

Long-term irregular staying migrants in Austria

Practices and challenges

Martin Stiller and Lukas Humer

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SUMMARY

In Austria, irregular migration is a recurring topic in political discussions and in the media. Key points of focus for such discussions are containing further irregular migration to Austria and returning migrants already staying irregularly, with rejected asylum seekers being a special case in the latter group. Austria makes no distinction, either in legal or practical terms, between long-term and short-term irregularly staying individuals.

Accordingly, individuals staying irregularly in Austria are not classified based on the length of stay – as proposed for this EMN study – but by the circumstances of an individual's irregular status. An example is the case of asylum seekers in Austria who evade procedures and remain in Austria. Other individuals continue to stay in Austria after termination of their residence status, entering a situation in which they become “irregularized”. Another category consists of individuals who have been issued return decisions that for legal or practical reasons cannot be enforced. A continued stay is therefore tolerated for these individuals. Finally, there is also a group of migrants in Austria who remain outside the purview of the authorities.

Due to the specific aspects of irregular migration, exact figures on the number of individuals staying irregularly in Austria are not available. The statistics and figures presented in this study for each category can only provide a partial picture of the actual situation.

Especially in the case of individuals who for legal or practical reasons cannot be removed and who are therefore tolerated, Austrian law allows for a continued stay as well as access to social benefits. Such persons are issued a Card for Tolerated Stay, which among other functions serves as an identity card during procedures before the Federal Office for Immigration and Asylum. Despite being tolerated, such a person's stay is not lawful but only accepted in lieu of any alternative under the legal system. The Federal Office for Immigration and Asylum applies highly restrictive principles when issuing a Card for Tolerated Stay. A paradoxical situation may therefore arise where a migrant who cannot be removed is nonetheless ineligible for tolerated stay. Austria also has a limited option for regularizing an individual's stay, for instance by issuing a Residence Permit for Exceptional Circumstances. Tolerated persons are specifically offered the option of obtaining a Residence Permit for Individual Protection. Once one of these two types of residence title has been issued, a migrant may also transfer to the residence scheme under the Settlement and Residence Act.¹

A decision to grant tolerated stay is crucial for access to basic benefits (beyond those extended to asylum seekers) because tolerated individuals are considered foreign nationals in need of aid and protection, and thus receive support to cover basic needs. Material reception conditions cover accommodations and statutory health insurance as two essential aspects of daily life. This contrasts with irregularly staying individuals whose stays are not tolerated or who are outside the purview of the authorities: this group is not allowed access to material reception conditions and only limited access, if any, to State social benefits. Such persons are in practice forced to depend on services provided by NGOs or religious organizations. Civil society representatives highlight the

¹ FLG I No. 100/2005, in the version of the federal law FLG. I No. 24/2020.

need to provide a wider range of financial and human resources to address the social situation in which such individuals find themselves, which is often characterized by homelessness in particular.

This contrasts with Austrian policy, which focuses on returning migrants irregularly staying in the country and rejected asylum seekers in particular. In Austrian policymaking circles, voluntary return is one of the mechanisms relied on as a means of terminating (long-term) irregular stays. Migrants can generally participate in such return programmes regardless of how long they have been staying in the country. Yet representatives of NGOs point out that the likelihood of voluntary return declines in proportion to the length of an individual's irregular stay. These NGOs therefore propose tailoring return programmes to target this group.

Adopting uniform standards at EU level has also been proposed by experts as a way of improving current conditions for irregular migrants in Austria. These uniform standards should define the criteria for immigration to Europe, for a standardized residence permit and a coordinated return strategy.

I. INTRODUCTION

I.1 Overview of topics and study objectives

Based on the Austrian legal situation, the Federal Office for Immigration and Asylum is obliged to issue a return decision against third-country nationals who are staying irregularly in Austria. An irregular stay can result, for example, from the fact that the persons concerned no longer fulfill the residence conditions or have never fulfilled them.

Similarly, the European Return Directive² sets the obligation for Member States to issue a return decision against third-country nationals who are staying irregularly on their territory, unless there are compelling reasons not to do so or a procedure for renewing a residence permit is pending (Art. 6 Return Directive). The Return Directive thus sets common EU standards for, among other things, forced return. Compliance with the obligation to issue return decisions aims at reducing legal uncertainty for third-country nationals, as the return decision clearly expresses that they are considered to be irregularly staying and therefore subject to the obligation to return.

If a return decision is issued against a person residing irregularly in Austria, this person is subsequently obliged to leave Austria. If this does not happen voluntarily, the Austrian authorities are entitled and obliged to compel this person to leave, i.e. to remove him or her. In practice, however, there are cases in which third-country nationals do not or cannot leave Austrian territory. In such cases, removal may not be possible either; for example because there are legal or practical obstacles to it. This can ultimately lead to third-country nationals continuing to stay in Austria despite the obligation to return. Under certain circumstances, this stay extends over a long period of time, which is sometimes accompanied by deplorable living conditions – for example, a precarious financial situation, homelessness and unclear or inadequate health care. People in such a situation can also fall victim to exploitation more easily (European Migration Network, 2020).

With regard to the problems associated with irregular stay, this study takes a closer look at the phenomenon of irregular staying persons. The EMN study, to which this national report contributes, aims to provide an overview of existing policies and practices in EU Member States and Norway towards third-country nationals who stay irregularly for longer periods in one of these States. The study therefore examines the responses and approaches taken by the relevant authorities to prevent and mitigate such situations and the social consequences for the third-country nationals concerned. Accordingly, this national report first presents the initial situation in Austria on the basis of the political and public debates as well as the different categories of irregularly staying persons in Austria. Subsequently, tolerated stay as well as measures to prevent or terminate an irregular stay are described. Finally, the support options for affected persons in Austria are also highlighted. Due to the ongoing COVID-19 pandemic, a separate section also presents the measures taken in Austria in connection with the pandemic and irregular staying persons.

The study's period of investigation is limited to the period from 2015 to 2020.

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, OJ L 348, pp. 98–107.

I.2 Definitions

The study is based on the following definitions, taken from the Asylum and Migration Glossary of the European Migration Network (European Migration Network, 2018a, 2018b) except where another source is cited:

Irregular migration: Movement of persons to a new place of residence or transit that takes place outside the regulatory norms of the sending, transit and receiving countries.

Irregular stay: The presence on the territory of an EU Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Art. 5 of the Schengen Borders Code³ or other conditions for entry, stay or residence in that EU Member State.

Regularization: state procedure by which irregularly staying third-country nationals are awarded a legal status.

Residence permit: Any authorization issued by the authorities of an EU Member State allowing a non-EU national to stay regularly in its territory, in accordance with the provisions of the Long Stay Visa Regulation.⁴

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

Return decision: An administrative or judicial decision or act, stating or declaring the stay of a third-country national to be unlawful and imposing or stating an obligation to return.

Third-country national: Any person who is not a citizen of the European Union within the meaning of Art. 20(1) of Treaty on the Functioning of the European Union⁵ and who is not a person enjoying the European Union right to free movement, as defined in Art. 2(5) of the Schengen Borders Code.

Voluntary return: The assisted or independent return to the country of origin, transit or third country, based on the free will of the returnee.

I.3 Methodology

The present study was conducted by the National Contact Point (NCP) Austria in the EMN within the framework of the EMN's 2019–2020 Work Programme. The study follows a common study template (European Migration Network, 2020) with a predefined set of questions developed by the EMN, in order to facilitate comparability of the findings across all Member States.

3 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders, OJ L 77, pp. 1–52.

4 Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa, OJ L 85, pp. 1–4.

5 Treaty on the Functioning of the European Union, OJ C 326, pp. 47–390.

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

To supplement the information obtained from secondary research, qualitative semi-structured face-to-face interviews were conducted with experts in the field of migration with additional information being requested in writing in some cases. The experts listed below participated in personal interviews:

- Lukas Gahleitner-Gertz, speaker and asylum expert of the non-governmental organization Asylkoordination Österreich;
- Katrin Hulla, Legal Advisor - expert on Asylum Law, Caritas der Erzdiözese Wien;
- Christoph Riedl, Expert on Asylum and Migration of the Diakonie Österreich.

In addition, the following institutions or persons provided written information:

- Wolfgang Hauptmann, Head of Unit (Basic Care and Refugees) of the Office of the Provincial Government of Burgenland;
- Katie Klaffenböck, M.A., Counter-Trafficking project manager, International Organization for Migration, Country Office for Austria;
- Wolfgang Meier, Head of Division on Livelihood (Department for Social Affairs and Integration) of the Office of the Provincial Government of Vorarlberg;
- Roswitha Müller, Head of the Integration Division (Department for Education and Integration) of the City of Graz;
- Peter Nollet, Head of Unit (Basic Care for Foreigners) of the Office of the Provincial Government of Upper Austria;
- Cansel Öztürk, Advisor (Department V/I 0) of the Federal Ministry of the Interior;
- Markus Pauchart, Head of Division (Social Affairs Department) of the Office of the Provincial Government of Tyrol;
- Evelyn Rainer, project coordinator, International Organization for Migration, Country Office for Austria;
- Barbara Unterlerchner, MA, Advisor for Groundwork and Innovation, neunerhaus.

The study was compiled by Martin Stiller (Legal Associate, IOM Country Office for Austria) and Lukas Humer (Research Associate, IOM Country Office for Austria).

The interviewees mentioned above deserve special thanks for sharing their knowledge and experience through personal interviews and written responses, as well as Saskia Heilemann (Research Associate, IOM Country Office for Austria) for her valuable comments and for compiling the statistical parts of the study. The authors wish to thank Stefan Fink and Katrin Lusk (Interns, IOM Country Office for Austria) for various support services at different stages of the research work.

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

2. AUSTRIAN CONTEXT

This section provides an overview of the political and public debates on irregular staying persons and legal developments in Austria and outlines the Austrian context of the study.

2.1 Political and legal developments

None of the political discussions or legislative developments in the period from 2015 to October 2020 related specifically to long-term irregularly staying migrants. The main focus instead was containing further irregular migration in general and returning migrants – especially rejected asylum seekers – already staying irregularly in Austria. Accordingly, widespread legislative amendments relating to migration were passed in October 2017. In adopting the Act Amending the Aliens Law 2017,⁶ the Federal Government primarily pursued the aim of “facilitating the enforced removal of rejected asylum seekers and foreign nationals irregularly staying in Austria, as well as promoting voluntary departure” (Austrian Parliament, 2017). To this end, foreign nationals who do not depart voluntarily despite circumstances including a final return decision and who are not tolerated as defined in Art. 46a of the Aliens Police Act 2005⁷ (see section 4.1) can be obliged to stay in federal accommodation (residence requirement pursuant to Art. 57 Aliens Police Act 2005). Persons targeted by this measure include those individuals who do not comply voluntarily with the departure obligation within the allotted period and whose continued non-compliance is assumed (Kainz and Krisper, 2017:84). A geographical restriction was also introduced: this measure prohibits third-country nationals who are receiving care at a federal reception centre from leaving the administrative district in which the reception centre is located (Art. 52a Aliens Police Act 2005). Failure to observe this requirement constitutes an administrative offence punishable by a fine ranging from EUR 100 to EUR 1,000 (Art. 121 para 1a Aliens Police Act 2005). Stiff penalties also apply to individuals staying unlawfully in Austria. Foreign nationals who are themselves responsible for their failure to comply with an obligation to leave Austrian territory without delay, such as when a return decision issued against them becomes both final and enforceable, commit an administrative offence punishable by a fine of up to EUR 15,000 (Art. 120 para 1b Aliens Police Act 2005). According to legislators, these measures are intended to make absconding more difficult (Austrian Parliament, 2017) and have been described by the Minister of the Interior as “achieving clarity” sooner about migrants not entitled to stay in the country (Die Presse, 2017). The Minister of the Interior also called for an amendment to the Federal Basic Care Act, so as to withhold material reception conditions from rejected asylum seekers who fail to actively cooperate in their removals from the country (Salzburger Nachrichten, 2016). Even after the adoption of the Act Amending the Aliens Law 2017, however, asylum seekers can be excluded from material reception conditions who fail to cooperate in determining their identities or their need for assistance (Art. 3 para 1 subpara 2 Federal Basic Care Act 2005).⁸

Besides the changes resulting from the Act Amending the Aliens Law 2017, access to State social benefits was tightened during the period under review for migrants who do not or no longer have a lawful residence status.

