



International Organization for Migration (IOM)



# THE EFFECTIVENESS OF RETURN IN AUSTRIA: CHALLENGES AND GOOD PRACTICES LINKED TO EU RULES AND STANDARDS



**Saskia Heilemann, Rainer Lukits**

Co-financed  
by the  
European Union



REPUBLIC OF AUSTRIA  
FEDERAL MINISTRY OF THE INTERIOR

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

Saskia Heilemann, Rainer Lukits

**THE EFFECTIVENESS OF RETURN IN AUSTRIA:  
CHALLENGES AND GOOD PRACTICES LINKED TO  
EU RULES AND STANDARDS**

The opinions expressed in the report are those of the authors and do not necessarily reflect the views of the Austrian Federal Ministry of the Interior, the European Commission and/or the International Organization for Migration (IOM). The designations employed and the presentation of material throughout the report do not imply the expression of any opinion whatsoever on the part of IOM concerning the legal status of any country, territory, city or area, or of its authorities, or concerning its frontiers or boundaries.

IOM is committed to the principle that humane and orderly migration benefits migrants and society. As an intergovernmental organization, IOM acts with its partners in the international community to assist in meeting the operational challenges of migration, to advance understanding of migration issues, to encourage social and economic development through migration and to uphold the human dignity and well-being of migrants.

Translation: Robert Schlarb

Layout and print: AV+Astoria Druckzentrum GmbH

This book has been printed on environmentally friendly paper.

Publisher: National Contact Point Austria in the  
European Migration Network

International Organization for Migration,

Country Office for Austria

Nibelungengasse 13/4, 1010 Vienna

Tel.: +43 1 585 33 22 0

Fax: +43 1 585 33 22 30

E-mail: [iomvienna@iom.int](mailto:iomvienna@iom.int), [emnaustria@iom.int](mailto:emnaustria@iom.int)

Internet: [www.iomvienna.at](http://www.iomvienna.at), [www.emn.at](http://www.emn.at)

ISBN 978-3-9504448-3-4 (paperback)

ISBN 978-3-9504448-4-1 (PDF), German edition

ISBN 978-3-9504448-5-8 (PDF), English edition

© September 2017, International Organization for Migration (IOM)

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise without the prior written permission of the publisher.

# 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.

# TABLE OF CONTENTS

<b>SUMMARY</b>	7
<b>1. INTRODUCTION</b>	10
1.1 Study Background	10
1.2 Study Objectives and Definitions	12
1.3 Methodology	13
<b>2. SUMMARY OF CURRENT DEVELOPMENTS IN AUSTRIAN RETURN POLICIES</b>	15
2.1 Implementation of EU Norms	15
2.2 New Policies and Legislation	17
2.3 National Debates	19
<b>3. RETURN DECISIONS</b>	23
3.1 General Provisions	23
3.2 Systematic Issuing of Return Decisions	24
3.3 Recognition of Return Decisions and Travel Documents	27
3.4 Challenges and Good Practices	28
<b>4. ENTRY BANS</b>	30
4.1 General Provisions	30
4.2 Preconditions for Issuing Entry Bans and Periods of Validity	32
4.3 Challenges and Good Practices	33
<b>5. VOLUNTARY DEPARTURE</b>	34
5.1 General Provisions and Period for Voluntary Departure	34
5.2 Challenges and Good Practices	35
<b>6. RISK OF ABSCONDING</b>	38
<b>7. ENSURING THE ENFORCEMENT OF RETURN OBLIGATIONS</b>	41
7.1 Detention Pending Removal and other Types of Detention	41
7.1.1 <i>Detention Types and Preconditions</i>	41
7.1.2 <i>Detention Length and Facilities</i>	43
7.1.3 <i>Procedural Guarantees</i>	44
7.1.4 <i>Statistics</i>	45
7.2 Lenient Measures	46
7.3 Challenges and Good Practices	47

<b>8. PROCEDURAL GUARANTEES AND LEGAL REMEDIES</b>	50
8.1 General Provisions	50
8.2 Challenges and Good Practices	53
<b>9. SPECIAL PROVISIONS FOR VULNERABLE PERSONS</b>	54
9.1 Minors and Unaccompanied Minors	55
9.1.1 <i>Assessment of the Best Interests of the Child</i>	55
9.1.2 <i>Detention Pending Removal, Return and Reintegration</i>	57
9.2 Individuals with Medical Needs	59
9.3 Challenges and Good Practices	60
<b>10. CONCLUSIONS</b>	62
10.1 Implementation of the European Commission's Recommendations in Austria	62
10.2 The Significance of EU Norms for an Effective Return Policy	63
<b>ANNEX</b>	65
A.1 List of Translations and Abbreviations	65
A.2 Bibliography	68

## LIST OF FIGURES AND TABLES

Figure 1: Decisions Ordering the Detention of Third-country Nationals Pending Removal	45
Table 1: Grounds for Issuing an Entry Ban as Defined in the Return Directive (2008/115/EC)	32
Table 2: Circumstances and Criteria for Assessing a Risk of Absconding as Defined in Recommendations no. 15 and 16 of the European Commission	39
Table 3: Types of Lenient Measure in Austria	46
Table 4: Criteria Pursuant to Art. 138 of the General Civil Code for Assessing the Best Interests of the Child	56

## SUMMARY

The refugee situation in 2015 and 2016 confronted Austria with a huge challenge. New policies and legislation, some relating to return policy, were introduced in response. Beginning in 2016, a new policymaking focus was defined, aimed at the return of foreigners who are residing irregularly in the country, rejected asylum seekers in particular. Specifically, programmes to encourage voluntary departure and return were expanded and the 2017 Act Amending the Aliens Law<sup>1</sup> was adopted, which provides for several changes to improve the enforcement of departure requirements. In accordance with an effective, humane return policy and as a dignified alternative to being forcibly returned, Austria generally pursues the primary goal of voluntary return and departure. The main findings of the study are summarized in the following.

The Federal Office for Immigration and Asylum in accordance with the Return Directive (2008/115/EC),<sup>2</sup> is required to issue a return decision to a third-country national residing illegally in Austria (Art. 52 para 1 Aliens Police Act).<sup>3</sup> Along with the return decision, an entry ban, valid ten years at most or even indefinitely, can also be issued (Art. 53 Aliens Police Act). In conformity with Art. 7 of the Return Directive (2008/115/EC), a time period for voluntary departure, usually 14 days, is specified with the return decision (Art. 55 Aliens Police Act). Third-country nationals not departing in time are required to be removed if possible (Art. 46 Aliens Police Act).<sup>4</sup> The 2017 Act Amending the Aliens Law also introduces an administrative penalty for failure to comply with a return decision or entry ban (Art. 2 subpara 82 2017 Act Amending the Aliens Law).

In accordance with the Return Directive, a complaint against a return decision can be lodged with the Federal Administrative Court within two

1 Available at [www.parlament.gv.at/PAKT/VHG/XXV/BNR/BNR\\_00513/fname\\_645121.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/BNR/BNR_00513/fname_645121.pdf) (accessed on 18 July 2017).

2 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, 24 December 2008, OJ 2013 L 348/98.

3 FLG I No. 100/2005, in the version of FLG I No. 68/2017.

4 Cf. Art. 8 Return Directive (2008/115/EC).



weeks (see Art. 9 para 2 Aliens Police Act; Art 16 para 1 Federal Office for Immigration and Asylum Procedures Act).<sup>5</sup> Where removal would conflict with the principle of non-refoulement as referred to in the Geneva Refugee Convention<sup>6</sup> or would violate the right to life or the prohibition of torture as stipulated in the European Convention on Human Rights (ECHR),<sup>7</sup> third-country nationals staying illegally can obtain a permit referred to as a “residence title for exceptional circumstances” (see Art. 54–61 Asylum Act)<sup>8</sup>, if the conditions required by law are met. Another option is tolerated stay (Art. 46a Aliens Police Act).

As laid down in the Return Directive (2008/115/EC), where a third-country national is the subject of a return procedure and there is a risk of absconding, that individual can be detained pending removal after a case-by-case review. Art. 76 para 3 Aliens Police Act lists certain circumstances to specifically consider when evaluating whether a risk of absconding exists. Examples include the person’s cooperation in arranging return, a breach of any exclusion order or entry ban, and violation of any imposed conditions, obligations to cooperate, restrictions applying to residence area or registration requirements. Detention is, however, only considered as a last resort, after first examining whether a lenient measure can be applied (Art. 76–81 Aliens Police Act).<sup>9</sup>

An apprehension order represents a further option for ensuring an individual’s departure; such an order can be issued even when no risk of absconding exists (Art. 34 Federal Office for Immigration and Asylum Procedures Act).<sup>10</sup> Since 2014, detention after an apprehension order has been used more frequently than detention pending removal, particularly with rejected asylum seekers (Austrian Court of Audit, 2016:102, 206). A

5 The decision of the Constitutional Court of 26 September 2017 (G 134/2017, G 207/217), which was announced on 16 October 2017, revoked the shortened deadline of two weeks for complaints against decisions of the Federal Office for Immigration and Asylum on an application for international protection in connection with return decisions. The standard period for filing an appeal is four weeks.

6 Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series vol. 189.

7 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, 4 November 1950, Council of Europe Treaty Series No. 5.

8 FLG I No. 100/2005, in the version of FLG I No. 68/2017.

9 Cf. Art. 15 Return Directive (2008/115/EC).

10 FLG I No. 87/2012, in the version of FLG I No. 84/2017.

special feature of Austrian legislation is the option for individuals to decide on voluntary return even after detention pending removal has been imposed.<sup>11</sup>

Special return provisions exist for certain categories of vulnerable persons, specifically for minors, or ill and injured individuals.<sup>12</sup> The circumstances of each individual case are required to be considered when carrying out removal (Art. 46 para 3 Aliens Police Act).

The study comes to the conclusion that, with respect to return policy, EU law provides a certain framework for the legal situation and for the practices of authorities in Austria. In addition, Austria has already implemented the majority of the non-binding recommendations for making returns more effective when implementing the Return Directive, as published by the European Commission on 7 March 2017 and covered in this study.<sup>13</sup>

11 Interview with Günter Ecker, Verein Menschenrechte Österreich, 26 July 2017.

12 See, for instance, Art. 46 para 3 and Art. 76–79 Aliens Police Act.

13 European Commission, *Commission Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017)1600 final, available at <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1600-F1-EN-MAIN-PART-1.PDF> (accessed on 14 March 2017).

# 1. INTRODUCTION

## 1.1 Study Background

An effective and humane return policy is an essential part of the EU's migration and asylum policy.<sup>14</sup> Statistics currently available from Eurostat indicate a slight increase in the return rate for the whole of the EU. While in 2015 only 43 per cent of third-country nationals left the particular Member State following a return decision, the percentage increased to 50 per cent by 2016.<sup>15</sup> The return rate in Austria was, at 51 per cent, higher than the EU average.<sup>16</sup>

The Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC was published by the European Commission with the objective of substantially increasing the rates of return.<sup>17</sup> The measures proposed by the Commission represent recommendations for applying the EU's legal norms in a targeted way towards making return procedures more efficient and increasing the frequency of returns.<sup>18</sup> Recital 6 of the preamble states, for example, that “[a] more effective implementation of that Directive would reduce possibilities of misuse of procedures and remove inefficiencies, while

14 European Commission, *European Agenda on Migration: Commission presents new measures for an efficient and credible EU return policy*. Press Release, 2 March 2017, available at [http://europa.eu/rapid/press-release\\_IP-17-350\\_en.htm](http://europa.eu/rapid/press-release_IP-17-350_en.htm) (accessed on 16 August 2017).

15 Individuals returning in a given year may have already received a return decision in the previous year.

16 Eurostat, *Third-country nationals ordered to leave – annual data (rounded), [migr\_eiord]*, available at [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_eiord&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eiord&lang=en) (accessed on 12 July 2017); Eurostat, *Third-country nationals returned following an order to leave – annual data (rounded) [migr\_eirtn]*, available at [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_eirtn&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eirtn&lang=en) (accessed on 12 July 2017).

17 European Commission, *Commission Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017)1600 final, available at <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1600-F1-EN-MAIN-PART-1.PDF> (accessed on 14 March 2017).

18 See Footnote 14.

ensuring the protection of fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union.” Recital 7 elaborates that the “Recommendation provides guidance on how the provisions of Directive 2008/115/EC should be used for achieving more effective return procedures”.

The Commission’s Recommendation has not remained undisputed. Concerns were expressed in a joint press release by the Platform for International Cooperation on Undocumented Migrants (PICUM), the United Nations International Children’s Emergency Fund (UNICEF) and the International Organization for Migration (IOM). The main fear expressed was that the Recommendation could encourage EU Member States to conduct swift returns of people – including children – while reducing procedural safeguards and making increased use of detention. It is noted that the Recommendation favours in particular reduced procedural guarantees, quicker and automatic return decisions, more forced removals, and more detention.<sup>19</sup> Criticism was levelled especially at the recommendations relating to detention (recommendation no. 10). The European Union Agency for Fundamental Rights (FRA) sees encouragement for imposing detention pending removal arbitrarily (FRA, 2017:130). Amnesty International fears the development of an inhuman detention system.<sup>20</sup> PICUM, with the support of 90 civil society organizations, has criticized the Commission for urging the Member States to detain migrants more quickly and for longer periods of time. These organizations fear potential weakening of protection for human rights.<sup>21</sup> Recommendation no. 14, to place minors in detention, is regarded highly critically. PICUM, UNICEF and IOM underscore the proven harm of forced removal and detention to children and families. Consequently they warn against

19 PICUM/UNICEF/IOM, *New European Union returns policies put children at risk*. Press Release, 3 March 2017, available at [www.unicef.org/media/media\\_95028.html](http://www.unicef.org/media/media_95028.html) (accessed on 6 July 2017).

20 Amnesty International, *EU: Cruel migration detention regime exposes hypocrisy of European Commission*. Press Release, 3 March 2017, available at [www.amnesty.org.au/cruel-migration-detention-regime-exposes-hypocrisy-european-commission/](http://www.amnesty.org.au/cruel-migration-detention-regime-exposes-hypocrisy-european-commission/) (accessed on 6 July 2017).

21 PICUM, *New EU Commission plans on returns and detention will create more harm and suffering*. Press Release, 3 March 2017, available at <http://picum.org/en/news/picum-news/52056/> (accessed on 6 July 2017).

detaining children, even as a last resort.<sup>22</sup> FRA reports that placing children in detention has a serious impact on their physical and mental health (FRA, 2017:131).

Even though the Commission's Recommendation is not legally binding, recital 27 of the preamble specifies the following: "Member States should instruct their national authorities competent for carrying out return-related tasks to apply this Recommendation when performing their duties."

## 1.2 Study Objectives and Definitions

This study explores how the legal situation and the practices of authorities in Austria are influenced by EU norms – such as expressed in the Return Directive (2008/115/EC)<sup>23</sup> and corresponding rulings by the Court of Justice of the European Union (CJEU). Attention is given here to the challenges in carrying out return measures effectively, as well as to good practices for enforcing obligations to return, in compliance with returnees' fundamental rights and dignity and with the principle of non-refoulement. The main focus is on the following areas: return decisions, entry bans, voluntary departure, the risk of absconding, detention pending removal, lenient measures, procedural guarantees and legal remedies as well as special provisions for vulnerable persons. In line with Art. 3 para 3 of the Return Directive (2008/115/EC), the study is principally limited in scope to the return of third-country nationals to a third country (Dublin transfers<sup>24</sup> or forcible return to other EU Member States<sup>25</sup> are thus precluded).

22 PICUM/UNICEF/IOM, *New European Union returns policies put children at risk*. Press Release, 3 March 2017, available at [www.unicef.org/media/media\\_95028.html](http://www.unicef.org/media/media_95028.html) (accessed on 6 July 2017).

23 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, 24 December 2008, OJ 2008 L 348/98.

24 See Regulation (EU) 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 L180/31.

25 See Art. 45 Aliens Police Act.

As used in this study, “effective return” is defined as the actual implementation of the obligation to return, either through removal or through voluntary departure. In accordance with the Glossary of the European Migration Network (EMN), “removal” is defined here as the enforcement of the obligation to return, in other words the physical transportation out of the Member State, while “voluntary departure” is used to refer to meeting the obligation to return within the period allotted in the return decision. In distinction to the latter term, “voluntary return” designates the assisted or independent return of persons to their countries of origin or transit or (other) third countries based on the free will of the returnees, even without any obligation to return (e.g. the case of irregularly residing individuals who have not yet been apprehended or of applicants for asylum or a residence title whose case has not yet been decided with final effect).<sup>26</sup>

The study template defines an “effective return policy” as one that produces the desired or intended result, in other words one that implements a return obligation while complying with the fundamental rights and the dignity of the returnees and the principle of non-refoulement.<sup>27</sup>

### 1.3 Methodology

The present study was conducted by the National Contact Point (NCP) Austria in the EMN within the framework of the EMN’s 2017–2018 Work Programme. In order to facilitate comparability of the findings across all Member States, the study follows a common study template with a predefined set of questions, which were developed by the EMN to correspond to each of the recommendations published by the European Commission on 7 March 2017.

Legislative texts, national and international publications, press releases and internet sites were used as sources. The study was also able to draw on

26 European Commission, *EMN Glossary & Thesaurus*, available at [https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_en) (accessed on 26 July 2017).

27 This definition is based on the definition of ‘effective’ as ‘successful in producing a desired or intended result’ (Oxford Dictionary, *effective*, available at <https://en.oxforddictionaries.com/definition/effective> (accessed on 4 May 2017)).

information from continuous media monitoring by the International Organization for Migration (IOM), Country Office for Austria. Statistics were provided by the Federal Ministry of the Interior and taken from the Eurostat database and the statistics of the Federal Office for Immigration and Asylum. A major share of the information was provided by the Federal Ministry of the Interior, specifically in the context of an interview conducted jointly with Tobias Molander, head of Unit III/5/c (Resettlement, Return and International Affairs), and unit staff member Stephanie Theuer, while additional information was obtained in written form.

To supplement this information, qualitative, semi-structured interviews were conducted with two expert practitioners. One of the two was Günter Ecker, Director of Verein Menschenrechte Österreich (VMÖ). VMÖ provides care to individuals in detention pending removal or in alternative lenient measures, observes human rights compliance during removals of several persons, and provides statutory legal counselling as well as return counselling.<sup>28</sup> The other expert interviewed was Stephan Klammer, director of legal counselling with Diakonie Refugee Service. This organization – a member of the ARGE Rechtsberatung legal aid working group – also provides statutory legal counselling in asylum procedures and in procedures under aliens law.<sup>29</sup>

The study was compiled by Saskia Heilemann (Research Associate, IOM Country Office for Austria) and 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).

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

28 Verein Menschenrechte Österreich, available at [www.verein-menschenrechte.at/en-index.html](http://www.verein-menschenrechte.at/en-index.html) (accessed on 16 August 2017).

