



International Organization for Migration (IOM)



THE ESTABLISHMENT OF IDENTITY IN THE AUSTRIAN MIGRATION PROCESS



Rainer Lukits

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EUROPEAN MIGRATION NETWORK

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

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

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

The main task of the NCPs is to implement the work programme of the EMN including the drafting of the annual policy report and topic-specific studies, answering Ad Hoc Queries launched by other NCPs or the European Commission, carrying out visibility activities and networking in several forums. Furthermore, the NCPs in each country set up national networks consisting of organizations, institutions and individuals working in the field of migration and asylum.

In general, the NCPs do not conduct primary research but collect and analyse existing data and information. Exceptions might occur when these are not sufficient. EMN studies are elaborated in accordance with common study templates in order to achieve comparable results within the EU and

Norway. Since the comparability of the results is frequently challenging, the EMN has produced a glossary, which ensures the application of similar definitions and terminology in all national reports.

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

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1. INTRODUCTION

1.1 Topic of study

This study concerns establishing the identities of third-country nationals in procedures under aliens law.

Procedures for granting residence permits and visas are discussed in the study, as are procedures for returning migrants. Procedures for granting residence permits include in particular procedures involving international protection (“asylum procedures”), procedures for granting residence titles for exceptional (“humanitarian”) reasons under the Asylum Act and procedures for granting residence titles under the Settlement and Residence Act.

Procedures for returning migrants under Austrian law include in particular the procedure for issuing a return decision and removal.¹ The voluntary return of third-country nationals is not a topic of this study.

Among the other topics not discussed in this study are specifically procedures for granting citizenship or procedures for resettlement or for humanitarian admission (see Kratzmann, 2016:15–16; Art. 3a Asylum Act).

This study is focused only on establishing the identities of “third-country nationals”. As referred to in this study, third-country nationals are persons who are not citizens of the European Union and who do not enjoy the European Union right to freedom of movement (see EMN, 2014:283; EMN, 2012:62; section 1.6). Hence EEA citizens and Swiss citizens are not covered in this study (cf. Hailbronner/Thym, 2016:68).²

1.2 Importance of the topic

Establishment of identity plays an important role in procedures under aliens law, especially in asylum procedures. Despite its great relevance in practice, little published research exists on this topic. An example to be mentioned here is the 2012 focussed study by the European Migration Network (EMN), although that study is limited to the establishment of

1 See Art. 46 and 52 Aliens Police Act.

2 Cf. Art. 2 para 1 subpara 6 Settlement and Residence Act; Art. 2 para 1 subpara 20b Asylum Act.

identity in asylum and return procedures (Reyhani, 2012). In 2016 the National Contact Point Austria in the EMN held an international conference on the topic of “Establishment of Identity in the Migration Process”.³ The speakers’ contributions were also published in the form of conference proceedings (AT EMN NCP, 2016). Those contributions nonetheless deal only with selected topics related to the establishment of identity in procedures under aliens law. It would therefore seem that there is no comprehensive and current published research on the establishment of identity in procedures under aliens law. Another aspect is that, in Austria, the legal situation relating to the establishment of identity is complex (refer to section 1.3). This paper is correspondingly intended to close the existing information gap through a relatively comprehensive presentation of how identity is established in migration procedures.

In the current political situation in Austria, establishing the identities of migrants is a highly relevant topic (AT EMN NCP, 2016:6, 7). Establishing the identities of applicants plays an important role in each and every procedure under aliens law (see chapter 9). Yet, compared generally, establishing a person’s identity is most difficult in asylum procedures since asylum seekers very frequently do not carry any reliable identity documents with them or do not show them to the authorities. The same applies to establishing the age of asylum seekers. The establishment of identity in an asylum procedure is also made more difficult by the fact that it is usually not possible to obtain any information from the claimed country of origin (refer to section 4.1).

1.3 The legal framework in Austria

Establishing the identities of third-country nationals in procedures under aliens law is mainly governed by acts of national law and by legal acts of the European Union.

In regard to cases of issuing visas for Austria, most of the provisions on the establishment of identity are specified in the Aliens Police Act.⁴ This

3 See National Contact Point Austria in the European Migration Network, *National EMN Conference Austria: “The Establishment of Identity in the Migration Process”*, available at www.emn.at/wp-content/uploads/2017/01/EMN-Tagungsbericht_web.pdf (accessed on 10 July 2017).

4 See in particular Art. 11, 21, 34 Aliens Police Act.

act also specifies that certain rules of the EU Visa Code are applied accordingly (Art. 11 para 1 Aliens Police Act).

The provisions governing the procedure for issuing ordinary residence titles are specified for the most part in the Settlement and Residence Act. Related provisions are additionally contained in a corresponding implementing regulation issued by the Federal Minister of the Interior (Regulation on the Implementation of the Settlement and Residence Act).⁵ The provisions of the Aliens Police Act pertaining to granting visas also play a determining role where such a visa must be issued as a prerequisite for obtaining a residence title.⁶ The conditions of the Asylum Act under which family members can be reunified with persons entitled to international protection⁷ are specified primarily in Art. 35 Asylum Act. On the other hand, the provisions on the required granting of a visa in such cases are mostly contained in the Aliens Police Act.⁸ The rules for the establishment of identity in asylum procedures are mainly defined in the Asylum Act⁹ and in the Federal Office for Immigration and Asylum Procedures Act.¹⁰ Legal provisions on the protection of personal data in Austria are specified in particular in the Austrian Data Protection Act.¹¹ Other relevant legal provisions are contained in particular in the Eurodac Regulation,¹² the SIS II Regulation¹³ and the VIS Regulation.¹⁴

5 See in particular Art. 7 Regulation on the Implementation of the Settlement and Residence Act.

6 See in particular Art. 20 para 1 subpara 5 Aliens Police Act; Art. 25 Aliens Police Act.

7 I.e. persons granted asylum and beneficiaries of subsidiary protection.

8 See in particular Art. 20 para 1 subpara 6 Aliens Police Act, Art. 26 Aliens Police Act.

9 See in particular Art. 15 and Art. 19 para 1 Asylum Act.

10 See for instance Art. 24–25 Federal Office for Immigration and Asylum Procedures Act; Art. 36 Federal Office for Immigration and Asylum Procedures Act.

11 Federal Act concerning the Protection of Personal Data 2000, FLG I No. 165/1999 in the version of FLG I No. 83/2013.

12 Regulation (EC) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation) OJ 2013 L 180/31.

13 Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2006 L 381/4.

14 Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ 2008 L 218/60; in particular Art. 21–22.

Various decrees by the Federal Ministry of the Interior and specifically the general “Regulations for the Identification Service” (*Vorschrift für den Erkennungsdienst*) relate to the establishment of identity. The latter also contains a separate chapter on processing asylum seekers and aliens for identification purposes.¹⁵ Decrees are also issued on special topics related to the establishment of identity, such as guidelines on fingerprinting.¹⁶ Another decree by the Federal Ministry of the Interior relates for example to age estimation in asylum procedures (Lukits/Lukits, 2011).¹⁷ These decrees are not available to the public, however.

1.4 Current changes

The 2015 Act Amending the Aliens Law was instrumental in introducing changes in the area of establishing the identities of migrants.¹⁸ Subsequently, where a complaint is lodged against an asylum decision rejecting the asylum application as unfounded, the suspensory effect of the complaint can be withdrawn where the individual concerned refuses to comply with the requirement to allow fingerprints to be taken (Art. 18 para 1 subpara 7 Federal Office for Immigration and Asylum Procedures Act).¹⁹ This provision was introduced to implement a corresponding provision of the Asylum Procedures Directive.²⁰ As part of the 2015 Act Amending the Aliens Law, a provision was also introduced requiring any necessary investigation into the identities of asylum seekers to be carried out without undue delay at the beginning of the admission procedure

15 BMI-KP1000/0676-II/BK/6.1/2016; interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

16 Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, 5 July 2017.

17 Federal Ministry of the Interior, decree on age assessment; BMI-BA1000/1067-BAA/2009; BMI-BA1210/0183-BFA-B/I/1/2016.

18 Act Amending the Aliens Law 2015. FLG I No. 70/2015, available at www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2015_I_70/BGBLA_2015_I_70.pdf (accessed on 3 May 2017).

19 Art. 2 para 22 Act Amending the Aliens Law 2015.

20 Act Amending the Aliens Law 2015, Government Proposal, Explanatory Notes, p. 6, available at www.parlament.gv.at/PAKT/VHG/XXV/I/I_00582/fname_401629.pdf (accessed on 10 July 2017).

(Art. 29 para 6 subpara 5 Asylum Act).²¹ If an alien is to be deported, that person is explicitly obliged to cooperate to the necessary extent in actions required to obtain a replacement travel document (Art. 46 para 2 Aliens Police Act).²² This specifically includes cooperation to establish the person's identity.²³ This obligation can also be enforced with the aid of coercive penalties (refer to Lukits, 2016a:33). The reason given for this amendment was that difficulties in obtaining replacement travel documents represent the most common tangible barrier to deportation in practice.²⁴

In 2016 a legal option was also introduced of querying the Central Aliens Register using only photos.²⁵ The main grounds cited for the proposed legislation was the specific challenge involved in establishing the identities of aliens with no travel document or visa. It was claimed that, regarding aliens not holding a document, fingerprints and photos are most often the only reliable information on these people that is available to the authorities. It was therefore argued that photos should be able to be employed in addition to fingerprints when querying the Central Aliens Register.²⁶ This option has not yet been implemented, however.²⁷

The increase in asylum applications in recent years has not had any significant impact on the methods used to establish identity.²⁸ Yet, for

21 Art. 3 para 33 Act Amending the Aliens Law 2015.

22 Art. 4 para 23 Act Amending the Aliens Law 2015.

23 Act Amending the Aliens Law 2015, Government Proposal, Explanatory Notes, p. 18, available at www.parlament.gv.at/PAKT/VHG/XXV/II/I_00582/fname_401629.pdf (accessed on 3 May 2017).

24 Ibid.

25 Federal Act Amending the Border Control Act and the Federal Office for Immigration and Asylum Procedures Act, FLG I No. 25/2016, Art. 2, available at www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2016_I_25/BGBLA_2016_I_25.pdf (accessed on 16 June 2017).

26 Federal Act Amending the Border Control Act and the Federal Office for Immigration and Asylum Procedures Act, Legislative Proposal, Reasoning, p. 3, available at www.parlament.gv.at/PAKT/VHG/XXV/A/A_01531/fname_508417.pdf (accessed on 16 June 2017).

27 Interviews with Sabina Schlegelhofer, Johann Putz and Reinhard Schmid, Federal Ministry of the Interior, 5 July 2017.

28 Written query response by the Municipal Department 35 of the City of Vienna, 12 June 2017; Interviews with Stephanie Theuer, Sabina Schlegelhofer, Johann Putz and Reinhard Schmid, Federal Ministry of the Interior, 5 July 2017.

example, query processes have become more highly automated, particularly in response to the large quantity of applications.²⁹

The establishment of the identities of migrants and more specifically asylum seekers is also a subject of public debate. Recently, Austrian media frequently reported plans to introduce heavier penalties for asylum seekers who conceal their identity.³⁰ No amendment to this effect is planned for the 2017 Act Amending the Aliens Law, however.

1.5 The concept of establishing identity

The study template defines identity in general as a set of characteristics related to a person which makes it possible to individualize that person.

29 Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

30 See for instance Salzburger Nachrichten, *Fortschritte bei Fremdenrechtspaket erzielt*, 29 November 2016, available at www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/fortschritte-bei-fremdenrechtspaket-erzielt-224178; Salzburger Nachrichten, *Fremdenpaket bringt mehr Strafen und mehr Aushilfs-Jobs*, 24 December 2016, available at www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/fremdenpaket-bringt-mehr-strafen-und-mehr-aushilfs-jobs-227303; Salzburger Nachrichten *Neues Fremdenrechtspaket: Strengere Strafen für Flüchtlinge*, 7 December 2017, available at www.salzburg.com/nachrichten/amp/sn/artikel/neues-fremdenrechtspaket-strengere-strafen-fuer-fluechtlinge-225041 (accessed on 11 July 2017); Heute Online, *Wie wenn jemand im Garten steht“: Innenminister Sobotka findet Geldstrafen für Flüchtlinge gut*, 6 December 2016, available at www.heute.at/1377506; Wallner sieht Verschärfungen im Fremdenrecht positiv, 6 December 2016, available at <http://diepresse.com/home/politik/innenpolitik/5130054/Wallner-sieht-Verschaeerfungen-im-Fremdenrecht-positiv>; Die Presse, *Weitere Verschärfungen im Asylrecht*, 5 December 2016, available at <http://diepresse.com/home/politik/innenpolitik/5129838/Weitere-Verschaeerfungen-im-Asylrecht>; Der Kurier *Regierung bei Fremdenrechtspaket einig – Keine Obergrenze im Gesetz*, 5 December 2016, available at <https://kurier.at/politik/inland/regierung-bei-fremdenrechtspaket-einig-keine-obergrenze-im-gesetz/234.302.575>; Die Presse *Regierung einigt sich auf härtere Sanktionen für Asylwerber*, 5 December 2016, available at <http://diepresse.com/home/politik/innenpolitik/5129615/Regierung-einigt-sich-auf-haertere-Sanktionen-fuer-Asylwerber>; Der Standard, *Regierung bei Fremdenrechtspaket einig: Keine Obergrenze im Gesetz*, 5 December 2016, available at <http://derstandard.at/2000048811446/Regierung-bei-Fremdenrechtspaket-einig-Keine-Obergrenze-im-Gesetz> (accessed on 16 May 2017).

Such characteristics include the person's name, date and place of birth, nationality, origin and biometric characteristics.

The term "establishment of identity" is defined in Austrian law within the context of different provisions.

For the purpose of conducting asylum procedures, return procedures, visa procedures and procedures for granting residence titles, no special legal definition of the concept of the establishment of identity exists. Yet, as defined in Art. 34 para 2 of the Aliens Police Act and Art. 36 para 2 of the Federal Office for Immigration and Asylum Procedures Act, the establishment of identity by officials of the public security service refers to "recording a person's names, date of birth, nationality and address of residence". The Security Police Act contains a similar definition, without, however, referring to nationality.³¹

The Code of Criminal Procedure includes a more generalized definition of the establishment of identity. There, the establishment of identity refers to determining and establishing data that unmistakably characterizes a certain person (Art. 117 subpara 1 Code of Criminal Procedure).

