



universität
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MASTER THESIS

Titel der Master Thesis / Title of the Master Thesis

**“The return of refugees who fail in the Austrian Asylum process
back to their respective countries”**

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the
degree of

Master of Arts (MA)

Wien, 2020 / Vienna 2020

Studienkennzahl lt. Studienblatt /
Postgraduate program code as it appears on
the student record sheet:

UA992 884

Universitätslehrgang lt. Studienblatt /
Postgraduate program as it appears on the
student record sheet:

Master of Arts in Human Rights

Betreut von / Supervisor:

Uni. – Prof. Mag. Dr. Reinprecht Christoph

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Acronyms and abbreviations

AsylG: Asylum Act
BFA: Federal Office for Immigration and Asylum
CAT: Convention Against Torture
CRC: Convention on the Rights of the Child.
ECHR: European Convention on Human Rights
ECtHR: European Court for Human Rights.
EEA: European Economic Area
EU: European Union
FPG: Aliens Police Act
ICCPR: International Covenant on Civil and Political Rights
ICESCR: International Covenant on Economic, Social and Cultural Rights
NGO: Non-Government Organisation
UN: United Nations
UNHCHR: United Nation High Commission for Human Rights
UNHCR: United Nation High Commission for Refugees
Frontex: European Border and Coast Guard Agency.
TFEU: Treaty on the Functioning of the European Union.
EMN: European Migration Network
BM.I: Federal Ministry of Interior
BMEIA: Federal ministry for Europe, Integration and Foreign affairs
ÖIF: Austrian Integration Fund
AVG: General Administrative Procedures Act
AMIF: Asylum, Migration and Integration Fund
BVwG: Federal Administrative Court
VwGH: Austrian Supreme administrative Court
VfGH: Austrian Constitutional Court
IOM: International Organisation for Migration
LGBTIQ+: Lesbian, Gay, Bi-sexual, Transgender and Queer
AMS: Austrian Public Employment Service
UNIKO: Universities Austria
PTSD: Posttraumatic Stress Disorder
CSOs: Civil Society Organisations

Chapter 1: Introduction

Following the 2015 – 16 Refugee Crisis in Europe, Austria registered a total of 89,098 and 42,285 Asylum applications respectively. According to the 2016 statistics from the Austrian Ministry of interior (BMI), only 22,307 (48%) people received a positive decision, 13.124 (28%) received a negative decision and 24% (10,992) received Humanitarian Visas and other decisions.¹ Statistics from 2019 still from the Austrian ministry of Interior further shows that more and more Asylum applications end up being rejected. From the 11,334 Asylum Applications, 2,633 were from Afghanistan, 46% turned out positive and 41% turned to be negative. Syrians were 2,346, 89% were positive and 8% got negative. From the 672 applicants from Somalia, 58% got positive and 38% got negative. Nigerians were 313, 4% got positive where as 84% got a negative. From India, 317 applied for Asylum in Austria, no one got a positive, 86% got a negative and the rest got other decisions.

When a refugee receives a negative Asylum decision, that decision comes along with a return order. Which means that the person has to return to his/her country either voluntary or forced to return (deportation). But not all times a return decision is issued to a rejected Asylum application that a return is either way possible, this might happen due to; Legal reasons such as the right to a private and family life under Art. 8 ECHR, Non- refoulment under Art. 21 of Directive 2011/95/eu of the European Parliament and the Council, Right to life Art. 2, Prohibition of Torture Art. 3 of ECHR and Art. 3 of the Convention against Torture (CAT), Prohibition of expulsion or return Art. 33 para 1 of the 1951 Geneva Refugee Convention. A return may also be impossible due to factual reasons such as lack of travel documents, lack of cooperation of third-country authorities, refusal of carriage by the airline, resistance of the returnee to return.

This master thesis is aiming to finding out how do refugees caught up in a situation where they are denied asylum but cannot as well go back to their country continue leading a life in Austria. The broader current situation of how easy or hard their lives would be and how they go through their day today life. Which human rights are at stake in a situation where a refugee fails in the Asylum process but has to continue his life in Austria.

¹BMI, “Asyl Statistiken” <https://www.bmi.gv.at/301/Statistiken/start.aspx> (Accessed 7 May 2020).

1.1.Definitions:

This thesis is based on the following definitions as applies in Austria;

Asylum Seeker: A stranger from the time an application for international protection is filed until is legally finalized, terminated or no longer relevant. (§2(14) Asylum act 2005)²

Absconding: Action by which a person seeks to avoid legal proceedings by not remaining available to the relevant authorities or to the court. Art 76 (FPG)³

Application for international protection: A request made by a third- country national or a stateless person for protection of Austria, who can be understood to seek refugee or subsidiary protection status. §2(13) AsylG⁴.

Return order: This is an order issued to third country nationals by the federal office to bring them outside of the country when their application for international protection according to section 4a and 5 of the 2005 Asylum act is rejected. (Section 61(1) Aliens police act 2005)⁵.

Forced return/deportation: Foreigners against whom a return decision, an order to bring them outside the country, an expulsion or a residence ban can be enforced if;

- a) It appears necessary to monitor their departure for reasons of public order or security.
 - b) They have not fulfilled their obligation to leave in good time.
 - c) On basis of certain facts that there is reason to fear that they would not meet their departure obligations.
 - d) They have returned to the federal territory contrary to an entry ban or a residence ban.
- (§ 46(1) Aliens police act 2005)⁶

Voluntary return: This is a free will departure by a refugee back to the country of origin.⁷

²Asylum act 2005,
<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004240>,
(Accessed 5 June 2020).

³Aliens police act 2005,
<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004241>,
(Accessed 5 June 2020).

⁴Ibid.

⁵Ibid.

⁷Federal Office for immigration and Asylum (BFA), “Asylum procedure”

https://www.bfa.gv.at/files/broschueren/Informationsbroschuere_Asylverfahren_in_Oesterreich_EN.pdf
(Accessed 5 June 2020).

Common European Asylum System: A framework of agreed rules which establish common procedures for international protection and a uniform status for those who are granted refugee status or subsidiary protection based on the full and inclusive application of the Geneva Convention and which aims to ensure fair and humane treatment of applicants for international protection, to harmonize asylum systems in the EU and reduce the differences between Member States on the basis of binding legislation, as well as to strengthen practical cooperation between national asylum administrations and the external dimension of asylums.⁸

Country of origin: the state of which the foreigner is a national or, in the case of statelessness, the state of his former habitual residence⁹.

Non-refoulement: The principle of *non-refoulement* forms an essential protection under international human rights, refugee, humanitarian and customary law. It prohibits States from transfer- ring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill- treatment or other serious human rights violations¹⁰.

Subsidiary protection: the temporary, renewable right of entry and residence, which Austria grants to foreigners in accordance with the provisions of the Asylum Act¹¹.

Third country national: a foreigner who is not an EEA citizen or a Swiss citizen¹².

An Alien: Anyone who does not have Austrian citizenship¹³.

⁸European commission, “Migration and Home affairs” https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en (Accessed 5 June 2020).

⁹Asylum act 2005, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004240>, (Accessed 5 June 2020).

¹⁰OHCHR, “The principle of non-refoulement under international law” <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> (Accessed 5 June 2020).

¹¹Asylum act 2005, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004240>, (Accessed 5 June 2020).

¹²Ibid.

¹³Ibid.

Safe country of origin: A country where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Art. 9 of Directive 2011/95/EU (Recast Qualification Directive), no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict¹³.

Family member: who is the parent of a minor child, spouse or single unmarried child of an asylum seeker or a stranger at the time of the application, who has been granted the status of subsidiary protection or asylum seeker, provided that the spouse's marriage already existed before entry, as well as the legal representative of the person who has been granted international protection if the child is a minor and not married, provided that this legally relevant relationship already existed before entry; this also applies to registered partners if the registered partnership already existed before entry¹⁵.

Minor: means a third-country national or stateless person below the age of 18 years¹⁶.

Unaccompanied minor: Means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States¹⁷.

¹⁴EUR-Lex, “DIRECTIVE 2011/95/EU of the European parliament and of the council of 13 December 2011”, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>, (Accessed 5 June 2020).

¹⁵Asylum act 2005, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004240>, (Accessed 5 June 2020).

¹⁶EUR-Lex, “DIRECTIVE 2011/95/EU of the European parliament and of the council of 13 December 2011”, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>, (Accessed 5 June 2020).

¹⁷Ibid.

1.2. Research question

This master thesis is aiming to finding answers to the following general research question:

What is the human rights situation of rejected asylum seekers in Austria who cannot be returned to their respective countries?

Specific research Questions:

- ❖ Is Austria still taking on the responsibility to provide for and protect Refugees who cannot return or be returned back to their countries after a failed asylum application?
- ❖ Are International Organizations such as the UNHCR still mandated to fight for such refugees?
- ❖ Are there any other possible channels in Austria where such refugees can use in order to acquire other official status or even become naturalized Austrian citizens?
- ❖ What human Rights do these refugees continue to enjoy in Austria?

1.3. Research objectives

In trying to answer the questions raised above, this research will be conducted with the following general objective:

To examine the situation of refugees in Austria who did not qualify for Refugee status or any other legal statuses using the Human rights lens.

Specific research objectives:

- ❖ To analyze asylum cases and finding out the major reasons for negative decisions.
- ❖ To find out integration challenges faces by refugees in Austria who have no legal status.
- ❖ To identify policies that favor refugees without a legal status and those that makes their lives harder in Austria.

1.4. Methodology

This thesis offers a broad qualitative analysis of the general life of how refugees without a legal status survive in Austria, it does not look at refugees from a specific country but rather all refugees specifically those who failed in their asylum applications but still continue to live in Austria.

The thesis also does not cover refugees who failed in the Asylum process but continue to live in Austria *illegally* (Refugees who were issued a return order but did not cooperate with the Authority and instead go into hiding). The reasons for the continued stay in Austria for the refugees covered by this thesis are far beyond their control as clearly highlighted in chapter 1 above. The continued stay in Austria for refugees covered by this Thesis is *legal*, meaning that they are cooperating with the Authority and they continue to have permanent residences and continue to enjoy some freedoms in Austria.

The information in this thesis was prepared through desktop research as well as interviews carried out with the refugees in the same situation, Asylum lawyers, NGOs and the Authority. While trying to answer the research questions, the data was then analyzed in a Human rights perspective. This paper mainly looks at the social dimension of refugees that are impossible to return (such as access to education, housing, employment and to social security). It also covers the legal dimension (such as residency rights).

1.5. Scope and limitations

This Thesis focuses on refugees as defined in the 1951 refugee convention, since Austria is a signatory to this convention, the main focus will be on that definition and not on other terminologies that comes up in the refugee discussions. Terms like migrants or economic migrants will not appear in this thesis. This is done because the definition of who is a refugee offers an in-depth view of the subject, *de-facto* refugees i.e. that someone is not a refugee for various reasons and therefore should be deported by the Austrian government will be the major focus of this thesis but in particular, those that as well cannot leave voluntarily or be deported.