29 Diakonie Refugee Service, available at <https://fluechtlingsdienst.diakonie.at> (accessed on 16 August 2017).

## 2. SUMMARY OF CURRENT DEVELOPMENTS IN AUSTRIAN RETURN POLICIES

### 2.1 Implementation of EU Norms

Austrian law in the area of return policy has been variously amended in recent years in response to EU norms. An example is the Act Amending the Aliens Authorities Restructuring Act,<sup>30</sup> which became effective on 1 January 2014 and specifies that, when issuing a return decision, the Federal Office for Immigration and Asylum “can” at the same time impose an entry ban (cf. Rutz, 2014:16–17).<sup>31</sup> Prior to that date, an entry ban for at least 18 months had been compulsory with any return decision issued (Art. 53 Aliens Police Act as amended prior to the Act Amending the Aliens Authorities Restructuring Act). The Administrative High Court ruled, however, that the previous provision conflicted with the Return Directive (2008/115/EC),<sup>32</sup> which requires the length of an entry ban to be determined with regard to individual circumstances (see section 4.1).<sup>33</sup> Another provision valid since 1 January 2014 specifies that a return decision can be issued even after the third-country national’s departure from Austria (Art. 52 para 1 subpara 2 Aliens Police Act).<sup>34</sup> This provision was introduced to comply with Art. 6 para 1 of the Return Directive (2008/115/EC).

The 2015 Act Amending the Aliens Law<sup>35</sup> defined, for the purposes of detention pending removal, when a risk of absconding exists. This specification was occasioned in particular by the provision in Art. 2 (n) of

30 FLG I No. 68/2013.

31 Art. 4 subpara 58 and 83 Act Amending the Aliens Authorities Restructuring Act, FLG I No. 68/2013; Act Amending the Aliens Authorities Restructuring Act, *Government Proposal, Explanatory Notes*, p. 23–24, available at [www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_02144/imfname\\_285862.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_02144/imfname_285862.pdf) (accessed on 20 July 2017).

32 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, 24 December 2008, OJ 2008 L 348/98.

33 Administrative High Court, 15 December 2011, 2011/21/0237; 15 May 2012, 2012/18/0029.

34 FLG I No. 100/2005, in the version of FLG I No. 68/2017.

35 FLG I No. 70/2015.



the Dublin III Regulation (604/2013)<sup>36</sup> and related rulings by the Austrian Administrative High Court.<sup>37</sup>

In several instances the 2017 Act Amending the Aliens Law also includes more stringent provisions that reflect the European Commission's Recommendation on making returns more effective when implementing the Return Directive (2008/115/EC).<sup>38</sup> An example is the option of administrative penalties for failure to comply with return decisions (Art. 2 subpara 82 2017 Act Amending the Aliens Law; recommendation no. 11). Another example is the increase to 18 months of the maximum length of detention pending removal, thereby utilizing the maximum detention period specified in Art. 15 para 6 of Directive 2008/115/EC (Art. 2 subpara 75 2017 Act Amending the Aliens Law; recommendation no. 10 (b)). These provisions are set to become effective as of 1 November 2017 (Art. 2 subpara 94 2017 Act Amending the Aliens Law).

According to Art. 2 para 2 of the Return Directive (2008/115/EC), the Member States may exclude certain groups of third-country nationals from the application of the directive. These groups include persons, who were refused entry at the Schengen external border, persons, who were apprehended in connection with the illegal crossing of the external border and persons, who are obliged to return under criminal law or who are subject to an extradition procedure. An express exception of the groups of third-country nationals mentioned from the application of the Return Directive is not defined in the Austrian aliens law. Third-country nationals, who have entered Austria illegally and who are apprehended by border control, may be rejected at the border under Art. 41 Aliens Police Act (Zurückweisung). However, even in this case a return decision may be issued

36 Regulation (EU) 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 (recast), 29 June 2013, OJ 2013 L 180/31.

37 2015 Act Amending the Aliens Law, *Government Proposal, Explanatory Notes*, p. 22, available at [www.parlament.gv.at/PAKT/VHG/XXV/II/I\\_00582/fname\\_401629.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/II/I_00582/fname_401629.pdf) (accessed on 18 July 2017).

38 European Commission, *Commission Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017)1600 final, available at <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1600-F1-EN-MAIN-PART-1.PDF> (accessed on 14 March 2017).

(Art. 52 Aliens Police Act). The extradition or surrender of irregularly staying third-country nationals for the purposes of criminal persecution takes priority over other forms of forcing someone to leave the country.<sup>39</sup> However, also in these cases the application of the Return Directive and in particular the additional issuing of a return decision are not excluded by the relevant statutory provisions (see Art. 52 Aliens Police Act).

## 2.2 New Policies and Legislation

The refugee situation in 2015 and 2016 confronted Austria with a huge challenge.<sup>40</sup> New policies and legislation were introduced in response. An “Asylum Summit” with representatives of the Federal State, provinces, cities and municipalities took place on 20 January 2016. A decision relating to return policy was adopted at the summit, specifically to step up efforts to remove rejected asylum seekers from the country and to expand voluntary return options.<sup>41</sup> The results included a return assistance scheme for asylum seekers from certain countries of origin, which varies depending on how soon applicants agree to assistance as well as a one-time increase in financial support to EUR 1,000.<sup>42</sup> Another result was to revise the Regulation on Countries of Origin<sup>43</sup> in February 2016, adding several “safe countries of origin”. Now accelerated asylum procedures can also be conducted for citizens of Algeria, Georgia, Ghana, Morocco, Mongolia and Tunisia (Art. 27a Asylum Act).<sup>44</sup> Where asylum seekers from a safe country of origin lodge a complaint against an asylum decision rejecting their asylum application as unfounded, the suspensive effect of the complaint can be withdrawn (Art. 18 para 1 Federal Office for Immigration and Asylum

39 See Art. 13 Extradition and Mutual Assistance Act and Art. 15 Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union.

40 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

41 Republic of Austria, *Asylgipfel am 20. Jänner 2016 – Gemeinsame Vorgangsweise von Bund, Ländern, Städten und Gemeinden*, p. 3, available at [www.bka.gv.at/DocView.axd?CobId=61858](http://www.bka.gv.at/DocView.axd?CobId=61858) (accessed on 7 June 2017).

42 Federal Office for Immigration and Asylum, *Return Assistance*, available at [www.bfa.gv.at/files/return/Infoblatt\\_fuer\\_AW\\_zur\\_Sonderaktion.pdf](http://www.bfa.gv.at/files/return/Infoblatt_fuer_AW_zur_Sonderaktion.pdf) (accessed on 7 June 2017).

43 FLG II No. 177/2009, in the version of FLG II No. 47/2016.

44 FLG I No. 100/2005, in the version of FLG I No. 68/2017.

Procedures Act).<sup>45</sup> Another development has been the removal since March 2017 of Afghan nationals to Afghanistan (see section 2.3), following the signing of a joint declaration by the EU and the Afghan government in October 2016.<sup>46</sup> In addition, the Federal Administrative Court commissioned an experts' report which, based on evidence gathered between January and February 2017, concluded that "no grounds were found which would prevent the return of single males to Afghanistan or would represent a serious difficulty or entail a risk for such returnees" (Mahringer, 2017:54). This evaluation only applies to the cities of Kabul, Mazar-e-Sharif and Herat, however (Mahringer, 2017:6).

During the significant increase in asylum seekers in 2015, the focus was on providing sufficient accommodation and completing asylum procedures, but now attention has shifted to the topic of return.<sup>47</sup> This was in fact a main focus of the Federal Office for Immigration and Asylum in 2016.<sup>48</sup> The return of rejected asylum seekers is in particular considered a major issue and a national policy priority in Austria. This is exemplified in the decision adopted at the "Asylum Summit" on 20 January 2016 to step up efforts to return rejected asylum seekers.<sup>49</sup> In its working programme for 2017/2018, the Austrian Federal Government pledged to "substantially reduce the number of migrants arriving in Austria and illegally residing in the country". In view of this goal, the Government announced plans including more restrictive return policy measures as well as incentives for voluntary departure and voluntary return.<sup>50</sup> In April 2016, the Federal

45 FLG I No. 87/2012, in the version of FLG I No. 84/2017.

46 European Union/Islamic Republic of Afghanistan: *Joint Way Forward on migration issues between Afghanistan and the EU*, available at [https://eeas.europa.eu/sites/eeas/files/eu\\_afghanistan\\_joint\\_way\\_forward\\_on\\_migration\\_issues.pdf](https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf) (accessed on 11 August 2017).

47 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

48 Federal Office for Immigration and Asylum, 2016 – *Das Jahr der Erweiterung*, available at [www.bfa.gv.at/files/Statistiken/BFA\\_Jahresbilanz\\_2016.pdf](http://www.bfa.gv.at/files/Statistiken/BFA_Jahresbilanz_2016.pdf) (accessed on 16 June 2017).

49 Republic of Austria, *Asylgipfel am 20. Jänner 2016 – Gemeinsame Vorgangsweise von Bund, Ländern, Städten und Gemeinden*, p. 3, available at [www.bka.gv.at/DocView.axd?CobId=61858](http://www.bka.gv.at/DocView.axd?CobId=61858) (accessed on 7 June 2017).

50 Republic of Austria, *Für Österreich: Arbeitsprogramm der Bundesregierung 2017/2018*, 27ff., available at <http://archiv.bundeskanzleramt.at/DocView.axd?CobId=65201> (accessed on 28 July 2017).

Ministry of the Interior set the goal of having 50,000 persons leave or removed by 2019. Voluntary departure and voluntary return were cited as major components in this regard.<sup>51</sup> The number of returnees (including removals as well as voluntary departures and returns) did in fact increase, by around 30 per cent in 2016 compared with the previous year<sup>52</sup> and by 10 per cent in the first six months of 2017 compared with the same period the year before.<sup>53</sup> During this period the share of removals increased at a higher rate and, in the first six months of 2017 and for the first time since 2008,<sup>54</sup> exceeded the total percentage of individuals either departing or returning voluntarily. If Austria is to achieve the goal of having 50,000 persons leave or removed by 2019, the number will have to increase by 12 per cent in 2018 and 2019.

The Federal Ministry of the Interior emphasizes that, in keeping with the principles of an effective and humane return policy, and in accordance with the Return Directive (2008/115/EC), Austria primarily encourages voluntary return and departure. Only when individuals do not depart voluntarily are they forcibly returned, the ministry states.<sup>55</sup>

### 2.3 National Debates

In the first six months of 2017, Austrian media coverage of the subject of return was dominated by three topics: voluntary return, removals to Afghanistan and the draft amendment to the Act Amending the Aliens Law.

51 Federal Ministry of the Interior, *Neues Rückkehrhilfeprogramm für Asylweber aus Afghanistan, Marokko und Nigeria*, News, 14 April 2016, available at [www.bmi.gv.at/cms/bmi/\\_news/bmi.aspx?id=3647354D7433414355414D3D&page=119&view=1](http://www.bmi.gv.at/cms/bmi/_news/bmi.aspx?id=3647354D7433414355414D3D&page=119&view=1) (accessed on 26 July 2017).

52 Federal Office for Immigration and Asylum, *2016 – Das Jahr der Erweiterung*, available at [www.bfa.gv.at/files/Statistiken/BFA\\_Jahresbilanz\\_2016.pdf](http://www.bfa.gv.at/files/Statistiken/BFA_Jahresbilanz_2016.pdf) (accessed on 16 June 2017); Federal Office for Immigration and Asylum, *2015 – Das Jahr der Steigerungen*, available at [www.bfa.gv.at/files/Statistiken/BFA\\_Jahresbilanz2015\\_web.pdf](http://www.bfa.gv.at/files/Statistiken/BFA_Jahresbilanz2015_web.pdf) (accessed on 26 July 2017).

53 Federal Office for Immigration and Asylum, *BFA-Bilanz 1. Halbjahr 2017*, p.1, available at [www.bfa.gv.at/files/Statistiken/BFA\\_Halbjahresbilanz\\_2017.pdf](http://www.bfa.gv.at/files/Statistiken/BFA_Halbjahresbilanz_2017.pdf) (accessed on 26 July 2017).

54 2008 is the least recent year for which data is available.

55 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

In January, Austrian media reported on the plans announced by the Federal Office for Immigration and Asylum to expand the system of **voluntary return** in 2017.<sup>56</sup> The Minister of the Interior (of the Austrian People's Party) announced in March 2017 a special campaign to promote the voluntary return of certain categories of individuals: the first 1,000 individuals returning voluntarily to their home countries would receive EUR 1,000 in start-up assistance. To prevent misuse, nationals of EU Member States, the Western Balkans and visa-free countries, persons who have committed a crime pursuant to the Criminal Code, persons who have sufficient financial resources, and those who have already received assistance are excluded.<sup>57</sup> The non-governmental organizations Caritas and Verein Menschenrechte Österreich underscored in this context the advantages of voluntary return, citing examples such as better chances for reintegration in the country of return and a more comfortable departure, which it was claimed would especially benefit families.<sup>58</sup>

On the subject of **removals to Afghanistan**, in late March 2017 Austrian media covered the first jointly coordinated flight to remove Afghan nationals to their home country that took place following the signing of the declaration by the EU and Afghanistan in October 2016.<sup>59</sup> In this context, media quoted from an expert opinion that assessed the reintegration prospects for returnees to Afghanistan as being more positive than had previously been the case (see section 2.2).<sup>60</sup> The media also reported

56 Die Presse, *Asylamt setzt Fokus auf Afghanistan*, 19 January 2017, available at <http://diepresse.com/home/innenpolitik/5156932/Asylamt-setzt-Fokus-auf-Afghanistan> (accessed on 6 July 2017).

57 Written input by Stephanie Theuer, Federal Ministry of the Interior, 14 November 2017.

58 Kleine Zeitung, *1000 Euro für die ersten 1000 Rückkehrer*, 22 March 2017, available at [www.kleinezeitung.at/politik/innenpolitik/5187883/Fluechtlinge\\_1000-Euro-fuer-die-ersten-1000-Rueckkehrer](http://www.kleinezeitung.at/politik/innenpolitik/5187883/Fluechtlinge_1000-Euro-fuer-die-ersten-1000-Rueckkehrer) (accessed on 6 July 2017).

59 Salzburger Nachrichten, *Flüchtlinge – Erster Frontex-Charter nach Afghanistan*, 29 March 2017, available at [www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/fluechtlinge-erster-frontex-charter-nach-afghanistan-240927/](http://www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/fluechtlinge-erster-frontex-charter-nach-afghanistan-240927/) (accessed on 6 July 2017).

60 Wiener Zeitung, *Der Einzelfall entscheidet*, 23 June 2017, available at [www.wienerzeitung.at/nachrichten/oesterreich/politik/899950\\_Der-Einzelfall-entscheidet.html](http://www.wienerzeitung.at/nachrichten/oesterreich/politik/899950_Der-Einzelfall-entscheidet.html) (accessed on 14 August 2017); Der Standard, *Vermehrte Abschiebungen nach Afghanistan: Angst lähmt Community*, 5 May 2017, available at <http://derstandard.at/2000055439852/Vermehrte-Abschiebung-nach-Afghanistan-Angst-laehmt-afghanische-Community> (accessed on 29. August 2017); Der Standard, *Harter Start*

controversial opinions. It was related, for example, that there had been public protest against removals. It was also reported how individuals were in a precarious situation after returning to Kabul.<sup>61</sup> The removals were also criticized in view of the security conditions in that city.<sup>62</sup> However, a spokesperson for the Federal Ministry of the Interior claims that individual cases are examined in view of any potential risk existing upon return.<sup>63</sup>

Another subject of discussion was the **draft amendment**, put forth by the Federal Government, **of the Act Amending the Aliens Law**, which seeks among other things to sanction illegal residence more efficiently and more widely (2017 Act Amending the Aliens Law).<sup>64</sup> A draft supplement was later submitted by the Federal Ministry of the Interior, aimed especially at more efficient enforcement of rejected asylum seekers' obligation to depart from the country (2017 Act Amending the Aliens Law Part II).<sup>65</sup> The proposed amendments to legislation were the subject of controversial discussions in Austrian media. The Austrian Defence Minister (of the Social Democratic Party of Austria) and the Minister of the Interior (of the Austrian People's Party) argued that individuals who had been issued a negative asylum decision with final effect had to be removed from the country, while underscoring the need for the measures included in the draft act, specifically: additional counselling, heavier administrative fines with imprisonment as a substitute, more extensive use of detention pending

*nach der Abschiebung in Afghanistan*, 4 April 2017, available at <http://derstandard.at/2000055333735/Harter-Start-nach-der-Abschiebung-in-Afghanistan> (accessed on 6 July 2017).

- 61 Der Standard, *Harter Start nach der Abschiebung in Afghanistan*, 4 April 2017, available at <http://derstandard.at/2000055333735/Harter-Start-nach-der-Abschiebung-in-Afghanistan> (accessed on 6 July 2017).
- 62 Salzburger Nachrichten, Österreich schob am Mittwoch 17 Afghanen nach Kabul ab, 31 Mai 2017, available at [www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/oesterreich-schob-am-mittwoch-17-afghanen-nach-kabul-ab-250132/](http://www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/oesterreich-schob-am-mittwoch-17-afghanen-nach-kabul-ab-250132/) (accessed on 6 July 2017).
- 63 Die Presse, *Grüne wollen Abschiebungen nach Afghanistan stoppen*, 5 June 2017, available at <http://diepresse.com/home/innenpolitik/5229722/Gruene-wollen-Abschiebungen-nach-Afghanistan-stoppen> (accessed on 6 July 2017).
- 64 2017 Act Amending the Aliens Law, *Ministerial Proposal, Preamble*, p. 1, available at [www.parlament.gv.at/PAKT/VHG/XXV/ME/ME\\_00279/imfname\\_582632.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00279/imfname_582632.pdf) (accessed on 12 July 2017).
- 65 2017 Act Amending the Aliens Law Part II, *Ministerial Proposal, Preamble*, p. 1, available at [www.parlament.gv.at/PAKT/VHG/XXV/ME/ME\\_00311/imfname\\_629378.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00311/imfname_629378.pdf) (accessed on 12 July 2017).

removal, the establishment of departure centres and withdrawal of basic welfare support. In view of the latter measure, media reports quoted warnings by the United Nations High Commissioner for Refugees (UNHCR) and the Vienna refugee coordinator that withdrawing basic welfare support would threaten illegally residing refugees with homelessness.<sup>66</sup> The Diakonie organization feared that many would not be able to pay the stiffer administrative fines, with prison sentences having to be imposed more frequently as a substitute. The Austrian Bar Association expected a corresponding rise in administrative and court costs.<sup>67</sup> According to media, with the proposed supplements the Social Democratic Party of Austria and the Austrian People's Party sought primarily to restrict rejected asylum seekers to certain residence areas by threatening them with sanctions. While the party referred to as NEOS – The New Austria criticized the continued lack of important measures such as readmission agreements, the Austrian Freedom Party called for consistent and immediate removal of asylum seekers making false claims. The Austrian Green Party, in contrast, emphasized the need for shorter asylum procedures meeting high quality standards.<sup>68</sup>

66 Kurier, *3500 Obdachlose? Kritik an neuem Fremdenrecht*, 28 February 2017, available at <https://kurier.at/politik/inland/fremdenrecht-regierung-verteidigt-verschaerfungen/249.037.516> (accessed on 6 July 2017); Wiener Zeitung, *Sobotka fordert Ausreisezentren*, 2 March 2017, available at [www.wienerzeitung.at/nachrichten/oesterreich/politik/877104\\_Sobotka-fordert-Ausreisezentren.html](http://www.wienerzeitung.at/nachrichten/oesterreich/politik/877104_Sobotka-fordert-Ausreisezentren.html) (accessed on 6 July 2017).