6 FLG I No. 145/2017.

7 FLG I No. 100/2005, in the version of FLG I No. 27/2020.

8 FLG No. 405/1991, in the version of the federal law FLG I No. 53/2019.

Specifically, the General Social Assistance Act⁹ adopted in 2019 excludes those foreign nationals who are obliged to leave the country from the scope of social assistance benefits (Art. 4 para 2 subpara 3). Observers view such measures as being aimed at encouraging an individual's willingness to return (Rosenberger et al., 2018:1). This General Social Assistance Act and the provision excluding certain foreign nationals from the scope of social assistance benefits has met with criticism from the Austrian provinces. In a written response to the draft bill, the Province of Salzburg noted the lengthy period of time that often transpires between the entry into force of the departure obligation and the finalization of the departure itself, during which individuals requiring assistance would no longer be assured of basic care (Province of Salzburg, 2019:3).

2.2 Public debates

Irregular migration is a recurring topic both in political debates and media reports. Yet the length of an individual's irregular stay or how long a certain person has already stayed irregularly in the country is not discussed in these contexts. Frequent topics in reports include possible overlaps between irregular migration and asylum, and – most especially – irregular stays of rejected asylum seekers in Austria.

- The Act Amending the Aliens Law 2017 was the subject of media reporting. Such reports mostly concerned the consequences of the amendments for rejected asylum seekers continuing to stay in Austria, resulting from requirements specifying places of residence and limiting residence to certain districts, and from new fines introduced (see section 2.1). Multiple newspapers quoted a statement issued by the Ministry of the Interior, which described an irregular stay in Austria as a non-trivial offence and declared its intention to apply the new laws to the fullest extent (Salzburger Nachrichten, 2017). This was deemed necessary particularly because irregularly staying persons were said to resort to criminal behaviour in the absence of any prospect for permanently residing in Austria.
- In general, it should be noted that it is difficult to record the exact numbers of irregular migrants. This also applies to Austria (see section 3). In the past, this circumstance triggered media interest. This was evident, for example, in the response given to a question raised in Parliament in 2016 regarding unlawfully present persons apprehended in Austria (Federal Ministry of the Interior, 2016b). The Ministry of the Interior was then quoted by a daily newspaper as saying that these figures gave no indication of the number of people actually staying irregularly in Austria. The statistics included repeat arrests of one and the same person and did not indicate the procedures followed after individuals had been apprehended, a ministry spokesperson elaborated (Die Presse, 2016). That is also true for the number of persons whose asylum application had been rejected by a final decision but who were still in Austria. The figure quoted in October 2016 (Salzburger Nachrichten, 2016) by the then Austrian Minister of the Interior (Austrian People's Party) referred to persons who had received a negative asylum decision and were in basic care, according to the then Minister of Defence (Social Democratic Party of Austria). Yet the number of unreported cases was certainly higher; the minister stated (Kronen Zeitung, 2016). In 2017, the then Minister of the Interior declared that knowing the number of persons receiving material reception conditions who were obliged to leave the country does not allow to exactly determine the number of persons residing irregularly in Austria (Heute, 2017).

⁹ FLG I No. 41/2019, in the version of the federal law FLG I No. 108/2019.

3. CATEGORIES OF IRREGULARLY STAYING PERSONS IN AUSTRIA

The common study template underlying this EMN-wide study focuses on long-term irregular staying persons. However, Austria does not make a (legal) distinction between short-term and long-term irregularly staying third-country nationals.¹⁰ Similarly, the legal consequences in response to an irregular stay, be it short term or long term,¹¹ are the same: a return decision is issued.¹² According to the actual wording of the legislation, the Federal Office for Immigration and Asylum has a “duty” to issue such a return decision (Art. 52 Aliens Police Act 2005). Rather, this categorization (discussed below) is based on other criteria, such as whether or not it is possible to remove an individual on legal or practical grounds. The statistics and figures presented below for each defined category must be treated only as approximations of the actual numbers of all persons staying irregularly in Austria.

Individuals who have been issued return decisions that for legal or practical reasons cannot be enforced

In Austria there are legal obstacles potentially even to issuing a return decision against an irregularly staying individual. One such case is where the return decision would interfere with that individual's right to private or family life and this intervention would not be urgently necessary to achieve the goals listed in Art. 8 para 2 of the European Convention on Human Rights (ECHR)^{13,14} – including public interest in an orderly system of alien affairs¹⁵ (Art. 9 para 1 Federal Office for Immigration and Asylum Procedures Act).¹⁶ Accordingly, it is only lawful to order a measure terminating a person's stay when such interference in private or family life serves to meet those goals.¹⁷

If the issuance of a return decision is admissible, however, legal obstacles to the actual removal of an irregularly staying person – which is achieved in practice by the (compulsory) enforcement of a removal decision that has been issued (Art. 46 Aliens Police Act 2005; Peyrl et al., 2017:408) – may arise, such as when removing that individual would violate their right to life or the prohibition of torture (Art. 2 and 3 ECHR; Art. 50 para 1 Aliens Police Act 2005). Such individuals are to be subsequently tolerated (Art. 46a Aliens Police Act 2005). However, this does not make their stay lawful (see section 4.1).

¹⁰ Interview with Lukas Gahleitner-Gertz, Asylkoordination Österreich, 22 September 2020; Interview with Katrin Hulla, Caritas der Erzdiözese Wien, 15 September 2020; Written input: Federal Ministry of the Interior, 20 October 2020.

¹¹ For the conditions of lawful residence see Stiller, 2018a:Section 3.3.

¹² For details see Stiller, 2018b:37.

¹³ FLG No. 210/1958.

¹⁴ Everyone has the right to respect for his/her private and family life, his/her home and his/her correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Art. 8 ECHR).

¹⁵ Written input: Federal Ministry of the Interior, 20 October 2020.

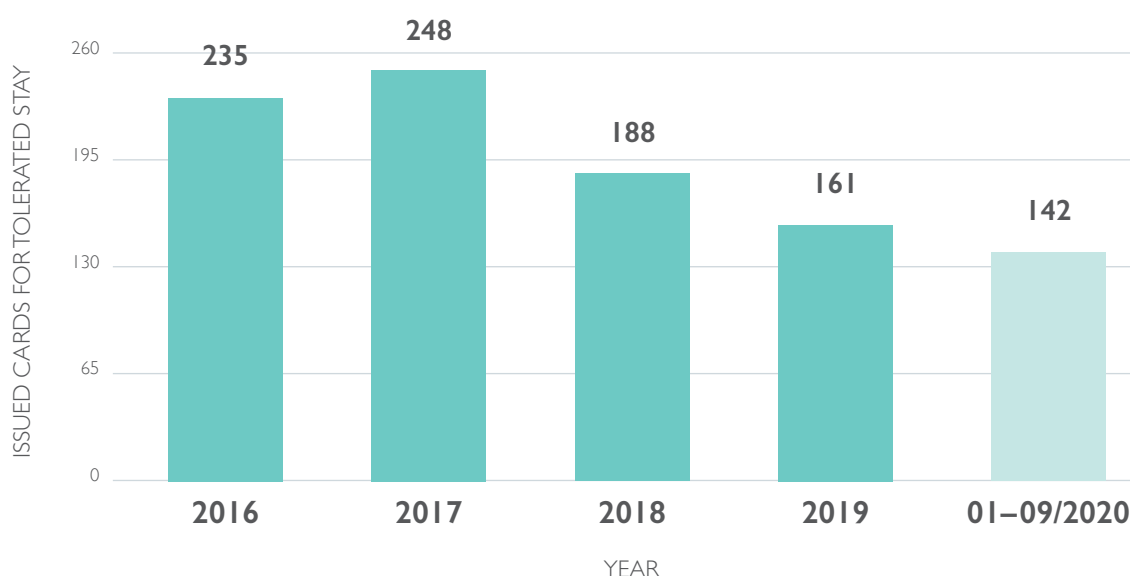
¹⁶ FLG I No. 87/2012, in the version of FLG No. 29/2020.

¹⁷ Written input: Federal Ministry of the Interior, 20 October 2020.

Similar conditions apply to individuals who are unable to be removed for practical reasons (for which the foreigner is not responsible).¹⁸ Such reasons can be, for example, missing travel documents or a lack of readmission agreements between the States involved. In the absence of any removal option, such individuals are also to be subsequently tolerated (Art. 46a Aliens Police Act 2005; see section 4.1).

For documentation purposes, tolerated persons are issued a Card for Tolerated Stay (see section 4.1). In the reporting time frame,¹⁹ the highest number of Cards for Tolerated Stay (248) was issued in 2017. In subsequent years, the number declined, although it should be noted that for 2020, only data from January to September were available at the time the study was prepared.

Figure 1: Number of Cards for Tolerated Stay issued in Austria (2016–2020)



Note: Data on tolerated stays are available only from 2016 onwards.
Source: Written input: Federal Ministry of the Interior, 20 October 2020.

For those persons who refuse to cooperate with the authorities, tolerated stay is not offered (see section 4.1). Therefore, the number of Cards for Tolerated Stay issued does not fully reflect the sum total of individuals unable to be removed for legal or practical reasons.

Asylum seekers in Austria who evade procedures and remain in Austria

Responses to questions raised in Parliament as well as media articles reveal the presence in Austria of asylum seekers who evade asylum procedures (Der Standard, 2017; Federal Ministry of the Interior, 2016c, 2017b) and thus lose their regular residence status. It should, however, be assumed that, except in rare cases, these

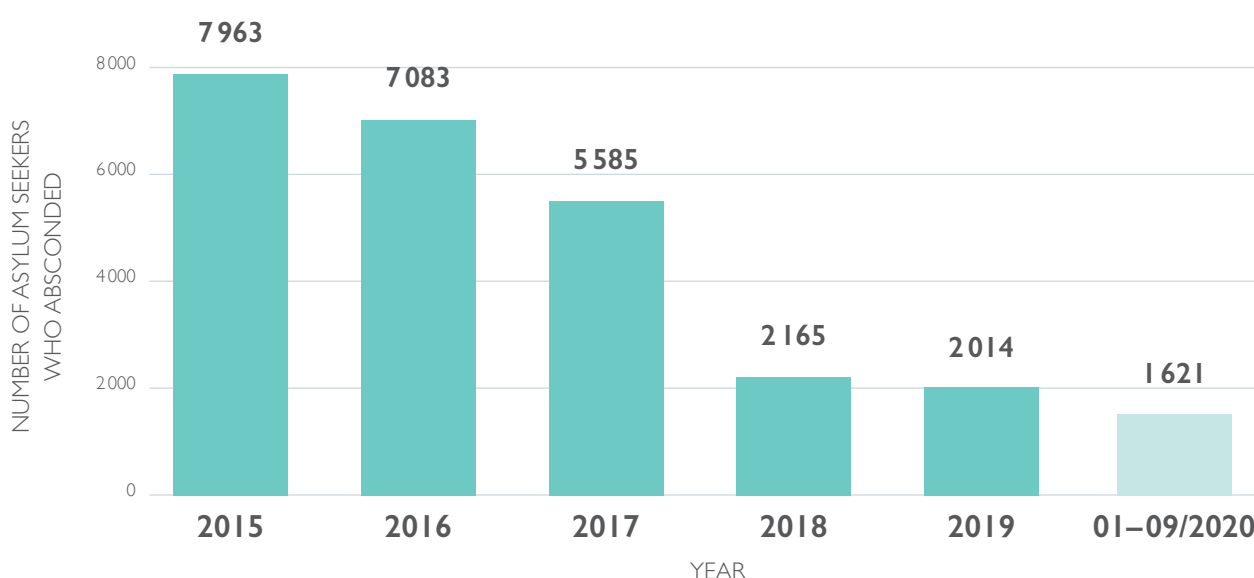
¹⁸ Ibid.