Austria receives refugees from different countries and different continents. This thesis is not limited to refugees from a specific country but rather all refugees without exclusion. It should as well be noted that the reasons as to why people flee are quite broad, this means that the

chances of being accepted are also different. Some refugees especially from Syria have a well clear and known reason of fleeing, which is the on-going civil war happening in that country till up to date. This means that, refugees fleeing from Syria find it easy to prove their case unlike their counterparts from Pakistan for example.

Though on the other hand, the well-founded fear of persecution and the grounds for being recognized as a refugee are not only political, but can as well be race, religion, nationality etc. it's not a must that all Syrians asking for Asylum in Austria Automatically get it, there is a percentage of people who receive negative decisions and those are the exact refugees this thesis will focus on.

This thesis looks at refugees as Human rights holders, whose rights are enshrined in the 1951 convention relating to the status of refugees,¹⁷ as well as the optional protocol.¹⁸ furthermore, the rights are then built on the non-refoulment principle,¹⁹ where hosting states are obliged not to return individuals to places where their lives are at risk of being persecuted once returned.

¹⁷Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Henceforth referred to as the Refugee Convention, along with its Optional Protocol).

¹⁸Optional Protocol Relating to the Status of Refugees (adopted 31 Jan 1961) 6223 UNTS 267. (Henceforth included in 'Refugee Convention.')

¹⁹Art 33 of the Refugee Convention.

Chapter 2: Background

2.1.who is a Refugee?

The 1951 Refugee convention Article 1(A) (2) defines a Refugee as follows: -

*“As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.*²⁰

As per the 1951 Refugee Convention, formal recognition of a State is not necessary. One becomes a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of ones’ refugee status does not therefore make a person a refugee but declares him to be one. A Person does not become a refugee because of recognition by a state, but he is simply recognized because he is a refugee.²¹

“A Refugee does not become a refugee because of recognition, but is recognized because he is a refugee”.

If a person flees from his/her country of habitual residence with the intention of not returning to it for fear that his/her life would be in danger because of persecution, by the time he lands a foot in Austria, he is already a Refugee, applying for Asylum is the only way to declare one as a refugee and offer him his rights according to the 1951 Refugee convention.

Failing in the Asylum process does not mean that someone is no longer a refugee anymore, and that’s why this thesis still looks at someone with a continuing general fear of persecution back in his/her country as a refugee and not an illegal migrant or economic migrant.

²⁰Convention relating to the status of a Refugee (adopted 28 July 1951, entered into force 22 April 1954) Article 1(A)(2).

²¹UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1991, § 28.

We cannot talk about Refugees in Austria and forget to talk about Asylum seekers, In Austria, Asylum seeker refers to individuals who claimed protection for the reasons mentioned in the 1951 Refugee convention,²² from the time an application for international protection is filed until is legally finalized, terminated or no longer relevant. (§2(14) Asylum act 2005)²³. In Austria, Asylum seekers include not only the individuals seeking international protection, but also those who seek other forms of protection from a state under European Union law (subsidiary protection: death penalty, freedom from torture, fleeing generalised violence due to personalised risk)²⁴

Once a refugee applies for asylum in Austria, a look in to his/her case starts from there, the authority will examine the case and if one fulfills the criteria mentioned in the 1951 refugee convention, the person is granted asylum, and if not, then the authority might decide to offer other protections such as Subsidiary protection or residence permit.²⁵

Since the internationally recognized definition of “Refugee” in the 1951 convention relating to the status of refugee²⁶ doesn’t really define “persecution” in normative terms,²⁷ this cautiously limits the scope of who can receive “refugee status”.²⁸ this means that many people who really need international protection will be left out.

²² Convention relating to the status of a Refugee (adopted 28 July 1951, entered into force 22 April 1954) Article 1(A)(2).

²³Asylum act 2005,

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004240>, (Accessed 9 June 2020).

²⁴Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] Official Journal L.304/12 (hereinafter “Qualification Directive”).

²⁵Federal Office for immigration and Asylum (BFA), “Asylum procedure”

https://www.bfa.gv.at/files/broschueren/Informationsbroschuere_Asylverfahren_in_Oesterreich_EN.pdf (Accessed 9 June 2020).

²⁶Ibid.

²⁷Subasi Vera, “The integration of Bosnian and Syrian war refugees in Austria in the 1990s and today” <http://othes.univie.ac.at/54013/>, (Accessed 9 June 2020).

²⁸Ibid.

2.2 Refugee protection at the International Level

On the International level, Refugees are protected by different International law documents signed and ratified by different countries. These form the basis for; Refugee law and Human Rights Law.

2.2.1 International Refugee Law

International Refugee Law deals with the rights and duties states have vis-à-vis refugees.²⁹ International refugee law is designed to provide a back-up source of protection to seriously at-risk persons. States have a responsibility to protect its citizens and the notion where International law rests is not to protect people that are persecuted by the state, but rather provide refuge to those whose home state cannot afford them protection from persecution.³⁰

Geneva Convention relating to the status of Refugees 1951

The 1951 Convention relating to the status of Refugees is the foundation of International refugee law.³¹ this is where the worldwide accepted definition of “who is a Refugee?” is derived from. It also natured the principle of *non-refoulement*, where refugees should not be forcefully returned to countries where their lives would be threatened. It also sets out the duties of refugees and the responsibilities of states towards the refugees.³²

Adopted in the aftermath of World War II by the then members of the United Nations, the refugee definition contained in article 1A(2) of the 1951 Geneva Convention has never been amended since, and has only been expanded in geographical and temporal scope through the 1967 New York Protocol.³³

²⁹wikipedia, “Refugee law” https://en.wikipedia.org/wiki/Refugee_law (Accessed 22 June 2020)

³⁰James C. Hathaway, “International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative” <https://www.refworld.org/pdfid/3dca73274.pdf> (Accessed 22 June 2020).

³¹Convention relating to the status of a Refugee (adopted 28 July 1951, entered into force 22 April 1954) Article 1(A)(2).

³²UNHCR, “A guide to international refugee protection and building state asylum systems” <https://www.unhcr.org/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html> (Accessed 22 June 2020).

³³Protocol relating to the status of Refugees (Adopted 16 December 1966, Entered into force 4 October 1967).

To this day, the definition, accepted by 148 states party to the Convention and/or the Protocol, remains the international standard for determining protection needs across the globe. Far from endorsing the general conception of a refugee as a person that has been forced to flee to another country.³⁴

The 1951 Refugee Convention was drafted after the end of the second world war, hence the main focus being drawn to the problems of that time, and that is why the definition dwells more on the people who became refugees as a result of events that took place before 1951, as new crises emerged all over the world during the 1950s and 1960s, it became clear that the geographical scope of the 1951 convention needed to be widened. Hence the 1967 protocol to the convention was adopted.

Protocol relating to the status of Refugees 1967

The 1967 New York protocol or well known as the 1967 Protocol relating to the status of refugees is independent though related to the 1951 Geneva convention. The 1967 New York protocol only removed the temporal and geographical limits found in the 1951 refugee convention. States agreed to apply the core content of the 1951 convention especially Articles 2-34 to all persons covered by the protocol's definition without limitations of time and place.³⁵

We reaffirm the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto as the foundation of the international refugee protection regime. We recognize the importance of their full and effective application by States parties and the values they embody.... We reaffirm that international refugee law, international human rights law and international humanitarian law provide the legal framework to strengthen the protection of refugees.... We reaffirm respect for the institution of asylum and the right to seek asylum. We reaffirm also respect for and adherence to the fundamental principle of non-refoulement in accordance with international refugee law... (UN General Assembly, New York Declaration for Refugees and Migrants, Resolution 71/1,2016)

³⁴Carton. J "Complicated Refugees: A study of the 1951 Geneva convention Grounds in Aleksandar Hemon's Life Narrative", 2018, Pg. 331-347.

³⁵Protocol relating to the status of refugees (adopted 16 December 1966, entered into force 4 October 1967) Article 1(1-3)

UN Declaration on Territorial Asylum of 1967

The issue of Asylum can be traced way back in the 1948 Universal Declaration of Human Rights (UDHR). “Everyone has a right to seek and to enjoy in other countries asylum from persecution” Art 14(1). UDHR. As well as article 13(2) which says “everyone has the right to leave any country, including his own, and to return to his country” (UDHR). Both articles are the foundation for the UN declaration on Territorial Asylum of 1967.

The Declaration on Territorial asylum came to light with resolution 2312,³⁶ that was adopted unanimously by the 22nd session of the United Nations General Assembly. A declaration, unlike the convention is non-binding.

The United Nations Declaration on Territorial Asylum, that was unanimously adopted by the General Assembly in 1967, defines certain important principles intended to facilitate admission for asylum. Firstly, the principle that “asylum granted by a State in the exercise of its sovereignty ... shall be respected by all other States”. It is a peaceful and humanitarian act and ... as such it cannot be regarded as unfriendly by any other State”. Secondly, “Where a State finds difficulty in granting or continuing to grant asylum, States, individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.”³⁷

2.2.2 Human Rights Law

International human rights law lays down the obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.³⁸ For Refugees on an International level, there are specific Human Rights Law documents that protect them on an international level;

³⁶UN General Assembly, Declaration on Territorial Asylum, 15 December 1976.

³⁷UNHCR, “Note on Asylum EC7SCP/4” <https://www.unhcr.org/excom/scip/3ae68cbb30/note-asylum.html> (Accessed on 22 June 2020) .

Universal Declaration of Human Rights 1948

Following the 10th December 1948 General Assembly resolution 217, The Universal Declaration of Human Rights (UDHR) was proclaimed as a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world.³⁸

Article 14 (1) “*Everyone has the right to seek and to enjoy in other countries asylum from persecution*”³⁹ on behalf of refugee protection on the International level, this is the backbone for most of the rights enjoyed by refugees especially the right to seek Asylum. This goes along with article 13(2) “*Everyone has the right to leave any country, including his own, and to return to his country*”.⁴⁰ this allows refugees free movement across borders without being criminalized by the Authority.

Article 14(2) however of UDHR says “*This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations*”⁴¹ this act as an exclusion provision. This means that refugees who have been involved in war crimes, crimes against humanity, crimes against peace or acts contrary to the purpose and principles of the united nation cannot seek asylum and are not eligible to such protection. As of today, this limitation and scope of the right to seek asylum provided for in article 14(2) of the UDHR can be found in article 1(F) of the 1951 refugee convention.⁴²

“*The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*

- *He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
- *He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*
- *He has been guilty of acts contrary to the purposes and principles of the United Nations”.* (Article 1(F) of the convention relating to the status of refugees).

³⁸United Nations, “universal declaration of Human Rights” <https://www.un.org/en/universal-declaration-human-rights/> (Accessed 23 June 2020).

³⁹Universal Declaration of Human Rights (Adopted 10 December 1948) Article 14(2).

⁴⁰Ibid Article 13(2).

⁴¹Ibid Article 14(2)

⁴²Convention relating to the status of refugees (adopted 28 July 1951, entered into force 22 April 1954) Article 1(F).