For the purpose of return, if the destination country is likely to accept a document referred to as a return travel certificate (or *laissez-passer*), the Federal Office for Immigration and Asylum can issue such a document to third-country nationals without a travel document. The return travel certificate must always indicate the name, date of birth, height and nationality of the third-country national (Art. 97 Aliens Police Act). Where it would not be effective to issue a return travel certificate, the authorities of the particular third country must issue a travel document.³² In this case the necessary identity data is determined based on the law of the particular country of origin (cf. Reyhani, 2012:18).

The Settlement and Residence Act requires that residence titles specifically include the person's family name, first name, date of birth and a photograph; such a title is valid as an identity document. The template set forth in the Regulation on the Implementation of the Settlement and Residence Act also requires the person's place of birth, nationality and

31 Art. 35 para 2 Security Police Act.

32 Art. 46 para 2 Aliens Police Act.

gender to be indicated in the residence title.³³ This gives rise to the identity data that have to be determined in order to issue a residence title under the Settlement and Residence Act.

For procedures under aliens law, on the other hand, the identity data required to be determined are not uniformly defined. Yet, the individual's name and date of birth are apparently central elements in establishing identity.

1.6 Definitions

The study is based on the following definitions taken in particular from the Asylum and Migration Glossary of the European Migration Network³⁴ and from Austrian legislation:³⁵

Persons granted asylum: Foreigners who have been granted asylum status (Art. 3 para 4 Asylum Act; see below under “Asylum status”).

Asylum procedure: Procedure for extending international protection (see below under “International protection”).

Third-country nationals: Persons who are not citizens of the European Union within the meaning of Art. 20 para 1 of the Treaty on the Functioning of the European Union (TFEU) and who do not enjoy the European Union right to freedom of movement as defined in Art. 2 para 5 of the Schengen Borders Code (EMN, 2014:283).

Family reunification: The (lawful) entry into and residence in Austria by family members of a third-country national residing lawfully in the country in order to preserve the family unit, regardless of whether the family relationship arose before or after the resident's entry (Art. 2 (d) Family Reunification Directive).

33 Art. 8 para 2 Regulation Settlement and Residence Act; Art. 1 Regulation on the Implementation of the Settlement and Residence Act; Annex A Regulation on the Implementation of the Settlement and Residence Act.

34 See National Contact Point Austria in the European Migration Network, IOM Country Office for Austria, Glossary, available at www.emn.at/de/publikationen/glossar (accessed on 10 July 2017).

35 See Federal Chancellery, Legal Information System, available at www.ris.bka.gv.at (accessed on 10 July 2017).

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

Identity: A set of characteristics related to a person which make it possible to individualize that person.

International protection: Protection that encompasses refugee status and subsidiary protection status (EMN, 2014:168; cf. Art. 2 para 1 subpara 13 Asylum Act; see below under “Asylum status” and “Subsidiary protection status”).

Beneficiaries of subsidiary protection: Foreigners who have been granted subsidiary protection status (Art. 8 para 4 Asylum Act; see below under “Subsidiary protection status”).

Subsidiary protection: The protection given to a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to their country of origin, or in the case of a stateless person to their country of former habitual residence, would face a real risk of suffering serious harm as defined in Art. 15 of 2011/95/EU, and to whom Art. 17 para 1 and 2 of Directive 2011/95/EU do not apply, and is unable or, owing to such risk, unwilling to avail themselves of the protection of that country (EMN, 2014:278).

Asylum status: The initially time-limited and later permanent right to enter into and reside in Austria which Austria grants to foreigners based on the provisions of the Asylum Act (Art. 2 para 1 subpara 15 Asylum Act).

Subsidiary protection status: The temporary and renewable right to enter into and reside in Austria which Austria grants to foreigners based on the provisions of the Asylum Act (Art. 2 para 1 subpara 16 Asylum Act).

Visa: The authorization or decision of a Member State required for transit or entry for an intended stay in that Member State or in several Member States (EMN, 2014:297). This includes Schengen visas issued pursuant to the Visa Code and national category D visas (Art. 2 para 1 Aliens Police Act; AT EMN NCP, 2015:44).

1.7 Methodology

The study follows a common study template with a predefined set of questions developed by the European Migration Network (EMN), in order to facilitate comparability of the findings across all European countries participating in the study. The respective national reports and a synthesis report will be published on the EMN website.³⁶

The main sources for the study are: provisions of Austrian and EU law, rulings of Austrian and European courts, and publications including legal literature, previous EMN studies, statistics, media reports and various internet sources. In addition, supplementary information gathered in interviews with experts in the fields of the establishment of identity and aliens law was used in the study. The interviews were conducted with the following individuals: Johann Putz (Federal Ministry of the Interior, Department III/4, Residence, Civil Status and Citizenship Affairs), Sabina Schlegelhofer (Federal Ministry of the Interior, Department III/4, Residence, Civil Status and Citizenship Affairs), Reinhard Schmid (Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service) and Stephanie Theuer (Federal Ministry of the Interior, Unit III/5/c, Resettlement, Return and International Affairs).

Written responses to queries related to the study were received from: Municipal Department 35 of the City of Vienna (MA35), Unit II/3/b of the Federal Ministry of the Interior (Passport and Visa Affairs of Aliens), and the Federal Ministry for Europe, Integration and Foreign Affairs. Responses to queries were also received by phone from the Federal Ministry of the Interior, the Federal Ministry for Europe, Integration and Foreign Affairs, MA35, and the non-governmental organization Caritas Salzburg.

Each of the experts responding to queries has consented to the information being quoted from the responses.

The list of sources in the Annex provides an overview of the sources of information used. The study was finalized in July 2017 and thus includes only information available up to that time.

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

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

The study was compiled by Rainer Lukits (Legal Associate, IOM Country Office for Austria) under the supervision of Julia Rutz (Head of Research and Migration Law, IOM Country Office for Austria) and Marian Benbow Pfisterer (Head, IOM Country Office for Austria) in close cooperation with the Federal Ministry of the Interior. The author also wishes to thank Saskia Heilemann (formerly Koppenberg, Research Associate, IOM Country Office for Austria) for providing major assistance with statistical issues and for editing the draft study. Many thanks also to Raphaela Haberler, who represented the author during parental leave, for her research. The author also wishes to express his thanks to the individuals and organizations listed above for sharing their knowledge and experience by responding to queries.

This EMN study is primarily aimed at decision-makers and practitioners at national and European levels, as well as at academic researchers and the general public.³⁷

Following the introduction, the second chapter provides an overview of how identity is established during the procedures that are discussed. Chapter 3 introduces the authorities playing a major role in the establishment of identity in Austria. The following chapter describes the major challenges for the establishment of identity in the various procedures. Chapters 5 to 8 discuss the different methods used to establish identity. Chapter 9 describes how identity is established in procedures under aliens law and what impact the establishment of identity has on how a procedure is decided. The final chapter provides a summary of the report.

The annex provides a list of translations and abbreviations in English and German and a list of sources.

37 See Art. 1 and Art. 9 para 2 Decision of the Council of 14 May 2008 establishing a European Migration Network (2008/381/EC), OJ 2008 L 131/7–12.

2. OVERVIEW OF THE VARIOUS PROCEDURES

The aim of this chapter is to provide an overview of how identity is established in the various procedures under aliens law.

2.1 Asylum procedures

An individual filing an application for international protection is to be questioned by representatives of the public security service (as a rule police officers)³⁸ (Art. 42 para 1 Federal Office for Immigration and Asylum Procedures Act). This initial questioning is specifically aimed at determining the identity of the individual concerned (Art. 19 para 1 Asylum Act). With applicants aged 14 and over, the representatives of the public security service are required to process the individual for identification purposes.³⁹ This specifically includes taking fingerprints and producing images (Art. 64 Security Police Act). Fingerprints are transmitted to the Eurodac database and are compared with existing fingerprints.⁴⁰ For establishing the identities of applicants in asylum procedures, automated fingerprint queries in the Visa Information System (VIS) are also performed. At the same time, fingerprints are compared with the national fingerprint database including fingerprints of asylum seekers, irregularly staying foreigners, criminal suspects and fingerprints taken from crime scenes.⁴¹ Asylum seekers are obliged to immediately surrender to the authorities any available identity documents (Art. 15 para 1 subpara 5 Asylum Act). The representatives of the public security service are also authorized to search asylum seekers' apparel and any receptacles carried by them and to seize identity documents

38 See Art. 5 para 2 Security Polic Act.

39 Art. 42 para 1 and Art. 24 para 1 subpara 1 Federal Office for Immigration and Asylum Procedures Act.

40 See Art. 9 Eurodac Regulation.

41 Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017; Art. 21 and 22 VIS Regulation.

(Art. 38 and 39 Federal Office for Immigration and Asylum Procedures Act). Identity documents presented or seized when the application is made are examined by trained document examiners with the competent regional police directorate. In the event of suspicion of forgery, the document is forwarded to Criminal Intelligence Service Austria for more detailed evaluation. Any identity documents presented later during the asylum procedure are initially examined by staff members of the Federal Office for Immigration and Asylum. Where this general examination leads to suspicion of forgery, the document is forwarded first to the regional police directorate and later possibly to Criminal Intelligence Service Austria (AT EMN NCP, 2016:34–35). Document examination devices (document scanners) are also used to examine passports. Such scanners specifically read out passport data and, based on alphanumeric information, perform queries in certain databases.⁴²

2.2 Return procedures

The representatives of the public security service⁴³ are permitted to establish the identity of a person where, based on certain facts, that person must be assumed to be residing in Austria illegally, or where there is an urgent suspicion that aliens not authorized to reside in Austria are at that person's place of residence. Identification here entails recording the person's name, date of birth, nationality and address of residence (Art. 34 Aliens Police Act; Art. 35 Security Police Act).

Where an illegal resident alien above the age of 14 is apprehended, the regional police directorate responsible for the case is permitted to process the individual for identification purposes (Art. 99 para 1 subpara 3 Aliens Police Act; see section 2.1). A query in the Visa Information System (VIS) can be performed to identify an illegal resident.⁴⁴

The Federal Office for Immigration and Asylum is normally required to issue a return decision against a third-country national residing illegally in Austria (Art. 52 para 1 subpara 1 Aliens Police Act). Where an application for

42 See Federal Ministry of the Interior, *Falsche Papiere, krumme Dinge*, Öffentliche Sicherheit 9-10/12, p. 6.

43 See Art. 5 para 2 Security Police Act.

44 Art. 20 VIS Regulation.

asylum or for humanitarian protection is refused, a return decision is usually issued simultaneously (Art. 52 para 2 and 3 Aliens Police Act). The Federal Office for Immigration and Asylum is authorized to process an alien for identification purposes if a return decision has been issued for that person.⁴⁵ This procedure can be performed by representatives of the public security service on behalf of the Federal Office for Immigration and Asylum.⁴⁶ Where a return decision is issued against an alien, if necessary, the Federal Office for Immigration and Asylum is to commission representatives of the public security service with the removal of that person (Art. 46 para 1 Aliens Police Act).

If the person concerned has no travel document, a replacement travel document issued by the person's country of origin is frequently required.⁴⁷ To issue such a document, it is also necessary for the authorities of the individual's country of origin to verify the person's identity. Such cases give rise in particular to appointments for questioning at embassies and to identification missions by foreign authorities.⁴⁸

2.3 Schengen visas

Applications for Schengen visas normally have to be made at the competent representation authority (embassy or consulate) outside Austria.⁴⁹ When applying for a Schengen visa, applicants are required to submit with the application a valid travel document and a suitable photograph (Art. 10 and 12 Visa Code). To examine documents, the representation authority consults with document examiners of the Federal Ministry of the Interior who are available locally, with document examiners from other countries (such as Germany) or with trusted lawyers.⁵⁰

45 Art. 24 para 1 subpara 6 Federal Office for Immigration and Asylum Procedures Act.

46 Art. 24 para 2 Federal Office for Immigration and Asylum Procedures Act.

47 See Art. 46 para 2 Aliens Police Act.

48 Cf. Art. 46 para 2a Aliens Police Act; interview with Stephanie Theuer, Federal Ministry of the Interior, Department III/5/c, Resettlement, Return and International Affairs, 5 July 2017; cf. Act Amending the Aliens Law 2015, Government Proposal, Explanatory Notes, p. 18, available at www.parlament.gv.at/PAKT/VHG/XXV/II/00582/fname_401629.pdf (accessed on 6 July 2017).

49 Art. 7 para 1 in conjunction with Art. 2 para 5 subpara 3 Aliens Police Act.

50 Query response via telephone by Gernot Wiedner, Federal Ministry for Europe, Integration and Foreign Affairs, Unit IV.2.a, Passport and Visa Affairs, 30 June 2017.

A photo of the person concerned is made when the initial application is submitted. Fingerprints are also taken of applicants 12 years of age and above (Art. 13 Visa Code). If the application is admissible, the representation authority runs a query in the Visa Information System (VIS) and enters the specified data in the system.⁵¹ The representation authority also checks to ensure that the travel document submitted is not false, counterfeit or forged (Art. 21 para 3 (a) Visa Code). The representation authority also checks whether an alert has been issued in the Schengen Information System (SIS) to prevent the individual concerned from entering the Schengen area.⁵²

2.4 National visas

Applications for national visas normally have to be made at the competent representation authority (embassy or consulate) outside Austria.⁵³ Under certain conditions, national visas can also be issued at airports by the competent regional police directorate.⁵⁴ National visas (category D visas) can be issued for purposes such as gainful employment, as a prerequisite for a residence title or within the framework of family reunification as specified in the Asylum Act.⁵⁵ The normal conditions for issuing national visas also include a photo, a valid travel document and fingerprinting.⁵⁶

2.5 Residence titles under the Settlement and Residence Act

Residence titles can be issued under the Settlement and Residence Act in particular for the purpose of gainful employment or education (school pupils and students) or for family reasons (see Art. 8 para 1 Settlement and Residence Act; Art. 63–64 Settlement and Residence Act; Buschek-Chauvel/Chahrokh, 2015, chapter 2; Lukits, 2016b).

