

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN **AUSTRIA**

IN 2005

submitted to the Network by **Manfred NOWAK**,*

on 15 December 2005

Reference: CFR-CDF/AT/2005



The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union.

* Constanze PRITZ, Birgit WEYSS and Alexander LUBICH

EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX
CFR-CDF

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN **AUSTRIA** IN 2005

submitted to the Network by **Manfred NOWAK**,*

on 15 December 2005

Reference: CFR-CDF/AT/2005

The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union.

* Constanze PRITZ, Birgit WEYSS and Alexander LUBICH

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (suppléant Birgitte Kofod-Olsen) (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moysse (Luxembourg), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ilvija Puce (Lettonie), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. Tchèque), Edita Ziobiene (Lituanie). Le Réseau est coordonné par O. De Schutter, assisté par V. Van Goethem.

Les documents du Réseau peuvent être consultés via :

http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The EU Network of Independent Experts on Fundamental Rights has been set up by the European Commission (DG Justice, Freedom and Security), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights is composed of Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (substitute Birgitte Kofod-Olsen) (Denmark), Henri Labayle (France), Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moysse (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), and Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.

The documents of the Network may be consulted on :

http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm

TABLE OF CONTENTS

CHAPTER I. DIGNITY	8
ARTICLE 1. HUMAN DIGNITY	8
ARTICLE 2. RIGHT TO LIFE	8
Euthanasia	8
Domestic violence	8
Other relevant developments	9
ARTICLE 3. RIGHT TO THE INTEGRITY OF THE PERSON	14
Rights of the patients	14
ARTICLE 4. PROHIBITION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT	15
Conditions of detention and external supervision of the places of detention	15
<i>Penal institutions and institutions for the detention of persons with a mental disability</i>	15
<i>Centres for the detention of foreigners</i>	18
Protection of the child against ill-treatments	20
Other relevant developments	20
ARTICLE 5. PROHIBITION OF SLAVERY AND FORCED LABOUR	26
Trafficking in human beings	26
Protection of the child	27
Other relevant developments	27
CHAPTER II. FREEDOMS	29
ARTICLE 6. RIGHT TO LIBERTY AND SECURITY	29
Deprivation of liberty for juvenile offenders	29
Deprivation of liberty for foreigners	29
ARTICLE 7. RESPECT FOR PRIVATE AND FAMILY LIFE	32
<i>Private life</i>	32
Criminal investigations and the use of special or particular methods of inquiry or research	32
Voluntary termination of pregnancy	33
Other relevant developments	33
<i>Family life</i>	35
Protection of family life	35
ARTICLE 8. PROTECTION OF PERSONAL DATA	39
Independent control authority	39
Protection of personal data	39
Protection of the private life of workers	42
Other relevant developments	42
ARTICLE 9. RIGHT TO MARRY AND RIGHT TO FOUND A FAMILY	43
Marriage and control of marriages suspect of being simulated	43
Legal recognition of same-sex partnerships and recognition of the right to marry for transsexuals	44
Other relevant developments	45
ARTICLE 10. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION	45
Incentives and reasonable accommodations provided in order to ensure the freedom of religion, including the right to conscientious objection	45
Other relevant developments	46
ARTICLE 11. FREEDOM OF EXPRESSION AND OF INFORMATION	48
Freedom of expression and of information	48
Media pluralism and fair treatment of the information by the media	49
Secrecy of journalistic sources	49
Other relevant developments	50
ARTICLE 12. FREEDOM OF ASSEMBLY AND OF ASSOCIATION	50
Freedom of peaceful assembly	50
Freedom of association	51
ARTICLE 13. FREEDOM OF THE ARTS AND SCIENCES	51
Freedom of research and academic freedom	51
ARTICLE 14. RIGHT TO EDUCATION	52
Access to education	52
Vocational training	53

Other relevant developments	54
ARTICLE 15. FREEDOM TO CHOOSE AN OCCUPATION AND RIGHT TO ENGAGE IN WORK	56
The right to engage in work and the right for nationals from other member States to seek an employment, to establish themselves or to provide services	56
The prohibition of any form of discrimination in access to employment	57
Other relevant developments	58
ARTICLE 16. FREEDOM TO CONDUCT A BUSINESS	59
Freedom to conduct a business	59
ARTICLE 17. RIGHT TO PROPERTY	59
The right to property and the restrictions to this right	59
ARTICLE 18. RIGHT TO ASYLUM	61
Asylum proceedings	61
Other relevant developments	66
ARTICLE 19. PROTECTION IN THE EVENT OF REMOVAL, EXPULSION OR EXTRADITION	67
Subsidiary protection and prohibition of removals of foreigners to countries where they face a real and serious risk of being killed or being subjected to torture or to other cruel, inhuman and degrading treatments	67
CHAPTER III EQUALITY.....	69
ARTICLE 20. EQUALITY BEFORE THE LAW	69
Equality before the law	69
ARTICLE 21. NON-DISCRIMINATION.....	71
Protection against discrimination.....	71
Fight against incitement to racial, ethnic, national or religious discrimination	75
Remedies available to the victims of discrimination	75
Positive actions aiming at the professional integration of certain groups	75
Protection of Gypsies / Roms	76
Other relevant developments	76
ARTICLE 22. CULTURAL, RELIGIOUS AND LINGUISTIC DIVERSITY	76
Protection of religious minorities.....	76
Protection of linguistic minorities.....	77
ARTICLE 23. EQUALITY BETWEEN MAN AND WOMEN	77
Gender discrimination in work and employment.....	77
Positive actions seeking to promote the professional integration of women	80
Remedies available to the victim of gender discrimination	81
Other relevant developments	81
ARTICLE 24. THE RIGHTS OF THE CHILD.....	82
Possibility for the child to be heard, to act and to be represented in judicial proceedings.....	82
Other relevant developments	82
ARTICLE 25. THE RIGHTS OF THE ELDERLY	84
Participation of the elderly to the public, social and cultural life	84
The possibility for the elderly to stay in their usual life environment	85
Specific measures of protection for the elderly.....	85
ARTICLE 26. INTEGRATION OF PERSONS WITH DISABILITIES	86
Protection against discrimination on the grounds of health or disability	86
Professional integration of persons with disabilities: positive actions and employment quotas	89
CHAPTER IV SOLIDARITY.....	90
ARTICLE 27. WORKER'S RIGHT TO INFORMATION AND CONSULTATION WITHIN THE UNDERTAKING ..	90
Workers' information on the economic and financial situation of the undertaking.....	90
ARTICLE 28. RIGHT OF COLLECTIVE BARGAINING AND ACTION	90
ARTICLE 29. RIGHT OF ACCESS TO PLACEMENT SERVICES	90
ARTICLE 30. PROTECTION IN THE EVENT OF UNJUSTIFIED DISMISSAL	90
Reasons for dismissals	90
ARTICLE 31. FAIR AND JUST WORKING CONDITIONS	90
Health and safety at work	90
Sexual and moral harassment at work	91
ARTICLE 32. PROHIBITION OF CHILD LABOUR AND PROTECTION OF YOUNG PEOPLE AT WORK.....	91
Protection of minors at work and monitoring of the protection	91
ARTICLE 33. FAMILY AND PROFESSIONAL LIFE	92

Parental leaves and initiatives to facilitate the conciliation of family and professional life	92
Protection against dismissal on grounds related to the exercise of family responsibilities	93
ARTICLE 34. SOCIAL SECURITY AND SOCIAL ASSISTANCE	93
Social assistance and fight against social exclusion	93
Social assistance for undocumented foreigners and asylum seekers	96
ARTICLE 35. HEALTH CARE	98
Access to health care	98
Drugs	100
Other relevant developments	100
ARTICLE 36. ACCESS TO SERVICES OF GENERAL ECONOMIC INTEREST	100
Access to services of general economic interest in the economy of networks: transports, posts and telecommunications, water-gas-electricity	100
ARTICLE 37. ENVIRONMENTAL PROTECTION	101
Right to a healthy environment	101
ARTICLE 38. CONSUMER PROTECTION	103
Protection of the consumer in contract law and information of the consumer	103
<u>CHAPTER V CITIZENS' RIGHTS.....</u>	105
ARTICLE 39. RIGHT TO VOTE AND TO STAND AS A CANDIDATE AT ELECTIONS TO THE EUROPEAN PARLIAMENT	105
ARTICLE 40. RIGHT TO VOTE AND TO STAND AS A CANDIDATE AT MUNICIPAL ELECTIONS	105
Right to vote and to stand as a candidate for EU citizens non nationals of the member State	105
Other relevant developments	106
ARTICLE 41. RIGHT TO GOOD ADMINISTRATION	107
ARTICLE 42. RIGHT OF ACCESS TO DOCUMENTS	107
ARTICLE 43. OMBUDSMAN	107
ARTICLE 44. RIGHT TO PETITION	107
ARTICLE 45. FREEDOM OF MOVEMENT AND OF RESIDENCE	107
Right to social assistance for the persons who have exercised their freedom of movement	107
Prohibition to enter certain zones or portions of the national territory during particular events	107
Other relevant developments	108
ARTICLE 46. DIPLOMATIC AND CONSULAR PROTECTION	109
<u>CHAPTER VI JUSTICE</u>	110
ARTICLE 47. RIGHT TO AN EFFECTIVE REMEDY AND TO A FAIR TRIAL	110
Access to a court and, in particular, the right to legal aid / judicial assistance	110
Interim judicial protection	110
Independence and impartiality	111
Publicity of the hearings and of the pronouncement of the decision	112
Reasonable delay in judicial proceedings	112
Other relevant developments	115
ARTICLE 48. PRESUMPTION OF INNOCENCE AND RIGHT OF DEFENCE	115
Presumption of innocence	115
The right to freely choose one's defence counsel and the right to an interpreter	117
ARTICLE 49. PRINCIPLES OF LEGALITY AND PROPORTIONALITY OF CRIMINAL OFFENCES AND PENALTIES	117
ARTICLE 50. RIGHT NOT TO BE TRIED OR PUNISHED TWICE IN CRIMINAL PROCEEDINGS FOR THE SAME CRIMINAL OFFENCE	117

CHAPTER I. DIGNITY

Article 1. Human dignity

Article 2. Right to life

Euthanasia

Legislative initiatives, national case law and practices of national authorities

In autumn 2004 the Ministry of Health and Women presented a draft, providing for the legal basis for **patients**, wanting to declare a **living will** (*Patientenverfügung*). The draft was strongly opposed by the medical association due to the fact that the decision as to whether the will must be followed in a particular case needs to be made by the doctor, who may lack the necessary legal education to make this decision correctly. As a consequence the Ministry revised the draft taking into account the different criticisms and handing it over to an expert group, which modified the revised draft in certain areas. The revised and modified version was then forwarded to the Federal Commission on Bioethics for consultation and will be further revised by the Ministry of Health and Women. The draft will fill a gap in the Austrian legal system. Under the current law it is unclear with which form and with what content a living will can be laid down and whether it will be legally binding or simply provides guidelines for the assessment of the patient's will and to help in making medical decisions.¹ The current draft aims to establish the criteria required for a living will to be considered as binding, if the patient is in a condition, where he/she is not capable of acting independently anymore. Caritas stresses that the legislator must seek to avoid the situation that old, ill and disabled people would be put under social pressure to sign a living will.² Some voices demand the limitation of the scope of the living will; others argue that this would limit the autonomy of the patient too much.³

Domestic violence

Legislative initiatives, national case law and practices of national authorities

Two cases related to domestic violence were brought before the Committee on the Elimination of Discrimination against Women this year by the Viennese Intervention Centre against Domestic Violence (*Wiener Interventionsstelle gegen Gewalt in der Familie*) and the association "Legal Protection for Women" (*Rechtshilfeverein "Frauen Rechtsschutz"*) respectively. The Republic of Austria is accused of "having not undertaken all necessary steps to protect women against violence."⁴ In both cases, a woman was repeatedly and continually beaten, tyrannized and finally murdered by her husband. One of the women married a conservative man from a Turkish background. He forced her to wear a headscarf. When she demanded a divorce, he threatened to kill her. She went to the police and they granted an occupation order but the husband was not arrested. Two days later she called the police again, because her husband had come to her place of work and threatened to kill her. Social workers from the Viennese Intervention Centre sent a letter to the police, stressing the threat that the husband posed. The police applied for an arrest warrant from the office of the public prosecutor, a request which was ignored due to the opinion that it was unlikely he would put

¹ „Österreich auf dem Weg zu einem Patienten-verfügungs-Gesetz“, Zeitschrift für Biopolitik No. 2/05.

² „Regeln für Sterben in Würde“ in *Die Presse* of 24.03.2005.

³ „Wenn Patienten lieber sterben“ in *Die Presse* of 23.06.2005.

⁴ *Falter* No. 26/05 quoting a passage of one of the applications.

his threats into practice. The husband was therefore summoned for questioning two weeks later. Before this interview took place he bought a knife and stabbed his wife to death. The other case concerned a 33 year old woman working as a waitress in Vienna. For years her husband had severely mistreated her. Criminal proceedings against him had been dropped or delayed. After a visit to the Intervention Centre her husband shot her twice in the head in the presence of her two daughters.⁵

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Two years after the Mauretanain citizen Cheibani Wague died during a police operation in the Viennese “Stadtpark”, criminal proceedings against six police officers, three ambulance men and the doctor have been launched and resulted in the criminal conviction of one police officer and an emergency physician. Furthermore, the Administrative Court confirmed the decision of the Independent Administrative Tribunal finding i.a. a violation of Art 3 of the ECHR⁶.

The Administrative Court endorsed, broadly speaking, the decision of the Vienna Independent Administrative Tribunal.⁷ The Court based its decision on the facts as established by the Tribunal. It held that the conduct and state of mind of Mr. Wague justified depriving him of his liberty in order to bring him to psychiatric help. The deceased had tried to prevent a friend from leaving, by throwing himself, screaming, on the bonnet of his friend’s car. Thereafter, he had smashed the car’s window and thereby injured himself, after which he had struggled and fallen to the ground. The use of handcuffs was justified for security reasons and due to his attempt to flee. The Court considered the additional cuffing of the legs of Mr Wague as well as restraining him on the ground to be unnecessary and, therefore, not legitimate. The Court held, that “it could not be seriously argued, that 6 police officers could not have brought him securely handcuffed to the ambulance.” Restraining him on the ground was also not justifiable for the purpose of giving him a sedative. The Court confirmed the facts, as established by the tribunal, concerning the accusation that the police officers had beaten the victim on the back of the head while he was already secured on the ground. As a consequence the Court upheld the decision of the Tribunal, finding a violation of Article 3 ECHR.

Finally, on 19 July 2005, more than two years after the death of Cheibani Wague, the oral hearing in the criminal proceedings against the six police officers, one emergency physician and three paramedics, all accused of negligent manslaughter under particularly dangerous circumstances, has commenced. The delay came about due to several different reasons: first the forensic doctor did not deliver her report for months, secondly it turned out that she had failed to answer some crucial questions, such as whether the chronic cardiac problems of Mr Wague had in conjunction with the sedative injection and the extraordinarily stressful situation, caused his death. Finally the case was also examined by the Ministry of Justice which took several more weeks until the prosecution finally started on 12 April 2005^{8,9}.

The trial itself took four months and resulted in the conviction of one police officer and the emergency physician for negligent manslaughter. They were both sentenced to 7 months of imprisonment on remand. The medical experts’ reports were crucial to the convictions. The two doctors, mandated by the Court, came to the conclusion that the pressure

⁵ “Wenn der Staat versagt” in *Falter* No. 26/05.

⁶ See Report on the situation of Fundamental Rights in Austria in 2003, p.11 and in 2004, p.16,17.

⁷ VwGH 26.07.2005, 2004/11/0070-10,0071-7.

⁸ „Tödlicher Einsatz: Seit eineinhalb Jahren heißt es „Bitte warten““ in *Die Presse* of January 27, 2005.

⁹ “Chronologie im Fall Wague” in *die Presse.com* of November 9, 2005.

on the thorax and around the upper part of the body had caused a cardiovascular failure which led to suffocation. The combination of Mr Wague's state of excitement, the drugs which had been administered to him and his genetic heart condition acting together gave Mr Wague little chance of surviving his arrest.¹⁰ One of the medical experts further highlighted, that attempts to resuscitate him had started three or four minutes too late. As opposed to the police officers and the ambulance men, the physician should have known that the fact Mr Wague had stopped struggling so quickly could not only have been the effect of the sedative.

Contrary to doubts, raised already before the trial regarding his independence, the expert on operation tactics, coming from the Ministry of Interior, rather incriminated the police officers but criticized as well severely the handling of information by the Viennese Police. He held that the police officers had failed to coordinate their actions and that some of them had not followed the correct procedures when restraining Mr. Wague.¹¹ **In their testimonies the defendants denied that they knew the dangers inherent in restraining someone in a face-down position and also that they had ever received a letter that had been circulated warning in detail of the dangers of restraining someone in this position.** The police commanders when questioned gave a very unclear picture of how this information was forwarded to the staff. Instructors on the use of force during police operations (*Anwendung einsatzbezogener Körperkraft – AEK*) testified that they trained using outdated teaching material which did not include the relevant warnings about restraining people in the face down position for more than four minutes. One of instructors even indicated that six of the other instructors had met shortly before the trial, for what purposes remained unclear.¹² Under questioning about the alleged punches none of the witnesses could testify as to which police officers had beaten Cheibani Wague.

After eight days the judge announced his judgement on 9 November 2005. According to the judge all the necessary elements for negligent manslaughter had only been fulfilled by one of the police officers and the physician. The former had contributed to the death of Mr Wague by kneeling on his chest with his full weight, in full knowledge of the risks inherent. The conduct of the physician was found to be illegal and he was culpable because he had refrained for too long from attempting to resuscitate Mr Wague. According to the judge the situation did not fulfil the criteria of being “particularly dangerous circumstances” as required by law. The two other police officers who had restrained the victim around the upper body had also contributed to his death, but were found not guilty due to the deficiencies in their in service police training. The conduct of two other police officers and the ambulance men was found not to have contributed to the death of Mr. Wague.¹³ The defence has announced, that they will appeal against the judgement. **The public prosecutor accepted the sentences, but will appeal against the acquittals. In a public statement she declared that she is more convinced than ever before that each of the accused was partly responsible for the death of Mr. Wague,**¹⁴

Opinions about the judgement varied. While the daily newspaper “die Presse” highlighted the need to **reform of the training of the police**, the “Der Standard” agreed with the public prosecutor, arguing that the knowledge that **“pressing down on somebody’s torso using one’s full body weight can have lethal consequences” is simply common sense.**¹⁵ Amnesty

¹⁰ Protokoll von a.i. of November 9, 2005, forwarded on November 10,2005.

¹¹ „Urteilsverkündung kommenden Mittwoch” of November 4, 2005 available at [http://oesterrich.orf.at/wien/stories/\(11.11.2005\)](http://oesterrich.orf.at/wien/stories/(11.11.2005)).

¹² “Ein Update” in *Falter* No. 44/05.

¹³ Protokoll von a.i. of 09.11.2005, forwarded on 10.11.2005.

¹⁴ “Staatsanwältin bekämpft Freisprüche im Wague-Prozess” in *ORF ON News* available at <http://www.orf.at/ticker/199583.html> (10.11.05):

¹⁵ E.g. “Beklemmung nach Prozessende” and “Zweimal Milde, achtmal Unschuld” in *der Standard* of 10.11.2005.

International demanded the reform of police training and demanded further **criminal investigations against the people responsible.**

The spokesman for the Minister of Interior argued that improved teaching methods have been put into practice since 2003 and that police work is always a tightrope walk. Karl Mahrer, the Deputy Police Commander of Vienna, admitted that it was not tested enough, whether police officers have read information provided and whether they are capable of putting this knowledge into the practice. In the near future the commanders of all 102 police stations in Vienna will be responsible for evaluating the knowledge of their staff.

The criminal investigation into the case of the Nigerian Citizen Edwin Ndubu¹⁶, an inmate at the prison of Krems Stein, who died following a rage attack, will be discontinued.

The Ministry of Justice dropped the prosecution on the basis of a forensic expert's report, which established that inhumane treatment by a third person could be excluded. The death of Mr. Ndubu was caused by too much strain on his heart.¹⁷

In the case of the Romanian Citizen Nicolae J.¹⁸, who was shot by police after they had stopped him following a car chase, the proceedings against the police officer were also dropped.

Even though the Vienna Independent Administrative Tribunal had held in its decision in August 2004, that the use of firearms had been excessive and disproportionate and therefore unlawful, the office of the public prosecutor dropped the charges against the police officer who shot Nicolae J. They reasoned that the police officer was acting in assisted self-defence; according to the tribunal's assessment of the situation the police officer had had no other alternative than to use his weapon.¹⁹

In the case of the ethnic Kurd Binali Ilter²⁰, where the use of firearms by the police in dubious circumstances led to the fatal injury and consequent death of the victim, the acquittal of the police officer in the criminal proceedings became final after the Higher Regional Court upheld the decision of the Court in First Instance. The proceedings before the Independent Administrative Tribunal are still pending.

The 28 year old Kurd Binali Ilter attacked a police officer with a small bottle of mineral water, after he had tried to rob a clothes shop and steal the handbag of a woman on the street. Both the shop owner and the woman declared later, that they realised that he was not of sound mind and that he could be easily driven away. As already reported last year, the police officers have been acquitted by the Vienna Regional Criminal Court. The decision became final after the Higher Regional Court confirmed the decision of the court in First Instance. According to the lawyer of the family of Mr. Ilter, Mr Embacher, the proceedings before the Independent Administrative Tribunal were adjourned in spring 2005 to obtain the case file from the criminal law proceedings.

On 22 February 2005 the Algerian citizen Habra Saharoui was found dead in his cell in the Viennese detentions center Hernalser Gürtel.

Habra Sahraoui had gone on hunger strike on February 20 and was in the following transferred to a single cell. 2 days later, in the morning of the 22 February 2005 he was found dead in his cell. Pursuant to the autopsy he had strangulated himself. The authorities neither informed the public nor the Human Rights Advisory Board about the incident. The Board found out about the incident only two weeks after the death of Habra Saharoui through the

¹⁶ See Report on the situation of Fundamental Rights in Austria in 2004, p. 20, 21.

¹⁷ „Gewaltsamer Tod“ in *Falter* No. 1-2/05.

¹⁸ See Report on the situation of Fundamental Rights in Austria in 2004, p.18.

¹⁹ Available at: www.salzburg.com/sn/05/06/08/artikel/1578041.html (23.10.05).

²⁰ See Report on the situation of Fundamental Rights in Austria in 2004, p. 17.

media.²¹ The Media reported as well about injuries in the face of the deceased. The Office of Internal Investigations (Büro für Interne Angelegenheiten – BIA) investigated the case and informed the public prosecutor, who discontinued the case.

On 4 October 2005 the Gambia citizen Yankuba Ceesay was found dead in his cell in the detention centre in Linz.

On 28 October he declared to go on hunger strike and was therefore transferred to a single cell. After he had refused the medical examination by the public health officer in the detention centre, he was driven to a hospital, where he presumably has kicked a nurse. He was returned to the detention centre and locked into a security cell, where he died approximately only three hours later. According to the autopsy, Yankuba Ceesay was suffering from a blood anomaly, which led together with a lack of food and dehydration to his death. Pursuant to the forensic expert, he must have lost weight already before he had officially declared to go on hunger strike.²² The lawyer of the victim's family will bring the case before the Independent Administrative Tribunal.

On 13 August a detainee, presumably of Nigerian citizenship killed a cellmate in the detention centre Hernalser Gürtel.

In August 2005 an inmate, most probably of unsound mind, ran amok and attacked his cellmates with a butter knife in the PAZ-Hernalser Gürtel. Six of them succeeded in escaping to the toilet attached to the cell. One did not make it and was caught by the aggressor and stabbed to death. The five guards, who were alerted to the situation by the cell mates pressing an alarm button, were only equipped with pepper spray and did not succeed in separating the attacker from his victim. The Special Police Force (WEGA) only succeeded in subduing the aggressor by spraying him with a fire extinguisher. The surviving cell mates reported that the man was already behaving strangely, when he was brought to their cell, while the prison staff had not witnessed any abnormalities.

On 5 August 2005 a person of African origin tried to escape from the police by jumping into the Danube.

He was suspected of being a drug dealer. A week later, a dead body was found in the water very close to the place where he had jumped into the Danube.²³

Positive aspects

Pursuant to an article in “*die Presse*”, the training methods of the Viennese police force are being reformed, after several incidents, where the use of firearms has had lethal consequences.

The new training programme incorporates training in the areas of tactics, technique and shooting. The use of weapons will no longer be trained in isolation, but embedded in concrete situations. During the training, real life scenarios are reconstructed. Starting in spring 2005, 7000 police officers shall be trained step by step, via the application of these new teaching methods. The training will not only be given by teachers from the Special Police Force (*WEGA*), but also by normal police officers, who carry out their duties in ordinary police stations. (In comparison to members of *WEGA*, who shoot on average 3400 training shots per year, ordinary police officers only fire 250 to 270 shots per year. *WEGA* officers have a test to prove their competence with weapons once a year, if they fail, they can repeat this test once. If they fail a second time they have to leave the Special Police Force.²⁴)

²¹ “Selbstmord in der Schubhaft“ in orf.at of 21.11.05(14.12.05).

²² “Linz: Tod von Yankuba Ceesay“ in www.afrikanet.info of 14.10.05,(14.12.05).

²³ “Wasserleiche entdeckt: Flüchtiger Dealer ?“ in www.vienna.at of 11.08.05 (14.12.05).

²⁴ “Todesschütze Polizist: Reform der Ausbildung“ in *Die Presse* of 10.03.2005.

The **Human Rights Advisory Board** (*Menschenrechtsbeirat – MRB*) has issued several recommendations in the past concerning the training of the security forces in the context of its different areas of mandate; In 2005 the Board published a comprehensive **report on “Human rights in the basic and advanced training of the security forces”**, analysing, inter alia, the current state of the training programme and the value given to human rights education as part of the general training and within the institution as such. Pursuant to the report, human rights education has been further developed in the past years. Besides the existing concept of specific human rights courses and the topic of human rights being included in courses on personal development, the Board recommended introducing a more human rights focused approach in the classical policing subjects such as operational training, criminalistics and police conduct in order to provide a more practical approach to the issue of human rights. In order reach the necessary standards for such an approach, the Human Rights Advisory Board recommended the introduction of a tandem training model. Human Rights experts will jointly develop, draft and revise teaching methods and materials together with police training experts and also carry out training programmes in tandem. The Board revealed a great discrepancy between young police officers, who have already been subject to the new human rights approach in their basic training and those age groups whose training had not been carried out in such a manner. The report stressed that the success of the reform will depend, to a large extent, on how quickly these discrepancies can be addressed, inter alia, by further training. Furthermore, the Board recommended that the factual relevance of human rights in policing should be made visible within the organisation by taking into account conduct compliant with human rights as criteria for promotion, recruitment, remuneration and other organisational decisions.

Negative aspects

One of the positive aspects of the criminal proceedings in the case of Cheibani Wague is that deficiencies of the most different types i.e. lack of coordination, gaps in the chain of command and severe deficiencies in the training of the police were discovered by the Judiciary. The initial efforts of the then Minister of Interior, Ernst Strasser, to play down the case and to assure the public that none of the police officers involved had made any mistake failed. **The judgement also confirms the criticism, expressed in the reports of the last two years, in regard to investigations carried out by the Bureau of Internal Affairs (*Büro für Interne Angelegenheiten*) (subordinate to the Ministry of Interior) which initially did not see any wrong doing by any of the police officers involved.** One must also not forget that, had a video of the entire operation not existed, which was a pure coincidence, the case would almost certainly not have led to any criminal investigations, due to the fact that the reports of the police and the physician did not present a clear picture of the case. It is also questionable whether the police officers would have been prosecuted without the persistent media coverage of the case and the criticism by the Human Rights Advisory Board. While many voices agree that the judge tried to seek transparency and to conduct the trial in an impartial manner, the judgement itself follows the tradition of not apportioning any blame to the police officers acquitted, as in the case of Binali Ilter, due to the flaws in their training.

The judgement let the individual police officers and the emergency team (except for one police officer and one physician) off the hook – a result which stems partially from the concept of Austrian Criminal law. The institution and some of its representatives shouldered the blame for not having sufficiently informed and trained their police officers, presumably in the knowledge that the risk they had of facing criminal sanctions was quite low. **The judge has followed the logic, that the two police officers, whose conduct led to the death of Mr Wague, did not know what many believe to be common sense i.e. that restraining someone around the upper body for a long period of time can lead to suffocation.** It is possible that the judgment is also influenced, to certain extent by, sympathy for the difficult position of the police and the concern that convictions for negligence manslaughter could

have a negative or paralysing effect on the work of the police. These are legitimate concerns, but ignore at the same time the other message thereby sent to the general public, namely that unprofessional police work will in general not lead to penal sanctions for the individuals concerned; information which will not increase the trust of the population in the police. It is now up to the institution to shoulder the responsibility they have assumed in this regard. **It should also not be forgotten that the criminal proceedings failed to find any guilt concerning the allegations that one of the police officers had insulted and punched Mr Wague – a fact which was established by the Independent Administrative Tribunal and was confirmed by the Administrative Court. Whether this omission will be subject to revision by the Higher Regional Criminal Court or at least subject to disciplinary proceedings will be contained in next year’s report.**

All eight case of death, described above concern foreigners or persons with a migrant background. The question arises therefore, whether these cases would have been dealt with in the same way by the police, public prosecutors and judges if the victims had been Austrians.

Article 3. Right to the integrity of the person

Rights of the patients

Legislative initiatives, national case law and practices of national authorities

The Technical University of Graz assigned a project to the Institute for Forensic Medicine of the Medical University of Graz to carry out motion tests using human cadavers. Around 20 cadavers have already been used in such kinds of simulation since the mid nineties. The University stressed that these tests were not conventional crash tests because they were performed at much lower speeds and that the results were used in the development of more realistic crash test dummies and in the construction of car seats which protect more effectively against whiplash. The first test phase, funded by the EU, was carried out according to the directives set out in the Wayne State protocol for post mortem human subject (PMHS) tests. For the current test phase the Institute for Forensic Medicine wants to comply with the ethical requirements of the Medical University, its partner in a new project.²⁵ Despite the fact that the Ethics Commission of the University declared itself as not competent to decide in this matter, it delivered a recommendation, stating that it considers these types of experiment to be absolutely invaluable. It further recommended either obtaining approval from the next of kin before performing such tests or using the bodies of people who have already consented during their lifetime to these kinds of experiment. It can be argued that this recommendation does not fully take into account the right to human dignity, personal integrity and privacy of the deceased person. Since the right to human dignity and integrity of the person is an absolute right and since medical experiments can only be carried out with the consent of the persons concerned, as required by Art 7 para 2 CCPR, the consent of the relatives shall only be considered to be sufficient if it can be proven that they express the wish of the deceased.²⁶ The Minister for Education, Science and Culture, Elisabeth Gehrler forwarded the case to the Commission for Bioethics, located in the Federal Chancellery. The response of the Commission was not made available to the public.²⁷

²⁵ Stellungnahme der TU Graz zu „Porst Mortem Human Subjects“ (PHMS) Experimenten; of 18.03.2005, available at <http://www.presse.tugraz.at/pressemitteilungen> (20.10.2005).

²⁶ „Sind Leichen die besseren dummies?“, *Die Presse* of 13.09.2005.

²⁷ Information provided by Robert Gmeiner, Office of the Federal Commission on Bioethics on 20.10.2005.

Reasons for concern

In an interview with *Die Presse*, the **Ombudsman for Viennese Patients, Werner Vogt** severely criticised the conditions in Viennese nursing homes. He stated that he continually receives **complaints about poor medical treatment, bad care service and unhygienic conditions**. In his estimation the situation is worse than it was two years ago, when the “Lainz-Skandal” was the subject of widespread public debate, during which the terrible conditions in a Viennese geriatric institution became public, describing the situation as one of structural (institutional) violence. He puts the problem down to the lack of qualified nursing staff, particularly in private institutions, but also in public ones. The promise of the Mayor of Vienna to provide funding for a recruitment campaign for volunteers has been fulfilled up to this point. Werner Voget stresses that some progress has been made as well: “More sensitivity can be found. If there is something wrong, the relevant institution keeps a closer eye on the situation”. Furthermore the Viennese Act on Nursing Homes (Wiener Pflegeheimgesetz) now provides for a right to social contact and medical treatment.

Article 4. Prohibition of torture and inhuman or degrading treatment or punishmentConditions of detention and external supervision of the places of detention*Penal institutions and institutions for the detention of persons with a mental disability**International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

See below

Legislative initiatives, national case law and practices of national authorities

Even though the **number of prisoners in Austrian Penal Institutions** has not increased since last year, the large prison population continues to be a reason for concern. As of the 1 October 2005 a total of 8818 people were being detained in Austrian prisons; of these 5518 were convicted criminals and 2352 detainees pending trial.²⁸ Particularly in Vienna, the number of prisoners has stayed extremely high. In the prison of Wien Josefstadt an average of 1200 people are kept under custody although the capacity of the prison is only 900 inmates. The fact that the number of people in pre-trial detention during 2005 constantly decreased can be interpreted as a positive sign. The statistics show that in the first quarter of 2005, 980 people were kept in pre-trial detention, whereas on the 1 October only 883 detainees were awaiting trial. The reason for this may be the decreasing crime rate. In comparison to a year ago the crime rate decreased in the first 6 months of 2005 by 3.8 percent and in Vienna by 7 percent.²⁹ The larger prison population in the Eastern Regions of Austria is caused beside other factors as well by the stricter regime that is applied there. According to a study carried out between January 2000 and April 2004, only 43.3 percent of the inmates in Feldkirch – Vorarlberg had to serve their full sentence however 74.2 percent of the convicts in Vienna had to serve their full sentence. 21.6 percent of the prisoners in Vorarlberg were released early on suspended sentence having served two thirds of their sentence, while in Vienna the share of inmates released early was only 8.3 percent.³⁰

²⁸ Website of the ministry of Justice, available at <http://www.bmj.gv.at/justiz/content.php?nav=48> (27.10.2005).

²⁹ Austrian Crime Statistics for the first half of 2005, available at http://www.bmi.gv.at/downloadarea/krimstat/2005/Kriminalitaet_erstes_Halbjaehr_05.pdf (20.10.05).

³⁰ „In Wien mehr Haft als im Westen“ in *Die Presse* of 22.08.2005,

The large prison population and its negative effects have led to several initiatives by the Ministry of Justice. A new prison with the capacity for 550 prisoners (400 for prisoners on remand) will be constructed in Vienna by the end of 2008. A subject of criticism by judges and lawyers and the opposition parties is the initiative to split the jurisdiction of the Viennese Regional Criminal Court and to create a second court on the same plot as the new prison. The judges, especially, fear that this division into two Courts will lead to unclear areas of competence, inconsistent jurisprudence and unnecessary expenditure.³¹ The Ministry of Justice on the other hand argues, that unnecessary transport between the Court and the prison can therefore be avoided, by guaranteeing the proximity of the detained and the judges for questioning and also avoiding difficulties, caused by the distance for lawyers, relatives of the inmates and counselling institutions.³²

Electronic tagging will be tested in four Austrian court prisons in a pilot project between January 2006 and June 2007, with an option to prolong the project until September 2007. Pursuant to the Ministry of Justice “the aim of the project is to increase conditional release under conditions and charges, to test collaboration between the Courts, authorities and other actors and to evaluate further areas of application with the purpose of avoiding imprisonment and the damage resulting from imprisonment as well as fostering rehabilitation and the prevention of further criminal offences.³³ The electronic tag is a non-metal strap with an emitter, which can be fastened around the ankle. The emitter communicates with a mobile phone which the prisoner has to carry at all times. When there is a distance of more than 10 meters between the phone and the emitter an alarm activates. The position of the prisoner is then automatically forwarded by SMS to the authorities.³⁴ Whether electronic tagging will help in the future to reduce prison populations will depend to a large extent on the actions of the judges, who have the competence to decide in each individual case if they should apply this measure or not.³⁵

Another initiative aims to reduce the number of people who fail to pay court imposed fines and thereby end up serving a prison sentence. In the testing phase, which will begin in January 2006, around 500 people will carry out work of public utility instead of serving their sentence in prison. The Ministry of Justice will probably appoint the association *Neustart*, which is currently also responsible for probation assistance, to do the logistics.³⁶

The suggestion by the prison experts’ group, “*Kriminalpolitische Initiative*” to decrease the number of foreign nationals in prisons who would generally be deported, after they have served their sentence, will not be put into practice. Mr. Gratz, a psychologist and a member of the above mentioned group held that “Reintegration is not the focus anymore; these people are only locked away... which poisons the penal system for all the other inmates as well”. **The group suggested offering convicted foreign nationals the possibility of returning to their country of origin after they have served half of their sentence.** If they then returned to Austria they would have to serve the rest of their sentence.³⁷

The idea developed by the former Minister of Justice Dieter Böhmdorfer, to finance the building of a **prison in Romania** and negotiate an agreement that would oblige Romania to take over the responsibility for the enforcement of the sentence against their nationals directly

³¹ „Zweites Straflandesgericht in Wien“ in *Salzburger Nachrichten*, available at http://www.salzburg.com/sn/archiv_artikel.php?xm=1580685&res=0 (27.10.05).

³² Statistics provided by the Ministry of Justice on 28.10.2005.

³³ Answer by the Ministry of Justice of 2.12.2005 to a questionnaire concerning the compilation of the Austrian Report 2005.

³⁴ „Fußfessel ab 2006, aber Gefängnisse bleiben voll“ in *Die Presse* of 21.03.2005.

³⁵ „Will das beste Strafvollzugssystem Europas“ in *Die Presse* of 22.06.2005.

³⁶ Information provided by Marco Rosenberg, director of Neustart on 28.10.2005.

³⁷ „Heimkehr statt Strafe“ in *Falter* No. 25/05.

after their arrest in Austria was not further pursued by the new Minister of Justice, Karin Gastinger.³⁸

In July 2005 the Ministry of Justice bought 60 so-called “Taser” weapons, of the brand X 26, for use in prisons under the authority of the Ministry of Justice. On application of this weapon, the person targeted by a Taser receives an electric shock which immediately paralyzes him/her. After few minutes the targeted person shall fully recover.³⁹ Amnesty International Austria demanded that these weapons should not be put into use until independent studies have been carried out concerning their potential long and short term negative effects. The Ministry relied on the expert opinion of the Forensic Department of the University of Vienna before making the purchase. According to an internal order only certain specially trained people will be authorized to use the Taser by the Head of the prison. According to information from the Ministry, the Taser has already been used successfully, although there is no information about how often. They stated that the use of the weapon had not resulted in negative effects to the inmates or to the staff. Every case where a Taser is used must be reported to the Ministry. The use of the weapon will be assessed in each individual case.⁴⁰ While the danger inherent in regard to potential misuse should not be ignored, it might serve in certain cases as of aggressive inmates threatening the life or health of prisons guards or fellow inmates as a less intrusive measure than firearms.

Reasons for concern

An expert commission mandated by the Minister of Justice Ms Gastinger delivered its report on the “Improvements in the Care of Mentally Ill Inmates in Penal and Mental Institutions”⁴¹ (*Verbesserung der Betreuung psychisch kranker Insassen im Straf- und Maßnahmenvollzug*). After a written inquiry by the green parliamentarian Karl Öllinger, the report was forwarded by the Ministry of Justice to the Parliament and made available to the public.⁴² The report highlights that the percentage of convicts with noticeable mental problems is steadily increasing. According to the report this phenomenon might be caused by the general tendency not to detain patients with mental problems in psychiatric institutions, but to treat them on an ambulant basis, thereby risking that they commit criminal offences while at liberty. More and more of the general budget for the penal system has to be spent on medical treatment in prisons. Although only €20.1 million was spent on medical treatment in 2001, this number increased to €32 million in 2003. According to the report in none of the three biggest penal institutions (Stein, Graz-Karlau and Garsten) is the number of hours a psychiatrist is present sufficient. In “Stein” the psychiatric service with 54 psychiatric hours per week has to accommodate the whole prison population, including those with drug addictions. In six court prisons (*Justizanstalten*) the psychiatric service is not available outside of office hours, which leads to high costs due to the necessary inmate transfer to psychiatric institutions.

The conditions concerning the detention of inmates with mental disorders who are still criminally culpable, the so-called “Sec 21 para 2 Criminal Code Cases” particularly give reason for concern. The situation in the prisons Stein, Graz-Karlau and Garsten has deteriorated due to the growing number of such cases. The prison Garsten, which has a department for 6 Sec 21 para 2 cases, accommodated 37 such cases, while Graz- Karlau has the capacity for 17, but in fact accommodated 60 convicts. The psychiatric head of the prison

³⁸ See Report on the situation of Fundamental Rights in Austria in 2004, p.23.

³⁹ „Stromwaffe für die Justizwache“ in *Die Presse* of 05.07.2005.

⁴⁰ Answer by the Ministry of Justice of December 2, 2005 to a questionnaire concerning the compilation of the Austrian Report 2005.

⁴¹ See Report on the situation of Fundamental Rights in Austria in 2004, p.25.

⁴² Response of the Minister to the written inquiry of the parliamentarian Karl Öllinger, 2507/ABXXIIGP, available at www.parlinkom.gv.at (30.10.05).