European Convention on Human Rights 1950

The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, is a standard document for the council of Europe that was opened for signature in Rome on 4 November 1950 and came into force on 3rd September 1953, it was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and make them binding.⁴³ Since its adoption in 1950 the Convention has been amended a number of times and supplemented with many rights in addition to those set forth in the original text.⁴⁴ With 47 states that are part to this convention,⁴⁵ it is a very crucial document when it comes to the protection of fundamental rights and protection of refugees and the international level.

The European Convention of Human Rights established the European court of Human Rights in 1959, an International court based in Strasbourg which rules on individual or state applications alleging violation of the civil and political rights set out in the European Convention on Human Rights (ECHR).⁴⁶

The ECHR together with the ECtHR are regarded as the Human Rights breakthrough for refugees because state sovereignty is partly taken away, paving way for the laying down fundamental status in Human Rights law.

The applicability of the convention to Refugees.

Article 3⁴⁷ is one of the most important articles when it comes to refugee protection, the spell out the non-refoulment principle of international law which forbids the return of persons back to states where they risk being tortured or subjected to other grave violations of human rights.

⁴³Council of Europe, “European Convention on Human Rights” <https://www.echr.coe.int/Pages/home.aspx?p=basictexts> (Accessed 23 June 2020)

⁴⁴Ibid.

⁴⁵Council of Europe, “Treaty office” <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3> (Accessed 23 June 2020).

⁴⁶Council of Europe, “European Court of Human Rights, ECtHR” https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/european-court-human-rights-ecthr_en (Accessed 23 June 2020).

⁴⁷European Convention on Human Rights (Adopted 4 November 1950, entered into force 3 September 1953) article 3.

Different cases raised by refugees have gone to the European Court of human rights and where the court has sometimes ruled in favor of Refugees and Asylum seekers. For example, *Soering v UK* (1989);⁴⁸ *Cruz Varas and Others vs Sweden* (1991);⁴⁹ *Chahal v UK* (1996);⁵⁰ *Saadi v Italy* (2008);⁵¹ *MSS v Belgium and Greece* (2012);⁵² *Sufi and Elmi v The United Kingdom* (2011);⁵³ *Hirsi Jamaa and Others v Italy* (2013);⁵⁴ *Tarakhel v Switzerland* (2016)⁵⁵

The ECtHR has most frequently considered asylum cases under Article 3; However, it should be mentioned that there are also other provisions within the ECHR, which are relevant to asylum issues. Namely, asylum cases may also rise due to violations of Article 2 (right to life), Article 4 (prohibition of slavery, servitude and compulsory labor), Article 5 (right to liberty and security), Article 6 (right to a fair trial), Article 7 (prohibition on retroactive criminal punishment), Article 8 (right to respect for private and family life), Article 9 (right to freedom of thought, conscience and religion), Article 10 (freedom of expression), Article 11 (freedom of assembly and association), Article 14 (prohibition of discrimination in the enjoyment of ECHR rights), Article 4 of Protocol No.4 (collective expulsion of aliens), Article 1 of Protocol No.7 (exclusion of own nationals), Article 4 of Protocol No.7 (prohibition of double jeopardy) and Article 1 of Protocol No.12 (general prohibition on discrimination)

The Principle of Non-Refoulement under the ECHR

Article 3 of the ECHR led to the recognition and establishment of the non-refoulement principle by the ECtHR. The principle first appeared and was discussed in the case of *Soering V. The United Kingdom*. Its applicability and context however reflect back to the action of removing or extraditing someone back to a country where his/her life might be in danger of being persecuted, tortured or killed.⁵⁶

⁴⁸European Court of Human Rights, *Soering V. The United Kingdom*, no. 14038/88, 7 July 1989.

⁴⁹*Ibid.* *Cruz Varas and others v. Sweden*, no. 15576/89, 20 March 1991.

⁵⁰*Ibid.* *Chahal v. The United Kingdom*, no. 22414/93, 15 November 1996.

⁵¹*Ibid.* *Saadi v. Italy*, 37201/06, 28 February 2008.

⁵²*Ibid.* *M.S.S V. Belgium and Greece*, no. 30696/09, 21 January 2011.

⁵³*Ibid.* *Sufi and Elmi v. The United Kingdom*, no. 8319/07 and 11449/07, 28 November 2011.

⁵⁴*Ibid.* *Hirsi Jamaa and others v. Italy*, no. 27765/09, 23 February 2012.

⁵⁵*Ibid.* *Terakhel v. Switzerland*, no. 29217/12, 4 November 2014.

⁵⁶J.Ristik, 'The Right to Asylum and the principle of Non-refoulement under the European Convention of Human Rights', *European Scientific Journal*, vol 13, no. 28, 2017 pp. 109- 115, (Accessed 23 June 2020).

The fact that the principle of non-refoulement under the ECHR, unlike the Refugee Convention, extends to inhuman and degrading behavior, makes the ECHR “one of the most important juridical instruments for protection of asylum seekers throughout Europe. Namely, the prohibition of refoulement is “a form of complementary protection covering a wider category of ‘refugees’ beyond the 1951 definition”⁵⁷

The non-refoulment principle is the cornerstone of international refugee law and this highlights the responsibility of states to ensure that all individual enjoy human rights equally. Including the right to life, freedom from torture and inhumane degrading treatment or punishments, as well as personal liberty and security. Article 33(1) of the 1951 convention relating to the status of refugees (*Prohibition of expulsion or return*),⁵⁸ encourages states not to expel or return a refugee to a country where his/her life would be threatened by the reasons stated in Article 1A(2),⁵⁹ and if they are not in the scope of Article 1F of the 1951 Refugee convention.⁵⁹ this marks the birth of the non-refoulment principle.

International Covenants on Civil and Political rights as well as on Economic, Social and Cultural Rights 1966.

The International Covenant on Civil and Political Rights of 1966 (ICCPR) is one of the universal human rights treaties.⁶⁰ Together with the International Covenant on Economic, Social and Cultural Rights, it mirrors, though with differences, the Universal Declaration on Human Rights of 1948 and turns this soft-law into binding obligations for States parties. The ICCPR contains classic civil liberties developed during the Enlightenment, such as freedom from torture, freedom of opinion, equality before the law and due process.⁶¹

⁵⁷J.Ristik, ‘The Right to Asylum and the principle of Non-refoulment under the European Convention of Human Rights’, European Scientific Journal, vol 13, no. 28, 2017 pp. 109- 115, (Accessed 23 June 2020).

⁵⁸Convention relating to the status of refugees (adopted 28 July 1951, entered into force 22 April 1954) Article 33(1).

⁵⁹Ibid. Article 1A(2).

⁶⁰International Covenant on Civil and Political Rights. International Covenant on Economic, Social and Cultural Rights. International Convention on the Elimination of All Forms of Racial Discrimination. Convention on the Elimination of All Forms of Discrimination against Women. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Convention on the Rights of the Child. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

⁶¹UNHCR, “Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights” <https://www.unhcr.org/research/working/4552f0d82/protecting-refugees-asylum-seekers-under-international-covenant-civil-political.html> (Accessed 23 June 2020),

However, a number of reservations to the ICCPR have been entered on signature and/or ratification.⁶² With the exception of very broad reservations on Article 13, however, very few pertain to aspects and rights that are of importance for refugee protection.⁶³ as of June 2020, 173 states have ratified the ICCPR.⁶⁴

The ICCPR protects refugees in the following articles;

Article 13 (Expulsion procedure) *“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority”*⁶⁵

Article 7 (Non Refoulement) *“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”*.⁶⁶

Article 12(2) (Right to leave the country of origin) *“Everyone shall be free to leave any country, including his own”*.⁶⁷

Article 9(1) (Liberty and personal security) *“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”*.⁶⁸

Article 24(1) (Detention of Minors) *“Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State”*.⁶⁹

Article 12(1) (Freedom of movement) *“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence”*.⁷⁰

Article 23(2) (Family unity) *“The family is the natural and fundamental group unit of society and is entitled to protection by society and the state”*.⁷¹

⁶²United Nations, “Treaty collection”

https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND (Accessed 23 June 2020).

⁶³Ibid.

⁶⁴Ibid.

⁶⁵International Covenant on Civil and Political Rights, (Adopted 16 December 1966, entered into force 23 March 1976) article 13.

⁶⁶Ibid. Article 7.

⁶⁷Ibid. Article 12(2).

⁶⁸Ibid. Article 9(1).

⁶⁹Ibid. Article 24(1).

⁷⁰Ibid. Article 12(1).

⁷¹Ibid. Article 23(2).

Article 26 (Non-discrimination) “*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*”.⁷²

Article 27 (Right of Minorities) “*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language*”.⁷³

Article 12(4) (Voluntary return) “*No one shall be arbitrarily deprived of the right to enter his own country*”.⁷⁴

States’ compliance with the guarantees of the ICCPR is monitored by the Human Rights Committee,⁷⁵ the committee consists of 18 independent human rights experts elected by the States parties.⁷⁶ There may not be more than one Committee member per State party, which ensures that various legal cultures are represented. The Committee’s main functions are the review of state reports, the review of individual complaints and the issuance of General Comments.⁷⁸

The ICCPR does protect refugees especially on an International level, Unfortunately, it has to be stated that states are far too often disinclined to fully implement the legal protection that the ICCPR provides. Violations of reporting obligations, lack of respect for the Committee’s interpretation and sometimes blunt refusal constitute a serious threat for the protective power of the ICCPR, notwithstanding progress made in the field of human rights in the last decades. It can only be hoped that the future Human Rights Council will strengthen states’ acceptance of treaty bodies and encourage cooperation with treaty body mechanisms and in particular the Human Rights Committee.⁷⁹

⁷²International Covenant on Civil and Political Rights, (Adopted 16 December 1966, entered into force 23 March 1976) Article 26.

⁷³Ibid. Article 27.

⁷⁴Ibid. Article 12(4).

⁷⁵UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 15 (Rev.1), Civil and Political Rights: The Human Rights Committee, May 2005, No. 15 (Rev.1), <https://www.refworld.org/docid/4794773c0.html> (accessed 25 June 2020).

⁷⁶International Covenant on Civil and Political Rights, (Adopted 16 December 1966, entered into force 23 March 1976) Articles 28 – 34.

⁷⁸UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 15 (Rev.1), Civil and Political Rights: The Human Rights Committee, May 2005, No. 15 (Rev.1), <https://www.refworld.org/docid/4794773c0.html> (accessed 25 June 2020).

⁷⁹UNHCR, “Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights” <https://www.unhcr.org/research/working/4552f0d82/protecting-refugees-asylum-seekers-under-international-covenant-civil-political.html> (Accessed 25 June 2020),

Convention against Torture and other Cruel, inhuman or degrading Treatment or Punishment 1984. (CAT)

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (known as the United Nations Convention against Torture) is the most important international human rights treaty that deals with torture and other ill-treatment. The Convention requires countries that are parties to the treaty to prohibit and prevent torture and cruel, inhuman or degrading treatment in all circumstances.⁸⁰ Members of the CAT are independent human rights experts drawn from around the world, who serve in their personal capacity and not as representatives of States parties. The Committee consists of 10 independent experts who monitor the implementation of the convention by its state parties.⁸¹ the committees' concluding observations and decisions on individual communications are an independent assessment of States' compliance with their human rights obligations under the treaty.⁸²

The applicability of CAT to Refugees.