67 Der Standard, *Strafen für abgelehnte Asylwerber: Hohe Kosten, Nutzen unklar*, 7 February 2017, available at <http://derstandard.at/2000052199948/Strafen-fuer-abgelehnte-Asylwerber-Hohe-Kosten-Nutzen-unklar> (accessed on 6 July 2017).

68 Salzburger Nachrichten, *Doskozil verteidigt Fremdenrechtspaket gegen Kritik*, 21 April 2017, available at [www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/doskozil-verteidigt-fremdenrechtspaket-gegen-kritik-244182/](http://www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/doskozil-verteidigt-fremdenrechtspaket-gegen-kritik-244182/) (accessed on 6 July 2017).

## 3. RETURN DECISIONS

This chapter discusses the termination of a third-country national's illegal stay through the issuing of a return decision as referred to in Art. 6 of the Return Directive (2008/115/EC).<sup>69</sup> The European Commission's Recommendation on making returns more effective when implementing the Return Directive<sup>70</sup> is also discussed in this context. An evaluation is presented in particular of the extent to which Austria implements individual recommendations, specifically: no. 5 on the systematic issuing of return decisions, no. 6 relating to the unlimited duration of return decisions, no. 7 on information concerning the obligation to leave the country for a third country, no. 8 relating to the use of a derogation, no. 9 (c) on the issuing of travel documents, no. 9 (d) relating to the use of the instrument of mutual recognition, and no. 24 (d) on the issuing of return decisions during exit checks.

### 3.1 General Provisions

The Federal Office for Immigration and Asylum is the authority in Austria responsible for issuing return decisions (Art. 3 para 1 subpara 3 Act Establishing the Federal Office for Immigration and Asylum;<sup>71</sup> Art. 3 para 2 subpara 4 Federal Office for Immigration and Asylum Procedures Act).<sup>72</sup> A return decision obliges the recipient to depart for a third country (Art. 52 para 8 Aliens Police Act).<sup>73</sup> The person concerned is required to be informed

69 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, 24 December 2008, OJ 2008 L 348/98.

70 European Commission, *Commission Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017)1600 final, available at <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1600-F1-EN-MAIN-PART-1.PDF> (accessed on 14 March 2017).

71 FLG I No. 87/2012, in the version of FLG I No. 70/2015.

72 FLG I No. 87/2012, in the version of FLG I No. 84/2017.

73 FLG I No. 100/2005, in the version of FLG I No. 68/2017.



of this obligation either orally or in writing (Art. 58 Aliens Police Act). This information is contained in the return decision.<sup>74</sup>

Austrian law has no provision specifying the period of validity of a return decision (refer to Art. 52 Aliens Police Act). Such decisions are, therefore, valid until the third-country national concerned actually leaves Austria or until a decision with different wording is issued (Art. 60 para 3 Aliens Police Act; Schrefler-König/Szymanski, 2014:Art. 52, E 9).<sup>75</sup> The 2017 Act Amending the Aliens Law<sup>76</sup> introduces an administrative penalty for the failure to comply with return decisions, in keeping with recommendation no. 11 by the European Commission. The Act allows the authorities to impose a fine of between EUR 5,000 and EUR 15,000. Imprisonment of a maximum of six weeks is defined as a substitute penalty for individuals unable to pay the fine (Art. 2 subpara 82 2017 Act Amending the Aliens Law). This provision is set to become effective as of 1 November 2017 (Art. 2 subpara 94 2017 Act Amending the Aliens Law).

### 3.2 Systematic Issuing of Return Decisions

The authorities are generally required to issue return decisions to all third-country nationals not residing legally in Austria, as specified in Art. 52 para 1 Aliens Police Act. Such a decision can also be issued after the person concerned has already left Austria. This provision was introduced when the Aliens Authorities Restructuring Act<sup>77</sup> came into effect as of 1 January 2014, in order to comply with Art. 6 para 1 of the Return Directive (2008/115/EC).<sup>78</sup> Thus, a procedure for issuing a return decision can even be initiated when, on leaving the country, a person is discovered to have resided here

74 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

75 See also Administrative High Court, 22 May 2013, 2011/18/0230; 14 March 2013, 2012/22/0214.

76 Available at [www.parlament.gv.at/PAKT/VHG/XXV/BNR/BNR\\_00513/fname\\_645121.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/BNR/BNR_00513/fname_645121.pdf) (accessed on 18 July 2017).

77 FLG I No. 87/2012.

78 Aliens Authorities Restructuring Act, *Government Proposal, Explanatory Notes*, p. 64, available at [www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01803/fname\\_255385.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01803/fname_255385.pdf) (accessed on 18 July 2017).

illegally.<sup>79</sup> However, no cases of this kind are known from court rulings and legal counselling.<sup>80</sup>

Return decisions can also be issued in Austria when the whereabouts of the person concerned are unknown. However, the facts must be sufficiently investigated.<sup>81</sup> In such cases, the decision can be published on the authorities' official notice board and after two weeks is considered legally served (Art. 25 Service of Documents Act).<sup>82</sup> Return decisions are issued even to individuals who do not yet have a travel document or proof of identity (see Art. 52 Aliens Police Act).<sup>83</sup> To establish the place of residence or identity of a suspected illegal resident, the police are entitled to check the person's identity (see Art. 34 para 1 subpara 1 Aliens Police Act). The police are also authorized to enter premises and rooms where at least five foreigners are assumed to reside, some of whom are staying in Austria illegally (see Art. 36 para 1 subpara 3 Aliens Police Act). Beyond this, the Federal Office for Immigration and Asylum can request – by means of a corresponding order – the apprehension of a person not residing legally in Austria (see Art. 34 Federal Office for Immigration and Asylum Procedures Act). Such persons, whether Austrian citizens, citizens of the EU and the European Economic Area (EEA) or third-country nationals, can be arrested and detained on justifiable grounds in the course of a normal police check.<sup>84</sup>

Return decisions can also be issued to third-country nationals residing legally in Austria (see Art. 52 para 4 and 5 Aliens Police Act). Another case arises where an application for international protection or for a humanitarian residence title is rejected: here the authorities are normally required to issue with the rejection a return decision to the person concerned (see Art. 52 para 2 and para 3 Aliens Police Act; Art. 10 Asylum Act).<sup>85</sup>

79 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

80 See Federal Chancellery, *Rechtsinformationssystem (RIS)*, available at [www.ris.bka.gv.at/Judikatur](http://www.ris.bka.gv.at/Judikatur) (accessed on 18 July 2017); interview with Stephan Klammer, Diakonie Refugee Service, 4 August 2017.

81 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

82 FLG No. 200/1982, in the version of FLG I No. 40/2017.

83 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

84 Ibid.

85 FLG I No. 100/2005, in the version of FLG I No. 68/2017.

In cases of forcible return (*Zurückschiebung*), on the other hand, Austria refrains from issuing a return decision if a readmission agreement exists with the Member State to which the third-country national is to be returned (Art. 52 para 7 Aliens Police Act). Forcible return (*Zurückschiebung*) refers to the return of an individual to an EU Member State and can be used in particular where:

- a person enters the country illegally and is apprehended within 14 days;
- a person is apprehended within 14 days of when the person's stay became illegal;
- or the person is apprehended when departing after an illegal stay (Art. 45 para 1 Aliens Police Act).

Even once a return decision is issued, the principle of non-refoulement must be observed in removal cases. Removal is not permissible where, for instance, it would result in a violation of Art. 2 or 3 of the European Convention on Human Rights (ECHR)<sup>86</sup> or of the prohibition of the death penalty. It is also not permissible if it would lead to a serious threat to the life or the integrity of the third-country national as a civilian, resulting from arbitrary violence during an international or national conflict. Furthermore, a removal is not permissible if the life or freedom of the person concerned would be threatened on account of the person's race, religion, nationality, membership of a particular social group or political opinion, as specified in Art. 33 para 1 of the Geneva Refugee Convention.<sup>87</sup> This is not the case where the person has an alternative to flight within that country (Art. 50 Aliens Police Act; Lukits, 2016:39; Rutz, 2014:24–25).

Where removal is not permitted and all other legally required conditions are met, third-country nationals staying in Austria illegally can obtain humanitarian residence titles on various grounds (referred to as “residence titles for exceptional circumstances”). This applies in particular in the following cases: where it is necessary to protect a person's private or family life; where third-country nationals have resided in Austria for at least five

86 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, 4 November 1950, Council of Europe Treaty Series No. 5.

87 Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series vol. 189.

years or their stay has been tolerated for at least one year; and victims of trafficking in human beings or of violence (see Art. 54–61 Asylum Act; AT EMN NCP, 2015:54–56). The stay of a third-country national can also be tolerated if removal is not permissible or is not possible due to reasons which the person is not responsible for (Art. 46a Aliens Police Act; refer also to Lukits, 2016:40–41). Tolerated third-country nationals do not, however, have legal residence status in Austria (Art. 31 para 1a subpara 3 Aliens Police Act).

### 3.3 Recognition of Return Decisions and Travel Documents

A return decision issued by another member state of the European Economic Area (EEA) is legally recognized in Austria where the person concerned has no residence title for Austria and the return decision was issued on certain grounds, including a violation by that person of the issuing country's entry and residence laws (Art. 46b Aliens Police Act). On recognition of a return decision, procedures are initiated for returning the person to the particular third country.<sup>88</sup>

Whether or not third countries accept EU travel documents or issue their own travel documents for returning third-country nationals staying illegally in Austria depends on the particular third country, according to the Federal Ministry of the Interior.<sup>89</sup> As required in the currently valid Regulation on the Implementation of the Aliens Police Act,<sup>90</sup> travel documents for the return of third-country nationals were previously issued based on the template given in the related recommendation by the Council of the European Union in 1996.<sup>91, 92</sup> That recommendation has been repealed, however, by Regulation (EU) 2016/1953 on the establishment of a European travel document for the return of illegally residing third-country

88 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

89 Ibid.

90 Regulation on the Implementation of the Aliens Police Act, FLG II No. 450/2005.

91 *Council Recommendation of 30 November 1994 concerning the adoption of a standard travel document for the expulsion of third-country nationals*, 19 September 1996, OJ 1996 C 274/ 18.

92 Art. 17 Regulation on the Implementation of the Aliens Police Act.

nationals,<sup>93</sup> which has been in effect since 8 April 2017 (Art. 9 of the Regulation).

The Federal Office for Immigration and Asylum is responsible for obtaining the necessary travel documents, provided that no valid travel document exists. When all formal requirements of the third country are met, the process is started and the proceedings are conducted in line with the legal bases aiming at coming to a completion as quickly as possible.<sup>94</sup>

### 3.4 Challenges and Good Practices

According to the Diakonie Refugee Service, **challenges** exist in the application in practice of Art. 6 para 2 Return Directive (2008/115/EC) and Art. 52 para 6 Aliens Police Act. These provisions specify an obligation to depart for illegally residing third-country nationals who have the right of residence in another EU Member State, as opposed to issuing them a return decision. Diakonie Refugee Service observes that, in practice, third-country nationals who have committed crimes are not requested to leave Austria but are issued a return decision, even though a return decision is only required to be issued to individuals with a valid right of residence in another Member State when the particular individual does not comply with the obligation to depart or where no immediate departure is necessary for reasons of public policy or safety (see Art. 52 para 6 Aliens Police Act). Diakonie Refugee Service claims that these factors are not sufficiently weighed. The personal consequences for the individuals concerned, Diakonie claims, are removal to their particular country of origin and difficulties in re-entering the Member State for which they have a residence title.<sup>95</sup> Correspondingly, the Federal Administrative Court has repeatedly handed down rulings in recent years repealing the original decisions in such cases.<sup>96</sup>

93 Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals, and repealing the Council Recommendation of 30 November 1994, 17 November 2016, OJ 2016 L 311/13.

94 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

95 Interview with Stephan Klammer, Diakonie Refugee Service, 4 August 2017.

96 See, for instance, Federal Administrative Court, 20 June 2017, W159 2140192-2.; 8. June 2015, W226 2102337-1; 5 December 2014, 1403 2014908-1.

According to the Federal Ministry of the Interior difficulties arise when mutually recognizing return decisions of EEA member states. These are discussed also at EU level.<sup>97</sup>

Non-governmental organizations estimate that the specified fine for disregarding return decisions exceeds the means of the persons concerned and thus expect the substitute penalty of imprisonment to be enforced in many cases. Similar experience has previously been gathered with existing administrative penalties for illegal entry and illegal residence (see Art. 120 para 1 and para 1a Aliens Police Act).<sup>98</sup>

A **good practice** to be mentioned is that of having one and the same authority (the Federal Office for Immigration and Asylum) issue both return decisions and decisions rejecting applications for international protection, frequently at the same time (see Art. 52 Aliens Police Act; see also section 8.1). This encourages coherent decisions and efficient procedures (Lukits, 2016:44).

97 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

98 Interview with Günter Ecker, Verein Menschenrechte Österreich, 26 July 2017; interview with Stephan Klammer, Diakonie Refugee Service, 4 August 2017; Der Standard, *Strafen für abgelehnte Asylwerber: Hohe Kosten, Nutzen unklar*, 7 February 2017, available at <http://derstandard.at/2000052199948/Strafen-fuer-abgelehnte-Asylwerber-Hohe-Kosten-Nutzen-unklar> (accessed on 6 July 2017).

## 4. ENTRY BANS

This chapter discusses entry bans as referred to in Art. 11 of the Return Directive (2008/115/EC).<sup>99</sup> Consideration is also given as to how Austria implements the related recommendations by the European Commission for making returns more effective when implementing the Return Directive.<sup>100</sup> The focus of the discussion includes recommendations no. 24 (a) relating to the period of validity, no. 24 (c) on alerts in the Schengen Information System and no. 24 (d) relating to issuing entry bans during exit checks.

### 4.1 General Provisions

Prior to 1 January 2014, an entry ban valid for at least 18 months had been compulsory with any return decision issued (Art. 53 Aliens Police Act as amended prior to the Act Amending the Aliens Authorities Restructuring Act).<sup>101</sup> The Administrative High Court ruled, however, that the previous provision conflicted with the Return Directive (2008/115/EC), which requires the length of an entry ban to be determined with regard to individual circumstances.<sup>102</sup> Hence, the Act Amending the Aliens Authorities Restructuring Act specifies that, when issuing a return decision, the Federal Office for Immigration and Asylum “can” at the same time impose an entry ban (Art. 53 Aliens Police Act,<sup>103</sup> cf. Rutz, 2014:

99 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, 24 December 2008, OJ 2008 L 348/98.

100 European Commission, *Commission Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017)1600 final, available at <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1600-F1-EN-MAIN-PART-1.PDF> (accessed on 14 March 2017).

101 FLG I No. 68/2013.

102 Administrative High Court, 15 December 2011, 2011/21/0237; 15 May 2012, 2012/18/0029.

103 FLG I No. 100/2005, in the version of FLG I No. 68/2017.

16–17).<sup>104</sup> The phrasing of the new provision thus does not generally require an entry ban to be imposed. This concurs with Art. 11 para 3 of the Return Directive (2008/115/EC), which allows Member States to refrain from imposing an entry ban in individual cases on humanitarian grounds.

In recommendation no. 24 (d) the European Commission proposes that a return decision be issued (and in justified cases where necessary an entry ban as well) where an illegal stay is discovered during an exit check. Austria, however, does generally not issue entry bans in such cases because the administrative effort is disproportionate compared with the added value. Currently, alerts relating to existing entry bans are entered in the Schengen Information System on a case-by-case basis.<sup>105</sup>

The validity period of an entry ban begins on the day after departure (Art. 53 para 4 Aliens Police Act). This basically concurs with recommendation no. 24 (a) by the European Commission, although the Commission's recommendation refers to departure from the EU, while the Aliens Police Act defines departure as leaving the territory of Austria (Art. 2 para 3 subpara 2a Aliens Police Act).

A special penal provision applies to persons failing to comply with an entry ban, as specified in the 2017 Act Amending the Aliens Law.<sup>106</sup> Specifically, entering Austria in breach of an entry ban is subject to a potential maximum fine of EUR 15,000 and a substitute penalty of a maximum of six weeks' imprisonment.<sup>107</sup> Non-governmental organizations, predicting that the persons concerned will be unable to pay the fines, expect substitute imprisonment to be imposed (see section 3.4).<sup>108</sup>

104 Art. 4 subpara 58 and 83 Act Amending the Aliens Authorities, FLG I No. 68/2013; Act Amending the Aliens Authorities, *Government Proposal, Explanatory Notes*, p. 23–24, available at [www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_02144/imfname\\_285862.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_02144/imfname_285862.pdf) (accessed on 20 July 2017).

105 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

106 Available at [www.parlament.gv.at/PAKT/VHG/XXV/BNR/BNR\\_00513/fname\\_645121.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/BNR/BNR_00513/fname_645121.pdf) (accessed on 18 July 2017).

107 Art. 2 subpara 82 2017 Act Amending the Aliens Law.

108 Der Standard, *Strafen für abgelehnte Asylwerber: Hohe Kosten, Nutzen unklar*, 7 February 2017, available at <http://derstandard.at/2000052199948/Strafen-fuer-abgelehnte-Asylwerber-Hohe-Kosten-Nutzen-unklar> (accessed on 6 July 2017). Interview with Günter Ecker, Verein Menschenrechte Österreich, 26 July 2017.



## 4.2 Preconditions for Issuing Entry Bans and Periods of Validity

Pursuant to Art. 53 para 2 of the Aliens Police Act, when determining the length of an entry ban, the Federal Office for Immigration and Asylum is required to take into account the previous behaviour of the person concerned and to consider to what degree the person's stay would be contrary to public policy or security or other public interests listed in Art. 8 para 2 of the European Convention on Human Rights (ECHR).<sup>109</sup> Now that it is no longer compulsory for a return decision to be combined with an entry ban, it has to be assumed that these criteria apply not only to determining the length of an entry ban but also to deciding whether to impose an entry ban at all. In keeping with Art. 11 of the Return Directive (2008/115/EC), the particular circumstances of the individual case play a decisive role here.

The table below lists the grounds for issuing an entry ban as defined in Art. 11 para 1 (c) of the Return Directive (2008/115/EC) in conjunction with Art. 7 para 4 and Art. 11 para 1 (b) of that Directive, comparing them with how the grounds are applied in Austria.

**Table 1: Grounds for Issuing an Entry Ban as Defined in the Return Directive (2008/115/EC)**

Grounds for issuing an entry ban	Application in Austria
Risk of absconding (Art. 7 para 4).	The risk of absconding is not explicitly mentioned in the Aliens Police Act as grounds for imposing an entry ban (see Art. 53 para 2 Aliens Police Act). This can be considered, however, when assessing the case.
The person concerned poses a risk to public policy, public security or national security (Art. 7 para 4).	Pursuant to Art. 53 para 2 of the Aliens Police Act, the authorities are especially to consider to what degree the third country national's stay would be contrary to public policy or security or other public interests listed in Art. 8 para 2 ECHR. In addition to public safety (or policy), national security is explicitly listed in Art. 8 para 2 ECHR.
The application for legal stay has been dismissed as manifestly unfounded or fraudulent (Art. 7 para 4).	This is also not explicitly mentioned in the Aliens Police Act as grounds for an entry ban (see Art. 53 para 2 Aliens Police Act), yet it can be considered when assessing the case.
The obligation to return has not been complied with (Art. 11 para 1 (b)).	The fact that the person concerned has breached the obligation to return is not explicitly mentioned in the Aliens Police Act as grounds for an entry ban (see Art. 53 para 2 Aliens Police Act). However, where the person fails to comply with the obligation to return, Art. 11 para 1 of the Return Directive requires a return decision to generally be combined with an entry ban.