Wien Mittersteig located the roots of these developments inter alia as well in the growing length of the sentences for those delinquents. The expert commission highlighted the fact that in 7 court prisons people with acute mental illnesses had to be segregated in 48 separate cases in 2003, due to the lack of a possibility to transfer them to a psychiatric hospital or because their stay in hospital had been too short. **In its concluding summary the experts' report underlined that the lack of psychological treatment violates the entitlement of inmates to medical treatment and causes the amount of time people have to be kept in custody to be prolonged.** This fact also impacts negatively on the budget. Furthermore they underline that the less stable the patients are the higher the security risk is for the general public, when they are released.

As already mentioned in the 2004 report⁴³ the expert commission was also authorised to examine the three cases of the prisoners who died in the Court Prisons Göllersdorf, Stein und Schwarzau in regard to procedural deficiencies concerning the psychological treatment of the inmates. In regard to the death of Ernst K, who was found dead tied to a bed with leather belts after he had a seizure, the expert commission held that pursuant to his mental state the inmate should have been transferred years before to a psychiatric hospital where he could have received proper treatment. There was a lack of trained staff necessary to sedate and observe him properly, a situation which has remained unchanged. Restraining him to a bed with leather belts was also considered not to be *lege artis*. Concerning the case of the inmate who committed suicide using his pyjama jacket (due to his mental state, he had been before transferred to a prison cell equipped with a video camera, which unfortunately had a blind spot), the experts held that proper sedation had not been possible due to the lack of trained personnel and monitoring equipment but would have been preferential to transferring him to the surveillance cell. In the third case, the commission came to no conclusions, because the forensic report was not available when the report of the expert commission had to be finalised. The ways in which the Ministry of Justice has addressed the problems, outlined in the report, is unknown. In response to a questionnaire forwarded to the Ministry, addressing, inter alia, the report and what steps have subsequently been undertaken, the Ministry simply stated: "The report was for the purposes of informing the Minister – the recommendations have been taken into account as far as possible."

Centres for the detention of foreigners

Reasons for concern

The situation of foreigners, pending their deportation to their country of origin, has remained more or less unchanged; Data in regard to the number of detainees in Austria in 2005 is not available. According to the Ministry of Interior a total of 10,937 foreigners, pending their deportation were detained in police detentions centres (*PAZ*) in Austria in 2004, 4,975 were detained in the two police detentions centres in Vienna in 2004.⁴⁴ Due to the renovation of *PAZ* Rossauerlande, all male detainees have been transferred in June to the *PAZ*- Hernalser Gürtel detention centre. Due to the fact that all the single cells have to be used for disciplinary measures, **people on hunger strike are at this stage not anymore segregated, but detained in normal cells** together with the rest of the prison population. The Human Rights Advisory Board (HRAB) has in the past repeatedly criticized the strict regime applied to detainees who go on hunger strike because of its punitive nature⁴⁵.⁴⁶ Being isolated in a single cell, without any possibility of communicating with others, puts an even heavier burden on the mental state of the inmates than the regular detention. Furthermore the risk of

⁴³ Report on the situation of Fundamental Rights in Austria in 2004, p. 24.

⁴⁴ Statistic provided by the Ministry of the Interior on 23.11.2005.

⁴⁵ E.g. Empfehlungen des Menschenrechtsbeirates im Jahre 2005 zur Anhaltung in Einzelhaft, available at www.menschenrechtsbeirat.at (30.10.05)

⁴⁶ Please see as well underneath summary of the findings of the CPT.

successfully committing suicides and other forms of autoaggression is higher due to the absence of other inmates. These concerns were once again raised in regard to two cases with lethal consequences. One of the incidents had taken place in the Viennese detention centre Hernalser Gürtel. An Algerian citizen had strangled himself with his bed sheet after he had gone on hunger strike two days before and had been transferred to a single cell.⁴⁷ The second case concerned a 19 year old detainee from Gambia, who was found dead in his “security” cell in the detention centre in Linz at the beginning of October this year. (For further information please refer to Art. 2)

In the past the legislator has left it more or less up to the discretion of the executive powers, on how to deal with the problem of **hunger strikes**. Persons who have slimed down to a certain weight and where the public health officer (*Amtsarzt*) established that he/she is not in the state anymore to be detained are normally released. The draft proposal for the new Aliens Police Act foresaw the possibility of force - feeding. During the consulting phase, many institutions, such as the HRAB raised their concerns. The HRAB considered the introduction of such a measure to be an unjustifiable interference with the right to privacy.⁴⁸ Amnesty International considered the application of force feeding to be a violation of Art 3 ECHR and doctors also considered it to be against medical ethics.⁴⁹ After negotiations between the government parties with representatives of the Austrian Social Democratic Party, it was communicated to the public that the criticised provision had been eradicated. This was in fact not the case.⁵⁰ Starting in January 2006, when the Aliens Police Act will enter into force, the police will be able to transfer those detainees, who cannot be detained in police custody anymore due to their self-inflicted ill health, to the medical department of a penal institution. Section 79(1) Aliens Police Act refers to section 53d Administrative Offences Act (Verwaltungsstrafgesetz - VStG) which in turn generally refers to the Enforcement of Sentences Act (Strafvollzugsgesetz - StVG) which contains a provision in section 69 which allows for detained persons to be force-fed. According to the Ministry of Justice, force feeding is not carried out in the Austrian penal system. Doctors in the prisons, under the authority of the Ministry of Justice, use psychological methods to prevent inmates from going in hunger strike instead.

As already highlighted in last year’s report, the overcrowded and inadequate police detention centres further contribute to a tense climate which promotes aggressive behaviour by the inmates towards others. Psychological examinations and treatment are only carried out very superficially and there is a shortage of staff, which have also not been trained to deal with difficult situations that may arise. These concerns were once more confirmed by an incident, which has taken place on August 2005 in the PAZ- Hernalser Gürtel. An inmate, most probably of unsound mind, ran amok and killed one of his cellmates with a butter knife in the PAZ-Hernalser Gürtel. The five guards, who were alerted to the situation by the cell mates pressing an alarm button, were only equipped with pepper spray and did not succeed in separating the attacker from his victim. (For further information please refer to Art 2)

⁴⁷ „Tod in der Schubhaft: Vergebliches Warten auf Obduktionsbericht, available at derStandard.at (30.10.05).

⁴⁸ Stellungnahme des Menschenrechtsbeirates zum Begutachtungsentwurf des BMI zum Asyl- und Fremdenpolizeigesetz 2005, available at www.menschenrechtsbeirat.at (30.10.05).

⁴⁹ „Ärzte gegen Zwangsernährung” of 28.04.2005 available at <http://science.orf.at> (23.11.2005).

⁵⁰ “Die rote Asyl-Lüge” of 12.07.05 available at <http://www.chilli.cc/index> (13.12.05).

Protection of the child against ill-treatments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

On 31 March 2005, the Committee on the Rights of the Child published its concluding observations, considering the second periodic report of Austria, delivered on the 22 November 2002.

In regard to **abuse, neglect and violence** against the child, the Committee welcomed the amendments to the criminal law and criminal procedure on sexual abuse and violence in the family, but expressed its concerns at the same time regarding the effectiveness of the law and the rehabilitation of child victims. Therefore it recommended Austria to “(a) provide training for the personnel involved, both in the prosecution process and in the rehabilitation process; (b) provide programmes to change the attitudes and behaviour of abusers and perpetrators; (c) improve the rehabilitation programmes for child victims; and (d) make an attempt to have a one stop service where multidisciplinary and cross- sector services are provided.” Concerning **corporal punishment**, the Committee recommended that Austria “continue its public education and awareness raising campaigns on non-violent forms of disciplining and child rearing” as well as “undertaking studies on the prevalence of violence in experience of children and the negative effects of corporal punishment on the development of children.”

Regarding **harmful traditional practices** the Committee welcomed the introduction of criminal provisions relating to the prohibition of FGM, but uttered its concerns that these practices still occur. It therefore called on Austria to carry out well targeted and appropriate campaigns in the context of religious communities and to consider the possibility of making the acts, of those involved in the performance of FGM outside of Austria, punishable by law. In reference to **juvenile justice**, the committee articulated its worries about the increasing number of people under 18 placed in detention, a disproportionate amount of these having foreign origins and that inmates younger than 18 are not always separated from adults.

Besides reiterating Austria’s obligations under international law and international standards, the committee also recommended pursuing the following measures:

- (i) Alternative measures for detention, including pre-trial detention, should be strengthened and applied as often as possible in order to ensure that the deprivation of liberty is for the shortest possible time and a measure of last resort;
- (ii) Measures to ensure that people younger than 18 held in detention are strictly separated from adult detainees, also during daytime activities;
- (iii) Measures to ensure that the staff in juvenile detention centres are well trained to deal in a proper and adequate manner with the relatively large number of people under 18 who are of foreign origin;
- (iv) Measures to significantly improve the collection of data on all relevant aspects of the juvenile justice system in order to obtain a clear and transparent picture of its practice.

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The report on the fourth periodic visit to Austria by the Council of Europe’s Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment (CPT) was published on 21 June 2005. The CPT reported about several allegations of ill-treatment and described the regime under which foreign nationals are kept in one of the Viennese police detentions centres as “totally unacceptable”.

The findings based on the visits of the Committee's delegation to police and prison establishments in Vienna, Linz and Wels and to a psychiatric hospital in Linz in April 2004 were as follows:

The CPT reported several **allegations of physical ill-treatment** (slaps, punches, kicks, blows to the head with telephone books, prolonged and tight handcuffing and the use of hand and ankle cuffs together – in combination over long periods of time) of criminal suspects detained by the police in Linz and the surrounding area. The CPT identified the risk of being the object of ill treatment as being particularly high for suspects who do not immediately confess. The CPT expressed particular concern about the allegations brought forward by juvenile detainees. These allegations were also verified by prison staff who reported that people arriving from police custody frequently spoke about problems of ill treatment and sometimes bore injuries. While the report noted that the situation concerning ill-treatment in police detentions centres had improved, there were still complaints regarding rude and racist behaviour by certain police officers to foreign nationals. In an interview in the *Tiroler Tageszeitung* the Minister of Interior, Liese Prokop, rejected these allegations: All the incidents had been investigated, however none could be confirmed⁵¹

Although holding that the **Human Rights Advisory Board** could in principal form a significant safeguard against ill-treatment, the Committee invited the Austrian authorities to review the status of the Board in relation to the following institutional deficiencies: The financial resources of the Board are provided by the Ministry of Interior, three of the Board members are civil servants of the Ministry, the Minister also selects the NGO represented on the board and he/she has the power to terminate their appointment. The delegations of the board may only visit detention centres under the authority of the Ministry of Interior which deters delegations of the board from following up cases when a detainee is transferred to a prison which is controlled by the Ministry of Justice. On 20 June, 2005, the Ministry of Justice issued an ordinance, holding that for the exercise of their duties it is necessary that the members of the Human Rights Advisory Board can interview prisoners after they have been transferred to a prison under the authority of the Ministry of Justice and that they have to be assisted by the prison staff in the exercise of these duties.⁵²

Regarding the **right of access to a lawyer during police custody** the Committee noted significant legal improvements, though according to the applicable provisions, the police can still limit this right if it is considered to be necessary “in order to avoid that the investigation or the gathering of evidence are adversely affected by the lawyer's presence” The Committee stressed that the right to have a lawyer present during questioning should never be totally be denied, but instead “access to another independent lawyer who can be trusted not to jeopardise the legitimate interests of the investigations should be arranged.”

Another focal point during the delegation's visit was the detention of foreign nationals awaiting deportation. The CPT visited the police detention centres in Vienna-Hernalser Gürtel, Innsbruck, Linz and Wels (further referred to as PAZ). These are used for detaining criminal suspects for up to 48 hours, for holding people serving an administrative sanction for up to 6 weeks, and for detaining foreign nationals pending deportation for a maximum of 6 months during a two year period.⁵³ While the CPT expressed its criticism relating to several aspects of detention in the first three mentioned detention centres, the PAZ in Wels fulfilled, to a large extent, the CPT standards. (Due to a fire in 2001 it has been thoroughly renovated and only reopened in 2003; it only has a capacity of 38 detainees.) Concerning the “material conditions” in the PAZ the CPT recommended inter-alia renovating all the cells at the PAZ in Innsbruck and Linz and reviewing the catering in all three PAZ in regard to specific dietary

⁵¹ Available at <http://portal.tirol.com/politik/innsbruck/15653/index.do> (31.10.05).

⁵² BMJ – E41701/0047-V 1/2005.

⁵³ According to the new Aliens Police Act 2005 foreigners pending their deportation can be detained up to 10 months in a period of two years.

habits and adequate catering for the needs of the detainees. (In its response of 21 July 2005, the Austrian government held that for the year 2005 Euro 55.000 funding for improvements in the PAZ- Innsbruck will be provided, since the visit of the CPT all the windows have already been replaced; the Austrian Government believes the current catering situation to be sufficient⁵⁴).

Referring to “activities” the CPT stated: “Despite the renovation which had taken place at the PAZ Wien Hernalser Gürtel, the regime under which foreign nationals were held remained totally unacceptable.” Most of the detainees had to spend the greater part of the day locked in a cell; there were no radios provided and only a few TV-sets, which offered exclusively German television programmes, exercise outdoors had been restricted to as little as 20 minutes per day. Due to staff shortages, the recreation rooms, which were equipped with table tennis tables, could be used very rarely. The lack of exercise outdoors was also criticised in regard to the PAZ-Linz. At the end of the visit the delegation made an immediate observation to the Austrian authorities, requesting them to ensure, that all detainees in Vienna and Linz were offered the possibility of outdoor exercise for at least one hour per day. In their letter of 4th August 2004, the Republic of Austria justified the situation by referring to para 17 of the Detention Regulations (*Anhalteordnung*) which entitle detainees to one hour of exercise per day; some of the detainees did not want to make use of this right due to lack of motivation or bad weather.

Concerning the staffing situation, the CPT recommended increasing staffing levels and providing for better training of the staff. In relation to health care the Committee expressed its concern, that all the medical examinations took place in the presence of police officers, which is detrimental to a proper doctor patient relationship. (The Republic of Austria stressed in its response, that most police officers are also trained paramedics. According to Sec 54 of the Physicians Act (*Ärztegesetz*), doctors’ assistants are also bound by the duty of confidentiality.) **Furthermore the CPT wished to stress that hunger strikes should be approached from a therapeutic rather than a punitive standpoint.** (In some detention centres, detainees who were on hunger strike were placed in segregation cells and were subject to a more restrictive regime). The CPT went on to report that none of the PAZ employed a psychologist and only in the PAZ- Hernalser Gürtel were visits from a psychologist from Project Dialog offered. **In regard to disciplinary sanctions the CPT recommended that detainees be given the right to be heard on the subject of the offence of which they are accused.** (In its response the Republic of Austria referred to Sec.24 para 3 and following of the Detention Regulations (*Anhalteordnung*), holding that the commander has to hear the detainee in case of breaches of a regulation rule. If the request of the detainee can not be followed, the commandant has to transfer the case to his authority to decide – The possibility to appeal is therefore practically offered.)

Furthermore the CPT undertook visits to prisons under the authority of the Ministry of Justice, namely, the Linz Prison and the Vienna- Mittersteig Prison. A follow up visit to the Vienna Josefstadt Prison, for the purpose of examining the conditions under which juvenile prisoners were held there, was also made. At the outset of the visit, the CPT was informed about the rising prisoner population over the last two years (although there is a maximum official capacity of 7,900 places in Austria, the prison system was then holding over 8,000 prisoners and as of July this year as many as 8,500 prisoners.⁵⁵) The overcrowding in prisons and the lack of staff has had a negative effect on organised activities in the prisons. The CPT received no allegations of ill-treatment of prisoners in prisons under the authority of the Ministry of Justice. In general the report on the situation in prisons was rather positive.

⁵⁴ Stellungnahme der Republik Österreich zum Bericht des Europäischen Komitees zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Strafe (CPT) über seinen Besuch in Österreich vom 14. bis 23 April 2004, of July, 2005, CPT/Inf(2005) 14.

⁵⁵ See as well report on the situation of fundamental rights in Austria 2004, p. 4.

Concerns were expressed regarding the non segregation of juvenile and adult defenders in the prisons in Linz. The Austrian authorities explained, that due to overcrowding segregation is simply not always possible, it becomes even more difficult to achieve if several accomplices are committed to the same prison at the same time. Furthermore the CPT made the criticism that in Linz there were no educational activities offered, and practically no opportunities to do vocational training. The situation of juveniles in the Prison Wien Josefstadt is negatively influenced by the lack of staff and the shift system. Previously the night shift started at 3 p.m. and ended at 7.a.m. During this time the juveniles were locked in their cells. (In a letter dated 11 November 2004, the Austrian authorities informed the CPT that the night shift would start later at 6.p.m. on weekdays and that juveniles would be provided with additional activities. The CPT further recommended employing a fully qualified specialist in child/adolescent psychiatry in order to address the specific problems of juvenile prisoners.)

Concerning the imprisonment of people who had committed a criminal offence under the influence of a serious psychiatric or psychological abnormality, the CPT only issued one recommendation. It addressed the fact, that during the court's procedure, of reviewing the prisoner's case once a year, most of the prisoners are not represented by a lawyer. The CPT recommended ensuring that prisoners have legal representation (including legal assistance for prisoners who are not in a position to pay for a lawyer themselves.) (In its response the Austrian authorities held, that in addition to the regulation of the Execution of Sentences Act (*Strafvollzugsgesetz*), the court also has to apply the procedural regulations of the Criminal Procedure Code (*Strafprozessordnung*), including the regulation on legal aid. According to Sec 41 para 3 of the Criminal Procedure Code legal aid has to be awarded, if it is deemed to be necessary in the interests of the administration of Justice.)

The third periodic state report of Austria on the implementation of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was submitted on 4 March 2005.⁵⁶ The report was considered by the Committee at its 679th and 680th meetings, held on 16 and 17 November 2005, and adopted, at its 691st meeting, held on 24 November 2005 its conclusion and recommendations.⁵⁷

The report of Austria had been due in 2000, but was only submitted on 30 June 2003. The information provided is therefore to a large extent outdated or not relevant to the reporting period 2005. Of note and also subject to criticism by the Committee is that Austria has still not implemented the definition of torture as provided for under Art. 1 of the Convention explicitly into the Austrian legal order, in concreto into the Austrian Criminal Code. Furthermore the Austrian Government refrained from providing the Committee with statistics in numerous areas or appropriately disaggregating those supplied, e.g. in respect of cases of the rejection of extradition requests due to fear of torture, cases of the expulsion of foreigners and countries to which asylum seekers have been returned. **Furthermore the Committee expressed its concerns about the lack of prompt investigation into certain cases of torture and ill-treatment committed by law-enforcement officials, as well as about the penalties imposed on the perpetrators, in particular with reference to the case of Cheibani Wague.**

⁵⁶ Third state party report on Austria of 30 June, 2003, CAT/C/34Add.18.

⁵⁷ CAT/C/AUT/CO/3/CPR.1.

Legislative initiatives, national case law and practices of national authorities

Although the **law, providing for the Protection from Domestic Violence**⁵⁸ (*Gewaltschutzgesetz*) is often referred to as a good working model in the international context and was well applied by the police (during the period 1 May 1997 until September 2005, the Federal Office of Criminal Investigations registered 37.600 occupation orders⁵⁹), major deficiencies exist with regards to the judiciary. A study carried out by the Institute for Conflict Research (*Institut für Konfliktforschung*), published this year shows that many criminal proceedings relating to domestic violence were discontinued⁶⁰: 50 percent of allegations of bodily harm and up to 60 percent of allegations of threatening behaviour (*gefährliche Drohung*) did not lead to criminal proceedings. This was partly due to the refusal of the victims to give evidence or the victims not consenting to the public prosecutor pressing charges in cases of threatening behaviour; but in a considerable number of cases, the public prosecutor deemed the evidence as insufficient to start criminal proceedings. Dangerous threats were qualified as expressions of resentments related to the milieu the person was coming from and were therefore not punishable. One in three complaints of bodily harm was settled by diversion. The option of sending offenders on trainings to help them deal with their aggression was barely used.⁶¹

Due to the new Styrian **Protection from Domestic Violence Act which governs institutions that provide help for the victims of domestic violence**⁶² (*Steiermärkisches Gewaltschutzeinrichtungsgesetz - StGschEG*) and budgetary cuts the two women's refuges in Styria are facing great difficulties in carrying out their work. The law obliges the women, seeking refuge to give their name, the name of the aggressor and to explain the circumstances around which the incident took place. This puts them under enormous pressure considering they have just experienced a traumatic situation.⁶³

The Minister of Justice, Karin Gastinger and the Minister of Health and Women, Maria Rauch Kallat together with the Minister for Education, Science and Culture, the Minister of Foreign Affairs, the Minister of Social Security, Generations and Consumer Protection, the Minister of the Interior in collaboration with NGOs formulated a **package of measures against "violence caused by tradition" (traditionsbedingte Gewalt)**: The Ministry of Justice presented a draft amendment of the Criminal Code in regard of forced marriages and threatening behaviour within the domestic circle. Up to now threatening behaviour could only be prosecuted, if the victim authorized the public prosecutor to press charges; forced marriages were only punishable if the victim consented to the prosecution. (for further information please refer to Art. 9) The improvements of the rights of victims of crimes in general will be better safeguarded, when an amendment to the Criminal Procedure Code comes into force in January 2006.⁶⁴ Victims of crimes will then have the explicit right of free access to legal and psychosocial counselling. They will also have as well access to the records

⁵⁸ Bundesgesetz über Änderungen des allgemeinen bürgerlichen Gesetzbuchs, der Exekutionsordnung und des Sicherheitspolizeigesetzes (Bundesgesetz zum Schutz vor Gewalt in der Familie - GeSchG), Federal Law Gazette (BGBl.) 759/1996.

⁵⁹ In *die.Standard.at* of 30.09.2005.

⁶⁰ Subject of the study were the so-called „diaries“ of the public prosecutor's offices in the period between January until June 2001.

⁶¹ „Schutz vor Gewalt in der Familie – Das österreichische Gewaltschutzgesetz“ by Albin Dearing, *Birgitt Haller*, 2005, p. 339.

⁶² Gesetz vom 16. November 2004 über die Gewährung von Hilfe in Frauenschutz und Kinderschutzeinrichtungen sowie durch täterbezogene Intervention, Law Gazette of Styria (LGBl.) No. 17/2005.

⁶³ „Steirische Frauenhäuser in der doppelten Krise“ in *dieStandard.at* of September 27, 2005

⁶⁴ Bundesgesetz mit dem die Strafprozessordnung 1975, das Staatsanwaltschaftsgesetz und das Tilgungsgesetz geändert werden, Federal Law Gazette (BGBl.) 119/2005.

and have a right to be informed about the development of the procedures (For further information please refer to Art. 47). The other ministries want to include the topic of female circumcision in the curriculum for paediatricians and gynaecologists. Other proposals include the offer of emergency shelter for young women and girls who are threatened with being forced into marriage, to install an anonymous database containing cases of female genital mutilations and forced marriage in order to get a clearer picture of the problem. Furthermore, it was proposed to sensitise street workers, youth organisations, and other institutions about this topic and to design an extracurricular, mobile workshop for juveniles.⁶⁵

In June 2005 the **first Information Centre on Female Genital Mutilation** was opened in Vienna. The centre called, "Bright Future" is run by the association of African Women's Organisations of Vienna (*Afrikanische Frauenorganisationen Wien – AFO*). The municipality of Vienna gave funding of €60,000 to the centre in 2005. Bright Future offers counselling, if possible in the native language, as well as gynaecological examinations to girls and young women. Furthermore the Centre is engaged in information activities addressing in particular families, coming from countries where FGM is traditionally practised and health personal.⁶⁶

Performing FGM is punishable under Sec 85 Criminal Code - grievous bodily harm with lasting consequences (*schwere Körperverletzung mit Dauerfolgen*). Since 2001 Sec 90 para 3 of the Criminal Code explicitly holds that consenting to the performance of FGM is not possible. According to a study carried out by AFO in 2000, approximately 8000 circumcised women are living in Austria. **In the survey of 200 migrants, one third of the people interviewed indicated that they have already circumcised their daughter or planned to do so.** The survey also showed that the fact that FGM is forbidden in Austria is generally known. Most of the families therefore take their daughters to Africa for this purpose. Only in a very small percentage of the cases FGM was carried out in Austria or in other countries in the European Union.⁶⁷ Nevertheless Sepp Leodolter, an Austrian gynaecologist and a member of UNICEF, believes that the current legal situation is not good enough and argues that an obligation for doctors to report to the police should be introduced, if parents ask a doctor to perform FGM on their daughter. The opposition parties have called for including FGM as a reason for granting asylum.⁶⁸

Reasons for concern

Allegations of inhuman treatment of recruits during kidnapping simulations in several army barracks became public at the end of last year.

After similar allegations in Germany became public, a former recruit of the Austrian Federal Army published a video showing acts of inhumane treatment during kidnapping simulations in a military barracks in Freistadt in Upper Austria. The video, recorded in 2003, shows instructors pulling plastic bags over the heads of 80 recruits and forcing them to enter a truck. They were then driven to a compost heap, where still blindfolded, they had to crawl through the mud. Those, who were not quick enough, were dragged along the ground by the instructor, simulating the kidnappers. Later they poured mineral water over the soldiers to make them believe they were being urinated on. The sound of screaming was supposed to give them the impression that one of them was being beaten. Afterwards similar incidents that

⁶⁵ „Gesetz zur Zwangsehe soll geändert werden“ in *dieStandard.at* of September 30, 2005; paper on "Maßnahmen gegen traditionsbedingte Gewalt gegen Frauen in Österreich" forwarded by the Ministry for Health and Women on September 13, 2005.

⁶⁶ „Erste Beratungsstelle für FGM und Frauen in Österreich“ of 26.06.2005 available at wien.web.at (22.11.05).

⁶⁷ Studie zu Weiblichen Genitalverstümmelung in Österreich of October 2000 available at www.stopfgm.net (22.11.05).

⁶⁸ „im Namen der Reinheit“ in *Falter* No. 26/05.

had occurred in other barracks in Tyrol and Vorarlberg and Upper Austria came to the public attention. As it turned out later, the recruits had given their consent to take part in the latter simulations and were given the option of opting out, in which case they had to use a code word. In reaction to the so-called “Bundesheer Affaire”, two high ranking civil servants, responsible for the training of recruits have been transferred to different posts. The public prosecutor opened criminal proceedings against 14 people, but the charges were later dropped. Disciplinary measures were imposed on four instructors, all involved in the incidents in Freistadt, but were still open to appeal at the end of October.⁶⁹ Pursuant to media coverage the Federal Armed Forces Appeals Commission (*Bundesheerbeschwerdekommision*) classified the incidents as violating human dignity.⁷⁰ The Commission failed to provide confirmation as to whether this information is totally correct.

Article 5. Prohibition of slavery and forced labour

Trafficking in human beings

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In 2004 the criminal offence of “**human trafficking**” was introduced in Sec 104 a Austrian Criminal Code. Prior to this Sec 217 of the Criminal Code had only prohibited transborder trafficking for the purpose of prostitution (*Grenzüberschreitender Prostitutionshandel*). The new offence, laid down in Sec 104a of the Criminal Code prohibits the trafficking of human beings for the purposes of sexual exploitation, the removal of organs or the exploitation of manpower.⁷¹ The Austrian security report 2004, published in summer 2005 for the year 2004 refers to 238 cases which were investigated under Sec 104a of the Criminal Code and 165 cases under Sec 217 of the Criminal Code.⁷² According to the Minister of Interior 353 women were victims of human trafficking in 2004.⁷³ Nevertheless criminal convictions are rare. Often women are too scared to testify as the traffickers have access to their new address which is contained in the case file. If they do not have a visa, they run the risk of being deported and having to pay an administrative fine for “illegal prostitution”⁷⁴. Others who have visas and temporary work permits as dancers are legally dependent on their employers due to the fact that the work permit is issued for a specific employment.

While the authorities are very active in the fight against those suspected of human trafficking, they seem more reluctant to pursue the clients of women subject to trafficking. (The Viennese weekly magazine the *Falter* reported in issue 34/05 two cases of human trafficking in which the traffickers were convicted, while the clients, some of them well regarded members of the Austrian establishment, were not even prosecuted. In reaction to this report, the Ministry of Justice demanded the competent office of the public prosecutor to reopen criminal investigations.). According to Sec 207b sec 3 of the Criminal Code clients of juvenile prostitutes can only be convicted if the public prosecutor succeeds in proving that the clients had a reasonable belief that the women were under 18.

⁶⁹ Information provided by the Ministry of Defence on 07.11.2005.

⁷⁰ „Heeres-Affäre: Freistädter Verfahren eingestellt“ available at *ViennaOnline* of 22.08.2005, available at: www.vienna.at (30.10.05).

⁷¹ See as well report on the situation of fundamental rights in Austria 2004, p. 27.

⁷² Sicherheitsbericht 2004, Statistik und Analyse.p.2.

⁷³ Anfragebeantwortung of the Minister of Interior, Liese Prokop of November 18, 2005, XXII.GP-NR3393/AB.

⁷⁴ „Einfach Hinklatschen“, *Falter* No. 34/05.

Positive aspects

Due to the need for a multidisciplinary approach in regard to preventive, repressive and coordinating measures in the fight against trafficking, an inter-ministerial working group on human trafficking was set up in 2003. By the end of 2004 this group was converted into a permanent “**human trafficking task force**”. Permanent members of this group include the Ministry for Foreign Affairs, the Ministry for Health and Women, the Ministry of Justice, The Ministry of Interior, the Ministry for Social Security, Generations and Consumer protection, the Ministry of Economics and Labour and the Centre for Intervention of Victims of Trafficking of women of the NGO LEFÖ. This task force deals with issues such as information exchange, international development, participation in conferences and multilateral negotiations, the elaboration of position papers and opinions about Austria’s role in the fight against human trafficking. It also handles individual cases of human trafficking especially when it comes to the protection of victims in a harmonized way.

One positive step in the right direction is the **amendment of the regulations regarding residence visas for humanitarian reasons in the new Settlement and Residence Act**⁷⁵ (*Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich – NAG*). The law now provides for the issue of residence permits for witnesses and victims of trafficking for the duration of the criminal and civil procedures for a minimum period of 6 months. Regrettably the legislator has refrained from entitling these persons to such a visa or to give them the right to appeal in case of rejection.

Reasons for concern

LEFÖ, an NGO that counsels, trains and coaches female migrants, inter alia, victims of trafficking is facing serious financial problems. Due to a lack of public funding, it has had to considerably reduce its services in the areas of education, public relations and coordination.

Protection of the child

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The **UN Committee on the Rights of the Child** noted in reaction to the second periodic report of Austria in regard to economic exploitation and child labour that Austria had ratified the ILO – Convention 138 concerning Minimum Age for Admission to Employment, but kept at the same time concerned that Austrian law still permits children **from the age of 12 to be engaged in light work**. Concerning sexual exploitation, pornography and trafficking the Committee welcomed “The State party’s efforts in addressing the issue of sexual abuse and child pornography, such as the National Plan of Action of 1998 against Sexual Abuse and Child Pornography on the Internet and the training of police and other professionals.” It also noted the Criminal Law Amendment Act of 2004, which contains a new regulation on trafficking in human beings”.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In July, the Austrian Federation of Trade Unions (*Österreichischer Gewerkschaftsbund*) made public a **case, which comes close to the definition of, “modern slavery”**. An Austrian Company, S.S.U Montage und Demontage GmbH, located in Linz, had contracted 150

⁷⁵ Federal Law Gazette (BGBl.) I 100/2005. „kj“

Indonesian and Korean workers to take part in disassembling work. The labour market service (*Arbeitsmarktservice*) issued work permits (*Entsendbewilligungen*) on the basis of a contract between S.S.U. and an Indonesian Company, the latter responsible for paying the salary of the workers. The Labour Inspectorate investigating, the case discovered that the workers had to work a minimum of 63 hours each week for a salary of € 1.30 per hour.⁷⁶ The accommodation provided by S.S.U was described as catastrophic. The workers lived and slept, cramped together, in an old workshop. The conditions of the sleeping rooms, the kitchen area and of the washing facilities were described as degrading.

Pursuant to the response of the Ministry of Economics and Labour to a parliamentary inquiry of 26 August 2005 proceedings concerning the withdrawal of working permits have been launched. The workers were relocated in private accommodation.⁷⁷

⁷⁶ Anfrage an den Bundesminister für Finanzen betreffend „Moderne Sklavenarbeit“ der Firma S.S.U Montage und Demonatge GmbH“ of July 7, 2005, 3263/J XXII.GP.

⁷⁷ Anfragebeantwortung des BM für Wirtschaft und Arbeit of August 26, 2005,3175/AB XXII.GP.

CHAPTER II. FREEDOMS

Article 6. Right to liberty and security

Deprivation of liberty for juvenile offenders

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Read as well under Art 4 - Prohibition of torture and inhuman or degrading treatment or punishment

Deprivation of liberty for foreigners

Legislative initiatives, national case law and practices of national authorities

In July 2005 the Austrian Peoples Party (ÖVP), the Freedom Party (FPÖ) and the Social Democratic Party (SPÖ), approved the new “Aliens Law Codification” (*Fremdenrechts paket*), which introduced, inter alia, the new Asylum Act, the Settlement and Residence Act and the Aliens Police Act (which enter into force in January 2006).⁷⁸

The proposal, presented in April, had been met with a lot of resistance regarding certain provisions, which raised severe concerns about their accordance with human rights law. Even after its revision and adoption, several regulations provide reason for concern. The Act's structure separates areas which had previously been amalgamated under the Aliens Act 1997.

The title “Aliens Police Act” corresponds to its content, expanding the powers of the police and introducing several criminal offences in regard to unlawful immigration. As appeared originally, in the ministerial draft, the detention of foreigners pending deportation could have been upheld for an unlimited time. After severe criticism, inter alia, by the Human Rights Advisory Board, which qualified this measure as interfering disproportionately with the right to personal liberty, the Ministry revised the relevant regulation. While the provision in the “old” Aliens Act allowed for a maximum period of detention of 6 months within a 2 year period, detention can now be prolonged for a maximum period of 10 months in two years given that the following conditions apply: (a) the aliens cannot be deported because their citizenship or identity remains unknown, or (b) because permission for their entry or transit into or through another state has been refused or (c) because they prevent their deportation. As a condition for all three cases the alien must have impeded the deportation.⁷⁹ The same applies to asylum seekers or persons having applied for international protection, if an enforceable deportation order (*Ausweisung*) is issued, if the authority started deportation proceedings pursuant to the Asylum Act 2005, if a residence ban (*Aufenthaltsverbot*) or a deportation order had already been issued prior to the alien applying for international protection, or if pursuant to certain investigations it can be assumed that the application of the alien for international protection will be rejected due to the lack of competence of Austria.

⁷⁸ Bundesgesetz, mit dem das Bundes-Verfassungsgesetz geändert wird, ein Asylgesetz 2005, ein Fremdenpolizeigesetz 2005 und ein Niederlassungs- und Aufenthaltsgesetz erlassen, das Bundesbetreuungsgesetz, das Personenstandsgesetz, das Bundesgesetz über den unabhängigen Bundesasylsenat, das Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 1991, das Sicherheitspolizeigesetz, das Gebührengesetz 1957, das Familienlastenausgleichsgesetz 1967, das Kinderbetreuungsgeldgesetz und das Tilgungsgesetz 1972 geändert werden sowie das Fremdenengesetz 1997 aufgehoben wird (Fremdenrechtspaket 2005), Federal Law Gazette (BGBl.) 100/2005.

⁷⁹ Art 80 Abs 4 FPG.

The new provisions for the detention of asylum-seekers with a view to their deportation will extend the maximum duration of the detention period from six months to ten months and also broaden the grounds for such detention. According to section 80(4) last sentence Aliens Police Act 2005 (*Fremdenpolizeigesetz – FPG*), an asylum-seeker can be detained longer than six months but not longer than ten months within a period of two years if he or she cannot be deported because his or her identity cannot be determined or a necessary visa to be issued by another state could not be obtained or the person defeats the deportation by physical resistance. On the other hand the grounds for detention have been increased and will now enable most notably the detention of a person having applied for asylum or subsidiary protection if during the admission proceedings the aliens police can assume that the application will be rejected by the asylum authority for lack of jurisdiction, in particular due to the Dublin Regulation (section 76(2)4 Aliens Police Act). It appears that the aliens police could either base their decision on a respective procedural note by the Federal Asylum authority (section 29 para. 3 Asylum Act 2005), in which it has stated that it intends to reject the application, or merely on the results of the first interrogation, body search and the taking of fingerprints. According to section 76(2)2 Aliens Police Act in connection with section 27(2) and (3) Asylum Act, the aliens police will also have the power to detain an asylum-seeker whose application will likely be rejected or dismissed and against whom the asylum authority has instituted accelerated deportation proceedings because he or she was convicted by a criminal court for a deliberately committed offence, irrespective of its severity and the sentence passed, or indicted by the public prosecutor for being suspected of having committed a crime.

Given that more and more **detained asylum-seekers** were going **on hunger-strike**⁸⁰ in order to force their release for reasons of health, the drafters of the Aliens Law Codification 2005 (*Fremdenrechtspaket 2005*) included a provision that would have expressly authorised the aliens police to force-feed detainees pending deportation. During the consultation process before the Asylum Act was introduced to Parliament this issue of **force-feeding** initiated a heated public debate. Various media commentators, NGOs, human rights experts and politicians of the Greens as well as some members of the Social Democrats, which were in principle in favour of the draft asylum legislation, criticised this provision for being an unproportionate interference with the right to private life and for demanding from physicians to carry out unsolicited medical treatment, thereby bringing them into a possible conflict with both the criminal law and their conscience. Whereas this draft provision did eventually not become law, the Government Bill, which at its face had apparently abandoned this concept, re-introduced it at least to some extent and widely unnoticed by the public at large. In fact, section 79(1) Aliens Police Act refers to section 53d Administrative Offences Act (*Verwaltungsstrafgesetz - VStG*) which in turn generally refers to the Enforcement of Sentences Act (*Strafvollzugsgesetz - StVG*) which contains a provision in section 69 which allows for detained persons to be force-fed. Hence it would be possible under this legal construction to transfer a detained asylum-seeker on hunger strike into the custody of a judicial penal institution where he or she could then be legally subjected to force-feeding under the supervision of a physician. In Austrian law the possibility to force-feed a convicted and imprisoned criminal is long established but has never been exercised in practice.

Reasons for concern

In view of the new regulations for the detention of asylum-seekers, four major concerns have arisen, namely the empowerment of the aliens police to detain asylum-seekers with a negative

⁸⁰ See „Zwangsernährung bei Verbrechern sinnvoll“ in *Die Presse* of 23 May 2005, which states that one in ten of the 9041 persons detained in Austria in 2004 went on hunger strike in order to be released; Minister of the Interior Liese Prokop in an interview for *Die Presse* of 6 July 2005 saying that in 2004 a number of 1072 persons were early-released because of hunger strike.

prognosis regarding their application during the admission proceedings, the possibility to institute accelerated deportation proceedings when the asylum-seeker is indicted by the public prosecutor, and the possibility to carry out force-feeding on asylum-seekers on hunger strike when they are moved to a penal institution, and the possibility to detain children and unaccompanied minors pending deportation. In particular, the Austrian law on the detention of asylum-seekers does not appear to be complying with international standards established by the UNHCR.⁸¹

The Ludwig Boltzmann Institute of Human Rights has expressed its concerns about the draft law and highlighted among other issues that it will be possible for the aliens police to detain a person even prior to a negative decision at first instance. Hence anyone can be detained whose application for international protection is likely to be rejected or dismissed following a procedural notice to that end issued by the Federal Asylum Authority during the admissibility proceedings (section 29 para. 3 Asylum Act 2005). This procedural notice is not subject to a separate appeal even though it may result in the detention of the concerned asylum-seeker (section 76 para 2 Aliens Police Act). It appears that such far-reaching authorisation for the police to detain an asylum-seeker merely on the basis of a first and preliminary prognosis on the outcome of the proceedings and before deportation proceedings are instituted or even a negative decision on the application is taken at first instance would violate Articles 5(1)f and 13 ECHR.

The second concern centres on the interference, if not infringement, of the principle of proportionality and the presumption of innocence by the provisions permitting the Federal Asylum Office to commence accelerated deportation proceedings at any stage of the asylum proceedings, provided that there is a negative prognosis based on the facts which could be established so far, and the person concerned has either been convicted by a court of law for a deliberately committed criminal offence or indicted by the public prosecutor for allegedly having committed a crime. While the first ground can be questioned for it does not distinguish on the severity of the committed offence and thereby might affect persons having committed a petty crime in the same way as professional criminals, the second ground is problematic not only for reasons of proportionality but also for its interference with the presumption of innocence. Any suspicion about a criminal involvement of an asylum-seeker could put him or her at a very real risk of being detained.

Exercising force-feeding on asylum-seekers on hunger strike seriously interferes with the right to personal life as protected by Article 8 ECHR. It is particularly doubtful if such measure would stand the proportionality test in order to be legally justified, as it amounts to a medical treatment against the will of the patient who is regularly no dangerous criminal but only happened to apply for asylum in Austria with little prospect for success.