51 Art. 19 para 2 and Art. 21 para 2 Visa Code; Art. 8 and Art. 15 VIS Regulation.

52 Art. 92 para 1 Convention implementing the Schengen Agreement; Article 21 para 3 (c) Visa Code.

53 Art. 7 Aliens Police Act.

54 Art. 5 para 2 and 3 Aliens Police Act; Art. 24b Aliens Police Act.

55 See Art. 20 para 1 Aliens Police Act.

56 Art. 11 para 1; Art. 99 para 4 in conjunction with Art. 2 para 5 subpara 4 Aliens Police Act.

The initial application for a residence title under the Settlement and Residence Act normally has to be filed with an authority representing Austria in another country.⁵⁷ The applicant is usually required to appear personally before the authority, where the individual is processed for identification purposes (Art. 19 para 1 and para 4 Settlement and Residence Act; Art. 35 Settlement and Residence Act). The application must be accompanied by a valid travel document, a photograph and a birth certificate or equivalent document (Art. 7 para 1 subpara 1–3 Regulation on the Implementation of the Settlement and Residence Act). An exemption from this requirement can be requested, however (Art. 19 para 8 Settlement and Residence Act; see section 5.1). Where the authority representing Austria has doubts as to the authenticity or correctness of an identity document, the authority can also directly order document verification.⁵⁸ Normally the representation authority forwards the application to the competent settlement authority. The latter has the main responsibility for verifying the application and thus for establishing the applicant’s identity as well (Art. 22 Settlement and Residence Act).

When establishing identity, representation authorities and settlement authorities can consult resources including the Central Aliens Register (Art. 27 Federal Office for Immigration and Asylum Procedures Act). The authorities may request certification of the submitted documents.⁵⁹ The authority in Austria can also consult the authority representing Austria in the other country. The latter can take steps such as having documents examined by “trusted lawyers”. Alongside these options, Austria cooperates in practice with representation authorities in other countries.⁶⁰ Only in cases of doubt is the applicant’s identity established with the aid of a fingerprint comparison.⁶¹ In such cases, Criminal Intelligence Service

57 See Art. 3 para 3, Art. 8 para. 1 subpara 10, Art. 21, Art. 64 Settlement and Residence Act.

58 Written query response by Municipal Department 35 of the City of Vienna, 12 June 2017.

59 See Art. 6 para 4 Regulation on the Implementation of the Settlement and Residence Act; Interview with Johann Putz and Sabina Schlegelhofer, Federal Ministry of the Interior, Department III/4, Residence, Civil Status and Citizenship Affairs, 5 July 2017.

60 Written query response by Municipal Department 35 of the City of Vienna, 12 June 2017.

61 Written query response by Municipal Department 35 of the City of Vienna, 12 June 2017; Interview with Johann Putz and Sabina Schlegelhofer, Federal Ministry of the Interior, Department III/4, Residence, Civil Status and Citizenship Affairs, 5 July 2017.

Austria is requested to assist.⁶² The settlement authority notifies the representation authority of approval of the application (Art. 23 para 2 Settlement and Residence Act). If the applicant no longer has a valid travel document, or if the representation authority has grounds for doubting the individual's identity or the authenticity of the documents submitted, the representation authority can refuse to issue a visa. The latter is nonetheless required to notify the settlement authority, giving reasons for the refusal (Art. 25 Aliens Police Act). With the issue of a residence title, the title holder's fingerprints are recorded in the usual case.⁶³

2.6 Family reunification under the Asylum Act

Whereas the Settlement and Residence Act provides for migration of family members to join holders of residence titles under the Settlement and Residence Act and persons granted asylum in Austria, the Asylum Act allows for family reunification with persons granted asylum and beneficiaries of subsidiary protection (see Lukits 2016b:7–8; Art. 35 Asylum Act).

A specific questionnaire is required to be completed when applying for family reunification under the Asylum Act. The questionnaire includes items on the identities of the individuals concerned (Art. 35 para 3 Asylum Act; Annex 1 Regulation on the Implementation of the Asylum Act). The authority representing Austria in another country is required to forward the application immediately to the Federal Office for Immigration and Asylum (Art. 35 para 3 Asylum Act). The latter has the main responsibility for verifying the identities of the individuals concerned (Art. 35 para 4 Asylum Act). In practice, the representation authority notifies the Federal Office for Immigration and Asylum of any doubts relating to identity claims by applicants.⁶⁴ Where an applicant is initially unable to furnish evidence proving a claimed family relationship, that person can request a

62 Interview with Johann Putz and Sabina Schlegelhofer, Federal Ministry of the Interior, Department III/4, Residence, Civil Status and Citizenship Affairs, 5 July 2017; Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

63 See Art. 1 Regulation on the Implementation of the Settlement and Residence Act.

64 Interview with Stephanie Theuer, Federal Ministry of the Interior, Department III/5/c, Resettlement, Return and International Affairs, 5 July 2017.

DNA analysis at their own expense (Art. 12a Aliens Police Act; Lukits, 2016b:42).

2.7 Humanitarian residence titles

Residence titles for exceptional circumstances (humanitarian residence titles) can be issued on request or ex officio by the Federal Office for Immigration and Asylum (see AT EMN NCP, 2015:76–79).⁶⁵ As in asylum procedures and in procedures for issuing a return decision, the provisions of the Federal Office for Immigration and Asylum Procedures Act apply in principle (Art. 1 Federal Office for Immigration and Asylum Procedures Act). It is also possible to have a voluntary DNA analysis performed in procedures for a humanitarian residence title (Art. 13 para 3 Federal Office for Immigration and Asylum Procedures Act). Individuals are normally required to submit applications for a humanitarian residence title in person to the Federal Office for Immigration and Asylum.⁶⁶ In procedures for issuing a humanitarian residence title, individuals aged 14 and over can be processed for identification purposes (see section 2.1).⁶⁷ The application can be rejected if the applicant fails to cooperate to the extent necessary to allow their identity to be established.⁶⁸ The Regulation on the Implementation of the Asylum Act specifies that humanitarian residence titles can normally be issued only after a valid travel document is presented (see section 5.1 for details).

65 See Art. 54–61 Asylum Act.

66 Art. 58 para 5 Federal Office for Immigration and Asylum Procedures Act.

67 Art. 24 para 1 subpara 3 and Art. 2 Federal Office for Immigration and Asylum Procedures Act.

68 Art. 58 para 11 Federal Office for Immigration and Asylum Procedures Act.

3. INSTITUTIONAL FRAMEWORK

3.1 Competent authorities

Generally, the authorities responsible for establishing the identity of an individual are the same as those competent in the main procedure (see Art. 37 General Administrative Procedures Act). This does not, however, preclude the option of the competent authority requesting the assistance of another authority (see in particular Art. 22 Federal Constitutional Act).

The Federal Office for Immigration and Asylum is primarily responsible for establishing the identities of individuals in first instance asylum and return procedures.⁶⁹ The Federal Administrative Court is responsible in the second instance (Art. 7 para 1 Federal Office for Immigration and Asylum Procedures Act). Rulings by the Federal Administrative Court can be appealed before the Administrative High Court and the Constitutional Court.⁷⁰

In procedures for issuing residence titles under the Settlement and Residence Act, the governor of the particular province has the main responsibility. Governors can, however, issue a regulation authorizing the district administrative authorities to take decisions on their behalf in all or in specified cases (Art. 3 para 1 Settlement and Residence Act). Residence titles for family reasons⁷¹ and residence titles for the purpose of education⁷² or gainful employment are among those issued under the Settlement and Residence Act.⁷³ The authority representing Austria in the particular country is responsible for accepting applications submitted outside Austria (Art. 3 para 3 Settlement and Residence Act). That authority is charged with taking steps to ensure that the application is correct and complete and with forwarding it to the particular provincial governor (Art. 22 Settlement and Residence Act). The administrative court of the particular province rules in

69 See Art. 3 para 2 and Art. 24 para 1 Federal Office for Immigration and Asylum Procedures Act; Art. 46 para 2 Aliens Police Act.

70 Art. 133 and Art. 144 Federal Constitutional Act.

71 See in particular Art. 46 and Art. 47 Settlement and Residence Act.

72 See Art. 63 and 64 Settlement and Residence Act.

73 See in particular Art. 41 Settlement and Residence Act.

the second instance on complaints lodged against decisions by the provincial governor (Art. 3 para 2 Settlement and Residence Act).

The representation authorities (embassies or consulates) are generally responsible in the first instance for issuing visas (Art. 7 Aliens Police Act). Yet, under certain conditions, national visas can also be issued at certain airports by the competent regional police directorate.⁷⁴ Usually, an application for a national visa also has to be made in cases when family members wish to be reunified under the Asylum Act with persons granted asylum or beneficiaries of subsidiary protection (see Lukits, 2016b:40).⁷⁵ The Federal Administrative Court rules on such cases in the second instance (Art. 9 para 3 Aliens Police Act). Rulings by the Federal Administrative Court can in turn be appealed before the Administrative High Court or the Constitutional Court.⁷⁶

3.2 Changes in recent years

Since 1 January 2014 the newly established Federal Office for Immigration and Asylum has been responsible in the first instance especially for conducting asylum procedures, return procedures and procedures for a humanitarian residence title (cf. Reyhani, 2012:7, 15).⁷⁷ Since 1 January 2014, the Federal Administrative Court, another newly established body, has been responsible for second-instance decisions in such cases (cf. Reyhani, 2012:7).⁷⁸ Conducting such procedures additionally entails establishing the identities of the individuals concerned, where this aspect might be relevant in the specific case.⁷⁹

74 Art. 5 para 2 and 3 Aliens Police Act; Art. 24b Aliens Police Act; Art. 1 Regulation on the Implementation of the Aliens Police Act.

75 See Art. 35 Asylum Act; Art. 26 Aliens Police Act.

76 Art. 133 and Art. 144 Federal Constitutional Act.

77 See Art. 3 para 2; Art. 56 para 1 Federal Office for Immigration and Asylum Procedures Act; Art. 3 and Art. 8 para 1 Act Establishing the Federal Office for Immigration and Asylum.

78 See in particular Art. 7 para 1 Federal Office for Immigration and Asylum Procedures Act; Art. 27 para 1 Federal Administrative Court Act.

79 See for instance Art. 37 General Administrative Procedures Act; *Hengstschläger/Leeb*, General Administrative Procedures Act, Art. 56, para 41 ff.

The aim in setting up the Federal Office for Immigration and Asylum was specifically to pull together responsibilities in areas related to aliens law, as a means of achieving synergy effects and in order to be able to respond more expeditiously and efficiently to increasing migration flows.⁸⁰ The Federal Administrative Court was established as part of general measures to introduce a two-tier system of administrative justice. This reform was intended in particular to relieve the burden on the Administrative High Court, as well as to fulfil the specifications for legal protection set forth in the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights.⁸¹

3.3 Central support institutions

In terms of central institutions providing support in establishing the identities of individuals, mention is made in particular of Criminal Intelligence Service Austria and criminal intelligence service in the provinces of Austria. These institutions are consulted especially for the verification of identity documents (cf. AT EMN NCP, 2016:34–35; Reyhani, 2012:16).⁸² In each province, the criminal intelligence service is part of the province's regional police directorate.⁸³ Criminal Intelligence Service Austria, in contrast, is part of the Federal Ministry of the Interior.⁸⁴

80 Aliens Authorities Restructuring Act, Government Proposal, Explanatory Notes, p. 1, 3 and 5, available at www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01803/fname_255385.pdf (accessed on 19 May 2017).

81 Act Amending the System of Administrative Courts 2012, Government Proposal, Explanatory Notes, p. 1 and 3; available at www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01618/fname_238643.pdf (accessed on 19 May 2017).

82 Criminal Intelligence Service Austria, *Sicherheit 2016*, p. 48, available at www.bmi.gv.at/cms/BK/publikationen/krim_statistik/2016/Web_Sicherheit_2016.pdf (accessed on 19 June 2017); Federal Ministry of the Interior, *Erkennen neuer Fälschungstrends*, Öffentliche Sicherheit 1-2/09, p. 77; Federal Administrative Court, 6 February 2017, W230 2128874-1; 30 December 2016, W215 1419469-1; 8 November 2016, L506 2122178-1; 12 December 2016, L504 2120697-1; 12 November 2016, W220 2139785-1; 17 August 2016, W149 1416847-1.

83 See for instance Administrative High Court, 24 January 2017, Ra 2015/01/0133; interview with Stephanie Theuer, Sabina Schlegelhofer and Johann Putz, Federal Ministry of the Interior, 5 July 2017.

84 Art. 1 Act on the Criminal Intelligence Service Austria and Art. 6 para 1 Security Police Act.

Criminal Intelligence Service Austria played a major role in developing the system referred to as the Document Reporting Line (*Dokumentenmeldeschiene*). Among other things, this computer application provides an overview of the places in Austria where forged or falsified documents were discovered as well as their current whereabouts.⁸⁵

Criminal Intelligence Service Austria also uses an electronic document information system referred to as Argus. The information managed in this system includes alerts indicating recent forgeries and the features characterising them.⁸⁶ Images of authentic identity documents are also displayed for the purposes of comparison.⁸⁷

Finally, Criminal Intelligence Service Austria also makes use of the European information systems FADO and PRADO.⁸⁸ False and Authentic Documents Online (FADO) contains images of authentic as well as forged and falsified documents, along with information on techniques used in forgery and verification.⁸⁹ The Public Register of Authentic Travel and Identity Documents Online (PRADO) contains publicly accessible information on authentic travel and identity documents.⁹⁰ Criminal Intelligence Service Austria also uses EDISON, an electronic document information system with images and descriptions of genuine documents issued by various countries.⁹¹

85 See Federal Ministry of the Interior, *Falsche Papiere, krumme Dinge*, Öffentliche Sicherheit 9-10/12, p. 10; Federal Ministry of the Interior, *Erkennen neuer Fälschungstrends*, Öffentliche Sicherheit 12/09, p. 77.