109 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, 4 November 1950, Council of Europe Treaty Series No. 5.

Art. 53 para 2 Aliens Police Act enumerates additional circumstances that must be considered, especially when assessing whether to impose an entry ban. Examples include convictions with final effect for specific administrative offences or acts punishable by an Austrian court, destitution, illegal employment, or a marriage or adoption of convenience.

Under certain conditions entry bans can be issued for ten years at most or even indefinitely (Art. 53 para 3 Aliens Police Act; Rutz, 2014:18), and are imposed in practice for varying periods of time.<sup>110</sup> Recent rulings by the Federal Administrative Court reveal that entry bans are relatively often imposed for a period of ten years.<sup>111</sup>

Art. 53 para 2 of the Aliens Police Act enumerates by way of example the circumstances justifying the imposition of entry bans for ten years at most. These include specific administrative offences, destitution, illegal employment, or a marriage or adoption of convenience. Pursuant to para 3, an entry ban can be imposed for longer than five years where certain facts make it reasonable to assume that the stay of the person concerned would represent a serious threat to public safety or policy. This paragraph lists by way of example the circumstances giving occasion to consider imposing an entry ban for longer than five years. These include in particular a conviction for certain acts punishable by an Austrian court. An entry ban can even be imposed for an unlimited period in the cases enumerated in subpara 5–8, which include a specifically defined relationship to a criminal organization or to terrorist activity (cf. Rutz, 2014:18).

### 4.3 Challenges and Good Practices

Several **challenges** emerge in view of the implementation of entry bans in practice. A problematic set of circumstances can develop where an entry ban is imposed after the person concerned has already complied with a previously issued return decision. Here the person might at first, which means until the application for a visa, not be aware of the entry ban.<sup>112</sup>

No related specific **good practices** could be identified in the study.

110 See the case law of the Federal Administrative Court on Art. 53 Aliens Police Act at [www.ris.bka.gv.at/bvwg](http://www.ris.bka.gv.at/bvwg) (accessed on 21 July 2017).

111 See, for instance, Federal Administrative Court, 7 July 2017, I403 2124712-2; 5 July 2017, I407 2159086-1; 3 July 2017, L515 1235454-3; 29 June 2017, W189 1301887-3; 28 June 2017, I408 2148389-1.

112 Interview with Stephan Klammer, Diakonie Refugee Service, 4 August 2017.

## 5. VOLUNTARY DEPARTURE

This chapter discusses voluntary departure as referred to in Art. 7 of the Return Directive (2008/115/EC).<sup>113</sup> The European Commission's Recommendation on making returns more effective when implementing the Return Directive<sup>114</sup> is also discussed in this context. In particular, an evaluation is presented of the extent to which Austria complies with recommendations no. 17 on granting voluntary departures on request and nos. 18 and 19 relating to the period for voluntary departure. A closer examination is also made of recommendation no. 24 (b) on verifying voluntary departure within the allotted period.

### 5.1 General Provisions and Period for Voluntary Departure

The period for voluntary departure in Austria is set by the authorities (Art. 55 Aliens Police Act)<sup>115</sup> and not as recommended by the European Commission at the request of the individual concerned (recommendation no. 17). This provision is in line with the Austrian and European return policy, which gives preference to voluntary departure and return over removal (see section 2.2; recital no. 10 Return Directive).

A return decision is normally tied to a set period for voluntary departure, except where a complaint is lodged and the suspensive effect of that complaint is lifted (Art. 55 Aliens Police Act; cf. Lukits, 2016:21). In this case the return decision can be executed before a ruling on the complaint is handed down. This procedure is followed in particular if there is a risk of absconding or where the person's immediate departure is necessary in

113 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, 24 December 2008, OJ 2008 L 348/98.

114 European Commission, *Commission Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017)1600 final, available at <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1600-F1-EN-MAIN-PART-1.PDF> (accessed on 14 March 2017).

115 FLG I No. 100/2005, in the version of FLG I No. 68/2017.

the interests of public order or security (Art. 18 para 2 Federal Office for Immigration and Asylum Procedures Act).<sup>116</sup> The suspensive effect of a complaint can also be withdrawn where asylum seekers have not stated any grounds for persecution or where the reasons given for flight are obviously not true (see Art. 18 para 1 Federal Office for Immigration and Asylum Procedures Act; Lukits, 2016:25–26).

In general, the Federal Office for Immigration and Asylum grants a period for voluntary departure in accordance with Art. 55 para 1 Aliens Police Act. Pursuant to para 2 the period set is 14 days from when the decision becomes final.<sup>117</sup>

In the event of special circumstances, the Federal Office for Immigration and Asylum can also specify a period exceeding 14 days on one occasion, in accordance with Art. 55 para 3 Aliens Police Act. Such special circumstances are examined as part of a decision in the individual case. In its decision, the Federal Office for Immigration and Asylum is required to weigh any special personal circumstances against the grounds for issuing a return decision (see Art. 55 para 2 Aliens Police Act). Such circumstances include children attending school and other aspects as specified in Art. 7 para 2 of the Return Directive (2008/115/EC).<sup>118</sup> The person concerned must provide evidence of the special circumstances, while at the same time stating the date of departure (see Art. 55 para 3 Aliens Police Act).

## 5.2 Challenges and Good Practices

Austria faces **challenges** in the area of voluntary departure, especially relating to the length of the allotted period, the risk of absconding and to verification of departure. Specifically, Verein Menschenrechte Österreich (VMÖ) and Diakonie Refugee Service view the **period** of two weeks allowed to prepare for and carry out returns as often too short in practice. This need not be a problem, it is observed, as long as a certain amount of flexibility is exercised and extension requests are granted. This has previously been the

116 FLG I No. 87/2012, in the version of FLG I No. 84/2017.

117 Regarding the legal effect of a decision see Lukits, 2016:21.

118 Interview with Stephan Klammer, Diakonie Refugee Service, 4 August 2017.

case in general (see below).<sup>119</sup> Another challenge, in the experience of VMÖ, is posed by **absconding** in general and thus also in cases of voluntary departure. In practice, the **verification** whether a person has actually left within the set period for voluntary departure is, especially in the case of non-assisted return, difficult.<sup>120</sup> With reference to verification of voluntary departure, VMÖ reports that the persons concerned are requested to appear before the Austrian representation authority in the country of return. If they fail to do so, their departure can only be verified if the individuals left Austria as part of an assisted voluntary return programme. In this case there are various methods of verification offering varying reliability. For example, the organization responsible for the programme sends confirmation of departure to the authorities after accompanying the person to the departing flight. The person is similarly accompanied to the bus when returning by land. Where possible, the person's arrival in the country of return is verified through phone calls, written confirmation or exit stamps.<sup>121</sup> An alternative in cases of individuals formerly seeking asylum is to refer to records of discharge from basic welfare support, which can serve as evidence of departure.<sup>122</sup>

Reality shows that when an alien opts for assisted voluntary return, the time until actual departure can be prolonged. This is mainly due to the processing time of an application for assisted voluntary return and the specific organization and associated expenses (document procurement, etc.).<sup>123</sup> The degree of flexibility shown in handling the period for voluntary departure is considered a **good practice** in individual cases. Specifically, VMÖ has made the positive observation that even where the period for voluntary departure has expired, a voluntary return is possible. Two to three weeks are reportedly required on average to prepare and carry out a voluntary return. VMÖ reports of regular contact with the Federal Ministry of the Interior and the Federal Office for Immigration and Asylum to exchange

119 Interview with Günter Ecker, Verein Menschenrechte Österreich, 26 July 2017, Interview with Stephan Klammer, Diakonie Refugee Service, 4 August 2017.

120 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

121 Interview with Günter Ecker, Verein Menschenrechte Österreich, 26 July 2017.

122 Interview with Tobias Molander, Federal Ministry of the Interior, 25 July 2017; interview with Stephan Klammer, Diakonie Refugee Service, 4 August 2017.

123 Written input by Stephanie Theuer, Federal Ministry of the Interior, 14 November 2017.

information on any delays in departure and reasons for delays. According to VMÖ, this is in keeping with the priority given to voluntary return in Austria's return policy (see section 2.2).<sup>124</sup> Diakonie Refugee Service also confirms that extension requests are usually granted, while noting that the two-week period allotted for preparation is very short.<sup>125</sup>

124 Interview with Günter Ecker, Verein Menschenrechte Österreich, 26 July 2017.

125 Interview with Stephan Klammer, Diakonie Refugee Service, 4 August 2017.

## 6. RISK OF ABSCONDING

This chapter relates to Art. 7 para 3 of the Return Directive (2008/115/EC)<sup>126</sup> and to nos. 15 and 16 of the European Commission's Recommendation on making returns more effective when implementing the Return Directive.<sup>127</sup> The issues here relate to assessing the potential risk of absconding before return and to certain obligations intended to avoid such risk.

When the period for **voluntary departure** is set, certain requirements can be specified to avoid any risk of absconding. These include the obligation to reside within a certain administrative district, to report regularly to a police station, to surrender documents for safekeeping or to make a security deposit (Art. 56 Aliens Police Act).<sup>128</sup>

For the case when **individuals are forced to leave the country** and with reference to the provisions on detention pending removal (see chapter 7), Art. 76 para 3 of the Aliens Police Act specifies the conditions for assessing any risk of absconding. These conditions were legally defined in detail in the 2015 Act Amending the Aliens Law.<sup>129</sup>

This specification was occasioned in particular by the provision in Art. 2 (n) of the Dublin III Regulation (604/2013)<sup>130</sup> and the related ruling by the Austrian Administrative High Court (cf. Administrative High Court,

126 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, 24 December 2008, OJ 2008 L 348/98.

127 European Commission, *Commission Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017)1600 final, available at <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1600-F1-EN-MAIN-PART-1.PDF> (accessed on 14 March 2017).

128 FLG I No. 100/2005, in the version of FLG I No. 68/2017.

129 FLG I No. 70/2015.

130 Regulation (EU) 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 (recast), 29 June 2013, OJ 2013 L180/31.

2016:114).<sup>131</sup> The Dublin III Regulation requires the reasons for assuming a risk of absconding to be “based on objective criteria defined by law”. Addressing the legal situation prior to the 2015 Act Amending the Aliens Law, the Administrative High Court ruled that adequate criteria were not defined in the Aliens Police Act.<sup>132</sup>

According to the new legal situation as defined in Art. 76 para 3 first sentence of the Aliens Police Act, a risk of absconding exists “where certain facts make it reasonable to assume that the alien will avoid the procedure or removal or that the alien will impede removal to a substantial degree”. The second sentence of Art. 76 para 3 Aliens Police Act goes on to enumerate those circumstances that are especially required to be considered in this assessment. These circumstances do not, however, allow a risk of absconding to be automatically concluded, rather they are merely “to be considered”. The circumstances are enumerated only by way of example, which is indicated by the use of the expression “in particular” (insbesondere).<sup>133</sup> This means that other circumstances can also be considered when assessing the existence of any risk of absconding.

The table below presents the circumstances and criteria for assessing a risk of absconding as listed in recommendations no. 15 and 16 of the European Commission, as well as the application of these criteria in Austrian law.

**Table 2: Circumstances and Criteria for Assessing a Risk of Absconding as Defined in Recommendations no. 15 and 16 of the European Commission**

Circumstances/criteria for assessing a risk of absconding	Application in Austria
Refusing to cooperate in the identification process (no. 15 (a))	When examining the case, consideration must be given as to whether the person cooperates in the procedure for issuing a return decision or whether the person avoids or impedes return or removal (Art. 76 para 3 subpara 1 Aliens Police Act). In the procedure for issuing a return decision, the person concerned is obliged in particular to cooperate in establishing his or her identity (see Art. 13 para 1 Federal Office for Immigration and Asylum Procedures Act). To aid in removal, third-country nationals are especially required to cooperate in obtaining a replacement travel document (Art. 46 para 2 Aliens Police Act). This includes cooperating in establishing their identities. <sup>134</sup>

131 2015 Act Amending the Aliens Law, *Government Proposal, Explanatory Notes*, p. 22, available at [www.parlament.gv.at/PAKT/VHG/XXV/I/I\\_00582/fname\\_401629.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00582/fname_401629.pdf) (accessed on 18 July 2017).

132 Administrative High Court, 19 February 2015, Ro 2014/21/0075.

133 Cf. 2015 Act Amending the Aliens Law, *Government Proposal, Explanatory Notes*, p. 22, available at [www.parlament.gv.at/PAKT/VHG/XXV/I/I\\_00582/fname\\_401629.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00582/fname_401629.pdf) (accessed on 18 July 2017).

134 See 2015 Act Amending the Aliens Law, *Government Proposal, Explanatory Notes*, p. 3 and p. 18, available at [www.parlament.gv.at/PAKT/VHG/XXV/I/I\\_00582/fname\\_401629.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00582/fname_401629.pdf) (accessed on 18 July 2017).



<b>Circumstances/criteria for assessing a risk of absconding</b>	<b>Application in Austria</b>
Violently or fraudulently opposing the operation of return (no. 15 (b))	As mentioned above, consideration must especially be given to whether the person concerned avoids or impedes return or removal (see row above; Art. 76 para 3 subpara 1 Aliens Police Act). Thus, any violent or fraudulent opposition to return must certainly be considered when assessing the risk of absconding.
Not complying with a measure aimed at preventing absconding (no. 15 (c))	Consideration also must be given to whether the person concerned has breached any requirements related to voluntary departure or to lenient measures imposed in lieu of detention pending removal (Art. 76 para 3 subpara 7 and subpara 8 Aliens Police Act).
Failure to comply with an existing entry ban (no. 15 (d))	Failure to comply with an entry ban or an exclusion order is similarly listed among the criteria (Art. 76 para 3 subpara 2 Aliens Police Act).
Unauthorized secondary movements to another Member State (no. 15 (e))	An attempted secondary movement to another EU Member State can also be taken to indicate a risk of absconding (Art. 76 para 3 subpara 6 Aliens Police Act).
Explicit expression of the intention of non-compliance with a return decision (no. 16 (a))	An explicit expression of the intention to not comply with a return decision is not explicitly listed among the criteria.
Non-compliance with a period for voluntary departure (no. 16 (b))	Non-compliance with a period for voluntary departure is not explicitly mentioned as a separate criterion indicating a risk of absconding (Art. 76 para 3 Aliens Police Act). The existence of an enforceable return decision is, however, explicitly to be considered (Art. 76 para 3 subpara 3 Aliens Police Act).
Conviction for a serious criminal offence in the Member States (no. 16 (c))	Criminal convictions are not mentioned as a separate criterion indicating a risk of absconding (Art. 76 para 3 Aliens Police Act). Yet, such convictions are indeed to be considered when assessing whether it is proportionate to order detention pending removal (see section 7.1.1).

Other facts are also to be considered here, including: whether the person concerned has already on one occasion avoided a return decision or an asylum procedure, whether de facto protection against removal has been suspended or whether the person is not eligible for it, whether an enforceable return decision already existed when the application for asylum was made, and whether the person has previously applied for asylum in more than one EU Member State (Art. 76 para 3 subpara 3–6 Aliens Police Act). The degree of integration in Austrian society is also mentioned among the assessment criteria. This includes factors such as the existence of sufficient financial means (Art. 76 para 3 subpara 9 Aliens Police Act). Providing misleading information is, on the other hand, not explicitly mentioned in the second sentence of Art. 76 para 3 Aliens Police Act as a separate criterion indicating a risk of absconding. Yet this factor can be considered as part of the general assessment of the risk of absconding as referred to in the first sentence of Art. 76 para 3 Aliens Police Act.

## 7. ENSURING THE ENFORCEMENT OF RETURN OBLIGATIONS

This chapter centres on detention as a measure for enforcing return decisions. Consideration is also given to the related recommendations by the European Commission for making returns more effective when implementing the Return Directive,<sup>135</sup> as well as to the implementation of these recommendations in Austria. These include recommendation no. 10 (a) on the option of detention, no. 10 (b) relating to the maximum detention periods of six months and 18 months, and no. 10 (c) on bringing detention capacity in line with actual needs. Finally, discussion is given to the “less coercive measures” mentioned in Art. 15 para 1 of the Return Directive (2008/115/EC). In Austria, such measures are referred to as “lenient measures” (gelindere Mittel).

### 7.1 Detention Pending Removal and other Types of Detention

#### 7.1.1 Detention Types and Preconditions

Based on Art. 76 of the Aliens Police Act,<sup>136</sup> aliens are permitted to be taken into **detention pending removal** for the purpose of return. Detention is, however, only considered as an ultima ratio that is resorted to only after first examining whether a lenient measure can be used (see Art. 76 para 1 Aliens Police Act).<sup>137</sup> Strict standards are to be accordingly applied when judging whether the preconditions for ordering detention pending removal are met (cf. Austrian Court of Audit, 2016:113–115).<sup>138</sup>

135 European Commission, *Commission Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017)1600 final, available at <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1600-F1-EN-MAIN-PART-1.PDF> (accessed on 14 March 2017).

136 FLG I No. 100/2005, in the version of FLG I No. 68/2017.

137 See, for instance, Administrative High Court, 11 May 2017, Ro 2016/21/0010.

138 Interview with Stephanie Theuer, Bundesministerium für Inneres, 25 July 2017.

It must be ordered only where necessary for ensuring the procedure or the individual's removal, where a risk of absconding exists and where this is proportionate (Art. 76 para 2 Aliens Police Act). The risk of absconding presupposes that the person will avoid the procedure or removal or will impede removal to a substantial degree (Art. 76 para 3 Aliens Police Act).

The detailed legal criteria for assessing the risk of absconding, based in particular on Art. 2 (n) of the Dublin Regulation, were introduced in the 2015 Act Amending the Aliens Law (see chapter 6). As specified in the 2017 Act Amending the Aliens Law,<sup>139</sup> when examining whether detention is proportionate, consideration is also to be given to whether, due to the seriousness of the crime committed by the person concerned, the public has a preponderant interest in expeditious enforcement of the individual's removal (Art. 2 subpara 71 2017 Act Amending the Aliens Law). This provision conforms to Administrative High Court rulings.<sup>140</sup>

To enforce a return decision, the authorities can also request apprehension (by means of an **"apprehension order"** or *Festnahmeauftrag*); this is specified in Art. 34 of the Federal Office for Immigration and Asylum Procedures Act.<sup>141</sup> An apprehension order can be issued even where no risk of absconding exists. Apprehension is requested in particular when the person concerned fails to comply with conditions applying to a period for voluntary departure or does not comply with the obligation to leave, or in preparation for a removal order. In such cases the individual concerned can be detained for a maximum of 72 hours.

The 2017 Act Amending the Aliens Law includes the explicit option of imposing **coercive penalties**, particularly in the context of obtaining any necessary travel documents (Art. 2 subpara 58 2017 Act Amending the Aliens Law). Coercive penalties amounting to a maximum fine of EUR 726 and up to four weeks' detention can be imposed as often as necessary until the person complies with the obligation.<sup>142</sup>

139 Available at [www.parlament.gv.at/PAKT/VHG/XXV/BNR/BNR\\_00513/fname\\_645121.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/BNR/BNR_00513/fname_645121.pdf) (accessed on 18 July 2017).