Taking together the tightened provisions, there is thus a serious concern that in the future more asylum-seekers including children will end up in police detention, even though the total number of applications for international protection is likely to decrease further.

Legislative initiatives, national case law and practices of national authorities

Paragraph 36a of the newly amended Security Police Act (*Sicherheitspolizeigesetz*) entered into force on 1 January 2005⁸², allows for the installation of so-called

⁸¹ Cf. 1999 UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers; UNHCR Executive Committee, Conclusion No. 44 (XXXVII) of 1986, Detention of Refugees and Asylum-seekers; 1997 UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Minors Seeking Asylum.

⁸² Federal Law Gazette (BGBl) 566/1991 idF BGBl. 151/2004.

“Protection zones” particularly around schools, kindergartens and day care centres, where minors might be affected by crimes such as drug dealing.

The zone covers the object of security, i.e. the school and the surrounding area, to a radius of a maximum of 150 meters. The zone is established by decree for a specific period of time and must be revoked, if there is no potential security threat anymore. Inside these protection zones the police can request any persons, who they suspect to commit a crime at an unspecified time in the future, to leave the protection zone and can issue an injunction preventing the suspect from re-entering the zone for a certain period. The issuing of such an injunction must be reported to the relevant authorities, who then have to review the decision within 48 hours. If the conditions for the granting of the injunction no longer apply, the authority has to inform the person affected. The injunction lasts for thirty days unless it is extended. According to the Ministry of Interior there are currently five “protection zones” established in Austria, one in Vienna and 4 in Lower Austria.⁸³

The concept of “protection zones” provides some reasons for concern. The law is very generally drafted, when it comes to defining the places, where “protection zones” may be set up, not even limiting their establishment to public property. According to the wording of the law, theoretically, even shop owners could demand the establishment of a “protection zone” around their place of business.⁸⁴ Hence the first experience with a “protection zone”, which had been established around a school in Vienna’s Karlsplatz, resulted in moving the drug scene to the neighbouring subway station and shopping passage, which led to conflicts arising with shop owners and pedestrians due to the more restricted space.⁸⁵ Furthermore, it gives a broad authority to police officers, in assessing, whom they suspect of committing a crime, which in turn leads to a high risk that discriminatory decisions will be made. Therefore it is at least positive to note that all such decisions will be reviewed, ex officio by the relevant authority, which should restrict the danger of the provision’s misuse.

The concept of the establishment of “protection zones” will be expanded in regard to the preparations for the European Soccer Championship in 2008 by another amendment to the Security Police Act, already presented as a draft by the Ministry of Interior.⁸⁶ According to the draft “protection zones” may be established within a radius of 500 meters around soccer stadiums. In contrast to the provision in Sec 36 a of the Security Police Act, the draft amendment does not provide for an ex officio review of the decision to expel a person from the protection zone.

Article 7. Respect for private and family life

Private life

Criminal investigations and the use of special or particular methods of inquiry or research

In regard to video surveillance please see Art. 8 – protection of personal data.

⁸³ Information provided by Wolfgang Glaninger, department II/1/A of the Ministry of Interior on November 23, 2005.

⁸⁴ Stellungnahme der ARGE Daten, available at <http://www.argedaten.at/news/20040510.html> (03.11.05).

⁸⁵ „70 Euro für „unbegründetes Stehenbleiben““ of March 24, 2005 in *Standard online* (03.11.05)

⁸⁶ Entwurf für ein Bundesgesetz, mit dem das Sicherheitspolizeigesetz geändert wird (SPG – Novelle 2006), available at the Ministry of Interior’s website, <http://www.bmi.gv.at/begutachtungen> (03.11.05).

Legislative initiatives, national case law and practices of national authorities

On 1 January the Austrian Administrative Court (*Verwaltungsgerichtshof*) overruled the decision of the Independent Administrative Tribunal of Vorarlberg concerning a search warrant owing to the illegal violation of procedural regulations. In the case of one applicant the Court further annulled the decision of the Tribunal on material grounds.⁸⁷

The applicants were suspected of cultivating cannabis in an Austrian forest. Therefore, the investigating judge authorised a search warrant for the applicants' premises, with the limitation that the applicants should first be asked if they would agree to a voluntary inspection. As a result three police officers went to the apartment of the suspects. After they entered the premises, they told the applicants the reason for their visit without further explanation. The applicants agreed to a voluntary inspection because they were told that a search warrant had been granted anyway. The police found cannabis and also weapons and ammunition. The applicants were taken to the nearest police station, where the police questioned them without informing one of them of his right to consult with a person he trusted or his lawyer. At the Independent Administrative Tribunal (*Unabhängiger Verwaltungssenat – UVS*) the applicants argued that a valid search warrant had never been authorised and that one of them had not been informed of his right to legal advice. The Independent Administrative Tribunal held in its decision that a search warrant for the premises had been authorised (*Hausdurchsuchungsbefehl*) and negated the existence of the right to a lawyer or a person of trust in the context of the house search. The Administrative Court overturned the decision of the UVS, holding that the UVS had failed to establish that a valid search warrant for the premises had existed and that the applicant had a right to be informed about their right to consult a lawyer during the house search, independent of whether the house search was undertaken voluntarily or on the basis of the decision of the investigating judge.

Voluntary termination of pregnancy*Legislative initiatives, national case law and practices of national authorities*

Due to the increasingly radical behaviour of anti-abortion activists, towards women wanting to enter the abortion clinic in the first district of Vienna, the Viennese Council adopted an amendment to the Viennese Security Act⁸⁸ (*Wiener Landes Sicherheitsgesetz*) allowing the police to order such activists to either stop protesting or to leave the area.⁸⁹ These activists have, repeatedly, verbally assaulted the women visiting the clinic by calling them, "murderers" and have also forced plastic embryos upon them. (Please see also Article 12.)

Other relevant developments*Legislative initiatives, national case law and practices of national authorities*

The Administrative Court held in its judgement of 21 June 2005, that prisoners have, under certain conditions, the human right to family life, including a sex life, if suitable accommodation is available at the relevant institution.

The judgement was based on the application of an inmate serving a life sentence in the prison of Graz – Karlau, who had applied for permission to have sexual intercourse with his wife while still in custody. The Ministry of Justice upheld the decision of the head of the penal institution, that neither the Execution of Sentences Act (*Strafvollzugsgesetz*) nor the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides for the right to sexual intercourse

⁸⁷ VwGH 28.01.2005, 2004/01/0250.

⁸⁸ Provincial Law Gazette of Vienna (LGBL) 35/2005.

⁸⁹ "Schutz vor radikalen Abtreibungsgegnern" in *Die Presse* of April 30, 2005.

with a spouse whilst still in custody. The Administrative Court reasoned in its decision that, in comparison to the old wording of the Execution of Sentences Act, which expressly restricted visitation rights to only “verbal contact”, the wording introduced by amendment 1993 does not provide for such a restriction. According to an interview given to *Der Standard* by Dr. Neider, head of the competent section of the Ministry of Justice, the Ministry is currently working on plans for how to better accommodate family life in prisons in general. The plan is for inmates to have the right to receive conjugal visits for a length of between 24 to 36 hours. For this purpose the Ministry is currently evaluating the models used in Spain, Switzerland and the Scandinavian countries where the right to conjugal visits already exists.⁹⁰

Within the framework of the Aliens Law Codification 2005 (*Fremdenrechtspaket*), the powers of the police authorities have been broadly extended by the Aliens Police Act (*Fremdenpolizeigesetz - FPG*), interfering inter alia with the right to private and family life.

According to Sec 34 of the Act the police officials are authorized to confirm the identity (*Identitätsfeststellung*) of a person if they believe, on the basis of specific facts, that the person entered into or is residing illegally in Austria, that an arrest warrant (Sec 74 FPG) for the person has been issued or if they believe that the person is residing outside of the territory his/her residence has been restricted to. The affected person is obliged to cooperate and tolerate the confirmation of identity. Furthermore the police are authorized to enter plots of land, rooms, work places and vehicles under the following conditions: if the relevant authority has issued a search warrant (Sec 75 FPG), for the purpose of finding people who have been trafficked or have breached provisions on prostitution, with the suspicion that at least 5 people are present including illegal aliens or with the suspicion that people can be found illegally residing and working at the place (Sec 36 para 1 FPG.). According to Sec 38 they are further authorized to search people, if they have been arrested (under the Aliens Police Act), if they are suspected of residing illegally in Austria and having objects on them which are relevant for their deportation, their transit, or their refusal of entry at the border. Further competences are to arrest (Sec 39), safe-keep evidence (Sec 38), to request information (Sec 33), to prevent aliens from entering Austrian territory (Sec 41) or to force aliens to return to the country they entered from (Sec 43).

Reasons for concern

The Aliens Police Act is based on the assumption that aliens in principle constitute a danger of the public security.

During the consultation phase the expanded competences in the Aliens Police Act, which were partially taken from the Security Police Act and the Criminal Procedure Act gave rise to severe criticism of various institutions and organisations, e.g the Human Rights Advisory Board, Amnesty International, SOS Mitmensch, the Ludwig Boltzmann Institute of Human Rights, the Austrian bar association and others, in regard to their broad interference with, inter alia, the rights to personal liberty, privacy and non-discrimination. The Constitutional Service of the Federal Chancellery (*Verfassungsdienst - VD*) was of the opinion that the draft version of Sec 35 (the new Sec 34) was too broadly drafted, allowing the police to establish the identity of suspected aliens, more or less, whenever they want to.⁹¹ In the revised draft these concerns are to some extent still legitimate. The broad discretion of the authority entails the danger that the police bases its suspicion, necessary to establishing the identity of a person on ethnic features – a practice which would raise serious concerns in

⁹⁰ „Mehr Familienleben hinter Gittern“ in *Standard* of July 28, 2005.

⁹¹ Stellungnahme des Bundeskanzleramts – Verfassungsdienst zum Entwurf eines Bundesgesetzes mit dem das Asylgesetz 2005 und das Fremdenpolizeigesetz, das UBASG und das EGVG geändert werden of April 15, 2005, 51/SN-259/ME.

regard to the Constitutional Law on the Elimination of all Forms of Racial Discrimination⁹² (*Rassendiskriminierungs – BVG*). The Austrian Constitutional Service also expressed concerns regarding the wording of Sec 37 FPG (the new Sec 36) referring to the jurisprudence of the Austrian Constitutional Court, holding that search warrants have, in general, to be authorized by the decision of a judge with the exception of situations where an imminent danger is perceived. Even if there is an imminent danger, the search of premises by police officers should be at least authorized by the responsible police authority.⁹³

Family life

Protection of family life

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The **UN-Committee of the Rights of the Child** addressed the issues of “privacy” and “family reunification” in its Considerations of the second periodic report of Austria, issued on 31 March 2005. It expressed its concern about the information of children and adolescents and that their **privacy**, for example with regard to personal correspondence, is not fully respected in everyday life. Hence it recommended that Austria “takes necessary measures such as awareness-raising and educational campaigns, to improve the understanding of and respect for the Child’s right to privacy amongst parents and other professionals working for and with the children.” Further it expressed its concern regarding the **length of family reunification procedures** and over the fact that they are restricted via a quota system and that the age limit for children is set at 15 years. In this regard the Committee recommended that “the State Party undertake all measures to ensure that family reunification procedures fully comply with Article 10 of the Convention.”⁹⁴

Right to family reunification

Legislative initiatives, national case law and practices of national authorities

In the framework of the Aliens Law Codification 2005⁹⁵ the provisions regulating the issuance, denial and withdrawal of residence permits have been moved from the former Aliens Act to the new Residence and Settlement Act (*Niederlassungsaufenthaltsgesetz - NAG*). The law provides improvements for the dependants of EEA citizens and third country nationals who wish to join their sponsor⁹⁶ in Austria, whereas dependants of Austrian nationals are discriminated against in comparison to EEA citizens when it comes to their right to family reunification.

The amendments shall transpose, inter-alia, the Directive 2004/48/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the

92 Federal Law Gazette (BGBl.) No. 390/1973

93 VfSlg 1811/1949, 6553/1971; VwGHof November 4, 1998, 93/13/0308.

94 Concluding Observations : Austria of March 31, 2005, CRC/C/15/Add 251, para. 36.

95 Bundesgesetz, mit dem das Bundes-Verfassungsgesetz geändert wird, ein Asylgesetz 2005, ein Fremdenpolizeigesetz 2005 und ein Niederlassungs- und Aufenthaltsgesetz erlassen, das Bundesbetreuungsgesetz, das Personenstandsgesetz, das Bundesgesetz über den unabhängigen Bundesasylsenat, das Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 1991, das Sicherheitspolizeigesetz, das Gebührengesetz 1957, das Familienlastenausgleichsgesetz 1967, das Kinderbetreuungsgeldgesetz und das Tilgungsgesetz 1972 geändert werden sowie das Fremdenengesetz 1997 aufgehoben wird (Fremdenrechtspaket 2005), Federal Law Gazette (BGBl.) 100/2005.

96 sponsor means a person applying or whose family members apply for family reunification to be joined with him/her.

Member States, Directive 2003/86/EC on the right to family reunification, Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, Directive 2004/114/EC on the conditions of admission for third-country nationals for the purposes of study, pupil exchange, unremunerated training or voluntary service and Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

While the Aliens Law legislation was embedded in a new legal framework, the underlying concept remained by and large the same: a double quota system regulates the settlement of third country nationals in Austria on the one hand and the access to the labour market on the other. Implementing Art 8 of Directive 2003/86/EC the NAG now provides for the entitlement of third country nationals to family reunion after three years if the application for a settlement permit had been denied due to the quota being exhausted.

The main provisions on the right to family reunification are to be found in the second part of the NAG. While chapter I regulates, generally speaking, the settlement of third country nationals and their family members in Austria, chapter II includes the provisions on family reunification of sponsors (*Ankerfremde/r*) residing on a permanent basis in Austria (Citizens of Austria, Switzerland and EEA citizens), who have not made use of their right of free movement. While chapter III provides for the settlement of third country nationals, who are long term residents in other member states and of their family members, chapter IV provides for the settlement of EEA citizens making use of their right to freedom of movement and that of their family members.

Third country nationals, being family members of EEA citizens, who have not yet exercised their freedom of movement, receive a quota - free settlement permit. The term “family members” must be understood in a restrictive manner in this context. Only spouses and unmarried and minor children, including adopted children and step-children are covered by this definition. They are excluded from the Aliens Employment Act and have therefore free access to the labour market.⁹⁷ Direct relatives in the ascending line of the sponsor and his/her spouse, if they provided maintenance for them; partners (if they can prove, that they have lived in partnership in the country of origin and that the sponsor has provided maintenance for him/her) and also other dependants of the sponsor, if the sponsor has provided maintenance already in the country of origin and has lived in the same household or those who are in need of personal care through the sponsor are not entitled to settle if they are third country nationals. According to the wording of the law they “may” receive a “settlement permit for dependants“, independently of a quota, but are not entitled to work.

Dependants of EEA citizens, having exercised their freedom of movement and who are themselves EEA citizens are entitled to settle freely according to Sec 52 NAG. The definition of dependants in this context is an extensive one and corresponds with the definition, provided for in Art 2 no. 2 and Art 3 no. 2 of Directive 2004/38/EC. They are obliged to register with the Austrian authorities, who have to subsequently issue a registration certificate.

Dependants of EEA citizens, who are third country nationals, are entitled to reside freely as well. This provision is only applicable to the nuclear family, encompassing the spouses; descendants of the sponsor and his/her spouse, up to the age of 21 or if they provided maintenance for them and dependants in the ascending line of the sponsor or his/her spouse,

⁹⁷ para 1 sec. 2 lit. m Bundesgesetz vom 20. März 1975, mit dem die Beschäftigung von Ausländern geregelt wird (Ausländerbeschäftigungsgesetz - AuslBG) Federal Law Gazette (BGBl) No 218/1975 as last amended by BGBl. 101/2004.

as well with the condition that they provide maintenance for them. The authorities have to issue members of this group a residence card which is valid for 10 years. Family members, like partners and dependants who receive maintenance are not entitled to reside freely, but the authorities “may” grant them a settlement permit as “dependants”, and as such they do not fall under any quota, but have no access to the labour market.

Family reunification for third country nationals, wanting to join the sponsor, who are third country national themselves, fall, generally, under the quota regime. The family concept applied is the narrowest to be found in the NAG. Only the nuclear family (spouses and unmarried minor children including adopted children and step children) can join the sponsor. The concept is further limited excluding spouses, who are when applying, not yet 18 years old. A spouse wanting to join a sponsor already living with another spouse in Austria cannot apply for family reunification (prohibition of family reunification in regard to polygamous marriages). According Sec 46 of the NAG the sponsor themselves must have settled in Austria either as a key-professional or as a private person (having enough capital to maintain themselves) or must hold a “long term EC residence permit”, an “unlimited settlement permit”, a “limited settlement permit”, or have been granted asylum. People who have any other settlement permit must have fulfilled the so-called integration agreement. Family members (except those of private persons) receive a “*limited* settlement permit”, granting them access to the labour market, if they have acquired a work permit in accordance with the Aliens Employment Act (*Ausländerbeschäftigungsgesetz – AuslBG*). After 12 months family members of those sponsors holding a “Long term EC residence permit”, an “unlimited settlement permit” or those that have been granted asylum receive an “unlimited settlement permit” granting them unrestricted access to the labour market. According to Sec 50 NAG family members of third country nationals holding a “long term EC residence permit” (the so-called mobility cases, regulated by Chapter III of Directive 2003/109/EC) and one of the national settlement permits, can apply for a settlement permit. The authorities “may” only issue settlement permits with the same confines of that held by the sponsor.

Family members holding a settlement permit derive their right to settle in Austria from the sponsor for five years. If the sponsor loses his/her right to settle before, the family members lose theirs as well. Only in those cases, provided for by Art 15 para 3 of Directive 2003/86/EC and transposed by Sec 27 para 3 of the NAG, namely, where the sponsor dies, if a divorce occurred due to the predominant guilt of the sponsor or in other specific circumstances e.g. in cases of domestic violence, the family members do not lose their right to reside. Furthermore, the family members do not lose their right to reside if they can prove they have a residence, health insurance covering all risks and that they have sufficient means to subsist according to standard rates for social benefits; family allowance (*Familienbeihilfe*) and children’s allowance (*Kindergeld*) do not count towards this.

Family members of third country nationals, residing only for a limited time and for a specific purpose in Austria, such as artists or scientists may apply for a residence permit, if they have led a family life already in the country of origin. This possibility is not available to family members of students, of posted workers, the self-employed, pupils or persons who carry out social services.

Already introduced into the Aliens Act 2003 was the obligation for certain aliens to fulfil the so-called “**integration agreement**”. Applying for a settlement permit they have been under the obligation demonstrating their conduct of the German language or obliging themselves to bring prove of their linguistic competence within a defined time frame of four years maximum. Due to several exceptions, the number of persons having in fact to fulfil the agreement was rather low. Through the Residence and Settlement Act the amount of required course hours will be stepped up and the exceptions reduced.

Reasons for concern

The NAG does provide for certain improvements, stemming from Austria's obligation to implement several EC directives, but it discriminates against Austrian citizens and their family members by applying a more restrictive definition of family, in comparison to the definition of family for EEA citizens. According to the jurisprudence of the Austrian Constitutional Court, discrimination against Austrian citizens in regard to foreigners is in need of justification by facts.⁹⁸ To prevent the law from being overruled by the Austrian Constitutional Court the Austrian legislator did not draw a difference between Austrian sponsors and other EEA citizens, but between those EEA citizens, who have exercised their right of free movement and those who have not. In general the latter applies mainly to Austrian Citizens who don't exercise their right to free movement. It remains to be seen whether the Constitutional Court will assess this as a violation of the constitutional principle of equal treatment. (for further information please see Art. 45 – Freedom of movement and residence). In comparison to the “old” Aliens Act⁹⁹ (*Fremdengesetz*) dependants of Austrian citizens or of their spouses in the direct ascending line are no longer entitled to join the sponsor. **An aggravation in comparison to para 27 of the Aliens Act was introduced through sec 26 para 1. NAG: While the Aliens Act provided an independent right for family members, having joined the sponsor, to reside in Austria after four years, the NAG only allows this right after five years.** If the sponsor loses his/her settlement permit, the family members lose theirs as well. The authorities do not have to issue any official notification and the person affected has no right to appeal.

During the consultation process the provision in Sec 27 para 3 of the NAG (see above) was heavily criticized by NGOs such as Caritas, Helping Hands Salzburg, Peregrina and Diakonie due to its **negative effects on female migrants** as it could foster the dependence of women on their husbands. NGOs and the Ministry of Health outlined in their opinion to the draft legislation that the exceptions to the principle were drafted too narrowly.¹⁰⁰ In order to establish the sponsor's guilt their wives would be forced to undergo long divorce proceedings, whereas short mutual divorces could have been carried out as well. Furthermore, in divorce proceedings involving spouses without Austrian Citizenship the Aliens Marriage Law often has to be applied, not foreseeing the institute of divorce due to the predominant guilt of one spouse. In reaction to these voices the Ministry of Interior expanded the exception clause to cases of particular circumstances, listing as an example three situations where the exception can be applied. In fact, in the future, it will be up to the authorities to interpret this clause in a broad minded manner. This is particularly relevant bearing in mind that it will be very difficult for young women with children to fulfil the second exception clause which grants them an independent right to settle if they can prove they have sufficient means to subsist according the social benefit standard rates. It is also of concern that Austria does **not grant extra protection to foreign citizens who were born and have grown up in Austria**. While the Aliens Act 1997 prohibited the issuance of a ban on residence in regard to these cases, the Aliens Police Act also provided for the prohibition of a ban on residence but excludes from this prohibition those persons sentenced to more than 2 years in prison, those suspected of being terrorists or of having committed a terrorist act, those who endanger the security of the

⁹⁸ E.g. VfGH 15.12.2004, G 79/04.

⁹⁹ Bundesgesetz über die Einreise, den Aufenthalt und die Niederlassung von Fremden (Fremdengesetz 1997 - FrG), Federal Law Gazette (BGBl.) No. 75/1997 amended by BGBl.151/2004.

¹⁰⁰ see collected opinions to the “Ministerialentwurf betreffend ein Bundesgesetz, mit dem das Niederlassungs- und Aufenthaltsgesetz erlassen wird sowie das Fremdengesetz 1997, das Gebührengesetz 1957, das Familienlastenausgleichsgesetz 1967 und das Kinderbetreuungsgeldgesetz geändert werden“, 266/ME (XXII. GP) at the website of the Austrian Parliament, available at <http://www.parlinkom.gv.at>.

Republic by incitement and those who have publicly given approval to a crime against humanity, a crime against peace or genocide.

Article 8. Protection of personal data

Independent control authority

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

On 5 July 2005 the European Commission launched an **infringement procedure against Austria for having failed to transpose the Data Protection Directive**. According to the Commission the independence of the Austrian Data Protection Commission, which is part of the Federal Chancellery, is not fully guaranteed as outlined in the directive.

Legislative initiatives, national case law and practices of national authorities

In August the **Commission on Data Protection** issued a report, which had been due since January 2004, on its activities covering the period January 2002 to June 2005. In its report the Commission acknowledged the **lack of personnel** as being one of the major problems in efficiently fulfilling its mandate. Given the shortage of personnel the Commission is presently not able to conduct control functions on its own initiative but only in response to complaints and applications¹⁰¹. In regard to the number of people employed at the Data Protection Authorities in relation to the population, Austria ranks only 24th out of a total of 31 European states¹⁰². ARGE Data, an NGO active in the field of data protection, made the criticism that due to the lack of human resources the Commission would regularly base its decisions on written information only. Complainants often lack access to the processed data of companies or public authorities and would therefore often not be in the position to provide the relevant proof¹⁰³.

The number of complaints launched at the Commission has progressively increased during the last three years. In 2004, the number of unsettled complaints older than 6 months reached a peak which resulted in disproportionately high number of negligence actions (*Säumnisbeschwerde*) submitted to the Administrative Court. In 2005, the Commission was able to reduce the backlog and increase the number of settled cases.

Protection of personal data

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Legislative initiatives, national case law and practices of national authorities

The Austrian Government generally supports the **British proposal to extend the recording of telephone and e-mail data**. Given that this data, amongst other things, enables the police to trace the physical movements of people from one place to another, these proposals have been criticised by the Constitutional Service of the Federal Chancellery - (*Verfassungsdienst*)

¹⁰¹ Datenschutzbericht 2005, of August 2005, p. 13, available at: <http://www.dsk.gv.at/Datenschutzbericht2005.pdf> (02.11.2005)

¹⁰² Datenschutzbericht 2005, of August 2005, p. 12, available at: <http://www.dsk.gv.at/Datenschutzbericht2005.pdf> (02.11.2005)

¹⁰³ “Unzureichender Datenschutz: EU-Vertragsverletzungsverfahren gegen Österreich”, ARGE Daten, August 11, 2005.

as well as by members of the Green Party and academics¹⁰⁴. Currently the storing of telephone data is generally only permitted for a maximum period of 6 months. The storing of e-mail data is generally forbidden. The Data Protection Council, which acts as advisory body at federal and local level in political matters of data protection, clearly rejected the proposed retention of data processed in connection with the provision of public electronic communication services as a disproportionate measure which is incompatible with Art 8 ECHR and the Austrian Federal Act on the Protection of Data¹⁰⁵.

Pursuant to the report of the Commission on Data Protection the main reasons for infringements of the right to secrecy, rectification and erasure of data were due to bad organisational structures, inaction and lack of information about the legal situation on behalf of companies.¹⁰⁶

The number of **complaints regarding data processed by the security authorities** has slightly increased since 2002, amounting to 19 in 2004. Upon the refusal of a District Administrative Authority (*Bezirkshauptmannschaft*) to delete the personal data of a prior suspect under the, now unconstitutional, penal provision sec 209¹⁰⁷, the Commission released a decision in favour of the complainant and ordered the deletion of the relevant data.¹⁰⁸ Due to the limited scope of the Data Protection Act, the Commission made no decision about the deletion of paper files kept by police authorities.

In 2005, under the ambit of the newly amended Security Police Act (*Sicherheitspolizeigesetz*), which entered into force on 1 January 2005, seven public spaces i.a. in Vienna, Graz and Innsbruck have been put under **video surveillance by the police**. The recorded data is automatically deleted if no suspicious incidents are recorded. On 6 August 2005, the Vienna Transport Authority (*Wiener Linien*) installed cameras in four trains with the aim of preventing crime and vandalism. The fact that video surveillance is being used is indicated at the train entrances. The Data Protection Commission approved this **video surveillance in public transport** for a one-year test period, while determining that data transfer at the request of the police is generally not permitted¹⁰⁹. Only in cases of vandalism or serious crime is the transfer of data to the police authorities authorised by the Commission's decision. In order to assess the adequacy of video surveillance, the Commission ordered the Vienna Transport Authority to record all incidents which are detected via the use of video surveillance.

In May 2005, a group of parents filed a complaint to the Constitutional Court against the Education Documentation Act¹¹⁰ (*Bildungsdokumentationsgesetz*). The claimants argued that the Act disproportionately interferes with the right to the protection of personal data. The Act provides a **legal basis for school authorities to collect and store pupils' data about their colloquial language, participation in religious education and failed subjects or classes** etc. The data of each pupil will be stored at least until they reach the age of 75. The fact that

¹⁰⁴ „Datenspeicherung auch in Österreich“ in *Die Presse* of July 12, 2005, p.5. „Österreich für Vorratsspeicherung von Daten“ in *Die Presse* of July 14, 2005, p. 3.

¹⁰⁵ „Auch der Datenschutzrat sagt ‚Nein zur Vorratsdatenspeicherung‘“, ARGE Daten, October 26, 2005.

¹⁰⁶ Datenschutzbericht 2005, of August 2005, p. 21, available at: <http://www.dsk.gv.at/Datenschutzbericht2005.pdf> (02.11.2005)

¹⁰⁷ In 2002, the Federal Constitutional Court held sec 209 Penal Code, penalising sexual relationships between men if below the age of 18, unconstitutional due to the different age of consent between bisexual or lesbian persons.

¹⁰⁸ In 2003, the Minister of the Interior already issued an internal order to all security authorities to delete any data related to sec 209 Penal code of persons who have been acquitted or whose cases were dropped.

¹⁰⁹ Administrative Decision of the Data Protection Commission issued on 21 June 2005, GZ K507.515-021/0004-DVR/2005.

¹¹⁰ Federal Law Gazette (BGBl.) I No. 12/2002 as amended by BGBl. I Nr. 169/2002.

this data is linked to the pupils' social security numbers means that they are directly identifiable by the Federal Ministry for Education, Science and Culture. Even though the Act legislates for administrative sanctions of up to € 2,200, several pupils and parents refused to provide the necessary data. The Act's rationale is to use the collected data in order to adequately adapt educational policy. However, it is questionable whether this purpose justifies the storage of directly identifiable education data for a period of over 60 years.

In regard to the draft **Asylum Act and draft Aliens Act**, particular concern has been raised by many actors including Amnesty International and the Constitutional Service of the Federal Chancellery (*Verfassungsdienst*) in relation to data protection safeguards. They made the criticism that the potential interference with the protection of data was disproportionately large due to the vague and overly extensive power of the public authorities to process and exchange sensitive data on asylum seekers and aliens¹¹¹.

Positive aspects

Even though, currently, only very few companies apply **voluntary Codes of Conduct on data protection**, there is a positive trend in regard to direct marketing and financial service businesses which aim to avoid complaints and save resources¹¹².

Reasons for concern

Serious concerns have been raised i.a. by the Association of Judges (*Richtervereinigung*) as well as by the Data Protection Council in regard to the proposed amendments to the Security Police Act. The draft legislation aims to extend the access of the police authorities to sound and picture data that has been recorded by other authorities, private persons or companies not only in order to prevent dangerous attacks or organised crime, but also to investigate potential hazards (*erweiterte Gefahrenerforschung*). As a result the police will be entitled to require the transmission or handing over of data for police security purposes (*sicherheitspolizeiliche Zwecke*) without any concrete suspicion of a criminal act having taken place (*Tatverdacht*).

According to the Association of Judges such extended police powers need to be put under judicial control. The safeguards provided by the commissioner for legal protection, an independent official charged with the protection of legality and proportionality at the Ministry of the Interior (*Rechtsschutzbeauftragter*), are not seen as sufficient. Besides the fact that the commissioner's independence is not sufficiently secured, the Association of Judges further points out that this control function can only be implemented if the police authorities are obliged to report the collection of such data to the commissioner. The explanatory report to the draft act does not sufficiently explain the reasons for such far reaching interference with the right to privacy and data protection.¹¹³

In its opinion on the draft legislation the Data Protection Council draws attention to the fact that the draft amendments do not foresee any provision that would prohibit the use of private

¹¹¹ Stellungnahme von *amnesty international Österreich*, of April 2005, available at: <http://www.amnesty.at/fokus/oesterreich/asylbehoerde2.htm> (03.11.2005). Stellungnahme vom Verfassungsdienst des Bundeskanzleramts, of April 15, 2005, available at: http://www.parlinkom.gv.at/portal/page?_pageid=908,847519&_dad=portal&_schema=PORTAL (03.11.2005).

¹¹² „Selbstregulierung im Datenschutz“ by Florian Philapitsch in *medien und recht* 4/05, p. 270f.

¹¹³ Stellungnahme der Richtervereinigung zur SPG-Novelle 2006, 27.10.2005, available at: <http://www.parlinkom.gv.at> (28.11.2005).

data which were collected in violation of data protection legislation. Generally, the Council points out that police measures have to be proportional and adequate and that the proposed measures are problematic in regard to these two constitutional requirements. Equally, the planned extension of the police authorities' power to **investigate individual data (*personenbezogene Daten*) in connection with the protection of persons and objects during international events** is seen as being unconstitutional. As a precondition for such investigations the draft amendments only require that an international event takes place without referring to any concrete threat or danger. Given the frequency of international events, for example in Vienna, such an extension of police powers seems disproportional and therefore in contravention with the constitution.¹¹⁴ (Regarding further information on the Security Police Act see also Article 6 and 45.)

Protection of the private life of workers

Legislative initiatives, national case law and practices of national authorities

In autumn 2005, the Trade Union of Private Sector Employees (*Gewerkschaft der Privatangestellten*) published a brochure providing information about data protection for employees. The brochure provides information about the technological possibilities of surveillance in the workplace and gives examples of how better to protect private data¹¹⁵. The Trade Union wants additional legal protection to better secure employees' rights to data protection. As in Germany, Austrian companies should be obliged to appoint an internal or external commissioner for data protection who should support the work council.¹¹⁶

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The introduction of the e-card, a health insurance chip card and the entering into force of a new law regulating the exchange of sensitive health data generated strong criticism from data protection organisations who fear that the security guarantees are not strict enough to ensure the inaccessibility of health data to unauthorised persons such as employers.

With the introduction of the **e-card**, a health insurance chip card, paper-free access to all health care services will be provided in the entire region of Austria. The distribution of these cards took place during the year 2005. At the moment its main purpose is to demonstrate a patient's eligibility to health services. The card is presently limited to storing information relevant for patient identification only. In the future it is planned that e-cards will enable providers of health care services to access other patient data and to store health relevant information if patients wish so.

Data Protection organisations fear the potential abuse of sensitive patient data in connection with the e-card¹¹⁷. On 1 January 2005 the **Health Telematics Act (*Gesundheitstelematikgesetz*)** entered into force, allowing for the transmission of sensitive patient data between actors in the Austrian health care system. The Act aims to prevent malpractice and to assure the confidentiality of the sensitive individual data of patients and harmonise and improve data safety measures. According to the International Network for

¹¹⁴ Stellungnahme des Datenschutzrates zur SPG-Novelle 2006, 14.11.2005, available at: <http://www.parlinkom.gv.at> (28.11.2005).

¹¹⁵ Rächer der enterbten Daten, GPA, 2005, available at: <http://www.interesse.at/it/> (28.11.2005).

¹¹⁶ „GPA-Katzian fordert verpflichtende Einführung eines betrieblichen Datenschutzbeauftragten“, GPA press release of 28.11.2005.

¹¹⁷ „Die Auslieferung der e-Card“, ARGE Daten, 13.09.2005.

Health Policy and Reform the Act is quite innovative and has the potential to increase transparency and accountability in the Austrian health care sector¹¹⁸. The hazy definition of who exactly will have access to all the information gathered is one major issue of criticism¹¹⁹.

Article 9. Right to marry and right to found a family

Marriage and control of marriages suspect of being simulated

Legislative initiatives, national case law and practices of national authorities

Under the framework of the new Aliens Police Act (*Fremdenpolizeigesetz*), new offences in regard to fictitious marriages and adoptions were introduced.

Whereas, according to the old Aliens Act, only the professional facilitation of fictitious marriages and adoptions was punishable as a criminal offence, the new provisions go much further. Sec 117 of the new Act allows not only those who arrange fictitious marriages, but also Austrian citizens or aliens who reside legally in Austria, who enter into such fictitious marriages to be punished with a fine of up to €350 daily rates. If they have committed the offence with the intent to enrich themselves, with a fine of up to €350 daily rates or up to one year of imprisonment. Those who arrange fictitious marriages professionally risk being imprisoned for up to three years. In regard to fictitious adoptions the offence laid down in Section 118 mirrors the provisions set out in Sec 117 and provides corresponding sanctions. Aliens who benefit from the marriage or adoption are punishable as a party to the crime, except in those instances, in which the marriage or adoption was not entered into for profit.

In its judgement of 10 May 2005 the Austrian Supreme Court held that the legal guardian of a person is entitled to bring divorce proceedings before the Court.

Compared to an amicable divorce, which asks for a manifestation of will, which cannot be substituted by the declaration of a guardian, the petition for divorce is not a strictly personal right.¹²⁰ In this case the client of the guardian was severely injured in a car accident and fell into a coma. The client had already left her husband and asked for a divorce before the accident took place. The guardian wanted to get the divorce for her, to prevent her husband from inheriting her property, in case she died in the interim.

Reasons for concern

The sanctions against fictitious marriages and adoptions, introduced by the new Aliens Police Act, can only be considered as unproportional. In its opinion on the criminal provisions in the draft of the Aliens Police Act, the Institute of Penal Law and Criminal Science of the University of Innsbruck compared and contrasted the sanctions for the criminal offences laid down in Sec 117 and 118 of the Aliens Police Act with sanctions provided for in the Austrian Criminal Code. Committing fraud up to a value of 3000 Euros is punishable by a maximum sentence of half a year of imprisonment according to Sec 146 of the Criminal Code; arranging a marriage or adopting somebody for the purpose of profit, even if the amount is only symbolic, can be punished by up to one year of imprisonment. The sanction of up to three years of imprisonment, as provided for by the Aliens Police Act, for arranging marriages or adoptions professionally is comparable to the sanctions for committing grievous bodily harm

¹¹⁸ International Network for Health Policy & Reform, Health policy survey on Austria: Health Telematics Law, October 12, 2005. <http://www.healthpolicymonitor.org>

¹¹⁹ „Schörghofer räumt Datenschutzprobleme bei e-card-Administration ein“, ARGE Daten, June 6, 2005.

¹²⁰ OGH 10.05.05, 5 Ob 94/05t.

(Sec 84 Para 1 Criminal Code) or the theft of up to 50.000 Euros (Sec 128 Para 1 no. 4 Criminal Code) under the Austrian Criminal Code. Also other sanctions for offences newly created by the Aliens Police Act such as “participation in illegal residency” – (section 115), “trafficking” (section 114) and “fraudulent acquisition of a residence permit” (section 119) are to strong according to the opinion.¹²¹

Legal recognition of same-sex partnerships and recognition of the right to marry for transsexuals

Legislative initiatives, national case law and practices of national authorities

HOSI Vienna (Homosexual Imitative Vienna) criticised the section of the new Settlement and Residence Act relating to the right to family reunification for same sex couples as having only been incorporated to the absolute minimum standards required by European Law (Council Directive 2003/86/EC and Directive 2004/38/EC).

EEA citizens in same sex partnerships are not entitled to family reunification, even if they have entered into civil union, as it is possible in Germany, France, the five Nordic countries, soon the UK and Switzerland. It remains unclear whether citizens, coming from these countries, in which same sex partners can marry, have an entitlement to family reunification. However, people in same sex partnerships now have more rights in Austria than before. Even if they are not entitled to family reunification the authorities have to assess their case on an individual basis and cannot simply reject their application.

After the Social Democratic Party had presented their draft proposal for a Civil Union Act in March 2003 and the Greens in May, the Minister of Justice Karin Gastinger, announced in September, that a working group will develop a model for a registered partnership, a so-called “Homo-marriage light”.

This registered partnership will also be available to heterosexual couples, but not grant the right to adoption. Mrs Gastinger rejected the initiatives, by the coalition partner ÖVP, to improve the situation only in regard to certain issues like the right to information for family members and the right not to testify in criminal proceedings against a partner. The two biggest NGOs Lambda and HOSI, that represent the interests of the gay and lesbian community, welcomed this initiative in principal but rejected the concept of “a second class marriage”.¹²² Due to the political situation in Austria at the moment it seems unlikely that the Minister of Justice will be successful with her proposal. Even in her own party (BZÖ), most Mps will vote against a registered partnership for homosexuals. After the recent judgment of the Austrian Constitutional Court annulling, inter alia, Sec 123 Para 8 lit b. of the Social Security Act, which limits the access only to heterosexual partnerships, members of the Peoples Party and the BZÖ keep to their resistance, while Gastinger sees herself confirmed.¹²³ Comments of the most discriminatory nature were spread by representatives of the Freedom Party. In the election campaign for the Viennese Municipality, the top candidate H.C. Strache rhymed in a public speech: Die SPÖ macht keine Politik für die Ärmsten der Armen, sondern für die Wärmsten der Warmen” (“The Social Democrats do not make politics for the poorest of the poor, but for the gayest of the gay.”). Ewald Stadler, a member of the Freedom Party, announced at the end of November that his party “will not accept homosexual or other

¹²¹ „Stellungnahme zum Entwurf eines Bundesgesetzes, mit dem das Asylgesetz 2005 und das Fremdenpolizeigesetz 2005 erlassen und einige andere Gesetze geändert werden“ of April 1, 2005 , available at http://www2.uibk.ac.at/strafrecht/strafrecht/asyl2005_stellung_schwaighofervenier.pdf (04.11.05)

¹²² „Gastinger arbeitet an Modell für Homosexuellenehe light“ of September 12, 2005 in *derStandard.at* 04.11.05)

¹²³ „Scheibner pfeift Gastinger zurück“ in *die.standard.at* of November 23, 2005(24.11.05)

perverted partnerships.” This is particularly concerning due to the fact that Stadler holds the office of Ombudsperson. The other two Ombudspersons called for his resignation.¹²⁴

See Art. 20 – Equality before the law.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The issue of **forced weddings** is becoming a topic of more and more widespread public and political debate. Official statistics are lacking; however, the NGO *Orientexpress* reported, in 2004 alone, 184 alleged cases in Austria, but believes the real figures are much higher. Most of the women forced to marry have acquired the Austrian citizenship and are minors.

The cases are usually remarkably similar: a young woman is taken on holiday to her country of origin, where she is then confronted with the fact that she has to marry. Via these forced weddings, the spouse gains permission to enter Austria and consequently, a work permit.¹²⁵ Not only women are affected by forced marriages, but also men. They often do not refuse, but leave their wives very soon after their wedding. The women are then forced to live in the home of their parents-in-law and a return to their native country is no longer possible.¹²⁶ The NGO *Orientexpress* offers counselling to these young women and men. If a solution within the family is not a possibility they help the women to leave their family, and to move into one of the women’s shelters or into a crisis intervention centre for juveniles.