Article 3 of the convention provides:

- 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*
- 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.*

The CAT committee has got powers under Article 22,⁸³ to prevent refoulement of individual Asylum seekers who are likely to be subjected to torture when returned to their countries of origin. Through its state party reporting procedure, states have been able to re-examine their laws and practices relating to refugee protection.⁸⁴

⁸⁰UHCHR, "UN's Committee against Torture issues new guidelines on asylum seekers' rights" <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22725&LangID=E> (Accessed 25 June 2020).

⁸¹UHCHR, "Committee against Torture" <https://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx> (Accessed 25 June 2020).

⁸²Ibid.

⁸³Convention Against Torture, (Adopted 10 December 1984, entered into force 26 June 1987), Article 22.

⁸⁴B. Gorlick, The convention and the committee against torture: a compulsory protection regime for refugees, "International Journal of Refugee Law, 1999, Vol 11, no. 3, pp 479 – 495.

In 2018, the UN Committee against Torture issued new guidelines on asylum seekers rights,⁸⁵ this was aimed to help governments avoid violating international Human Rights law and to help asylum seekers avoid torture or other ill-treatment. The committee came up with preventative measures to guarantee the principle of non-refoulement in general comment no. 4 (2017) on the implementation of article 3 in the context of article 22,⁸⁶ and these include,

- (a) Ensuring the right of each person concerned to have the case examined individually and not collectively and to be fully informed of the reasons why the person is the subject of a procedure that may lead to a decision of deportation and of the rights legally available to appeal such a decision;*
- (b) Providing the person concerned with access to a lawyer, to free legal aid, when necessary, and to representatives of relevant international organizations of protection;*
- (c) Developing an administrative or judicial procedure concerning the person in question in a language that the person understands or with the assistance of interpreters and translators;*
- (d) Referring the person alleging previous torture to an independent medical examination free of charge, in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol);*
- (e) Ensuring the right of appeal by the person concerned against a deportation order to an independent administrative and/or judicial body within a reasonable period of time from the notification of that order and with the suspensive effect of the appeal on the enforcement of the order;*
- (f) Providing effective training for all officials who deal with persons under deportation procedures on respect for the provisions of article 3 of the Convention, in order to avoid decisions contrary to the principle of non-refoulement;*
- (g) Providing effective training for medical and other personnel dealing with detainees, migrants and asylum seekers in identifying and documenting signs of torture, taking into account the Istanbul Protocol.*

General principle no.12 further highlights that “Any person found to be at risk of torture if deported to a given State should be allowed to remain in the territory under the jurisdiction, control or authority of the State party concerned so long as the risk persists. The person in question should not be detained without proper legal justification and safeguards. Detention should always be an exceptional measure based on an individual assessment⁸ and subject to regular review.

⁸⁵UHCHR, “UN’s Committee against Torture issues new guidelines on asylum seekers’ rights” <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22725&LangID=E> (Accessed 25 June 2020).

⁸⁶Convention against Torture and other Cruel, inhuman degrading Treatment or Punishment, General comment No.4 (2017), 4 September 2018.

Furthermore, the person at risk should never be deported to another State from which the person may subsequently face deportation to a third State in which there are substantial grounds for believing that the person would be in danger of being subjected to torture”.⁸⁷

In 1985, after serious concerns about the alarming number of reported cases of torture and other Cruel, inhumane or degrading or punishment taking place in various parts of the world, the UN Commission on Human Rights established the Special Rapporteurship with Resolution 1985/33,⁸⁸ with the aim of examining questions relevant to torture. In fulfilling the mandate, the Special Rapporteur undertakes country visits, communicates with governments concerning information and complaints received regarding alleged rights violations, and submits activity reports to the UN General Assembly and Human Rights Council.⁸⁹

In 2010, the then UN special rapporteur on torture, Manfred Nowak,⁹⁰ after a mission to Greece, found out that the Greek Asylum authority was facing a problem of logistical overload and that refugees in the detention camps were living in an inhumane condition. He made recommendations that led to the suspension of deportation of refugee by the Austrian Authority back to Greece.⁹¹

⁸⁷Convention against Torture and other Cruel, inhumane degrading Treatment or Punishment, General comment No.4 (2017), 4 September 2018.

⁸⁸OHCHR, “resolution y/Res/1985/33”, https://ap.ohchr.org/documents/E/CHR/resolutions/E_CN.4_RES_1985_33.pdf (Accessed 25 June 2020).

⁸⁹International Justice Resource Centre, “Special Rapporteur on Torture and other Cruel, Inhumane or degrading treatment or punishment”, https://ijrcenter.org/un-special-procedures/special-rapporteur-on-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment/#MANDATE_OF_THE_SPECIAL_RAPPORTEUR_ONTORTURE (Accessed 25 June 2020).

⁹⁰OHCHR, “Special Rapporteur on Torture and other Cruel, Inhumane and Degrading Treatment or Punishment” <https://www.ohchr.org/en/issues/torture/srtorture/pages/srtortureindex.aspx> (Accessed 25 June 2020).

⁹¹Ludwig Boltzmann Institute of Human Rights, “Stop of deportation to Greece” <https://bim.lbg.ac.at/en/news/stop-deporations-greece> (accessed 25 June 2020).

UN Convention on the Rights of the Child 1989. (CRC)

The CRC is the most ratified international human rights treaty in the history of the United Nations (UN). All UN Member States, except for the United States of America (USA),⁹² have ratified the CRC and accepted the universality of children's rights, recognize children as rights-holders and have committed to respect, protect and fulfil the rights of children, without discrimination.⁹³ without any distinctions, the CRC applies to all children, refugees and non-refugees and of all social backgrounds.

For effective implementation, the Committee on the rights of the child (CRC Committee) introduced four guiding principles which also act as potential game changer for refugee children across international borders.⁹⁴ And these include;

- 1) **Non-discrimination.** This non-discrimination principle is in line with article 2 of CRC and it requires States to actively identify individual children and groups of children whose rights may demand special measures. For example, data collection of potential children who would be at risk of discrimination so as to be able to provide special care to them.⁹⁵
- 2) **The best interests of the child.** In line with article 3(1) of CRC, this guiding principle mostly looks at the actions undertaken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”.⁹⁶ The principle calls for active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply “*the best interest principle*” by systematically considering how children's rights and interests are or will be affected by their decisions and actions they undertake.

⁹²United Nation Treaty Collection, “Convention on the Child: Status as at : 25 June 2020 “
https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (Accessed 25 June 2020).

⁹³Ibid.

⁹⁴Committee on the Rights of the Child, General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child (arts 4,42 and 44, para 6), 27 November 2003.

⁹⁵Ibid.

⁹⁶Ibid.

- 3) **The right to life, survival and development.** Leaning on article 6 of CRC, The Committee expects States to interpret “development” in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children.⁹⁷
- 4) **The right of the child to express his or her views freely and for those views to be given due weight according to the age and maturity of the child.** This principle that is in line with article 12 of CRC highlights the role of the children as active participants in the promotion, protection and monitoring of their rights, it applies equally to all measures adopted by States to implement the Convention.⁹⁸

The main objective of the CRC is to make sure that children reach their maximum potential, this can only be realized if states fulfill their obligations and putting children’s rights into consideration both in policy and law. the CRC protects refugees and Asylum-seeking children in the following articles;

- 1) **Article 2:** *“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.*⁹⁹ Children of whatever legal status within county’s jurisdiction are entitled to the rights and protection without discrimination.
- 2) **Article 3:** *“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.*¹⁰⁰ A states accept that the best interest of the child should be the major guiding principle in all matters concerning children well-being.

⁹⁷Committee on the Rights of the Child, General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child (arts 4,42 and 44, para 6), 27 November 2003.

⁹⁸Ibid.

⁹⁹Convention on the Right of the Child, (Adopted 20 November 1989, entered into force 2 September 1990), article 2.

¹⁰⁰Ibid, article 3.

- 3) **Article 6:** “a. *States Parties recognize that every child has the inherent right to life*”.
“b. *States Parties shall ensure to the maximum extent possible the survival and development of the child*”.¹⁰¹ Refugee children have a right to life and the survival and development of children is thus a responsibility of each state signatory to the CRC.
- 4) **Article 22:** “*States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties*”.¹⁰² This provision is specifically to ensure that refugee children do acquire the much deserved care assistance and child protection amenities.
- 5) **Article 12:** “*States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child*”.¹⁰³ This article provides refugee children with the right of freedom of expression especially in matters concerning their lives.
- 6) **Articles 19,32,34 and 39:** These articles protect refugee children from Violence, harm, sexual abuse and exploitation.¹⁰⁴

Children rights are absolute rights which states cannot derogate from in times of national emergency or to justify securitization of state borders, if the CRC is fully implemented and applied to asylum-seeking and refugee children, such children have a right to protection and a durable solution in their best interests.

¹⁰¹Convention on the Right of the Child, (Adopted 20 November 1989, entered into force 2 September 1990), article 6.

¹⁰²Ibid, article 22.

¹⁰³Ibid, article 12.

¹⁰⁴Ibid, article 19,32,34,39.

2.3 Refugee protection in the European Union

On the EU level, Refugees are protected on one hand by different International law documents (European Convention on Human Rights (1950), Geneva Convention relating to the Status of Refugees (1951) and the 1967 Protocol relating to the status of Refugees), and on the other hand we have the European Union Law as well as law of member states. Asylum procedure with the EU member states is regulated by the Common European Asylum system where all the legislative framework is done by the European Union and in accordance with the 1951 Refugee Convention plus the additional Protocol.¹⁰⁵

2.3.1 European Union Law

The European Union started coordinating asylum legislation within Europe in the 1990s.¹⁰⁶ To understand the unequal distribution of asylum seekers, it is therefore necessary to understand the most relevant legal acts in the field of Asylum within the European Union, these include the following; Asylum procedure Directive, Charter of Fundamental Rights, Dublin-III-Regulation, Family Reunification Directive, Qualification Directive, Reception Condition Directive and the Return Directive.

The EU Charter of Fundamental rights

The Charter of Fundamental Rights of the EU was first drawn up in 1999-2000 with the original objective of consolidating fundamental rights that are applicable at the EU level into a single text, but with the entry into force of the Treaty of Lisbon in December 2009, the Charter of Fundamental Rights of the EU has now become a binding bill of rights for the European Union.¹⁰⁷

¹⁰⁵European Commission, “Migration and Home Affairs”, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en (Accessed 1 July 2020).

¹⁰⁶D. Leithold, “Asylum in Europe”, *Dice Report*, Vol. 13, No. 4, 2015, pp. 55-58, (accessed 1 July 2020)

¹⁰⁷European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007.

The 2 main functions of the EU Charter of fundamental rights are;¹⁰⁸

- To ensure that the interpretation of EU law and national implementing legislation must comply with fundamental rights and the general principles of the EU legal order.
- A breach of a fundamental right (and/ or a general principle of EU law) can be a ground for a judicial review by the EU courts.

The applicability of the EU Charter to Refugees.