140 2017 Act Amending the Aliens Law, *Government Proposal, Explanatory Notes*, p. 35, available at [www.parlament.gv.at/PAKT/VHG/XXV/II/II\\_01523/imfname\\_619001.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/II/II_01523/imfname_619001.pdf) (accessed on 7 August 2017); see, for instance, Administrative High Court, 11 May 2017, Ro 2016/21/0022; 25 March 2010, 2009/21/0276.

141 FLG I No. 87/2012, in the version of FLG I No. 84/2017.

142 Art. 5 Administrative Enforcement Act; cf. 2017 Act Amending the Aliens Law Part II, *Ministerial Proposal, Explanatory Notes*, p. 8–9, available at [www.parlament.gv.at/PAKT/VHG/XXV/ME/ME\\_00311/fname\\_629377.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00311/fname_629377.pdf) (accessed on 8 August 2017).

### 7.1.2 Detention Length and Facilities

The current **maximum length** of detention pending removal in Austria is 10 months. No provision exists for exceeding the maximum length (Art. 80 Aliens Police Act). The maximum length of detention pending removal will, however, be increased to 18 months through the 2017 Act Amending the Aliens Law (Art. 2 subpara 75 2017 Act Amending the Aliens Law). This step utilizes to the fullest legal extent the maximum period specified in Art. 15 para 6 of the Return Directive (2008/115/EC).<sup>143</sup> This provision is to become effective as of 1 November 2017 (Art. 2 subpara 94 2017 Act Amending the Aliens Law).

Currently, the average length of detention pending removal is between two and three weeks (Austrian Court of Audit, 2016: 110). How the average length of detention pending removal will change as a result of the 2017 Act Amending the Aliens Law is not yet known.<sup>144</sup>

Pursuant to Art. 78 para 1 of the Aliens Police Act, persons awaiting removal are generally to be detained in a **detention facility** belonging to the police administration of one of the provinces, referred to as police detention centres. At these centres, other types of detention take place in addition to detention pending removal (Austrian Court of Audit, 2016:116). A detention centre exclusively for detaining persons awaiting removal was opened in early 2014 in the Styrian town of Vordernberg, with the aim of substantially improving this type of detention in accordance with human rights standards and to implement the requirements of the Return Directive (2008/115/EC; Austrian Court of Audit, 2016:103, 129, 173).

With the opening of the Vordernberg detention centre, new rules were introduced for detention pending removal. Where the length is expected to exceed seven days, individuals should be detained only at the Vordernberg detention centre, the Zinnergasse family accommodation facility in Vienna or another open detention facility (Asylkoordination Österreich/ECRE, 2016:88; Austrian Court of Audit, 2016:130, 135, 137). In a decree issued in May 2015, the Federal Ministry of the Interior ruled that throughout Austria detention pending removal is to take place under open conditions (with cells open during the day; Austrian Ombudsman Board, 2017:141).

143 2017 Act Amending the Aliens Law, *Government Proposal, Explanatory Notes*, p. 36, available at [www.parlament.gv.at/PAKT/VHG/XXVI/II/I\\_01523/imfname\\_619001.pdf](http://www.parlament.gv.at/PAKT/VHG/XXVI/II/I_01523/imfname_619001.pdf) (accessed on 7 August 2017).

144 Written input by Stephanie Theuer, Federal Ministry of the Interior, 14 November 2017.

As of 31 December 2016, there were seven such detention facilities in Austria with a total capacity for 500 persons. In addition, the Zinnergasse family accommodation facility had a capacity of 69 places. Of the 500 places, 303 were in open detention (222 for men and 81 for women). The remaining 197 places were in shared cells of varying sizes (ranging from individual cells to cells for eight persons).<sup>145</sup> Detention capacity is normally measured in terms of the number of available beds. A minimum space of six square metres is available per person, whereas in shared cells six square metres is available for the first person and at least four square metres for each additional person – plus the space required for sanitary facilities (toilets and wash basins) and for any storage (cabinets). These arrangements conform to the minimum standards issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, according to the Federal Ministry of the Interior.<sup>146</sup>

### *7.1.3 Procedural Guarantees*

As of 1 January 2014, the Federal Office for Immigration and Asylum has become the authority responsible for ordering detention pending removal (Art. 76 para 4 Aliens Police Act; Art. 3 para 1 subpara 3 Act Establishing the Federal Office for Immigration and Asylum;<sup>147</sup> Austrian Court of Audit, 2016:115–116).<sup>148</sup> Whether detention pending removal has been rightfully imposed is not generally reviewed by any court as part of official duties (Art. 22a para 4 Federal Office for Immigration and Asylum Procedures Act). Nevertheless, the person concerned can lodge a complaint with the Federal Administrative Court against the detention order, which then must normally hand down a decision within one week (Art. 22a para 2 Federal Office for Immigration and Asylum Procedures Act).

When a complaint is lodged with the Federal Administrative Court, the Court also rules whether it is permissible to continue detention from the time of the decision (Art. 22a para 3 Federal Office for Immigration and Asylum Procedures Act). The Federal Administrative Court also has the duty to verify at least every four weeks whether detention of the

145 Written input by Tobias Molander, Federal Ministry of the Interior, 8 August 2017.

146 Written input by Tobias Molander, Federal Ministry of the Interior, 8 August 2017.

147 FLG I No. 87/2012, in the version of FLG I No. 70/2015.

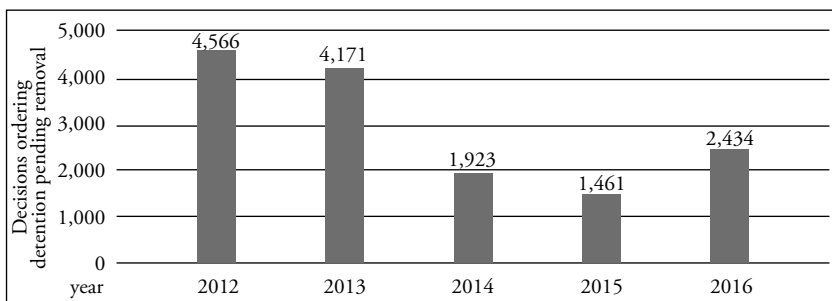
148 See also Federal Administrative Court, 4 July 2017, W137 2162752-1; 4 July 2017, W137 2162946-1; 29 June 2017, W137 2162316-1.

individual pending removal continues to be proportionate (Art. 80 para 6 Aliens Police Act; Art. 22a para 4 Federal Office for Immigration and Asylum Procedures Act). If the individual is detained for longer than four months, the Federal Administrative Court is obliged to decide whether detention pending removal continues to be permissible. The Federal Office for Immigration and Asylum is required to forward the pertinent files to the Federal Administrative Court at least one week before the end of the four-month period (Art. 22a para 4 Federal Office for Immigration and Asylum Procedures Act).

#### 7.1.4 Statistics

The figure below shows that the number of cases of detention pending removal was relatively constant between 2012 and 2013, at about 4,000 detention decisions issued. The figure then dropped significantly to less than half that number in 2014, with 1,923 decisions ordering detention pending removal. There was another decrease in 2015, with the level remaining comparable to 2014. The Austrian Court of Audit attributes the decrease to a change in related practices. Since 2014, increased use has reportedly been made of detention based on apprehension orders as opposed to detention pending removal. This is illustrated by the fact that in 2015 only about 29 per cent of removals were preceded by detention pending removal. Particularly in the case of rejected asylum seekers, removal increasingly takes place following detention based on an apprehension order (Austrian Court of Audit, 2016:102, 206, 127).

**Figure 1: Decisions Ordering the Detention of Third-country Nationals Pending Removal**



Sources: AT EMN NCP, 2014:14 (2012–2013);  
2014–2016 Statistics on Detention Pending Removal, provided by the Federal Ministry of the Interior, 11 August 2017 (2014–2016).

The figure also shows the significant repeated increase in detentions pending removal in 2016. While 1,461 decisions ordering this kind of detention were issued in 2015, the comparable number in 2016 was almost twice as high, at 2,434. The Federal Ministry of the Interior attributes the increase to a stronger focus on return and removal since 2016. However, no capacity shortage arose in 2016 despite an increase in detentions pending removal.<sup>149</sup>

## 7.2 Lenient Measures

Authorities are required to order a lenient measure where it can be reasonably assumed that such a measure will also achieve the purpose of detention pending removal (Art. 77 para 1 Aliens Police Act). Art. 77 para 3 of the Aliens Police Act lists three examples of lenient measures. This does not, however, represent an exhaustive enumeration, since it is introduced with “in particular” (insbesondere).

The table below summarizes the various types of lenient measure applied in Austria and how they are structured.

**Table 3: Types of Lenient Measure in Austria**

Lenient measures	Features
Obligation to report to authorities	Instead of imposing detention pending removal, individuals can be required to report regularly to a police station. No more than 24 hours may lapse between reports (Art. 77 para. 3 subpara 2 and para 6 Aliens Police Act). Detention pending removal is normally to be ordered if the person concerned fails to report (Art. 77 para 4 Aliens Police Act). Yet an exception is made if the person can demonstrate that it was impossible or unreasonable to report (Art. 77 para 6 Aliens Police Act). Detention pending removal is consequently not to be ordered in such cases.
Obligation to remain in defined places	Another lenient measure is to oblige the person concerned to take up residence in defined accommodation (Art. 77 para 3 subpara 1 Aliens Police Act). As permitted in Art. 77 para 9 of the Aliens Police Act, the police administrations of the provinces have set up such accommodation, for example at Zinnergasse 29a in 1110 Vienna and at Hauptstraße 38 in 2540 Bad Vöslau. <sup>150</sup> The accommodation at Zinnergasse allows the administration of lenient measures especially to vulnerable persons such as families, unaccompanied minors and people with disabilities. Persons residing within the framework of a lenient measure at Zinnergasse are permitted to leave the accommodation during the day but are required to report regularly to local police (AT EMN NCP; 2014:34–35; Asylkoordination Österreich/ ECRE, 2016:88).

149 Interview with Tobias Molander und Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

150 Federal Administrative Court, 4 July 2017, W117 2162268-1; 20 June 2017, W117 2161338-1.

Lenient measures	Features
Security deposit	Another lenient measure can be to require the deposit of a sum of money with the Federal Office for Immigration and Asylum (Art. 77 para 3 subpara 3 Aliens Police Act). An implementing regulation requires the amount of money to be “specified in the individual case so as to be appropriate and proportionate”. Currently the amount set must not exceed EUR 1,779.68 (Art. 13 para 1 Regulation on the Implementation of the Aliens Police Act in conjunction with Art. 293 General Social Insurance Act). The person concerned is required to be issued confirmation of the deposit (Art. 13 para 2 Regulation on the Implementation of the Aliens Police Act). The security deposit is to be refunded as soon as the grounds for ordering it cease to exist (Art. 13 para 3 Regulation on the Implementation of the Aliens Police Act). The money is forfeited if the person concerned absconds. The person concerned is also to be informed about this when the deposit is made (Art. 13 para 4 Regulation on the Implementation of the Aliens Police Act).

Other types of lenient measures are not explicitly stipulated as lenient measures in Austrian law (cf. Art. 77 para 3 Aliens Police Act).

### 7.3 Challenges and Good Practices

Various **challenges** arise in connection with detention pending removal. Imposing **detention pending removal** represents in principle a decision that is taken in the individual case only as a last resort (see section 7.1.1). Accordingly, the scope of related court rulings is relatively large.<sup>151</sup>

As far as the practice of detention pending removal is concerned, the Austrian Ombudsman Board<sup>152</sup> visited 21 times different (police) detention centres in 2016 as part of preventive verification of human rights. The identified deficiencies were correspondingly addressed by the working group on detention conditions in police and other detention centres (see below).

VMÖ reports increased potential for conflicts in detention pending removal. It is noted that the group of detainees is composed mainly of individuals who refuse voluntary return and tend to be difficult (exhibiting,

151 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

152 Based on the Federal Constitution, the Austrian Ombudsman Board is responsible for protecting and promoting compliance with human rights in the Republic of Austria. Along with its six multidisciplinary commissions it monitors in its function as national prevention mechanism public and private institutions in which liberty is being deprived or restricted. The Austrian Ombudsman Board also monitors the public administration's exercise of direct authority and the use of force (Austrian Ombudsman Board, *Aufgaben und Zuständigkeiten*, available at <https://volksanwaltschaft.gv.at/ueberuns#anchor-index-1528> (accessed on 7 August 2017)).



for example, aggressive behaviour, staging hunger strikes or endangering themselves). This results in more frequent conflicts in open detention (with cells that are open during the day).<sup>153</sup>

Among the **lenient measures**, the obligation to make a security deposit in particular represents a **challenge**. As is demonstrated by several recent decisions by the Federal Administrative Court, such a deposit very often does not come under consideration in practice due to the financial situation of the persons concerned.<sup>154</sup>

The study also identified several **good practices** relating to the practice of **detention pending removal**. One example is a working group on detention conditions in police and other detention centres. The group, established in early 2014, consists of representatives of the Austrian Ombudsman Board and committees delegated by it, together with the Federal Ministry of the Interior. Regular meetings are held with the particular aim of improving the living and detention conditions of individuals in detention pending removal, for example by specifying general conditions and standards (Austrian Ombudsman Board, 2017:140). The Austrian Ombudsman Board reports of how effective the direct discussions with the Federal Ministry of the Interior are (Austrian Ombudsman Board, 2016:130).

Regarding detention standards, VMÖ makes positive mention of the role commonly played by non-governmental organizations in Austria in caring for detainees. This is said to help de-escalate potential conflicts and avoid incidents and thus help ensure effective return. VMÖ was solely entrusted with this responsibility in 2017. The organization's staff provide detainees with information, assist them in language difficulties and take care of their concerns.<sup>155</sup>

Positive mention is also made of specific detention centres. VMÖ and Diakonie Refugee Service both mentioned the Vordernberg detention centre, which since opening in 2014 has been used exclusively for detention pending removal. This centre is cited by both organizations as providing a

153 Interview with Günter Ecker, Verein Menschenrechte Österreich, 26 July 2017.

154 See Federal Administrative Court, 4 July 2017, W117 2162268-1; 27 June 2017, W250 2154607-2; 23 June 2017, W250 2157721-1; 23 June 2017, W250 2161901-1; 21 June 2017, W174 2161352-1; 20 June 2017, W268 2161486-1; 20 June 2017, W140 2161340-1.

155 Interview with Günter Ecker, Verein Menschenrechte Österreich, 26 July 2017.

high, modern standard of care, despite the existence of several challenges and weaknesses, such as those relating to location, costs, the contract award process for operation, and capacity utilization (see Austrian Court of Audit, 2016:172ff). Positive mention is made of detention practices at the Vordernberg centre as meeting human rights standards.<sup>156</sup> Beyond this, the Austrian Ombudsman Board rated the detention conditions at the Vordernberg centre as “good” in general (Austrian Ombudsman Board, 2015:131). The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was impressed by the high standards observed at that centre (CPT, 2015:6).

Diakonie Refugee Service reports how well family accommodation at the Zinnergasse centre in Vienna functions, which is attributed to the care structure there (staff not in uniform, having some psychological training).<sup>157</sup> The system of family accommodation was also rated positively by the European Commission based on the Schengen evaluation mechanism, in view of a daily schedule in line with the needs of the various age groups and the medical assistance provided.<sup>158</sup>

Another positive aspect mentioned by VMÖ is the option for individuals to decide on voluntary return even after detention pending removal has been imposed.<sup>159</sup>

No specific **good practices** related to **lenient measures** could be identified in the study.

156 Interview with Günter Ecker, Verein Menschenrechte Österreich, 26 July 2017; interview with Stephan Klammer, Diakonie Refugee Service, 4 August 2017.

157 Interview with Stephan Klammer, Diakonie Refugee Service, 4 August 2017.

158 Written input by Tobias Molander, Federal Ministry of the Interior, 8 August 2017.

159 Interview with Günter Ecker, Verein Menschenrechte Österreich, 26 July 2017.

## 8. PROCEDURAL GUARANTEES AND LEGAL REMEDIES

This chapter discusses legal remedies against return decisions as referred to in Art. 13 of the Return Directive.<sup>160</sup> Consideration is also given to how Austria implements the related recommendations by the European Commission for making returns more effective when implementing the Return Directive.<sup>161</sup> The recommendations specifically addressed are: no. 12 (a) on merging hearings in one procedural step, no. 12 (b) relating to the deadline for lodging appeals against return decisions, no. 12 (c) on the automatic suspensive effect of appeals against return decisions, and no. 12 (d) concerning the principle of non-refoulement.

### 8.1 General Provisions

When issuing a return decision, the authorities have the duty to verify whether it is permissible to remove the person concerned to a certain country. Removal is not permissible in particular when it would violate the principle of non-refoulement as referred to in the Geneva Refugee Convention<sup>162</sup> or the right to life or the prohibition of torture as stipulated in the European Convention on Human Rights (ECHR).<sup>163, 164</sup>

160 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, 24 December 2008, OJ 2008 L 348/98.

161 European Commission, *Commission Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017)1600 final, available at <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1600-F1-EN-MAIN-PART-1.PDF> (accessed on 14 March 2017).

162 Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series vol. 189.

163 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, 4 November 1950, Council of Europe Treaty Series No. 5.

164 See Art. 52 para 9 in conjunction with Art. 50 Aliens Police Act.

A **complaint** can be lodged with the Federal Administrative Court against a return decision; this option is specified in Art. 9 para 2 of the Aliens Police Act.<sup>165</sup> A two-week period is allowed for lodging such a complaint (Art. 16 para 1 Federal Office for Immigration and Asylum Procedures Act<sup>166</sup>).<sup>167</sup>

In general, a complaint lodged against a return decision has suspensive effect (Art. 13 para 1 Proceedings of Administrative Courts Act).<sup>168</sup> This means that the return obligation is not permitted to be enforced with coercive means before the court hands down a decision. The suspensive effect can be excluded, however, if the removal is urgently required (Art. 13 para 2 and Art. 22 para 2 Proceedings of Administrative Courts Act). The suspensive effect is to be withdrawn in particular where the person's immediate departure is necessary in the interests of public policy or security, the person has violated an entry ban or there is a risk of the person absconding (Art. 18 para 2 Federal Office for Immigration and Asylum Procedures Act). A complaint does not generally have any suspensive effect if the return decision is combined with a rejection of the asylum application based on a safe third country. The Federal Administrative Court can, however, grant the complaint suspensive effect (Art. 16 para 2 subpara 1 Federal Office for Immigration and Asylum Procedures Act in conjunction with Art. 52 para 2 subpara 1 Aliens Police Act).

In procedures in the first instance, the authorities can carry out an **oral hearing** (Art. 39 para 2 General Administrative Procedures Act).<sup>169</sup> The same applies to return procedures conducted by the Federal Office for Immigration and Asylum.<sup>170</sup> The Federal Office for Immigration and Asylum can require the person concerned to attend the hearing or

165 FLG I No. 100/2005, in the version of FLG I No. 68/2017.

166 FLG I No. 87/2012, in the version of FLG I No. 84/2017.

167 The decision of the Constitutional Court of 26 September 2017 (G 134/2017, G 207/217), which was announced on 16 October 2017, revoked the shortened deadline of two weeks for complaints against decisions of the Federal Office for Immigration and Asylum on an application for international protection in connection with return decisions. The standard period for filing an appeal is four weeks.