According to a draft from the Ministry of Justice, the criminal offence provided for in Sec 193 para 2 of the Criminal Code, which provides criminal sanctions against persons forcing their partner into marriage and can only lead to prosecution if the victim consents, will be deleted. Instead persons such as the spouse and family members will be made liable according to sec 106 Sec 3 for causing aggravated duress which will be prosecutable ex officio. According to the current law somebody who forces someone else to have sexual intercourse is already punishable under sec 201 (sexual duress) or sec 202 (rape).¹²⁷

Article 10. Freedom of thought, conscience and religion

Incentives and reasonable accommodations provided in order to ensure the freedom of religion, including the right to conscientious objection

Legislative initiatives, national case law and practices of national authorities

In July, the Government amended the **Civilian Service Act**¹²⁸ (*Zivildienstgesetz*) which will enter into force on January 1 2005. The Act shortens the period for alternative civilian community service from 12 to 9 months. This change does not bring about harmonisation with compulsory military service since as of January 2006, military service will be shortened from 9 to 6 months. Given that the 9 month regulation of the Civilian Service Act was adopted in as a constitutional provision the differences in compulsory service between alternative civilian and military service cannot be challenged before the Federal Constitutional Court.

¹²⁴ „Aufregung über Stadlers Attacken gegen Homosexuelle“ in der *Standard.at* (25.11.05).

¹²⁵ „Zur Ehe gezwungen: Es geschieht mitten in Wien“ in *Die Presse* of April, 19, 2005.

¹²⁶ „Ein Kampf gegen die Zwangsehe“ in *Die Presse* of October 12, 2005.

¹²⁷ paper on “Maßnahmen gegen traditionsbedingte Gewalt gegen Frauen in Österreich“ forwarded by the Ministry for Health and Women on September 13, 2004.

¹²⁸ Federal Law Gazette (BGBl.) 679/1986 as amended by BGBl. I No 106/2005.

Positive aspects

In March 2005, the Federal Ministry for Health and Women appointed an **Ombudsperson** according to the requirements of the Employment Directive (2000/78/EC) who is responsible for, among other issues, counselling people who have experienced religious discrimination in employment in the private sector (for further information see Article 21).

In October 2005, the biggest mosque in the federal province of Vorarlberg was opened. The construction was financed by the Muslim community and the Imam will be financed by Turkey.¹²⁹

Good practices

On April 24, 2005, the **first Austrian Conference of Imams** took place in Vienna. In the final declaration of the conference the Islamic Faith Community acknowledged that official recognition as a religious society would promote dialog with state representatives and the society as such. The declaration further included a clear condemnation of all terrorist and extremist acts and emphasised the importance of dialogue, the promotion of diversity, universal values and equal possibilities for women and men¹³⁰.

*Reasons for concern*Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Austrian religious community of Jehovah's Witnesses is challenging the Religious Communities Act before the Eur. Ct. H.R. for its restrictive criteria regarding the acquisition of the status as an officially recognised religious society. The court has declared the complaint admissible.

On July 5 2005, the Eur. Ct. H.R. declared an **application of the Austrian religious community of the Jehovah's Witnesses** and its four leading representatives admissible in regard to the Convention's Art 9, 6, 13 and 14.¹³¹ The applicants complained that the refusal of the Austrian authorities to grant legal personality to the religious community by conferring the status of a religious society under the Recognition Act would violate their right to freedom of religion. In particular, they challenged the Religious Communities Act (*Bekennnisgemeinschaftengesetz*) for imposing discriminatory criteria for the granting of legal personality such as a minimum number of members (2 % of the population, i.e. approx. 16,000 members) and the ten year waiting period.¹³² The applicants furthermore pointed out

¹²⁹ „Größte Moschee Vorarlbergs eröffnet“, *ORF ON*, (09.10.2005), available at: <http://vorarlberg.orf.at/stories/62944/>, (09.11.2005)

¹³⁰ Final declaration of the Islamic Faith Community at the occasion of the Imame-conference in Vienna on April 24, 2005, available at: <http://www.yenivatan.com/news/Imame-Konferenz.html> (04.11.2005).

¹³¹ Eur. Ct. H.R. (1st sect.), *Religionsgemeinschaft der Zeugen Jehovas in Österreich v. Austria* (Appl n° 40825/98) judgment of 5 July 2005.

¹³² The Religious Communities Act, which was adopted in 1998, changed the criteria under which religious organisations can acquire the status as recognised religious society which enjoy certain advantages in regard to tax regulations, state subsidies and religious education etc. The criteria include a minimum membership of 0,2 % of the Austrian population (approx. 16.000 persons) and a ten year waiting time for being eligible. Presently, there are 12 recognised religious societies in Austria, which

several differences established by law between recognised religious societies and other religious communities such as subsidised religious education in schools, exemption from compulsory military and civilian service and tax advantages. In regard to freedom of religion, the court declared admissible the applicants' complaint about the refusal of recognition as a religious society and the complaint that the status of a religious community presently conferred was inferior to that of officially recognised religious societies which amounted to discrimination.

On February 2, 2005, the Eur. Ct. H.R. held in two parallel decisions that the complaints of M. Gütl and P. Löffelmann, who both are **Jehovah's Witnesses** and hold a full time functions as preachers, unanimously admissible in regard to Art 4 para 2 and para 3, Art 9 and Art 14¹³³. The appellants claimed that the Military Service Act (*Wehrgesetz*) and the Civilian Service Act (*Zivildienstgesetz*) regulating compulsory military and civil service were discriminatory as they only exempt members of officially recognised religious communities, who have particular functions, from compulsory service.

On the occasion of the **OSCE conference on Anti-Semitism and other forms of intolerance**, which took place on June the 8th and 9th 2005, NGO representatives deplored the fact that members, in particular children, of religious minorities in Austria reported numerous cases of religious discrimination in schools, communities and at the workplace. **It was further criticised, that Austrian legislation establishes three different hierarchies in regard to the recognition of religious organisations:** officially recognised religious communities, religious confessional communities and associations.¹³⁴ It was recommended that the Federal Sect Office should be staffed with neutral experts and that, as in Great Britain, more emphasis should be devoted to mediation and conflict resolution measures¹³⁵. A positive aspect mentioned at the conference was the anti-bias and tolerance training in Austrian schools. Due to the commemoration events celebrating 60 years after the end of WWII and Austria's 50th anniversary of independence, special attention was given to activities dealing with tolerance and human rights.

Legislative initiatives, national case law and practices of national authorities

In December 2004, the Federal Administrative Court ruled that the provision in the Aliens' Employment Act¹³⁶ (*Ausländerbeschäftigungsgesetz*) excluding foreigners from working as pastors (*Seelensorger*) for recognised religious societies, does not apply to other religious communities which do not enjoy the same status according to the Law on the Status of Religious Confessional Communities (*Bekennnisgemeinschaftengesetz 1998*)¹³⁷. The court therefore held that foreigners working as pastors for the Jehovah's Witnesses, which is only recognised as a religious community, are subject to the Aliens' Employment Act.

According to information provided by the Austrian Focal Point of the European Monitoring Centre on Racism and Xenophobia, the **London terrorist attacks of July 7, 2005** had no

have required their status before the amendments of 1998. Under the present legal situation, only four out of 12 would comply with these criteria.

¹³³ Eur. Ct. H.R. (1st sect.), Markus Gütl v. Austria (Appl n° 49686/99) judgment of 1 February 2005. Eur. Ct. H.R. (1st sect.), Philemon Löffelmann v. Austria (Appl n°42967/98) judgment of 1 February 2005.

¹³⁴ Human Rights Without Frontiers, Address to the Advisory Panel of Experts at the Cordoba OSCE Conference on anti-Semitism and on Other Forms of Intolerance, 8-9 June 2005, available at: http://www.osce.org/documents/cio/2005/06/15270_en.pdf (04.11.2005).

¹³⁵ Forum for Religious Freedom, Statement at Cordoba OSCE Conference on anti-Semitism and on Other Forms of Intolerance, available at: http://www.religionsfreiheit.at/FOREF_5_Seiten.pdf (04.11.2005)

¹³⁶ Federal Law Gazette (BGBl) No 218/1975 last amended by BGBl.I No 104/2005.

¹³⁷ VwGH, 15.12.2004, GZ 2003/09/0149.

apparent effect on members of the Muslim community. However, a number of Islamophobic insults were posted on the internet forums of several daily newspapers. In general, media reports after the terrorist attacks avoided making generalisations about the Muslim faith and terrorist attacks. The prevailing expression of Islamophobic tendencies in Austria can be found in racist e-mails, posts in internet forums of the daily newspapers or letters received by the Islamic Faith Community¹³⁸. In immediate reaction to the terrorist attacks the Islamic Faith Community condemned all terrorist and extremist acts of violence. Furthermore, all Muslims have been called upon to actively support peace and the security of the country and its inhabitants.

Article 11. Freedom of expression and of information

Freedom of expression and of information

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In the case of *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria* (application no. 58547/00) the Court held unanimously that there had been a violation of Article 10 (freedom of expression) of the European Convention on Human Rights. The Court held that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant company and under Article 41 (just satisfaction), awarded 9,103.02 euros (EUR) in respect of pecuniary damage and EUR 5,364.60 for costs and expenses.

The applicant, *Wirtschafts-Trend Zeitschriften-Verlags GmbH*, is a limited liability company based in Vienna which owns and publishes the weekly magazine *Profil*. In November 1998 *Profil* published a review of a book called “The Antifa-Complex” written by Peter Sichrovsky, member of the European Parliament and member of the Austrian Freedom Party. The article criticised the author of the book for his treatment of Jörg Haider, the former leader of the Austrian Freedom Party, in that he pardoned “his belittlement of the concentration camps as ‘punishment camps’” in the book. The following month Mr Haider filed a successful compensation claim against *Wirtschafts-Trend Zeitschriften-Verlags GmbH* under the Media Act. In July 1999 Wiener Neustadt Regional Court ordered the applicant company to pay 50,000 Austrian schillings (ATS – approximately 3,633 euros) in compensation to Mr Haider and to pay his costs. It ordered the forfeiture of that particular issue of the magazine and instructed the company to publish its judgment. In its reasoning the court said that Mr Haider’s words had been taken out of context and that the article gave the impression that he had played down the extent of crimes committed in concentration camps when using the term punishment camps, and that he had thereby infringed Sections 3g and 3h of the National Socialism Prohibition Act. The applicant company appealed unsuccessfully. The applicant company complained that the courts’ judgments ordering payment of compensation, publication of judgment and forfeiture of the relevant issue of *Profil* violated its right to freedom of expression as guaranteed by Article 10 of the Convention. The ECHR was not convinced by the domestic courts’ argument that the statement in the article regarding the belittlement of the concentration camps came close to accusing Mr Haider of criminal behaviour in contravention of the National Socialism Prohibition Act. The Court found that conclusion somewhat far-fetched, as the standards for assessing someone’s political opinions were quite different from the standards for assessing an accused’s responsibility under criminal law. The Court agreed with the parties that the statement at issue was a value judgment. The parties disagreed however on whether the applicant had provided a sufficient

¹³⁸ Information provided by the Austrian Focal Point of the European Monitoring Centre on Racism and Xenophobia on November 4, 2005. See: www.univie.ac.at/bim/focalpoint (04.11.2005)

factual basis for its allegations. In that respect the Court noted that the necessity to provide the facts underlying a value judgment was less stringent where those facts were already known to the general public. It found that the use of the term “punishment camp”, which implied that people were detained there for having committed punishable offences, might reasonably be criticised as a belittlement of the concentration camps if that term was applied by someone whose ambiguity towards the Nazi era was well-known. The undisputed fact that Mr Haider had used the term punishment camp instead of concentration camp was a sufficient factual basis for the applicant’s statement, which was therefore not excessive in the circumstances. **The Court reiterated that the limits of acceptable criticism were wider as regards a politician than as regards a private individual. Mr Haider was a leading politician who had been known for years for his ambiguous statements about the National Socialist Regime and the Second World War and had, therefore exposed himself to fierce criticism inside Austria and at European level.** In conclusion, the Court found that the reasons adduced by the domestic courts were not relevant and sufficient to justify the interference. Moreover, the Court noted that the applicant was not only ordered to pay compensation to Mr Haider and to publish the judgment finding it guilty of defamation, but that the courts also ordered the forfeiture of the issue of *Profil* which was a severe and intrusive measure and a disproportionate interference. Consequently, the interference complained of was not “necessary in a democratic society” within the meaning of Art 10 para 2.

Media pluralism and fair treatment of the information by the media

Legislative initiatives, national case law and practices of national authorities

The government plans to amend the Austrian Broadcasting Act¹³⁹ (*ORF – Gesetz*). Two parliamentarians have already brought forward a private bill on this matter.¹⁴⁰ The amendment would provide the Public Broadcasting Company the ability to show commercial spots in-between the single segments within sports programmes. The draft amendment stipulates that there must be at least a 20 minute gap between each spot. The private broadcaster ATVplus opposed this amendment, stating that it was in opposition to the interests of private broadcasting in Austria and called for further limitations on ORF’s ability to generate revenue via commercials. The private bill was forwarded to the Constitutional Committee in the Austrian parliament.

Secrecy of journalistic sources

Legislative initiatives, national case law and practices of national authorities

In Spring 2005 the Office of Internal Affairs (Büro für Interne Angelegenheiten), located in the Ministry of the Interior, investigated two police officers suspected of having violated the Official Secrets Act. Both the press and the Green party claimed the **right to journalistic secrecy of sources** (*Redaktionsgeheimnis*) **had been violated**. In April 2005 the Federal Criminal Court of Graz approved the telephone tapping of the police officers, an action which also indirectly affected a journalist from the daily newspaper *Die Kleine Zeitung*. The two were under suspicion of informing a journalist from *Die Kleine Zeitung* about the criminal investigations surrounding a murderer which formed part of a story, published in February 2005, in the newspaper. According to the Federal Criminal Court of Graz, the order to tap the phones was legitimate.¹⁴¹

¹³⁹ Federal Law Gazette (BGBl.) 379/1984 last amended BGBl. 97/2004.

¹⁴⁰ Antrag betreffend ein Bundesgesetz, mit dem das Bundesgesetz über den Österreichischen Rundfunk (ORF – Gesetz, ORF-G) geändert wird of October 19, 2005, 723/A XXII.GP.

¹⁴¹ „Meideninformant von Polizei überwacht“ in *Der Standard* of 25.09.2005.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

An Austrian judge sued the journalist of the weekly magazine *Der Falter* for libel and slander. The magazine had reported about the criminal proceedings against a security guard, accused of having raped an asylum seeker in the refugee camp Traiskirchen, nearby Vienna. The judge considered the testimony of the women to be false and therefore found the defendant not guilty. The magazine reported that the judge had “accused the witness of the meanest ills, without any proof” and considered the judgement to be “a scandal.” and reported “that the scandal in reaction to this judgment did not appear”. The judge argued that the magazine had accused her of the misuse of authority. The first oral hearing took place in the Federal Criminal Court of Vienna, but was adjourned for an indefinite period of time.¹⁴²

In the **Worldwide Pressfreedom Index**, published every year by Reporters Without Borders, Austria was ranked in joint **16th position** in 2005 together with Latvia and so has improved by one position since last year. In an interview with *der Standard* the representative of the RWB Austria, Rubina Möhring criticized the information politics of the Ministries and the eavesdropping of journalists in Austria.¹⁴³

Article 12. Freedom of assembly and of association

Freedom of peaceful assembly

Legislative initiatives, national case law and practices of national authorities

According to information provided by the Austrian Documentation Centre of Austrian Resistance (*Dokumentationsarchiv des österreichischen Widerstandes, DöW*) **no right-wing extremist demonstrations took place in Austria in 2005**. Several potential demonstrations by right-wing extremist groups were forbidden by the national authorities. In order to circumvent the obligation to announce demonstrations or assemblies the *Bund Freier Jugend* (BFJ, Alliance of Free Youth), considered as a neonazi organisation by the Documentation Service of the Austrian Resistance (*Dokumentationsarchiv des Österreichischen Widerstandes*) organises so-called “political city tours” which took place in Linz and Steyr¹⁴⁴.

On 27 June 2005, the Vienna Independent Administrative Tribunal orally declared that the policeman, who had hindered the applicant’s protest against a commemoration ceremony of the WWII Nazi pilot Nowotny at Vienna’s central cemetery in November 2004, had acted unlawfully. **The tribunal ruled that demonstrating against right-wing extremist assemblies does not endanger public safety and that a restriction therefore would result in a violation of Art 11 ECHR**¹⁴⁵.

In June 2005, the Constitutional Court ruled that the public authority prohibiting a right-wing extremist demonstration from re-awarding an honorary grave to the WWII Nazi pilot Nowotny, acted in accordance with the law¹⁴⁶. The court reasoned that the demonstration fell

¹⁴² “Sind Richter kritisierbar?” in *Falter* No. 36/05.

¹⁴³ „Pressefreiheit: Österreich liegt hinter Trinidad“ in *Der Standard* of 20.10.2005.

¹⁴⁴ „BFJ in Sicherheit“, in *Neues von ganz rechts* – July 2005, DöW, available at: www.doew.at (09.11.2005).

¹⁴⁵ UVS Wien, 27.06.2005 GZ 02/12/9873/2004/13.

¹⁴⁶ VfGH, 07.06.2005, B 1473/04.

under the scope of the Prohibition Statute¹⁴⁷ (*Verbotsgesetz*) penalising national-socialist activities and therefore could be banned in accordance with art 12 of the Basic Law on the General Rights of Nationals (*Staatsgrundgesetz*) and Art 11 ECHR.

In order to **protect women seeking an abortion from militant demonstrators** the Vienna National Council (*Landtag*) amended the Regional Security Act in July 2005¹⁴⁸. The amendment grants the police authorities the power to warn and consequently turn people away who publicly harass or exert psychological pressure on other people, particularly in front of medical institutions. Vienna is the only federal province which has taken specific measures to protect women who seek an abortion. Problems with militant anti-abortion activists have also been reported in other provinces. It was argued by the Greens and Social Democrats that the Federal Security Police Act should be amended to extend the possibility to designate so-called, “protection zones” to the areas around medical institutions¹⁴⁹. The Federal Minister of Health and Women, Maria Rauch-Kallat, does not support such an amendment¹⁵⁰. (Please see also Article 7.)

Freedom of association

Legislative initiatives, national case law and practices of national authorities

In February 2005, Heinz Mayer, Professor of Constitutional Law at the University of Vienna, delivered an **expert opinion on whether the *Arbeitsgemeinschaft für demokratische Politik* (Consortium for democratic policy, hereafter the AFP) recognised as an association as well as a political party acts in contravention with the Constitutional Act prohibiting the National-Socialist German Workers’ Party**¹⁵¹ (Prohibition Statute, *Verbotsgesetz*). Prof. Mayer came to the conclusion that the AFP is responsible for producing several publications that grossly violate the Prohibition Statute. These publications include obvious clarifications of national-socialist ideology, cynical denials of violent National Socialist measures, and aggressive language against foreigners, Jews and *Volksfremde*.¹⁵² The Prohibition Statute that prohibits the formation and continuation of any National Socialist organisation in connection with Art 1 of the Party Act (*Parteigesetz*) should therefore form a legal basis on which any court could *incediter* deny legal recognition to the AFP’s status as political party. According to Prof. Mayer, the *Bund Freier Jugend* is equally engaged in the publication of written material which infringes the Prohibition Statute. Given that the BFJ is not organised as an association and political party, the public authorities can only act against individuals.

Article 13. Freedom of the arts and sciences

Freedom of research and academic freedom

Legislative initiatives, national case law and practices of national authorities

Concerning the ratification of the **Biomedicine Convention of the Council of Europe**, NGOs representing persons with disabilities raised their concerns in regard to Art 17 of the Convention, which allows, under certain circumstances, research on people without the capacity to consent, even if such research has no potential to produce results that would

¹⁴⁷ Federal Law Gazette [BGBl.]13/1945 as amended by BGBl. 504/1994.

¹⁴⁸ Provincial Law Gazette of Vienna No. 35/2005 as of 12.07.2005.

¹⁴⁹ “Abschreckung gegen AbreibungsgnerInnen“, in *dieStandard.at*, 16.09.2005.

¹⁵⁰ Interview with Maria Rauch-Kallat published in *Die Presse* on 05.03.2005.

¹⁵¹ Federal Law Gazette (BGBl.) 13/1945 as amended by BGBl. 25/1947.

¹⁵² „Rechtsgutachten über die Arbeitsgemeinschaft für demokratische Politik (AFP) und den Bund freier Jugend (BfJ), Mayer, H., 03.03.2005, available at: www.doew.at (09.11.2005).

directly benefit the health of the person concerned. An amendment to the Austrian Civil Code, prohibiting the trustee from giving his/her consent to research, which has no potential of directly benefiting the person with the disability, now provides Austria with the possibility of making a reservation under Art 17.¹⁵³

On 15 May 2005, the National Assembly of the Austrian Parliament passed the Act on the implementation of the Biotechnology Directive 98/44/EC.¹⁵⁴

On 21 July 2005 the Ministry for Health and Women presented a draft for an amendment of the Austrian Gene Technology Act (*Gentechnikgesetz*) and the Reproduction Medicine Act (*Fortplanzungsmedizinengesetz*)¹⁵⁵, providing, inter alia, under certain restricted circumstances, for “preimplantation genetic diagnosis” or PGD, a method which enables the detection of genetic deficiencies in embryos created by artificial insemination prior to their implantation. In the weeks following widespread discussion took place about whether the law was a step in the right direction, or whether it might open up the path to the concept of selection in the Austrian legal order, which might lead to the disrespect of the right to life of human beings in general, but in particular when considering the elderly and disabled.¹⁵⁶ As a result of the broad discussion the relevant provisions had been eradicated.

Article 14. Right to education

Access to education

Legislative initiatives, national case law and practices of national authorities

The OECD PISA study 2003 published on 7 December 2004 assessed the performance of 15 to 16 year old students in mathematics, reading, science and problem solving. The study showed that the performance of pupils is influenced by socio-economic factors like levels of parental education and parents’ occupation are more or less influential across the participating countries. In comparison to the other 40 states included in the study Austria is average in this respect.¹⁵⁷ Furthermore, **the study corroborates previous findings of the disadvantaged educational position of pupils with a migrant background.** In the mathematics test, students with an immigrant background were 2.1 times more likely than native students to score in the bottom quarter of the national mathematics performance distribution. With 36 points difference between native students and students with an immigrant background the mathematics test results in Austria were double the OECD average difference of 18 points.

In July 2005, the Parliament adopted the **Disability Equality Package**¹⁵⁸ which was seen as an important improvement in the protection against discrimination on the grounds of disability in Austria. However, **in regard to access to school education the amendments led to no improvement.** Given the separation of legislative powers the adaption of provisions on barrier free access to school buildings would have required a special agreement between the

¹⁵³ Bundesgesetz, mit dem das allgemeine bürgerliche Gesetzbuch geändert wird, Federal Law Gazette (BGBl.) 43/2005.

¹⁵⁴ Bundesgesetz, mit dem das Patentgesetz 1970, das Patentverträge-Einführungsgesetz, das Gebrauchsmustergesetz, das Halbleiterschutzgesetz und das Sortenschutzgesetz 2001 geändert werden (Biotechnologie-Richtlinie – Umsetzungsnovelle), BGBl. I 42/2005.

¹⁵⁵ Ministerialentwurf betreffend ein Bundesgesetz, mit dem das Gentechnikgesetz geändert wird, 327/ME (XXII.GP).

¹⁵⁶ „Am Ende steht die Pflicht zur Tötung“ in *Die Presse* of 19.08.2005.

¹⁵⁷ OECD (2004) *Learning for Tomorrow’s World. First Results from PISA 2003*, p. 179, pp. 397, available at: <http://a455.g.akamai.net/7/455/1879/v1/193.51.65.71/dataoecd/1/60/34002216.pdf>, (08.11.2005)

¹⁵⁸ Federal Law Gazette (BGBl.) I 82/2005 as of 10.08.2005.

Federal Government and the Provinces. So far no concrete measures have been made public which means that no agreement will be concluded in the near future. As a result children with disabilities who wish to register at a school can still be rejected by school directors legally.

Positive aspects

In October 2005, the Federal Minister of Education together with the Interior and Social Minister presented the **initiative to provide early language support especially targeted at children with mother tongues other than German**¹⁵⁹. Registration for primary schools started for the first time in October. During the registration process the childrens' language skills are tested. If deficiencies in German are identified, the child receives a so-called "language ticket" which can be used to receive 120 hours of remedial instruction. The ticket is worth € 80 and can be converted at kindergartens who will receive € 80 from the Integration Fund (*Integrationsfonds*) of the Ministry of Interior. The remaining costs for language support, which are estimated to be another € 80 per student, are to be carried by the community or the federal province¹⁶⁰. According to the initiative, children with language problems should have the option of "growing into" the language subjects are taught in before entering primary school. The implementation of these measures requires special training for kindergarten and primary school teachers. Its success and practicality will mainly depend on the co-operation of the provinces, communities and the kindergarten institutions.

Vocational training

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Only one day after the European Court of Justice ruled that Austria indirectly discriminates against students from other Member States in their access to Austrian universities, the Federal Parliament agreed to abolish free access to eight study fields and to allow certain universities to establish their own admission procedures. Due to certain Numerus-Clausus regulations in Germany, Austrian universities have had to deal with more than 50% of the applications coming from German nationals in some subjects.

Austria's practice of permitting foreigners, including those coming from EU Member States, access to university only on the condition that they were entitled to an equivalent study place in their home country was challenged before the European Court of Justice. On 7 July 2005 the European Court of Justice ruled that Austria's refusal to treat secondary education diplomas obtained in other Member States differently from Austrian diplomas, for the purpose of gaining access to university courses, constitutes indirect discrimination on the grounds of nationality in violation of Article 12 of the EC Treaty.¹⁶¹

The Court argued that requiring community nationals to meet specific requirements for a chosen course as laid down by the Member State which issued their diploma, would affect nationals from other Member States more than Austrians. Even though such a requirement would affect Austrian students equally, it would indirectly discriminate against students from other Member States. Austria therefore failed to take "the necessary measures to ensure that holders of secondary education diplomas awarded in other Member States can gain access to higher and university education organised by it under the same conditions as

¹⁵⁹ Austrian Education News, Federal Ministry of Education, Science and Culture, No. 43, September 2005, available at: <http://www.bmbwk.gv.at/fremdsprachig/en/schools/aen.xml?style=text> (21.11.2005).

¹⁶⁰ "Neue Pläne: Deutschkurse schon im Kindergarten", in *ORF ON News*, 17.10.2005.

¹⁶¹ Case C-147/03 *Commission v. Austria* [2005] (judgment of 7 July 2005).

holders of secondary education diplomas awarded in Austria [...]" Austria had therefore failed to fulfil its obligations under Articles 12 EC, 149 EC and 150 EC.

Legislative initiatives, national case law and practices of national authorities

One day after the issuance of the ECJ ruling on discriminatory access to Austrian universities, the Austrian Parliament introduced Sec 124b into the University Act which entitles the rectors of the Universities affected by German Numerus-Clausus students to launch pre-admission exams or to conduct so-called knock-out exams within the first two semesters.¹⁶²

It is very likely that this provision will be challenged before the Constitutional Court as sec 124b **University Act is formulated very broadly and lacks any detailed regulations requiring universities to adopt admission restrictions**. Another issue which might be examined by the Constitutional Court is the cut-off date of 7 July 2005, which seems arbitrary and could not be predicted by students who applied for university access and might be rejected in the first-come-first-served procedure adopted by several universities¹⁶³. Altogether eight study fields, including medicine, psychology, biology and veterinary medicine have been affected by this regulation. All the study places at Austria's three medical universities were filled within a few weeks. In Innsbruck 2000 applicants, of whom 60% stemmed from Germany, applied for 550 places, in Graz around 1500 students applied for 300 places (48% Germans, 44% Austrians)¹⁶⁴ and in Vienna 2800 people applied for 1560 places according to a first-come-first-served procedure (17% Germans).¹⁶⁵

The Federal Government and in particular, the **Minister of Education, Elisabeth Gehrler, was repeatedly criticised for having reacted too late to the predictable ruling of the ECJ**. Austrian students who were not able to enrol in certain universities because of the newly introduced admission procedures were encouraged by the Austrian National Union of Students, (*Österreichische Hochschülerschaft*) to file complaints at the responsible universities.¹⁶⁶ The Student Union made the further criticism that the amendment to the University Act provides the Rectors with an exclusive power to adopt admission requirements independently, thereby **evading the elected democratic bodies of the Universities**. It is feared that students will be **excluded from enjoying certain social benefits**. In the situation where there is only one possible date for the entrance exams per year some students might not be able to gain enough credits to be entitled to student benefits. The Student Union also draws attention to the results from previous studies that show that **women and students from a less socially privileged background are more likely to be excluded**.¹⁶⁷

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In its first report on Austria, the CoE **Committee of Experts of the European Charter for Regional or Minority Languages** holds in its findings that "*the objective situation of the languages for which there is a specific legal framework, i.e. the Slovenian, Burgenland-Croatian and Hungarian languages in their respective language areas in Carinthia and in*

¹⁶² Sec 124b Universitätsgesetz, Federal Law Gazette (BGBl.) I No. 120/2002 as amended by BGBl. I No. 77/2005 (28.07.2005).

¹⁶³ „Unzulässige Zulassungsbeschränkung?“ in *Die Presse* of July 18, 2005.

¹⁶⁴ „Gehrler prüft „Hintertür!“ in *Die Presse* of 20.07.2005.

¹⁶⁵ „Medizin-Uni Wien: 168 warten. Neues Auswahlmodell kommt“ in *die Presse* of August 4, 2005.

¹⁶⁶ Information provided by the Austrian National Union of Students available at:

<http://oeh.ac.at/oeh/111936740895/112203986446> (10.11.2005).

¹⁶⁷ Information provided by the Austrian National Union of Students upon request in November 2005.

Burgenland, is considerably better than that of the other regional or minority languages.” The Committee further identifies shortcomings with respect to teaching materials and teacher training in regional or minority languages. In regard to the situation in Vienna, the Committee states that the provisions for regional or minority language teaching in Vienna are in considerable need of development as there are no provisions for Burgenland-Croatian teaching, and Hungarian is only taught at the primary school level.¹⁶⁸

Legislative initiatives, national case law and practices of national authorities

As a consequence of Austria’s relatively negative results of the PISA 2003 study, the Socialist Party (SPÖ) and the People’s Party (ÖVP) agreed to **lower the two thirds majority requirement necessary to amend legislation on school matters.**¹⁶⁹ Except for issues related to religious education, the differentiated schooling system and the introduction of school fees the Parliament can now reform school legislation with simple majority. Art 14 para 5 of the Federal Constitution was extended by para 5a which lays down, amongst other issues, the principle that access to schools should be free and that compulsory education amounts to nine years. Furthermore, para 5a enumerates democracy, humanity, solidarity, peace and justice as well as openness and tolerance towards individuals as basic values of school education.¹⁷⁰

No new **school statistics** broken down by citizenship or type of school were published during the reporting period. Important information necessary to assess the education situation of immigrants in Austria is therefore missing. According to a sociological study investigating the social and economic situation of 16-24 year old second generation migrants, **the number of people completing only lower education is considerably higher amongst second generation immigrants than amongst the Austrian population (48% of 2nd generation immigrants, 29% of Austrian respondents).** This unequal representation in higher education directly translates into higher representation in unskilled labour¹⁷¹.

Positive aspects

Due to the increasing interest in the languages of neighbouring countries, the number of pupils participating in **minority language education** increased during the school year 2004/05. Compared to the school year 2003/04 the number of pupils participating in bilingual German-Croatian or German-Hungarian education in Burgenland schools increased from 3,469 to 4,043.¹⁷² In the federal province Carinthia the number of pupils participating in classes taught in Slovenian slightly increased from 3,407 in 2003/04 to 3,573 in 2004/05¹⁷³.

In its report on Austria the Committee of Experts on the European Charter for Regional or Minority Languages, “*welcomes as a very positive element the fact that the structure of regional or minority language education in Burgenland, and to a lesser extent in Carinthia, is*

¹⁶⁸ Report on Austria of the Committee of Experts on the European Charter for Regional or Minority Languages, ECRML (2005) 1, 19.01.2005, p. 61, 62, available at: http://www.coe.int/T/E/Legal_Affairs/Local_and_regional_Democracy/Regional_or_Minority_languages/ (10.11.2005)

¹⁶⁹ Ergebnisse Pisa 2003, Bundes Ministerium für Bildung, Wissenschaft und Kultur, 06.12.2004, available at: http://www.pisa-austria.at/aktuelle_ergebnisse.htm (22.11.2005).

¹⁷⁰ Federal Law Gazette (BGBl) I No 31/2005 (09.06.2005).

¹⁷¹ „Die zweite Generation: Integrationswege – Integrationserfolge“ by Hilde Weiss, in: Dossier 04/2005, Wien: Katholische Sozialakademie Österreich, pp. 12-17.

¹⁷² Schülerzahlen im Bereich des Minderheitenschulwesens im Burgenland, published by *Landesschulrat Burgenland*, available at: <http://www.lsr-bgld.gv.at/schul/daten/aps/mhs/statistikmhs.htm> (10.11.2005).

¹⁷³ Information provided by the Austrian Focal Point of the European Monitoring Centre on Racism and Xenophobia upon request: original source, Landesschulrat für Kärnten, information provided on 21.10.2005.

*open to monolingual German speakers living in areas where bilingual education is provided in accordance with Austrian law.*¹⁷⁴

Good practices

In the course of the **European Year of Citizenship through Education** the Federal Ministry of Education, Science and Culture set up a website to educate about citizenship and human rights¹⁷⁵. Besides information on related events and publications, the web site also includes a database showing good practices. In order to co-ordinate activities related to the European Year of Citizenship and facilitate networking and exchange among stakeholders, the Ministry set up an advisory committee. The committee is composed of representatives of various ministries, youth representatives, media and NGOs and will continue to perform its functions following the European Year of Citizenship.

In autumn, the Service Centres for Civic Education and Human Rights Education, both based at the Ludwig Boltzmann Institute of Human Rights and financed by the Ministry of Education, launched the **COMPASS project**. Based on the “Manual on Human Rights Education with Young People” published by the Council of Europe, the project aims to conduct train-the-trainer seminars, particularly targeted at secondary school teachers and to disseminate the CoE training hand books.

During the reporting period the Service Centre for Human Rights Education, conducted 79 **workshops on human rights for pupils of primary and secondary schools** (“*Recht hat jede(r)?! Trainings zum alltäglichen Umgang miteinander*”¹⁷⁶). Since April 2001, 400 workshops with around 9,000 participants have taken place across Austria.

Article 15. Freedom to choose an occupation and right to engage in work

The right to engage in work and the right for nationals from other member States to seek an employment, to establish themselves or to provide services

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Following a decision of the European Court of Justice, Austria has to change legislation which still prohibits “*the employment of women in work in a high-pressure atmosphere and in diving work*”¹⁷⁷. Even though the relevant regulation¹⁷⁸ was based on Convention No 45 of the International Labour Organisation (of 21 June 1935) it infringes Directive 76/207/EEC implementing the principle of equal treatment for men and women as regards access to employment, vocational training, promotion, and working conditions.

¹⁷⁴ Report on Austria of the Committee of Experts on the European Charter for Regional or Minority Languages, ECRML (2005) 1, 19.01.2005, p. 61, available at: http://www.coe.int/T/E/Legal_Affairs/Local_and_regional_Democracy/Regional_or_Minority_languages/ (10.11.2005).

¹⁷⁵ See: www.politische-bildung-2005.schule.at (22.11.2005).

¹⁷⁶ Further information available at: www.humanrights.at/thr (10.11.2005).

¹⁷⁷ European Court of Justice (01.02.2005): Case C-203/03 *Commission v. Austria* [2005] (judgement of 1 February 2005).

¹⁷⁸ Art 8 and 31 of the *Druckluft- und Taucherarbeiten-Verordnung*, Federal Law Gazette (BGBl) No. 501/1973 as last amended by BGBl. No. 450/1994.

Legislative initiatives, national case law and practices of national authorities

On 1 January, the so-called **Service Cheque Act** (*Dienstleistungsscheckgesetz*) will enter into force. **The act aims at preventing illegal employment in private households and should facilitate the ability to legally employ people working in private households.**

The payment of such employees will function via a system of provision on Services Cheques which will have a value of €10 and be available to purchase at local post offices. Employers will be able to buy these cheques at the cost of 10.20 € each thereby covering all legally prescribed social security costs to be paid by employers. The employee will be able to convert the cheques at the local health insurance authority and will then receive €10 credited to their bank account. If the employee exceeds the lower earnings limit (*Geringfügigkeitsgrenze*) they will be obliged to pay additionally towards compulsory social security. The provisions Service Cheques can only be used to employ people who have completed their compulsory education only. Thereby abuse and price dumping should be prevented.

The Chamber of Labour (*Arbeiterkammer*) has generally welcomed these positive developments in protecting employees working in private households but has criticised that the unequal social security protection provided compared to standard contracts of employment.¹⁷⁹ According to the Government, the introduction of Service Cheques will further reduce illicit work. Given that only people with a valid work permit are eligible for the Service Cheque system, the Chamber of Labour doubts that it will have any effect on preventing unregistered work. In fact, many people will have no other option but to engage in illicit work precisely for the reason that they are not entitled to work in Austria. (See also Article 33.)

The prohibition of any form of discrimination in access to employment

Please see Article 21, 23, 25 and 26.

Reasons for concern

Due to the lack of amending legislation on professional qualification criteria, people with disabilities are still excluded from certain professions, without allowing for a case by case examination in regard to possibilities for reasonable accommodation as provided for in Art 5 of the Employment Equality Directive (2000/78/EC).

In July 2005, the Parliament adopted the Disability Equal Treatment Act¹⁸⁰ (*Behindertengleichstellungsgesetz*) and amended the Disability Employment Act¹⁸¹ (*Behinderteneinstellungsgesetz*) which will both enter into force on 1 January 2006. The process of adopting a comprehensive equal treatment act for disabled persons started more than 10 years ago. The need to transpose the Employment Equality Directive 2000/78/EC however can be seen as a catalyst in this respect. The Disability Employment Act stipulates that access to employment shall be free from discrimination based on disability. Many legal provisions regulating access to certain professions, however, still include clauses requiring full physical and psychological capability (*volle körperliche und geistige Eignung*), which generally excludes people with some kind of sensory or physical impairment. Even though the Government planned to adopt amendments which would eliminate these discriminatory requirements in parallel with the Disability Equal Treatment Act, so far no draft legislation has been presented to the public. Such barriers are still in place, for example, in regard to the

¹⁷⁹ „AMS-Chef Buninger – ‚Kombilohn nur für über 45-Jährige‘“, in *der Standard*, 23.08.2005.

¹⁸⁰ Federal Law Gazette (BGBl.) I 82/2005 as of 10.08.2005.

¹⁸¹ Federal Law Gazette (BGBl.) 22/1970 as amended by BGBl. I 82/2005 as of 10.08.2005.

professional requirements for nurses (*Pflegehelfer, Diplomkrankenschwester und -pfleger*), dentists, nursery teachers, judges, prosecutors etc.¹⁸² These requirements are in breach of the Employment Equality Directive 2000/78/EC.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

As a reaction to the increasing unemployment rate in Austria (see below), the **Government** adopted the **Employment Promotion Act**¹⁸³ (*Beschäftigungsförderungsgesetz*) **regulating the Government's strategy in counteracting unemployment. The Act singles out juveniles, women and the long-term unemployed as specific target groups that need support.** The employment related measures include professional education and qualification measures, further education and promotion of the reception and continuation of labour. In the framework of the Employment Promotion Act the Government started the initiative "Endeavour Employment" (*Unternehmen Arbeitsplatz*). More than 60.000 people stand to profit from the planned qualification and employment push. According to the Ministry for Economics and Labour the initiative has already led to an 8.2% increase in people participating in training programmes compared to October 2004. Under the framework of this initiative special qualification programmes for persons working in the expanding health care sector and specific programmes for women and adolescents will be started in 2006.

Another measure designed by the Government to improve the re-integration of the long-term unemployed is the so-called "**combined-wages scheme**" (Kombilohn). Starting in January 2006, people below 25 or above 45 years, who are working in the low income sector, can receive certain subsidies (so-called "combined-wages") for a maximum period of one year.¹⁸⁴ The benefits can total up to 50% of the salary, which combined with the benefits may not exceed €1.000 per month. These combined-wage benefits are supposed to tackle the problem that many low-income jobs are not taken by the unemployed, who claim that they can either not live off the low income provided, or that the difference between the salary for such low-income employment and their unemployment benefit is too small to make working worthwhile. The opposition parties as well as the Austrian Federation of Trade Unions (*Österreichischer Gewerkschaftsbund*) and the Chamber of Labour (*Arbeiterkammer*) criticised the combined-wages scheme as an inappropriate measure for creating new jobs and pointed out the risk of wage dumping.¹⁸⁵ It is feared that companies could take advantage of the benefits and by firing more expensive low-skilled employees causing the "long-term unemployed of tomorrow." Even though the act will be re-evaluated in one year, employees' representatives fear that the state of the economy could put a lot of pressure in regard to its continuation.¹⁸⁶

Reasons for concern

At the end of October 2005, the number of registered unemployed was 5.8% higher compared to the same period in 2004. The number of women unemployed increased by 6.9% whereas the number of unemployed men increased by 4.7%. The percentage of people between 16 and 24 seeking employment increased by an alarming 10.4%,

¹⁸² „Berufsverbote für behinderte Menschen in Österreich“ by Michael Krispel, 30.03.2003, available at: <http://www.bizeps.or.at/news.php?nr=4091&suchhigh=k%F6rperliche%2Beignung> (10.11.2005).