¹⁹ Data is only available from 2016 onwards.

persons do not wish to stay in Austria and should not therefore be classified as migrants staying in Austria irregularly (Rutz and Chahrokh, 2015:58). According to media reports, such individuals who “go underground” are frequently asylum seekers who originally intended to migrate to countries other than Austria and who plan to continue on to their destination (Der Standard, 2017).

The total number of asylum seekers who remain in Austria after absconding is unknown. This group of individuals can nonetheless be assumed to have grown smaller in the past six years. Based on the figures provided by the Federal Ministry of the Interior, the number of individuals recorded on an annual basis to have evaded asylum procedures dropped sharply from 2015 to 2018, from 7,963 to 2,165 (-73%), while remaining relatively stable in 2019. The data for 2020 are not comparable, as only data from January to September were available at the time the study was prepared.

Figure 2: Number of Former Asylum Seekers who Absconded (2015–2020)



Source: Written input: Federal Ministry of the Interior; 20 October 2020.

At this point it should be noted, however, that these figures do not reveal whether or not these individuals are still at large in Austria. As mentioned above, it is assumed that a significant number of absconded asylum seekers travel on to other countries.

Individuals whose situation has become “irregularized” after termination of their residence status

The category of “irregularized”²⁰ individuals must also be mentioned. This group includes individuals who do not fulfil the conditions for a stay in Austria or whose legal right to stay in Austria has come to an end as a result

20 Interview with Katrin Hulla, Caritas der Erzdiözese Wien, 15 September 2020.

of their failure to renew a residence permit in time or the expiry of a visa, for example.²¹ A representative of the Caritas organization reports that such individuals rarely attract the attention of the authorities: since most individuals continue working and are provided with accommodation, they do not come into contact with sources of (State) assistance, although their lack of a (valid) residence permit would come to light in the context of receiving such benefits. While these individuals are staying irregularly in Austria, a return decision has not (yet) been issued against them, not least because the authorities are unaware that they are staying irregularly.²² Authorities usually become aware of an individual's irregular stay only after a police check, so that any return decision is issued with some delay.²³

No information is available on individuals previously staying regularly in Austria before their right of residence terminated, not even from databases kept for administrative procedures, according to the Federal Ministry of the Interior. Nor do the Austrian authorities keep statistics on individuals who have not left the country although their stays have been terminated by an official or court decision (Federal Ministry of the Interior, 2016a:1). This arises in part from the practical difficulties of determining whether an individual has indeed left the country during the period allotted for voluntary return. Reliable figures on those persons whose right of residence has ended and who have left Austria can at most be determined in connection with removals or assisted voluntary departures (Heilemann and Lukits, 2017:36).

Persons in Austria outside the purview of the authorities

Finally, there is also a group of migrants in Austria who are not in the authorities' purview. These migrants presumably wish to keep their distance from the authorities. Indeed, some of these individuals make an active effort to avoid contact with the authorities (Rutz and Chahrokh, 2015:24, 41–42).

According to an estimate by the Migration Council for Austria, the number of individuals staying unlawfully in Austria was between 95,000 and 254,000 in 2015. This number equates to between 1.1 and 2.9 per cent of Austria's total population. This estimate was based on police criminal statistics, in which "stay not lawful" is a separate category for classifying suspects. The number of irregularly staying individuals has been interpolated from these data (Federal Ministry of the Interior, 2016d:20). No information is available, however, on the method and the factor used for this projection: accordingly, no statements can be made about the accuracy of this estimate. Kraler/Reichel generally recommend caution in using projections based on the number of apprehended individuals and their estimated ratio to undetected individuals, arguing that apprehension rates are seen as highly prone to vary due to their dependence on a number of factors such as police practices or migrant conduct (Kraler and Reichel, 2011:106–107).

Summary

In the section above, examples are provided illustrating the statistical indicators for each category of migrants staying irregularly in Austria (some categories also overlap). Each indicator entails specific sources of uncertainty.

21 Written input: Federal Ministry of the Interior; 20 October 2020.

22 Interview with Lukas Gahleitner-Gertz, Asylkoordination Österreich, 22 September 2020; Interview with Katrin Hulla, Caritas der Erzdiözese Wien, 15 September 2020.

23 Written input: Federal Ministry of the Interior; 20 October 2020.

One overarching problem here is the lack of any base data (derived from surveys for example) and the difficulty of extrapolating the number of migrants irregularly staying in the country from available flow data (including Cards for Tolerated Stay and number of asylum seekers absconding each year). While a comprehensive description of Austria's irregular migrant population is not feasible at present, Kraler/Reichel propose triangulating various types of data in order to achieve a more comprehensive picture (Kraler and Reichel, 2011:112). Examples of additional data to incorporate in such a triangulation include the records kept by Criminal Intelligence Service Austria on the number of apprehended individuals irregularly staying in or entering the country, as well as a comparison of the data published by Eurostat on departure orders issued with the actual number of departures. Both of these indicators will again entail their own deficiencies (see for example Kraler and Reichel, 2011:114). In view of the uncertain statistical data situation, the categorization of persons residing irregularly in Austria made in this section is not conclusive. It is therefore conceivable that, on the one hand, there are other groups of persons staying irregularly in Austria and, on the other hand, that there are other possibilities for categorizing these persons.

4. TOLERATED STAY OF IRREGULAR STAYING PERSONS AND MEASURES TO PREVENT OR END IRREGULAR STAYS

This section describes the measures taken in Austria to prevent or end irregular stays. These include, among others, (voluntary) return and regularization of stay. In this context, tolerated stay has a special status. Although it does not make the stay lawful, it is an exception to the administrative penalty to be imposed for an unlawful stay. Tolerated stay and the Austrian measures to prevent or end irregular stay are described in more detail in the following subsections.

4.1 Tolerated stay

If there are no legal obstacles that would oppose issuing a return decision (see section 3), the decision issued includes a ruling on whether removal to one or more specified States is permissible (Art. 52 para 9 Aliens Police Act 2005), while possibly also setting a deadline for voluntary departure (Art. 55 para 1 Aliens Police Act 2005). The Federal Office for Immigration and Asylum has a duty to inform individuals obliged to return about their obligation to depart the country either immediately or within a specified period, and about the measures used to enforce this obligation to depart (Art. 58 para 1 Aliens Police Act 2005); the latter refers to removal as defined in Art. 46 Aliens Police Act 2005. This information can be provided by any suitable means, such as a factsheet or informing the individual in person.²⁴

If the return decision cannot be enforced due to legal or practical obstacles, so that the individual concerned cannot be removed, the person's stay in Austria is tolerated.²⁵

- An example of a potential **legal** obstacle to removal is where removal to another State is prohibited because the individual's right to life or the ban on torture (Art. 2 and 3 ECHR) would be violated.
- **Practical** obstacles²⁶ to removal can arise in cases where the individual concerned has no documents, where no readmission agreement has been signed between the individual's host country and the country of origin, or if the embassy of the (assumed) country of origin does not cooperate with the host country and fails to issue a return travel certificate (a replacement travel document; Federal Office for Immigration and Asylum, n.d.:22), or cannot or does not wish to certify the individual's identity (Rosenberger et al., 2018:2). Removal cannot be enforced in such cases. Other practical obstacles can result from the person's refusal to cooperate with attempts by the authorities to determine their identity (Rosenberger et al., 2018:2), thereby making it impossible to obtain a return travel certificate, for example. Tolerated stay is nonetheless

²⁴ Written input: Federal Ministry of the Interior; 20 October 2020.

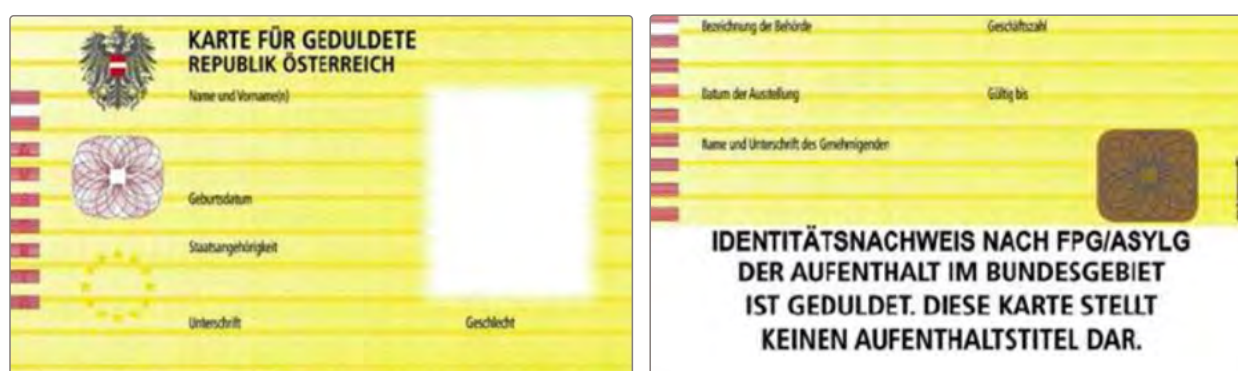
²⁵ This only applies, if after a decision of removal from the country (Art. 61 Aliens Police Act 2005) the competence of another State does not exist (Art. 46a para 1 Aliens Police Act 2005). The competence of another State may result from the fact that the person concerned has filed an application for international protection in another Member State and that this Member State is competent for examining this application (Art. 61 para 1 subpara 2 Aliens Police Act 2005).

²⁶ For details see Lukits, 2016:Section 5.

ruled out in such cases, since tolerated stay is not an option if the individuals concerned are themselves responsible for the obstacles to removal (Art. 46a para 3 Aliens Police Act 2005).²⁷

A person whose stay is tolerated is issued a Card for Tolerated Stay, either on application or ex officio. The individual's stay is considered tolerated either from the card's date of issue or a prior date on which fulfilment of the requirements was recognized with final effect (Art. 46a para 6 Aliens Police Act 2005). No provision exists that would require more detailed consultation on the fact of tolerated stay (Filzwieser et al., 2016:Art. 46a K 23). The card also serves as an identity card for procedures before the Federal Office for Immigration and Asylum. The card must include the individual's name, gender, date of birth and nationality as well as a photo and the holder's signature (Art. 46a para 4 Aliens Police Act 2005). A Card for Tolerated Stay is valid for one year and then renewed each year thereafter as long as the holder continues to meet the requirements for tolerated stay. The card will be revoked if these requirements (and certain other conditions) are no longer met (Art. 46a para 5 Aliens Police Act 2005).