168 FLG I No. 33/2013, in the version of FLG I No. 24/2017.

169 FLG No. 51/1991, in the version of FLG I No. 161/2013; See Hengstschläger/Leeb, 2017:Art. 39 para 25–26.

170 See Art. 1 para 2 subpara 1 Act Introducing the Acts on Administrative Procedures.

interrogation<sup>171</sup> personally. This requirement can even be enforced using coercive penalties or by having the person brought before the authority by force.<sup>172</sup>

An oral hearing can also be held in the course of procedures before the Federal Administrative Court, for example in the case of a complaint against a return decision (Art. 24 para 1 Federal Administrative Court). The Federal Administrative Court can nonetheless refuse a requested hearing, if it is not expected to contribute towards further clarifying the case (Art. 24 para 4 Proceedings of Administrative Courts Act). Specifically in procedures relating to the issuing of return decisions, an oral hearing can be waived if the case appears clear based on the documents on file or if the claims made by the person concerned are obviously false (see Art. 21 para 7 Federal Office for Immigration and Asylum Procedures Act).<sup>173</sup>

An authority can hold a **joint hearing** for several procedures (Art. 39 para 2 General Administrative Procedures Act).<sup>174</sup> The Federal Office for Immigration and Asylum can also hold a joint hearing involving return procedures and other types of procedure. If rejection of an application for international protection appears likely, the Federal Office for Immigration and Asylum can initiate a return procedure before the asylum procedure is completed (Art. 27 Asylum Act).<sup>175</sup> In this case the Federal Office for Immigration and Asylum can hold an oral hearing for both procedures.<sup>176</sup>

The Federal Office for Immigration and Asylum can also carry out joint hearings involving procedures for granting a humanitarian residence title and for issuing a return decision.<sup>177</sup> A single hearing could possibly be held both to impose detention pending removal and to issue a return

171 In the context of the Federal Office for Immigration and Asylum the term “interrogation” is used (Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017).

172 See Art. 10 para 1 and Art. 19 General Administrative Procedures Act.

173 Cf. Act Amending the Aliens Authorities, *Government Proposal, Explanatory Notes*, p. 15, available at [www.parlament.gv.at/PAKT/VHG/XXIV/II/II\\_02144/imfname\\_285862.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/II/II_02144/imfname_285862.pdf) (accessed on 20 July 2017); see also Administrative High Court, 20 October 2016, Ra 2016/21/0289.

174 FLG No. 51/1991, in the version of FLG I No. 161/2013.

175 FLG I No. 100/2005, in the version of FLG I No. 68/2017.

176 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

177 See Art. 10 Asylum Act; Art. 3 para 1 subpara 2 Act Establishing the Federal Office for Immigration and Asylum; Art. 52 Aliens Police Act.

decision, since the Federal Office for Immigration and Asylum is responsible for both types of procedure (Art. 5 para 1a subpara 2 Aliens Police Act; Art. 3 para 1 Act Establishing the Federal Office for Immigration and Asylum).

Yet responsibility for issuing normal residence titles under the Settlement and Residence Act<sup>178</sup> lies with the governor of the particular province (Art. 3 para 1 Settlement and Residence Act). It is therefore not possible to carry out joint hearings involving the issuing of a residence title under the Settlement and Residence Act and a return decision.

## **8.2 Challenges and Good Practices**

Difficulties can obviously arise when interests have to be weighed to determine whether a complaint has suspensive effect (see section 8.1).

No specific good practices related to this area could be identified in the study.

178 FLG I No. 100/2005, in the version of FLG I No. FLG I No. 122/2015.

## 9. SPECIAL PROVISIONS FOR VULNERABLE PERSONS

This chapter discusses vulnerable persons as defined in Art. 3 para 9 of the Return Directive (2008/115/EC).<sup>179</sup> According to the Directive, this category consists of “minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence”. Special provisions are accordingly specified for the detention, return and removal of (unaccompanied) minors and families in Art. 10 and Art. 17 of the Return Directive (2008/115/EC). Consideration is also given to the related recommendations by the European Commission for making returns more effective when implementing the Return Directive,<sup>180</sup> as well as to the implementation of these recommendations in Austria. The chapter specifically examines recommendations no. 13 (c) on targeted reintegration policies for unaccompanied minors, no. 13 (d) relating to assessment of the best interests of the child and no. 14 on placing minors in detention. A discussion is also devoted to special provisions for individuals with medical needs in the context of return.

In contrast to EU law, Austrian aliens law contains no general definition of the term “vulnerable persons”.<sup>181</sup> In the context of removal, however, special provisions do exist for certain categories of vulnerable persons. This is true in particular for minors (see section 9.1.2). The Aliens Police Act<sup>182</sup> also contains special rules applying to the detention of minors and individuals with medical needs (see section 9.1.2 and section 9.2).

179 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, 24 December 2008, OJ 2008 L 348/98.

180 European Commission, *Commission Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017)1600 final, available at <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1600-F1-EN-MAIN-PART-1.PDF> (accessed on 14 March 2017).

181 Cf. Art. 3 para 9 Return Directive (2008/115/EC); Art. 21 Reception Directive (2013/33/EU).

182 FLG I No. 100/2005, in the version of FLG I No. 68/2017.

## 9.1 Minors and Unaccompanied Minors

### 9.1.1 Assessment of the Best Interests of the Child

Pursuant to Article 1 of the Federal Constitutional Act on Children's Rights,<sup>183</sup> the child's best interests must be a priority consideration in all actions taken by public and private institutions that affect children. This principle also applies when return decisions are issued by the Federal Office for Immigration and Asylum.<sup>184</sup> In particular when assessing cases to determine a possible violation of the fundamental right to private and family life,<sup>185</sup> the Federal Office for Immigration and Asylum is required to duly consider the best interests of any children concerned.<sup>186</sup>

For the purposes of the Federal Constitutional Act on Children's Rights (and in accordance with Art. 1 of the Convention on the Rights of the Child),<sup>187</sup> a child is generally any person who is not yet 18 years of age (Fuchs, 2011:103–104; Lukits/Lukits, 2014:57–58). In procedures relating to the issuing of a return decision, the best interests of the child are assessed by the competent officials of the Federal Office for Immigration and Asylum. The officials can in the specific case consult with experts or obtain an opinion from the youth welfare authority.<sup>188</sup>

In Art. 138 of the General Civil Code,<sup>189</sup> Austrian legislators have enumerated important aspects for determining the best interests of the child. Examples of these include appropriate care, a diligent education, a secure environment, protection from violence, and esteem (see Art. 138 subpara 1–12 General Civil Code). These aspects do not represent a

183 FLG I No. 4/2011.

184 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

185 See Art. 9 Federal Office for Immigration and Asylum Procedures Act.

186 Constitutional Court, 9 June 2016, E2617/2015; Administrative High Court, 7 May 2014, 2013/22/0352; ECtHR, 23 June 2008, *Maslov v. Austria*, Application No. 1638/03, para 82; ECtHR, 10 July 2014, *Mugenzi v. Frankreich*, Application No. 52701/09, para 45; ECtHR, 3 October 2014, *Jeunesse v. the Netherlands*, Application No. 12738/10, para 109, 118.

187 Convention on the Rights of the Child Including Reservations and Declarations, FLG 1993/7 in the version of FLG III No. 187/2016.

188 See Art. 52 General Administrative Procedures Act; cf. Administrative High Court, 25 February 2014, 2011/01/0244; 20 March 2013, 2012/01/0054; 1 April 2008, 2007/06/0262.

189 JLC No. 946/1811, in the version of FLG I No. 43/2016.



complete list – this is indicated by the phrase “in particular” (*insbesondere*) – rather, additional criteria can be considered. All criteria put forth in the case are duly considered, according to the Federal Ministry of the Interior.<sup>190</sup>

The table below presents the criteria for assessing the best interests of the child as enumerated in Art. 138 subpara 1–12 of the General Civil Code.

**Table 4: Criteria Pursuant to Art. 138 of the General Civil Code for Assessing the Best Interests of the Child**

<b>Criteria for assessing the best interests of the child</b>	<b>Corresponding detailed provision of Austrian law</b>
Provision of needs	Appropriate provision for the child’s needs, in particular through providing food and housing (Art. 138 subpara 1 General Civil Code).
Care, protection and security	Caring, secure and protective environment to ensure the child’s physical and emotional integrity (Art. 138 subpara 2 General Civil Code).
Health	Provision of medical care and protection of the child’s physical and emotional integrity (Art. 138 subpara 1 and subpara 2 General Civil Code).
Respect	Esteem for and acceptance of the child by its parents (Art. 138 subpara 3 General Civil Code).
Development and Education	Diligent education and fostering of the child’s predispositions, skills, inclinations and development opportunities (Art. 138 subpara 1 and 4 General Civil Code).
Opinion of the child	Due consideration of the child’s opinion, yet dependent on its abilities to comprehend and form an independent opinion (Art. 138 subpara 5 General Civil Code).
Avoidance of any impairment	Any impairment is to be avoided that the child could suffer as a result of any action that is implemented and asserted (Art. 138 subpara 6 General Civil Code).
Avoidance of any jeopardizing situation	Besides protection of the child’s physical and emotional integrity (Art. 138 subpara 2 General Civil Code), an aspect of the child’s best interests that is explicitly mentioned is the avoidance of abuse, violence, abduction and other risks of harm (Art. 138 subpara 7 and 8 General Civil Code).
Protection of the family environment and maintenance or restoration of relationships	The child’s consistent contact and secure bonds with both parents and with significant others are to be protected (Art. 138 subpara 9 General Civil Code). This implies avoiding loyalty conflicts or causing the child feelings of guilt (Art. 138 subpara 10 General Civil Code).
Interests of the child	The safeguarding of the rights, claims and interests of the child (Art. 138 subpara 11 General Civil Code).
Living conditions	Finally, when assessing the best interests of the child, due consideration is to be given to the living conditions of the child and its parents and to its wider environment (Art. 138 subpara 12 General Civil Code).

Besides these factors, the child’s identity or sense of belonging, while not explicitly mentioned in law, can be considered when assessing the best

190 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

interests of the child. As the main consideration is the best interests of the child concerned and not of its parents or guardians, the latter's views and opinions are only a factor inasmuch as they affect the child's best interests (see Art. 138 General Civil Code). Accordingly, esteem for and acceptance of the child by its parents are explicitly mentioned in the Code as factors in the best interests of the child (Art. 138 subpara 3 General Civil Code).

### *9.1.2 Detention Pending Removal, Return and Reintegration*

Austrian aliens law has special provisions applying to the **detention of minors pending removal**. In recommendation no. 14 of 7 March 2017, the European Commission proposes that Member States should not preclude the possibility of placing minors in detention. In Austria, in contrast, minors under the age of 14 are not permitted to be held in detention pending removal (Art. 76 para 1 Aliens Police Act). Lenient measures are to be applied where possible in the case of minors above the age of 14 (Art. 77 para 1 Aliens Police Act).

Art. 79 of the Aliens Police Act lists the currently valid standards applying to the detention of minors pending removal. Specifically, minors below the age of 16 can only be detained where accommodation and care appropriate to their age and level of development are ensured. Minors are generally to be detained separately from adults. Yet, where detention pending removal is imposed on one of the minor's parents or a guardian and it would not conflict with the child's best interests, minors are to be detained with those adults. Minors must also generally not be detained longer than two months, as specified in Art. 80 para 2 subpara 1 Aliens Police Act.

On **removal**, it must be possible to entrust unaccompanied minors to a family member, legal guardian or a suitable reception facility in the country of return (Art. 46 para 3 Aliens Police Act). The individual's stay in Austria can be tolerated if removal is impossible for factual reasons for which the individual is not responsible (Art. 46a para 1 subpara 3 Aliens Police Act). A tolerated stay does not, however, imply legal residence status in Austria (Art. 31 para 1a subpara 3 Aliens Police Act), although the person's stay can be legalized after one year (Art. 57 para 1 Asylum Act;<sup>191</sup>

191 FLG I No. 100/2005, in the version of FLG I No. 68/2017.

Lukits, 2016:41). This provision also applies to unaccompanied minors (see section 3.2).

The Federal Ministry of the Interior reports that unaccompanied minors are removed only in exceptional cases (Koppenberg, 2014:81). VMÖ underscores the need, before removal, to clarify the **option of voluntary return**, which is feasible where certain prerequisites are met.<sup>192</sup> Specific internal regulations have to be observed, for example, in the case of assisted voluntary return of unaccompanied minors under the International Organization for Migration (IOM). These regulations include the requirement for voluntary return to be facilitated by the Organization only if it is in the child's best interests, while considering the child's will to an extent appropriate to its age. In addition, written consent is required from the child's legal guardians in Austria and in the country of return.<sup>193</sup>

With regard to **assistance after return**, while Austria has no reintegration measures specifically for unaccompanied minors, this group is entitled to participate in the three reintegration programmes for voluntary returnees listed below. The support mainly consists of in-kind contributions:

- RESTART II project: reintegration assistance in Afghanistan and in the Islamic Republic of Iran by IOM Austria;
- IRMA plus project: reintegration assistance for vulnerable persons in 40 countries by Caritas Austria;
- European Reintegration Network (ERIN): assistance provided by the Federal Ministry of the Interior for setting up a business in, for example, Iraq, Morocco, Pakistan or in the Russian Federation (IOM Country Office for Austria, 2017:5). Unaccompanied minors are not explicitly excluded by the grant agreements. In practice, however, they will most likely not start a business as this is not in the child's best interests.<sup>194</sup>

192 Interview with Günter Ecker, Verein Menschenrechte Österreich, 26 July 2017.

193 Written input by Andrea Götzelmann, IOM Country Office for Austria, 13 June 2017; see also Koppenberg, 2014:82–83.

194 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

## 9.2 Individuals with Medical Needs

Individuals in detention pending removal who have medical needs can optionally be detained in the medical facilities of the Vienna court prison or at a suitable hospital, depending on the particular person's state of health (see Art. 78 para 6–7 Aliens Police Act). In court prisons, individuals are usually detained pending trial or serve sentences for a maximum of 18 months (see Art. 9 Penal Sanctions Enforcement Act<sup>195</sup> and Art. 183 Code of Criminal Procedure).<sup>196</sup>

The Federal Office for Immigration and Asylum is required to consider the circumstances of each individual case when carrying out **removal** (Art. 46 para 3 Aliens Police Act). The person concerned can present relevant medical documents to aid authorities in assessing the person's state of health. Medical officers are available to provide a second opinion.<sup>197</sup> In addition, the person concerned undergoes a medical examination within 24 hours of the scheduled departure for removal to determine whether the person is fit for air travel (Schrefler-König/Szymanski, 2014:Art. 46 Aliens Police Act, note 6; Lukits, 2016:35).<sup>198</sup> In practice, removal is postponed in the presence of corresponding medical grounds, for example when the person is pregnant (cf. Lukits, 2016:35).<sup>199</sup>

Part of the written decision of the Federal Office for Immigration and Asylum are the circumstances in the country of origin, which are provided by the Federal Offices' Country of Origin Information Unit. These include information concerning special issues such as infrastructure and supply of medical care. While no medical care is provided in the country of return following a person's removal, medical support can be provided in that country if the person returns voluntarily as part of the reintegration project IRMA plus (see 9.1.2; Lukits, 2016: 35).<sup>200</sup>

195 FLG No. 144/1969, in the version of FLG I No. 26/2016.

196 FLG No. 631/1975, in the version of FLG I No. 117/2017.

197 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

198 See also Federal Administrative Court, 21 June 2017, W174 2161352-1; 28 March 2017, W250 2150801-1.

199 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

200 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

With regard to the **voluntary return** of individuals with medical needs, no prerequisites are laid down in Austrian aliens law. Instead, the requirements depend on the organization supporting their return. Where individuals with medical needs wish to participate for example in an assisted voluntary return programme under IOM, certain factors have to be considered at the outset. Aside from assessing individuals' decision-making abilities (where a psychological disorder is involved) as well as their fitness to travel and any special travel requirements (for example a wheelchair or a particular seat), IOM also considers the supply of medical services in the country of return (IOM Country Office for Austria, 2014:4). Thus, as part of preparations for return, IOM Austria can provide assistance in gathering information about health care in the country of return and recommends procuring an adequate supply of any medication to cover the initial period after return (IOM Country Office for Austria, 2015:6 and 7).

### 9.3 Challenges and Good Practices

A general **challenge** involved in the return of vulnerable persons is seen by Verein Menschenrechte Österreich (VMÖ) in the need to weigh interests in the individual case – in enforcing the departure requirement on the one hand and in respecting vulnerabilities and rights worthy of protection on the other.<sup>201</sup> An example illustrating this challenge is the argument put forth by the authorities and courts that, after return, individual parents are able to maintain family relationships with their children in Austria using modern telecommunications services. On this question, the Constitutional Court has ruled that the normal processes of communication between a parent and a small child, taking place primarily through physical proximity and non-verbal interaction, can under no circumstances be replaced by telecommunication and electronic media.<sup>202</sup>

With regard to the assisted voluntary return of **unaccompanied minors**, the IOM Country Office for Austria points out several challenges in practice. These include the potential difficulties when obtaining consent

201 Interview with Günter Ecker, Verein Menschenrechte Österreich, 26 July 2017.

202 Constitutional Court, 25 February 2013, U2241/12; Constitutional Court, 19 June 2015, E426/2015; interview with Stephan Klammer, Diakonie Refugee Service, 4 August 2017.

to voluntary return in determining a person responsible for the minor.<sup>203</sup> Problems can also arise when contradicting estimates of a minor's age are given by embassies, courts, the Federal Office for Immigration and Asylum, youth welfare authorities, or unaccompanied minors themselves<sup>204</sup>. A minor's possible return also poses difficulties where the child's parents are also refugees and are not entitled to stay in the targeted country of return.<sup>205</sup>

Where **individuals with medical needs** wish to participate in an assisted voluntary return programme under IOM, certain factors also have to be considered initially (see section 9.2), which can later turn into challenges. Gathering information about the supply of medical services in the country of return can, for example, take a certain amount of time, which in many cases is not available. While in some cases returnees wish to get home as soon as possible, in other cases it is the authorities who press for the earliest arrangement of the return process. This faces IOM with the challenge of obtaining, within the available amount of time, the most extensive information possible about the health care system in the particular country of return (IOM Country Office for Austria, 2014:4).

In addition to challenges, the study was able to identify **good practices** in dealing with vulnerable persons. Tried and proven legal arrangements include, in the view of the Federal Ministry of the Interior, the requirement to apply lenient measures for **minors** above the age of 14 where possible (see section 9.1.2).<sup>206</sup>

In the case of **individuals with medical needs**, VMÖ reports that the authorities usually make attempts to achieve conditions allowing the enforcement of an obligation to depart.<sup>207</sup> Medical assistance and equipment (including wheelchairs) in particular are made available during travel (Lukits, 2016:35). Yet medical assistance can only be provided in the country of return when the individuals return voluntarily through participation in a reintegration project (see section 9.2).

203 For a legal analysis see Lukits, Staatliche Rückkehrhilfe für Minderjährige, FABL 2/2016:50.

204 Written input by Stephanie Theuer, Federal Ministry of the Interior, 14 November 2017.

205 Written input by Andrea Götzelmann, IOM Country Office for Austria, 13 June 2017.

206 Written input by Tobias Molander, Federal Ministry of the Interior, 8 August 2017.

207 Interview with Günter Ecker, Verein Menschenrechte Österreich, 26 July 2017.

# 10. CONCLUSIONS

## 10.1 Implementation of the European Commission's Recommendations in Austria

Of the recommendations examined here, which were proposed by the European Commission for making returns more effective when implementing the Return Directive,<sup>208</sup> the majority have been implemented in Austria, either in recent years or through the 2017 Act Amending the Aliens Law.