¹⁸³ Federal Law Gazette (BGBl.) I No. 114/2005 as of 27.10.2005.

¹⁸⁴ Sec 34a Employment Service Act (*Arbeitsmarktservicegesetz*), Federal Law Gazette (BGBl.) I No. 114/2005 as of 27.10.2005.

¹⁸⁵ „AMS-Chef Buninger – ‚Kombilohn nur für über 45-Jährige‘“, in *der Standard*, 23.08.2005.

¹⁸⁶ „AK-Präsident Josef Fink lehnt Kombilohn-Modell ab“, press release of the *Arbeiterkammer*, 12.08.2005.

compared to October 2004. In regard to education the unemployment rate of unskilled workers with no school leaving certificate rose by 19.2%. The latter group accounts for about 80% of all unemployed persons¹⁸⁷. The Federal Ministry for Economics and Labour blames the stagnating economy and the increasing seasonal employment sector, for instance in the tourism branch, for the climbing unemployment rate.

Article 16. Freedom to conduct a business

Freedom to conduct a business

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In October 2005, the ECJ resolved a dispute between dentists (*Dentisten*), who must complete a three year non-university study to qualify and dental practitioners (*Zahnarzt*), who have completed a university degree in medicine. The court ruled that dentists are not allowed to engage in their occupation under the title dental practitioner or “*Zahnarzt*”¹⁸⁸.

Legislative initiatives, national case law and practices of national authorities

Sec 8 para 3 of the Disability Equality Act¹⁸⁹ (*Behindertengleichstellungsgesetz*) stipulates that the regulations for awarding public subsidies have to be in line with the provisions on prohibiting discrimination on the grounds of disability. The institution or person receiving subsidies as well as the subsidised project have to comply with the Disability Employment Act and Disability Equality Act.

Article 17. Right to property

The right to property and the restrictions to this right

Legislative initiatives, national case law and practices of national authorities.

With the **amendment to the Austrian Copyright Act 2005**¹⁹⁰ (*Urheberrechtsgesetznovelle 2005*) Directive 2001/84/EC on the right of resale for the benefit of the author of an original work of art and Directive 2004/48/EC on the enforcement of intellectual property rights will be partially incorporated into Austrian law. Concerning the latter, only copyright and alienated rights will be regulated by this amendment. Regarding the right of resale, Austria has favoured a more restrictive approach and will only incorporate the directives relating to this field to the minimum standards necessary to comply with the Directive. Enforcement of the rights and regulations on copyright already more or less correctly implement the directives. Changes have to be undertaken concerning interlocutory injunctions and the entitlement to access to information. The legal position of film producers will be improved by

¹⁸⁷ “Arbeitsmarktlage: Arbeitslose +58%, Beschäftigte +1,2% im Jahresabstand”, Press release of the Federal Ministry for Economics and Labour, 03.11.2005.

¹⁸⁸ European Court of Justice (27.10.2005) Case C-437/03 Commission v Austria, [2005] (judgment of 27 October 2005).

¹⁸⁹ Federal Law Gazette (BGBl.) I 82/2005 as of 10.08.2005.

¹⁹⁰ Ministerialentwurf betreffend ein Bundesgesetz, mit dem das Urheberrechtsgesetz und die Urheberrechtsgesetz-Novelle 1996 geändert werden (Urheberrechtsgesetz-Novelle 2005 - UrhG-Novelle 2005), 350/ME (XXII. GP).

an entitlement to a part of the revenue made, via re-broadcasting, by cable and satellite television.¹⁹¹

The **Voluntarily Offer for Sale Amendment Act**¹⁹² (*Feilbietungsänderungsgesetz*) will provide for the liberalisation and modernisation of the “voluntarily offer for sale” of real estate, an instrument which, up to this point, has hardly been taken advantage of. Until now real estate could only be voluntarily offered for sale in non contentious court proceedings, the amendment transfers this competence to notaries. The amendment provides the real estate owner with the option to mandate persons, who have a trade licence to hold vendues to the sale at auction.¹⁹³

On 25 May 2005 the Austrian Government and the Austrian Jewish Community (*Israelitische Kultusgemeinde – IKG*) **reached an agreement concerning claims for compensation for the losses of the IKG under the NS regime**. The IKG is satisfied with 18.2 million Euros – money which forms part of the remaining sum of the Austrian Reconciliation Fund.¹⁹⁴ Due to the fact that fewer victims of Nazi forced labour than expected brought claims for compensation, this money was disposable. In return the IKG had to withdraw, as *amicus curiae*, a class action in the US and its claims before the General Settlement Fund. Money will only be transferred, if the class action in the US is settled. This is also the case in the applications for compensation by victims of the Nazi regime pending before the General Settlement Fund. Another prerequisite for the payment of this compensation is that all the claims pending before the Settlement Fund must have been decided upon, a procedure which is taking much longer than expected. Due to the fact that with each passing day more and more victims of the Nazi regime are dying, the Austrian Government planned to start with the payments of quota (In fact these payments will again be only part of a quota due to the fact that full compensation will not be granted, but only a part of the full budget – US\$ 210 million). For this purpose the Federal Act on the General Settlement Fund (*Entschädigungsfondsgesetz*) has been amended on 16 November 2005.¹⁹⁵

On September 20 2005 the **arbitration panel of the General Settlement Fund**, established to examine allocations for in rem restitutions, issued a decision¹⁹⁶ **recommending the City of Vienna return the airfield of Aspern** (5,700 square meters of land) to the heirs of the former owner, a Jewish lawyer. After the end of the NS regime, claims for restitution were rejected, inter alia, by the Administrative Court. Only the latest research, carried out by the Austrian Historian Commission, contributed to the positive assessment of the claim. The real estate in question is one of the important areas in regard to metropolitan development. The City of Vienna will therefore most probably offer compensation or an alternative plot of land to the heirs. In any case, the Municipality of Vienna has obliged itself since 2001 to follow the recommendations of the panel.¹⁹⁷

¹⁹¹ Gesetzesentwürfe: Urheberrechtsgesetz-Novelle 2005 available at the website of the Ministry of justice www.bmj.gv.at/gesetzesentwuerfe (08.11.05).

¹⁹² Ministerialentwurf betreffend ein Bundesgesetz, mit dem die Notariatsordnung, das Notariatsaktsgesetz, das Gerichtskommissärsengesetz, das Gerichtsgebührengesetz, das Gerichtliche Einbringungsgesetz 1962, das Gerichtskommissionstarifgesetz, das Außerstreitgesetz und die Gewerbeordnung 1994 geändert werden (Feilbietungsrechtsänderungsgesetz - FRÄG), 348/ME (XXIIGP).

¹⁹³ Gesetzesentwürfe: Feilbietungsänderungsgesetz, available at the website of the Ministry of Justice, www.bmj.gv.at/gesetzesentwuerfe (08.11.05).

¹⁹⁴ 414.2 million Euro of this fund formed originally part of the budget of the insolvency and compensation fund (*Insolvenz-Ausgleichs Fonds*), The Constitutional Court currently examines, whether this transfer was legitimate, “Finten & Fonds” in *Falter* No. 42/05.

¹⁹⁵ Bundesgesetz, mit dem das Entschädigungsfondsgesetz geändert wird, 509/BNR (XXII. GP).

¹⁹⁶ Entscheidung 24/2005, available at <http://www.nationalfonds.org/aef/deutsch/> (08.11.05).

¹⁹⁷ “Flugfeld Aspern zurück an die NS-Opfer?” of 27.09.2005 available at <http://www.vienna.at/> (08.11.05).

Article 18. Right to asylum

Asylum proceedings

Legislative initiatives, national case law and practices of national authorities

Statistics released by the asylum department of the Ministry for the Interior show that the number of asylum-seekers has dropped considerably.¹⁹⁸ This is mainly due to the last round of enlargement and the ensuing application of the Dublin Regulation in the new Member States and also to the deterrent effect of the ever more tightened asylum laws in Austria. Actual figures prove that from January to October 2005 a total of 17,730 persons applied for asylum in Austria, which is a further decrease by 15% in comparison with the comparable period in the year 2004. A climax was reached in 2002 with a total of 39,354 applications.

State of origin	Number of applications	Positive decisions	Negative decisions
Russian Federation	3496	2089	188
Serbia and Montenegro	3345	374	840
India	1102	1	311
Turkey	880	58	492
Moldova	824	4	183
Georgia	799	56	440
Nigeria	754	4	545
Afghanistan	720	448	105
Mongolia	481	3	44
Bangladesh	451	0	94

In the period of scrutiny most people came again from the Russian Federation (i.e. mostly from Chechnya) with 3,496 new applications, of which 2,089 were decided positive and 188 negative. Serbia and Montenegro follows with 3,345 applications (374 pos, 840 neg) and India comes next with 1,102 applications (1 pos and 311 neg). Despite less applications this year, there is still a huge backlog of more than 38,000 applications as per 1 November 2005. Interestingly, there is also attached a table on the requests that have been made by Austria under the Dublin Regulation to other Member States. In the period January to October 2005, 3,158 requests for readmission were decided positive, 654 were rejected and 1,085 were still pending.

In July 2005 the Austrian Parliament passed a new and comprehensive codification of the law in the area of asylum and immigration (*Fremdenrechtspaket 2005*¹⁹⁹) with the votes of the Government parties and of the opposition Social Democrats. After severe criticism of the wording of many provisions in the initial proposal sent out for consultation of the public exercised most of all by the UN High Commissioner for Refugees, the Human Rights Advisory Board, the Austrian Red Cross, the Ludwig Boltzmann Institute of Human Rights and amnesty international, at least some recommendations were taken up by the Government in order to avoid that the Constitutional Court would again repeal parts of the Asylum Act such as it did with

¹⁹⁸ Federal Ministry for the Interior, *Bundesministerium für Inneres/Sektion III – Asyl- und Fremdenstatistik Oktober 2005*.

¹⁹⁹ Federal Law Gazette (BGBl) I No. 100/2005.

respect to the 2003 amendment²⁰⁰. The legal package contains *inter alia* the enactment of the Asylum Act 2005 with effect as from 1 January 2006, being a complete revision of the Asylum Act 1997 which was amended in major parts only two years ago. The intention of the drafters was to present a readable and systematic legal text while taking into account recent developments in EU legislation and shortcomings presently perceived in the practice of the asylum proceedings.

As can be seen from the official Explanations attached to the Government Bill introducing the Asylum Act 2005, clearly the envisaged goals are to shorten the period of time between the submission of an application for international protection and the decision taken by the asylum authorities and to tighten the regulations for asylum-seekers while their cases are pending. As far as possible, it is intended to close all perceived loopholes and to rule out any possibilities for the misuse of the right to asylum.

Asylum proceedings in Austria will hence be divided into two phases, a system which was in principle taken over from the 2003 amendment. However, the distinction between the preliminary admission proceedings and the substantive asylum proceedings has been made more explicit.

In the **admission proceedings** carried out in the initial reception centres (*Erstaufnahmestellen*) the case is regularly, but not necessarily, confined to the examination of whether Austria is at all the competent country for the asylum proceedings. Jurisdiction can be denied either under the Dublin Regulation/Convention or for the reason that the person seeking international protection could have applied for asylum or subsidiary protection in a safe third state. Renewed applications after a final negative decision shall also be dismissed at this stage if the factual situation of the person has not changed significantly. This first phase ends with the admissibility decision and a prognosis on the presumable outcome based on the facts established so far. Only if a person is admitted to asylum proceedings in Austria, the material issues of his or her case will be heard and fully examined by the authorities.

When applying for asylum the person concerned will regularly be brought to one of the initial reception centres. Asylum-seekers arriving by plane, however, will be kept in special zones at the airport pending the decision on their applications if they do not prefer to leave the country. For the purpose of taking down and processing the person's particulars including fingerprints and the route of refuge on their way to Austria he or she will be interviewed first by an officer of the immigration police. Subsequently the asylum-seeker will be examined by a physician. Contrary to the existing regulations, an asylum-seeker who can credibly assert that he or she was traumatised in the state of origin or during the refuge will no longer be exempted from the Dublin Regulation. This means that if another Dublin state is competent, a traumatised person who does not suffer from an acknowledged stress-dependent psychological illness caused by torture or a similar incident (section 30 Asylum Act 2005) can be rejected from admission to the Austrian asylum proceedings. As a consequence of the negative decision such person may even be detained pending deportation. Within a period of no longer than 20 days the Federal Asylum Office (*Bundesasylamt*) shall come up with a decision on whether Austria is the competent country to decide on the application for asylum and hence whether the case will be admitted for the consideration of the facts (admissibility decision). During this period the asylum seeker enjoys factual protection from deportation but must not leave the territory of the administrative district where the initial reception centre is located, unless it is necessary for compliance with a duty of law, for compliance with an order issued by an authority or for reasons of medical treatment (Section 12 para. 2 Asylum Act 2005). Whereas the period for coming up with a decision on the admissibility of the application for asylum may be extended if consultations are held with other "Dublin States", the restrictions on the right to free movement may not be extended beyond the 20-day-period. Rather unusual for

²⁰⁰ See Report on the Situation of Fundamental Rights in Austria in 2004, p.48-50.

administrative proceedings section 29 Asylum Act 2005 provides that the Federal Asylum Office shall state in a procedural notice (*Verfahrensanordnung*) to be handed over to the asylum-seeker how it intends to decide the case, although this anticipatory statement is without prejudice to the final decision. Despite the fact that a negative prognosis authorises the immigration police to issue an order for detention pending deportation under section 76(2)4 Aliens Police Act (*Fremdenpolizeigesetz 2005*), no separate appeal lies against this procedural notice.²⁰¹ If the admissibility is denied, the Federal Asylum Office shall at the same time order the deportation of the asylum-seeker (section 10 Asylum Act 2005). On the other hand, a positive decision on the admissibility of an application for asylum during the admissibility proceedings is not final and can still be reversed at a later stage of the asylum proceedings pursuant to section 28(1) Asylum Act 2005.

Special provisions apply to asylum-seekers arriving at an international airport in Austria. These “airport proceedings” shall be finished in both instances after six weeks at the latest. The already existing co-operation with the UNHCR in such cases shall be continued under the Asylum Act 2005. Negative admissibility decisions based on the safe third state concept in section 4 may not be effected without the consent of the UNHCR; likewise material decisions on the right to asylum or to subsidiary protection in the initial reception centre of an airport also require the approval of the UNHCR (section 33 para. 2 Asylum Act). If it is not likely that an application can be rejected or dismissed directly at the airport, the asylum-seeker must be admitted into the country and hence will be covered by the regular regime.

If admitted to the **substantive asylum proceedings**, the asylum-seeker will be given a special identity card (*Aufenthaltsberechtigungskarte*) allowing him or her to stay on the territory of Austria during the asylum proceedings.

In the system of the Asylum Act 2005 the exclusion clauses contained in Article 1(F) of the 1951 Geneva Refugee Convention have been extended by section 6 for other grounds such as public security reasons and have been effectively reversed so as to operate as negative prerequisites for the asylum proceedings to be applied by the authority before the material decision on the status of refugee is taken.

For families special provisions apply which ensure that international protection granted to one family member will be extended to other family members if this is necessary in the light of Article 8 ECHR. However, the enjoyment of the right to lead a family life is restricted to couples that were married in their state of origin and to their common minor children due to the narrow definition of section 2 para. 1(22) Asylum Act 2005.

Section 57 para. 11 allows for the transmission of personal data of asylum-seekers to their states of origin, if the application for international protection was rejected or dismissed at first instance; in such cases the authorities must not reveal the fact that the person applied for international protection. However, there is no such precautionary rule if an asylum-seeker was caught in the act of committing a crime or if the Austrian public prosecution issued an indictment for an allegedly committed crime.

The right to appeal a negative decision of the Federal Asylum Office before the Independent Federal Asylum Tribunal (*Unabhängiger Bundesasylsenat – UBAS*) is regulated very restrictively as regards the aspect of suspensive effect and the general prohibition to present new evidence in the appeals proceedings before the UBAS. In the admission proceedings, an appeal against a negative decision by the Federal Asylum Office regularly carries no suspensive effect pursuant to section 36 para. 1 Asylum Act 2005. Only exceptionally, if the UBAS grants the suspensive effect within seven days from the day when the appeal was

²⁰¹ The issues regarding the detention of asylum-seekers pending deportation are dealt with under Article 6.

submitted for reasons of non-refoulement will the asylum-seeker be protected from deportation prior to the decision becoming final (section 36 para. 4). According to section 38 Asylum Act 2005, the Federal Asylum Office shall hold that an appeal against a decision dismissing an application for substantive reasons has no suspensive effect if the person comes from a safe state of origin²⁰²; has already been in Austria longer than three months before applying for asylum and cannot give legitimate reasons explaining such delay; attempted to deceive the authority about his or her true identity, nationality or the authenticity of the documents despite instructions about the consequences; did not state reasons for his or her persecution; portrays a threatening situation which apparently does not exist; or if prior to the application the authorities had issued an enforceable order for deportation and prohibition of residence. The UBAS may overrule such decision by the Federal Asylum Office within a period of seven days if the deportation of the person concerned would violate the principle of non-refoulement. After the close of the proceedings at first instance the asylum-seeker cannot present new evidence to support his or her case unless the relevant factual situation has changed considerably, or the authority did not follow the procedural rules properly, or the evidence was not available to the asylum-seeker, or the asylum-seeker was not in a position to produce it.

As regards the issue of re-entry into Austria in case the Federal Asylum Tribunal overrules a negative decision of the first instance which has already been effected against the concerned person, section 14 Asylum Act 2005 provides that such person needs to present to the border police the respective appeals decision.

The involvement and participation of the UNHCR in the asylum proceedings is guaranteed by section 63 of the Asylum Act 2005.

Reasons for concern

The new asylum law in Austria as contained in the so-called Aliens Law Codification 2005 (*Fremdenrechtspaket*)²⁰³ can be seen as a consistent further step in the systematic undertaking to move large parts of the administrative proceedings for the granting of asylum or subsidiary protection to the competence of the police and to secure an utmost degree of involvement of the security authorities. The new possibility for the Federal Asylum Office under section 26 Asylum Act 2005 to issue an arrest warrant against an asylum-seeker that withdraws from the asylum proceedings is only the most eminent example on which this appraisal is based. The powerful position of the security and alien police can also be seen when looking at sections 43 to 47 which hold that asylum-seekers without a valid visa or residence permit for Austria shall be detained, body-searched and interrogated by the police before they are brought to one of the initial reception centres. Negative decisions by the Federal Asylum Office on the application for international protection that will frequently be issued together with a deportation order (see section 10) shall be served upon the asylum-seeker by a police officer who will on this occasion regularly arrest and detain the concerned person in order to secure the deportation. Given that the police are not specifically trained for the treatment of asylum-seekers, of which many will be physically exhausted from the long refuge, fearful of persons in uniform carrying weapons, and traumatised by torture or similar events that they were exposed to, it is at least doubtful that the police will be able to fulfill their tasks in a proportional and appropriate way. Rather, it must be feared that with the operation of the new Act asylum-seekers will generally be treated like persons suspected of criminal offences and

²⁰² Safe states of origin will be all states of the EEA plus Australia, Canada, New Zealand, Bulgaria and Romania, as long as there are no Article 7 TEU proceedings instituted or - with respect to non-EU member states - the Government does not pass a Statutory Regulation to the contrary (see section 39).

²⁰³ Federal Law Gazette (BGBl) I No. 100/2005. The provisions will become effective and apply to all applications for asylum and subsidiary protection as from 1 January 2006.

that despite a clear decrease of the number of applications for asylum the number of asylum-seekers in police detention will very probably increase.

Of particular concern for the UNHCR in its analysis of the Asylum Act 2005²⁰⁴ were the extended grounds for detention pending deportation, an aspect which is dealt with in detail under Article 6, the fact that the former special protection of traumatised persons has now been reduced to the group of persons that suffer from a medically acknowledged stress-dependent psychological illness as a consequence of their exposure to torture or a similar incident, and the lack of sufficient safeguards for the protection of asylum-seekers from the transmission of their personal data to the states of origin. These are major concerns that are fully shared by the expert.

It must be feared that the possibility for the authorities to detain even persons with signs of traumatisations, who were formerly specially treated and taken care of for their needs, might be used excessively in the future. This applies in particular in relation to the readmission of asylum-seekers for which another state is competent either under the Dublin Regulation or pursuant to an applicable international agreement. It is particularly regrettable that the special protection of victims of torture and traumatised persons, which was only recently introduced by the 2003 amendment to the Asylum Act and welcomed by the UNHCR as best practice in Europe for the legal recognition of the special needs of these persons (section 24b Asylum Act 1997), will be abandoned again with the entering into force of section 30 of the new Asylum Act 2005. Unfortunately, the ambit of this section is very much reduced so that it will cover only very serious cases of traumatisation. Moreover, since the law is silent on who is entitled to attest such trauma with the requested "high probability" it may well be in practice that ordinary civil servants employed in the Federal Asylum Office will perform this sensitive task.²⁰⁵ Hence it is to be feared that the extraordinary strain which detention and deportation entails even for healthy persons might in some cases cause irreversible and permanent damage to traumatised persons.²⁰⁶

The UNHCR has rightly pointed out that the exclusion clauses of the 1951 Geneva Convention, particularly those in Article 1(F), should as a matter of principle be examined by the authorities after the status of refugee could be determined under Article 1(A). However, this system has been reversed by the Austrian Asylum Act 2005: an asylum-seeker will only be admitted to the proceedings if he or she does not fall under section 6 with the consequence that there will be no proportionality test balancing the committed crime with the personal threat which the concerned asylum-seeker is likely to face if being deported.

As laid down by the UNHCR Executive Committee in its Resolution no. 30 (XXXIV) of 1983, appeals against decisions in asylum proceedings must in principle carry suspensive effect. Only in certain circumstances may exceptions to this rule be justified such as with applications that are manifestly ill-founded or that have a clearly fraudulent character. In the light of this the UNHCR considers section 38 of the Asylum Act 2005, setting out the criteria under which the Federal Asylum Office can refuse to grant suspensive effect to an appeal, to be potentially too broad. As regards negative decisions in admission proceedings, the general rule is that the deportation can be effected even if the concerned person filed an appeal

²⁰⁴ UNHCR-Kurzanalyse der Regierungsvorlage für das Fremdenrechtspaket 2005 (UNHCR short analysis of the government bill introducing the Alien Law Codification 2005), available at <http://www.unhcr.at> (01.12.2005).

²⁰⁵ Only the official explanations to the Government proposal for an Asylum Act refer to physicians with a diploma in psychology (*Erläuterungen zur Regierungsvorlage*, 952 d.B. XXII. GP)

²⁰⁶ Stellungnahme des Ludwig Boltzmann Instituts für Menschenrechte zur Regierungsvorlage des Asylgesetzes 2005 und Fremdenpolizeigesetzes 2005 (Statement of the Ludwig Boltzmann Institute of Human Rights on the government bill for the Asylum Act 2005 and the Alien Police Act 2005), 14 April 2005.

(section 36(4)). Only if the Independent Federal Asylum Tribunal, which is not bound by the declaration of the first instance, still grants suspensive effect within seven days (sic!), will the aliens police be prevented from enforcing the deportation order. Given the exhaustive list of grounds where it will exceptionally be possible to produce new evidence in the appeal proceedings before the Independent Federal Asylum Tribunal and the fact that the law does not provide for a minimum standard of the interpreters required for the hearings, it is very uncertain if wrong translations could be corrected on appeal.

The issue of data protection for asylum-seekers is not satisfactory since it cannot be ruled out under the new Act that the state of origin learns about the fact that one of their nationals applied for asylum in Austria. Therefore, it would be recommendable to delete section 57 para. 11 authorising the Austrian authorities to contact and transmit to the state of origin personal data of the asylum-seeker, such as was proposed by the UNHCR in its analysis.

Once deported, it will not be possible for an asylum-seeker to return to Austria even if his application for asylum succeeded on appeal in case he or she fails to produce the respective decision to the border police. Given that all decisions of the asylum authorities are electronically stored in the Asylum Information System (*Asylinformationssystem- AIS*) this adverse condition for re-entry appears to have no justification.

Positive aspects

Despite several and severe grounds for criticism, it cannot be denied that the **Asylum Act 2005 provides for a clear two-tier structure for the proceedings**. Parallel to the coming into force of the new legislation the staff of the asylum authorities will be significantly increased.²⁰⁷ The official explanations to the Government Bill propose an additional staff of 60 persons for the first instance Federal Asylum Office and 72 more personnel in the Independent Federal Asylum Tribunal, of which there will be 16 new members of the tribunal and 20 legal assistants. For these reasons there is some hope that this will also result in the proceedings being completed faster in the future.

What has been abandoned in the new law are the special procedural provisions for cases that are manifestly ill-founded. Once admitted, all asylum-seekers should therefore be treated equally and their cases be fully examined by the authorities.

It is also welcomed that **asylum-seekers will receive newly translated information sheets** which inform about the proceedings and their rights and obligations. These sheets shall as far as possible be available in a language that is understandable to the person concerned. It remains to be hoped that on the occasion of the proposed new translation the errors of the past²⁰⁸ are not repeated and that explanations and information are kept as simple and readable as possible.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The **criminal provisions against trafficking in human beings have been extended** in section 114(1) Aliens Police Act **to cover even persons that** knowingly promote the entry into or transit through a member state of the European Union or a neighboring state of Austria of a foreigner, but **act out of humanitarian reasons** without intention to take payment or to profit otherwise. Perpetrators shall be punished by court with a term of imprisonment of up to

²⁰⁷ See the official explanations to the Government Bill (*Erläuterungen zur Regierungsvorlage*, 952 d.B. XXII. GP) at pp. 18-19.

²⁰⁸ Please refer to the Report on the Situation of Fundamental Rights in Austria in 2004, pp. 54-55.

one year. Even more worrying is the criminal provision in section 115(1) which puts anyone under the threat of criminal prosecution and a possible sentence of up to six months who assists another person without a lawful residence permit in extending his or her stay in a member state of the European Union with a view to avoiding his or her deportation. The far-reaching wording of the provision would even cover lawyers practising in the field of asylum law, non-governmental organisations and helpful individuals. Hence it must be pointed out that section 115(1) could be used overly excessively to prosecute persons with a humanitarian attitude to asylum-seekers.

Article 19. Protection in the event of removal, expulsion or extradition

Subsidiary protection and prohibition of removals of foreigners to countries where they face a real and serious risk of being killed or being subjected to torture or to other cruel, inhuman and degrading treatments

Legislative initiatives, national case law and practices of national authorities

The case of Mohamed Bilasi-Ashri, an Egyptian national, who is likely to be extradited from Austria to his home country upon diplomatic assurances that he will not be tortured or exposed to inhuman or degrading treatment, even though a real threat could have been established, has not only caused protest by amnesty international but also by the UN Special Rapporteur against torture and the Commissioner for Human Rights of the Council of Europe. Both experts have pointed out that due to the absolute prohibition of torture recognised by the international law diplomatic assurances by the requesting state to the extraditing state cannot be compared to a diplomatic pledge not to execute a death penalty where there is no such common consensus at the international level. Mr. Bilasi-Ashri was an activist within the “Muslim Brotherhood” in 1985 and later joined the “*Al-Gama-Al-Islamaya*” (Islamic Group), another Islamic fundamentalist group. He was also a member of “*Al-Jihad-Al-Islami*” (Islamic Holy War - “Al-Jihad”). For his political activities he was arrested several times by the Egyptian authorities. In 1995 he arrived in Austria and applied for asylum. On 25 December 1995 the Egyptian State Security Emergency Court convicted the applicant *in absentia* of belonging to an illegal association whose aim was to threaten national order and security by means of violence and terror and of various criminal offences and sentenced him to fifteen years’ imprisonment and hard labour. Since the Federal asylum Office had dismissed his application for asylum and the Egyptian Minister for Justice had in the meantime filed a request for extradition, proceedings were instituted in Austria to extradite him. By letter of 22 March 2002 the United Nations High Commissioner for Refugees (UNHCR) informed the Minister of Justice that, in the light of the documents submitted by the applicant and an interview with him on 11 March 2002, the UNHCR strongly recommended that he be granted refugee status on the basis that he had a well-founded fear of persecution for reasons of political opinion if extradited to Egypt. It urged the Minister of Justice to respect the applicant’s particular need of protection and, hence, refrain from extraditing him. On 26 November 2002 the European Court of Human Rights dealt with the complaint of Mr. Bilasi-Ashri most of all under Article 3 of the Convention that he would be subjected to ill-treatment if extradited to Egypt.²⁰⁹ However, after the release of the applicant from detention pending extradition, which was effected following the refusal of Egypt to accept the conditions set out in the extradition order, the European Court of Human Rights concluded that the matter had been resolved within the meaning of Article 37 para. 1(b) of the Convention and hence struck the application off the list. However, on 25 February 2005 Egypt eventually accepted in a diplomatic note to the Austrian Ministry for Foreign Affairs the conditions for the extradition as stated in the letter dated 10 January 2002. Hence the extradition proceedings were resumed in May 2005 and on 24 June 2005 the Krems

²⁰⁹ ECtHR, *Bilasi-Ashri v. Austria* (Application no. 3314/02) decision of 26 November 2002.

Regional Court declared the extradition admissible at first instance. Presently the case is still pending and will be followed-up in the next report.

CHAPTER III EQUALITY

Article 20. Equality before the law

Equality before the law

Legislative initiatives, national case law and practices of national authorities

On 23 November 2005, the proposals for the amendment of the Industrial Relations Act (*Arbeitsverfassungsgesetz*) and the Chamber of Labour Act (*Arbeiterkammergesetz*) were finally adopted by the Parliamentarian Committee on Labour and Social Issues.²¹⁰

According to the current wording of the law, only Austrian citizens can be elected to workers' councils and to the Chamber of Labour. One year ago the ECJ considered this a clear case of discrimination, excluding EU-nationals employed in Austria from standing for elections to the Chamber of Labour. The Court had found that the same was true for non-EU nationals for whom a special agreement between the Community and non-member states was applicable. The decision was in line with the Court's own views, which had been laid down in a preliminary judgement in 2003 regarding the interpretation of the association agreement with Turkey and findings previously been adopted by the UN Human Rights Committee in April 2002 and the ILO Committee of Experts on the Application of Conventions and Recommendations in 2003, respectively, on similar complaints regarding the election to work councils.²¹¹ According to the new wording of sec 21 of the Industrial Relations Act, everybody from the age of 19 onwards who has worked in Austria for a minimum of two years during the last 5 years is eligible for election to the Chamber of Labour. In regard to election to the workers' council employees from the age of 19 onward, who have been employed by the company for a minimum of 6 months are eligible for election.²¹²

On 10 October, the Austrian Constitutional Court deleted sec 123 para 8 lit. b of the General Security Act²¹³ (*Allgemeines Sozialversicherungsgesetz - ASVG*) and sec 83 para 8 of the Trade Security Act²¹⁴ (*Gewerbliches Sozialversicherungsgesetz - GSVG*) due to their discriminatory content. While the Constitutional Court had declared an application in regard to a comparable case to be inadmissible in 1998²¹⁵, it now has been forced to change its jurisprudence in the light of the judgement of the European Court of Human Rights in *Karner v. Austria*²¹⁶.

The applicant employee was compulsorily health insured according to the General Security Act. He applied in July 2004 at the Lower Austrian Health Insurance (*Niederösterreichische Gebietskrankenkasse*) to confirm that his partner was entitled to benefit as a dependant in accordance with sec 123 para 8 lit. b ASVG of his health insurance. Due to his position as director of a limited company he also applied for confirmation according to sec 83 para 8 GSVG at the Social Security Body for Trade (*Sozialversicherung der gewerblichen Wirtschaft*). The applications were rejected and the decisions in first instance confirmed by the

²¹⁰ Bericht des Ausschuss für Arbeit und Soziales, 1217 d.B. (XXII. GP).

²¹¹ See in this regard the Report on the Situation of Fundamental Rights in Austrian, in 2003, p. 32 and in 2004, p. 60.

²¹² Antrag betreffend ein Bundesgesetz, mit dem das Arbeiterkammergesetz 1992 und das Arbeitsverfassungsgesetz geändert werden, 607/A (XXII. GP).

²¹³ Federal Law Gazette (BGBl.) No. 189/1955 amended by BGBl. No. 282/1981.

²¹⁴ Federal Law Gazette (BGBl.) No. 560/1978 amended by BGBl. No. 643/1989.

²¹⁵ VfGH 16.06.1998, B 935/98.

²¹⁶ Eur.Ct.H.R (1stsect.), *Karner v. Austria*, (Appl. n°40016/98) judgement of 24 July 2003.

governor of the Federal Province of Lower Austria (*Landeshauptmann von Niederösterreich*). In his appeal to the Constitutional Court the applicant claimed that his right to equal treatment according to the Austrian Constitution had been violated in regard to same sex partnerships. The Court opened proceedings and also examined provisions of the statutes of health insurance funds in its examination, based on the relevant provisions in the ASVG and GSVG. Pursuant to sec 123 para 8 lit b of the ASVG, the funds can expand the circle of persons, entitled to benefit from the health insurance from family members to other persons of the opposite sex, not related to the insured person under the precondition that the person has lived together with the insured for more than 10 months and has kept his/her household for free. Sec 83 para 8 of the GSVG is worded in a similar manner. Both the Lower Austrian Health Insurance and the Social Security Body for Trade have made use of this authorization and laid down corresponding provisions in their statutes.

In its reasoning the Austrian Constitutional Court referred to the judgement of *Karner v. Austria*, holding that differential treatment on the grounds of sexual orientation or sex can be only justified on the grounds of serious reasons. In its response the Government argued that the difference in treatment is justified due to the aim of promoting families with children. The Court rejected this argument, holding that the laws do not refer to children as a precondition, and only establish “cohabitation” (*Wohngemeinschaft*) and “housekeeping free of charge” as preconditions. The court further held that there is not even a requirement for the existence of a partnership (*Lebensgemeinschaft*). Contrary to the claims of the applicant and the Government the Constitutional Court not only declared the wording “of the opposite sex” in the provisions null and void but completely deleted the two provisions which led consequently to the deletion of the corresponding provisions in the two statutes. Pursuant to its reasoning, a partial deletion would interfere with the competence of the legislator. **In its final reasoning the Court indicated that the legislator now has the possibility of redrafting the provision in a constitutional manner in a way which corresponds with its aims, namely to promote families with children.**

Reasons for concern

The Court refrained from giving any final answer to the current family political debate but left it to the legislator, to find an answer. The more liberal side of the Government, represented in this regard by the Minister of Justice Karin Gastinger, used the judgement as an impetus to bring forward her initiative introducing a registered partnership into Austrian Family Law. She feels confirmed by the Court, indicating already in 1998 that the differentiation between partnership and cohabitation are without any interferences with the right to private life hard to draw. The continuation of the system as it is now, could lead to a heavy burden being laid on the Social Security System. The Conservatives, especially those in the Peoples Party, like the president of the national assembly Andreas Kohl und Maria- Theresia Fekter spokesperson for Justice in the Peoples Party, rejected further initiatives in this direction. They do not see any reason for a reform of family law. The judgement might even be used to limit the access to co-insurance to relatives and spouses or to partners when children are living in the same household. If this is the case only those same sex couples who raise children from earlier heterosexual relationships would have access to co-insurance, due to the fact that homosexual couples have no right to adoption.²¹⁷

²¹⁷ „Koalitionszwist um die Home-Ehe“ of 11.11.2005 in *wienweb.at*, available at: www.wienweb.at (28.11.05).

Article 21. Non-discrimination

Protection against discrimination

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In its judgement of 4 May 2005 the European Court of Justice declared that Austria had failed “to adopt, within the period prescribed, all the laws, regulations and administrative provisions necessary to comply with Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [...]”²¹⁸ Austria was held to have violated the obligation to transpose the Racial Equality Directive because of inadequate implementation in some of the Federal Provinces and the fact that it had not notified the Commission as stipulated in the directive. The Court held that Austria could not justify this delay by referring to its internal regulations on shared competencies between the Federal State and the Provinces. Austria is also facing the prospect of another negative decision relating to the delayed transposition of the Employment Framework Directive. In March 2005, the European Commission brought another infringement procedure against Austria for failing to transpose the directive on the prohibition of discrimination on the grounds of disability and for failing to adopt relevant legislation in regard to all grounds on the provincial level.²¹⁹

On 15 February 2005, the European Commission against Racism and Intolerance (ECRI) made public its third report on Austria which was adopted on 25 June 2004 and which covers the period from January to early December 2003. While considering Austria’s efforts in regard to improving and monitoring the conduct of law enforcement officials the Commission noted that several of its previous recommendations have not been subsequently implemented. The Commission held that the measures which have **been adopted to do with asylum (since its second report) have had an obviously negative impact on public support for the people affected. The Commission identified Muslims, black Africans and Roma as the minority groups which are most vulnerable to racism and racial discrimination.** Furthermore, the Commission stressed that any condemnation of entire communities or generalisations made during public debate should be avoided²²⁰.

In its concluding observations on Austria’s 2nd periodic report the **Committee on the Rights of the Child in March 2005 expressed its concerns in regard to “discriminatory attitudes and manifestations of neo-Nazism, racism, xenophobia and related intolerance towards migrant communities and those of certain ethnic backgrounds and at their impact on children belonging to these groups, as well as towards refugee and children seeking asylum.”** Furthermore, the Committee was concerned that the existing legal instruments that limit the dissemination of racist and violent images, texts and games through the Internet were inadequate.²²¹

Although Austria signed the **Additional Protocol to the Cybercrime Convention in January 2003**, concerning the criminalisation of acts of a racist and xenophobic nature

²¹⁸ European Court of Justice (04.05.2005): Case C-335/04 *Commission v. Austria* [2005] (judgement of 4 May, 2005).

²¹⁹ Action brought on 21 March 2005 by the Commission against Austria, OJ 2005/ 29, Case C-133/05. (2005/C 143/29)

²²⁰ Third Report on Austria, European Commission against Racism and Intolerance, CRI (2005) 1, adopted on 25 June 2004, released on 15 February 2005, available at: http://www.coe.int/T/E/human_rights/ecri/1-ECRI/2-Country-by-country_approach/ (23.11.2005)

²²¹ Concluding Observations on Austria, Committee on the Rights of the child, 38th session, CRC/C/15/Add.251, 31.03.2005, para 21, 31.

committed on computer systems, it has not ratified it so far. Equally, **Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms** has not been ratified either.

Legislative initiatives, national case law and practices of national authorities

The most important developments in regard to anti-discrimination legislation in Austria during the reporting period were the adoption of the **Disability Employment Act** and the **Disability Equal Treatment Act and the setting up of the additional equality bodies responsible for discrimination on the grounds of race and ethnic origin, religion, age and sexual orientation**. The two Acts prohibiting discrimination on the grounds of disability will enter into force on 1 January 2006 and will finally transpose the disability related scope of the Employment Framework Directive, albeit three years too late (for further information see Article 26). Equally delayed, the two new senates of the Equal Treatment Commission and the two new Ombudspersons responsible for discrimination on race and ethnic origin, religion and belief, age and sexual orientation were nominated and started their activities in spring 2005.

At the **provincial level**, except Salzburg, all other federal provinces have so far adopted the required anti-discrimination legislation falling under their competence. In 2005, the Acts in Carinthia, Tyrol, Lower Austria, Vorarlberg, Upper Austria and Burgenland entered into force. The Acts adopted in 2005 by the provinces Carinthia²²², Tyrol²²³, Lower Austria²²⁴ and also Vienna go beyond the minimum requirements of the Directives by extending the non-employment scope of the Racial Equality Directive to all discrimination grounds.

In March 2005, the **two new ombudspersons**, who were appointed on the basis of the Equal Treatment Commission and Ombud for Equal Treatment Act²²⁵, assumed their duties. Due to the implementation of the two EU anti-discrimination directives the mandate of the previous Ombud for Equal Opportunities for Women and Men was extended to include these two new ombudspersons as well. While one ombudsperson remains responsible for gender discrimination in employment, one of the new ombudspersons is responsible for the other reasons for discrimination in employment²²⁶ while the other one deals with ethnic discrimination outside the field of employment.²²⁷

The ombudspersons' mandate is to provide individual support to victims of discrimination. They can negotiate with employers or the discriminating person on behalf of the victim provided that they agree to such a course of action. These negotiations are based on the legal right to obtain relevant information from the employer or discriminating person. If one of the ombudspersons concludes that discrimination has taken place, they can pass the case on to the responsible senate of the Equal Treatment Commission, which then has to take up proceeding. Furthermore, the ombudspersons can make recommendations and publish reports based on their observations. They can also undertake independent research on discrimination issues.