Figure 3: Card for Tolerated Stay, Front and Back



Source: Regulation on the Implementation of the Aliens Police Act 2005,²⁸ Annex A.

Despite the affected individual being tolerated and issued a card, such a person's stay is not lawful but only accepted in lieu of any alternative under the legal system (Schrefler-König and Szymanski, 2018:Art. 46a Aliens Police Act 2005 comment 1; Art. 31 para 1a subpara 3 Aliens Police Act 2005). However, the tolerated stay is an exception to the administrative penalty to be imposed for unlawful stay (Art. 120 para 5 subpara 2 Aliens Police Act 2005). The obligation of a tolerated person to leave the country remains in effect²⁹ and the tolerated stay does not in itself prevent the enforcement of a measure terminating residence, as long as the removal is permissible according to Art. 50 Aliens Police Act 2005. Tolerated stay ends once the circumstances impeding removal cease to exist. The stay is terminated automatically by virtue of law, and withdrawal of the Card for Tolerated Stay is not a prerequisite for being deprived of tolerated stay (Filzwieser et al., 2016:Art. 46a C 20). The Card for Tolerated Stay need not therefore be withdrawn prior to removing the holder (Federal Ministry of the Interior, 2017a:3).

²⁷ According to Art. 46a para 3 Aliens Police Act 2005 this includes in any case the concealment of identity, the non-observance of a summons to clarify identity or to obtain a replacement travel document as well as the lack of cooperation or prevention of the steps necessary to obtain a replacement travel document.

²⁸ FLG II No. 450/2005, in the version of federal law FLG II No. 227/2018.

²⁹ Written input: Federal Ministry of the Interior, 20 October 2020.

Challenges and best practices

A representative of Asylkoordination Österreich has described the procedure leading to tolerated stay as very laborious from the point of view of the persons concerned, due in no small degree to the restrictive policy applied by the Federal Office for Immigration and Asylum in such cases. Accordingly, the Federal Office for Immigration and Asylum initially very often assumes that the persons concerned conceal their identity – such conduct would preclude the granting of tolerated stay.³⁰ Given the wide latitude granted to the Federal Office for Immigration and Asylum for tolerated stay decisions, foreign nationals may well find themselves in a situation where they are de facto non-removable yet also not tolerated (Hinterberger, 2020:445). A representative of the Caritas organization also remarked on the authorities' apparent lack of interest in granting tolerated stay.³¹

The study preparation process did not identify any best practices related to tolerated stay.

4.2 Extension of the departure period

In addition to the tolerated stay, an extension of the departure period can also be considered. Under Austrian law, a deadline for voluntary departure is set when a return decision is issued (Art. 55 para 1 Aliens Police Act 2005). The deadline is normally 14 days from when the return decision becomes final but can (in case of special circumstances) also be fixed once with a longer period (Art. 55 para 2 and 3 Aliens Police Act 2005). There is no separate right to apply for an extension of an already fixed deadline. The authorities can rescind the period allotted where there is a risk of the individual absconding or posing a threat to public order or security (Art. 55 para 5 Aliens Police Act 2005).³² According to a representative of the Diakonie organization, an extension is more likely to be granted for humanitarian reasons, for instance when one family member is in hospital and removal is postponed to allow the entire family to be removed at once.³³ This representative is not aware, however, of any case where the deadline for departure was extended due to obstacles impeding removal.³⁴

Challenges and best practices

A representative of Asylkoordination Österreich estimates that in most cases notice of a deadline extension is provided informally, for example by authorities sending an email to the return counselling facility involved. In such emails, assurance is given that no further steps will be taken towards removal if the individual concerned has left Austria by a specified date. Such an informal extension of the period allotted for departure is not legally binding, however.³⁵ Consequently, there have been cases in the past where a specific date had been agreed for departure and yet steps were nonetheless taken to remove the person earlier (ORF, 2020). The Asylkoordination Österreich organization has criticized this practice as casting doubt upon “the entire system of voluntary return” (Asylkoordination Österreich, 2020).

30 Interview with Lukas Gahleitner-Gertz, Asylkoordination Österreich, 22 September 2020.

31 Interview with Katrin Hulla, Caritas der Erzdiözese Wien, 15 September 2020.

32 Written input: Federal Ministry of the Interior, 20 October 2020.

33 See also Heilemann and Lukits, 2017:35.

34 Interview with Christoph Riedl, Diakonie Österreich, 23 September 2020.

35 Interview with Lukas Gahleitner-Gertz, Asylkoordination Österreich, 22 September 2020.

The study preparation process did not identify any best practices related to the extension of the voluntary departure period.

4.3 (Voluntary) return

A focal point of Austria's handling of irregular migration is the return of migrants without a right of residence or with a valid obligation to leave the country, with priority always given to voluntary return, unless there are compelling reasons such as the protection of public order and security. The return of such individuals, among others, is characterized as an essential component of a credible and functional asylum and migration policy (Federal Ministry of the Interior; n.d.).³⁶ Correspondingly, affected individuals may choose voluntary return at any stage in procedures (in principle) and therefore apply to receive appropriate support for this decision. Such a choice can be made even after detention pending removal has been imposed, which is considered tremendously beneficial from a humanitarian standpoint.³⁷

The main policy items relating to the return of migrants who do not hold residence permits are set out in the Act Amending the Aliens Law 2017. In the case of foreign nationals who have been issued final return decisions and whose deadline for voluntary departure has expired, the act provides the legal basis for the housing of these individuals in what is termed a "federal return counselling facility". Among other things, this option is intended to improve and increase a willingness to depart voluntarily, where possible (Federal Ministry of the Interior; 2019b). The ultimate effectiveness of such attempts to promote return may be questionable, however; particularly in the case of long-term irregular migrants, many of whom do not believe that they will receive voluntary return assistance.³⁸ In fact, voluntary return programmes are usually set up for certain groups of individuals or for certain periods but make no distinctions based on the length of a participant's stay in Austria.³⁹ Thus, these return programmes are also open to third-country nationals who are not or no longer entitled to residency, even years after their regular residence status has expired (Federal Office for Immigration and Asylum, 2015:4).⁴⁰

In general, however, Austria offers incentives to encourage individuals to return voluntarily as soon as possible – as shown by the (two-phase) return assistance programme set up in 2017. The specific indicator here is the amount of financial assistance paid out by the time a person leaves the country. Accordingly, asylum seekers who make a return decision while first-instance procedures are still ongoing – i.e. at a time when a foreign national's stay in Austria is still lawful (Art. 12 Asylum Act 2005)⁴¹ – receive as much as EUR 500 in start-up assistance. Financial assistance is reduced considerably in cases where an individual decides to return only once their asylum application has been rejected in the first instance or after staying in Austria as an irregular migrant under circumstances other than asylum procedures. The maximum amount is EUR 250 in such cases. In some circumstances, only stop-gap assistance of EUR 50 is provided and some cases receive no support funds

36 Written input: Federal Ministry of the Interior; 20 October 2020.

37 Interview with Evelyn Rainer; IOM Country Office for Austria, 20 August 2020.

38 Ibid.

39 Interview with Christoph Riedl, Diakonie Österreich, 23 September 2020.

40 Interview with Evelyn Rainer; IOM Country Office for Austria, 20 August 2020.

41 FLG I No. 100/2005, in the version of federal law FLG I No. 69/2020.

whatsoever. The Federal Office for Immigration and Asylum is responsible for setting the amount paid out to a specific individual (Federal Office for Immigration and Asylum, 2015:5).

The Federal Ministry of the Interior characterizes the Austrian system of voluntary return assistance as being well-established and subject to continuous improvement. Measures are routinely adapted to reflect current developments, while new measures and instruments aimed at increasing voluntary departure are kept in the pipeline. Such measures include public awareness campaigns utilizing a wide range of channels as well as targeted and effective return counselling services. These services are timed to ensure that the individuals concerned receive prompt and up-to-date information about the consequences of applicable departure obligations, and about assistance options for voluntary return and reintegration procedures. These measures also include financial return assistance and reintegration projects in certain third countries. Individuals are eligible for return counselling at any stage within the procedures. Furthermore, according to current law, recipients of a first-instance return decision are required to participate in one return counselling session (Art. 52a para 2 Federal Office for Immigration and Asylum Procedures Act).⁴² An individual not returning voluntarily is then subject to forced removal.⁴³

A representative of the Diakonie organization expressed doubts as to the effectiveness of requiring return counselling during the asylum procedure itself, instead proposing that funds should be invested in reintegration or return programmes for long-term irregular migrants – and especially in light of the need for reintegration programmes tailored to this group that offer a real perspective for a new start in their country of origin.⁴⁴ Among other things, this need arises from the challenges of providing information to irregularly staying migrants who are not in contact with authorities. These challenges include a lack of motivation on the part of irregular migrants to contact the authorities, a general wariness of accepting counselling services or assistance, and language barriers (Rutz and Chahrokh, 2015:41 et seq.).

Challenges and best practices

Actors working in the area of voluntary return in Austria consider it positive to extend voluntary return also to long-term irregular migrants, even though such individuals are not especially targeted as a group. Thus, in principle, return services could also be offered to this category of individuals. In particular, this should be noted because of the fact that migrants without a residence permit often remain convinced of their ineligibility for voluntary return programmes.⁴⁵

A representative of Asylkoordination Österreich also views return counselling as good practice, provided that the outcome is not a foregone conclusion and the participant is not pressured to leave the country. Based on these criteria, this representative reserved particular praise for the return counselling services provided by the Caritas organization.⁴⁶ The Province of Tyrol reported that migrants with an uncertain residence status frequently mention their confidence in the counselling provided by Caritas, as this organization is said to strive to achieve

⁴² FLG I No. 87/2012, in the version of FLG No. 29/2020.

⁴³ Written input: Federal Ministry of the Interior, 20 October 2020.

⁴⁴ Interview with Christoph Riedl, Diakonie Österreich, 23 September 2020.

⁴⁵ Interview with Evelyn Rainer, IOM Country Office for Austria, 20 August 2020.

⁴⁶ Interview with Lukas Gahleitner-Gertz, Asylkoordination Österreich, 22 September 2020.

solutions in the interests of such individuals.⁴⁷ The Caritas organization is also cited as a good practice example for independent return counselling provided free of charge.⁴⁸ Return counselling services are currently provided by Caritas and the Verein Menschenrechte Österreich association. As the Federal Ministry of the Interior itself observed in 2015, having voluntary return counselling provided by these kinds of non-government organizations can work to allay the fears held by irregular migrants about involvement with the authorities and make them more likely to establish contact (Rutz and Chahrokh, 2015:42). Despite this insight, return counselling will become the responsibility of the newly created Federal Agency for Care and Support Services from 2021 (see section 5).