86 Federal Ministry of the Interior, *Falsche Papiere, krumme Dinge*, Öffentliche Sicherheit 9-10/12, p. 10.

87 Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

88 Ibid.

89 Joint Action 98/700/JI of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the setting up of a European Image Archiving System (FADO), OJ 1998 L 333/4.

90 Federal Ministry of the Interior, *Falsche Papiere, krumme Dinge*, Öffentliche Sicherheit 9-10/12, p. 8; General Secretariat of the Council, About PRADO; verfügbar auf www.consilium.europa.eu/prado/en/prado-contacts/about-prado.pdf (accessed on 19 May 2017).

91 Query response via telephone by Johann Fuchsluger, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.2.3, Documents and Handwritings, 7 July 2017; Edison, available at www.edisontd.net (accessed on 7 July 2017).

Criminal Intelligence Service Austria also holds workshops on the establishment of identity, in particular for staff members of the Federal Office for Immigration and Asylum, the Federal Ministry of the Interior and criminal intelligence services in the provinces.⁹²

Criminal Intelligence Service Austria is additionally involved in developing new personal identification techniques. Current work is centred in particular on setting up an automated facial recognition system. In addition, Criminal Intelligence Service Austria prepares decrees related to the establishment of identity, to be implemented by subordinate authorities.⁹³

Central Identification Service (Sub-department 6.1) is a unit within Criminal Intelligence Service Austria. This unit is responsible for managing national collections of biometric data and biometric databases. The unit also plays a role in areas such as setting up personal identification databases.⁹⁴

Criminal Intelligence Service Austria also has a sub-department of forensic science (Sub-department 6.2).⁹⁵ This sub-department includes a unit specialising in documents (Unit 6.2.3 Documents and Handwritings).⁹⁶

92 Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017; Federal Ministry of the Interior, *Büro 6.1 Zentraler Erkennungsdienst*, available at www.bmi.gv.at/cms/BK/wir_ueber_uns/abteilung_6/Buero_6_1.aspx (accessed on 19 June 2017).

93 Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

94 Federal Ministry of the Interior, *Büro 6.1 Zentraler Erkennungsdienst*, available at www.bmi.gv.at/cms/BK/wir_ueber_uns/abteilung_6/Buero_6_1.aspx (accessed on 19 June 2017).

95 Federal Ministry of the Interior, *Büro 6.2 Kriminaltechnik*, available at www.bmi.gv.at/cms/BK/wir_ueber_uns/abteilung_6/Buero_6_2.aspx (accessed on 19 June 2017).

96 Federal Ministry of the Interior, *Referat 6.2.3 Urkunden und Handschriftenuntersuchung*, www.bmi.gv.at/cms/BK/wir_ueber_uns/abteilung_6/Referat_6_2_3.aspx (accessed on 7 July 2017).

4. CHALLENGES

Establishing the identities of third-country nationals in procedures under aliens law frequently presents those involved with challenges, although this is true mainly for asylum procedures and return procedures.

4.1 Asylum procedures

Establishing the identities of migrants especially represents a challenge in asylum procedures (AT EMN NCP, 2016:6–7).

The reason for this is that asylum seekers often do not carry adequate documents with them (cf. AT EMN NCP, 2016:13, 14; Reyhani, 2012:6, 11).⁹⁷ Another reason cited by Criminal Intelligence Service Austria is that forged or falsified documents are frequently presented.⁹⁸ Even authentic documents can sometimes include erroneous information (Reyhani, 2012:10). Determining the individual's age also presents difficulties in many cases (AT EMN NCP, 2016:8; 50–60; Lukits/Lukits, 2013:196–201; Lukits/Lukits, 2011:17–26).⁹⁹ Identification of young asylum seekers is difficult due to the provision of the currently valid Eurodac Regulation allowing fingerprinting of individuals only from the age of 14 and above.¹⁰⁰ This age limit is expected to be lowered to six, however, according to a current proposal by the European Commission for amending the Eurodac Regulation.¹⁰¹ Based on information from the Federal Ministry of the

97 See for instance Die Presse, *Sobotka will Handydaten von Asylwerben auslesen*, 3 March 2017, available at <http://diepresse.com/home/techscience/technews/5177991/Sobotka-will-Handydaten-von-Asylwerben-auslesen> (accessed on 16 May 2017); interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

98 Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

99 Ibid.

100 Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017; see Art. 9 para 1 Eurodac Regulation.

101 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for

Interior, establishing the identities of asylum seekers is also rendered difficult in practice by the fact that it is usually not possible during the asylum procedure to obtain any information from the person's country of origin.¹⁰²

In asylum procedures, the large volume of asylum applications as well as the large number of asylum procedures awaiting decision have led to problems in establishing applicants' identities (cf. AT EMN NCP, 2016:7).¹⁰³ Whereas in 2014 31,338 open asylum procedure cases in the first or second instance were recorded, the number of such cases rose to 79,723 in the year 2015 and 76,409 in the year 2016.¹⁰⁴ According to the asylum statistics kept by the Federal Ministry of the Interior, applications for international protection ("asylum applications") increased from 28,064 in 2014 to 88,340 in 2015.¹⁰⁵ The number of asylum applications thus increased more than three-fold in 2015 compared with 2014. In 2016 the number of asylum applications dropped by more than half to 42,285.¹⁰⁶

These circumstances have resulted in challenges for establishing applicants' identities in asylum procedures. Yet, the methods used to establish identity have not considerably changed as a result (cf. section 1.4).¹⁰⁷

the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), 4.5.2016, COM(2016) 272 final; in particular Art. 10 para 1.

102 Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017; see Art. 33 para 4 and 5 Federal Office for Immigration and Asylum Procedures Act.

103 Interview with Reinhard Schmid, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

104 Federal Ministry of the Interior, *Asylstatistik 2016*, available at www.bmi.gv.at/cms/BMI_Asylwesen/statistik/files/Asyl_Jahresstatistik2016.pdf (accessed on 1 May 2017), p. 7 and p. 55.

105 *Ibid.*, p. 4.

106 *Ibid.*

107 Interview with Stephanie Theuer, Federal Ministry of the Interior, Department III/5/c, Resettlement, Return and International Affairs, 5 July 2017.

4.2 Humanitarian residence titles

In procedures for issuing a humanitarian residence title under the Asylum Act as well, the individuals involved frequently do not have adequate identity documents.¹⁰⁸

4.3 Return procedures

Also in cases of return, establishing the identities of the persons concerned is often fraught with difficulties. Specifically, problems often arise when it comes to procuring the required travel documents (Lukits, 2016a:35; cf. Reyhani, 2012:8–10).¹⁰⁹ Difficulties also arise in this context as a result of the lack of willingness to cooperate shown by certain countries of origin (see also Lukits, 2016a:31, 34).¹¹⁰

There are no accurate statistics on the number of migrants illegally residing in Austria (see Rutz/Chahrokh, 2015:58).¹¹¹ Yet, the number of third-country nationals identified as residing irregularly in Austria increased more than two-fold between 2014 and 2015.¹¹² Thus, the large number of third-country nationals illegally residing in the country might possibly result in challenges for establishing the identities of these individuals.

108 Interview with Reinhard Schmid, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

109 Cf. for instance Act Amending the Aliens Law 2015, Government Proposal, Explanatory Notes, p. 18. available at www.parlament.gv.at/PAKT/VHG/XXV/I/I_00582/fname_401629.pdf (accessed on 19 June 2017).

110 Interview with Reinhard Schmid, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

111 Cf. Der Standard, *Warum nicht abgeschoben wird*, 9 March 2017, available at <http://derstandard.at/2000053764337/Warum-nicht-abgeschoben-wird> (accessed on 16 May 2017).

112 Criminal Intelligence Service Austria, *Schlepperei Österreich Jahresbericht 2015*, available at www.bmi.gv.at/cms/BK/publikationen/krim_statistik/2015/1362016_Web_Schlepperei_2015.pdf (accessed on 8 May 2017), p. 7 and 19; Eurostat, *Aufgefundene Drittstaatenangehörige mit illegalem Aufenthalt*, available at <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do> (accessed on 8 May 2017).

4.4 Residence titles under the Settlement and Residence Act

Establishing an individual's identity in procedures for issuing residence titles under the Settlement and Residence Act scarcely presents difficulties, since applicants usually have adequate identity documents.¹¹³

One example of a problem is the lack of certification required to confirm the authenticity of a document. Documents are regularly certified, specifically through supplementary certification (Überbeglaubigung) of identity documents by the authority representing Austria in another country (embassy or consulate), following certification by the foreign ministry of the particular country. Yet, in the case of certain countries in Africa and Asia lacking an Austrian embassy, the competent embassy does not provide any such supplementary certification.¹¹⁴ Also when applications are made in Austria, the identity documents that applicants bring with them frequently do not bear supplementary certification either. Another difficulty is that certification confirms only the authenticity of the document and not the correctness of its contents.¹¹⁵ After all, certification attests only to the fact that the document does indeed originate from the issuing authority but not that the details contained in it are correct. Even authentic documents can thus contain false information, for instance due to corruption or inadequate verification.¹¹⁶

113 Written query response by Municipal Department 35 of the City of Vienna, 12 June 2017; interview with Johann Putz and Sabina Schlegelhofer, Federal Ministry of the Interior, Department III/4, Residence, Civil Status and Citizenship Affairs, 5 July 2017.

114 Written query response by Municipal Department 35 of the City of Vienna, 12 June 2017; query response via telephone by Sabrina Langer, Municipal Department 35 of the City of Vienna, 13 June 2017.

115 Written query response by Municipal Department 35 of the City of Vienna, 12 June 2017; cf. Art. 3 Act on Consular Certification.

116 Interview with Reinhard Schmid, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

4.5 Visa procedures

The Federal Ministry for Europe, Integration and Foreign Affairs reports no major difficulties associated with establishing the identities of individuals in visa procedures.¹¹⁷ The main underlying reason is clearly that applicants are as a rule required to present adequate identity documents (see section 5.1).

117 Written query response by the Federal Ministry for Europe, Integration and Foreign Affairs, 29 June 2017.

5. ESTABLISHING IDENTITY WITH THE AID OF DOCUMENTS

The following two chapters describe the various methods used in the establishment of identity. A person's identity can be established with database support, through sharing personal data and using other identification methods (see chapters 6–8); in addition to these options, documents play a vital role in establishing the identities of third-country nationals.

5.1 Documents used

The main document used to establish a person's identity is a valid passport.¹¹⁸ Yet, in principle, all documents suited to the establishment of identity can be considered for this purpose (see Art. 46 General Administrative Procedures Act).

Particularly in **asylum procedures**, other documents such as school certificates, personal identity documents, driving licences, citizenship certificates, excerpts from civil registers or UNHCR registration certificates can be used to establish identity (Lukits, 2016b:41; cf. Reyhani, 2012:7, 18).¹¹⁹ In the case of asylum seekers from Afghanistan, a personal document referred to as a “Tazkira” is frequently used.¹²⁰

118 Written query response by Municipal Department 35 of the City of Vienna, 12 June 2017; cf. also *Die Presse*, *Sobotka will Handydaten von Asylwerben auslesen*, 3 March 2017, available at <http://diepresse.com/home/techscience/technews/5177991/Sobotka-will-Handydaten-von-Asylwerben-auslesen> (accessed on 16 May 2017); *Der Kurier*, *Sobotka irritiert mit Sager über Flüchtlinge und Handys*, 5 November 2016, available at <https://kurier.at/politik/inland/sobotka-irritiert-mit-sager-ueber-fluechtlinge-und-handys/229.098.617> (accessed on 24 May 2017); *Die Presse*, *ÖVP: Illegale Einreise als Straftat*, 17 August 2016, available at http://diepresse.com/home/politik/innenpolitik/5070452/OVP_Illegale-Einreise-als-Straftat?_vl_backlink=/home/index.do (accessed on 24 May 2017).

119 See Asylum Court, 28 November 2012, E7 429165-1/2012; Federal Administrative Court, 24 May 2017, L516 2122617-1; 17 May 2017, L515 2152362-1; 3 April 2017, L502 2151598-1; 27 February 2017, W108 2133752-1.

120 Federal Administrative Court, 24 May 2017, W248 2137870-1; 17 May 2017, W148 2132074-1; 17 May 2017, W148 2132070-1.

In **visa procedures**, on the other hand, the identity of the applicant is mainly established with the aid of a valid travel document (especially a passport).¹²¹ By way of exception, Schengen visas can be issued on humanitarian grounds or on grounds of national interest, even if no valid travel document is presented.¹²² The national humanitarian visa can also be issued even in the absence of a valid travel document, in particularly exceptional cases for humanitarian reasons or on grounds of national interest.¹²³

In the procedure for granting a **residence title under the Settlement and Residence Act**, a birth certificate or comparable document plays an important role alongside a valid travel document.¹²⁴ In the exceptional cases listed below, residence titles can be issued even without these documents:

- in the case of an unaccompanied minor, to safeguard the child's best interests;
- to maintain the individual's private and family life in accordance with Art. 8 ECHR;
- where evidence is provided demonstrating that it was not possible or reasonable for the foreigner to procure the documents.¹²⁵

In practice, other documents such as UNHCR registration certificates are used to establish the individual's identity.¹²⁶

The Regulation on the Implementation of the Asylum Act specifies that **humanitarian residence titles** can normally be issued only after a valid travel document is presented. The only exception to this rule specified in the regulation applies to children under the age of six months.¹²⁷ It remains uncertain, however, whether this provision of the regulation is adequately founded in (constitutional) law. Specifically, Art. 54 para 4 Asylum Act only allows for the appearance and content of humanitarian residence titles to

121 See Art. 2 para 4 subpara 5, Art. 11 para 7, Art. 21 para 1 subpara 1, Art. 22 para 3 and Art. 26 Aliens Police Act; Art. 19 para 1, Art. 10 para 3 (b) and Art. 12 Visa Code.