While an “effective return policy” as referred to in this study is defined as the enforcement, through removal or voluntary departure, of an obligation to return, voluntary return, as a dignified alternative to being forcibly returned, has top priority in Austria’s return policy (see section 2.2). Voluntary return or departure is also given priority over removal in provisions of EU law (see recital no. 10 Return Directive). Voluntary return as used here refers to the assisted or independent return to the country of origin or transit or (other) third country, based on the free will of the returnee. In contrast to voluntary departure, the term also applies to individuals not under obligation to return. This group includes irregularly residing individuals who have not yet been apprehended and applicants for asylum or a residence title whose case has not yet been decided with final effect.<sup>209</sup> In 2016 and 2017 Austria accordingly stepped up not only measures aimed at encouraging voluntary departure but also programmes to promote voluntary return. One example is a campaign launched to inform asylum applicants of the option of voluntary return during an ongoing asylum procedure.<sup>210</sup> In addition, varying levels of return assistance

208 European Commission, *Commission Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017)1600 final, available at <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1600-F1-EN-MAIN-PART-1.PDF> (accessed on 14 March 2017).

209 European Commission, *EMN Glossary & Thesaurus*, available at [https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_en) (accessed on 26 July 2017).

210 Federal Office for Immigration and Asylum, *Voluntary departure & return assistance*, available at [www.voluntaryreturn.at/en/](http://www.voluntaryreturn.at/en/) (accessed on 26 July 2017).

were introduced for asylum seekers from Afghanistan, Morocco and Nigeria,<sup>211</sup> while return bonuses were also offered to other asylum seekers.<sup>212</sup> Furthermore, return counselling throughout Austria has been expanded nationwide. The reintegration programmes ERIN, RESTART II and IRMA plus have been available since January 2017 (see section 9.1.2).<sup>213</sup>

## 10.2 The Significance of EU Norms for an Effective Return Policy

EU law no doubt lays down a certain legal framework for the return of third-country nationals staying in Austria. Norms for Austria's return policy derive in particular from the Return Directive (2008/115/EC),<sup>214</sup> but also from other legal sources such as the Charter of Fundamental Rights<sup>215</sup> and general principles of EU law (see for example Bieber/Epiney/Haag, 2015:187).

The decision as to whether to impose detention pending removal has possibly been facilitated as a result of the detailed definition of the risk of absconding which, prompted by EU law, is now found in the Aliens Police Act. Here, finally, the most important criteria relevant for assessing whether a risk of absconding exists are enumerated in one of the provisions (see Art. 76 para 3 Aliens Police Act; see chapter 6).

By increasing the maximum length of detention pending removal to 18 months, the scope of the Return Directive (2008/115/EC) is exhausted and at the same time it also complies with the European Commission's

211 Federal Office for Immigration and Asylum, *Neues Rückkehrhilfeprogramm für Asylwerber aus Afghanistan, Marokko und Nigeria*. Press, 13 April 2016, available at [www.bfa.gv.at/presse/thema/detail.aspx?nwid=4F717067766351484946513D&ctrl=2B7947437976465443374D3D](http://www.bfa.gv.at/presse/thema/detail.aspx?nwid=4F717067766351484946513D&ctrl=2B7947437976465443374D3D) (accessed on 28 July 2017).

212 Federal Office for Immigration and Asylum, *Freiwillige unterstützte Rückkehr – Sonderaktion EUR 1.000,-*, available at [http://bfa.gv.at/bmi\\_docs/1985.pdf](http://bfa.gv.at/bmi_docs/1985.pdf) (accessed on 7 August 2017).

213 Written input by Stephanie Theuer, Federal Ministry of the Interior, 14 November 2017.

214 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, 24 December 2008, OJ 2008 L 348/98.

215 Charter of Fundamental Rights of the European Union, 26 October 2012, OJ C 326/391; see also Art. 6 para 1 Treaty on European Union (Consolidated Version), 26 October 2012, OJ 2012 C 326/01.



Recommendation on making returns more effective when implementing the Return Directive. According to the Federal Ministry of the Interior, the increased length of detention pending removal is intended to successfully prepare returns and, if necessary, to ensure that irregularly staying third-country nationals do not elude return. In the view of the Federal Ministry of the Interior, Austria has installed a highly efficient return system.<sup>216</sup> While it is the responsibility of the European Union to ensure that such systems are set up and harmonized across all EU Member States.<sup>217</sup> Measures as potential aids to enforcing return decisions are in particular a harmonized European replacement travel document,<sup>218</sup> group flights for the purpose of removal<sup>219</sup> and readmission agreements at EU level. In this context the Ministry points to the need for the entire European Union to act as one, if an effective return, i.e. the actual enforcement of an individuals' obligation to return, is to be achieved. This applies in particular to cooperation with third countries. In this regard, the Ministry sees the European Union as a body as being in a better position to negotiate than a single Member State (see Lukits, 2016:31–33).<sup>220</sup>

Europe-wide databases could also help improve return procedures (for instance in relation to the required identification) and aid in enforcing return decisions.<sup>221</sup> Databases specifically mentioned here are the Schengen Information System (SIS), the Visa Information System (VIS) and the Eurodac database. No provision currently exists for access to the EURODAC database in return cases, although such an option is included in the European Commission's proposal for revising the Eurodac Regulation (see Lukits, 2017:section 6.4).

216 Written input by Stephanie Theuer, Federal Ministry of the Interior, 14 November 2017.

217 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

218 Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals, and repealing the Council Recommendation of 30 November 1994, 17 November 2016, OJ 2016 L 311/13.

219 See Council Decision of 29 April 2004 on the organization of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders (2004/573/EC), OJ 2004 L 261/28.

220 Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.

221 Ibid.

# ANNEX

## A.1 List of Translations and Abbreviations

English term	English abbreviation	German term	German abbreviation
–	–	Fremden- und Asylrechtliche Blätter	FABL
–	–	Verein Menschenrechte Österreich	VMÖ
Act Amending the Aliens Authorities Restructuring Act	–	Fremdenbehördenneustrukturierungsgesetz-Anpassungsgesetz	FNG-Anpassungsgesetz
Act Amending the Aliens Law	–	Fremdenrechtsänderungsgesetz	FrÄG
Act Establishing the Federal Office for Immigration and Asylum	–	BFA-Einrichtungsgesetz	BFA-G
Act Introducing the Acts on Administrative Procedures	–	Einführungsgesetz zu den Verwaltungsverfahrensgesetzen	EGVG
Administrative Enforcement Act	–	Verwaltungsvollstreckungsgesetz	VVG
Administrative High Court	–	Verwaltungsgerichtshof	VwGH
Aliens Authorities Restructuring Act	–	Fremdenbehördenneustrukturierungsgesetz	FNG
Aliens Police Act	–	Fremdenpolizeigesetz	FPG
Amnesty International	–	Amnesty International	–
Asylum Act	–	Asylgesetz	AsylG
Austrian Court of Audit	ACA	Rechnungshof	RH
Austrian Freedom Party	–	Freiheitliche Partei Österreich	FPÖ
Austrian Green Party	–	Die Grünen	–
Austrian Ombudsman Board	AOB	Volksanwaltschaft	VA
Austrian People's Party	–	Österreichische Volkspartei	ÖVP
best interests of the child	–	Kindeswohl	–
Code of Criminal Procedure	–	Strafprozessordnung	StPO
Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	CPT	Europäisches Komitee zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Strafe	CPT
complaint	–	Beschwerde	–
Constitutional Court	–	Verfassungsgerichtshof	VfGH
detention pending removal	–	Schubhaft	–
Diakonie Refugee Service	–	Diakonie Flüchtlingsdienst	–
entry ban	–	Einreiseverbot	–

<b>English term</b>	<b>English abbreviation</b>	<b>German term</b>	<b>German abbreviation</b>
European Commission	–	Europäische Kommission	–
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 Dactyloscopy	Eurodac	Europäische Daktyloskopie	Eurodac
European Economic Area	EEA	Europäischen Wirtschaftsraum	EWR
European Migration Network	EMN	Europäisches Migrationsnetzwerk	EMN
European Reintegration Network	ERIN	Europäisches Netz zur Wiedereingliederung	ERIN
European Union	EU	Europäische Union	EU
European Union Agency for Fundamental Rights	FRA	Agentur der Europäischen Union für Grundrechte	FRA
Extradition and Mutual Assistance Act	–	Auslieferungs- und Rechtshilfegesetz	ARHG
Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union	–	Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union	EU-JZG
Federal Administrative Court	–	Bundesverwaltungsgericht	BVwG
federal constitutional act	–	Bundes-Verfassungsgesetz	B-VG
Federal Constitutional Act Children Rights	–	Bundesverfassungsgesetz über die Rechte von Kindern	BVG Kinderrechte
Federal Law Gazette	FLG	Bundesgesetzblatt	BGBL.
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
General Administrative Procedures Act	–	Allgemeines Verwaltungsverfahrensgesetz	AVG
General Civil Code	–	Allgemeines Bürgerliches Gesetzbuch	ABGB
Geneva Refugee Convention	–	Genfer Flüchtlingskonvention	GFK
International Organization for Migration	IOM	Internationale Organisation für Migration	IOM
Legal Information System	–	Rechtsinformationssystem	RIS
legal remedy	–	Rechtsbehelf	–
lenient measure	–	gelinderes Mittel	–
National Contact Point	NCP	Nationaler Kontaktpunkt	NKP

English term	English abbreviation	German term	German abbreviation
NEOS – The New Austria	NEOS	NEOS – Das Neue Österreich	NEOS
Official Journal of the European Union	OJ	Amtsblatt der Europäischen Union	ABl.
Penal Sanctions Enforcement Act	–	Strafvollzugsgesetz	StVG
Platform for International Cooperation on Undocumented Migrants	PICUM	Plattform für Internationale Kooperation zu MigrantInnen ohne legalen Status	PICUM
principle of non-refoulement	–	Grundsatz der Nichtzurückweisung	–
Proceedings of Administrative Courts Act	–	Verwaltungsgerichtsverfahrensgesetz	VwGVG
Regulation on Countries of Origin	–	Herkunftsstaaten-Verordnung	HStV
Regulation on the Implementation of the Aliens Police Act	–	Fremdenpolizeigesetz-Durchführungsverordnung	FPG-DV
removal	–	Abschiebung	–
residence title for exceptional circumstances	–	Aufenthalts Titel aus berücksichtigungswürdigen Gründen	–
return decision	–	Rückkehrenscheidung	–
Return Directive	–	Rückführungsrichtlinie	–
Return Expert's Group	REG	Expertengruppe zur Rückkehr	REG
risk of absconding	–	Fluchtgefahr	–
Schengen Borders Code	–	Schengener Grenzkodex	–
Schengen Information System	SIS	Schengener Informationssystem	SIS
Service of Documents Act	–	Zustellgesetz	ZustG
Settlement and Residence Act	–	Niederlassungs- und Aufenthaltsgesetz	NAG
Social Democratic Party of Austria	–	Sozialdemokratische Partei Österreichs	SPÖ
subpara	–	Ziffer	Z
suspensive effect	–	aufschiebende Wirkung	–
Treaty on European Union	TEU	Vertrag über die Europäische Union	EUV
unaccompanied minors	UAM	unbegleitete Minderjährige	–
United Nations Children's Fund	UNICEF	Kinderhilfswerk der Vereinten Nationen	UNICEF
United Nations High Commissioner for Refugees	UNHCR	Flüchtlingshochkommissariat der Vereinten Nationen	UNHCR
Visa Information System	VIS	Visa-Informationssystem	VIS
voluntary departure	–	freiwillige Ausreise	–
voluntary return	–	freiwillige Rückkehr	–
vulnerable persons	–	schutzbedürftige Personen	

## A.2 Bibliography

### *Literature*

Austrian Court of Audit

- 2016 *Bericht des Rechnungshofes: Vollzug der Schubhaft mit Schwerpunkt Anhaltezentrum Vordernberg*, available at [www.rechnungshof.gv.at/fileadmin/downloads/\\_jahre/2016/berichte/teilberichte/bund/Bund\\_2016\\_22/Bund\\_2016\\_22\\_2.pdf](http://www.rechnungshof.gv.at/fileadmin/downloads/_jahre/2016/berichte/teilberichte/bund/Bund_2016_22/Bund_2016_22_2.pdf) (accessed on 6 July 2017).

Austrian Ombudsman Board

- 2015 *Bericht der Volksanwaltschaft an den Nationalrat und Bundesrat 2014 – Präventive Menschenrechtskontrolle*. Available at <https://volksanwaltschaft.gv.at/downloads/b5cgi/Parlamentsbericht%202014%20Band%20II.pdf> (accessed on 16 August 2017).
- 2016 *Bericht der Volksanwaltschaft an den Nationalrat und Bundesrat 2015 – Präventive Menschenrechtskontrolle*. Available at <https://volksanwaltschaft.gv.at/downloads/k2ma/PB39pr%C3%A4ventiv.pdf> (accessed on 14 July 2017).
- 2017 *Bericht der Volksanwaltschaft an den Nationalrat und Bundesrat 2016 – Präventive Menschenrechtskontrolle*. Available at <https://volksanwaltschaft.gv.at/downloads/elqga/PB40pr%C3%A4ventiv.pdf> (accessed on 14 July 2017).

Bieber, R., A. Epiney and M. Haag

- 2015 *Die Europäische Union: Europarecht und Politik*. Eleventh Edition. Nomos, Baden-Baden.

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

- 2015 *Report to the Austrian Government on the visit to Austria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 September to 1 October 2014*. CPT, Strasbourg. Available at <https://rm.coe.int/1680653ec7> (accessed on 26 July 2017).

European Migration Network (EMN)

2014 *The use of detention and alternatives to detention in the context of immigration policies – Synthesis Report for the EMN Focussed Study 2014*. European Commission, Brussels. Available at [www.emn.at/wp-content/uploads/2017/01/emn\\_study\\_detention\\_alternatives\\_to\\_detention\\_synthesis\\_report\\_en.pdf](http://www.emn.at/wp-content/uploads/2017/01/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf) (accessed on 6 September 2017).

European Union Agency for Fundamental Rights (FRA)

2017 *Fundamental Rights Report 2017*. FRA, Luxembourg. Available at [http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2017-fundamental-rights-report-2017\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-fundamental-rights-report-2017_en.pdf) (accessed on 26 July 2017).

Hengstschläger, J. and D. Leeb (eds.)

2017 *Allgemeines Verwaltungsverfahrensgesetz – Kommentar*. Manzsche Verlags- und Universitätsbuchhandlung, Vienna.

Knapp, A.

2016 *Country Report: Austria*. ECRE, Vienna. Available at [www.asylumineurope.org/sites/default/files/report-download/aida\\_at\\_2016update.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_at_2016update.pdf) (accessed on 26 July 2017).

Koppenberg, S.

2014 *Unaccompanied Minors in Austria – Legislation, Practices and Statistics*. IOM, Vienna. Available at [www.emn.at/wp-content/uploads/2017/01/EMN\\_UAM-Study2014\\_AT\\_EMN\\_NCP\\_eng.pdf](http://www.emn.at/wp-content/uploads/2017/01/EMN_UAM-Study2014_AT_EMN_NCP_eng.pdf) (accessed on 3 August 2017).

Lukits, R.

2016 *The Return of Rejected Asylum-Seekers from Austria*. IOM, Vienna. Available at [www.emn.at/wp-content/uploads/2016/12/The-return-of-rejected-asylum-seekers-from-Austria.pdf](http://www.emn.at/wp-content/uploads/2016/12/The-return-of-rejected-asylum-seekers-from-Austria.pdf) (accessed on 6 July 2017).

2017 *The Establishment of Identity in the Austrian Migration Process*. IOM, Vienna. Available at [www.emn.at/en/publications/studies/](http://www.emn.at/en/publications/studies/) (not yet published).

Mahringer, K.

2017 Gutachten BVwG-160.000/0001-Kammer A/2017.

National Contact Point Austria in the European Migration Network (AT EMN NCP)

2014 *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies in Austria*. IOM, Vienna. Available at [www.emn.at/wp-content/uploads/2017/01/Detention-and-alternatives-to-detention\\_AT-EMN-NCP\\_final.pdf](http://www.emn.at/wp-content/uploads/2017/01/Detention-and-alternatives-to-detention_AT-EMN-NCP_final.pdf) (accessed on 6 July 2017).

2015 *The Organization of Asylum and Migration Policies in Austria*. IOM, Vienna. Available at [www.emn.at/wp-content/uploads/2017/01/organisation-study\\_AT-EMN-NCP\\_2016.pdf](http://www.emn.at/wp-content/uploads/2017/01/organisation-study_AT-EMN-NCP_2016.pdf) (accessed on 6 July 2017).

Peyrl, J., T. Neugschwendtner and C. Schmaus

2015 *Fremdenrecht Asyl Ausländerbeschäftigung Einbürgerung Einwanderung Verwaltungsverfahren*. ÖGB-Verlag, Vienna.

Rutz, J.

2014 *Austria's Return Policy: Application of Entry Bans Policy and Use of Readmission Agreements*. IOM, Vienna. Available at [www.emn.at/wp-content/uploads/2017/01/EMNReturnStudy2014\\_AT-NCP\\_eng.pdf](http://www.emn.at/wp-content/uploads/2017/01/EMNReturnStudy2014_AT-NCP_eng.pdf) (accessed on 6 July 2017).

Schreffler-König, A. and W. Szymanski (eds.)

2014 *Fremdenpolizei- und Asylrecht*. Manzsche Verlags- und Universitätsbuchhandlung, Vienna.

#### *Journal articles*

Fuchs, C.

2011 Kinderrechte in der Verfassung: Das BVG über die Rechte von Kindern. Aktuelle Fragen des öffentlichen Rechts im Jahr 2010. *Jahrbuch Öffentliches Recht 2011*: p. 91–110.

Lukits, R.

2016 Staatliche Rückkehrhilfe für Minderjährige. In: *Fremden- und Asylrechtliche Blätter, FABL 2/2016-I*, p. 49–56.

Lukits, D. and R. Lukits

2014 Grundrechtliche Vorgaben der medizinischen Altersuntersuchung.  
In: *Zeitschrift für Familien- und Erbrecht, EF-Z 2/2014*, p. 56–61.

*Political and policy documents*

2015 Act Amending the Aliens Law, *Government Proposal, Explanatory Notes*, available at [www.parlament.gv.at/PAKT/VHG/XXV/I/I\\_00582/fname\\_401629.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00582/fname_401629.pdf) (accessed on 18 July 2017).

2017 Act Amending the Aliens Law, *Government Proposal, Explanatory Notes*, available at [www.parlament.gv.at/PAKT/VHG/XXV/I/I\\_01523/imfname\\_619001.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01523/imfname_619001.pdf) (accessed on 7 August 2017).

2017 Act Amending the Aliens Law, *Ministerial Proposal, Preamble*, available at [www.parlament.gv.at/PAKT/VHG/XXV/ME/ME\\_00279/imfname\\_582632.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00279/imfname_582632.pdf) (accessed on 12 July 2017).

2017 Act Amending the Aliens Law Part II, *Ministerial Proposal, Explanatory Notes*, available at [www.parlament.gv.at/PAKT/VHG/XXV/ME/ME\\_00311/fname\\_629377.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00311/fname_629377.pdf) (accessed on 8 August 2017).