According to the Federal Ministry of the Interior, the system of voluntary return needs to be continuously adapted to reflect changing conditions. In practical terms, one of the main challenges here is structuring financial return assistance so as to make it easily accessible and attractive for potential returnees⁴⁹ while preventing it from becoming a pull factor.⁵⁰ As a representative of the Caritas organization has observed, individuals' options for voluntary return tend to decrease the longer their irregular stay persists, since they ultimately have only a few contacts in their countries of origin. In such cases, financial aid would not be seen as creating any additional incentive.⁵¹

In relation to removal and irregularly staying migrants, the Federal Ministry of the Interior considers a lack of interest in cooperation and/or the will to cooperate on the part of countries of origin as one of its most serious challenges. A fully functioning system of cooperation for returns is a central premise for removal. As a prerequisite for enforced removal, third-country cooperation is therefore being prioritized and improved on an ongoing basis by the Federal Ministry of the Interior – by establishing and nurturing contacts, for example.⁵²

4.4 Regularization of stay

In contrast to the promotion of (voluntary) return, Austrian policies do not reveal any priority for regularization as a way of ending irregular stay. Unlike a number of other European countries, Austria has yet to adopt policies aimed at the general regularization of any specific groups of irregular migrants. Even at an individual level, the chances of having a stay regularized are limited, according to a representative of the Diakonie organization – even in humanitarian emergencies, such as when an individual falls seriously ill.⁵³

Austria has no specific regulations for regularizing the stay of long-term irregular migrants.⁵⁴ Instead, the country offers only a general regularization option if the necessary requirements are met. The legal requirements are set out in detail in Art. 54 et seqq. of the Asylum Act 2005, under Residence Permits for Exceptional Circumstances,⁵⁵ as well as in the Settlement and Residence Act.

47 Written input: Province of Tyrol, 12 October 2020.

48 Written input: neunerhaus, 25 September 2020.

49 This includes increasing financial support and providing comprehensive counselling at the right time to increase efficiency (Written input: Federal Ministry of the Interior, 20 October 2020).

50 Written input: Federal Ministry of the Interior, 20 October 2020.

51 Interview with Katrin Hulla, Caritas der Erzdiözese Wien, 15 September 2020.

52 Written input: Federal Ministry of the Interior, 20 October 2020.

53 Interview with Christoph Riedl, Diakonie Österreich, 23 September 2020.

54 Written input: Federal Ministry of the Interior, 20 October 2020.

55 See on this and in particular on the Residence Title for Particularly Exceptional Circumstances Bassermann, 2019.

- An example is the Residence Permit on Grounds of Art. 8 ECHR, a permit granted when the requisite circumstances⁵⁶ exist (Art. 55 para 1 subpara 1 Asylum Act 2005) or when a return decision is deemed impermissible with lasting effect (Art. 9 para 1 to 3 Federal Office for Immigration and Asylum Procedures Act; Art. 58 para 2 Asylum Act 2005). Another option is to issue a Residence Permit for Particularly Exceptional Circumstances (Art. 56 Asylum Act 2005).⁵⁷ Another regularization option also exists, of particular interest in the case of individuals whose stay in Austria is tolerated. In some circumstances, such persons are able to obtain a Residence Permit for Individual Protection:⁵⁸ the individual must have been tolerated for at least one year; for example, and the qualifying conditions for tolerated stay must continue to exist (Art. 57 para 1 subpara 1 Asylum Act 2005).⁵⁹ Affected individuals may themselves apply for the residence permits referred to above. Decisions to grant residence permits may also be taken as part of official duties. An example here is the option of granting a Residence Permit for Individual Protection, which is considered when deciding on the facts of an asylum case prior to issuing a return decision (Art. 58 para 1 subpara 2 Asylum Act 2005). The above-mentioned residence permits are only considered where individuals have already been staying in Austria irregularly – one of the main reasons why the term “regularization” is used in this context (Hinterberger and Klammer, 2017:Section 3.3.2:1).
- Also the regularization of the stay by the change into the regime of the Settlement and Residence Act is in principle possible, if the necessary conditions are met.⁶⁰ The issuance of a Residence Permit on Grounds of Art. 8 ECHR or a Residence Permit for Particularly Exceptional Circumstances according to the Asylum Act 2005 facilitates this change. For example, the residence title Red-White-Red – Card Plus or a Settlement Permit must be issued if the person concerned has held the mentioned residence permit pursuant to the Asylum Act 2005 for twelve months (Art. 41a para 9, Art. 43 para 3 Settlement and Residence Act).

One study has compared the legal basis for regularization of stay and actual practice in Austria with the situation in Germany and Spain. Regularization is defined in the study as an administrative decision or a decision by an administrative court that “grants a right of residence to irregularly staying migrants following the fulfilment of minimum requirements” (Hinterberger, 2020:435). The corresponding term in an Austrian legal context is a Residence Permit for Exceptional Circumstances. According to the study, a distinct system of regularization can be identified in each of the three States. Among them, Austria is “at the lower end”, with fewer cases of regularization that the study author also describes as less effective in practice than comparable procedures in Germany or Spain (Hinterberger, 2020:461). Available statistics are said to demonstrate that in Austria the granting of residence permits plays no significant role in numeric terms as part of regularization procedures (Hinterberger, 2020:441).

56 According to Art. 9 para 2 Federal Office for Immigration and Asylum Procedures Act, the type and duration of previous residence and the question of whether the previous residence of the foreigner was unlawful or the actual existence of a family life is taken into account.

57 For details see Bassermann, 2019:Section 3.

58 This includes cases of tolerated stay due to the non-refoulement principle (Art. 46a para 1 subpara 1 Aliens Police Act 2005) or for actual reasons for which the foreigner is not responsible (Art. 46a para 1 subpara 3 Aliens Police Act 2005).

59 Written input: Federal Ministry of the Interior, 20 October 2020.

60 Ibid.

Challenges and best practices

When asked about the regularization of stay in Austria, a representative of Asylkoordination Österreich did not recognize any good practice examples worth mentioning explicitly. In further comments, this observer stated that regulations make it very difficult if not impossible to apply for a residence permit from within the country (Art. 21 para 2 Settlement and Residence Act). As a consequence, individuals staying irregularly in Austria who then become eligible for a residence permit would also have to leave the country to apply for this permit (Art. 21 para 1 Settlement and Residence Act). This circumstance is said to aggravate the negative impact of existing policy towards irregular migrants, which restricts their mobility in general, while making it practically impossible to regularize one's stay in Austria. The single exception to this is an individual's option to apply for a Residence Permit for Particularly Exceptional Circumstances. The representative of Asylkoordination Österreich thus fails to find any progressive approaches to solving this issue in Austria's policies and legal system.⁶¹ This view was shared by a representative of the Diakonie organization, who also commented on the lack of any general regularization scheme and noted that becoming regularized depends not only on the length of stay but also on meeting other criteria, such as being able to support oneself. Yet this self-sufficiency requirement is difficult to meet for older people in particular.⁶²

Unlike individuals who apply for international protection (Art. 12 Asylum Act 2005), applicants for one of the residence permits according to the Asylum Act 2005 are not protected from removal. As a result, such persons can still be forcibly returned even while procedures are still ongoing. Many individuals in this situation therefore also apply for international protection to preclude a removal order during procedures. Yet this course of action is often perceived by the authorities or in public discourse as an "abuse of the asylum system".⁶³

Finally, according to a representative of a non-governmental organization, another challenge with regard to regularization is homelessness of affected persons. The lack of a home address makes it practically impossible to cooperate with authorities and be available to them for the duration of the extended procedures under residence law.⁶⁴ In light of the difficult situation faced by irregular migrants, tolerated stay is cited as the only legal arrangement that officially confirms a person's temporary stay, yet it does not lead to a residence permit (Rosenberger et al., 2018:5).

⁶¹ Interview with Lukas Gahleitner-Gertz, Asylkoordination Österreich, 22 September 2020.

⁶² Interview with Christoph Riedl, Diakonie Österreich, 23 September 2020.

⁶³ Interview with Lukas Gahleitner-Gertz, Asylkoordination Österreich, 22 September 2020.

⁶⁴ Interview with Katrin Hulla, Caritas der Erzdiözese Wien, 15 September 2020.

5. RIGHTS AND BENEFITS

This section provides an overview of the rights and access to benefits available to irregular staying persons in Austria. In some cases, the reason for the irregular stay is irrelevant. This applies, for example, to school attendance and legal counselling, as explained below.

School attendance

With regard to the school attendance of children, reference should be made to Art. 1 para 1 of the Compulsory Schooling Act 1985,⁶⁵ according to which education is compulsory for all children permanently staying in Austria. A person is considered to be staying permanently in Austria if that individual resides at one place indefinitely or has a clear intention to do so. Children staying only temporarily in Austria are entitled to attend school (Art. 17 Compulsory Schooling Act). As a result, children in Austria always have access to education, regardless of whether their stay is temporary or permanent and even where their residence status is unclear (Federal Ministry of Education, Science and Research, 2017:6).

Legal counselling

Under Austrian law, individuals subject to decisions to be taken by the Federal Office for Immigration and Asylum, including return decisions, are to be informed of the option of receiving legal assistance at no expense (Art. 52 Federal Office for Immigration and Asylum Procedures Act). Legal assistance is provided by two organizations, ARGE Rechtsberatung and Verein Menschenrechte Österreich (Federal Ministry of the Interior, 2019a). As of 2021, responsibility for providing this assistance falls within the sole remit of the Federal Agency for Care and Support Services. Non-governmental organizations also play a key role in legal assistance. Prominent examples are the aliens law counselling service offered by Caritas in Vienna (Caritas der Erzdiözese Wien, n.d.), ARGE Rechtsberatung (ARGE Rechtsberatung Diakonie und Volkshilfe, 2018) and Frida, a private association offering counselling on asylum and aliens law to individuals regardless of residence status (Frida, n.d.). Another Vienna-based service is Deserteurs- und Flüchtlingsberatung, which offers free counselling in procedures relating to asylum and aliens law (Deserteurs- und Flüchtlingsberatung, n.d.).

In contrast, with regard to certain rights and access to benefits, the focus is on whether the persons in question are irregularly staying persons who cannot be removed for legal or practical reasons or other irregular staying persons. The following subsections describe these aspects in more detail.

⁶⁵ FLG No. 76/1985, in the version of the federal law FLG I No. 23/2020.

5.1 Rights and benefits for irregularly staying persons who cannot be removed for legal or practical reasons

The Agreement between the Federal State and the Provinces on Basic Care stipulates the entitlement to benefits under the system of material reception conditions for non-removable individuals having no residence status (Art. 2 para 1 subpara 2 and 4 Agreement between the Federal State and the Provinces on Basic Care – Art. 15a Federal Constitutional Act).⁶⁶ The Agreement between the Federal State and the Provinces on Basic Care is designed for nationwide harmonization of the provision of temporary material reception conditions to foreigner nationals requiring assistance and protection while staying within Austrian territory. The system of material reception conditions is accordingly to be uniform throughout Austria, and operated as a partnership that does not disproportionally burden any one region and ensures legal certainty for the individuals concerned (Art. 1 para 1 leg. cit.). Nonetheless, the specific prerequisites for actually being included in material reception conditions vary from one province to another. In Lower Austria and Styria, to mention an example, aliens police authorities must first certify that an individual is non-removable (Art. 3 para 2 subpara 4 (a) in conjunction with Art. 4 para 2 subpara 4 Lower Austrian Basic Care Act;⁶⁷ Art. 2 subpara 3 (c) in conjunction with Art. 3 para 2 subpara 4 Act on basic care for aliens in need of assistance and protection – Styrian Basic Care Act).⁶⁸ In the other provinces, material reception conditions are apparently provided without any such condition needing to be met. Material reception conditions cover the following areas, among others:

Accommodation

Care under material reception conditions includes “accommodation in suitable facilities” (Art. 6 para 1 subpara 1 Agreement between the Federal State and the Provinces on Basic Care – Art. 15a Federal Constitutional Act). The Federal State and the provinces may provide material reception conditions through humanitarian, religious and private institutions, and this is indeed often the case in practice. Accommodation is provided by the Diakonie organization in the provinces of Upper Austria, Salzburg and Styria (Diakoniewerk, n.d.). Another example is Caritas Vienna, which acts as a service point for Fonds Soziales Wien, an agency of the City of Vienna, and is responsible for administering material reception conditions to entitled individuals who live in Vienna. Caritas Vienna checks eligibility for benefits from the Vienna system of material reception conditions and helps eligible persons find housing (Fonds Soziales Wien, n.d.).