Pursuant to Article 51, the Charter is only applicable in situations which are governed by EU law.¹⁰⁹ this means that any operations carried out by any member state or the institutions of member states like Frontex attracts the implementation of the charter.¹¹⁰

The right to Asylum (article 18), *“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community”*.¹¹¹

For refugees, the right to Asylum is a fundamental right that is so crucial in their protection and wellbeing. When refugees come into the EU, a receiving country has to decide on whether to take in that person, that country must do in a way that complies with the right to Asylum.

¹⁰⁸European Council on Refugees and Exiles, “The EU Charter of Fundamental Rights; an indispensable instrument in the field of asylum”, <https://www.ecre.org/wp-content/uploads/2017/02/The-EU-Charter-of-Fundamental-Rights.pdf> (Accessed 1 July 2020).

¹⁰⁹Charter of Fundamental Rights of the EU, (adopted 2 October 2000, entered into force 1 December 2009), article 51.

¹¹⁰Ecre, “The application of the EU Charter of Fundamental Rights to asylum procedural law” <https://www.ecre.org/wp-content/uploads/2014/10/EN-The-application-of-the-EU-Charter-of-Fundamental-Rights-to-asylum-procedures-ECRE-and-Dutch-Council-for-Refugees-October-2014.pdf> (Accessed 2 July 2020).

¹¹¹Charter of Fundamental Rights of the EU, (adopted 2 October 2000, entered into force 1 December 2009), article 18.

The prohibition of collective expulsions (Article 19 (1)), “*Collective expulsions are prohibited*”¹¹² In *Čonka v Belgium*, the ECtHR found that collective expulsions mean any measure compelling persons as a group to leave the country, unless the measures are taken on the basis of a reasonable and objective examination of the case of each individual in the group.¹¹³

In order to ensure that Member States or Frontex are not breaching Article 19 (1) in the context of any mission at sea, there needs to be an individualized assessment of the risk of refoulement, and that each individual is given the opportunity to put forward arguments against their expulsion. This also includes access to medical care, interpreters, legal assistance and representation.¹¹⁴

The prohibition of refoulement (Article 19(2)), *No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*”.¹¹⁵ This article protects refugees from being sent back to countries where their lives would be at risk of torture or any inhuman or degrading treatment.

Prohibition of torture and inhuman or degrading treatment or punishment (Article 4), “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*”.¹¹⁶ This article is also in line with the principle of non-refoulement, member states are obliged not to return any person to a place where his/her life would be threatened with torture.

The EU right to an effective remedy and to a fair trial (Article 47), “*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article*”.¹¹⁷

¹¹²Charter of Fundamental Rights of the EU, (adopted 2 October 2000, entered into force 1 December 2009), Article 19(1).

¹¹³ECtHR, *Conka v. Belgium*, Appl. no. 51564/99, 5 February 2002.

¹¹⁴EU Regulation, no. 656/2014 of the European parliament and of the council, 15 May 2014, Article 4(3).

¹¹⁵Charter of Fundamental Rights of the EU, (adopted 2 October 2000, entered into force 1 December 2009), Article 19(2).

¹¹⁶*Ibid*, article 4.

¹¹⁷*Ibid*, article 47.

This article provides room for refugees to log in their claim to international protection, someone must be able to access the minimum procedural safeguards necessary to make their claims effective.

Given the binding character of the Charter, asylum practitioners can use its standards to enhance the protection afforded to those who are seeking international protection. It can also help achieve a proper interpretation of the relevant EU asylum Regulations and Directives.¹¹⁸

Access to Asylum in Europe

Once a Refugee enters the European Union, it's not always beds of roses as most refugees would expect it to be, there're several criteria one has to go through in order to access the asylum procedure. For example, not being able to apply for asylum in any desired country or even in different countries, the duration that the asylum process takes until it is complete might also lead to frustrations. Below are some of the EU legislations that member states have to put into consideration before taking on the asylum case and during the whole asylum process;

Dublin III-Regulation 2013/604/EU

The country through which the asylum seeker first entered the European Union is responsible for processing their asylum application, this is laid down in the European Union's Dublin III Regulation.¹¹⁹ The Regulation sets out the criteria for determining which Member State is responsible for processing an asylum application within the EU. In case a refugee applies for Asylum in one of the member state, he/she cannot move to another member state and apply again. The main function of the Dublin III Regulation is to avoid "Asylum shopping", Where one person can ask for Asylum in different countries within in the same time.

¹¹⁸Ecre, "The application of the EU Charter of Fundamental Rights to asylum procedural law" <https://www.ecre.org/wp-content/uploads/2014/10/EN-The-application-of-the-EU-Charter-of-Fundamental-Rights-to-asylum-procedures-ECRE-and-Dutch-Council-for-Refugees-October-2014.pdf> (Accessed 2 July 2020).

¹¹⁹EU regulation, no 604/2013 of the European Parliament and of the Council, 26 June 2013.

Article 3(1),¹²⁰ requires that one Member State is responsible for examining an asylum application, but in case there're proved substantial grounds of poor reception condition in the receiving state, but article 17(1),¹²¹ allows for derogation from article 3(1), it allows for a member state to fully take up the application if it wishes to do so.

In case an applicant is wrongly transferred to any member state due to Dublin III error or if the appeal against the Dublin III is accepted, then article 29(3),¹²² says that the person concerned must be accepted back in the country so that they have access to the asylum procedure in one state.

Asylum Procedure Directive 2005/85/EC

This directive regulates the procedures for examining an asylum claim and also highlights states responsibilities of providing appropriate information to asylum seekers so as to enable them make an asylum claim. Information such as the information about the country, language spoken, and any question raised by an asylum seeker should be answered so that they know what they are about to settle for.

Article 6(1) requires states to register an application within three working days or within six working days when an application is submitted to any authority other than the authority responsible for the registration.¹²³ for example, if a refugee applies for asylum in the prison, the prison authority should forward the application responsible to process the asylum application in that country within 6 working days.

Recast Procedure Directive 2013/32/EU

In the recast Procedures Directive, Article 6 distinguishes between making an application, registering an application and lodging an application.¹²⁴ article 6(3) further clarifies that, the application for international protection can only be lodged in in person and at a designated place.¹²⁵

¹²⁰EU regulation, no 604/2013 of the European Parliament and of the Council, 26 June 2013, article 3(1).

¹²¹Ibid, article 17(1).

¹²²Ibid, article 29(3).

¹²³Council Directive 2005/85/EC of 1 December 2005, article 6(1)

¹²⁴EU Directive 2013/32/EU of the European Parliament and of the Council, 26 June 2013, article 6.

¹²⁵Ibid, Article 6(3).

Article 7 stipulates who and under what circumstances an application for international protection can be made, including on behalf of dependants or children.¹²⁶

Article 8 indicates that if third country nationals or stateless person are held in detention facilities or caught up at border crossing point but would wish to apply for international protection, member states have to provide them with the information to do so. And there should also be possibilities of providing for an interpreter in case deemed necessary.¹²⁷

Article 8(2) gives access to Organizations and persons giving counselling personal access to the applicants present at the border crossing points including transit zones at external borders.¹²⁸

Qualification Directive 2011/95/EU

The Qualification Directive lays down common standards for the identification of non-EU citizens or stateless persons genuinely in need of international protection in the EU, either as refugees or as beneficiaries of subsidiary protection, it also ensures that those persons can use a minimum level of benefits and rights in all EU countries.¹²⁹

With the first Qualification Directive 2004/83/EC, the complementary status of **subsidiary protection** was introduced.¹³⁰ A person eligible for subsidiary protection means “*a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country*”.¹³¹

¹²⁶EU Directive 2013/32/EU of the European Parliament and of the Council, 26 June 2013, article 7.

¹²⁷Ibid, Article 8.

¹²⁸Ibid, Article 8(2).

¹²⁹EUR-Lex, “Refugees and stateless persons — common standards for qualification” <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex:32011L0095> (Accessed 3 July 2020).

¹³⁰ Council Directive 2004/83/EC of 29 April 2004.

¹³¹Ibid article 2(e).

The Qualification Directive 2011/95/EU applies to all EU Member states except the UK, Ireland and Denmark.¹³² UK and Ireland are bound to the 2004 Directive whereas Denmark is bound by the Treaty on the Functioning of the European Union (TFEU).¹³³

Recital 21 states it clearly that “The recognition of refugee status is a declaratory act”,¹³⁴ this means that a person does not become a refugee because of recognition, but is recognized because he is a refugee under Article 1(A) (2) of the 1951 Refugee convention, so one of the function of the directive is to declare the legal stay of refugees in the EU by providing them access to Asylum.

In accordance with the Asylum procedure directive and the Dublin III Regulation, article 3 of the directive sets up minimum favorable standards for determining who qualifies for Refugee status or subsidiary protection, but member states are free to introduce or retain those favorable standards.¹³⁵

The EU acknowledges the importance of maintaining family unity in accordance with article 8 of ECHR, with the Qualification Directive, article 23 (maintaining family unity) further asserts this responsibility to member states.¹³⁶ family members who are eligible for family reunification are further entitled to receive residence permits (article 23(2)).¹³⁷ The family talked about should already have existed in the country of origin.

Article 8 (Internal protection/flight), this Article provides that Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or has access to protection against persecution or serious harm; and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.¹³⁸

¹³²EU Directive 2011/95/EU of the European Parliament and the Council, 13 December 2011, article 1,2 and 4(a)(1) of the protocol no. 21.

¹³³C.Castello, *The Human Rights of Migrants and Refugees in the European Law*, “Oxford University press” 2016.

¹³⁴Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011, recital 21.

¹³⁵*Ibid*, Article 3.

¹³⁶*Ibid*, article 23.

¹³⁷*Ibid*, article 23(2).

¹³⁸*Ibid*, article 8.

UNHCR through its guidelines for international protection, views the word ‘settle’ as to imply to an assessment of different factors, inter alia the possibility for economic survival in the area taking into consideration the personal circumstances of the applicant.¹³⁹

Other articles to look into are; Article 11 and 16 (Cessation articles), article 12 (exclusion article), Article 14 (revocation of, ending of or refusal to renew refugee status), article 15 (serious harm), Article 24 (Residence permits), article 25 (travel document), article 31 (unaccompanied minors), article 34 (Access to Integration facilities).¹⁴⁰ It is important to note that persons whose status is revoked, ended or not renewed in accordance with article 14 of the qualification directive 2011/95/EU are entitled to their rights under the 1951 Refugee Convention including Articles 3, 4, 16, 22, 31, 32, 33 therein (Article 14(6)).

The directive also provides basic human rights to refugees like; Access to employment (Article 26), Access to social welfare (Article 29), Health care (Article 30), and access to accommodation (article 32).¹⁴¹

Reception Conditions Directive 2013/33/EU

The reception condition directive is meant to standardize living conditions in reception facilities for Asylum seekers within the European Union, this would deter people from moving from one country to another because of varying differences in living conditions within the camps or housing situations. The rules are also meant to ensure that Asylum seekers live under dignified accommodations and that their Human Rights are also respected.¹⁴²

Article 5 obliges member states to provide information regarding the conditions in the reception condition with in a given period not exceeding 15 days after lodging in the asylum application.¹⁴³

¹³⁹UNHCR, Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 23 July 2003, p. 5- 7.

¹⁴⁰ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011.