It is highly questionable if these extensive mandates can be efficiently fulfilled by only two Ombudspersons being responsible for the entire country of Austria. While

²²² Provincial Law Gazette of Carinthia (LGBl.) 63/2004, (28.12.2004).

²²³ Provincial Law Gazette of Tirol (GBl.) 2005, (01.02.2005), LGBl. 1/2005, (11.01.2005)

²²⁴ Federal Law Gazette of Lower Austria (LGBl.) 9290/2005, (29.04.2005) and LGBl. 2060/2005, (29.04.2005)

²²⁵ Federal Law Gazette (BGBl) I No. 66/2004.

²²⁶ Ombudsperson for Equal Treatment Irrespective of Ethnic Belonging, Religion and Belief, Age and Sexual Orientation in Employment.

²²⁷ Ombudsperson for Equal Treatment Irrespective of Ethnic Belonging in Other Areas.

approximately 20 people working in the Ombud's office deal with gender specific discrimination, only two people are responsible for the other grounds of discrimination.

The decentralisation of the Ombuds Office for Gender Discrimination has led to an enormous increase in cases due to their increased accessibility. Between 1998 and 2003 four regional offices in Graz, Innsbruck, Klagenfurt and Linz were established. As a result the number of cases brought increased almost sixfold²²⁸. Unfortunately, it seems that this lesson may need to be learned twice. Although the Act establishing the two new Ombuds foresees the possibility of creating regional offices responsible for the other grounds of discrimination, there are presently no plans to do so.

One month after the two new ombudspersons started working, **the two new senates of the Equal Treatment Commission became operational**, meaning that all the members were appointed. According to their mandate the senates are supposed to act as expert bodies, which can render legal opinions on individual cases of discrimination, brought by the responsible ombudsperson or the alleged victim of discrimination himself or herself. Furthermore, the senates can issue expert opinions on general issues of discrimination. Their legal opinions are, however, not enforceable.

The senates' fields of responsibility are shared in the same way as the Ombuds'. Apart from the existing first Senate, responsible for gender discrimination, a new second Senate for employment related discrimination on other grounds and a third Senate for non-employment related discrimination due to ethnic origin were set up. Both senates are constructed like tripartite bodies, composed of 10 members and 10 substitutes. Each member and substitute serves for a period of 4 years and can be re-appointed. Members delegated by one of the Social Partners must state that they will exercise their mandate conscientiously and impartially. A constitutional provision in the Act establishing the Commission legally secures the independence of the Government representatives.

Concerns exist in regard to the accessibility of the equality bodies and public awareness about antidiscrimination legislation in Austria. The transposition of the two anti-discrimination directives so far led to the adoption or amendment of totally 12 provincial and five federal acts. Furthermore, in each province one contact point was established to be responsible for providing information on the relevant provincial bill. At the federal level two new senates were created and two new ombudspersons were appointed. In regard to discrimination on the grounds of disability another ombudsperson has been established. Altogether this creates 14 new people and institutions responsible for dealing with different kinds of discrimination. Although one could say, "the more institutions the better" it will be very difficult for victims of discrimination to find their way through this jungle of provisions and bodies whilst trying to decide under which particular field of competency their individual case falls. Also, legal practitioners and judges may face some challenges in differentiating between the various scopes and obligations. A single act prohibiting discrimination on various grounds in the private and public sectors certainly would have been more accessible while at the same time facilitating public awareness on the relevant obligations and rights.

Between 1 March and 4 November 2005, the 2nd ombudsperson (responsible for employment issues) counted 267 first contacts which lead to 1149 consecutive contacts. The majority of these inquiries referred to discrimination on the grounds of ethnic origin (75) followed by discrimination on the grounds of age (32) and on the grounds of sexual discrimination (31). The 3rd ombudsperson (responsible for non-employment related discrimination on ethnic origin) received 170 first contacts leading to 451 consecutive contacts. Unfortunately, this data only provide information about general contacts and do not disclose the total number of complaints about discrimination that were referred to the ombudspersons. Given that there is

²²⁸ Die Institutionen und AkteurInnen des Gleichbehandlungsgesetzes, Christine Baur, Margit Groser 2005, available at: www.univie.ac.at/bim/workshopreihe/ (30.06.2005)

presently **no comprehensive monitoring system in place** that would provide information on discrimination under the various grounds, it seems particularly deplorable that these institutions do not help to fill these gaps in data. NGOs like ZARA or Helping Hands cannot provide reliable quantitative data on discrimination as they lack the resources to survey all regions in Austria. Crime statistics, on the other hand, only indicate a small percentage of the discriminatory incidents that occur in Austria because many cases are not reported to the police, or do not fall under the restrictive scope of criminal provisions.

Since its appointment in March 2005, Senate II of the Equal Treatment Commission has received nine applications on alleged cases of discrimination in the sphere of employment. Most of these cases dealt with discrimination on the grounds of ethnic origin and age. Seven cases are pending before Senate III, which is responsible for ethnic discrimination outside of employment.²²⁹

Number of first contacts to the two ombudspersons responsible for discrimination on grounds of ethnic belonging, religion and belief, age and sexual orientation (01.03.2005 – 04.11.2005)

Grounds of discrimination	Ombuds person responsible for discrimination in employment issues	Ombuds person responsible for discrimination on grounds of ethnic belonging in other issues
Ethnic belonging	75	140 ²³⁰
Religion	4	-
Belief	5	-
Age	32	-
Sexual Orientation	31	-
Different kinds of discrimination		-
Harassment	12	-
Vocational training and vocational guidance	7	-
Self employment	3	-
Equal pay	2	-
Working conditions	6	-
Access to work	25	-
Termination of work	9	-
Access to goods and services	-	22
Social benefits	-	1
Social protection	-	7
Total	211	170

Source: Office of the Ombud for Equal Treatment, (10.10.2005)

²²⁹ Information provided upon request by the Equal Treatment Commission on November 22, 2005.

²³⁰ These numbers include 30 unaccountable first contacts and 110 general contacts.

Fight against incitement to racial, ethnic, national or religious discrimination

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In its third report ECRI notes that a **“restrictive approach in the implementation of the legal provisions against racism can”** be noted with respect to the provisions against racist insults and acts of racial incitement. In particular, ECRI refers to sec 283 of the Criminal Code prohibiting racial incitement as being rarely applied due to the narrow scope of its interpretation. In order to fulfil the requirements of sec 283, racial incitement, it is necessary that the incitement is likely to endanger public order.

Legislative initiatives, national case law and practices of national authorities

No legislative amendments have been proposed in regard to fighting incitement to racial, ethnic, national or religious discrimination.

Remedies available to the victims of discrimination

Legislative initiatives, national case law and practices of national authorities

There have been no new developments in regard to the remedies available to victims of discrimination. **The Litigation Association for the Defense of the Rights of Victims of Discrimination** (*Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern*), an umbrella organisation which is open to all NGOs active in the field of anti-discrimination, is the only entity named by the Equal Treatment Act which has legal standing before a civil court. The Klagsverband has the aim of supporting victims of discrimination who wish to launch a complaint at the civil court under the Equal Treatment Act. In 2005, the Klagsverband represented two victims of discrimination before the court. In five cases a representative of the Klagsverband was consulted as an expert during hearings of the Equal Treatment Commission's second and third senates. All the work done by the Klagsverband has been accomplished through honorary work by representatives of the member organisations. Despite several requests to the Ministry of Justice, Ministry of Labour and Economics and the Ministry for Health and Women no financial support has been provided so far. The latter Ministry is formally responsible but has not yet managed to respond to funding inquiries within the last five months.

Positive actions aiming at the professional integration of certain groups

Legislative initiatives, national case law and practices of national authorities

In 2005, 11 EQUAL projects focussing on promoting qualifications of migrants and marginalised groups like asylum seekers or Roma as well as on diversity management in companies and other measures promoting anti-discrimination on the labour market have been completed.²³¹ In the second phase of the EQUAL initiative, which started in 2005, 4 development partnerships will be involved in combating racism and in promoting labour market integration of young Roma and Sinti (see below) and asylum seekers.

²³¹ These projects were financed by the European Social Fund and the Federal Ministry of Economic Affairs or Labour or the Ministry of Social Security. For further information see: www.equal-esf.at/ (28.11.2005).

Protection of Gypsies / Roms

Positive aspects

At the end of 2005, the **first contact point for juvenile Roma and Sinti will be opened in Vienna**. The contact point is called THARA and will offer special counselling in regard to career planning and orientation. Young Roma and Sintis often experience particular difficulties when entering the labour market. Low education and resentment by employers are indicated as obstacles in finding an adequate job. THARA focuses on measures of further education and provides a platform of exchange in order to dismantle prejudice between different cultures and promote dialogue. Concrete measures include learning aid, computer workshops, media laboratory including modern audio and video technologies etc.

Other relevant developments

Reasons for concern

In its third report on Austria, ECRI expressed its concerns about the public debate in the political arena and in the media on issues relevant to asylum seekers, non-EU citizens and other minority groups which has often been characterised as having racist and xenophobic overtones. As already expressed in its second report on Austria **ECRI remained worried about the influence exercised by political parties that resort to racist and xenophobic propaganda²³². Even though these criticisms refer to the year 2003 they continue to be relevant in 2005. The FPÖ focused their election campaign in Styria, Burgenland and Vienna on issues fomenting xenophobic and racist attitudes**. The campaign in Vienna, led by the Freedom's Party's front runner, Heinz Christian Strache, included slogans such as "work instead of immigration" (*Arbeit statt Zuwanderung*) and "free women instead of coercive headscarves" (*Freie Frauen statt Kopftuchzwang*)²³³. In Vienna, the right-wing populist Freedom Party gained 14.6% of the vote and remained Vienna's third strongest party. Political scientists fear that the issue of immigration and the xenophobic messages connected with it will become a major issue during the campaigns for the national elections in 2006²³⁴.

ECRI's recommendations to curb racist and xenophobic statements in public debate and, particularly, in the political arena should be taken very seriously by the responsible policy makers.

Article 22. Cultural, religious and linguistic diversity

Protection of religious minorities

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

See Article 10.

Legislative initiatives, national case law and practices of national authorities

See Article 10

²³² Third Report on Austria, European Commission against Racism and Intolerance, CRI (2005) 1, adopted on 25 June 2004, released on 15 February 2005, pp. 24, 29, available at: http://www.coe.int/T/E/human_rights/ecri/1-ECRI/2-Country-by-country_approach/ (23.11.2005).

²³³ For more information on the campaign see: <http://www.hcstrache.at/kampagne.php> (23.11.2005).

²³⁴ "Ausländerwahlkampf: Der nächste kommt bestimmt" in *der Standard*, 25.10.2005, p. 4.

Protection of linguistic minorities

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In its third report on Austria ECRI held *that it was “particularly concerned at the climate of hostility reportedly promoted against the Slovenian minority in Carinthia. The Governor of Carinthia is reported to have played a particularly active role in this respect, especially in connection with his open refusal to implement the rulings of the Constitutional Court that accord certain rights to members of this group.”*²³⁵ ECRI further expressed its concern that so negative a climate, such as had been reported, might lead to the adoption of discriminatory practices.

Even though the ECRI report has been adopted in June 2004, the situation has not changed in the meantime. As recently as November 2004, the Governor of Carinthia, Jörg Haider, refused to implement the Constitutional Court’s decision from 2001 requiring a higher number of bilingual topographic signs in Southern Carinthia, in accordance with Art 7 of the State Treaty²³⁶. At a meeting of the Freedom Party, Jörg Haider labelled people who claim that Article 7 of the State Treaty has not been fulfilled in Carinthia to be “terrorists of virtue” (“Tugendterroristen”).²³⁷ In May 2005, Jörg Haider claimed to have conducted a secret census to determine the number of members belonging to the recognised Slovenian minority, a statement which was rebutted by the Federal Government.

Regarding the first report on Austria by the CoE Committee of Experts of the European Charter for Regional or Minority Languages please read at Art 14.

Article 23. Equality between man and women

Gender discrimination in work and employment

Legislative initiatives, national case law and practices of national authorities

In August 2005, the Supreme Court ruled for the first time that **protection against discrimination on the ground of gender** also applies during a trial period (*Probezeit*). An employer seeking to terminate a trial period due to the employee’s pregnancy therefore

²³⁵ Third Report on Austria, European Commission against Racism and Intolerance, CRI (2005) 1, adopted on 25.06.2004, released on 15.02.2005, p. 22, available at:

http://www.coe.int/T/E/human_rights/ecri/1-ECRI/2-Country-by-country_approach/ (23.11.2005)

²³⁶ In December 2001, the Federal Constitutional Court (VfGH, G 213/01, of 13.12.2001) suspended specific regulations of the Ethnic Minority Act (*Volksgruppengesetz*) as unconstitutional because they restricted the right to bilingual names on topographic signs to communities, in which at least 25 percent of the population are members of an autochthonous minority. The ruling of the Constitutional Court suspended these regulations as unconstitutional with reference to the State Treaty of Vienna and demanded that the Federal Government pass a new Law in accordance with the treaty’s requirements. The court further held that a town or community (*Ortschaft*) in an autochthonous settlement area, where over a longer period more than ten percent of the resident population belongs to a national minority are to be qualified as having a right to bilingual names on topographic signs according to the Treaty of Vienna. An emotional debate has followed this ruling, as Jörg Haider, Governor of Carinthia, made clear that he refused to act in accordance with this court decision, which of course outraged minority members.

²³⁷ „Haider ‚Tugendterroristen‘ gegen ‚böse Kärntner““, in *wien.web.at*, 16.01.2005, available at: <http://www.wienweb.at/content.aspx?id=79120&cat=8&channel=2&typ=0> (23.11.2005).

violates the principle of equal treatment as stipulated in the Equal Treatment Act²³⁸ (*Gleichbehandlungsgesetz*). The woman concerned can appeal against such a dismissal within 14 days before the competent court. Whereas the applicant has to give plausible reasons why she has been dismissed on the grounds of her pregnancy the employer has to prove that other reasons were the cause.

The Office of the Ombud for Equal Treatment Opportunities of Women and Men collects data on **complaints about gender discrimination**. In 2004, the Office together with its regional sub-offices in Styria, Upper Austria, Carinthia and Tyrol dealt with a total of 3,301 new cases. Around one quarter of people who contacted the Ombud's Office were men. According to the head of the Ombud's Office, no reliable conclusions can be drawn from quantitative comparisons to previous years. The following chart therefore only includes the number of new cases of people seeking advice in 2004.²³⁹

Data on gender related counselling cases of the Ombud for Equal Opportunities

Area of discrimination	Counselling cases	contacts
General information on the Equal Treatment Act	1351	8627
Access to employment	171	1200
Equal pay	167	2685
Work related benefits	8	12
Access to training and further education	31	156
Access to all levels of professional hierarchy including promotion	97	1429
Other working conditions	269	2317
Discriminatory dismissals	75	995
Gender discriminatory job postings	276	1081
Discriminatory harassment and sexual harassment	541	4147
Gender Mainstreaming	201	1000
Positive measures	114	1001
Total	3301	24650

The numbers indicate that harassment, and in particular sexual harassment, is one of the major issues brought to the attention of the Ombud's Office. Since the set up of the four sub-offices the number of cases and inquiries directed to the Ombud's Office has increased considerably over the last couple of years. This indicates the importance of the institution's accessibility and reflects the offices' increasing publicity.

Only a small percentage of cases brought to the attention of the ombudsperson on Gender Equality are dealt with by the Equal Treatment Commission. Senate I of the Equal Treatment Commission, a tripartite expert body rendering non-legally binding opinions on individual cases of gender discrimination has received 44 applications about various cases of gender discrimination during the reporting period. More than half of the applications (23) concerned complaints in regard to sexual harassment. The other complaints were launched in connection with discriminatory working conditions, dismissals, and payments.²⁴⁰

²³⁸ OGH, 31.08.2005, GZ 9 ObA 4 / 05m.

²³⁹ Information provided upon request by the Office for Equal Opportunities of women and men in November 2005.

²⁴⁰ Information provided by the executive board of the Equal Treatment Commission upon request on 25.11.2005.

Reasons for concern

The Report on the Social Situation 2003-2004 indicates that women have a 14% greater risk of falling below the poverty line than men²⁴¹. **Poverty amongst women is principally related to their low earnings which translate into low pensions, unemployment and social assistance benefits. Within the old EU of 15, Austria has the third highest “gender income gap.”**²⁴² **In its Joint Employment Report 2004/2005 the European Commission admonishes Austria for its insufficient efforts to reduce the income gap between women and men.**²⁴³ The worst affected by the gender pay gap are female blue-collar workers with an average gross annual income that does not amount to even half of their male colleagues' income.²⁴⁴

The **shadow report**, to the third and fourth periodic report of the Austrian Government on the International Covenant on Economic, Social and Cultural Rights (prepared by two NGOs: FIAN Austria and the Protestant Development Co-operation) criticises the present Government policy promoting more flexible working times which may lead to an increase in the number of women performing badly paid part-time jobs or working under atypical or minimum employment contracts²⁴⁵ (*geringfügige Beschäftigung*). Instead, the money would be better spent on the establishment of more child care facilities²⁴⁶.

The **phenomenon of “working poor” particularly affects women**. According to the shadow report 52% of working women with children under the age of 15 do not earn enough to secure a minimum standard of living. Furthermore, the report points out, that the risk of poverty amongst working single mothers doubled from 14% to 28% in the period from 1999 until 2003/2004.

The report describes the **child care benefit model** (*Kindergeldmodell*) as counter-productive to a policy of integrating women into the labour market. The model provides incentives to keep women from gainful activity for as long as possible while lowering their chances of a successful re-entry into the job market. Across Austria, child care places presently only exist for 8% of children under the age of three. (See also Article 33.)

Low female income leading to small pensions has a direct impact on the **high number of female pensioners living below the poverty line**. While pensioners are entitled to income support payments (*„Ausgleichszahlungen“*) if their pension benefits are below a certain minimum level, no such income support exists with regard to emergency assistance (*Notstandshilfe*). Due to low income levels unemployed women are particularly affected by this lack of adequate social security.

²⁴¹ „Armut in Österreich“ in *Bericht über die Soziale Lage*, Bundesministerium für Soziale Sicherheit, Generationen und Konsumentenschutz, 2005, pp. 213.

²⁴² Background document: Commission staff working paper revised following bilateral and EMCO meetings, COM(2005)13 final, available at: http://europa.eu.int/comm/employment_social/employment_strategy/employ_en.htm (20.11.2005)

²⁴³ Joint Employment Report 2004/2005, Council of the European Union (Employment, Social Policy, Health and Consumer Affairs), 09.03.2005, available at: <http://register.consilium.eu.int/pdf/en/05/st07/st07010.en05.pdf> (20.11.2005)

²⁴⁴ „Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria. Comments to the Third and Fourth Periodic Report of the Republic of Austria based on Selected Issues” published by FIAN Austria & Protestant Development Co-operation, September 2005, p. 37.

²⁴⁵ Employment with an income equal to or lower than € 323.46 for 2005.

²⁴⁶ „Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria. Comments to the Third and Fourth Periodic Report of the Republic of Austria based on Selected Issues” published by FIAN Austria & Protestant Development Co-operation, September 2005.

The report concludes that the last five years have been a period of social descent for women and recommends i.a. the introduction of a minimum wage of €1,000 per month. Particularly women, who are overrepresented in low income sector, would benefit from such a measure. The current government has welcomed this model in principal but shifted the responsibility to the Social Partner organisations to renegotiate relevant collective agreements.²⁴⁷

Positive actions seeking to promote the professional integration of women

Legislative initiatives, national case law and practices of national authorities

The percentage of support measures attributable to women slightly decreased from 50.2% in 2003 to 49.4% in 2004. The share of unemployed women receiving subsidies amounts to approximately 33% of women and is considerably higher than the rate of subsidy amongst men (25%).²⁴⁸ The 2004 report of the Employment Service (*Arbeitsmarktservice*) only once explicitly mentions positive action programmes for women (*Frauenförderprogramme*) in connection with specific quotas for further education on management training.²⁴⁹

Positive aspects

At the occasion of a round table discussion on employment and the equal treatment of women in the labour market organised by the Minister of Health and Women, Maria Rauch-Kallat, Governmental plans of a **five point programme aiming at** better integrating women into the labour market organised was presented:²⁵⁰

1. Specific measures for women by the Employment Service (*Arbeitsmarktservice, AMS*) to enhance access to counselling in the regions.
2. Sensitising and raising the awareness of young women seeking employment in order to avoid gender segregation in male dominated professions.
3. Qualification measures for women who are particularly at risk of unemployment.
4. Training and qualification measures in the expanding field of health professions.
5. Improving the conditions for combining family life and work through the adequate opening hours of childcare institutions.

Good practices

The **Women-Business-Mentoring-Programme**, initiated in 2004, aims at supporting women re-entering the labour market as well as women seeking employment for the first time. In 2004 more than 1000 mentoring couples have been counselled at the so-called “mentoring points”, which have been established in all 9 federal provinces.

²⁴⁷ „Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria. Comments to the Third and Fourth Periodic Report of the Republic of Austria based on Selected Issues” published by FIAN Austria & Protestant Development Co-operation, September 2005, p. 12, 27.

²⁴⁸ „Beitrag des Vorstandes des AMS Österreich für das Nationale Reformprogramm 2005-2008“, p. 8, 21.07.2005.

²⁴⁹ AMS Geschäftsbericht 2004, p. 37, available at: <http://www.ams.at/neu/4441.htm> (11.11.2005).

²⁵⁰ Runder Tisch zu „Frauenbeschäftigung und Gleichstellung am Arbeitsmarkt“, 29.06.2005, further information available at: <http://www.bmgf.gv.at/cms/site/detail.htm?thema=CH0267&doc=CMS1121933419670> (11.11.2005). “5 Punkte-Programm zur Frauenbeschäftigung” (29.06.2005), available at: http://www.bmgf.gv.at/cms/site/attachments/3/4/0/CH0267/CMS1121933419670/5_punkte_programm.pdf (11.11.2005).

Reasons for concern

In 2004, the **unemployment rate of women increased by 3.2 % compared to 0.4 % amongst men. Particularly, migrant women and women working in the tourism and trade sector were affected by unemployment.** At the end of October 2005, the unemployment rate of women increased by 6.9 % compared to a 4.7 % increase in the unemployment of men.²⁵¹ According to information provided by the Employment Service, this trend is due to the fact that men profited more than women from the reflation in 2004, which affected mainly the construction and industry sector.²⁵² Roughly 50 % of unemployed women have completed compulsory education only.²⁵³

The total number of unemployed people is, however, still higher among men remaining at 7.5% compared to 6.6% of women.²⁵⁴ These numbers, however, have to be read with caution. A study by the Institute for Higher Studies (*Institut für Höhere Studien*), commissioned by the Federal Ministry for Health and Women but not yet released, draws attention to so-called, “**covered unemployment**” including people drawing parental leave benefits, participants of training courses offered by the Employment Service and women who are eager to work but have not registered at the Employment Service.²⁵⁵

Remedies available to the victim of gender discrimination*Legislative initiatives, national case law and practices of national authorities*

Since the amendment of the Equal Treatment Act which entered into force in July 2004, no legal developments or leading case law in regard to the burden of proof can be reported.

The Litigation Association for the Defense of the Rights of Victims of Discrimination (*Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern*) is the only entity named by the Equal Treatment Act which has legal standing before a civil court. The Klagsverband is an umbrella organisation which is open to all NGOs active in the field of anti-discrimination. Even though the *Klagsverband*, which is presently composed of six organisations, actively approached women’s organisations to participate in its activities no closer co-operation has taken place so far.

Other relevant developments*Positive aspects*

In April 2005, the Federal Minister for Health and Women Maria Rauch-Kallat initiated a symposium on **Gender Budgeting** in order to raise awareness about the importance of gender sensitive budgeting and the impact of incentives and other opportunities in promoting equal treatment policies²⁵⁶. The Minister commissioned a pilot study for the development of

²⁵¹ Press release of the Federal Ministry for Economics and Labour, 03.11.2005.

Information provided at the roundtable on employment and equal treatment of women in the labour market, further information available at:

<http://www.bmgf.gv.at/cms/site/detail.htm?thema=CH0267&doc=CMS1121933419670> (11.11.2005)

²⁵² Anfragebeantwortung der Bundesministerin für Gesundheit und Frauen, GZ BMGF-11001/0039-I/A/3/2005, 30.04.2005.

²⁵³ Information provided by the AMS upon request on 16.11.2005.

²⁵⁴ AMS Geschäftsbericht 2004, p. 7, available at: <http://www.ams.at/neu/4441.htm> (11.11.2005).

²⁵⁵ „Verschämt verschwiegen“ in *Die Presse*, p. 13, 11.07.2005.

²⁵⁶ „Gender Budgeting Fachtagung. Strategieentwicklung für eine geschlechtergerechte Budgetgestaltung“, 25.04.2005, further information available at: <http://www.bmgf.gv.at/cms/site/themen.htm?channel=CH0101> (11.11.2005).

methodological tools to implement gender budgeting in the Austrian administration. The study focuses on the federal budget on drug prevention, which was criticised by the opposition party SPÖ, mainly because of the lack of existing data on the subject. Further criticism was aimed at the fact that the initiative had been undertaken far too late and was mainly due to EU pressure²⁵⁷.

Article 24. The rights of the child

Possibility for the child to be heard, to act and to be represented in judicial proceedings

Positive aspects

In August 2005, the Federal Minister of Justice and the Minister of Social Affairs presented a **pilot project to support children during divorce proceedings**. From January 2006 onwards special support persons will look after the child's interests in four district courts in Vienna, Burgenland, Salzburg and Vorarlberg. In the course of disputes about child custody the responsible judge can appoint a child support person, who can have confidential sessions with the child concerned in order to find out the child's interests and opinions. In the course of the proceedings, the support person, who needs to have a background in psychology, functions as a kind of mouthpiece (*Sprachrohr*) for the child. The pilot project will run for 18 months. In 2004, 15.607 children were affected by divorce proceedings in Austria.²⁵⁸

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In March 2005, the **Committee on the Rights of the Child released its concluding observations on Austria's second periodic report**.²⁵⁹ The Committee reiterated its previous recommendations that Austria should set up an effective co-ordination mechanism on the implementation of the rights of the child at federal and provincial level and incorporate them into the Constitution. The Committee noted, with praise, the Government's approval of the "Young Rights Action Plan" (YAP) in November 2004, and recommended that it should be finally approved by the Parliament and effectively implemented. In regard to data the Committee regretted the fact that disaggregated data on certain areas, e.g. on asylum-seekers and child refugees, were not available.

In 2005, a working group consisting of representatives of the all Ministries, one NGO expert, one Child and Youth Ombudsperson (*Kinder- und Jugendanwaltschaft*) and one representative of the Federal Youth Council (*Bundesjugendvertretung*) was established to facilitate the National Action Plans's implementation process. During the reporting period two meetings took place. Unfortunately, the working group's mandate is still not very clear.

Legislative initiatives, national case law and practices of national authorities

On 19 October 2005, the Austrian Supreme Court ruled that the Youth Welfare Authorities are obliged to take care of an unaccompanied minor seeking asylum in

²⁵⁷ „Heinisch-Hosek zu Gender Budgeting: Frauenministerin und ÖVP befassen sich spät und bloß halbherzig mit Gender Budgeting“, *SPÖ Presseausendung*, 25.04.2005.

²⁵⁸ „Scheidungskinder kriegen Beistand“, in *die Presse*, p. 6, 01.09.2005.

²⁵⁹ Concluding Observations on Austria, Committee on the Rights of the Child, 38th session, CRC/C/15/Add.251, 31.03.2005.

Austria not only during asylum proceedings but also with regard to any other issues of custody.²⁶⁰

The Asylum Act so far only lied down the authorities' responsibility to legally represent unaccompanied minors in asylum proceedings. However, in regard to other custody related issues, like the conclusion of contracts or the permission of certain activities, the Act is silent. In its decision the Supreme Court had to interpret the Hague Convention on the Protection of Minors.²⁶¹ Pursuant to Art 2 of the Convention the authorities having the power to take measures directed at the protection of the minor's person or property shall apply them as provided by their domestic law. However, Art 8 limits this state obligation to mean only when the infant is threatened by serious danger to his person or property. The Supreme Court therefore had to decide whether an unaccompanied minor seeking asylum is threatened by serious danger even though his/her basic needs are cared for. In the present case, the applicant was a minor from Nigerian who was taken care of by an NGO.

Given the limited legal possibilities for minors to conclude contracts or to participate in youth activities without the consent of a legal guardian the court held that a minor without this kind of responsible person taking care of him/her is threatened by serious danger even though basic needs such as food and shelter are provided for. This decision had been long awaited by many children rights experts and NGOs supporting asylum seekers. Even though the Supreme Court interpreted the criteria of being "threatened by serious danger" widely it might not be able to re-interpret the criteria of being "a resident minor" as stipulated by the Convention. In its decision the Court held that residency might be assumed if a minor has stayed in the country for longer than six months. However, the present legal situation is highly unsatisfactory for unaccompanied minors who just entered the country and apply for asylum. Following the Court's decision unaccompanied minors seeking asylum would have to live through six months without legal custody until the Youth Welfare Authorities would become responsible. This legal uncertainty clearly points out the lack of a comprehensive legal framework implementing the rights stipulated in the Children's Rights Convention, which is not directly applicable in Austria.

Positive aspects

For the first time **juveniles of 16 years and older were in Vienna, Burgenland and Styria allowed to vote in** elections at the municipal level and the provincial parliaments.²⁶² (For further information please see Article 44.)

Reasons for concern

The Government Report on the Social Situation 2003-2004 indicates that there is a particularly high risk of poverty for single-parent households and families with three or more children. The situation is particularly worrisome if children are of below school age. Children living with single mothers are particularly affected.²⁶³ Poverty related social exclusion contributes to a much less stimulating learning environment, thereby limiting children's chances of higher education and better future employment prospects. Poverty therefore becomes hereditary.

²⁶⁰ OGH, GZ 70b 209 / 05v, 19.10.2005.

²⁶¹ Convention concerning the powers of authorities and the law applicable in respect of the protection of infants, concluded at The Hague on 5 October 1961.

²⁶² „Erstmals ‚Wählen ab 16‘ in Burgenland und Wien“ in *derStandard.at* of 04.10.2005.

²⁶³ Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria. Comments to the Third and Fourth Periodic Report of the Republic of Austria based on Selected Issues" published by FIAN Austria & Protestant Development Co-operation, p. 37, September 2005.

The **Committee on the Rights of the Child** also expressed concerns in its concluding observations in regard to the high rate of poverty, mainly affecting single-parent families, large families and families of foreign origin. The Committee recommends that Austria should take all necessary measures to further reduce and eliminate family poverty, which affects children. It further recommends that Austria should “continue to provide well-coordinated financial assistance to provide support to economically disadvantaged families, in particular single parent families and families of foreign origin, so as to guarantee the right of a child to an adequate standard of living. In this regard, efforts should be increased to support, in particular, single mothers re-entering the labour market and to extend good quality and affordable child day-care facilities.”²⁶⁴

In regard to **asylum seeking children** the Committee “remains concerned that existing reception facilities are still insufficient compared to the number of applicants and that unaccompanied and separated asylum-seeking children are not systematically assigned guardians.”²⁶⁵

Article 25. The rights of the elderly

Participation of the elderly to the public, social and cultural life

Legislative initiatives, national case law and practices of national authorities

According to the Governmental Report on the Social Situation 2003-2004 (*Bericht über die soziale Lage*) **households, in which pensions are the main source of income, run a 17 % higher risk of falling below the poverty line** compared to the rest of the population. Particularly, single women who have to live from the minimum pension are at risk of living below the poverty line. Middle age adults (*mittleres Erwachsenenalter*) are 14% less affected by poverty compared to young and old people.²⁶⁶

Positive aspects

On 29 April, the Social Partners organised an international symposium on adequate working opportunities and conditions for elderly people. Among other issues, examples of good practices for integrating elderly people into the labour market were presented by representatives from Finland, Sweden and the United Kingdom.²⁶⁷

Good practices

In 2005, the Federal Ministry of Social Security, Generations and Consumer Protection published a study on education facilities for elderly people, which was presented at two workshops with the topic “aging-education-learning”.²⁶⁸ Furthermore, examples of good practices were collected and recommendations made for future measures. Under the title

²⁶⁴ Concluding Observations on Austria, Committee on the Rights of the Child, 38th session, CRC/C/15/Add.251, 31.03.2005, para 44, 45.

²⁶⁵ Concluding Observations on Austria, Committee on the Rights of the Child, 38th session, CRC/C/15/Add.251, 31.03.2005, para 47.

²⁶⁶ „Armut in Österreich“ in *Bericht über die Soziale Lage*, Bundesministerium für Soziale Sicherheit, Generationen und Konsumentenschutz, 2005, pp. 221.

²⁶⁷ For further information see: www.arbeitundalter.at (20.11.2005).

²⁶⁸ For further information see: <http://www.bmsg.gv.at/cms/site/detail.htm?channel=CH0109&doc=CMS1110804317920> (24.11.2005).

“Nestor 2005” the Ministry awarded a prize to companies, which adopted positive measures for older employees.

Reasons for concern

The shadow report to the Governmental report on the implementation of the Covenant on Economic, Social and Cultural Rights criticises the situation that **people living in private and public care homes are not sufficiently covered by the existing legislation on patients’ rights**, which are regulated by the Hospital Acts of the Federal Provinces. Even though the establishment of the Vienna Care Ombudsman in 2003 was seen as a positive development the report points out that no appropriate legal mandate has been adopted in the meantime. Currently the Ombudsman is reliant on the good will of care institutions as he has no official right to inspect and to receive access to care related documents etc. **In 2004, the Ombudsman received 713 queries of which 685 were resolved.** The complaints referred mostly to shortcomings in care and insufficient communication.²⁶⁹

The possibility for the elderly to stay in their usual life environment

Reasons for concern

The shadow report on Austria’s CESCR 3rd and 4th periodic report emphasises that there is a **lack of outpatient care personnel in Austria, who are required to enable old people to stay as long as possible in their own accommodation.** Furthermore, the restrictions concerning employment or work permits for care personnel from new EU member states would lead to illegal employment and undocumented migration. Due to the lack of Austrian personnel and the high costs to be borne by the people in need illegal employment would often be the only possibility for older people to receive care services in their usual life environment.²⁷⁰

Specific measures of protection for the elderly

Legislative initiatives, national case law and practices of national authorities

In December 2004, the provincial Parliament of Vienna, as one of the last in Austria, passed a bill on care homes²⁷¹ (*Wiener Wohn- und Pflegeheimgesetz*). The Act includes **specific rights for the inhabitants of care homes and improves the enforceability of these rights.** Furthermore, certain minimum standards in regard to personnel and constructional issues were introduced in order to improve the quality of these institutions. Criticism was raised, however, that the Viennese Act does not explicitly refer to the Care Ombudsman thus providing them with a clear mandate and specific inspection rights.²⁷²

²⁶⁹ See Werner Vogt „The Austrian Health System and its current Reforms” in: Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria. Comments to the Third and Fourth Periodic Report of the Republic of Austria based on Selected Issues” published by FIAN Austria & Protestant Development Co-operation, September 2005, pp. 27-33.

²⁷⁰ Ibidem, p. 33.

²⁷¹ Provincial Law Gazette of Vienna, No. 15/2005 as of 29.03.2005.

²⁷² “Wien hat endlich ein Wohn- und Pflegeheimgesetz“, press release by *the Greens* on 29.03.2005.

Article 26. Integration of persons with disabilities

Protection against discrimination on the grounds of health or disability

Legislative initiatives, national case law and practices of national authorities

After ten years of NGO lobbying and inter-party negotiations the Federal Parliament finally adopted the Disability Equality Package (*Behindertengleichstellungspaket*). Thereby a new act on the general equal treatment of persons with disabilities (Disability Equality Act, *Behindertengleichstellungsgesetz*)²⁷³ was passed and three other acts dealing with disability were amended. The pending infringement procedure, before the ECJ, for not transposing the principle of equal treatment on the grounds of disability, in accordance with the Equality Framework Directive, has certainly speeded up the legislative process. The new regulations however go far beyond the Directive's scope on employment. The related legislative amendments will enter into force on 1 January 2006 and transpose the Directive after a delay of three years.

The prohibition of discrimination on the grounds of disability is split in two acts: the Disability Equality Act which applies in regard to access to goods and services and the Disability Employment Act²⁷⁴ (*Behinderteneinstellungsgesetz*) which applies only to employment related issues. The definition of the terms "discrimination" and "disability" and also procedural issues such as the shift in the burden of proof or the compulsory conciliation and mediation procedure are regulated in a similar manner in both acts.

Both acts **apply to the federal administration and private contracts prohibiting discrimination regarding access to public goods and services and in employment, vocational guidance and training.** The term disability is defined as "*the effects of a non-temporary physical, mental or psychological impairment, which is able to hamper participation in public life.*"²⁷⁵ The prohibition of discrimination, including direct and indirect discrimination, harassment and instruction to discriminate not only apply to the persons concerned but also to their direct relatives if they provide special (disability related) care.

In line with the Directive both acts include an exception to the prohibition of indirect discrimination. As a result barriers or conditions indirectly discriminating against persons with disabilities are not in violation of the acts if their removal cannot be resolved through "**reasonable accommodation**" and would yield a disproportionate burden on the person/employer/institution responsible. In order to determine whether this exception applies one has to take into account the costs related to the removal, the economic situation of the person/employer/institution responsible, the availability of public subsidies, the timeframe since the acts entered into force and the interests of the general public. Even if a full removal of barriers or discriminatory conditions would cause a disproportionate burden, the person/employer/institution cannot remain passive but is obliged to adopt any other reasonable measures which would result in a significant improvement for persons with disabilities.

The **obligation to ensure barrier free access** to places which are accessible to the public is weakened through several, partly very extensive, transitional regulations and time limits/periods. For existing buildings and means of public transport the law will only enter into force after a transition period of 10 years. The Disability Equality Act establishes 10 different categories with different transitional periods making the whole set of regulations a

²⁷³ Federal Law Gazette (BGBl.) I 82/2005 as of 10.08.2005.

²⁷⁴ Federal Law Gazette (BGBl.) 22/1970 as amended by BGBl. I 82/2005 as of 10.08.2005.

²⁷⁵ Para 3 Disability Equality Act, non-official translation by the author.

highly complex issue which is difficult to apply for public authorities but also difficult to understand for non-lawyers.

In the event that the prohibition of discrimination on the grounds of disability is violated the acts foresee **financial compensation as a sanction**. Claims for compensation can include material as well as immaterial damages. When determining the extent of compensation due both acts stipulate that the duration and gravity of the discrimination, individual guilt and also potential forms of multiple discrimination must be taken into account. In regard to harassment the acts establish a minimum compensation of € 400. In the employment sector the minimum amount of compensation payable varies between public and private employment, obliging the State to compensate a minimum of three monthly salaries compared to compensation of only one monthly salary in the private sector.

Enforcement and access to justice:

The **protection against victimisation**, in relation to the enforcement of the prohibition of discrimination, applies not only to the person concerned but also to witnesses or other persons supporting the anti-discrimination claim.

In contrast to the Equal Treatment Act, which prohibits discrimination on the grounds of gender, ethnic origin, religion and belief, age and sexual orientation, the two new acts **introduce a compulsory conciliation and mediation procedure**. Anybody who intends to bring a claim related to discrimination on the grounds of disability has to show that he/she has tried to reach a friendly settlement before the Federal Social Welfare Office (*Bundessozialamt*). Both acts foresee mediation by external mediators being offered to the conflicting parties. According to specific guidelines, which have not yet been published, the costs of such mediation will be covered by the Federal State. Only after a formal declaration from the Office, that a friendly settlement could not be reached, can the person concerned launch proceedings before the competent civil court.

In regard to court proceedings both acts foresee a **shift in the burden of proof** in favour of the person claiming his/her right to non discrimination. The plaintiff now has to establish facts from which it may be presumed that direct or indirect discrimination occurred. The respondent, on the other hand, has to prove that the motive established by the claimant was not the reason for the differential treatment.

According to the Disability Equality Act the Umbrella Organisation of the Austrian Disability Organisations (*Österreichische Arbeitsgemeinschaft für Rehabilitation, ÖAR*) is entitled to bring an **“affirmative action claim” (Feststellungsklage) in regard to cases of discrimination which affect the general interest of persons with disabilities** in a permanent and serious way. A class action requires a two-thirds approval by the Federal Advisory Board on Disability (*Bundesbehindertenbeirat*) composed by representatives of Ministries²⁷⁶, the political parties represented in Parliament, the Social Partners, disability interest groups and the disability ombudspersons (*Behindertenanwalt*). In regard to discrimination during employment no right to lodge comparable class actions has been established. In cases where the alleged victim agrees, the Employment Equality Act **entitles the ÖAR to represent the person concerned in court (Nebenintervention)**.

By amending the Federal Disability Act²⁷⁷ (*Bundesbehindertengesetz*), the position of a **new Disability Ombudsperson** was created. The Ombudsperson will be included in the organisational structure of the Federal Ministry of Social Security, Generations and Consumer Protection. He/she will be responsible for support and counselling. Furthermore, the Ombudsperson can conduct independent research on issues related to discrimination on the

²⁷⁶ Three representatives of the Ministry of Social Security, Generations and Consumer Protection and one representative of the Ministry of Finance.