The Agreement between the Federal State and the Provinces on Basic Care stipulates for unaccompanied minors a special, more encompassing scope of material reception conditions (Art. 7 Agreement between the Federal State and the Provinces on Basic Care – Art. 15a Federal Constitutional Act). Such individuals are to be housed in residential groups, halls of residence or another kind of organized housing (Art. 7 para 1 leg. cit.). The care provided to individuals in this category includes a daily schedule adapted to their particular needs (education, recreation and sports; Art. 7 para. 2 leg. cit.). In general, any existing special needs of vulnerable persons are also to be considered to the extent feasible (Art. 2 para 1 Federal Basic Care Act 2005).⁶⁹

⁶⁶ FLG I No. 80/2004.

⁶⁷ PLG 9240-0, in the version of PLG No. 90/2020.

⁶⁸ PLG No. 111/2016, in the version of PLG No. 63/2018.

⁶⁹ FLG No. 405/1991, in the version of the federal law FLG I No. 53/2019.

As an alternative, individuals receiving material reception conditions can live in private accommodation. This is relatively costly, however, and may be unaffordable for tolerated persons, given their particular financial circumstances.

Health care

The provision of material reception conditions includes ensuring recipients receive medical care, which means paying health insurance contributions on their behalf, as set out in the General Social Insurance Act⁷⁰ (Art. 6 para 1 subpara 5 Agreement between the Federal State and the Provinces on Basic Care – Art. 15a Federal Constitutional Act). Illness is among the types of claims covered by this health insurance policy (Art. 116 para 1 General Social Insurance Act), that also covers emergency health care. Additional programmes beyond the scope of standard material reception conditions are offered to unaccompanied foreign minors. Examples here include socio-pedagogical and psychological support (Art. 7 para 1 Agreement between the Federal State and the Provinces on Basic Care – Art. 15a Federal Constitutional Act). Benefits not covered by health insurance are also provided, following verification of need on a case-by-case basis (Art. 6 para 1 subpara 6 leg. cit.).

As it is true for all non-Austrians (Art. 2 Act Governing the Employment of Foreign Nationals),⁷¹ access to the labour market for persons who cannot be removed for legal or practical reasons is regulated by the Act Governing the Employment of Foreign Nationals. Accordingly, employers are only to be granted work permits (Art. 4 Act Governing the Employment of Foreign Nationals) for tolerated persons under certain conditions, such as when warranted by the situation and trends in the labour market, when not opposed by major public or national economic interests, and where the tolerated individual has recently been excluded from the scope of the Act Governing the Employment of Foreign Nationals, as referred to in Art. 1 para 2 (a) of that act.⁷² Furthermore, tolerated individuals are granted the right to vocational training, which means they may complete an apprenticeship. The provisions of the Act Governing the Employment of Foreign Nationals apply in such cases (Art. 2 para 2 (c) Act Governing the Employment of Foreign Nationals). The aforementioned possibilities do not exist for other irregular migrants in Austria.

5.2 Rights and benefits for other irregularly staying persons

No access to public services (with the exception of school attendance, see section 5.1) is generally granted to individuals staying irregularly in Austria who are not in the purview of authorities, who evade asylum procedures or whose right to stay in Austria has terminated. According to the provinces that responded to the questionnaire prepared as part of this study, public authorities have not implemented any local programmes with the specific aim of providing benefits to irregularly staying migrants, yet such programmes do receive official public support in some cases. Therefore, affected individuals rely on care provided by non-governmental or religious organizations unless they are able to provide for themselves. These institutions play a pivotal role in providing social benefits that are also made available to irregular migrants in Austria. Their areas of activity include in particular:

70 FLG No. 189/1955 in the version of the federal law FLG No. 18/1956, in the version of the federal law FLG I No. 105/2020.

71 FLG No. 218/1975, in the version of the federal law FLG I No. 98/2020.

72 According to Art. 1 para 2 subpara a, the Act Governing the Employment of Foreign Nationals does not apply to foreign persons who have been granted the status of a person entitled to asylum or subsidiary protection.

Accommodation

In Austria, among other things, facilities operated for homeless persons, especially in urban centres, are also available to long-term migrants without a residence permit; an example here is *neunerhaus*, a residence in Vienna. The Caritas organization also makes limited accommodation opportunities available throughout Austria: these principally benefit migrants – some of them “illegalized” – who have prospects of achieving regularized conditions of stay.⁷³

Health care

One project to be mentioned is *AmberMed*, a cooperative effort by the *Diakonie Flüchtlingsdienst* and the Austrian Red Cross, which is dedicated to providing medical care to individuals in Vienna without health insurance coverage. Although *AmberMed* is funded by the Vienna regional health insurance fund,⁷⁴ *Fonds Soziales Wien* (a public agency) and the Federal Ministry of Health, as well as by private donations (*AmberMed*, n.d.), securing adequate funding is reportedly difficult.⁷⁵ Another provider of easily accessible medical assistance is *Marienambulanz*, a clinic in Graz operated by the Styrian branch of Caritas (*Caritas Steiermark*, n.d.).

It needs to be noted, however, that the services mentioned above are not offered based on residence status and thus do not specifically target (long-term) irregular migrants. *neunerhaus*, for example, stresses that its services are structured so as to be easily accessible and “open to all”.⁷⁶

5.3 Access to benefits

In the following subsections, the prerequisites for access to benefits are examined. Likewise, the scientific assessment of this access is described.

5.3.1 Cooperation of the persons concerned

It can be interpreted from the ruling of the Constitutional Court of 27 February, 2020⁷⁷ (see on this section 6.2) that excluding foreign nationals who do not cooperate in returning to their countries of origin from material reception conditions is an unlawful act. According to officials from Upper Austria, such individuals are therefore no longer excluded.⁷⁸ The provinces do differ in terms of implementation in practice, however. The Province of Burgenland and the Province of Tyrol, for example, report that benefits can be reduced or withheld entirely if the authority in charge of an individual's asylum procedure has confirmed the applicant's failure to cooperate in the procedure.⁷⁹

⁷³ Interview with Katrin Hulla, Caritas der Erzdiözese Wien, 15 September 2020.

⁷⁴ The Austrian Health Insurance Fund (ÖGK) was created on January 1, 2020 by merging the nine former regional health insurance funds. See Österreichische Gesundheitskasse, n.d.

⁷⁵ Interview with Christoph Riedl, Diakonie Österreich, 23 September 2020.

⁷⁶ Written input: *neunerhaus*, 25 September 2020.

⁷⁷ Constitutional Court, 27 February 2020, A8/2019.

⁷⁸ Written input: Province of Upper Austria, 23 September 2020.

⁷⁹ Written input: Province of Burgenland, 21 September 2020; Written input: Province of Tyrol, 12 October 2020.

5.3.2 Verification of the residence status

The provincial authorities in Austria confirm the residence status of potential recipients prior to providing migrants with benefits under the system of material reception conditions (see section 5.1). In this context, a migrant's residence status is periodically checked against an appropriate federal-level system or determined by consulting with the Federal Office for Immigration and Asylum.⁸⁰

Where benefits are not sourced from the system of material reception conditions, the type of (social) benefit the migrant is to receive or the responsibility of the authorities will determine whether or not a residence status check is performed. To cite one example, regardless of residence status, children are allowed to attend school and even required to do so (compulsory schooling). Within the scope of child and youth welfare, municipalities also have responsibilities in the care of unaccompanied minor refugees, for example relating to guardianship. Outside of the scope of federal and provincial legislation, municipalities also administer some voluntary (social) benefits independently. One example of this is the language or vacation programme of the City of Graz, which is financed by the city and for which only the main place of residence in Graz is required.⁸¹

Commenting on health-care services, an expert from the Diakonie organization explained that emergency treatment is available to anyone attending a hospital, regardless of the patient's residence status or whether documents can be presented. The expert states that hospitals (i.e. the hospital operators) then attempt to collect the costs of treating patients without health insurance – by filing for court enforcement of claims if necessary. Claims that cannot be collected are ultimately written off, according to this expert. Yet this source was not aware of any legal requirement to notify the police or the authorities when administering treatment to irregularly staying individuals.⁸²

Most of the social facilities cited above can provide services to any particular target group – such as uninsured or homeless individuals or those without a legal right of residence – independently and not bound by instructions from authorities. This is the case for the *neunerhaus* facility mentioned above, for instance (see section 5.2).⁸³ No special “firewall provisions” would appear to exist in Austria, that is, provisions that would allow irregularly staying migrants to access services without their residence status being disclosed to (aliens) authorities. In the event of becoming victims of crime or witnesses to offences, irregularly staying individuals in Austria are granted only limited options to inform the public authorities without having to divulge their irregular status. In cases relating to labour law, UNDOK, a contact point providing trade union support to undocumented workers, is able to investigate possible incidents on their behalf and help those affected decide whether court action would be appropriate. UNDOK does not reveal the identities of those affected.⁸⁴

80 Written input: Province of Burgenland, 21 September 2020; Written input: Province of Vorarlberg, 24 September 2020.

81 Written input: City of Graz, 10 September 2020.

82 Interview with Christoph Riedl, Diakonie Österreich, 23 September 2020.

83 Written input: *neunerhaus*, 25 September 2020.

84 Written input: Katie Klaffenböck, IOM Country Office for Austria, 12 October 2020.

5.3.3 Scientific assessment

Irregular migrants' access to support services has been the subject of studies in Austria.

- At the University of Vienna, a research project entitled Inside the Deportation Gap. Social Membership for Non-Deported Persons was completed from 2015 to 2019. The project consulted publications on various European cities and countries to pursue a detailed investigation into topics including social policy as a migration control instrument (Ataç and Rosenberger, 2019:2). For Austria, access to social services is judged to be selective and conditional. According to the research, individuals in Austria who are temporarily non-removable have access to fewer benefits than other groups (Rosenberger et al., 2018:3). For example, under current legislation, social assistance benefits are to be granted in Austria only to Austrian citizens and persons granted asylum as well as to individuals who are permanently settled and have been actually staying in the country under a lawful right of residence for at least five years (Art. 4 para 1 General Social Assistance Act). In view of the growing challenge posed by the inability of individuals to return to their home countries, the authors recommend ensuring blanket basic care for this group and counteracting their "illegalization" with a more proactive approach to issuing the Card for Tolerated Stay and regularizing stays (Rosenberger et al., 2018:1).
- Irregular migrants without a legal right of stay⁸⁵ have also been the subject of a study on health insurance. According to the 2017 study commissioned by the Main Association of Austrian Social Security Institutions, 12 per cent of those affected viewed their lack of a residence permit as the reason for their uninsured status. The only reason to be mentioned more frequently was being out of work, in the case of individuals not entitled to unemployment benefits. The survey is non-representative and qualitative, however, and was carried out in institutions such as AmberMed that offer easily accessible counselling and care. The study combines these survey data with expert interviews to conclude that the majority of individuals in Austria without health insurance also have a low level of education, and lack Austrian citizenship and/or are persons with a migratory background (Fuchs et al., 2017:80–81).