¹⁴¹Ibid.

¹⁴²Eur-lex, “Living conditions for asylum seekers- EU rule” https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A23010502_2 (Accessed 6 July 2020).

¹⁴³ Directive 2013/33/EU of the European Parliament and of the council of 26 June 2013, Article 5.

Throughout the asylum process, proper and available information is so crucial to the asylum seekers, reception facilities have got different rules and in order not to penalize asylum applicants, these rules should be properly stated in a language that is well understood by the applicant so as to avoid misunderstandings.

Article 6 encourages member states to provide proper documentation to applicants of international protection within a period of no longer than 3 days after lodging in the asylum application.¹⁴⁴ proper documents makes it easier for Refugees to identify themselves in case they are required to do so by the police. It also helps to clarify that a person is no illegally staying in the country.

Article 7 allows asylum applicants free movement within the territory of the host member state, this provides freedom of movement to asylum seekers. On the other hand, asylum seekers are also encouraged by article 7(5) of the directive to inform the competent Authority in case of any change of address as soon as possible.¹⁴⁵ This article is also aimed to avoid depression and psychological torture caused by prison like situations in reception centers.

Articles 8-11 are the detention articles, being a refugee and asking for asylum is not an offense that requires the authority to detain any person in need of protection. In the 2014-2019 study by UNHCR, titled “beyond Detention”, it was stated that “Detention of asylum seekers is and remains inherently undesirable as it concerns the deprivation of liberty of “members of a particularly underprivileged and vulnerable population group in need of special protection””.¹⁴⁶ Article 8(2) and (4) however codify the concept of alternatives to detention, under which detention may only be resorted to for one of the mentioned six grounds where less coercive measures cannot effectively be applied.¹⁴⁷ Unaccompanied are only to be detained in exceptional circumstances under article 11(3),¹⁴⁸ the exceptional circumstances are however not defined by the reception condition directive.

¹⁴⁴Directive 2013/33/EU of the European Parliament and of the council of 26 June 2013, Article 6.

¹⁴⁵Ibid, Article 7

¹⁴⁶UNHCR, “Beyond Detention 2014-2019: A Global Strategy to support governments to end detention of asylum-seekers and refugees”, <https://www.unhcr.org/53aa929f6.html> (Accessed 6 July 2020).

¹⁴⁷Directive 2013/33/EU of the European Parliament and of the council of 26 June 2013, article 8(2,3 and 4).

¹⁴⁸Ibid, article 11(3).

Article 15 of the directive allows asylum applicant access to the labour market, Asylum applicants should be allowed to work and this should be done not later than 9 months from the time the asylum application is lodged. Article 15(2) however offers priority to EU citizens and to legal residents of third country nationals. But this privilege should not be withdrawn during the appeal procedures.¹⁴⁹

The directive further clarifies more on the material reception conditions in articles 17-20, Special reception needs of vulnerable persons under articles 21-25, Appeals under article 26, Guidance, monitoring and control systems in article 28.¹⁵⁰

Detention remains the most problematic and costly aspect of the Reception Conditions Directive. It doesn't only add substantial, financial and administrative costs to the asylum system but also deprives asylum seekers of their human rights by depriving them off their personal liberty and fundamental freedoms. Detention also exposes asylum seekers to inhuman or degrading conditions hence depriving them from accessing education and employment. Asylum seekers are also a vulnerable group of people, so, detention will only exacerbate their vulnerability hence undermining the relationship between the host community and the asylum seekers by taking away the trust in the asylum system and in a long run, the cooperation between asylum seekers and the asylum authority is just at stake.¹⁵¹

Family Reunification Directive 2003/86/EC

Non-EU nationals with a residence permit valid for at least 1 year or those who have a legal option for a long-term residence can apply for family reunification.¹⁵² The aim of the family reunification directive is to set out common rules of law relating to family reunification. The directive is objected to protect the family unit and to help in the integration of legally non-EU national residing within the European Union.

¹⁴⁹Directive 2013/33/EU of the European Parliament and of the council of 26 June 2013, article 15

¹⁵⁰Ibid

¹⁵¹ECRE, Information Note on Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)", https://www.ecre.org/wp-content/uploads/2016/07/Information_Note_Reception-2015.pdf (Accessed 6 July 2020).

¹⁵²EUR-Lex, "Family reunification" <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133118> (Accessed 6 July 2020).

Chapter II of the family reunification elaborates on how recognized refugees in the EU can be reunited with their family members in the EU. Article 4 include those people who are eligible for family reunification, and the following members are the one more likely to qualify for family reunification as per article 4 of the family reunification directive; the sponsor's spouse, minor children of the sponsor and of his/her spouse, minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her and minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her.¹⁵³

Article 4(4) of the family reunification further clarifies it that polygamy in family reunification is not tolerated, in case a refugee has more than one partner in his home country, he is allowed to be reunited with only one, a refugee can as well not be reunited with his/spouse in case he/she is already residing with a spouse in the territory of a member state.¹⁵⁴

Return Directive 2008/115/EC

The Directive on common standards and procedures in Member States for returning illegally staying third country nationals was approved by the European Parliament on 18 June 2008, formally adopted by the Council on 9 December 2008 and published in the Official Journal on 24 December 2008.¹⁵⁵ The Directive applies to all EU Member States except Ireland and Denmark.¹⁵⁶ Article 3(2) of the Return Directive defines “illegal stay” as “the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State”¹⁵⁷

¹⁵³COUNCIL DIRECTIVE 2003/86/EC of 22 September 2003 on the right to family reunification, article 4.

¹⁵⁴Ibid, article 4(4).

¹⁵⁵ECRE, ECRE Information Note: on the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals” <https://www.refworld.org/docid/496c61e42.html> (Accessed 6 July 2020).

¹⁵⁶ In accordance with Article 5 of the Protocol on the position of Denmark annexed to the Treaty of the European Union, this Member State will decide within a period of six months from the adoption of the Directive whether to implement it in its national law.

¹⁵⁷Directive 2008/115/EC of the European parliament and of the council, 16 December 2008, Article 3(2).

Illegal stay might be caused due to different reasons including; expiry of Visa or residence permit, revocation or withdrawal of a residence permit; final rejection of an asylum claim; withdrawal of refugee status; or unauthorized entry, hence making this directive applicable to approximately eight million people according to the European commission estimates.¹⁵⁸

Once a refugee or any other migrant receives a return order after a failed asylum case or withdraw of residence permit, he/she is issued with a return order that mandates that person to return to his/her respective country. Article 7 of the directive then offers such a person with “voluntary departure”, which means the said person can voluntarily leave the territories of the member state within 7 to 30 days.¹⁵⁹ article 7(2) however allows member states to extend that period taking into account the length of stay of the person in the country, existence of children attending school and any other family and social links.¹⁶⁰

In that given time of voluntary departure, the directive sets up certain obligation that a person has to fulfill which are more aimed at avoiding absconding, the authority might require one to do regular reporting, submission of financial guarantee, or even the freedom of movement might be limited by obliging a person not to leave a certain place for a duration during period of voluntary departure. (article 7(3)).¹⁶¹ In case a person poses a risk to public policy or security, then voluntary departure might not be an option for that person, or he/she might be granted a shorter period of even less than seven days.¹⁶²

Removal however is possible if the period given to someone for voluntary return expires though with continued presence of the person on the territory of the member state. Removal is to be used as a “last resort” and in case a third country national still resist, then the authority can use reasonable force to take that person out of the country. This process should be implemented in line with the Human rights and with due respect to dignity and physical integrity of the person concerned.¹⁶³

¹⁵⁸Baldaccini. A., “The EU Directive on Return: Principles and Protests, *Refugee Survey Quarterly*”, Volume 28, no. 4, 2009, Pages 114–138, <https://academic-oup-com.uaccess.univie.ac.at/rsq/article/28/4/114/1550517> (Accessed 13 July 2020).

¹⁵⁹Directive 2008/115/EC of the European parliament and of the council, 16 December 2008, Article 7.

¹⁶⁰Ibid., article 7(2).

¹⁶¹Ibid., article 7(3).

¹⁶²Ibid., article 7(4).

¹⁶³Ibid., article 8.

Removal must however be postponed in case there is a risk of refoulement or if the third country national made an appeal against the return decision and where such a review has suspensive effect under national legislation.¹⁶⁴ In case the third country national is mentally or physically unwell, or for technical reasons such as lack of transport means or failure to identify the person to be removed, then removal must in such a case be postponed.¹⁶⁵ Recital 12 addresses the situation of third-country nationals who are staying illegally but who cannot yet be removed, that member states should according to their national laws continue to provide basic conditions of subsistence, the authority should also provide a written confirmation or identification of their situation that such a person can use as identification in case of administrative controls or checks. In case where the third-country national is a minor, then the authority should make sure that the minor will be returned to a family member or a designated guardian, or that adequate reception facilities are already in place.¹⁶⁶

Legal Safeguards and protection of third-country nationals

Chapter III of the Return Directive sets out minimum legal safeguards on decisions related to return. The safeguards highlight that, return, removal and entry ban decisions must be issued in writing and must contain reasons for the ban (law and information on remedies), and translation of the main elements must be made available upon request, except in the case of irregular entrants where a standard form is to be issued instead (articles 12(1) and (2)).

Article 13(1) provides for an effective remedy against or seek review of decisions related to return. Reviews must be done by a competent judicial or administrative authority composed of members who are impartial and independent and who have the power to suspend the execution of the removal.¹⁶⁷ This reduces the risk of bias and provide for a second chance for third country nationals who are to be removed not in good faith.

¹⁶⁴Directive 2008/115/EC of the European parliament and of the council, 16 December 2008, Article 9(1).

¹⁶⁵*Ibid.*, article 9(2).

¹⁶⁶*Ibid.*, article 10(2).

¹⁶⁷*Ibid.*, article 13(1).

Article 13(3) obliges member states to provide for free legal assistance in accordance with relevant national rules on legal aid, however, article 13(4) mentions it that “*Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC (Asylum Procedure Directive)*”¹⁶⁸ this means that the free legal aid provided to third-country nationals maybe restricted in various circumstances.

In a situation where a removal is pending due the fact that voluntary departure was granted or removal being postponed, article 14(1) obliges member states to take into account *as far as possible* the principle of family unity, as well as emergency health care and the essential treatment of illness, access to basic education for minors, and the special needs of vulnerable people.¹⁶⁹ This means that third country nationals who are awaiting removal or voluntary return should continue enjoying their fundamental human rights and freedoms within the member states. Article 14(2) continues to oblige member states to provide a document to third-country nationals who are awaiting return with written confirmation of their situation.¹⁷⁰ This provides third-country nationals in that situation with a clear identification and in case of any administrative checks or control, they can still be able to produce that as evidence supporting their continued stay.

As highlighted above, the directive on one hands, puts up clear legal safeguards on return decisions, but on the other hand, does not put up any measures for basic conditions of subsistence that would have made it sure that, third-country nationals awaiting removal do not fall into homelessness or destitution. This was left out to member states who should predict this assistance according to their national law (recital 12). The lack of any obligation for member states to continue providing for basic necessities of life leaves people whose removal in practice cannot be enforced in a difficult and vulnerable situation, a situation that would take a long time given the fact that, the legal framework agreed upon by the member states does not provide a maximum period of time to change legal status or to end the situation.