²⁷⁷ Federal Law Gazette (BGBl.) 283/1990 as last amended by BGBl. I No. 82/2005 of 10.08.2005.

grounds of disability and publish reports and recommendations. Unlike the other ombudspersons responsible for discrimination the Disability Ombudsperson does not report to the Parliament but only to the Ministry.

Evaluation:

The adoption of the Disability Equality Package was seen as an important improvement to the protection against discrimination on the grounds of disability in Austria. Given the long negotiation period of ten years, disability interest groups were mainly disappointed by the outcome²⁷⁸. According to them the new amendments can only be seen as a first step in the right direction. Particular criticism has been voiced about the **lengthy transitional periods for the implementation of barrier free access to public places**. Given that the building codes fall under the competence of the Federal Provinces no preventive measures can be enforced in order to prevent the construction of new buildings which ignore the obligation to provide barrier free access. The Disability Equality Act only provides for sanctions once the building has been finished. Research has shown that the extra cost of providing barrier free access is below one percent of the total construction costs if planned in advance. Ursula Haubner, Minister of Social Security, Generations and Consumer Protection has promised, as a priority, to reach an agreement with the Federal Provinces in order to harmonise building codes and ensure barrier free access.²⁷⁹

Another issue which was subject to harsh criticism was the fact that **no prohibition of discrimination in regard to the access to school education** was established. School directors can still legally refuse to take children with physical, mental or psychological disabilities. Given the separation of legislative powers such a prohibition would have required a special agreement between the Federal Government and the Provinces. So far no concrete measures have been made public suggesting that such an agreement will be concluded in the near future.

Furthermore, **the independence of the Ombudsperson, who is included in the organisational structure of the Ministry of Social Security, is not seen as being sufficiently guaranteed**. Furthermore, the mandate is perceived as being too weak in order to make any real difference and efficiently support discriminated persons in their access to justice. The fact that **class actions are dependant on the consent of the Disability Advisory Board** is equally seen as inappropriate to provide NGOs with the right to engage in court proceedings as stipulated by the Employment Equality Directive. Furthermore, several amendments to other acts regulating access to certain professions are necessary to eliminate discrimination on the grounds of disability as stipulated by the Employment Framework Directive. The Government has promised to adopt a so-called "Bundle Act" (*Bündelgesetz*) eliminating discriminatory provisions in autumn 2005. As of November this year, no such legislation has been prepared.

Together with the adoption of the Disability Equality Package, Art 8 of the Federal Constitution²⁸⁰ was amended. As a result **Austrian Sign Language was formally recognised as an independent language**. This amendment however, offers no immediate effect. Further legislation is necessary to determine its use before public authorities or in education. Although the constitutional recognition is seen as an important step, it is presently only of symbolic value. According to Helene Jarmers, President of the Austrian Association of the

²⁷⁸ „Wie geht es nun weiter?“ by Martin Ladstätter in *BIZEPS online*, 29.07.2005, available at: www.bizeps.at (28.11.2005)., „Verfassungsausschuss beschließt Behindertengleichstellungsgesetz“, press release of the Federal Parliament (*Parlamentskorrespondenz*), 29.06.2005.

²⁷⁹ „Haubner: ‚Wir müssen eine 15a Vereinbarung zusammenbringen‘“, by Martin Ladstätter in *Bizeps online*, 23.08.2005, available at: www.bizeps.at (28.11.2005).

²⁸⁰ Federal Law Gazette (BGBl.) I No. 81/2005 of 10.08.2005.

Deaf (*Österreichischer Gehörlosenbund*), particular need for action is necessary in regard to the education of deaf children in order to provide them with equal access to education.²⁸¹

Professional integration of persons with disabilities: positive actions and employment quotas

Legislative initiatives, national case law and practices of national authorities

In 2004, the **number of persons with disabilities seeking employment declined** by 5.5% from 30,545 to 28,861 whereas the general rate of unemployment increased by 1.6%.²⁸² The unemployment rate amongst disabled women declined less than that amongst men. However, the average period of unemployment for persons with disabilities is about 62% higher than that of other unemployed people.

According to the Employment Disability Act, companies with more than 25 employees are obliged to employ one or (depending on the company's size) more persons with disabilities. If not, employers have to pay a **monthly compensation fee** (€ 201 per employee without disability) into a fund which is used to finance subsidies and provide positive measures for persons with disabilities. The majority of companies still opt to pay compensation fees rather than employing a person with disabilities. The parliamentary inquiries of Theresia Haidlmayr of the Green Party show that the Federal State fails to provide a good example in this regard. **In order to fulfil this quota the Federal State would have to employ 3,000 more persons with disabilities. In the Federal Provinces only Styria, Upper Austria and Carinthia fulfil the quota.** Last year the Federal State spent € 7.1 million on compensation fees while the Federal Provinces spent € 4.55 million.²⁸³

People with Austrian citizenship or citizenship of another EU Member State and also recognised refugees who suffer from a degree of disability of at least 50% enjoy **particular protection against dismissal**. This stronger protection against dismissal is often seen as a barrier for other persons with disabilities in their attempts to join the labour market. Christoph Leitl, president of the Chamber of Economics, has suggested abolishing this protection against dismissal whilst arguing for the increased use of mediation between employers and employees with disabilities.²⁸⁴

Positive aspects

The number of disability related activities supported by the Ministry of Social Affairs, Generations and Consumer Protection in 2005 increased by about 20% from 31,184 to 37,500 compared to 2004. Due to the increasing need for integration measures in order to remain in a job or to obtain one, the number of persons receiving subsidies will decrease in relation to the support measures. This trend, influenced by the difficult situation in the labour market, had already been observed in 2004. In 2005, 9 new development partnerships aiming at integrating persons with disabilities have started their work as part of the Community initiative EQUAL.

²⁸¹ „Eine symbolische Geste für die Gebärde“, in *Der Standard*, 16./17.07.2005, p. 7.

²⁸² Bundesweites arbeitsmarktpolitisches Behindertenprogramm, Bundesministerium für Soziale Sicherheit, Generationen und Konsumentenschutz, Jänner 2005.

²⁸³ „Bund hat 3.000 behinderte Mitarbeiter zu wenig“ in *der Standard - online*, 16.07.2005.

²⁸⁴ „Zu viele Drehtüren und zu wenig Jobangebote“ in *Die Presse*, 10.02.2005.

CHAPTER IV SOLIDARITY

Article 27. Worker's right to information and consultation within the undertaking

Workers' information on the economic and financial situation of the undertaking

Legislative initiatives, national case law and practices of national authorities

According to sec 108 of the Industrial Relations Act (*Arbeitsverfassungsgesetz*) only members of the work council have access to information on the economic and financial situation of the enterprise they are working in. In the case that no work council exists, employees do not have access to unpublished economic data. Equally, people working under atypical contracts or freelancers have no right to information on a company's economic or financial situation. Given the increasing number of self employed, this lack of a right to information has been criticised by employee interest groups. There are currently no legislative plans to change this situation.

Article 28. Right of collective bargaining and action

Article 29. Right of access to placement services

Article 30. Protection in the event of unjustified dismissal

Reasons for dismissals

Legislative initiatives, national case law and practices of national authorities

There have been no new legal developments during the reporting period

An important **decision on the prohibition of dismissal during a trial period** (*Probemonat*) was issued by the Austrian Supreme Court in August 2005. The court held that the termination of a trial period on the grounds of pregnancy would violate the Equal Treatment Act (*Gleichbehandlungsgesetz*) and can be appealed against before the competent court. In its ruling, the court stated that such cases do not fall under sec 2a para 1 (discriminatory refusal to conclude a working contract) but, instead, under sec 2a para 8 (discriminatory dismissal/discharge)²⁸⁵. The person concerned must therefore appeal against such a dismissal within 14 days. This ruling has not only had an impact on gender discrimination but on all other areas included in the EC Anti-discrimination Directives (2000/43/EC, 2000/78/EC).

Article 31. Fair and just working conditions

Health and safety at work

Legislative initiatives, national case law and practices of national authorities

According to the data displayed in the latest available annual report on 2003 of the Office of Labour Inspection, violations of technical and hygienic protection provisions as well as of

²⁸⁵ OGH, 31.08.2005, GZ 9 ObA 4 / 05m.

general and group specific provisions (e.g. children, youth, pregnant women) on working hours and rest periods are most often registered in fields where the percentage of alien employment is above average. These fields include tourism, trade, the construction industry and business oriented services.²⁸⁶ Compared to 2003, **the number of fatal accidents reported to the AUVA, the Austrian Social Insurance for Occupational Risks, increased by 23%** (216 in 2003; 267 in 2004) while the number of other labour accidents remained almost the same (216,353 in 2003; 216,257 in 2004).²⁸⁷

Sexual and moral harassment at work

For further information please see Article 23.

Article 32. Prohibition of child labour and protection of young people at work

Protection of minors at work and monitoring of the protection

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In its concluding observations on Austria the **Committee on the Rights of the Child reiterated its concerns that domestic legislation continues to permit children from the age of 12 to be involved in light work.** The Committee recommended that the relevant legislation should be amended by raising this age limit to that set in ILO convention No.138, which was ratified by Austria in 2000.²⁸⁸

Legislative initiatives, national case law and practices of national authorities

Measures to protect apprentices and adolescents at work are regulated by the Children and Youth Employment Act (*Kinder- und Jugendlichenbeschäftigungsgesetz*) and related regulations. According to information provided by the Chamber of Labour no legislative changes or other measures have been adopted during the reporting period. The main focus of activities during the reporting period was to fight youth unemployment by creating new places for apprentices and trainees²⁸⁹.

²⁸⁶ Information provided upon request by the Austrian Focal Point of the EUMC in November 2005.

Original Source: Tätigkeitsbericht der Arbeitsinspektion im Jahr 2003, *Bundesministerium für Wirtschaft und Arbeit*, Wien, pp. 174-177, 182-183, available at:

<http://www.arbeitsinspektion.gv.at/NR/rdonlyres/4EAA3C47-9390-49F9-BC48-723C01D3ECB4/0/jb2003.pdf>, (05.10.2005).

²⁸⁷ Die wichtigsten Kenndaten 2003/2004, Arbeitsmarktsinspektion, available at: <http://www.arbeitsinspektion.gv.at/AI/Arbeitsinspektion/Taetigkeitsbericht/taetigkeit40.htm> (24.11.2005).

²⁸⁸ Concluding Observations on Austria, Committee on the Rights of the Child, 38th session, CRC/C/15/Add.251, 31.03.2005, para 49, 50.

²⁸⁹ Information provided by the department on the protection of apprentices and adolescents at work of the Chamber of Labour on 21.11.2005.

Article 33. Family and professional life

Parental leaves and initiatives to facilitate the conciliation of family and professional life

Legislative initiatives, national case law and practices of national authorities

Without undergoing a prior public consultation process, the 1st Chamber of the Parliament adopted the Federal Act regarding the establishment of the company “Family and Professional Management” (*Bundesgesetz über die Errichtung der Gesellschaft “Familie & Beruf Management GmbH*) on 19 October 2005. This private company is supposed to take over from the Federal Ministry of Social Security, Generations and Consumer Protection issues related to the compatibility of work and family. The company, owned by the federal State, will co-ordinate a platform of institutions and stakeholders active in the area of work-family compatibility, collect data and statistics, provide counselling to child care institutions and develop or support innovative models for child care facilities. The company will have no administrative powers.

From the view point of a democratic decision making process, two worrying aspects should be reported. Firstly, the standard procedure of having a public consultation period was ignored, thereby preventing interest groups from providing statements and expert opinions on the draft legislation. Secondly, when the 2nd Chamber of the Parliament blocked the adoption of the act due to the majority of the opposition parties (the SPÖ and the Greens), the ruling parties (the ÖVP and the BZÖ) quickly took the combined decision to overrule the Federal Council’s decision. The daily newspaper *Kurier* reported on 17 November, that the Federal Chancellor Wolfgang Schüssel has sent out a blank form for party members of the National Council to facilitate the overruling of the Federal Council²⁹⁰. This information was confirmed by a Member of Parliament from the Socialist Party. The main criticism from the opposition parties refers to the fact that the outsourcing of the area compatibility of family and work would lead to a lack of parliamentary control. Also the cost-benefit relation of outsourcing is not evident as the Ministry itself could manage all agendas internally.

In order to facilitate the legal employment of baby sitters and persons helping in the household the Government adopted the so-called **Service Cheque Act** (*Dienstleistungsscheckgesetz*) which will enter into force on 1 January 2006. Among other issues the Act aims to facilitate the legal employment of people working in private households by avoiding complex insurance payments. (For further information see Article 15)

Reasons for concern

According to a study by the European Centre for Social Welfare Policy and Research there are **46,000 child care places missing in Austria**, in particular for children below three years of age²⁹¹. The access to another 40,000 places should be improved in regard to opening hours²⁹². The Employment Service (AMS) supports women re-entering the labour market after maternity leave via subsidies for the costs of child care. According to the AMS the lack of child care facilities is particularly evident in rural areas²⁹³.

²⁹⁰ „Bundesrat: Schüssel wehrt sich per Vordruck“, Daniela Knitter, in *Kurier*, p. 3, 17.11.2005.

²⁹¹ "Kinderbetreuungsplätze. Zwischen 10.000 und 100.000", European Centre for Social Welfare Policy and Research, finalized in October 2005, not yet published.

²⁹² „Probleme in der Kinderbetreuung“, press release of the *Arbeiterkammer*, 08.11.2005.

²⁹³ „Beitrag des Vorstandes des AMS Österreich für das Nationale Reformprogramm 2005-2008“, 21.07.2005, p. 7.

Another study commissioned by the Chamber of Labour (*Arbeiterkammer*) indicates that **child care benefit** (*Kinderbetreuungsgeld*) has a negative impact on the employment rate of young mothers. The extension of the time frame during which child care benefits are paid without adequate accompanying measures lead to a considerably higher unemployment rate of women. The low earning threshold allowed for additional income (*Zuverdienstgrenze*) deters well qualified women from taking part time work. Both the Chamber of Labour and the Federation of Austrian Industrialists (*Industriellenvereinigung*) started a common initiative demanding more flexible regulations in regard of the possibility of earning additional income and concerning the timeframe during which benefits are paid. A more flexible system would facilitate women's re-entry into the labour market and encourage men to make use of paternity leave while being able to earn additional income²⁹⁴.

Protection against dismissal on grounds related to the exercise of family responsibilities

Legislative initiatives, national case law and practices of national authorities

The Chamber of Labour criticized that the maximum period during which child-care benefits can be claimed (36 months) is still not harmonised with the period of protection against dismissal during maternity/paternity leave (24 months)²⁹⁵.

Positive aspects

The Federal Ministry for Health and Women started an awareness raising campaign on the equal division of household activities in order to improve women's double burden resulting from family and work responsibilities²⁹⁶. This campaign, named "*Mann glaubt es kaum. Frau braucht Zeit und Raum*" (men won't believe it – women need time and space) includes posters and radio advertising.

Good practices

In 2005, the private initiative "Taten statt Worte" (action instead of words) published a **handbook on equal chances and the compability of family and work life**. The publication aims at targeting employers but also work councils and employees by informing them about specific measures which would facilitate the compability of family and work life. The brochure provides an overview on different possibilities on how to implement family friendly working conditions.²⁹⁷

Article 34. Social security and social assistance

Social assistance and fight against social exclusion

Legislative initiatives, national case law and practices of national authorities

According to the Government Report on the Social Situation 2003-2004 (*Bericht über die soziale Lage*) 1,044,00 or 13.2% of persons living in Austria live below the poverty risk

²⁹⁴ Initiative Vereinbarkeit von Familie und Beruf, for further information see: <http://wien.arbeiterkammer.at/www-397-IP-24920-IPS-1.html> (19.11.2005).

²⁹⁵ Information provided in a telephone interview with a representative of the department on social policy on November 18,2005.

²⁹⁶ Further information available at:

<http://www.bmgf.gv.at/cms/site/detail.htm?thema=CH0119&doc=CMS1131098507535> (11.11.2005).

²⁹⁷ The handbook can be downloaded at : www.taten-statt-worte.at (28.11.2005)

threshold, defined by 60% of the median income (i.e. 785 €/month)²⁹⁸. This shows an increase of 20% (or 164.000 people) compared to the period 2001/2002. Women are 14% more likely to fall below the poverty line than men²⁹⁹. Groups who are particularly at risk include people with low levels of education, the unemployed, single mothers, families with three or more children, female pensioners and migrants. 5.9 % of Austria's inhabitants are affected by so-called consolidated poverty (i.e. lack of participation and low income; "verfestigte Armut").

Social benefits have an important impact in preventing poverty but can only provide limited safeguards. Households affected by long term unemployment and migrants are especially susceptible to falling below the poverty line despite the social benefit system. The report draws a clear link between poverty, unemployment and the lack of sufficient child care institutions. Full integration into the labour market as well as good education are seen as guarantors against poverty. Also the family network is seen as an important factor in preventing poverty.

In February 2005, the Federal Minister of Social Security, Generations and Consumer Protection, Ursula Haubner, presented the **biannual report on the social situation in Austria** (*Bericht über die soziale Lage*)³⁰⁰, covering the period 2003 to 2004. It was criticised that the worrying increase of poverty among certain parts of the population was downplayed and not sufficiently discussed by Government representatives.

The **factor of employment** has a significant impact on the chances of falling into poverty. The longer a person is unemployed the higher the risk of falling below the poverty line. Long term unemployed persons are 36% more likely to become poor. However, employment cannot be seen as a guarantor against poverty. The phenomenon of "**working poor**" affects around 235,000 people in Austria who work full time but still live below the poverty line. Statistics show that 28% of single mothers, even when they are employed live below the poverty risk threshold. Furthermore, the report points out that persons working as freelancer or atypical contracts are above the average risk of falling into poverty. This issue is particularly alarming as these types of open working relationships have been becoming increasingly popular over the last couple of years. Currently, there are only very limited safeguards to provide social security for these types of working contracts.³⁰¹

It seems particularly alarming that **more than a quarter of migrants living in Austria are at the risk of poverty** even though the employment rate in comparison to persons of Austrian or EU Member State origin is nearly equal. The main reasons for this worrying situation are low levels of education and language difficulties. Among migrants the population worst affected by poverty are persons of Turkish origin. The poverty risk of this group is 2.5 times higher than that of the rest of the population. The acquisition of Austrian citizenship does not necessarily improve the situation of the persons concerned. Austrian citizens with migration background are still twice as likely to suffer from poverty.³⁰² **The report concludes that the risk of poverty does not depend only on the factor of employment but, more specifically on which opportunities for employment are open to certain parts of the population.** Statistics substantiate a close connection between qualification, origin, and income opportunities.

²⁹⁸ „Armut in Österreich“ in *Bericht über die Soziale Lage*, Bundesministerium für Soziale Sicherheit, Generationen und Konsumentenschutz, 2005, pp. 213.

²⁹⁹ 571.000 women and 473.000 men live below the poverty risk threshold.

³⁰⁰ Available at: <http://www.bmsg.gv.at/cms/site/liste.html?channel=CH0338> (11.11.2005).

³⁰¹ „Armut in Österreich“ in *Bericht über die Soziale Lage*, Bundesministerium für Soziale Sicherheit, Generationen und Konsumentenschutz, 2005, pp. 216.

³⁰² „Armut in Österreich“ in *Bericht über die Soziale Lage*, Bundesministerium für Soziale Sicherheit, Generationen und Konsumentenschutz, 2005, pp. 219.

Statistics show that **single parents, families with more than three children and also elderly people living on their own, run particularly high risks of becoming poor.** Nearly every third single parent is at risk of poverty³⁰³. Equally, households with children below seven years of age are exposed to a higher risk of poverty. Single mothers with children below school age are less integrated into the labour market and therefore at a higher risk of poverty. These numbers clearly illustrate the problem of lacking a sufficient number of **child care institutions** which is related to the increased risk of poverty for young families and single parents³⁰⁴. Households in which **pensions** are the main source of income are at an equally high risk to poverty (17%). Due to the gender income gap, **single women** who have to live off the minimum pension are running a higher risk of living below the poverty line³⁰⁵.

The Report points out the **importance of social benefits for households in which a person with physical disabilities lives.** According to the report a quarter of persons at risk to poverty (236.000 persons) are living in a household in which one person is physically disabled. In cases in which such households have access to special social services compensating higher costs the risk decreases to 13%.³⁰⁶

According to the Austrian Anti-Poverty Network *Armutskonferenz* **the number of people living in Austria without social insurance is around 140,000.** The report on the Social Situation shows that **social benefits** have a crucial impact on lowering the poverty risk. The impact on certain groups however differs to a relatively high degree. Social transfer benefits lower the poverty risk of single parent households by 40%³⁰⁷. In households affected by long term unemployment, social benefits lower the risk of poverty from 70% to 36 %. The impact of social benefits is particularly high in households in which persons with disabilities live, lowering the risk from two third to 19 %. In regard to migrants social benefits do not decrease the poverty risk to the same extent compared to other vulnerable groups. Social benefits, composed mainly by family, unemployment and health benefits, reduce the poverty risk from 44 to 24%. The acquisition of the Austrian citizenship has hardly any impact on these numbers. The report ascribes these differences compared to other groups to the limited impact of pensions which are due to the migrants' age distribution³⁰⁸.

Finally, the report shows that the percentage of people at risk of poverty is higher in congested urban areas such as Vienna and Graz than in the rest of Austria.

Austria lacks a comprehensive monitoring system in regard to the numbers and situation of homeless people. The number of people living on the street is estimated to be between 1,000 to 2,000 people. In Vienna, the number is estimated to be between 600 and 800.³⁰⁹ During the reporting period 3.036 adults (2,220 men and 816 women) and 520 juveniles stayed in residential accommodation for homeless people. **Since 2002, the number of eviction proceedings (*Delogierungen*) steadily increased from 25,813 in 2002 to 28,222 in 2004. Taken for the last seven years, the number of evictions increased by 7.3%.³¹⁰** In 2004, 57,000 or 0,7% of the population were in danger to lose their flats. However, the percentage of executed evictions in relation to proceedings decreased. In Vienna, FAWOS - Centre for Secure Tenancy, aims at preventing evictions by offering information on legal and social aspects concerning living space for tenants of private flats or association flats in Vienna as well as by providing financial help. In 2004, FAWOS succeeded in securing the tenancy of

³⁰³ Ibid., pp. 220.

³⁰⁴ Ibid., pp. 217.

³⁰⁵ Ibid., pp. 221.

³⁰⁶ Ibid., pp. 226.

³⁰⁷ Ibid., pp 224.

³⁰⁸ Ibid., pp 226.

³⁰⁹ Information provided by Fonds Soziales Wien in November 2005.

³¹⁰ Report on Homelessness in Austria, Statistical Update 2005, Heinz Schoibl, Helix, 2005.

flats in 51% of cases. Similar efforts are also made in other federal provinces in Austria. The highest number of evictions however is to be found in the big cities like Vienna, Graz and Salzburg.

Reasons for concern

The 20% increase of persons living at risk of poverty during the period 2003 to 2004 indicate policy mistakes which become even more evident with regard to the growing gap between poor and rich. According to a study by the Austrian Institute of Economic Research (*Österreichisches Institut für Wirtschaftsforschung - WIFO*) the reasons for this development are to be found in the negative situation of the labour market and the increase of part time work. Adolescents and women are placed at the bottom end of the income pyramid³¹¹.

Unfortunately, the **category acute poverty is no longer surveyed** in the 2003/2004 report rendering comparison with the previous reports impossible. Instead the category of “consolidated poverty” is introduced which however lacks gender disaggregated data. Whereas in 2001/2002 65% of persons affected by acute poverty were female no follow up of this alarming outcome is feasible according to the present report.

The shadow report to the third and fourth periodic report of the Austrian Government on the International Covenant on Economic Social and Cultural Rights (CESCR) draws attention to the low emergency assistance (*Notstandshilfe*).³¹² While pensioners are entitled to income support payments (*Ausgleichszahlungen*) if pension benefits fall below a certain standard rate, an amount usually taken to be the official poverty line, no such income support exists with regard to emergency assistance.³¹³ **The report concludes that pension benefits, wages and insurance benefits below the poverty line infringe the right to social security (Art 9) and the right to an adequate standard of living (Art 11) of the CESCR.**

The fact that **single mothers and their children** below school age are at particular high risk to live below the poverty line points out the alarming lack of child care facilities.

Given the increasing number of **persons working in discontinuous and atypical employment contracts** and their high poverty risk it seems particularly worrying that no adequate legislation is in place to ensure social security for this growing employment sector.

Social assistance for undocumented foreigners and asylum seekers

Legislative initiatives, national case law and practices of national authorities

Undocumented foreign nationals are not eligible to access the social security system (including health, accidental and pension insurance). In order to be eligible for social security and social assistance third country nationals must reside legally within the Austrian territory for a certain number of months depending on the different requirements laid down in the laws of the federal provinces. Social assistance and

³¹¹ “Langfristige Tendenzen der Einkommensverteilung in Österreich”, press release of the *WIFO*, 26.09.2005.

³¹² „Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria. Comments to the Third and Fourth Periodic Report of the Republic of Austria based on Selected Issues” published by FIAN Austria & Protestant Development Co-operation, September 2005, p. 12.

³¹³ „Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria. Comments to the Third and Fourth Periodic Report of the Republic of Austria based on Selected Issues” published by FIAN Austria & Protestant Development Co-operation, September 2005, pp. 12, 37.

housing-specific services fall within the legislative competences of the federal provinces. In six of the nine federal provinces, third country nationals only have access to certain aspects of social aid depending on their legal residence status and length of residence.³¹⁴

There is **no possibility to obtain public health security insurance with an irregular residence status**, as this would be reported to the relevant authorities. Therefore undocumented foreigners do not enjoy any legal right to benefit from healthcare facilities. However, the Austrian Law on Hospitals and Sanatoria³¹⁵ (*Krankenanstalten- und Kuranstaltengesetz*) orders every hospital to take in and treat injured patients whose health is in serious danger. Social and medical care for undocumented migrants is in most cases limited to urgent medical aid. Some private organisations (e.g. Caritas, Diakonie/AMBER, Asyl in Not, Verein Ute Bock) support persons irrespective of their legal residence status in their access to help by negotiating reduced fees or by establishing networks of volunteer doctors and nurses to provide assistance when required. Furthermore two religious order's hospitals in Vienna and Graz provide health services that can be used by persons without health insurance.

An agreement between the Federal Government and the Provinces, effective since May 2004, defines the responsibilities of the Federation and the Provinces with regard to the **support for basic needs of asylum seekers**³¹⁶ (*Grundversorgungsvereinbarung*). Following the amended Basic Care Act³¹⁷ (*Grundversorgungsgesetz*), which enters into force on 1 January 2006, the Federal State's responsibility is reduced to ensure the availability of material reception conditions (in particular accommodation, food, health insurance and clothing) to asylum seekers during the admission proceedings in one of the presently five initial reception centres. Once admitted, the responsibility for the material support of asylum-seekers shifts to the Federal Provinces. According to section 6 para. 2 of the new Basic Care Act, the Federal authorities can extend the period of care up to 14 days after admission was granted - but are not obliged to - if a consensus on taking over the responsibility for the basic care of the applicant cannot be reached with the competent authority of the concerned Province. Since the conclusion of the agreement in May 2004, the major responsibility to provide social assistance to asylum seekers, who are not or only insufficiently able to support themselves, therefore rests upon the Federal Provinces. So far only Vienna, Styria and Upper Austria have adapted their respective Provincial social assistance acts in accordance with the Basic Care Agreement. In other provinces only Government resolutions to implement the Basic Care Agreement exist.³¹⁸ It is therefore possible that in case of a disagreement between the Federation and the Provinces on the responsibility for the care of an asylum-seeker, e.g. because of a dispute on the exhaustion or non-exhaustion of the assigned quotas, a fact which has repeatedly occurred in the past, this person might be left without any material support. This result does not seem to be compatible with the provisions of Directive 2003/9/EC³¹⁹ that require the member states to ensure an adequate support of all applicants during the entire asylum proceedings.

The CESCR shadow report on Austria points out the significant gap between the amounts of social assistance received by Austrian citizens and asylum seekers living in private flats. In

³¹⁴ Illegal immigration in Austria, National Contact Point Austria within the European Migration Network, 2005, pp. 26ff, 92ff.

³¹⁵ Federal Law Gazette (BGBl.) No. 1/1957 as amended by BGBl. I No. 65/2002.

³¹⁶ Federal Law Gazette (BGBl.) I No. 80/2004.

³¹⁷ With effect of the 2005 amendment the Federal Caretaking Act (*Bundesbetreuungsgesetz*) has been renamed into the Basic Care Act. Federal Law Gazette (BGBl.) I No. 314/1994 as amended by BGBl. I No. 100/2005.

³¹⁸ Information provided by the NGO Asylkoordinatin upon request on 30.11.2005.

³¹⁹ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, Official Journal L 031/18 of 6 February 2003.

Styria, for example, an Austrian citizen would receive €479, whereas an asylum seeker would receive only €180. Except for Salzburg and Vienna, social assistance may have to be repaid once the emergency situation has ended. In Vienna, asylum seekers are entitled to a maximum reimbursement of €110 per month while the maximum subsidy for Austrian citizens is €220.³²⁰

After the enactment of the Aliens Law Codification (*Fremdenrechtspaket 2005*) there are still no improvements as to their access to the Austrian labour market. The Aliens Employment Act (*Ausländerbeschäftigungsgesetz*) poses an almost insurmountable obstacle for asylum-seekers who wish to find a lawful employment while their cases are pending. In fact, they are only permitted to take up little jobs offered at the reception centres and homes for asylum-seekers in return for some pocket money (section 7 para. 5 Basic Care Act). Moreover, there have been reports that asylum-seekers supported in care taking programmes who earn some money first have to pay back the money they were given by the authorities.³²¹ Given that asylum proceedings often last for several months or even years³²², the current restrictions on the access of asylum-seekers to the Austrian labour market force the concerned persons to pronounced passivity for a long time with all ensuing negative consequences.

Article 35. Health care

Access to health care

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The OECD health report shows that **Austria is falling behind in regard to preventive medicine**. Among the 30 OECD countries Austria has, with 1.5% of the GDP, the fifth lowest budget allocated to preventive medicine and ranks way below the average of 2.9%. The report further shows that the total share of health costs has remained at around 7.7% of GDP since 2003³²³.

Legislative initiatives, national case law and practices of national authorities

With an amendment to the General Social Insurance Act the legal basis for the **introduction of the so-called “e-card”, which replaces health insurance vouchers**, was established in July 2005³²⁴. The e-card will provide paper-free access to all health care services in Austria. Equipped with an electronic chip, the e-card can store all kinds of health related data and can be used as a tool for doctors to exchange or inform others about important health issues of the patient concerned. Currently, the e-card only includes information about a person’s eligibility to health insurance, the social security number as well as the name and date of birth.

After a test run in the federal province of Burgenland, the Federal Ministry of Health started to distribute the e-cards in June 2005. By November everyone should have received their e-cards and all doctors under contract with the health insurance authorities should be equipped

³²⁰ „Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria. Comments to the Third and Fourth Periodic Report of the Republic of Austria based on Selected Issues” published by FIAN Austria & Protestant Development Co-operation, September 2005, p. 52.

³²¹ See „Taschengeldsperre“ in Falter 28/05.

³²² In 2005, of about 28,000 persons accepted in the caretaking programme more than 50% have been staying longer than one year, see “Grundversorgung für Länder billiger” in *Die Presse* of 2 September 2005.

³²³ “OECD: Mehr Mittel für Prävention” in *die Presse*, 14.11.2005.

³²⁴ Sec 31 lit c Allgemeines Sozialversicherungsgesetz, Federal Law Gazette (BGBl.) I No.71/2005, entering into force on 01.07.2005.

with the apparatus to read the e-cards. In the meantime both the old and new systems are running in parallel. Along with several technical problems some rejections of people entitled to health insurance occurred incorrectly. All the costs related to these teething problems will be refunded by the health insurances authorities.

Strong criticism has been voiced by several NGOs, the opposition parties and the Medical Chamber in regard to the denial of e-cards for people receiving social assistance (Sozialhilfe)³²⁵. These people, who number around 20,000 and are statistically at a higher health risk than the rest of the population, could face humiliating situations in the doctor's waiting room. The denial of e-cards to these people will establish an unnecessary barrier in regard to their access to health facilities which could even worsen the state of their health. In order to resolve this situation the federal provinces, which are responsible for the issue of social assistance, have been called upon to conclude contracts with the responsible health insurance authorities. The Municipality of Vienna is presently conducting talks with the insurance institutions promising the issuance of e-cards in the near future.

According to the **biannual report on the social situation in Austria (Bericht über die soziale Lage)**, covering the period 2003 to 2004, 13% of the people living below the poverty line feel that their state of health is greatly impaired (*gesundheitlich stark beeinträchtigt*), compared to 7 % of the rest of the population³²⁶. Around 160,000 people or 2% of the population living in Austria are not health insured.³²⁷

The **Austrian Report on Women's Health** examines social, cultural and language barriers in women's access to health. **Single mothers**, particularly those with children below the age of three, are significantly more at risk to health problems than "married mothers".³²⁸ Also, the fact that single mothers are at a higher risk to poverty has a directly negative effect on their state of health. In regard to the situation of **migrant women**, the report underlines the multiple burdens they are often confronted with. Bad and insecure working conditions, language barriers, the unequal share of household activities and child care increase their health risks. The report criticises the fact that not enough information on diseases, related therapy and prevention is available for this special target group. The large burden resting on migrant women is likely to result in their suffering from psychological problems. However, there are currently no studies examining the psychological well being of migrant women. Medical statistics indicate that the amount of psychosomatic health problems is particularly high among migrant women.

Positive aspects

According to information provided by the NGO *Asyl in Not* **access to health care institutions has improved since the last amendment to the Asylum Act in 2004 and the related agreement between the federal State and the nine Provinces**. The Austrian Report on Women's Health confirms this improvement. Between May 2004 and March 2005 the

³²⁵ Sozialhilfeempfänger mit ‚Krankenhilfe‘ von e-card nicht ausschließen“, press release of the *Armutskonferenz*, 24.06.2005. „Volkshilfe fordert e-card auch für Sozialhilfeempfänger“, press release of *Volkshilfe*, 30.08.2005.

³²⁶ *Bericht über die Soziale Lage*, Bundesministerium für Soziale Sicherheit, Generationen und Konsumentenschutz, 2005, pp. 226, available at: <http://www.bmsg.gv.at/cms/site/liste.html?channel=CH0338> (11.11.2005).

³²⁷ Nationaler Aktionsplan für soziale Eingliederung 2003-2005. Umsetzung und Aktualisierung, Bundesministerium für soziale Sicherheit, Generationen und Konsumentenschutz, 2005, p.23.

³²⁸ The wording „married mothers“ was translated literally. See: Österreichischer Frauengesundheitsbericht 2005 – Kurzfassung, Bundesministerium für Gesundheit und Frauen, pp. 46, available at: <http://www.bmgf.gv.at/cms/site/detail.htm?thema=CH0330&doc=CMS1114154451979> (11.11.2005).

number of health insured asylum seekers increased from 12,000 to 25,000.³²⁹ Difficulties in the access to health services for asylum seekers have been experienced in regard to the administrative barriers. Due to the fact that the relevant regulations are different in all 9 provinces asylum seekers face particular difficulties when changing their place of residence from one province to another. Also the ongoing changes to the regulations and the time limits on applications have caused difficulties.

Drugs

Legislative initiatives, national case law and practices of national authorities

In December 2004, the Parliament adopted an amendment to the **Tobacco Act**.³³⁰ The act led to a change of paradigm establishing the ban of smoking as a norm and its permission as an exception to this norm. The Act includes far reaching bans on advertising and sponsoring by tobacco companies. Furthermore the act extends the ban of smoking to publicly accessible spaces with the exception of hotels, restaurants and bars. With the amendment of this Act, Austria transposed the Tobacco Products Directive 2001/37/EC and the 2003/33/EC Directive on Advertising and Sponsorship of Tobacco Products.

In September 2005, Austria ratified the 2003 World Health Organization Framework Convention on Tobacco Control.

Other relevant developments

Positive aspects

In 2005, the Federal Minister for Women and Health commissioned the inter-ministerial working group on gender mainstreaming to elaborate guidelines on implementing **gender mainstreaming in the hospital sector**. The study is expected to be released at the end of the year³³¹.

Article 36. Access to services of general economic interest

Access to services of general economic interest in the economy of networks: transports, posts and telecommunications, water-gas-electricity

Legislative initiatives, national case law and practices of national authorities

In August 2005, the Government presented draft legislation to amend the Post Act³³² (*Postgesetznovelle 2005*). The proposed amendments are due to transpose EC standards (Dir. 97/67/EC, 2002/39/EC) in regard to **liberalisation of post services**. Presently, the Austrian Post Corporation has a monopoly on the mailing of letters up to one kilogram, which shall be reduced to half of the weight. Outside this monopoly every other service provider can engage in the delivery of mailings according to certain requirements set out by the draft legislation. Furthermore, the Act aims to ensure access to post services. The amendments would entitle

³²⁹ Österreichischer Frauengesundheitsbericht 2005 – Kurzfassung, Bundesministerium für Gesundheit und Frauen, p. 50.

³³⁰ Federal Law Gazette (BGBl.) I No. 167, 30.12.2004.

³³¹ Leitfaden zur Implementierung von Gender Mainstreaming im Spitalswesen, further information available at: <http://www.imag-gendermainstreaming.at/cms/imag/content.htm?channel=CH0135&doc=CMS1083238739482> (11.11.2005).

³³² BGBl. I No. 26/2000 as amended by BGBl. I No. 72/2003

the Federal Minister for Transport, Innovation and Technology to inhibit the closing of local post offices. In case the cost effective operation of certain post offices is not feasible alternatives such as the establishment of so-called post partners or mobile post offices have to be in place.

Private providers of post services criticised the proposed amendments for being too restrictive in regard to liberalising the mailing sector. They demand a clear date for the full liberalisation of the post market. The Government, however, refused to go beyond the liberalisation requirements set out by the European Union. At the end of 2006 all Member States will have to present “prospective studies” on the full liberalisation of post services, which will build the basis for future EU policies in this regard.

Article 37. Environmental protection

Right to a healthy environment

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In January, the ECJ ruled that Austria has failed to fulfill its obligations under Article 3(1) of Council Directive 75/439/EEC on the disposal of waste oils, as amended by Council Directive 87/101/EEC. The infringement procedure was launched in 2003 because Austria had not adopted the measures necessary to give priority to the processing of waste oils by regeneration where the technical, economic and organisational constraints so allowed³³³.

Legislative initiatives, national case law and practices of national authorities

On 17 January, Austria ratified the so-called Aarhus Convention³³⁴ on access to information, public participation in decision-making and access to justice in environmental matters. Due to related EU directives Austria had to amend several acts. Whereas, at the federal level, the necessary transposition process was completed, at the provincial level there remains an evident need for legislative action.

The latest amendment to the Act on Environmental Impact Assessment³³⁵, adopted at the end of March 2005, led to reduced public participation in related proceedings by excluding citizens’ initiatives from having legal standing. In February, the Peoples Party introduced a bill to amend the Act on Environmental Impact Assessment (*Umweltverträglichkeitsprüfungsgesetz*) which would have exempted three major construction projects (a racetrack in Spielberg, in Magna – a car test track and a European Championship Stadium in Klagenfurt) from the obligation to undergo an environmental impact assessment. Due to protests by the opposition parties and critical media coverage the proposed bill was not adopted. Environmental NGOs claimed that such legislation, which was tailored to suit these three planned construction projects, would be in violation of European and Constitutional law. The bill was amended and instead of adopting exemptions from obligatory environmental impact assessments, the scope of the simplified procedure was extended to include the above mentioned projects. This “simplified procedure” (*vereinfachtes*

³³³ European Court of Justice (27.01.2005): Case C-15/03 *Commission v Austria* [2005] (judgment of 27 January 2005).

³³⁴ UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted on 25 June 1998 in Aarhus (Århus)

³³⁵ BGBl. No. 773/1996 as amended by BGBl. I No. 14/2005 of 31.03.2005.

Verfahren) limits the participation by excluding citizens' initiatives from having legal standing on environmental impact assessments.³³⁶

Since June 2005, NGOs fulfilling certain formal requirements have legal standing in environmental impact assessments. According to the Act on Environmental Impact Assessment (EIA), which transposes the Public Participation Directive 2003/35/EC, NGOs have to prove that they are non-profit organisations according to the Federal Duties Act (*Bundesabgabengesetz*). Several NGOs have experienced difficulties in receiving the appropriate certificate from the local tax authorities.³³⁷

In addition, the **Austrian Trade Licence Act (*Gewerbeordnung*) was amended, granting NGOs legal standing in Integrated Pollution Prevention and Control Procedures.** Environmental NGOs are entitled to seek remedies at the Independent Administrative Tribunals but cannot bring a claim before the Administrative Court and the Constitutional Court. This was criticised by the Greens and NGOs³³⁸. The amendment led to the extension of the "simplified procedure" (*vereinfachtes Verfahren*) to company facilities (*Betriebsanlagen*), changing the size requiring EIA from 300 to 800 square meters. As a result local citizens' initiatives and also people living in close proximity to such facilities are only included in procedures relating to company facilities that are bigger than 800 m².