5.4 Challenges in the provision of support benefits

The vast majority of non-governmental organizations have argued that the policy framework in Austria tends to hinder the provision of services, and good practices are non-existent. A representative of the Caritas organization criticized the lack of political will, and a failure to provide the financial and human resources that would be needed to improve the social circumstances and living arrangements of irregular or "illegalized" migrants.⁸⁶ According to a representative of the Diakonie organization, the services provided to certain groups of individuals have been reduced or limited in recent years, which gives the impression that the potential for the social integration of third-country nationals with an uncertain residence status has been largely neglected.⁸⁷ Criticism was also levelled at the tendency displayed in political discussions to generalize the provision of services

⁸⁵ Persons who are tolerated in Austria are also covered by health insurance in the framework of material reception conditions. See section 5.1.

⁸⁶ Interview with Katrin Hulla, Caritas der Erzdiözese Wien, 15 September 2020.

⁸⁷ Interview with Christoph Riedl, Diakonie Österreich, 23 September 2020.

as a “pull factor” for irregular migration. A representative of Asylkoordination Österreich observed that such an attitude effectively renders any meaningful discussion of service provision impossible.⁸⁸

The Federal Ministry of the Interior has pointed out that the remit of the Federal Office for Immigration and Asylum includes the enforcement of the Basic Care Act (Art. 9 para 1 Federal Basic Care Act), and, where necessary and within the competence of the Federal Office for Immigration and Asylum, to seek compensation for incurred costs of care if benefits are claimed without justification. Payments made to an individual with a sufficient means of subsistence to cover their own living costs would be one such unjustified claim (Art. 3 para 2 Federal Basic Care Act). In light of the growing number of individuals receiving care in recent years and the accompanying rise in care costs, the Federal Ministry of the Interior was focusing on monitoring of benefits and combating “asylum and social abuse”.⁸⁹ The main challenges in this endeavour include the assurance of exhaustive monitoring of benefits, processing data derived from various sources, analysing data for relevant cases, converting analysis results into qualitative terms and transferring the results to the respective office responsible for further action while maintaining data privacy standards.⁹⁰

88 Interview with Lukas Gahleitner-Gertz, Asylkoordination Österreich, 22 September 2020.

89 Written input: Federal Ministry of the Interior, 20 October 2020.

90 Ibid.

6. COOPERATION BETWEEN THE AUSTRIAN AUTHORITIES

This section deals with the cooperation of the Austrian authorities and presents how the authorities involved cooperate with regard to irregular staying persons in Austria at the federal and provincial levels.

6.1 Exchange and cooperation

In connection with irregularly staying persons the Federal Office for Immigration and Asylum maintains a close working relationship with the police administrations in each of the Austrian provinces.⁹¹ Furthermore, the provincial police administrations have been carrying out priority measures throughout the country in cooperation with the Federal Office for Immigration and Asylum since February 2018. Other authorities also participate in these activities as required. The goal of the priority measures is to ensure improved local policing for problem areas in all of the provinces, so as to enable actions targeting irregularly staying individuals to be executed promptly and more effectively. In implementing these priority measures, the Federal Office for Immigration and Asylum exercises its legal authority at regional level by using its decision-making powers in support of policing efforts. While the Federal Office for Immigration and Asylum typically acts through intermediaries it can if necessary step in to initiate local procedures itself. This cooperative approach to priority measures has a number of advantages:

- Timely decisions are taken without delay at regional level;
- Direct communication channels in the provinces enhance efficiency by streamlining the flow of information between the police and the Federal Office for Immigration and Asylum.⁹²

The Austrian provinces generally make use of regular opportunities for dialogue between the administrations,⁹³ and long-term irregularly staying foreign nationals who require assistance and protection may be the subject of such meetings. Pursuant to the Agreement between the Federal State and the Provinces on Basic Care, any member may request the convening of coordination council meeting between the Federal State and the provinces. The council is tasked with resolving issues that may arise in novel situations and the need to interpret the aforementioned agreement. The council is also used as a forum for information sharing and consensus building (Art. 5 para 2 Agreement between the Federal State and the Provinces on Basic Care – Art. 15a Federal Constitutional Act).⁹⁴ In light of this, the council is said to play a significant role in coordinating successful efforts between the Federal State and the provinces (Maier, 2014:47).

6.2 Inter-institutional debate

The issue of long-term irregularly staying migrants has not led to any debates between local or regional authorities and the Federal State in Austria. In contrast, it was the fact that foreign nationals in general stay

91 Written input: Federal Ministry of the Interior, 20 October 2020.

92 Ibid.

93 Written input: Province of Burgenland, 21 September 2020.

94 FLG I No. 80/2004.

irregularly in Austria, and especially those individuals who are non-removable for practical or legal reasons, that sparked debates which in turn evoked varying responses to dealing with the issue.

In this context, it should be noted that rules for the provision of social benefits and for the care of needy and vulnerable individuals within the framework of material reception conditions are set out in general federal acts, an arrangement intended to ensure highly uniform standards in all of Austria. Since the implementation of these federal acts falls within the jurisdiction of each of the Austrian provinces, however, views may vary as the provinces interpret specific details of this legislation. One example revealed in a research paper is a more liberal implementation of the system of material reception conditions in the Province of Vienna, where such care also encompasses irregularly staying foreign nationals not cooperating with removal orders (Ataç et al., 2020:122). That this approach is legally covered is also clear from a ruling handed down by the Constitutional Court on 27 February, 2020⁹⁵ (see information box) on the petition brought by the Province of Vienna against the Federal State. A representative of Asylkoordination Österreich surmises that the petition lodged by the Province of Vienna arose from the fact that, considering the negative social impact, the City of Vienna can hardly afford to deprive individuals of benefits under the system of material reception conditions (Ataç et al., 2020:122).⁹⁶

Information box: Decision of the Constitutional Court of 27 February, 2020 (A8/2019)

In its action against the Federal State, the Province of Vienna demanded that the Federal State provide the legally stipulated cost coverage of material reception conditions (as set out in Art. 10 para 1 of the Agreement between the Federal State and the Provinces on Basic Care – Art. 15a Federal Constitutional Act) also for those individuals who are non-removable for practical or legal reasons and who do not actively cooperate in leaving the country. The Federal Government had earlier issued a decree in an attempt to exclude from this system of material reception conditions those needy and vulnerable foreign nationals without residence status who refuse to cooperate in leaving the country. The Constitutional Court found for the plaintiff, ruling that the Federal State should compensate the Province of Vienna for the expenses incurred. Among the grounds stated for the ruling was that the decree was to be understood solely as an official instruction directed at the aliens police authority and not directed at the provinces. The Constitutional Court also noted that the Agreement between the Federal State and the Provinces on Basic Care treats all foreign nationals who are non-removable for legal or practical reasons equally, even if this non-removable status results from a failure to cooperate in procedures for leaving the country.

Source: Constitutional Court, 27 February 2020, A8/2019.

⁹⁵ Constitutional Court, 27 February 2020, A8/2019.

⁹⁶ Interview with Lukas Gahleitner-Gertz, Asylkoordination Österreich, 22 September 2020; see also Ataç et al., 2020:122.

7. IMPACT OF THE COVID-19 PANDEMIC

This section provides an overview of the measures taken in Austria in relation to the COVID-19 pandemic and irregular staying persons. However, (long-term) irregularly staying migrants were not the focus of any measures taken by Austria to contain the COVID-19 pandemic.

7.1 Challenges in the area of return

Potential returnees remain interested despite the current situation caused by COVID-19. At the height of the COVID-19 crisis, return counselling continued to be provided online or by phone. Office hours for client visits resumed in May 2020, and there has been strong demand for the full range of return counselling services since the middle of the summer.⁹⁷

In the context of forced removals, the Federal Ministry of the Interior, among others, reported the restrictions imposed due to COVID-19 as greatest challenge. Such restrictions included cancelled flights, closed borders and strict quarantine conditions. These restrictions had massive repercussions for removal activities. Following more recent developments, flights to most countries of origin are again possible in theory, although, as flight regulations adapt to changing conditions, opportunities for enforcing removal continue to be extremely limited⁹⁸ or even rendered impossible.⁹⁹ Ensuring enforcement of asylum and aliens legislation is a priority of Federal Ministry of the Interior, despite the current situation caused by the COVID-19 pandemic. The ministry has therefore issued no general order to suspend or cancel removals. Instead, the responsible security and migration authorities are monitoring the situation continuously and responding as required. Information also continues to be shared on an ongoing basis with international and EU partner organizations. In accordance with Austrian, EU and international recommendations, removals are being carried out while applying suitable safety precautions and additional hygiene measures for containing the spread of COVID-19. Removals therefore continue to take place while ensuring full compliance with the specific entry regulations put in place by countries of origin in response to COVID-19.¹⁰⁰

7.2 Effects on support benefits

Officials of the provincial governments responding to the study questionnaire do not consider COVID-19 and the measures taken in response to have had any significant impacts on the services provided to migrants under the system of material reception conditions.¹⁰¹

97 Written input: Federal Ministry of the Interior; 20 October 2020.

98 Ibid.

99 Interview with Lukas Gahleitner-Gertz, Asylkoordination Österreich, 22 September 2020.

100 Written input: Federal Ministry of the Interior; 20 October 2020.

101 This includes – as described in section 5.1 – persons tolerated in Austria.

At the local level, however, the COVID-19 pandemic created a number of challenges and issues that led to significant impediments to service provision.¹⁰² However, there were also positive developments. The challenges and positive developments affected the following areas in particular:

Accommodation

The COVID-19 pandemic led to individuals being required to have a negative COVID-19 test before being accepted into housing funded by Vienna's homeless assistance programme. In contrast, the additional funding made available by the civic agency Fonds Soziales Wien to help the facility provide medical services to homeless or unsheltered individuals as well as those without health insurance was praised. The City of Vienna also extended its "Winterpaket", a programme providing overnight accommodation to homeless persons, until August 2020, and set up 24/7 services at emergency facilities for overnight stays. In addition to the 600 regular beds, arrangements were made for another 900 emergency beds. Daytime facilities were expanded to accommodate 745 individuals, from an original 600.¹⁰³

Health care

The need to ensure the lowest possible the bar for accessing the health-care system, so as to include all people living in Austria, has been highlighted in particular in discussions relating to COVID-19. Specifically, a low bar to health services was called for in the case of groups in need of protection, such as individuals lacking a valid residence status, since some of these currently lack such easy access. While those unable to be removed (tolerated persons) are considered foreign nationals requiring assistance and protection and are consequently covered by health insurance, this coverage does not generally extend to other groups of foreign nationals who do not hold residence permits (Fuchs, 2019:5). In this context, it has been remarked that, as a group, those categorized as irregularly staying potentially face a more serious infection risk due to their precarious personal circumstances. This group's lack of residence entitlement and worries about potential consequences are also said to act as a barrier to seeking medical treatment. In view of the COVID-19 pandemic, excluding one group of individuals from the health system is cited as exacerbating the problem for the overall population (Kohlenberger, 2020). In response to this need, an initiative calling itself "#undokumentiert gesund" ("#undocumented_but_healthy") is calling for health insurance coverage to be extended to third-country nationals without valid residence permits (Undokumentiert Gesund, 2020). A petition launched by the initiative accordingly demands that the Federal Government "refrain until after the COVID crisis from all measures under aliens law that would hinder treatment of suspected infections" (Salzburger Nachrichten, 2020). Whether such initiatives will stimulate broader political discussions remains to be seen.

