to stay. Some of these cases were extensively reported in the media and caused reactions by NGOs and lawyers.

In UNHCR's position paper on the 2009 amendment to the Asylum Act (regulating that where there would be an unjustified infringement with the right to private or family life deportation is inadmissible) criticism is expressed that no provisions on unaccompanied minors were included, which take the best interests of the child into account.⁷²

6. Conclusions:

The Austrian report shows that apart from asylum other types of status were created over time. These developments were partly caused by the necessity to fulfil international obligations resp. to establish procedures to fulfil these obligations and to explicitly regulate, that national authorities have to respect these obligations (esp. *non refoulement* obligations and the obligation to protect family and private life).

A subsidiary status was already defined in the Asylum Act 1997 in its amended version from 2003 and was adapted in the Asylum Act 2005. This type of status was created in order to transpose the provisions of the Qualification Directive. The original version was limited to a decision about the admissibility of deportation to the country of origin. The amended version also includes serious threats to the life or person of civilians by reason of indiscriminate violence in situations of international or internal conflicts.

Persons who fall under another type of status do have less rights than persons granted asylum. This goes e.g. for the right to reside in Austria, which is only granted for a limited period (prolongation however is possible) and also for the possibility to obtain travel documents.

Other types of status include a kind of tolerated stay according to the Aliens' Police Act, the possibility to issue residence permits for special protection needs and also to issue residence permits for reasons to protect family or private life. These types of status or tolerated stay were created to define other types of status for persons who should be allowed to stay in Austria but who do not qualify as refugees or as persons who fall under the subsidiary protection definition. Especially the recently established provisions on a right to residence to protect private or family life show that there has been a demand to create other types of status. Aus-

⁷² UNHCR, "Stellungnahme zum Entwurf eines Bundesgesetzes, mit dem u. a. das Asylgesetz 2005 und das Fremdenpolizeigesetz 2005 geändert werden" available at http://www.unhcr.at/fileadmin/unhcr_data/pdfs/rechtsinformationen/5_Oesterreich/2_A-Stellungnahmen/UNHCR_Novelle09.pdf.

trian legislation and practice thus also reflects the trend identified on a European level. Whereas the stay of persons who could not be sent back but did not have a possibility to get a residence permit can already be described as a kind of tolerated stay, a recent Government Bill for an amendment to the Aliens' Police Act suggests a kind of status called "Duldung" for these persons.

The recent amendments defining the criteria which have to be taken into account when deciding about the admissibility of deportation and about the granting of residence permits were developed from national and international jurisprudence there applicability in concrete cases seems to be quite difficult and might lead to diverse interpretations.

The developments also show that national legislation is adapted in order not only to follow obligations to guarantee *non refoulement* or to protect from unjustified interferences with the right to private or family life but also to grant residence rights to these persons and to develop certain types of status. Thus the recent developments show a certain tendency to depart from a solely tolerated stay and to grant residence rights to the persons concerned.

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ANNEX 1, Sources:

Legislation:

Austrian laws:

Federal Act concerning the Granting of Asylum (Asylum Act 2005 – Asylgesetz 2005), FLG I No. 100/2005, amended by FLG I No. 75/2007, FLG I No. 2/2008, FLG I No. 4/2008 and FLG I No. 29/2009.

Federal Act Concerning the Asylum Court (Asylum Court Act – AsylGHG), FLG I No. 4/2008, amended by FLG I No. 147/2008.

Aliens' Police Act, Federal Act on the Exercise of Aliens' Police, the Issue of Documents for Aliens and the Granting of Entry Permits (Aliens' Police Act 2005 – Fremdenpolizeigesetz 2005), FLG I No. 100/2005 as amended by FLG I No. 157/2005, FLG I No. 4/2008 and FLG I No. 29/2009.

Federal Act concerning Settlement and Residence in Austria (Residence Act – Niederlassungs- und Aufenthaltsgesetz), FLG I No. 100/2005 as amended by FLG No. 31/2006, by FLG I No. 4/2008, FLG I No. 103/2008 and by FLG I No. 29/2009.