2017 Act Amending the Aliens Law Part II, *Ministerial Proposal, Preamble*, available at [www.parlament.gv.at/PAKT/VHG/XXV/ME/ME\\_00311/imfname\\_629378.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00311/imfname_629378.pdf) (accessed on 12 July 2017).

Act Amending the Aliens Authorities Restructuring Act, *Government Proposal, Explanatory Notes*, available at [www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_02144/imfname\\_285862.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_02144/imfname_285862.pdf) (accessed on 20 July 2017).

Aliens Authorities Restructuring Act, *Government Proposal, Explanatory Notes*, available at [www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01803/fname\\_255385.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01803/fname_255385.pdf) (accessed on 18 July 2017).

Council of the European Union, *Council Recommendation of 30 November 1994 concerning the adoption of a standard travel document for the expulsion of third-country nationals*, 19 September 1996, OJ 1996 C 274/ 18.

European Commission, *Commission Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017)1600 final, available at <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1600-F1-EN-MAIN-PART-1.PDF> (accessed on 14 March 2017).



- European Union/Islamic Republic of Afghanistan, *Joint Way Forward on migration issues between Afghanistan and the EU*, available at [https://eeas.europa.eu/sites/eeas/files/eu\\_afghanistan\\_joint\\_way\\_forward\\_on\\_migration\\_issues.pdf](https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf) (accessed on 11 August 2017).
- Republic of Austria, *Asylgipfel am 20. Jänner 2016 – Gemeinsame Vorgangsweise von Bund, Ländern, Städten und Gemeinden*, available at [www.bka.gv.at/DocView.axd?CobId=61858](http://www.bka.gv.at/DocView.axd?CobId=61858) (accessed on 7 June 2017).
- Republic of Austria, *Für Österreich: Arbeitsprogramm der Bundesregierung 2017/2018*, available at <http://archiv.bundeskanzleramt.at/DocView.axd?CobId=65201> (accessed on 28 July 2017).

*European legislation and international treaties*

- Charter of Fundamental Rights of the European Union, 26 October 2012, OJ C 326/391.
- Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, 4 November 1950, Council of Europe Treaty Series No. 5.
- Convention on the Rights of the Child Including Reservations and Declarations, FLG 1993/7 in the version of FLG III No. 187/2016.
- Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series vol. 189.
- Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders (2004/573/EC), OJ 2004 L 261/28.
- 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, 24 December 2008, OJ 2008 L 348/98.
- Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 29 June 2013, OJ 2013 L 180/96.
- Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals,

- and repealing the Council Recommendation of 30 November 1994, 17 November 2016, OJ 2016 L 311/13.
- Regulation (EU) 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 (recast), 29 June 2013, OJ 2013 L180/31.
- Treaty on European Union (Consolidated Version), 26 October 2012, OJ 2012 C 326/01.

#### *European case law*

- European Court of Human Rights (ECtHR), 23 June 2008, *Maslov v. Austria*, Application No. 1638/03.
- European Court of Human Rights (ECtHR), 10 July 2014, *Mugenzi v. Frankreich*, Application No. 52701/09.
- European Court of Human Rights (ECtHR), 3 October 2014, *Jeunesse v. the Netherlands*, Application No. 12738/10.

#### *Austrian legislation*

- 2015 Act Amending the Aliens Law, FLG I No. 70/2015.
- 2017 Act Amending the Aliens Law, available at [www.parlament.gv.at/PAKT/VHG/XXV/BNR/BNR\\_00513/fname\\_645121.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/BNR/BNR_00513/fname_645121.pdf) (accessed on 18 July 2017).
- Act Amending the Aliens Authorities Restructuring Act, FLG I No. 68/2013.
- Act Establishing the Federal Office for Immigration and Asylum, FLG I No. 87/2012, in the version of FLG I No. 70/2015.
- Act Introducing the Acts on Administrative Procedures, FLG I No. 87/2008, in the version of FLG I No. 33/2013.
- Administrative Enforcement Act, FLG No. 53/1991, in the version of FLG I No. 33/2013.
- Aliens Authorities Restructuring Act, FLG I No. 87/2012.
- Aliens Police Act, FLG I No. 100/2005, in the version of FLG I No. 68/2017.
- Code of Criminal Procedure, FLG No. 631/1975, in the version of FLG I No. 117/2017.

Extradition and Mutual Assistance Act, FLG No. 529/1979, in the version of FLG I No. 121/2016.

Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union, FLG I No. 36/2004, in the version of FLG I No. 121/2016.

Federal Constitutional Act, FLG No. 1/1930, in the version of FLG I No. 106/2016.

Federal Constitutional Act Children Rights, FLG I No. 4/2011.

Federal Office for Immigration and Asylum Procedures Act, FLG I No. 87/2012, in the version of FLG I No. 84/2017.

General Civil Code, JLC No. 946/1811, in the version of FLG I No. 43/2016.

General Administrative Procedures Act, FLG No. 51/1991, in the version of FLG I No. 161/2013.

Penal Sanctions Enforcement Act, FLG No. 144/1969, in the version of FLG I No. 26/2016.

Proceedings of Administrative Courts Act, FLG I No. 33/2013, in the version of FLG I No. 24/2017.

Service of Documents Act, FLG No. 200/1982, in the version of FLG I No. 40/2017.

Settlement and Residence Act, FLG I No. 100/2005, in the version of FLG I No. 122/2015.

#### *Austrian Regulations*

Regulation on Countries of Origin, FLG II No. 177/2009, in the version of FLG II No. 47/2016.

Regulation on the Implementation of the Aliens Police Act, FLG II No. 450/2005.

#### *Austrian case law*

Administrative High Court, 1 April 2008, 2007/06/0262.

Administrative High Court, 25 March 2010, 2009/21/0276.

Administrative High Court, 15 December 2011, 2011/21/0237.

Administrative High Court, 15 May 2012, 2012/18/0029.

Administrative High Court, 14 March 2013, 2012/22/0214.

Administrative High Court, 20 March 2013, 2012/01/0054.

Administrative High Court, 22 May 2013, 2011/18/0230.

Administrative High Court, 25 February 2014, 2011/01/0244.

Administrative High Court, 7 May 2014, 2013/22/0352.  
Administrative High Court, 19 February 2015, 2014/21/0075.  
Administrative High Court, 20. October 2016, Ra 2016/21/0289.  
Administrative High Court, 11 May 2017, Ro 2016/21/0010.  
Administrative High Court, 11 May 2017, Ro 2016/21/0022.

Constitutional Court, 25 February 2013, U2241/12.  
Constitutional Court, 19 June 2015, E426/2015.  
Constitutional Court, 9 June 2016, E2617/2015.  
Constitutional Court, 26 September 2017, G 134/2017, G 207/2017.

Federal Administrative Court, 5 December 2014, 1403 2014908-1.  
Federal Administrative Court, 8 June 2015, W226 2102337-1.  
Federal Administrative Court, 28 March 2017, W250 2150801-1.  
Federal Administrative Court, 20 June 2017, W117 2161338-1.  
Federal Administrative Court, 20 June 2017, W140 2161340-1.  
Federal Administrative Court, 20 June 2017, W159 2140192-2.  
Federal Administrative Court, 20 June 2017, W268 2161486-1.  
Federal Administrative Court, 21 June 2017, W174 2161352-1.  
Federal Administrative Court, 23 June 2017, W250 2157721-1.  
Federal Administrative Court, 23 June 2017, W250 2161901-1.  
Federal Administrative Court, 27 June 2017, W250 2154607-2.  
Federal Administrative Court, 28 June 2017, I408 2148389-1.  
Federal Administrative Court, 29 June 2017, W137 2162316-1.  
Federal Administrative Court, 29 June 2017, W189 1301887-3.  
Federal Administrative Court, 3 July 2017, L515 1235454-3.  
Federal Administrative Court, 4 July 2017, W117 2162268-1.  
Federal Administrative Court, 4 July 2017, W137 2162752-1.  
Federal Administrative Court, 4 July 2017, W137 2162946-1.  
Federal Administrative Court, 5 July 2017, I407 2159086-1.  
Federal Administrative Court, 7 July 2017, I403 2124712-2.

### *Statistics*

Eurostat

2017 *Third-country nationals ordered to leave – annual data (rounded), [migr\_eiord]*, available at [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_eiord&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eiord&lang=en) (accessed on 12 July 2017).

2017 *Third-country nationals returned following an order to leave – annual data (rounded) [migr\_eirtn]*, available at [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_eirtn&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eirtn&lang=en) (accessed on 12 July 2017).

Federal Office for Immigration and Asylum

n.d. *2016 – Das Jahr der Erweiterung*, available at [www.bfa.gv.at/files/Statistiken/BFA\\_Jahresbilanz\\_2016.pdf](http://www.bfa.gv.at/files/Statistiken/BFA_Jahresbilanz_2016.pdf) (accessed on 16 June 2017).

n.d. *2015 – Das Jahr der Steigerungen*, available at [www.bfa.gv.at/files/Statistiken/BFA\\_Jahresbilanz2015\\_web.pdf](http://www.bfa.gv.at/files/Statistiken/BFA_Jahresbilanz2015_web.pdf) (accessed on 26 July 2017).

n.d. *BFA-Bilanz 1. Halbjahr 2017*, available at [www.bfa.gv.at/files/Statistiken/BFA\\_Halbjahresbilanz\\_2017.pdf](http://www.bfa.gv.at/files/Statistiken/BFA_Halbjahresbilanz_2017.pdf) (accessed on 26 July 2017).

2014–2016 Statistics on Detention Pending Removal, provided by the Federal Ministry of the Interior, 11 August 2017.

#### *Press releases*

Amnesty International

2017 *EU: Cruel migration detention regime exposes hypocrisy of European Commission*. Press Release, 3 March 2017, available at [www.amnesty.org.au/cruel-migration-detention-regime-exposes-hypocrisy-european-commission/](http://www.amnesty.org.au/cruel-migration-detention-regime-exposes-hypocrisy-european-commission/) (accessed on 6 July 2017).

European Commission

2017 *European Agenda on Migration: Commission presents new measures for an efficient and credible EU return policy*. Press Release, 2 March 2017, available at [http://europa.eu/rapid/press-release\\_IP-17-350\\_en.htm](http://europa.eu/rapid/press-release_IP-17-350_en.htm) (accessed on 16 August 2017)

Federal Ministry of the Interior

2016 *Neues Rückkehrhilfeprogramm für Asylweber aus Afghanistan, Marokko und Nigeria*. News, 14 April 2016, available at [www.bmi.gv.at/cms/bmi/\\_news/bmi.aspx?id=3647354D7433414355414D3D&page=119&view=1](http://www.bmi.gv.at/cms/bmi/_news/bmi.aspx?id=3647354D7433414355414D3D&page=119&view=1) (accessed on 26 July 2017).

Federal Office for Immigration and Asylum

- 2016 *Neues Rückkehrhilfeprogramm für Asylweber aus Afghanistan, Marokko und Nigeria*. Press, 13 April 2016, available at [www.bfa.gv.at/presse/thema/detail.aspx?nwid=4F717067766351484946513D&ctrl=2B7947437976465443374D3D](http://www.bfa.gv.at/presse/thema/detail.aspx?nwid=4F717067766351484946513D&ctrl=2B7947437976465443374D3D) (accessed on 28 July 2017).
- 2017 *1.000 Euro für 1.000 Personen*. Press, 22 March 2017, available at <http://bfa.gv.at/presse/news/detail.aspx?nwid=795370614C6A57592F5A633D&ctrl=796C386F347944696937796A68352F47503437326B513D3D&nwo=0> (accessed on 7 August 2017).

PICUM/UNICEF/IOM

- 2017 *New European Union returns policies put children at risk*. Press Release, 3 March 2017, available at [www.unicef.org/media/media\\_95028.html](http://www.unicef.org/media/media_95028.html) (accessed on 6 July 2017).

Platform for International Cooperation on Undocumented Migrants (PICUM)

- 2017 *New EU Commission plans on returns and detention will create more harm and suffering*. Press Release, 3 March 2017, available at <http://picum.org/en/news/picum-news/52056/> (accessed on 6 July 2017).

*Newspaper articles*

Der Standard

- 2017 *Harter Start nach der Abschiebung in Afghanistan*, 4 April 2017, available at <http://derstandard.at/2000055333735/Harter-Start-nach-der-Abschiebung-in-Afghanistan> (accessed on 6 July 2017).
- 2017 *Strafen für abgelehnte Asylwerber: Hohe Kosten, Nutzen unklar*, 7 February 2017, available at <http://derstandard.at/2000052199948/Strafen-fuer-abgelehnte-Asylwerber-Hohe-Kosten-Nutzen-unklar> (accessed on 6 July 2017).
- 2017 *Vermehrte Abschiebungen nach Afghanistan: Angst lähmt Community*, 5 May 2017, available at <http://derstandard.at/2000055439852/Vermehrte-Abschiebung-nach-Afghanistan-Angst-laehmt-afghanische-Community> (accessed on 29 August 2017).

#### Die Presse

- 2017 *Asylamt setzt Fokus auf Afghanistan*, 19 January 2017, available at <http://diepresse.com/home/innenpolitik/5156932/Asylamt-setzt-Fokus-auf-Afghanistan> (accessed on 6 July 2017).
- 2017 *Grüne wollen Abschiebungen nach Afghanistan stoppen*, 5 June 2017, available at <http://diepresse.com/home/innenpolitik/5229722/Gruene-wollen-Abschiebungen-nach-Afghanistan-stoppen> (accessed on 6 July 2017).

#### Kleine Zeitung

- 2017 *1000 Euro für die ersten 1000 Rückkehrer*, 22 March 2017, available at [www.kleinezeitung.at/politik/innenpolitik/5187883/Fluechtlinge\\_1000-Euro-fuer-die-ersten-1000-Rueckkehrer](http://www.kleinezeitung.at/politik/innenpolitik/5187883/Fluechtlinge_1000-Euro-fuer-die-ersten-1000-Rueckkehrer) (accessed on 6 July 2017).

#### Kurier

- 2017 *3500 Obdachlose? Kritik an neuem Fremdenrecht*, 28 February 2017, available at <https://kurier.at/politik/inland/fremdenrecht-regierung-verteidigt-verschaerfungen/249.037.516> (accessed on 6 July 2017).

#### Salzburger Nachrichten

- 2017 *Doskozil verteidigt Fremdenrechtspaket gegen Kritik*, 21 April 2017, available at [www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/doskozil-verteidigt-fremdenrechtspaket-gegen-kritik-244182/](http://www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/doskozil-verteidigt-fremdenrechtspaket-gegen-kritik-244182/) (accessed on 6 July 2017).
- 2017 *Flüchtlinge – Erster Frontex-Charter nach Afghanistan*, 29 March 2017, available at [www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/fluechtlinge-erster-frontex-charter-nach-afghanistan-240927/](http://www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/fluechtlinge-erster-frontex-charter-nach-afghanistan-240927/) (accessed on 6 July 2017).
- 2017 *Österreich schob am Mittwoch 17 Afghanen nach Kabul ab*, 31 Mai 2017, available at [www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/oesterreich-schob-am-mittwoch-17-afghanen-nach-kabul-ab-250132/](http://www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/oesterreich-schob-am-mittwoch-17-afghanen-nach-kabul-ab-250132/) (accessed on 6 July 2017).

Wiener Zeitung

- 2017 *Der Einzelfall entscheidet*, 23 June 2017, available at [www.wienerzeitung.at/nachrichten/oesterreich/politik/899950\\_Der-Einzelfall-entscheidet.html](http://www.wienerzeitung.at/nachrichten/oesterreich/politik/899950_Der-Einzelfall-entscheidet.html) (accessed on 14 August 2017).
- 2017 *Sobotka fordert Ausreisezentren*, 2 March 2017, available at [www.wienerzeitung.at/nachrichten/oesterreich/politik/877104\\_Sobotka-fordert-Ausreisezentren.html](http://www.wienerzeitung.at/nachrichten/oesterreich/politik/877104_Sobotka-fordert-Ausreisezentren.html) (accessed on 6 July 2017).

#### *Internet sources*

- Austrian Ombudsman Board, *Aufgaben und Zuständigkeiten*, available at <https://volksanwaltschaft.gv.at/ueber-uns#anchor-index-1528> (accessed on 7 August 2017).
- Diakonie Refugee Service, available at <https://fluechtlingsdienst.diakonie.at> (accessed on 16 August 2017).
- European Commission, *EMN Glossary & Thesaurus*, available at [https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_en) (accessed on 26 July 2017).
- Federal Chancellery, *Rechtsinformationssystem (RIS)*, available at [www.ris.bka.gv.at/Judikatur](http://www.ris.bka.gv.at/Judikatur) (accessed on 18 July 2017).
- Federal Office for Immigration and Asylum, *Voluntary departure & return assistance*, available at [www.voluntaryreturn.at/en/](http://www.voluntaryreturn.at/en/) (accessed on 26 July 2017).
- Oxford Dictionary, *effective*, available at <https://en.oxforddictionaries.com/definition/effective> (accessed on 4 May 2017).
- Verein Menschenrechte Österreich, available at [www.verein-menschenrechte.at/en-index.html](http://www.verein-menschenrechte.at/en-index.html) (accessed on 16 August 2017).

#### *Brochures and newsletter*

- Federal Office for Immigration and Asylum
- n.d. *Freiwillige unterstützte Rückkehr – Sonderaktion EUR 1.000,-*, available at [http://bfa.gv.at/bmi\\_docs/1985.pdf](http://bfa.gv.at/bmi_docs/1985.pdf) (accessed on 7 August 2017).
- 2017 *Return Assistance*, available at [www.bfa.gv.at/files/return/Infoblatt\\_fuer\\_AW\\_zur\\_Sonderaktion.pdf](http://www.bfa.gv.at/files/return/Infoblatt_fuer_AW_zur_Sonderaktion.pdf) (accessed on 7 June 2017).



- International Organization for Migration (IOM) Country Office for Austria
- 2014 *AVRR Newsletter – Autumn 2014*, available at [www.iomvienna.at/sites/default/files/AVRR-Newsletter\\_Autumn2014\\_EN.pdf](http://www.iomvienna.at/sites/default/files/AVRR-Newsletter_Autumn2014_EN.pdf) (accessed on 14 August 2017).
- 2015 *AVRR Newsletter – Summer 2015*, available at [www.iomvienna.at/sites/default/files/AVRR-Newsletter\\_Summer%202015\\_EN\\_final.pdf](http://www.iomvienna.at/sites/default/files/AVRR-Newsletter_Summer%202015_EN_final.pdf) (accessed on 14 August 2017).
- 2017 *AVRR Newsletter – Frühling 2017*, available at [www.iomvienna.at/sites/default/files/AVRRNLFruehling2017.pdf](http://www.iomvienna.at/sites/default/files/AVRRNLFruehling2017.pdf) (accessed on 28 July 2017).

*Interviews and written communication*

- Interview with Günter Ecker, Verein Menschenrechte Österreich, 26 July 2017.
- Interview with Stephan Klammer, Diakonie Refugee Service, 4 August 2017.
- Interview with Tobias Molander and Stephanie Theuer, Federal Ministry of the Interior, 25 July 2017.
- Written input by Andrea Götzelmann, IOM Country Office for Austria, 13 June 2017.
- Written input by Tobias Molander, Federal Ministry of the Interior, 8 August 2017.
- Written input by Stephanie Theuer, Federal Ministry of the Interior, 14 November 2017.