Social sector

Effects of the COVID-19 pandemic were also noticeable in the social sector. The limitations on personal appointments at public offices, the temporary cessation of soup kitchen services and the restrictions placed on

¹⁰² Written input: neunerhaus, 25 September 2020.

¹⁰³ Ibid.

street workers had a negative impact on the provision of services to those affected. The inclusiveness of the official information policy on health risks and the policy measures taken to contain the spread of the COVID-19 virus was also criticized by civil society representatives as inadequate.¹⁰⁴

However, there have also been some positive developments at the local level. For example, child education and care services (including language and school holiday programmes) in Graz were expanded to help limit the impacts from the pandemic on the community. These services also have the potential to benefit children with a legally precarious residence status.¹⁰⁵

¹⁰⁴ Ibid.

¹⁰⁵ Written input: City of Graz, 10 September 2020.

8. OUTLOOK

This section provides an outlook on future developments. On the one hand, planned changes are presented, but also those measures which, from Austria's point of view, should be implemented at the European level.

8.1 Planned Changes at the National Level

Irregular migration is generally a major issue in Austrian domestic policy. The coalitions forming the Federal Government in both the previous and present legislative periods have presented government programmes promising to reduce irregular migration to Austria (Die neue Volkspartei and Die Grünen - Die Grüne Alternative, 2020:136; Die neue Volkspartei and Freiheitliche Partei Österreichs, 2017:35). The former coalition, between the Austrian People's Party and the Austrian Freedom Party (December 2017 to May 2019), had emphasized ensuring the return of rejected asylum seekers (Die neue Volkspartei and Freiheitliche Partei Österreichs, 2017:28). The current coalition, between the Austrian People's Party and the Austrian Green Party, plans to ensure the removal of criminal offenders among third-country nationals who forfeit protection status and to step up voluntary return programmes (Die neue Volkspartei and Die Grünen - Die Grüne Alternative, 2020:199). Neither of the coalition governments has presented any concrete measures specifically targeting irregularly staying migrants. As a group, long-term irregularly staying migrants are also not mentioned in the recommendations published by Migration Council experts (Federal Ministry of the Interior, 2016d) that will serve as the basis for defining a master migration plan for Austria.

In connection with planned institutional changes, mention should be made here of the Federal Agency for Care and Support Services set up in 2019 (Art. 1 Act Establishing the Federal Agency for Care and Support Services).¹⁰⁶ One of the goals defined for this agency, whose shares are wholly owned by the Republic of Austria (Art. 1 para 5 Act Establishing the Federal Agency for Care and Support Services), is to increase the percentage of foreign nationals voluntarily leaving Austria (Federal Ministry of the Interior, 2019c). This goal also targets individuals unable to be removed for legal or practical reasons. Starting in December 2020, the agency will have federal responsibility for organizing the accommodation and care of foreign nationals requiring assistance and protection. Legal and return counselling will also form part of the new federal agency's remit as of January 2021 (Art. 2 para 1 in conjunction with Art. 2 para 3 Act Establishing the Federal Agency for Care and Support Services).

8.2 Desirable measures at EU level

The experts interviewed in the study emphasized the signal importance of implementing a common European migration policy. This would involve defining common criteria for immigration as well as common categories of residence permits. Such a system would also be important as a way of alleviating the burden resulting from migration placed on asylum systems. Standardized rules for return cases would also be very worthwhile.¹⁰⁷

¹⁰⁶ FLG I No. 53/2019.

¹⁰⁷ Interview with Christoph Riedl, Diakonie Österreich, 23 September 2020.

This concern has also been addressed by the New Pact on Migration and Asylum unveiled by the European Commission in September 2020. The programme envisages a commitment to an effective return policy as well as a return plan to be coordinated by the EU (European Commission, 2020:4). The Federal Ministry of the Interior has described this aspect of the pact, together with the cooperation it involves, as especially significant. Cooperating with third countries on return matters is also a correspondingly significant issue and there should be an increased focus on this cooperation at EU level. In cases where third countries fail to cooperate, the ministry calls for concrete action by the EU, including the threat or levying of sanctions, or the suspension of visa exemptions.^{108,109}

Researchers have also recommended standard rules, specifically to define uniform requirements and standards at EU level in order to regulate matters such as eligibility and the funding of basic social benefits. Such standards may have an impact on the undocumented onward travel of asylum seekers rejected in one Member State (Rosenberger et al., 2018:6). Enshrining a regularization policy within EU law is seen as a potentially effective supplement to EU return policy in the “fight” against irregular migration (Hinterberger, 2020:463).

¹⁰⁸ Written input: Federal Ministry of the Interior, 20 October 2020.

¹⁰⁹ See also Stiller, 2018a:34.

9. STUDY RESULTS

Based on the statements made in this study, the study results are presented below.

In Austria – as well as in general – there is no comprehensive analysis of the number of individuals staying in the country irregularly (over the long term). Reliable figures are not available from estimates or records kept by the various administrative authorities. Indisputably, the phenomenon of (long-term) irregular stay is detrimental to all: both for the State, which is necessarily compelled to respond to this phenomenon, and for the migrants themselves, who are forced to live in a state of constant uncertainty. However, none of the political discussions or legislative developments in the period from 2015 to October 2020 related specifically to long-term irregularly staying migrants.

Despite all the disadvantages associated with (long-term) irregular stay, the results of this study show that this topic is only dealt with selectively by Austrian policymakers, for example in the area of return. This conclusion is based in no small part on the fact that Austria offers very limited options for ending an irregular stay. These options are basically limited to (voluntary) return and a tightly restricted regularization option. Austrian policy in this matter appears to be clearly focused on (voluntary) return. Although voluntary return programmes are also open to long-term irregular migrants, many of those who would be included in this category do not believe that they will receive any assistance.

In contrast to (voluntary) return, the options for having one's stay in Austria regularized are to be seen as limited, due to the lack of priority given to regularization in government policy. Under applicable law, the most promising – although indirect – route to regularization appears to be tolerated stay. Since the authorities apply highly restrictive principles when granting such a stay, however, irregularly staying individuals face challenges in achieving this status. Even when tolerated, an individual's stay remains unlawful, as this status is only a basic prerequisite for obtaining a residence permit at a later point in time and thus actually being regularized. It thus comes as no surprise that specialists active in this policy area have not identified any good practices relating to the regularization of stay.

Access to social benefits for irregular staying migrants was found to be selective and conditional in a study conducted by the University of Vienna, for instance because under the current legal situation, social assistance benefits are to be granted exclusively to Austrian citizens and persons entitled to asylum as well as to permanently settled persons who have actually and lawfully stayed in Austria on a permanent basis for at least five years. There are areas that are open to all irregular staying migrants, such as school attendance and legal counselling. In the case of accommodation and health care, however, the reason for the irregular stay is decisive. Persons without a right of stay who cannot be removed for legal or practical reasons are given a better position. Those persons who are irregularly staying for other reasons generally have no access to public services and, unless they are able to provide for themselves, are therefore dependent on care provided by non-governmental or religious organizations.

ANNEXES

A.1 List of translations and abbreviations

English term	English abbreviation	German term	German abbreviation
Act Amending the Aliens Law	–	Fremdenrechtsänderungsgesetz	FrÄG
Act Establishing the Federal Agency for Care and Support Services	–	Bundesgesetz über die Errichtung der Bundesagentur für Betreuungs- und Unterstützungsleistungen Gesellschaft mit beschränkter Haftung	BBU-Errichtungsgesetz
Act Governing the Employment of Foreign Nationals	–	Ausländerbeschäftigungsgesetz	AuslBG
Act on basic care for aliens in need of assistance and protection – Styrian Basic Care Act	–	Gesetz über die Grundversorgung hilfs- und schutzbedürftiger Fremder – Steiermärkisches Grundversorgungsgesetz	–
administrative offense	–	Verwaltungsübertretung	–
Agreement between the Federal State and the Provinces on Basic Care - Art. 15a Federal Constitutional Act	–	Grundversorgungsvereinbarung - Art. 15a B-VG	–
Aliens affairs	–	Fremdenwesen	–
Aliens Police Act 2005	–	Fremdenpolizeigesetz 2005	FPG
Asylum Act 2005	–	Asylgesetz 2005	AsylG 2005
Austrian Freedom Party	–	Freiheitliche Partei Österreich	FPÖ
Austrian Green Party	–	Die Grünen	–
Austrian People's Party	–	Österreichische Volkspartei (auch Neue Volkspartei)	ÖVP
Card for Tolerated Stay	–	Karte für Geduldete	–

Constitutional Court	–	Verfassungsgerichtshof	VfGH
Coronavirus disease 2019	COVID-19	Coronavirus-Krankheit-2019	Covid-19
Criminal Intelligence Service Austria	–	Bundeskriminalamt	BK
detention pending removal	–	Schubhaft	–
District administrative authority	–	Bezirksverwaltungsbehörde	BVB
Euro	EUR	Euro	EUR
European Convention on Human Rights	ECHR	Europäische Menschenrechtskonvention	EMRK
European Migration Network	EMN	Europäisches Migrationsnetzwerk	EMN
European Union	EU	Europäische Union	EU
Federal Basic Care Act 2005	–	Grundversorgungsgesetz – Bund 2005	GVG-B 2005
Federal Law Gazette	FLG	Bundesgesetzblatt	BGBL
Federal Ministry of the Interior	Mol	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 Social Assistance Act	–	Sozialhilfe-Grundsatzgesetz	–
General Social Insurance Act	–	Allgemeines Sozialversicherungsgesetz	ASVG
International Organization for Migration	IOM	Internationale Organisation für Migration	IOM
Legis citatae (cited legal passage)	leg. cit.	Legis citatae (die zitierte Gesetzesstelle)	leg. cit.
Lower Austrian Basic Care Act	–	NÖ Grundversorgungsgesetz	–

material reception conditions	–	Grundversorgung	–
National Contact Point	NCP	Nationaler Kontaktpunkt	NKP
non-governmental organization	NGO	Nichtregierungsorganisation	NRO
Official Journal of the European Union	OJ	Amtsblatt der Europäischen Union	ABl.
persons granted asylum	–	Asylberechtigte	–
provincial government	–	Landesregierung	–
Provincial Law Gazette	PLG	Landesgesetzblatt	LGBl.
provincial police directorate	–	Landespolizeidirektion	LPD
Red-White-Red Card Plus	RWR Card Plus	Rot-Weiß-Rot – Karte plus	RWR-Karte plus
regional health insurance fund	–	Gebietskrankenkasse	–
Regulation on the Implementation of the Aliens Police Act	–	Fremdenpolizeigesetz-Durchführungsverordnung	FPG-DV
removal	–	Abschiebung	–
return	–	Rückführung	–
return assistance	–	Rückkehrhilfe	–
return decision	–	Rückkehrentscheidung	–
return travel certificate	–	Heimreisezertifikat	–
Schengen Borders Code	–	Schengener Grenzkodex	–
School Education Act	–	Schulpflichtgesetz 1985	–
Settlement and Residence Act	–	Niederlassungs- und Aufenthaltsgesetzes	NAG
social assistance	–	Sozialhilfe	–
Social Demoratic Party of Austria	–	Sozialdemokratische Partei Österreichs	SPÖ

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EUROPEAN MIGRATION NETWORK

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

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

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

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

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

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



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