Federal Law Regulating Basic Welfare Support of Asylum-Seekers in Admission Procedures and of Certain Other Aliens (Federal Government Basic Welfare Support Act 2005 – GVG-B 2005), FLG No. 405/1991, amended by FLG No. 314/1994, FLG I No. 134/2000, FLG I No. 98/2001, FLG I No. 101/2003, FLG I No. 32/2004, FLG I No. 100/2005, FLG I No. 2/2008 and FLG I No. 4/2008, available at <http://www.unhcr.at/information-in-english/austrian-asylum-legislation/basic-welfare-support.html>.

General Administrative Procedures Act 1991 (Allgemeines Verwaltungsverfahrensgesetz AVG), FLG No. 51/1991 as amended by FLG I No. 117/2002.

Basic Welfare Support Agreement - Art. 15a of the Federal Constitution, FLG I No. 80/2004. available at www.unhcr.org/refworld/docid/4416ab914.html.

Federal Law concerning the Austrian Nationality (Nationality Act 1985), FLG No. 311/1985, amended by FLG No. 386/1986, FLG No. 685/1988, FLG No. 521/1993, FLG No. 505/1994, FLG I No. 109/1997, FLG I No. 30/1998, FLG I No. 123/1998, FLG I No. 124/1998, FLG I No. 37/2006, FLG I No. 2/2008 and FLG I No. 4/2008.

Aliens' Employment Act, FLG No. 218/1975 in the version of FLG I No. 91/2009.

Previous: Federal Law concerning the Granting of Asylum (1997 Asylum Act – Asylgesetz 1997), FLG I No. 76/1997, amended by FLG I No. 106/1998, FLG I No. 110/1998, FLG I No. 4/1999, FLG I No. 41/1999, FLG I No. 196/1999, FLG I No. 82/2001, FLG I No. 126/2002, FLG I No. 101/2003, FLG I No. 105/2003 and FLG I No. 129/2004.

Community Law and Public International Law Treaties:

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001, p. 12.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who other-

wise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, p. 12.

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. OJ L 16, 23.1.2004, p. 44.

Convention relating to the Status of Refugees, 28.7.1951, 189 UNTS 150, herein after Geneva Refugee Convention. For Austria Federal Law Gazette (FLG) of the Republic of Austria 55/1955.

Bibliography:

Abermann, J. Niederlassung und Aufenthalt für die Praxis, Vienna 2007.

Brandl, U./Feik., R., Country report Austria: Comparative legal study on subsidiary protection in the fifteen EU member states, Analytical Framework of the Domestic Law of the EU Member States, in: *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention? Under the Supervision of Daphné Bouteillet-Paquet*, Brussels 2002, p. 267-309.

Commission staff working document accompanying the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Policy plan on asylum : an integrated approach to protection across the EU - Impact Assessment (COM(2008) 360 final), available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC2029:EN:NOT>.

ECRE/ICMPD, Preliminary studies on categorial protection policy, available on [http://www.acvz.com/publicaties/20090507%20Rapporten%20ECRE%20ICMPD%20\(samen%20gestelde%20versie%20per%20land%20gerangschikt\)%20EN.pdf](http://www.acvz.com/publicaties/20090507%20Rapporten%20ECRE%20ICMPD%20(samen%20gestelde%20versie%20per%20land%20gerangschikt)%20EN.pdf).

ECRE, The Impact of the EU Qualification Directive in International Protection, p.254.

Feißl J./Holzschuster, I., Asylgesetz 2005: Kommentar, Vienna 2006.

Frank, M./Anerinhof, P./Filzwieser, C., AsylG 2005, 3rd ed., Vienna/Graz 2006.

Klingenbrunner, A., Die Fremdenrechtsnovelle 2009, *migralex* 7, 2009, p. 38-44.

Maier, G., Kein zwingender Nachweis der spezifischen individuellen Betroffenheit erforderlich, Besprechung von EuGH 17. 2. 2009, C-465/07, *Elgafaji*, *FABL* 2/2009, available at <http://www.fabl.at/>.

Marth, T., Das „Bleiberecht“ im Asylverfahren, *migralex* 7, 2009, p. 45-50.

Muzak, G./Pinter C., Fremden und Asylrecht, looseleaf, 11. Suppl. Vienna 2009.