122 Art. 19 para 4 Visa Code.

123 See Art. 11 para 7, Art. 20 para 1 subpara 2 and Art. 22 para 3 Aliens Police Act.

124 Art. 7 para 1 subpara 1 and 2 Regulation on the Implementation of the Settlement and Residence Act.

125 Art. 19 para 8 Settlement and Residence Act.

126 Written query response by Municipal Department 35 of the City of Vienna, 12 June 2017.

127 Art. 8 Regulation on the Implementation of the Asylum Act.

be specified by regulation. Yet, the obligation to present a valid travel document represents a requirement for obtaining a residence title and does not relate to its appearance or content. The authorization to issue implementing regulations as laid down in Art. 18 para 2 of the Federal Constitutional Act is probably not an adequate basis either, since it is only permitted through such regulations to define the details of existing legal arrangements.¹²⁸ A corresponding legal basis apparently does not exist, however.

A wide variety of documents can be used in principle for establishing identity in **return procedures** as well. Successfully obtaining travel documents depends mainly on the requirements of the foreign representation authority in the particular case (cf. Reyhani, 2012:8–9).¹²⁹

5.2 Acceptance of copies

Document copies can also be considered in principle as evidence for establishing an individual's identity (see Art. 46 General Administrative Procedures Act). Depending on the circumstances of the individual case, copies might nonetheless have only limited value as evidence.¹³⁰

In **visa procedures**, in contrast, generally the original of a valid travel document (specifically a passport) is required for presentation.¹³¹ In the procedure for granting a **residence title under the Settlement and Residence Act**, both the original and a copy of a valid travel document and a birth certificate or comparable document have to be presented.¹³²

128 See *Raschauer*, Allgemeines Verwaltungsrecht⁵ (2017) 309–310; *Kahl/Weber*, Allgemeines Verwaltungsrecht⁵ (2015) 233–234; cf. for instance Constitutional Court, 22 September 2016, V26/2016.

129 Act Amending the Aliens Law 2017 Part II, Government Proposal, Explanatory Notes, p. 8, available at www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00311/fname_629377.pdf (accessed on 19 June 2017).

130 See for instance Federal Administrative Court, 24 May 2016, W226 2116379-1; 17 March 2015, L508 1429875-1; see however Administrative High Court, 25 April 2014, 2013/21/0236.

131 Art. 2 para 4 subpara 4 and 5, Art. 11 para 1 and para 7, Art. 21 para 1 subpara 1 Aliens Police Act; Art. 19 para 1, Art. 10 para 3 (b) and Art. 12 Visa Code.

132 Art. 6 para 1 and Art. 7 para 1 subpara 1 and 2 Regulation on the Implementation of the Settlement and Residence Act.

Exceptions can be made, however, to the requirement to present an original document (see section 5.1).¹³³

5.3 Fake documents

The large variety of documents issued throughout the world poses a great challenge. It is correspondingly very difficult to maintain an overview of the documents issued.¹³⁴ What is more, the quality of forged and falsified documents continues to improve, rendering it increasingly difficult to recognize fake documents.¹³⁵ The large volume of documents requiring examination also makes it difficult to scrutinize each document in detail.¹³⁶

In **asylum procedures**, fake documents are frequently identified during examination by a provincial or by the federal criminal intelligence service (cf. AT EMN NCP, 2016:34–35).¹³⁷ In procedures for granting a **residence title under the Settlement and Residence Act**, fake documents are usually identified during the application procedure. However, a presentation of fake documents does not occur often.¹³⁸ In cases involving **visas**, fake documents are most often identified during the application procedure and when documents are inspected on entry at the border.¹³⁹

133 Art. 19 para 8 Settlement and Residence Act.

134 See for instance Federal Ministry of the Interior, *Falsche Papiere, krumme Dinge*, Öffentliche Sicherheit 9-10/12, p. 6 and p. 9.

135 See Federal Ministry of the Interior, *Falsche Papiere, krumme Dinge*, Öffentliche Sicherheit 9-10/12, p. 8; Federal Ministry of the Interior, *Erkennen neuer Fälschungstrends*, Öffentliche Sicherheit 1-2/09, p. 77; Criminal Intelligence Service Austria, Sicherheit 2016, *Kriminalitätsentwicklung in Österreich*, p. 48 and p. 52, available at www.bmi.gv.at/cms/BK/publikationen/krim_statistik/2016/Web_Sicherheit_2016.pdf (accessed on 16 June 2017).

136 See for instance Federal Ministry of the Interior, *Falsche Papiere, krumme Dinge*, Öffentliche Sicherheit 9-10/12, p. 6.

137 Interview with Reinhard Schmid, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

138 Interview with Johann Putz and Sabina Schlegelhofer, Federal Ministry of the Interior, Department III/4, Residence, Civil Status and Citizenship Affairs, 5 July 2017.

139 Written query response by the Federal Ministry of the Interior, Unit II/3/b, Passport and Visa Affairs of Aliens, 27 June 2017.

6. ESTABLISHING IDENTITY WITH DATABASE SUPPORT

6.1 Using databases in procedures under aliens law

Authorities increasingly access national and European databases to establish the identities of third-country nationals. Which databases are accessed depends specifically on the type of procedure (see sections 6.2–6.5). The most important databases used in establishing the identities of migrants are managed by the Federal Ministry of the Interior and the Federal Office for Immigration and Asylum.¹⁴⁰ Another important resource is the Prüm data exchange system, which allows access specifically to biometric databases maintained by the participating states.¹⁴¹

At national level, personal information from procedures under aliens law is collected in the Central Aliens Register, also referred to as the Central Aliens Register Information Network.¹⁴² A legal provision exhaustively enumerates the categories of data that are permitted to be stored in the Central Aliens Register. These include names, date and place of birth, addresses of residence, nationality, alias data, information on documents carried by the individual, information on entry and residence permits, photos, fingerprint data and the results of a medical age assessment (Art. 27 para 1 Federal Office for Immigration and Asylum Procedures Act).

Beyond this, various migration authorities can store additional information relating to procedures – including applications, decisions and

140 Interview with Johann Putz, Federal Ministry of the Interior, Department III/4, Residence, Civil Status and Citizenship Affairs, 5 July 2017; interview with Reinhard Schmid, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

141 Interview with Reinhard Schmid, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017; Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ 2008 L 210/1; Federal Ministry of the Interior, *Eurodac, VIS, ASF und Prüm*, Öffentliche Sicherheit 11-12/15, p. 75.

142 Query response via telephone by Markus Radax, Federal Office for Immigration and Asylum, 11. July 2017.

appeals – in common, centrally maintained procedure files (Art. 28 Federal Office for Immigration and Asylum Procedures Act; Art. 36 Settlement and Residence Act; Art. 104 Aliens Police Act). Such a central procedure file (procedure database) is currently being kept by the Federal Office for Immigration and Asylum. This file contains information including procedure status, when decisions were served on parties or when any complaints were lodged.¹⁴³

Since 1 January 2014, the Integrated Administration of Aliens¹⁴⁴ has been available to the Federal Office for Immigration and Asylum. This combines the Central Register of Aliens and the procedures database maintained by the Federal Office for Immigration and Asylum. However, at a technical level, these two databases are maintained separately.¹⁴⁵ The Integrated Administration of Aliens system is also connected with national and international databases (such as the Schengen Information System).¹⁴⁶ The Integrated Administration of Aliens system replaced the Asylum Seekers Information System and the Aliens Information System. Data from the two previous databases were migrated to the newer system.¹⁴⁷ A secure online portal provides access to the Integrated Administration of Aliens system.¹⁴⁸

As of 1 June 2016, legal provision has been made for photo comparisons using the Central Aliens Register (Art. 27 para 2 Federal Office for Immigration and Asylum Procedures Act).¹⁴⁹ This option has not yet been

143 See Federal Administrative Court, 6 June 2017, L521 2131503-1; 22 March 2017, W241 2148455-1; 26 March 2015, W108 2009594-3.

144 Also referred to as Integrated Aliens Application (*Integrierte Fremdenanwendung*) or Integrated Aliens Law Application (*Integrierte Fremdenrechtliche Anwendung*).

145 Query response via telephone by Markus Radax, Federal Office for Immigration and Asylum, 11 July 2017.

146 Statistik Austria, Bericht zur Fachbeiratssitzung Bevölkerungsstatistik, 24 November 2016, 14/0-B/17; query response via telephone by Markus Radax, Federal Office for Immigration and Asylum, 11 July 2017.

147 Interview with Johann Putz, Federal Ministry of the Interior, Department III/4, Residence, Civil Status and Citizenship Affairs, 5 July 2017; interview with Reinhard Schmid, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

148 Query response via telephone by Markus Radax, Federal Office for Immigration and Asylum, 11 July 2017.

149 Art. 2 Act Amending the Border Control Act and the Federal Office for Immigration and Asylum Procedures Act, FLG I No. 25/2016.

implemented, however.¹⁵⁰ The criminal police are currently developing a face recognition system to be used in automated comparisons. This system could later be employed in areas related to aliens law.¹⁵¹

The authorities involved report that there are no significant types of data useful for identification that are not already being collected or stored.¹⁵² Yet, in the view of Criminal Intelligence Service Austria, the legal restrictions controlling access to existing data are too stringent in some cases. It is also criticized that many Member States still fail to store fingerprints in the Schengen Information System (SIS).¹⁵³

6.2 Asylum procedures

In asylum procedures, the Federal Office for Immigration and Asylum can access the Eurodac database,¹⁵⁴ the Visa Information System (VIS)¹⁵⁵ and the Schengen Information System (SIS).¹⁵⁶ These databases cannot, however, be accessed by the Federal Administrative Court, which is responsible for such procedures in the second instance.¹⁵⁷

150 Interviews with Sabina Schlegelhofer, Johann Putz, Reinhard Schmid, Federal Ministry of the Interior, 5 July 2017.

151 Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017; see Federal Ministry of the Interior, Sachausschreibungen, BMIBH1132/0314III/11/b/2017, available at www.bmi.gv.at/cms/bmi_jobs/_jobs/jobfiles/12104.pdf (accessed on 6 July 2017).

152 Written query response by the Federal Ministry for Europe, Integration and Foreign Affairs, 29 June 2017; written query response by Municipal Department 35 of the City of Vienna, 12 June 2017; interviews with Stephanie Theuer, Sabina Schlegelhofer, Johann Putz and Reinhard Schmid, Federal Ministry of the Interior, 5 July 2017.

153 Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

154 See Art. 9 Eurodac Regulation.

155 Art. 21–22 VIS Regulation.

156 See Art. 27 para 3 SIS II Regulation; European Commission, List of competent authorities which are authorised to search directly the data contained in the second generation Schengen information system pursuant to Article 31(8) of Regulation (EC) No 1987/2006 of the European Parliament and of the Council and Article 46(8) of Council Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen information system, OJ 2016 C 268/1, 89–90; see also Art. 33 para 6 EU Police Cooperation Act.

157 Interview with Stephanie Theuer, Federal Ministry of the Interior, Department III/5/c, Resettlement, Return and International Affairs, 5 July 2017.

The fingerprints of asylum seekers aged 14 and over are compared with sets of fingerprints stored in the central fingerprint database specified in the Eurodac Regulation.¹⁵⁸ Such comparisons are compulsory in principle.¹⁵⁹ As of June 2016, it is also usual in every case to compare fingerprints with those stored in the VIS.¹⁶⁰

As part of the second generation Schengen Information System (SIS II), it is also planned to support the option of performing fingerprint queries of the database.¹⁶¹ This feature is not yet available, however.¹⁶² Test runs are planned for 2018. Austria also expects to take part in these tests.¹⁶³

There is no provision for queries using photos either in the Schengen Information System (SIS) or within the framework of the Eurodac

158 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ 2013 L 180/1 (“Eurodac Regulation”).

159 See Art. 9 Eurodac Regulation.

160 See Art. 21 and 22 VIS Regulation; interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

161 See Art. 20 para 2 (f); Art. 22 and Art. 27 para 3 Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2006 L 381/4; European Commission, List of competent authorities which are authorised to search directly the data contained in the second generation Schengen information system pursuant to Article 31(8) of Regulation (EC) No 1987/2006 of the European Parliament and of the Council and Article 46(8) of Council Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen information system, OJ 2016 C 268/1, 89–90.

162 *Valsamis Mitsilegas/Niovi Vavoula*, The normalisation of surveillance of movement in an era of reinforcing privacy standards, in *Philippe Bourbeau* (ed.), *Handbook on Migration and Security* (Cheltenham 2017), p. 10; Report from the Commission to the European Parliament and the Council, *The availability and readiness of technology to identify a person on the basis of fingerprints held in the second generation Schengen Information System (SIS II)*, 29 February 2016, COM(2016) 93 final; see also Art. 33 para 3 EU Police Cooperation Act.

163 Interview with Stephanie Theuer, Federal Ministry of the Interior, Department III/5/c, Resettlement, Return and International Affairs, 5 July 2017.

Regulation.¹⁶⁴ Nor can the asylum authority compare photos in the VIS (cf. Reyhani, 2012:20).¹⁶⁵ There is no provision for comparisons of iris scan data in European databases.¹⁶⁶

The Federal Office for Immigration and Asylum also has access to national databases. Specific examples include the Integrated Administration of Aliens system,¹⁶⁷ which combines the Central Aliens Register Information Network¹⁶⁸ and the procedures database maintained by the Federal Office for Immigration and Asylum,¹⁶⁹ as well as the Electronic Criminal Information System (EKIS).¹⁷⁰ The Central Aliens Register can also be queried using fingerprints.¹⁷¹ Fingerprints are taken of asylum seekers aged 14 and over.¹⁷² To date, iris scans are not taken and therefore cannot be used for comparisons with national databases.¹⁷³

6.3 Procedure for issuing residence titles under the Settlement and Residence Act

In the procedure for issuing residence titles under the Settlement and Residence Act, the authorities have access to information including alerts

164 See Art. 22 (b) SIS II Regulation; Art. 1 para 2 Eurodac Regulation.

165 See Art. 21 and 22 VIS Regulation.

166 Art. 9–14 VIS Regulation; Art. 1 para 2 Eurodac Regulation; Art. 22 (b) SIS II Regulation.

167 Interview with Stephanie Theuer, Federal Ministry of the Interior, Department III/5/c, Resettlement, Return and International Affairs, 5 July 2017; interview with Johann Putz, Federal Ministry of the Interior, Department III/4, Residence, Civil Status and Citizenship Affairs, 5 July 2017; query response via telephone by Markus Radax, Federal Office for Immigration and Asylum, 11 July 2017.