Austria signed the CoE **Convention on the Protection of Environment through Criminal Law** in 1999 but has not ratified it so far. In October 2005, the Government published plans to include specific **penal provisions on environmental crimes** in the Criminal Code, which would thereby transpose the Convention. The proposal includes new provisions on criminal negligence in connection with the use of radioactive material and the culpable negligent operation of facilities endangering the environment³³⁹. Draft legislation is open for public consultation until 12 December 2005.

Positive aspects

In April, a **conference on citizens' initiatives** from Austria, the Czech Republic, Slovakia and Hungary was held in Vienna. The conference aimed at promoting common strategies and fostering the exchange of experience and ideas among stakeholders promoting the right to a healthy environment.³⁴⁰

Reasons for concern

According to the **Annual Report on Air Quality Assessment** the particulate matter (PM₁₀, *Feinstaub*) limit value – 35 days with a concentration of above 50 µg/m³ - was exceeded at 27 sites. The highest measurements, where the limit was exceeded, were taken at traffic related sites in large cities, in particular in the cities of Graz, in Vienna and Linz but also in several smaller towns. In large parts of north-eastern Austria the limit values were exceeded due to trans-boundary traffic coming from countries east of Austria. The main sources for primary PM in Austria are road traffic, domestic heating, industrial emissions, construction activities

³³⁶ ÖKOBÜRO Newsflash Umweltrecht, March 2005, pp.2-5, available at: <http://www.oekobuero.at/> (28.11.2005).

³³⁷ "Probleme mit der NGO-Anerkennung nach dem UVP-G" in ÖKOBÜRO Newsflash Umweltrecht, March 2005, pp. 6-7, available at: <http://www.oekobuero.at/> (28.11.2005).

³³⁸ Parliamentary press release (Parlamentskorrespondenz) N° 618, 21.07.2005.

³³⁹ Strafrechtsänderungsgesetz 2006, for further information see: http://www.parlinkom.gv.at/portal/page?_pageid=908.979120&_dad=portal&_schema=PORTAL (28.11.2005)

³⁴⁰ For further information see: www.lena-net.org (28.11.2005).

and off-road sources.³⁴¹ **In 2005, the limit values were exceeded by more than 30 days in all the Federal Provinces except for Salzburg**³⁴². In reaction to these alarming results an amendment to the Particulate Matter Act is currently being discussed by the parliamentary committee on environmental issues.

Legislative initiatives, national case law and practices of national authorities

Austria transposed **Directive 2003/4/EC, on public access to environmental information**, by adopting the necessary changes which entered into force on February 14 2005. The scope of environmental information as well as the circle of addressees obliged to provide such information was extended. Furthermore, the general time limit given to require someone to provide environmental information was shortened from eight to four weeks. The obligation to provide environmental information does not only include the response to inquiries but also refers to the active publication of relevant data.

The ÖKOBÜRO, a co-ordinating body of 14 Austrian environmental organisations, has published an **information brochure on how to access the relevant environmental data** according to the amended Environmental Information Act.³⁴³

Article 38. Consumer protection

Protection of the consumer in contract law and information of the consumer

Legislative initiatives, national case law and practices of national authorities

A **study on the organisational structure of consumer protection in Austria**, presented in October 2005, draws a generally positive picture on the currently existing counselling and protection measures. The study, commissioned by the Federal Ministry of Social Security, Generations and Consumer Protection, concludes that there is presently no need for further organisations providing legal advice on consumer protection issues. Further need of action was identified in regard to the networking between consumer protection organisations and authorities. In order to make better use of synergy effects the co-ordination of consumer protection policies should be improved. Following one of the study's recommendations the Ministry is currently elaborating a handbook on consumer protection providing information on consumer protection institutions and consumer's rights.³⁴⁴

The **largest case ever brought before a civil court under the Second Republic**, which involves 3.300 claimants who lost their investments in a construction trust (WEB-IMMAG Bautreuhand), is close to being concluded by a friendly settlement, which will finally be confirmed in December 2005. The claims of 2.300 injured investors were combined in a class action led by the Association of Consumer Protection (*Verein für Konsumentenschutz*). The case dealt with the bankruptcy of a construction trust in 1989. Three banking executives of the Salzburger Sparkasse (saving bank) were responsible for the trust's fatal financial situation for several years and were sentenced to prison in 2003. Due to the large number of claimants

³⁴¹ Jahresbericht 2004, Umweltbundesamt, pp.16-19, available at: http://www.umweltbundesamt.at/umweltschutz/luft/luftguete_aktuell/jahresberichte/ (28.11.2005).

³⁴² Press release of the federal government's expert authority for environmental protection and environmental control (*Umweltbundesamt*), 21.11.2005, available at: www.umweltbundesamt.at (28.11.2005).

³⁴³ Wissenswertes über das Umwelteinformationsgesetz, ÖKOBÜRO, June 2005, available at: http://doku.cac.at/uig2005_info_text.pdf (28.11.2005).

³⁴⁴ For further information see: <http://www.bmsg.gv.at/cms/site/detail.htm?channel=CH0036&doc=CMS1130158260264> (28.11.2005)

it was estimated that the trial would last for at least 10 years if no friendly settlement could be reached between the parties. Owing to the high litigation costs the consumers would have been left with hardly any compensation if there were no settlement. According to the settlement reached between the parties the 19.7 million Euros in damages paid by the Salzburger Sparkasse, after subtracting 20% for the costs of the litigation, will compensate for between 20% to 50% of the money invested by private persons.

A new act which will enter into force in January 2006 will establish the direct criminal liability of legal entities (*Verbandsverantwortlichkeitsgesetz*)³⁴⁵. Such an act would have considerably speeded up the above mentioned proceedings, and would have brought great advantages to the consumers/investors in regard to lower litigation costs.

In June 2005, the Federal Ministry of Justice organised a symposium on **mass actions (*Massenklagen*) and potential need of reforming the Civil Procedure Act**. Currently the Act does not foresee any specific regulations for this increasing phenomenon of mass actions. The parliamentary committee on justice affairs (*Justizausschuss*) asked the Ministry of Justice to elaborate draft legislation to facilitate the accomplishment of mass actions. There is broad political consent that such legislative amendments are necessary. The drafted amendments shall be presented at the end of the year.

³⁴⁵ Adopted by the National Council on September 28, 2005. The act is not yet published in the federal law gazette.

CHAPTER V CITIZENS' RIGHTS

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

Article 40. Right to vote and to stand as a candidate at municipal elections

Right to vote and to stand as a candidate for EU citizens non nationals of the member State

Legislative initiatives, national case law and practices of national authorities

In 2005 municipal elections in the provinces of Vorarlberg, Lower Austria, Styria and Vienna took place. In Vorarlberg, EU citizens were allowed to vote, if they had registered themselves on the electoral register, which is valid for 10 years. They could stand as candidates for election to the municipal council, but could not stand as candidates for the post of a mayor. There are no statistics on how many EU-citizens were entitled to vote or how many stood as candidates for the municipal council.³⁴⁶ In Vienna EU-citizens were entitled to vote at the district level, if they were officially registered as having their primary residence in Vienna – this accounted for 64,021 voters. This number, 40,000 more than in the last elections was caused by the accession of the new member states. EU citizens were also entitled to stand as candidates for the elections at district level, but there are no statistics on how many people made use of this right.³⁴⁷ In Lower Austria EU – citizens were only entitled to vote, if they were registered on the electoral register of the respective community. Registration for the European Union elections in March 2004 was not considered to be sufficient, instead EU – citizens had to register again, before a deadline of 3 January, so 2 months before the municipal elections. The head of the delegation of the European Commission in Austria received, as a consequence, several complaints about this measure and stressed that the right to vote at the municipal level is fundamental.³⁴⁸ EU-citizens have a right to stand for election to the municipal council, but not for to stand for mayor. There are no statistics on the number of EU Citizens entitled to vote in Lower Austria or on how many did in fact stand as candidates for the elections.³⁴⁹ In Styria 9,241 EU – citizens were entitled to vote. As in the other federal provinces there are no statistics available on how many actually stood as candidates for the municipal councils. EU – citizens cannot become the mayor of a municipality. As in Vienna, the Styrian municipalities had to list EU citizens on their electoral register, if they had registered their primary residence as being in Styria.³⁵⁰

³⁴⁶ Information provided by the Department for Internal Security of the Provincial Government of Vorarlberg on November 9, 2005.

³⁴⁷ Information provided by the Viennese Election Office on 09.11.2005.

³⁴⁸ „EU-Ausländer: Hürdenlauf zur Wahl“ in *Die Presse* of 02.03. 2005.

³⁴⁹ Information provided by the Department on Municipalities of the Provincial Government of Lower Austria.

³⁵⁰ Information provided by the Department on Municipalities and Election of the Provincial Government of Styria.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In Vienna and Burgenland juveniles of 16 years and older were allowed to vote, for the first time, in the elections at the municipal level and also for the provincial parliaments.³⁵¹ They numbered 25,634³⁵² potential voters in Vienna and 6,000 in Burgenland. In Styria people under 18 years of age could only vote in the elections at the municipal level but not for the provincial parliaments. In all other provinces the right to vote is only granted to people who are older than 18.

Reasons for concern

By proposing one of the most rigid Citizenship Acts within the European Union³⁵³ the Government also excludes a big share of the resident population in Austria from political participation. As one of its last steps, in regard to restrictive immigration policy, the Austrian Council of Ministers adopted, on November 15 2005, the amendment to the Austrian Citizenship Act.³⁵⁴ Despite broad criticism, the Minister of Interior stuck with the concept “access to citizenship is not a mean of integration, but the end of successful integration.”

In comparison to other European countries, where children who are born there automatically receive the citizenship of the country, Austria has not incorporated this aspect of the *ius solis* in its legal system. While under the current law these children had a right to naturalisation after four years, the amendment increases this period to six years. Spouses of Austrian citizens will only have access to citizenship after six years of lawful and permanent residence and only if they have been married and lived together for five years, even then it is not an absolute right but a discretionary entitlement. Under the current law, the spouse has an absolute right to citizenship after a five year period of combined residence and marriage. People who have been granted asylum and EU citizens are now entitled to citizenship after a period of 6 years. The period of time required for other aliens has stayed the same, the earliest they can get citizenship is after 10 years. However, the general conditions that need to be fulfilled to gain citizenship have been made more difficult; if the alien has, in the last three years before the application, taken advantage (in *Anspruch nehmen*) of social assistance, citizenship will be denied. Furthermore, aliens will now be tested on their command of the German language, their basic knowledge about the democratic order and the history of Austria and of the Federal Province where they apply for citizenship. The concept of the Austrian Citizenship Act and its amendment excludes a large part of the population (10 percent of the resident population are not Austrian nationals) from the political decision making process for a long time. Those who are third county nationals (approximately 6 percent) are excluded from voting for the European Parliament and at the municipal level. Bearing in mind that these people are paying taxes and contribute to the community in various ways, this has to be considered a serious democratic deficit

³⁵¹ „Erstmals „Wählen ab 16“ in Burgenland und Wien“ in *derStandard.at* of October 4, 2005.

³⁵² „35.634 Jugendliche profitieren“ in *kurier.at* of 10.10.2005.

³⁵³ „Rigides Staatsbürgerschaftsgesetz“ of 21.09.2005 in www.volksgruppen.orf.at (24.11.05)

³⁵⁴ Regierungsvorlage für ein Bundesgesetz, mit dem das Staatsbürgerschaftsgesetz 1985 (StBG), das Tilgungsgesetz 1972 und das Gebührengesetz 19657 geändert werden (Staatsbürgerschafts-Novelle – 2005).

Article 41. Right to good administration

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 42. Right of access to documents

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 43. Ombudsman

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 44. Right to petition

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 45. Freedom of movement and of residenceRight to social assistance for the persons who have exercised their freedom of movement*Legislative initiatives, national case law and practices of national authorities*

In accordance with Art 24 of the Council Directive 2004/38/EC entitling Union Citizens to equal treatment with citizens of the host Member State, most of the federal provinces have already amended their **social assistance** laws by giving EEA citizens access to social assistance.³⁵⁵

Prohibition to enter certain zones or portions of the national territory during particular events*Legislative initiatives, national case law and practices of national authorities*

As already outlined under Article 6 - the right to personal liberty and security the Austrian Security Police Act was amended, inter alia, in preparation for the European Soccer Championships in 2008. In the framework of the security concept for this event experts have discussed the carrying out of border controls in the light of **art 2 sec 2 of the Schengen Treaty**. While check points to the Czech Republic, Slovenia and the Slovak Republic borders still exist, the ones on the German border have already been dismantled. A reintroduction of border controls would therefore be expensive³⁵⁶ Pursuant to the information, provided by the Directorate General for Public Security (*Generaldirektion für die öffentliche Sicherheit*) there

³⁵⁵ See e.g. sec 7a para 2 lit d Wiener Sozialhilfegesetz, Wien, Law Gazette of Vienna (LGBI) 11/1973 last amended by LGBI 15/2005; sec 4 para 2 no 4 NÖ Sozialhilfegesetz – Niederösterreich, Law Gazette of Lower Austria (LGBI) 9200/2000 last amended by LGBI 9200/2004, or sec 2a para 2 lit a Tiroler Sozialhilfegesetz – Tirol, Federal Law Gazette of Tyrol (LGBI) 105/1973 last amended by LGBI 27/2004.

³⁵⁶ „Schutzzonen vor Stadien“ in *die Presse* of 20.10.2005.

were no cases, in which national border checks according to Art 2 sec 2 of the Schengen Treaty have been carried out in 2005.³⁵⁷

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In the case of Georg Dörr v. Sicherheitsdirektion für das Bundesland Kärnten und Ibrahim Ünal v. Sicherheitsdirektion, the European Court of Justice gave its preliminary ruling, on 2 June 2005, concerning the interpretation of Art 8 and 9 of Council Directive 64/221/EEC of 25 February 1964 on the measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security and public health and Articles 6 and 7 of the Decision No. 1/80 of the Association Council of 19 September 1980 on the development of the Association.

The German Citizen Georg Dörr and the Turkish citizen Ibrahim Ünal had been working and residing legally for several years in Austria. After Mr. Dörr was found guilty of aggravated fraud and sentenced to 18 months imprisonment, of which 12 were suspended, the first instance administrative authority of Klagenfurt (*Bezirkshauptmannschaft Klagenfurt*) issued a 10 year ban on his right to residence pursuant to para 48 sec 1 and para 3 sec 1 no. 1 of the Aliens Act (*Fremdengesetz*). After his appeal to the Carinthian Federal Security Authority (*Sicherheitsdirektion für das Bundesland Kärnten*) had been dismissed, Mr. Dörr appealed to the Administrative Court. Mr Ünal had been twice convicted for affray and once for the contravention of the Driving Licence Act (*Führerscheingesetz*). In 2001 the first instance administrative authority of Dornbirn (*Bezirkshauptmannschaft Dornbirn*) ordered the expulsion of Mr. Ünal, pursuant to the combined provisions of para 23 sec 1 n. 1 and para 10 sec 2 and no. 3 of the Aliens Act. After his appeal in second instance had been dismissed, he appealed to the Administrative Court, which joined the two sets of the proceedings together for the purpose of joint deliberation and resolution. The Administrative Court was confronted with the questions of firstly whether the judicial protection provided by the Austrian legal system is compatible with the requirements of Directive 64/221 and secondly whether those requirements are applicable to Turkish workers (whose legal status is defined by decision No. 1/80). The Court stopped the proceedings and referred these questions to the ECJ for a preliminary ruling. The ECJ ruled concerning the first question, that “Article 9(1) of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health is to be interpreted as precluding legislation of a Member State under which appeals brought against a decision to expel a national of another Member State from the territory of that first Member State have no suspensory effect and, at the time of examination of such appeal, the decision to expel can be the subject only of an assessment as to its legality, inasmuch as no competent authority within the meaning of that provision has been established” and in regard to the second question that the procedural guarantees set out in Articles 8 and 9 of Directive 64/221 apply also to Turkish nationals (whose legal status is defined under Article 6 or Article 7 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association).

Legislative initiatives, national case law and practices of national authorities

In August the Minister of Economy and Labour, Martin Bartenstein, announced that **the transition period for the opening of the free access to the labour market for eight of the new member States will be further suspended until 2009**, due to the high unemployment rate in Austria. The representatives of the farmers in his own Party, the Austrian Peoples

³⁵⁷ Information provided by the Directorate General of Public Security on 17.11.2005.

Party (*Österreichische Volkspartei*) protested. The head of the Chamber of Agriculture declared that Austrian farmers are increasingly dependant on migrant workers because they cannot find Austrian workers willing to do the work.³⁵⁸

Reasons for concern

As already referred to, in the context of Art. 7 on the right to private and family life, the Aliens Law has been broadly revised. Chapter four of Part four of The Settlement and Residence Act will regulate the right to settlement of those EEA – citizens who have exercised their right to freedom of movement and right of settlement of their dependents, while the rights of the dependants of those EEA -citizens having not made use of these rights falls under the scope of Chapter I. As concerns the latter a more restricted definition of family is applied. The wording of Art 3 of Directive 2004/38/EC, holding that the Directive “shall apply to all Union citizens who move or reside in a Member State other than that of which they are a national” does not seem to allow the kind of differentiation made in Austria, which has discriminatory effects on EEA citizens and their dependents. Furthermore, the ECJ has declared, in several cases, that differentiation based on the point in time, in which the Community law came into force in a Member State, is not an adequate ground to justify a current discrimination of EU-citizens.³⁵⁹

Article 46. Diplomatic and consular protection

³⁵⁸ „VP-Streit um Freizügigkeit“ in *Die Presse* of 19.08.2005.

³⁵⁹ ECJ, C-195/98 *ÖGB v. Austria*, judgement of April 18, 2003, C-290/00, *Duchon v. Pensionsversicherungsanstalt der Angestellten*, judgement of April 18, 2002, C-290/00.

CHAPTER VI JUSTICE

Article 47. Right to an effective remedy and to a fair trial

Access to a court and, in particular, the right to legal aid / judicial assistance

Legislative initiatives, national case law and practices of national authorities

As referred to already in the context of domestic violence under Article 2, an amendment to the Criminal Procedure Act 1975³⁶⁰ (*Strafprozessordnung 2005*) which takes into account the Framework Decision of the Council 2001/220/J, introduced improvements concerning the position of victims in criminal proceedings. The amendment introduces explicit obligations for the authorities to inform the victims of criminal acts about their rights during the proceedings, to respect their dignity, especially in regard to the dissemination of information including pictures and data adequate to reveal their identity to the public. The authorities must also inform victims, whose sexual integrity might have been violated about their right to refuse to answer certain questions regarding circumstances about their personal life or criminal acts, they consider unacceptable, their right to demand that proceedings are carried out in a gentle manner and the right to demand that the public is excluded from the trial. Furthermore certain victims have a right to be informed about the release of the defendant (before the judgement in first instance), or the withdrawal of the prosecution, the discontinuation (*Einstellung*) or termination (*Abbrechung*) or continuation of the proceedings against the “delinquent”. The proceedings must be translated for the victim, if necessary to allow the victim to make use of his/her rights. Victims subject to dangerous threats or violence or dependents of a victim, who died as the result of such an act or have witnessed this act, have the right to legal and psychosocial counselling. If the judge orders a medical expert he/she also has to establish the duration of suffering that was undergone.

Interim judicial protection

Legislative initiatives, national case law and practices of national authorities.

In November the Ministry of Justice presented draft amendments to the Criminal Code (*Strafgesetzbuch*), the Criminal Procedure Code (*Strafprozessordnung*) and the Execution Act (*Exekutionsordnung*)³⁶¹, introducing, inter alia, the criminal offence of “disturbing the quality of life” (*Beeinträchtigung der Lebensführung*), also referred to as “anti stalking”. A provision, providing the ability to gain an injunction against interference in the personal sphere will be introduced correspondingly. Pursuant to the draft amendment of the Execution Act the competent judge will be able to mandate the police to execute the injunction.

³⁶⁰ Bundesgesetz mit dem die Strafprozessordnung 1975, das Staatsanwaltschaftsgesetz und das Tilgungsgesetz geändert werden, Federal Law Gazette (BGBl) 119/2005.

³⁶¹ Entwurf für Bundesgesetz mit dem das Strafgesetzbuch, die Strafprozessordnung 1975 und die Exekutionsordnung geändert werden (Strafrechtsänderungsgesetz).

Independence and impartiality

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In *Thaler v. Austria*³⁶² (Appl. No 58141/00) the European Court of Human Rights determined a violation of article 6-1 of the European Convention on Human Rights and awarded compensation for costs and expenses.

The applicant, Michael Thaler, an Austrian national, was a doctor at the time he brought two sets of proceedings against the Tyrol Regional Health Insurance Board. In the first he claimed that he should be paid an additional 120 Austrian Schillings (ATS) in doctor's fees and in the second, that he was owed an additional ATS 18 million (about 1.3 million euros) on the basis that the rate for doctor's fees, which was determined by a general agreement between the Association of Social Insurance Boards and the Tyrol Regional Health Insurance Board, was too low. His case was dismissed by the Regional Appeals Commission and his complaint that the Regional Appeals Commission was not independent enough was dismissed by the Constitutional Court. The applicant claimed that the Regional Appeals Commission could not be regarded as an independent and impartial tribunal as required by Article 6 para 1 (right to a fair hearing). The Court noted that the assessors appointed to the Regional Appeals Commission were nominated by and had close links with the two bodies which had drawn up the general agreement at issue. In the first set of proceedings, the mere fact that the two bodies had appointed the assessors to the Regional Appeals Commission was in itself sufficient to justify the applicant's fears about the Commission's lack of independence and impartiality. In the second set of proceedings, the two assessors appointed by the Association of Social Insurance Boards were also senior officials of the Tyrol Regional Health Insurance Board which must have aggravated the applicant's fears. Nor was the lack of independence or impartiality of the Regional Appeals Board remedied on appeal; its decision was not subject to review by a judicial body, an appeal to the Administrative Court being excluded by law and the jurisdiction of the Constitutional Court being confined to questions of constitutional law.

The European Court of Human Rights therefore held unanimously that there had been a violation of Article 6 para 1 and that the finding of a violation constituted in itself sufficient just satisfaction for non-pecuniary damage. The Court awarded the applicant EUR 5,000 for costs and expenses.

Mr Perterer is still fighting to receive reparation from the Austrian Government in accordance with a final decision of the Human Rights Committee.³⁶³ The Committee had already found in 2004 that the composition of a disciplinary commission for the employees of the municipalities constituted a lack of impartiality. Moreover the Committee found the right to equality before the court which entails the requirement of speedy procedures to be violated due to the fact that it had taken in the present case 57 months to decide on a question of minor complexity and without the author's fault. Furthermore the Committee had explicitly stated that in "accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including payment of adequate compensation" Due to the refusal of the competent authorities – namely the Austrian government to implement the decision of the Committee the Republic of Austria ex officio, Mr Perterer sued the province of Salzburg and the republic of Austria for compensation in the Salzburg regional Court in August 2005.

³⁶² Eur.Ct.H.R (1st sect.) *Tahler v. Austria* (Appl. n°58141/00), judgement of 3 February 2005.

³⁶³ See Report on the situation of Fundamental Rights in 2004, p. 84

Publicity of the hearings and of the pronouncement of the decision

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In *Birnleitner v. Austria*³⁶⁴ (Appl. No 45203/99) the European Court of Human Rights determined a violation of article 6-1 of the European Convention on Human Rights and awarded compensation for costs and expenses.

The applicant, Elisabeth Birnleitner, an Austrian national, owns land which is an approved hunting ground. Every six years, when the district authority establishes the boundaries of hunting grounds, requests may be filed by landowners to have adjacent land attached to their hunting grounds. On 20 September 1992 the applicant made such a request and was only partly successful. She complained, under Article 6 para 1 of the European Convention on Human Rights, that she had not had an oral hearing before the Administrative Court. The European Court of Human Rights held unanimously that there had been a violation of Article 6 para 1 of the Convention and awarded the applicant 3,000 euros (EUR) for costs and expenses.

The case ***Osinger v. Austria*³⁶⁵** concerns proceedings brought to determine who should inherit a farm which had belonged to the applicant's brother. The applicant complained that in the succession proceedings there had been no public hearing where as required under Art 6 para 1 of the European Convention on Human Rights. The European Court of Human Rights held unanimously that there had been a violation of Article 6 para 1 of the Convention and that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. The Court awarded the applicant EUR 4,000 for costs and expenses.

Reasonable delay in judicial proceedings

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In 2005, the ECHR decided in a total of 10 cases that Austria has violated the right to a fair trial within a reasonable time

In ***El Massry v. Austria*** the applicant, an Egyptian national, was the victim of an assault and was heavily injured in September 1989. He complained under Article 6 (right to a fair hearing within a reasonable time) of the European Convention on Human Rights that the proceedings concerning his compensation claim had lasted for an unreasonably long amount of time. The European Court of Human Rights noted that the proceedings in question had gone on for almost 11 years. Accordingly, the Court concluded unanimously that there had been a violation of Art 6 para 1 of the Convention. It awarded the applicant EUR 9,000 for non-pecuniary damage and EUR 900 for costs and expenses.

In ***Hannak v. Austria*³⁶⁶** the applicant was convicted of fraudulent bankruptcy in December 1998. She complained about the length of the criminal proceedings against her, which lasted more than 15 years and nine months. She relied on Article 6 § 1 of the European Convention on Human Rights. The European Court of Human Rights held unanimously that there had

³⁶⁴ Eur.Ct.H.R (1st sect.), *Birnleitner v. Austria* (Appl. n°45203/99) judgement of 24 February 2005.

³⁶⁵ Eur.Ct.H.R (1st sect.), *Osinger v. Austria* (Appl. n°54645/00) judgement of 24 March 2005.

³⁶⁶ Eur.Ct.H.R (3rd sect.), *Hanak v. Austria* (Appl. n°70883/01) judgement of 22 December 2004.

been a violation of Article 6 § 1 of the European Convention and awarded the applicant EUR 9,000 for non-pecuniary damage and EUR 2,000 for costs and expenses.

In **Kern v. Austria**³⁶⁷ the European Court of Human Rights determined a violation of article 6-1 of the European Convention on Human Rights and awarded compensation. Relying on Art 6 para 1 and Art 1 of Protocol No. 1 (protection of property), the applicant, Franz Kern, an Austrian national, complained, amongst other things, of the length and unfairness of farmland consolidation proceedings concerning his property. The Court unanimously declared the application only admissible regarding the complaint concerning the length of the proceedings. It noted that these had lasted for more than 12 years. Having regard to the circumstances of the case, the Court considered that such a lengthy period failed to satisfy the "reasonable time" requirement. It accordingly held unanimously that there had been a violation of Article 6 para 1 and awarded the applicant EUR 5,000 for non-pecuniary damage and EUR 3,175.70 for costs and expenses.

The case of **Zuckerstätter and Reschenhofer v. Austria**³⁶⁸ concerning article 6-1 of the ECHR has been struck out following a friendly settlement in which they are to be paid EUR 6,000 and EUR 4,000 respectively for non-pecuniary damage, costs and expenses. The applicants, Wilhelm Zuckerstätter and Christian Reschenhofer, Austrian nationals, complained about the length of criminal proceedings against them concerning traffic offences. They relied on Article 6 para 1.

In **Blum v. Austria**³⁶⁹ and **Fehr v. Austria** the Eur. Ct. H.R. determined a violation of article 6-1 of the ECHR and awarded compensation for costs and expenses. The applicants, Heinrich Blum and Manfred Fehr, both Austrian nationals, were suspected of having illegally employed foreigners. The respective District Administrative Authorities opened administrative criminal proceedings against them under the Aliens' Employment Act (*Ausländerbeschäftigungsgesetz*). Relying on Article 6 para 1, the applicants complained, among other things, about the length and unfairness of the proceedings. The Court unanimously declared the applications admissible only regarding the complaint concerning the length of the proceedings. It noted that these had lasted for more than 5 years. It accordingly held unanimously that there had been a violation of Article 6 para 1 and awarded Mr. Blum EUR 2,000 and Mr. Fehr EUR 3,000 for costs and expenses.

In **Geyer v. Austria**³⁷⁰ the applicant, an Austrian national, was convicted of intentional tax evasion. Relying on Article 6 para 1 he complained about the length and unfairness of the proceedings (the lack of an oral hearing before the Administrative Court, not giving sufficient reason for the Administrative Court's decision). The Court unanimously declared the application admissible only regarding the complaint concerning the length of the proceedings (six years and five months). Having regard to the circumstances of the case, the Court considered that such a lengthy period failed to satisfy the "reasonable time" requirement. It accordingly held unanimously that there had been a violation of Article 6 para 1 and awarded the applicant EUR 4,500 for non-pecuniary damage and EUR 2,000 for costs and expenses.

In **Jancikova v. Austria**³⁷¹ the applicant, complained under Article 6 ECHR about the length of the administrative criminal proceedings against her concerning the employment of four foreigners without work permits. She also relied on Article 13 (right to an effective remedy). The European Court of Human Rights noted that the proceedings in question had lasted

³⁶⁷ Eur.Ct.H.R (1st sect.), *Kern v. Austria* (Appl. n°14206/02) judgement of 24 February 2005.

³⁶⁸ Eur.Ct.H.R (1st sect.), *Zucksterstatter and Reschenhofer v. Austria* (Appl. n°76718/02) friendly settlement of 24 February 2005.

³⁶⁹ Eur.Ct.H.R (1st sect.), *Blum v. Austria* (Appl. n° 31655/02) judgement of 3 February 2005.

³⁷⁰ Eur.Ct.H.R (1st sect.), *Geyer v. Austria* (Appl. n°69162/01) judgement of 7 July 2005.

³⁷¹ Eur.Ct.H.R (1st sect.), *Jancikova v. Austria* (Appl. n°56483/00) judgement of 7 April 2005.

almost for six years and eight months. Accordingly, the Court concluded unanimously that there had been a violation of Article 6 para 1 and of Article 13 (due to the excessive length of time of the proceedings) of the Convention. It awarded the applicant EUR 3,000 for costs and expenses.

In **Nowicky v. Austria**³⁷² the applicant complained about the length and unfairness of proceedings he had brought following the refusal of the Austrian authorities to grant him authorisation to market a pharmaceutical product that he had developed. The Court unanimously declared the application admissible only regarding the complaint concerning the length of the proceedings. These were still pending before the Austrian courts and had lasted for more than 9 years and 10 months at this time. Having regard to the circumstances of the case, the Court considered that such a lengthy period failed to satisfy the "reasonable time" requirement. It accordingly held unanimously that there had been a violation of Article 6 para 1 and awarded the applicant EUR 1,500 for costs and expenses.

In **Riepl v. Austria**³⁷³ the applicants, two Austrian nationals, Franz and Christina Riepl, had been waiting 7 years and 7 months for a building permit for a double garage with a parking area. The European Court of Human Rights held unanimously that there had been a violation of Article 6 para 1 of the Convention and awarded the applicants EUR 4,000 for non-pecuniary damage and EUR 1,629.97 for costs and expenses.

In **Sylvester v. Austria No 2**³⁷⁴ the applicant, a national of the United States of America, complained about the length of proceedings relating to his request to have a divorce decree and custody decision issued by a United States court in 1996 recognised in Austria. The Eur. Ct. H.R. held unanimously that there had been a violation of Article 6 para 1 of the Convention and awarded the applicants EUR 3,500 for non-pecuniary damage and EUR 2,500 for costs and expenses.

Legislative initiatives, national case law and practices of national authorities

An amendment to the Act on Insolvency Law³⁷⁵ (*Insolvenzrechts-Novelle*) provides for the tightening of the procedure on the forced liquidation agreement (*Zwangsausgleich*). Under the current law the co-debtor has to wait for a disproportionately long time until he/she can again dispose of his/her property without restriction.³⁷⁶

Within the framework of the Aliens Law Codification the efficiency of the **Independent Federal Asylum Senate (Unabhängiger Bundesasylensat – UBAS)** will be improved.³⁷⁷ Along with the headquarters in Vienna an office will be established in Linz, where at last four senates will be installed. Furthermore, the amendment introduced a controlling system, obliging the Senate to deliver a report to the Minister of the Interior every second year about its activities and collected experiences, who then must submit it to the Austrian Parliament. A controlling committee will evaluate the work of the Senate in regard to its optimal management of resources. The committee will have to report to the President of the

³⁷² Eur.Ct.H.R (1st sect.), *Novitsky v. Austria* (Appl. n°34983/02) judgement of 24 February 2005.

³⁷³ Eur.Ct.H.R (1st sect.), *Riepl v. Austria* (Appl. n°37040/02) judgement of 3 February 2005.

³⁷⁴ Eur.Ct.H.R (1st sect.), *Osinger v. Austria* (Appl. n°54640/00) judgement of 3 February 2005.

³⁷⁵ Regierungsvorlage betreffend das Bundesgesetz, mit dem das Gerichtsgebührengesetz, das Gerichtliche Einbringungsgesetz 1962, das Außerstreitgesetz, das Rechtsanwaltstarifgesetz, das Notariatstarifgesetz, die Konkursordnung, die Ausgleichsordnung, die Anfechtungsordnung und das Bundesgesetz über die Einziehung gerichtlicher Verwahnisse geändert werden (Gerichtsgebühren- und Insolvenzsrechts-Novelle 2006 - GIN 2006) 1168 d.B: (XXII.GP)

³⁷⁶ "Gesetzesentwürfe" available at the Website of the Ministry of Justice:

www.bmj.gv.at/gesetzesentwuerfe (17.01.05).

³⁷⁷ Änderung des Bundesgesetzes über den unabhängigen Bundesasylensat; Federal Law Gazette (BGBl.) 100/2005.

Independent Federal Asylum Senate about its findings and specify where improvements can be made. The President will have to forward a list of pending cases every half- year to the Minister of Interior including the year of the application, the number of decisions and the form of settlement. Furthermore, the amendment provides for the post of a lawyer competent to bring forward complaints in regard to disciplinary failure to the plenary meeting of the Senate. Due to the overburdening of the UBAS, the amendment provides for the appointment of new judges for the UBAS. Pursuant to information provided by the human resources department of the UBAS by the end of November the number of staff shall be increased from 101 by January 2006 to 183 persons, including the appointment of 16 new judges.

Reasons for concern

Regarding the length of administrative proceedings, it should be repeated here what has already been demanded in the Reports on Austria in 2003 and 2004. It seems absolutely necessary that the Administrative Court, which in many cases decides as first independent tribunal within the meaning of Article 6 ECHR, be relieved from that burden by setting up of a regional Administrative Courts in the Provinces with comprehensive jurisdiction in administrative matters allowing a further appeal to the Administrative Court solely on a point of law. This demand is regularly made by the Administrative Court itself e.g. in its last report for the year 2004. (In the last year proceedings before the Court took on average 22 months, 545 applications had been pending for more than 3 years and 7173 applications were still outstanding.)³⁷⁸ In a statement on the Government's proposal for the Aliens' Law Codification of 17 May 2005 the Court expressed its concern that the new wording of the provisions in the Aliens Law Codification will lead to even more appeals to the Administrative Court.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In its decision of 7 July the Austrian Supreme Court³⁷⁹ declared class actions to be admissible according to Austrian law. The Austrian system requires the assignment of the claims to a common representative who then brings the class action.³⁸⁰

Article 48. Presumption of innocence and right of defence

Presumption of innocence

Legislative initiatives, national case law and practices of national authorities

On 11 January 2005 the Austrian Supreme Court (Oberster Gerichtshof) overruled the applicants' call for annulment and their appeal, determining that a conviction does not violate Article 6 of the European Convention on Human Rights, even if the offence was provoked by an agent of the state.³⁸¹

The applicants, Silvia St. and Michael W., were convicted for professionally importing, exporting and selling addictive drugs. They were caught with the help of an undercover agent. Relying on Article 6 of the European Human Rights Convention, they argued that because the agent had entrapped them into buying 224.6g of cocaine their right to a fair trial was violated.

³⁷⁸ Activity report of the Administrative Court for the year 2004 of May 2005, available at the website <http://www.vwgh.gv.at/presse/taetigkeitsbericht2004.pdf> (18.11.05).

³⁷⁹ OGH vom 7.6.2005, 4 ob 116/05w.

³⁸⁰ "Sammelklage light auf Österreichisch" in *die Presse* of 05.09.2005.

³⁸¹ OGH of 11.1.05, 11 Os 126/04.

The Court noted by reason of the applicants' autonomous willingness to commit the crime that there was no incitement by the agent in this regard. Incidentally, Article 6 of the European Convention on Human Rights does not prevent someone from being convicted, in the event of the lawful evidence of their guilt, including in cases of entrapment by someone working for the executive authority. The breach of the Convention does not result in a substantial reason for impunity.

The film “operation spring”, made by two Austrian filmmakers and screened in Austria since September 2005, reports about the biggest Austrian police operation since the Second World War. The film raises the question of whether the right to a fair trial had been respected in the subsequent proceedings against the defendants, who were mainly of African origin.

On 27 May 1999 during a police raid with the code name “operation spring” 850 police officers stormed several private homes and refugee housing and arrested around 100 people of African origin. The police had made use for the first time of the “great bugging operation” (*großer Späh- und Lauschangriff*) which had been introduced in the Criminal Procedure Act 1997 and had entered into force in 1998.³⁸² In the criminal proceedings anonymous witnesses testified against suspected drug dealers for the first time. Most of the accused have been convicted, the trial of one person, who stands accused of having been the head of the drug cartel, is still pending. The media had celebrated the operation as being one of the greatest ever successes of Austrian police.³⁸³ The film reports about the operation and the trials, by interviewing people involved in the operation and the proceedings, e.g. one of the judges, lawyers, a jury member and one of the anonymous witnesses. However no representative of the police was interviewed. (According to one of the filmmakers none of the police officers involved agreed to give an interview.) The film points out several weaknesses and failures in the operation and the subsequent trials, e.g. video and audio surveillance not being recorded simultaneously, partial mistakes in the translation of the surveillance protocols by the Nigerian translator and dubious witnesses. In reaction human rights NGOs such as Amnesty International and SOS Mitmensch requested that the Ministry of Justice review the cases and to reopen all cases, in which questionable evidence had led to convictions.³⁸⁴ At the end of October a spokesperson for the Minister of Justice declared in an interview with the Austrian Press Agency that the Ministry has no plans to start any initiatives at the moment and will wait for the outcome of the last trial that is still open. The Ministry also underlined that the movie leaves other aspects of the proceedings that incriminate the defendants and that have resulted in convictions unexplored.³⁸⁵ The Green Parliamentarian Terezija Stoisits posed two written requests, concerning certain aspects of the cases and concerning the decision not to review the cases, to the Ministry of Justice, and one in regard to possible financial rewards for the anonymous witnesses to the Ministry of Interior. The response of the two Ministers had not been published before the report was finalised.³⁸⁶

³⁸² Bundesgesetz: Einführung besonderer Ermittlungsmaßnahmen in die Strafprozeßordnung zur Bekämpfung organisierter Kriminalität sowie Änderung des Strafgesetzbuches, des Mediengesetzes, des Staatsanwaltschaftsgesetzes und des Sicherheitspolizeigesetzes, Federal Law Gazette (BGBl) BGBl. No. 105/1997.

³⁸³ Filmwebsite www.operation-spring.at (28.11.2005).

³⁸⁴ „Alles waren schwarz“ in *der Falter* No. 38/05, insertion in *die Presse* of 11.18.2005.

³⁸⁵ “Justizministerium wird nicht von sich aus aktiv” in *DerStandard.at.*, of 11.10.2005.

³⁸⁶ Request of November 8, 2005, 3952/J XXII GP and of October 13, 2005, 3509/J XXII.GP and of November 10 3601/J XXII. GP.

The right to freely choose one's defence counsel and the right to an interpreter

Both the CPT³⁸⁷ and the CAT-Committee³⁸⁸ welcomed the amendment of the Criminal Procedure Code³⁸⁹ (*Strafprozessordnung*), entering in force on 1 January 2008 granting the access to a lawyer during police custody, in particular during the interrogation, following the decision of the Administrative Court of September 2002³⁹⁰, but expressed at the same time their concern regarding the provided exceptions to this right. According the Secs 57-63 and 164, the police may decide that contacts between a detained person and his/her lawyer be supervised (and limited to the provision of general legal advice) during police custody and/or deny the presence of a lawyer during interrogations, “insofar as it is considered necessary to avoid that the investigation or the gathering of evidence are adversely affected by the lawyer’s presence.” The CPT recommended granting in such a case access to an independent lawyer who can be trusted not to jeopardise the legitimate interest of the investigations, while the CAT-Committee urged Austria to “take all necessary legal and administrative guarantees to ensure that this restriction will not be misused, that it should be restricted to very serious crimes and that it shall always be authorized by a judge .

Article 49. Principles of legality and proportionality of criminal offences and penalties

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

³⁸⁷ Report to the Austrian Government on the visit to Austria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of July, 21, 2005, CPT/inf(2005) 13, para 24,25.

³⁸⁸ Conclusions and recommendations of the Committee against Torture –Austria of November 24, 2005, CAT/CAUT/CO/3/CPR.1, art. 11.

³⁸⁹ Bundesgesetz, mit dem die Strafprozessordnung 1975 neu gestaltet wird (Strafprozessreformgesetz), Federal Law Gazette (BGBl.) No. 19/2004.

³⁹⁰ VwGH 17.09.2005, 2000/01/0325.