¹⁶⁸Directive 2008/115/EC of the European parliament and of the council, 16 December 2008, Article 13(4).

¹⁶⁹Ibid., article 14(1).

¹⁷⁰Ibid., article 14(2).

Chapter 3: Refugees in Austria

Austria received its first refugee influx in 1956 during the Hungary uprising, over 180,000 refugees from Hungary came to Austria to seek for refuge,¹⁷¹ The “Prague Spring” of 1968 after the Soviet invasion of Czechoslovakia was written down as the second wave of refugees to come to Austria, over 162,000 Refugees came to the country.¹⁷² “..... the streets of Vienna were full of cars with Czechoslovak license plates, the Czech and Slovak language sounded from Viennese shops and restaurants and one could see small Czechoslovak flags waving everywhere” (Havac, 2016). The refugees who came to Austria by then received a massive welcome from both the government and the local people. Refugees had no hardships in accessing temporary residency from the Austrian Ministry of Interior, those who applied for International protection and fulfilled the conditions as of the 1951 Geneva convention also got the protection they asked for with ease.¹⁷³ around 12,000 out of 162,000 applied for political Asylum in Austria, majority returned back when the situation settled, others continued their journeys to western countries like the US, Canada, United Kingdom and Australia.¹⁷⁴

The Yugoslavian wars and the breakdown of the socialist government in Eastern Europe from 1989-1992, led to another wave of refugees in Austria, nearly 90,000 people mainly Romania and Poland applied for Asylum in Austria.¹⁷⁵ The Austrian Asylum and refugee policy started developing around this time, for example, the “temporary residence permit” which is active until now was created specifically for refugees from Bosnia who did not apply for asylum (de-facto refugees).¹⁷⁶ in 1992 alone, over 90,000 Bosnian war refugees sought refuge in Austria, of which, two thirds decided to stay after the war had ended.¹⁷⁷ this was followed by 20,000 refugees from the war in Kosovo.¹⁷⁸

¹⁷¹M. Böse, R. Haberfellner, A. Koldas., “Mapping Minorities and their Media: TheNational contex – Austria” https://www.zsi.at/attach/MinoritiesMedia_AT2001.pdf (Accessed 15 July 2020).

¹⁷²H. Ondrej., Czech Refugees in Austria 1968-1985, “Directory of open access Journals” https://sites.ff.cuni.cz/praguepapers/wp-content/uploads/sites/16/2016/11/ondrej_hlavac_82-97.pdf , 2016, vol 1, p 82-97, (Accessed 15 July 2020).

¹⁷³Ibid.

¹⁷⁴Ibid.

¹⁷⁵M. Böse, R. Haberfellner, A. Koldas., “Mapping Minorities and their Media: TheNational contex – Austria” https://www.zsi.at/attach/MinoritiesMedia_AT2001.pdf (Accessed 15 July 2020).

¹⁷⁶Ibid.

¹⁷⁷Ibid.

¹⁷⁸Ibid.

Austria has a strong history of accepting refugees since the end of World War II, but the recent 2015 refugee crisis that saw 88,340 asylum applications only in Austria was a big challenge to the Austrian asylum institutions.¹⁷⁹ The crisis led to many changes especially the asylum policies, changes that had never happened before during the past refugee influx from the Yugoslavia, Hungary and Czechoslovakia. The 2015 events proved to be a big challenge to Austria and other EU countries, tight border policies were set in place, given the tremendous number of refugees entering Austria, especially the large number of 20- to 35-year-olds males, citizens became alarmed at the prospect of finding work and integrating the so many male refugees especially from Syrian, Afghanistan, Iraq and Iran.¹⁸⁰ Highly publicized migrant crimes also led to negative Austrian citizen sentiment against immigrants and Austria's open-door policies.¹⁸¹

3.1 Asylum in Austria

Matters of Refugee protection in Austria are largely under the mandate of the Federal Ministry of Interior (BM.I). issues such as Immigration, emigration, citizenship, Asylum as well as the overall state boarder management are all a concern of the BM.I.¹⁸² The Federal office for Immigration and Asylum (BFA) that works under the BM.I is responsible for carrying out asylum interviews at the first instance, and is responsible for issuing of residence titles as well as return decisions to those refugees who fail in their asylum interview.¹⁸³ The Federal ministry for Europe, Integration and Foreign affairs (BMEIA) also plays a big part in refugee issues in Austria, it represents Austria when it comes to diplomatic issues abroad, as well as supporting integration programs at a federal level. The BMEIA also works hand in hand with other organizations such as the UNHCR and the Austrian Integration Fund (ÖIF) in carrying out integration projects for migrants and refugees in Austria.

¹⁷⁹B. Günter., D. Rupnow., Migration in Austria, "Innsbruck University press", <https://diglib.uibk.ac.at/ulbtirola/download/pdf/2546704?originalFilename=true> ,Vol 26, pp 38-41, (accessed 13 July 2020).

¹⁸⁰K. Butts., K. Hummel., M. Ferrill., S. Ozinga., "Austria and the Refugee crisis: An analysis of American sentiment in social versus print media" https://socialinnovation.usc.edu/wp-content/uploads/2017/09/FINAL-Report_USC_Embassy-of-Austria.pdf (Accessed 13 July 2020).

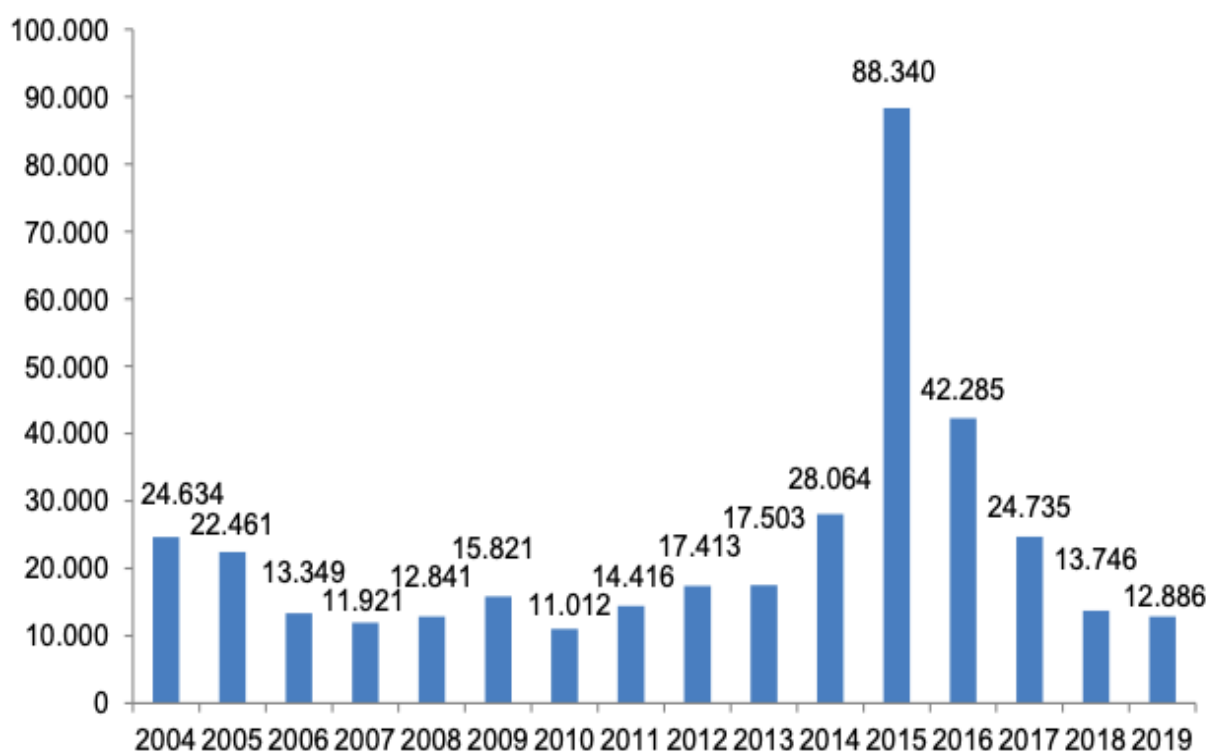
¹⁸¹Ibid.

¹⁸²Bundesministerium für Inneres, "Asyl" <https://www.bmi.gv.at/301/Allgemeines/Asylverfahren/start.aspx> (Accessed 17 July 2020).

¹⁸³Bundesamt für Fremdenwesen und Asyl, "Aufgaben des BFA" <https://www.bfa.gv.at/bundesamt/aufgaben/start.aspx> (Accessed 17 July 2020).

In the field of asylum in Austria, the Asylum Act (AsylG; 2005) is the key factor when it comes to national immigration and asylum laws. The Asylum Act governs obligations written down in the 1951 Geneva convention and under the European Union Law. It holds provisions for asylum applicants and beneficiaries of international protection with regard to entry, identification, and qualification, while the BFA Proceeding Act (BFA-VG) covers procedural aspects in line with the Asylum procedure Directive.¹⁸⁴ The Aliens Police Act (FPG; 2005) also plays another important role in the field of Asylum and migration in Austria, this mainly governs the entrance in the Austrian federal territory. It does not only set out grounds for rejection at entry points, but also covers residence termination measures, return, toleration and the general issuance of documents to foreigners.

Figure 1: Graph showing asylum applications in Austria since 2004 – 2019.



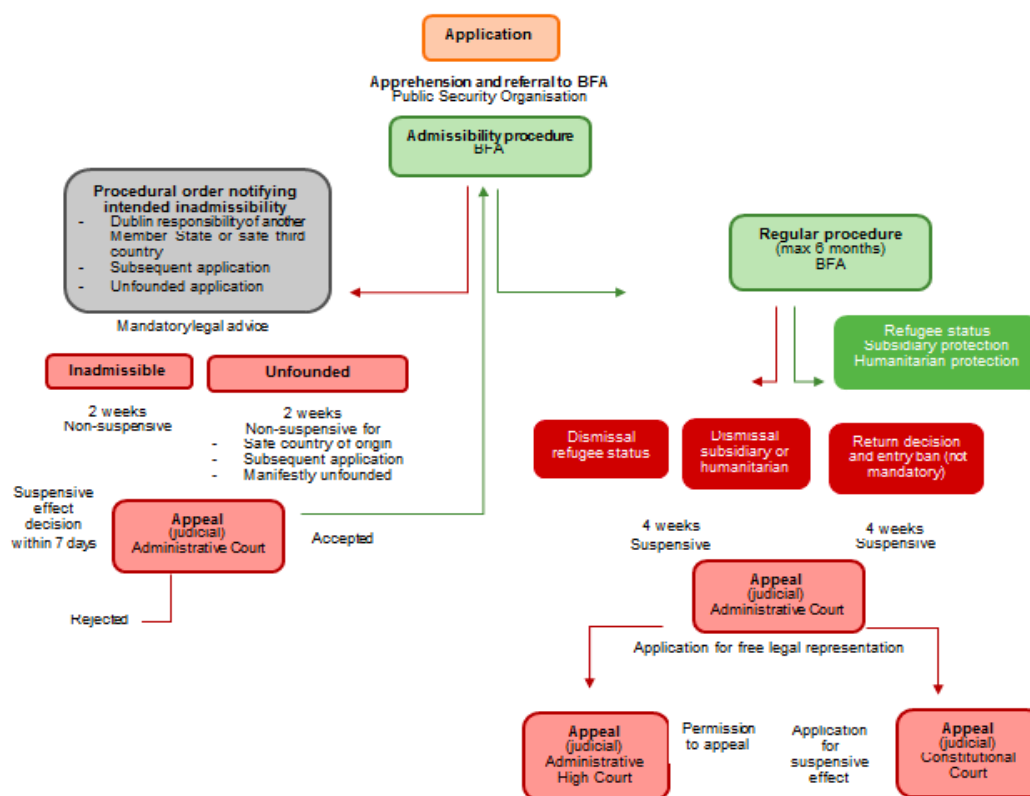
Source: Austrian Ministry of Interior (BM.I).