168 See Art. 27 Federal Office for Immigration and Asylum Procedures Act.

169 Art. 28 Federal Office for Immigration and Asylum Procedures Act; query response via telephone by Markus Radax, Federal Office for Immigration and Asylum, 11 July 2017.

170 See for instance Federal Administrative Court, 5 April 2017, L518 1265779-3; 6 March 2017, L515 2143774-1; 6 March 2017, I408 1428419-1; 12 November 2016, W182 2123669-1.

171 See Art. 27 Federal Office for Immigration and Asylum Procedures Act.

172 Art. 24 para 1 and Art. 42 para 1 Federal Office for Immigration and Asylum Procedures Act.

173 See in particular Art. 27 para 1 Federal Office for Immigration and Asylum Procedures Act; interview with Stephanie Theuer, Federal Ministry of the Interior, Department III/5/c, Resettlement, Return and International Affairs, 5 July 2017.

issued in the SIS to prevent entry.¹⁷⁴ While legal provision has been made for fingerprint queries in the Schengen Information System, this option has not yet been implemented at European level.¹⁷⁵ The authorities administrating the Settlement and Residence Act do not, however, have access to the Eurodac database or the VIS.¹⁷⁶ Art. 19 of the VIS Regulation permits access to the VIS by “authorities competent for carrying out checks within the territory of the Member States as to whether the conditions for entry to, stay or residence on the territory of the Member States are fulfilled”. The wording “competent for carrying out checks” would suggest that this provision relates only to authorities responsible for verification and not to those competent for issuing residence titles. Yet, it is common in practice for the settlement and residence authorities to contact an authority with the necessary authorization in order to obtain relevant information from the VIS.¹⁷⁷

Among the national databases that the settlement and residence authorities can access are the Electronic Criminal Information System (EKIS), the Central Residents Register and the Austrian Social Insurance Database.¹⁷⁸ In cases of doubt, the settlement and residence authorities also have fingerprints compared in national databases.¹⁷⁹

174 Art. 27 para 3 SIS II Regulation.

175 Art. 27 para 3 SIS II Regulation; cf. European Commission, List of competent authorities which are authorised to search directly the data contained in the second generation Schengen information system pursuant to Article 31(8) of Regulation (EC) No 1987/2006 of the European Parliament and of the Council and Article 46(8) of Council Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen information system, OJ 2016 C 268/1, p. 89–90; interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

176 Art. 1 Eurodac Regulation; Art. 18–22 VIS Regulation; interview with Johann Putz and Sabina Schlegelhofer, Federal Ministry of the Interior, Department III/4, Residence, Civil Status and Citizenship Affairs, 5 July 2017.

177 Written query response by Municipal Department 35 of the City of Vienna, 12 June 2017.

178 Written query response by Municipal Department 35 of the City of Vienna, 12 June 2017; Art. 31 para 4 subpara 3 General Social Insurance Act; Data Processing Register, available at <https://dvr.dsb.gv.at/at.gv.bka.dvr.public> (accessed on 13 June 2017).

179 Art. 27 para 1 Federal Office for Immigration and Asylum Procedures Act; written query response by Municipal Department 35 of the City of Vienna, 12 June 2017.

In cases of residence titles under the Settlement and Residence Act, only visual photo comparisons are performed, without the assistance of automation.¹⁸⁰

6.4 Return procedures

The Federal Office for Immigration and Asylum can use any knowledge obtained in a previous asylum procedure without restriction in order to return an individual to another country (cf. Lukits, 2016a:25). After all, this authority is responsible both for asylum procedures and return procedures (see chapter 2). Once the asylum procedure has been completed, however, the Federal Office for Immigration and Asylum cannot directly access the Visa Information System.¹⁸¹ Based on the wording of the VIS Regulation, only the aliens police and not the Federal Office for Immigration and Asylum directly is permitted to perform queries to identify persons residing illegally in the country. Specifically, the VIS Regulation allows only the authorities competent for carrying out checks to perform such queries (cf. section 6.3).¹⁸² A successful query is very useful for identifying an individual, since a valid travel document will have been presented in previous visa procedures.¹⁸³

No direct access to the Eurodac database is possible based on a return procedure.¹⁸⁴ Yet, according to the European Commission's current proposal for a recast Eurodac Regulation, Eurodac data are to be permitted for use in future return procedures.¹⁸⁵

180 Written query response by Municipal Department 35 of the City of Vienna, 12 June 2017.

181 See Art. 18–22 VIS Regulation.

182 Art. 20 VIS Regulation.

183 Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

184 Art. 1 Eurodac Regulation.

185 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), 4.5.2016, COM(2016) 272 final; in particular Art. 1 (b).

Access is nonetheless allowed to the Schengen Information System (SIS) when conducting return procedures. The SIS II Regulation allows access to authorities responsible “for the administration of legislation relating to third-country nationals in the context of the application of the Community *acquis* relating to the movement of persons”.¹⁸⁶ The Community *acquis* relating to the movement of persons includes the Directive on returning illegally staying third-country nationals.¹⁸⁷ Specifically, this Directive was based on the title of the EC Treaty setting out policies related to the free movement of persons.¹⁸⁸ Thus, when returning third-country nationals to another country, the Federal Office for Immigration and Asylum may also query the SIS. The Federal Office for Immigration and Asylum is also listed among the authorities with access to this system, but not in the context of return procedures.¹⁸⁹

Photo queries of the Central Aliens Register can be performed in return procedures as well.¹⁹⁰ The technical features for using this option have not yet been implemented, however.¹⁹¹ No photo comparisons in European databases are possible in return procedures either (cf. Reyhani, 2012:20).¹⁹²

186 Art. 27 para 3 SIS II Regulation.

187 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348/98 (“Return Directive”); cf. recital No. 10 of the SIS II Regulation.

188 Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community, OJ 2002 C 325/1.

189 European Commission, List of competent authorities which are authorised to search directly the data contained in the second generation Schengen information system pursuant to Article 31(8) of Regulation (EC) No 1987/2006 of the European Parliament and of the Council and Article 46(8) of Council Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen information system, OJ 2016 C 268/1.

190 See Art. 3 para 1 Act Establishing the Federal Office for Immigration and Asylum; Art. 27 Federal Office for Immigration and Asylum Procedures Act.

191 Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

192 See Art. 22 (b) SIS II Regulation; Art. 1 para 2 Eurodac Regulation; Art. 18–22 VIS Regulation.

6.5 Visa procedures

Provisions have been made for accessing the VIS and SIS but not Eurodac when conducting visa procedures.¹⁹³ The VIS Regulation permits the “competent visa authority” to consult the VIS in order to examine applications.¹⁹⁴ The question remains whether the VIS can also be consulted in the context of procedures for issuing national visas. The definition of the term “visa” in the VIS Regulation does in fact also cover national visas (category D visas).¹⁹⁵ The authority competent for issuing national visas is, therefore, authorized in such procedures to query the VIS.

The authorities are obligated to use the Visa Information System (VIS) when issuing Schengen visas.¹⁹⁶ A query of the Schengen Information System (SIS) is compulsory before issuing such a visa.¹⁹⁷

Among national databases, visa authorities can specifically access the Central Aliens Register.¹⁹⁸

No automated comparison of photos is performed in visa procedures either (see section 6.2).

193 Art. 15 para 1 VIS Regulation; Art. 27 para 3 SIS II Regulation; Art. 21 para 3 (c) Visa Code; Art. 1 Eurodac Regulation and recital No. 8 of the Eurodac Regulation.

194 Art. 15 para 1 VIS Regulation.

195 Art. 4 para 1 (a) in conjunction with Art. 4 para 3 VIS Regulation.

196 Art. 8 ff VIS Regulation; Art. 21 Abs. 2 Visa Code.

197 Art. 27 para 3 SIS II Regulation; Art. 21 para 3 (c) Visa Code; Art. 35 para 1 (a) Visa Code in conjunction with Art. 5 para 1 (d) Schengen Borders Code.

198 Art. 27 para 1 Federal Office for Immigration and Asylum Procedures Act.

7. SHARING PERSONAL DATA

Another aid in establishing a migrant's identity is the sharing of personal data with the competent migration authority. Personal data refer to details of the individuals concerned that define their identities or allow their identities to be determined.¹⁹⁹ In particular the sharing of personal data among authorities as well as carriers, international organizations or private entities can potentially contribute to establishing an individual's identity.

7.1 National authorities

The sharing of personal data among individual authorities is regulated in Austria through legislation. Thus, no agreements going beyond these legal provisions exist between authorities, according to the Federal Ministry of the Interior.²⁰⁰

For example, the Federal Minister of the Interior, the Federal Office for Immigration and Asylum, the representation authorities, the Federal Administrative Court and the authorities under the Settlement and Residence Act are permitted to process certain types of personal data, in a central register of aliens (Art. 26 and 27 Federal Office for Immigration and Asylum Procedures Act).

The Federal Office for Immigration and Asylum and the Federal Administrative Court are allowed to process the data collected in their procedures in a common, centrally maintained procedure file (Art. 28 Federal Office for Immigration and Asylum Procedures Act). Yet, the Federal Office for Immigration and Asylum currently maintains a procedure file that is separate from the one used by the Federal Administrative Court.²⁰¹ Where absolutely necessary, the Federal Office for Immigration and Asylum

199 Art. 4 para 1 Data Protection Act.

200 Interview with Stephanie Theuer, Sabina Schlegelhofer and Johann Putz, Federal Ministry of the Interior, 5 July 2017.

201 Query response via telephone by Markus Radax, Federal Office for Immigration and Asylum, 11 July 2017.

and the Federal Administrative Court may also examine procedure-related data held by the settlement and residence authorities and the regional police directorates (Art. 28 para 2 Federal Office for Immigration and Asylum Procedures Act).

Data from the Central Aliens Register and the central procedure file is permitted to be shared with certain authorities where necessary to allow those authorities to fulfil their responsibilities. Sharing of data is permissible in other cases only if explicitly authorized by law (Art. 29 para 1 Federal Office for Immigration and Asylum Procedures Act).

The authorities of the Federal State, the provinces and municipalities, the offices of Public Employment Service Austria, the Austrian Integration Fund, and the bodies responsible for social insurance are authorized and obligated on request to share with the Federal Office for Immigration and Asylum any data which they legally possess, if the latter requires such data in order to carry out a measure or procedure (Art. 30 para 4 Federal Office for Immigration and Asylum Procedures Act). This provision does not, however, play any significant role in establishing migrants' identities in asylum and return procedures (see AT EMN NCP, 2016:34).²⁰²

The authorities under the Settlement and Residence Act are also permitted to jointly process and use procedure-related data in a centrally maintained procedure file. No central procedure file has yet been set up for all settlement and residence authorities, however.²⁰³ Where absolutely necessary for fulfilling their responsibilities, settlement and residence authorities can also examine procedure-related data belonging to the Federal Office for Immigration and Asylum, the Federal Administrative Court and the regional police directorates (Art. 36 Settlement and Residence Act). The authorities of the Federal State, the provinces and municipalities, the offices of Public Employment Service Austria, and the bodies responsible for social insurance are authorized and obligated on request to share with the authorities under the Settlement and Residence Act any data which they legally possess, if the latter require such data for a procedure under that Act (Art. 37 para 5 Settlement and Residence Act).

202 Interview with Stephanie Theuer, Federal Ministry of the Interior, Department III/5/c, Resettlement, Return and International Affairs, 5 July 2017.

203 Query response via telephone by Markus Radax, Federal Office for Immigration and Asylum, 11 July 2017.

The regional police directorates and the Federal Minister of the Interior are similarly authorized to maintain a central procedure file. Where absolutely necessary for fulfilling their responsibilities, the regional police directorates can also examine procedure-related data belonging to the settlement and residence authorities, the Federal Office for Immigration and Asylum and the Federal Administrative Court (Art. 104 Aliens Police Act).

7.2 Authorities of other countries

The sharing of personal data with authorities of other countries is mainly regulated by legislation and in international agreements.

Art. 33 para 3 of the Federal Office for Immigration and Asylum Procedures Act permits only such items of a foreigner's personal data to be shared with that individual's country of origin as are required for procuring a replacement travel document. It is generally not permitted to share asylum seekers' personal data with their country of origin. On the other hand, where an asylum seeker's application has been rejected or that individual is not granted de facto protection against deportation, the data required for procuring the necessary entry permissions can be disclosed to the person's country of origin. The fact that an application for international protection has been made must not under any circumstances become known during such a disclosure (Art. 33 para 4 Federal Office for Immigration and Asylum Procedures Act; cf. Lukits, 2016a:25). After all, this circumstance could have detrimental impact on the person concerned or that individual's family.²⁰⁴

Data from the Central Aliens Register can be shared with asylum authorities in other countries where the authority concerned would not otherwise be able to establish the asylum seeker's identity or grant asylum. It must be ensured, however, that the shared data do not become available to the authorities of the country where the asylum seeker or refugee claims to fear persecution (Art. 29 para 1 subpara 7 Federal Office for Immigration and Asylum Procedures Act).

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

The Federal Government is entitled to enter international agreements concerning the sharing of data from the Central Aliens Register and the central procedure file referred to in the Federal Office for Immigration and Asylum Procedures Act. Such agreements may not include the citizens of the signatory states. An additional requirement is for the particular signatory state to have a level of data privacy comparable to that applicable in Austria (Art. 33 para 1 Federal Office for Immigration and Asylum Procedures Act). Such government agreements have been signed with countries including Albania,²⁰⁵ Bulgaria,²⁰⁶ Romania,²⁰⁷ and with Switzerland and Liechtenstein.²⁰⁸

The Federal Government is also entitled to sign international agreements covering the sharing of personal identification data that is collected in procedures for issuing residence titles. It is only permitted to share personal data of foreigners who are not citizens of the signatory states (Art. 38 para 1 Settlement and Residence Act; cf. Abermann/Czech/Kind/Peyrl, 2016:507).