Putzer, J./Rohrböck, J., Asylrecht, Vienna 2007.

Study on the Asylum Single Procedure against the Background of a Common European Asylum System and the Goal of a Common Asylum Procedure, available at http://ec.europa.eu/justice_home/doc_centre/asylum/studies/docs/study_gesamtbericht_2002.pdf, Country report Austria, p. 155-172. The study was carried out under the supervision of Prof. *Kay Hailbronner*

Vogl, M./Taucher, W./Bruckner, R./Marth, T./Doskozil, H.-P., Fremdenrecht, Vienna/Graz 2008.

Jurisprudence:

Austria:

Federal Constitutional Court B 1150/07, 29.9.2007, available at http://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_09929071_07B01150_2_00/JFT_09929071_07B01150_2_00.pdf.

Federal Constitutional Court, B 328/07, 29.9.2007, available at http://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_09929071_07B00328_2_01/JFR_09929071_07B00328_2_01.pdf.

Federal Constitutional Court G246/07, 27.6.2008, available at http://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_09919373_07G00246_01/JFR_09919373_07G00246_01.pdf.

ECJ:

ECJ, C-465/07, Judgment (Grand Chamber), *M. Elgafaji, N. Elgafaji v Staatssecretaris van Justitie*, 17.2.2009.

ANNEX 2, Statistics

Statistics on subsidiary protection are included in the text. This goes for the main countries of origin since 2004 and for the numbers of persons who have been granted subsidiary protection. There are so far no data available on the residence permits granted according to Art. 43 or Art. 44 Residence Act as amended in 2009.

As far as data are available about humanitarian residence permits issued on the basis of previous versions of the Residence Act or Aliens Act these data are also included in the text.

Data on the granting of asylum are provided in this Annex.

Decisions in the asylum procedure:

In 2004 and 2005 statistics showed positive and negative decisions of the first and second instance and the legal basis, e.g. if a decision was taken on the granting or denial of asylum according to Art. 7 Asylum Act 1977 or 2003. Since 2006 statistics only show positive and negative decisions and do not indicate the legal basis. Therefore no precise picture can be given how many decisions were taken on the merits in asylum proceedings. The following table shows all kinds of positive and negative decisions from 2006 onwards.

	2004	2005	2006	2007	2008	2009
Positive (first instance)	1.255 ⁷³ 349 ⁷⁴ Total 1.604	503 2.107 Total 2.610	2314	2500	2.219	1.238
Positive Federal Asylum Senate/ Asylum Court	1056 2 Total: 1058	845 165 Total: 1.010	1749	2697	1.534	850
Negative	2.592 350 Total: 2942	1.994 1.176 Total: 3.170	3216	2612	2.281	2.113
Negative Federal Asylum	531	422	2651	4.034	5.687	6.150

⁷³ The first figure shows decisions based on the Asylum Act 1997. The second figure shows decisions based on the Asylum Act 1997 as amended 2003. This goes for 2004 and 2005.

⁷⁴ See above.

Senate/ Asylum Court	43 Total: 574	256 Total: 678				
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Applications of unaccompanied minors:

2004	2005	2006	2007	2008	2009 (incl. August)
1212	881	414	582	874	730

Main countries of origin, where positive decisions were rendered:

2004		2005		2006	
Afghanistan	261	Afghanistan	135	Afghanistan	475
Iran	295	Iraq	53	Armenia	100
Russian Federation	1.233	Iran	107	Iran	211
Serbia and Montenegro	177	Russian Federation	658	Russian Federation	2.090
Turkey	53	Serbia and Montenegro	114	Serbia	318
				Somalia	103
				Turkey	113

2007		2008		2009 (incl. August)	
Afghanistan	497	Afghanistan	486	Afghanistan	377
Iraq	215	Armenia	105	Iraq	108
Iran	318	Iraq	240	Russian Federation	881
Russian Federation	2.633	Iran	198	Somalia	103
Serbia	240	Russian Federation	1.557		
Somalia	191	Serbia	117		
Turkey	195	Turkey	246		

Source Ministry of the Interior, available on http://www.bmi.gv.at/cms/BMI_AsyIwesen/statistik/start.aspx.