7.3 Carriers

The forwarding of personal data by passenger carriers to authorities is also regulated by law. According to these provisions, carriers transporting passengers to Austria by aircraft or watercraft or as part of regular international bus services are required in some cases to share certain items of information with border control authorities. Such information specifically includes the identity data of the passengers carried (name, date of birth and

205 Agreement between the Austrian Federal Government and the Council of Ministers of the Republic of Albania on mutual data exchange in matters of migration control and in asylum matters, FLG III No. 155/2013.

206 Agreement between the Austrian Federal Government and the Government of the Republic of Bulgaria on mutual data exchange in matters of migration control and in asylum matters, FLG III No. 134/2004.

207 Agreement between the Austrian Federal Government and the Government of Romania on mutual data exchange in matters of migration control and in asylum matters, FLG III No. 11/2005.

208 Agreement between the Austrian Federal Government, the Swiss Federal Council and the Government of the Principality of Liechtenstein on mutual data exchange in asylum matters, FLG III No. 65/2006.

nationality), data from the travel documents and travel data (Art. 111 para 2 and 3 Aliens Police Act).

7.4 International organizations

International organizations can similarly play a role in establishing migrants' identities. Specifically, the International Organization for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR) are relevant in this regard.

Personal data from the Central Aliens Register and the central procedure file are permitted to be shared with UNHCR where required to allow UNHCR to fulfil its responsibilities (Art. 29 para 1 subpara 5 Federal Office for Immigration and Asylum Procedures Act). Such responsibilities include the participation of UNHCR in asylum procedures at airports.²⁰⁹

In 2000 the Federal Ministry of the Interior and the International Organization for Migration (IOM) signed a Memorandum of Understanding which contains a clause that relates to the sharing of personal data. Yet, this agreement applies exclusively to cooperation in the field of voluntary return.²¹⁰

7.5 Private entities

Migration authorities can also obtain information from the private sector (for example from banks; Art. 46 General Administrative Procedures Act; principle of unlimited scope of evidence). This plays only a minor role, however, in the establishment of identity (see AT EMN NCP, 2016:34).

Data from the Central Aliens Register and the central procedure file can be shared with private legal counsellors and return counsellors, where required to allow such persons to fulfil their responsibilities (Art. 29 para 1 subpara 15 and 16 Federal Office for Immigration and Asylum Procedures Act). Yet, this does not play any special role in practice (cf. Lukits, 2016a:26).²¹¹

209 See Art. 31–33 Asylum Act.

210 Memorandum of Understanding between the International Organization for Migration and the Federal Ministry of the Interior of Austria on Cooperation in the Field of Humanitarian Voluntary Return of Migrants, 14 Juni 2000.

211 Query response via telephone by Gerlinde Hörl, Caritas Salzburg, 13 July 2017.

8. OTHER METHODS OF ESTABLISHING IDENTITY

Besides the use of documents and databases and the sharing of personal data, other possibilities exist for establishing the identities of persons involved in procedures under aliens law. Other methods of establishing identity are discussed in the following, specifically in the case of asylum procedures (section 8.1) and return procedures (section 8.2).

8.1 Asylum procedures

Questioning

After an individual applies for asylum, police are normally required to specifically question that person as to their identity (Art. 19 para 1 Asylum Act). The Federal Office for Immigration and Asylum is also generally required to conduct interviews in asylum procedures (Art. 19 para 2 Asylum Act). Questioning as to the applicant's identity is, therefore, in principle compulsory in an asylum procedure (cf. Reyhani, 2012:21).

Language analysis

Language analysis is also used in cases of doubt as to an asylum seeker's area of origin (AT EMN NCP, 2016:34, 36–37; Ammer et al., 2013:281).²¹² Use of this method is not compulsory but rather within the discretion of the Federal Office for Immigration and Asylum or the Federal Administrative Court.²¹³ Language analysis is frequently performed by Skandinavisk Sprakanalys AB (SPRAKAB) institute. The analysis very often takes place on the basis of a phone conversation (in contrast cf. Ammer et al.,

212 See also for instance Federal Administrative Court, 10 May 2017, L512 1436739-2; 9 May 2017, I403 1436406-1; 3 May 2017, W212 2110653-1; 24 May 2017, I403 2016325-2; 24 March 2017, W159 1420254-4; 31 January 2017, W211 1412140-2; 25 January 2017, I409 1409436-2.

213 See for instance Art. 39 para 2 and Art 46 AVG; interview with Stephanie Theuer, Federal Ministry of the Interior, Department III/5/c, Resettlement, Return and International Affairs, 5 July 2017.

2013:286).²¹⁴ Sometimes other institutes, specifically Verified or Lingua, are tasked with language analysis.²¹⁵ In addition, individual experts are also tasked with language analysis (Ammer et al., 2013:284).²¹⁶

Medical age assessment

Where any doubt exists as to an asylum seeker's claim to being a minor, medical age assessment is regularly ordered in asylum procedures. Such assessment is normally carried out by a medical expert. It is within the authority's discretion in principle to decide whether to request medical age assessment (see Art. 13 para 3 Federal Office for Immigration and Asylum Procedures Act; AT EMN NCP, 2016:35–36, 50–59).

Social media

In certain individual asylum procedures, the Federal Office for Immigration and Asylum also consults data that are freely accessible through social media.²¹⁷ This practice also plays only a minor role in the establishment of identity (AT EMN NCP, 2016:34).²¹⁸

Objects

The representatives of the public security service are also entitled to search asylum seekers' apparel and any receptacles carried by them and to temporarily seize any objects required for the asylum procedure (Art. 38 and 39 Federal Office for Immigration and Asylum Procedures Act).

214 See for instance Federal Administrative Court, 30 May 2017, I403 1304188-3; 24 May 2017, I403 2016325-2; 10 May 2017, L512 1436739-2; 24 March 2017, W159 1420254-4; 31 January 2017, W211 1412140-2; 4 January 2017, L515 2127222-1.

215 Federal Administrative Court, 11 November 2016, W211 1435323-2; 27 June 2016, W211 1432721-2; 20 June 2016, W221 1433214-2; 24 September 2015, I403 1319704-1; 11 August 2015, W211 1414815-2; 27 August 2015, W211 1438864-1; 31 January 2017, L519 1267991-2; 2 March 2016, W153 1249480-2; 11 January 2016, W211 1430109-2.

216 See for instance Federal Administrative Court, 10 June 2017, I409 1409436-3; 30 May 2017, I403 1304188-3; 27 April 2017, I411 12163603.

217 See for instance Federal Administrative Court, 5 May 2017, I403 2153186-1.

218 See also the case law of the Federal Administrative Court at www.ris.bka.gv.at/bvwg (accessed on 10 July 2017).

DNA analysis

In asylum procedures, DNA analysis can also be performed to identify family relationships. Such analysis may, however, only be done at the request of the person concerned.²¹⁹ In the context of asylum procedures, this option concerns in particular cases involving Austria's responsibility for the procedure as specified in the Dublin Regulation and application of the "most favourable treatment principle" (Günstigkeitsprinzip; see Art. 34 Asylum Act).²²⁰ DNA analysis is used more frequently in procedures for family reunification (Lukits, 2016b:42).²²¹

Other resources

In many cases, the Austrian embassy will mandate a "trusted lawyer" familiar with that particular country to conduct investigations, specifically also concerning the identity of an asylum seeker.²²²

At the same time, liaison officers with the Federal Ministry of the Interior who are assigned to that particular embassy often carry out investigations as well.²²³ Such officers can also forward requests for investigations to trusted lawyers.²²⁴

The author is not aware of any other methods worth mentioning for establishing identity in asylum procedures.

219 See Art. 13 para 4 Federal Office for Immigration and Asylum Procedures Acgt.

220 See for instance Aliens Authorities Restructuring Act, Government Proposal, Explanatory Notes, p. 17, available at www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01803/fname_255385.pdf (accessed on 14 June 2017); Art. 34 Asylum Act; Federal Administrative Court, 19 April 2016, W139 1428478-1.

221 Art. 29 para 2 Settlement and Residence Act; Art. 12a Aliens Polie Act; see the case law of the Federal Administrative Court at www.ris.bka.gv.at/bvwg (accessed on 11 July 2017).

222 See for instance Federal Administrative Court, 10 June 2017, I409 1409436-3; 8 June 2017, L512 2130977-1; 10 May 2016, W200 2123582-1/5E; 30 October 2015, L512 1428783-2/43E; 16 April 2015, L519 1313959-2/3E.

223 See for instance Federal Administrative Court, 19 May 2017, L521 2151307-1; 5 May 2017, I413 2128772-1; 24 January 2017, L502 2102648-1; 16 March 2016, I406 1415629-3.

224 Federal Administrative Court, 24 November 2016, L507 2131295-1.

8.2 Return procedures

The steps that are necessary for the authorities of a migrant's country of origin to approve the individual's return depend largely on the country in the particular case and on whether the individual concerned has a travel document.²²⁵

The findings from establishing an individual's identity in an asylum procedure can also be used in forced return. After all, the Federal Office for Immigration and Asylum is responsible for both asylum procedures and for cases of forced return (Art. 3 para 2 subpara 1, subpara 3 and subpara 4 Federal Office for Immigration and Asylum Procedures Act; cf. Lukits, 2016a:22, 25).²²⁶

Objects

Where a foreigner is suspected of residing in Austria illegally and of possessing items of evidence that are relevant for the deportation of that person from Austria, such items can be seized temporarily if required for a return procedure (Art. 38 and 39 Federal Office for Immigration and Asylum Procedures Act).

Questioning

It is within the authority's discretion in principle to decide whether to question the individual concerned or other persons for the purpose of establishing the individual's identity.²²⁷ The individuals concerned are questioned specifically when attempting to obtain replacement travel documents. Such questioning can also be carried out by representatives of the country of origin in the particular case (cf. Reyhani, 2012:21).²²⁸

225 See Art. 46 para 2 Aliens Police Act; Art. 97 Aliens Police Act; Act Amending the Aliens Law 2017 Part II, Government Proposal, Explanatory Notes, p. 3 and 7, available at www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00311/fname_629377.pdf (accessed on 6 July 2017).

226 Art. 3 para 2 subpara 1, subpara 3 and subpara 4 Federal Office for Immigration and Asylum Procedures Act.

227 See for instance Art. 48–51 General Administrative Procedures Act.

228 See for instance High Administrative Court, 11 June 2013, 2012/21/0121; 6 June 2017, L519 1406988-2.

Language analysis

Language analysis is also used where required when returning rejected asylum seekers (Lukits, 2016a:35; Reyhani, 2012:19). Here too, any use is in the authority's discretion.²²⁹

DNA analysis

The option of using DNA analysis also exists in return procedures.²³⁰ Here a family relationship can specifically be a factor where the protection of a person's private and family life is concerned.²³¹ In practice, however, DNA analysis plays no significant role in return procedures (cf. Reyhani, 2012:20).

Social networks and private sector

Written information obtained from the private sector as well as information that is freely accessible in social networks can also be used in return procedures (see section 8.1).

Medical age assessment

It is also possible to have age assessment performed in return procedures (Art. 13 para 3 Federal Office for Immigration and Asylum Procedures Act). In practice, however, age assessment is done mainly in the context of asylum procedures (cf. e.g. AT EMN NCP, 2016:35–36; Lukits/Lukits, 2011:17; Reyhani, 2012:19, 21).

Other resources

It is also possible to have trusted lawyers carry out investigations in return procedures. Such investigations are, however, usually limited to asylum procedures (cf. section 8.1).²³² The author is not aware of any other methods for establishing identity in return procedures.

229 See also Art. 46 para 3 Aliens Police Act; 25 January 2017, I409 1409436-2; 12 December 2016, W211 2122360-1.

230 Art. 13 para 4 Federal Office for Immigration and Asylum Procedures Act.

231 See Art. 9 Federal Office for Immigration and Asylum Procedures Act; Federal Administrative Court, 3 April 2017, I416 1437202-2.

232 See the case law of the Federal Administrative Court, available at www.ris.bka.gv.at/Bwv (accessed on 16 June 2017).

9. THE ESTABLISHMENT OF IDENTITY AND THE DECISION-MAKING PROCESS

The circumstances in the individual case largely determine how a person's identity is established in procedures under aliens law (Art. 45 para 2 and Art. 46 General Administrative Procedures Act). Identity documents play a major role in practice (see e.g. AT EMN NCP, 2016:32). In visa procedures and procedures for granting a residence title, the applicant is generally required to present a valid travel document (see section 5.1). In accordance with the principle of free evaluation of evidence, how various findings from different pieces of evidence are evaluated depends on the circumstances in the individual case.

No special provisions of law exist for identity management in the event of an exceptional volume of migrants.²³³ In the case of potential border checks, however, the option of greatly accelerated identity checks has been introduced.²³⁴

Austrian aliens law has no general system for denoting the degree of certainty associated with an identity that has been established.²³⁵ No current plans exist for introducing such a general grading system, according to the Federal Ministry of the Interior.²³⁶ Yet, decisions taken on asylum applications often contain a statement indicating that the identity of the person concerned has or has not been established.²³⁷ Where the identity of the person concerned is not established, reference is often made to a

233 See in particular Art. 62 Asylum Act and Art. 36–41 Asylum Act.

234 Interview with Reinhard Schmid, Federal Ministry of the Interior, Criminal Intelligence Service Austria, Sub-department 6.1, Central Identification Service, 5 July 2017.

235 Cf. written query response by Municipal Department 35 of the City of Vienna, 12 June 2017; written query response by the Federal Ministry for Europe, Integration and Foreign Affairs, 29 June 2017.

236 Interview with Stephanie Theuer, Sabina Schlegelhofer and Johann Putz, Federal Ministry of the Interior, 5 July 2017.

237 See for instance Federal Administrative Court, 5 May 2017, L512 2154474-1/6E; 4 May 2017, I411 2117673-1/27E; 4 May 2017, I416 2154826-1/3E; 3 May 2017, I403 2155106-1/3E; 2 May 2017, L524 2134815-1/8E; 2 May 2017, L506 2011165-2/13E; 2 May 2017, I403 2154316-1/3E; 2 May 2017, L524 2134813-1/8E.

“procedural identity” (i.e. identity for the purpose of the procedure).²³⁸ A verified identity, in contrast, is referred to as a “physical identity”.²³⁹

The importance of establishing a person’s identity depends for the most part on the type of procedure under aliens law. Consequently, the various types of procedure are discussed in detail below.

9.1 Asylum procedures

The identity of an asylum seeker is in part a decisive factor for granting international protection. An asylum seeker’s nationality, for example, is a major consideration in deciding whether a corresponding danger exists in that person’s country of origin (cf. Hartl, 2016:34).²⁴⁰ An asylum seeker’s date of birth or age can also be highly relevant for deciding whether to grant international protection. This aspect relates for instance to Austria’s responsibility for the case, to whether an internal flight alternative is considered reasonable or to the applicant’s credibility (cf. Lukits/Lukits, 2011).²⁴¹ Claiming a false identity can also detrimentally impact the individual’s credibility (cf. Hartl, 2016:34; Reyhani, 2012:6, 11–12, 22).²⁴² A legal provision prohibits the granting of subsidiary protection in any case where the country of origin of the person concerned cannot be established (Art. 8 para 6 Asylum Act).

9.2 Return procedures

A migrant’s identity also plays an important role if that individual is the subject of a return procedure. Specifically, the individual’s nationality

238 See for instance Federal Administrative Court, 22 June 2017, L518 2152669-1; 2 June 2017, W238 2125724-1; 17 May 2017, I405 21443551.

239 Interview with Stephanie Theuer, Federal Ministry of the Interior, Department III/5/c, Resettlement, Return and International Affairs, 5 July 2017.

240 See Art. 3 para 1 and Art. 8 para 1 Asylum Act in conjunction with Art 2 para 1 subpara 17 Asylum Act.

241 See for instance also Federal Administrative Court, 30 June 2017, L513 2159291-1; Constitutional Court, 27 June 2012, U 98/12; Federal Administrative Court, 6 July 2016, L502 1422695-1; Federal Administrative Court, 28 July 2015, W196 1438582-1.

242 Interview with Stephanie Theuer, Federal Ministry of the Interior, Department III/5/c, Resettlement, Return and International Affairs, 5 July 2017.

is key in deciding the country to which the person can be returned. Removal is extremely difficult in practice when a person's country of origin is not known (cf. Reyhani, 2012:12).²⁴³

9.3 Visas and residence titles under the Settlement and Residence Act

Where reasonable doubt exists as to an applicant's true identity or nationality, it is normally not permitted to grant an Austrian visa to that individual. This apparently does not apply, however, in the case of family reunification under the Asylum Act (see Art. 20, 21 and 26 Aliens Police Act).

When applying for a residence title under the Settlement and Residence Act, the applicant is required to present the documents and evidence necessary to allow that person's identity to be established beyond doubt (Art. 19 para 2 Settlement and Residence Act). The application must usually be accompanied by a valid travel document (Art. 7 para 1 subpara 1 Regulation on the Implementation of the Settlement and Residence Act). That document must indicate beyond doubt the identity of the person concerned (Art. 2 para 1 subpara 3 Settlement and Residence Act). A residence title can otherwise be granted only in certain exceptional cases (Art. 19 para 8 Settlement and Residence Act; see section 5.1).

Establishing the applicant's identity thus plays a key role in deciding on granting a visa or residence title. Where the identity of the individual concerned cannot be established with sufficient certainty, a permit can only be granted in exceptional cases.

243 Cf. also Act Amending the Aliens Law 2015, Government Proposal, Explanatory Notes, p. 18, available at www.parlament.gv.at/PAKT/VHG/XXV/II/I_00582/fname_401629.pdf (accessed on 10 July 2017); Aliens Law Package 2005, Government Proposal, Explanatory Notes, p. 38, available at www.parlament.gv.at/PAKT/VHG/XXII/I/I_00952/fname_040777.pdf (accessed on 10 July 2017).

10. SUMMARY

In the political sphere in Austria, establishing the identities of migrants is a highly relevant topic (section 1.2). Establishing the identities of applicants plays an important role in every procedure under aliens law (see chapter 9). Yet, generally speaking, establishing a person's identity is most difficult in asylum procedures since asylum seekers very frequently do not carry any reliable identity documents with them or do not show them to the authorities. The same applies to establishing the age of asylum seekers. The establishment of identity in an asylum procedure is also made more difficult by the fact that it is usually not possible to obtain any information from the claimed country of origin (see section 4.1).

In Austria, the authority that is responsible for taking a decision on a particular application is also primarily responsible for establishing the applicant's identity. In asylum procedures, procedures for humanitarian residence titles and return procedures, the corresponding authority in the first instance is the Federal Office for Immigration and Asylum and in the second instance the Federal Administrative Court. The representation authorities (embassies or consulates) in other countries are generally responsible for visa procedures in the first instance. In procedures for issuing normal residence titles under the Settlement and Residence Act, provincial governors take decisions in the first instance. Governors can, however, issue a regulation authorizing the district administrative authorities (district commission or municipal authority) to take decisions on their behalf in certain cases (section 2.1). When establishing individuals' identities, the competent authorities can request assistance specifically from Criminal Intelligence Service Austria and criminal intelligence services in the provinces of Austria (section 3.3).

Identity documents in particular are used to establish identity, provided that such documents are available (see in particular chapter 5). Where the authenticity of a document is doubted, the document can be forwarded specifically to Criminal Intelligence Service Austria and criminal intelligence service in the provinces for closer examination (section 3.3). Other methods used to establish a person's identity include: fingerprint comparisons, other database queries, medical age assessment, language analysis and interviews.

Additional options include for example having information gathered by “trusted lawyers” of Austrian embassies or by liaison officers of the Federal Ministry of the Interior (chapters 6 and 8).

National databases to be mentioned are specifically the Central Aliens Register, the Integrated Administration of Aliens system and the Electronic Criminal Information System (EKIS). The most important databases in Europe currently used for the establishment of identity are the Eurodac database and the databases belonging to the Visa Information System (VIS) and the Schengen Information System (SIS). Another important resource is the Prüm data exchange system, which allows access to certain databases maintained by the participating states (see chapter 6).

In 2016 the legal option was introduced of querying the Central Aliens Register using only photos. This option has not yet been implemented, however. Nevertheless, efforts are currently in progress under criminal policing to implement automated photo comparisons (face recognition). As of July 2016, fingerprints in Austria are also compared with the database of the Visa Information System (VIS). The age limit for fingerprinting is expected to be lowered from 14 to six, according to a current proposal by the European Commission for revising the Eurodac Regulation. It is also planned to allow the additional use of the Eurodac database in return procedures (chapter 6).

ANNEX

A.1 List of translations and abbreviations

English term	English abbreviation	German term	German abbreviation
Act Amending the Aliens Law	–	Fremdenrechtsänderungsgesetz	FrÄG
Act Amending the System of Administrative Courts 2012	–	Verwaltungsgerichtsbarkeits-Novelle 2012	–
Act Establishing the Federal Office for Immigration and Asylum	–	BFA-Einrichtungsgesetz	–
Act on Consular Certification	–	Konsularbeglaubigungsgesetz	–
Act on the Criminal Intelligence Service Austria	–	Bundeskriminalamt-Gesetz	–
Aliens Authorities Restructuring Act	–	Fremdenbehördenneustrukturierungsgesetz	FNG
Aliens Information System	–	Fremdeninformationssystem	FIS
Aliens Law Package 2005	–	Fremdenrechtspaket 2005	–
Aliens Police Act	–	Fremdenpolizeigesetz	FPG
aliens/foreigners	–	Fremde	–
Asylum Act	–	Asylgesetz	AsylG
Asylum Court	–	Asylgerichtshof	AsylGH
asylum seeker	–	AsylwerberIn	–
Asylum Seekers Information System	–	Asylwerberinformationssystem	AIS
Austrian Integration Fund	–	Österreichischer Integrationsfonds	ÖIF
beneficiaries of subsidiary protection	–	Subsidiär Schutzberechtigte	–
best interests of the child	–	Kindeswohl	–
Central Aliens Register	–	Zentrales Fremdenregister	IZR
Central Identification Service	–	Zentraler Erkennungsdienst	–
Central Residents Register	–	Zentrales Melderegister	ZMR
Charter of Fundamental Rights of the European Union	CFR	Grundrechtecharta der Europäischen Union	GRC
Code of Criminal Procedure	–	Strafprozessordnung	StPO
complaint	–	Beschwerde	–
Constitutional Court	–	Verfassungsgerichtshof	VfGH
Criminal Intelligence Service Austria	–	Bundeskriminalamt	.BK
criminal intelligence service in the provinces	–	Landeskriminalämter	LKA
Data Protection Act	–	Datenschutzgesetz	DSG
district administrative authority	–	Bezirksverwaltungsbehörde	BVB
district commission	–	Bezirkshauptmannschaft	BH

English term	English abbreviation	German term	German abbreviation
Document Reporting Line	–	Dokumentenmeldeschiene	–
Electronic Criminal Information System	–	Elektronisches Kriminalpolizeiliches Informationssystem	EKIS
EU Member State	–	EU-Mitgliedstaat	–
EU Police Cooperation Act	–	EU-Polizeikooperationsgesetz	–
European Community	EC	Europäische Gemeinschaft	EG
European Convention on Human Rights	ECHR	Europäische Menschenrechtskonvention	EMRK
European Court of Human Rights	ECtHR	Europäischer Gerichtshof für Menschenrechte	EGMR
European Economic Area	EEA	Europäischer Wirtschaftsraum	EWR
European Migration Network	EMN	Europäisches Migrationsnetzwerk	EMN
European Union	EU	Europäische Union	EU
False and Authentic Documents Online	FADO	FADO	FADO
family members	–	Familienangehörige	–
family reunification	–	Familienzusammenführung	–
Federal Administrative Court	–	Bundesverwaltungsgericht	BVwG
Federal Administrative Court Act	–	Bundesverwaltungsgerichtsgesetz	BVwGG
Federal Chancellery	–	Bundeskanzleramt	BKA
Federal Constitutional Act	–	Bundesverfassungsgesetz	B-VG
Federal Law Gazette	FLG	Bundesgesetzblatt	BGBL
Federal Ministry for Europe, Integration and Foreign Affairs	–	Bundesministerium für Europa, Integration und Äußeres	BMEIA
Federal Ministry of the Interior	–	Bundesministerium für Inneres	BMI
Federal Office for Immigration and Asylum	–	Bundesamt für Fremdenwesen und Asyl	BFA
Federal Office for Immigration and Asylum Procedures Act	–	BFA-Verfahrensgesetz	BFA-VG
final	–	rechtskräftig	–
General Administrative Procedures Act	–	Allgemeines Verwaltungsverfahrensgesetz	AVG
General Social Insurance Act	–	Allgemeines Sozialversicherungsgesetz	ASVG
governor of the province	–	Landeshauptmann/ Landeshauptfrau	LH
High Administrative Court	–	Verwaltungsgerichtshof	VwGH
in conjunction with	–	in Verbindung mit	iVm
internal flight alternative	–	innerstaatliche Fluchtalternative	–
Integrated Administration of Aliens system	–	Integrierte Fremdenadministration	IFA
International Organization for Migration	IOM	Internationale Organisation für Migration	IOM

English term	English abbreviation	German term	German abbreviation
Member State	MS	Mitgliedstaat	–
minors	–	Minderjährige	–
Municipal Department 35	–	Magistratsabteilung 35	MA35
National Contact Point	NCP	Nationaler Kontaktpunkt	NKP
officials of the public security service	–	Organe des öffentlichen Sicherheitsdienstes	–
personal data	–	personenbezogene Daten	–
persons granted asylum	–	Asylberechtigte	–
police administration(s) of the provinces	–	Landespolizeidirektion(en)	LPD
principle of free evaluation of evidence	–	Grundsatz der freien Beweiswürdigung	–
province	–	Bundesland	–
Public Register of Authentic Travel and Identity Documents Online	PRADO	PRADO	PRADO
Regulation on the Implementation of the Aliens Police Act	–	Fremdenpolizeigesetz – Durchführungsverordnung	FPG-DV
Regulation on the Implementation of the Asylum Act	–	Asylgesetz – Durchführungsverordnung	AsylG-DV
Regulation on the Implementation of the Settlement and Residence Act	–	Niederlassungs- und Aufenthaltsgesetz-Durchführungsverordnung	NAG-DV
Regulations for the Identification Service	–	Vorschrift für den Erkennungsdienst	VED
removal	–	Abschiebung	–
replacement travel document	–	Ersatzreisedokument	–
representation authority	–	Vertretungsbehörde	–
residence permit	–	Aufenthaltsberechtigung	–
Residence Permit	–	Aufenthaltsberechtigung (§ 54 Abs. 1 Z 2 AsylG)	–
residence title	–	Aufenthaltsstitel	–
residence title for exceptional circumstances	–	Aufenthaltsstitel aus berücksichtigungswürdigen Gründen	–
return decision	–	Rückkehrenscheidung	–
return travel certificate	–	Heimreisezertifikat	–
Schengen Borders Code	–	Schengener Grenzkodex	–
Schengen Information System	SIS	Schengener Informationssystem	SIS
second generation Schengen Information System	SIS II	Schengener Informationssystem der zweiten Generation	SIS II
Security Police Act	–	Sicherheitspolizeigesetz	SPG
Settlement and Residence Act	–	Niederlassungs- und Aufenthaltsgesetz	NAG
subsidiary protection	–	subsidiärer Schutz	–
third-country national	–	Drittstaatsangehöriger	–

English term	English abbreviation	German term	German abbreviation
Treaty on the Functioning of the European Union	TFEU	Vertrag über die Arbeitsweise der Europäischen Union	AEUV
trusted lawyers	–	VertrauensanwältInnen	–
unaccompanied minors	UAM	unbegleitete Minderjährige	–
United Nations High Commissioner for Refugees	UNHCR	Flüchtlingshochkommissariat der Vereinten Nationen	UNHCR
Visa Information System	VIS	Visa-Informationssystem	VIS

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