¹⁸⁴Refworld, “Federal Act laying down general stipulations concerning procedures before the federal office for immigration and asylum in relation to the granting of international protection, residence permits on grounds deserving of consideration and temporary leave to remain, the imposition of deportation orders and measures to terminate residence and the issuance of Austrian documents to aliens (federal office procedure act)”, <https://www.refworld.org/docid/5c863e697.html> (Accessed 17 July 2020).

Austria has got a welcoming policy for refugees and asylum seekers, the number of applicants however vary from time to time, During the 2015 refugee crisis, Austria received 88.340 asylum application, this is the highest the country has ever recorded. The reason for this high number was the presence of the Balkan route which refugees mainly from Syria, Iraq, Afghanistan and Iran used to enter Europe through Greece, Macedonia, Serbia, Hungary and to Austria and other industrialized European countries.¹⁸⁵ since March 2016 with the EU-Turkey deal, the Balkan route was closed together with other borders like Greece and Macedonia, making it hard for refugees to arrive to Austria.¹⁸⁶ hence a decline in asylum applications in Austria.

The Austrian Asylum procedure

Figure 2: Asylum procedure in Austria (Flow chat)



Source: Asylkoordination Österreich.

¹⁸⁵Info Migrants, “The Balkan route explained” <https://www.infomigrants.net/en/post/2546/the-balkan-route-explained> (Accessed 17 July 2020).

¹⁸⁶Friedrich Ebert Stiftung, “The Myth of the closed Balkan Route” <https://www.fes.de/en/displacement-migration-integration/article-page-flight-migration-integration/the-myth-of-the-closed-balkan-route> (Accessed 17 July 2019).

When a refugee enters Austria, he has a right to ask for Asylum, this can be done at the border entry or at designated places in Austria. At this point, the Authority will interrogate the Asylum seeker with a purpose of determining the admissibility procedure together with the Dublin procedure.¹⁸⁷ The main reason for the interrogation is mainly to establish the identity of the applicant since most of the refugees enter Austria without a Visa. At this stage, the asylum seeker will also be asked to narrate his/her travel route. The Austrian Constitution Court in 2012 gave a judgment that the reason for applying for international protection shall not be of the main focus at this stage.¹⁸⁸ unaccompanied minor cannot at this stage be interviewed without the presence of their legal representative.

According to the General Administrative Procedures Act (AVG), decisions have to be taken within 6 months after the application has been submitted. Within 20 calendar days, the BFA has to decide whether it intends to reject the application as inadmissible due to the responsibility of another Member State under Dublin III Regulation, the existence of a safe third country or for being a subsequent asylum application, or to dismiss the application for other reasons. As of September 2018, the admissibility procedure may be prolonged by lifting the 20 days deadline in manifestly unfounded cases. However, if no information about the intention to reject the application is issued within 20 calendar days, the application is automatically admitted into the regular procedure. Thus, the asylum-seeker should receive the preliminary residence permit and be allocated to the reception system of a federal province. To the contrary, if the asylum application is inadmissible the asylum-seeker receives legal assistance and has to be heard in presence of his/her lawyer. There is no legal remedy against this procedural order.¹⁸⁹

¹⁸⁷AsylG, Article 9.

¹⁸⁸RIS, “VfGH Decision U 98/12, 27 June 2012”

https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original%20Judgment%20VfGH%20U98_12%2C%202012-06-27.pdf (Accessed 17 July 2020).

¹⁸⁹Asylkoordination Österreich, “Regular Procedure”

<https://www.asylumineurope.org/reports/country/austria/asylum-procedure/procedures/regular-procedure> (Accessed 17 July 2019).

Table 1: Important rights and duties for applicants of international protection.

	Status	Rights	Duties
Stage 1: Admissibility procedure	Tolerated (Green Card)	-Protection from forced return	-Cooperation -Residence only within the municipality
Stage II: Substantive procedure	Asylum applicant (White Card)	-Basic welfare support -Health insurance -Access to housing -restricted employment (apprenticeship and charitable work -Freedom of movement within Austria	-cooperation -Integration and language learning

Source: own compilation

1st Instance (BFA).

This is the most important interview for an Asylum seeker, it determines whether one gets a positive at the BFA or his application is rejected hence an appeal at the Federal administrative Court. At this stage, one might be accompanied by a person they trust (person of confidence). Unaccompanied children must not be interviewed without the presence of their legal representative. If the person's fear of persecution is based on infringement of the right to sexual self-determination, he/she is interviewed by an official of the same sex unless they request otherwise. The authorities must prove that they have informed the asylum seeker of such possibility.¹⁹⁰

¹⁹⁰VfGH, Decision u 1674/12, No. 64 (XLI) and No. 73 (XLIV), 12 March 2103.

At this stage, asylum seekers are offered free legal advice at the branch offices of the BFA. This legal advice is funded by the Asylum, Migration and Integration Fund (AMIF) and co-funded by the Ministry of Interior. One association “Verein Menschenrechte Österreich” covers legal advice in 6 out of 18 BFA branch offices and also offers counselling at its offices in the federal states. In Styria, Caritas has a contract to provide legal advice as well.¹⁹¹

Interpreters are provided by the BFA. they are available for most languages of the countries of origin. Interviews are also conducted in a language the person is deemed to understand more sufficiently.

Asylum seekers from African countries are often interviewed in English or French, depending on the national language of the said country of origin of the interviewee. People are asked at the beginning of the interview if they understand the interpreter. There are no standards for the qualification of interpreters in asylum procedures. Interpretation is often not done by accredited interpreters; usually persons with the requested language knowledge are contracted on a case-by-case basis. UNHCR has published a training manual for interpreters in asylum procedures.¹⁹²

Once an application for International protection is granted by the BFA, then a refugee receives three years of right of residence in Austria, and once the three years are up, the right of residence then becomes indefinite provided that no revocation proceedings are initiated, however, revocation is still possible at any future time.¹⁹³ in some cases, the right to Asylum might be rejected once the applicant doesn’t qualify for this protection, but can be granted subsidiary protection.¹⁹⁴ subsidiary protection only provides a refugee with maximum of one year residence which upon request can be prolonged for two years in each case. Under exceptional circumstances, a refugee might be granted a Visa to stay in Austria in case the application for Asylum as well as for subsidiary protection is rejected.¹⁹⁵

¹⁹¹BM.I reply to Parliamentary Questions, 8 November 2017, https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_13244/imfname_673594.pdf (Accessed 17 July 2020).

¹⁹²UNHCR, “Trainingshandbuch für DolmetscherInnen im Asylverfahren” https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/AUT_UNHCR_Trainingshandbuch_fuer_DolmetscherInnen_im_Asylverfahren.pdf (Accessed 17 July 2020).

¹⁹³BFA, “Asylum procedure”, https://www.bfa.gv.at/files/broschueren/Informationsbroschuere_Asylverfahren_in_Oesterreich_EN.pdf (Accessed 20 July 2020).

¹⁹⁴Ibid.

¹⁹⁵Ibid.

Table 2: Important rights and duties for applicants of international protection upon a positive outcome.

	Status	Rights	Duties
Stage III: Positive decision	Recognized refugee (Convention passport)	- 3 years of legal residence - Social Insurance (including Needs-Based Minimum Benefit and health insurance) - Access to labour market	Civic integration programmes
	Subsidiary Protection (Grey Card for Persons Eligible for Subsidiary Protection)	- 1 year of legal residence - Social Insurance (including Needs-Based Minimum Benefit and health insurance) - Access to labour market	Civic integration programmes
	Humanitarian title (for example, Residence Permit Plus)	- 1 year of legal residence - Social Insurance (including Needs-Based Minimum Benefit and health insurance) - Access to labour market	Civic integration programmes

Source: own compilation

In case where the application for International protection is rejected and subsidiary protection or Visa is not granted, then a return decision is initiated, meaning, the refugee must return to his/her home country either voluntarily or be deported within a specific period of time. However, refugees still have a right to appeal the BFA's decision before the Austrian Federal Administrative Court (BVwG).¹⁹⁶

¹⁹⁶BFA, "Asylum procedure", https://www.bfa.gv.at/files/broschueren/Informationsbroschuere_Asylverfahren_in_Oesterreich_EN.pdf (Accessed 20 July 2020).

2nd Instance: Appeal before the Federal Administrative Court (BVwG)

Once an applicant receives a negative decision from the BFA, he/she can decide to appeal the BFA's decision before the Austrian Federal Administrative Court (BVwG). Appealing against a negative first instance decision has to be submitted within 4 weeks of the receipt of the decision from BFA, the applicant must submit the appeal to the BFA in writing, the whole file is then forwarded by BFA to the Federal Administrative Court (BVwG), (Article 16(1) BFA-VG). This appeal in principle has suspensive effect, meaning that the return decision made by the BFA will be put on hold until the Court gives a decision on the appeal.

At this stage, the applicant is assigned a free legal adviser provided by the state at the time of notification of the first instance decision. a legal counselor will then advice the applicant on the court proceedings and might offer to represent him before the BVwG. At the BVwG, a lawyer is not mandatory, however, the asylum seeker might hire one at his/her expenses.¹⁹⁷

The BVwG has a right to uphold, amend or overturn the BFA's decision, in case the appeal is granted, then the BVwG's decision supersedes the BFA's decision and the asylum seeker will have the right to stay in Austria. He/she will then be granted international protection, subsidiary protection or a Visa, but in case the BVwG rejects the appeal, the return decision offered by the BFA at the 1st instance is then re-activated, and the said refugee must leave Austria either voluntarily or deported back to his/her home country within a given period of time.

In case the asylum seeker still gets a negative decision from the Federal administrative court, he/she can proceed to make an appeal before either the Austrian Supreme Administrative Court (VwGH) or before the Austrian constitutional Court (VfGH) or possibly at both courts simultaneously. It is however important to note that the appeals made before the Supreme Administrative Court and the Constitutional courts have no suspensive effect, meaning that the asylum seeker might be deported at any time even before the court decision. in certain case though, these courts may grant suspensive effect.¹⁹⁸

¹⁹⁷BFA, "Asylum procedure",
https://www.bfa.gv.at/files/broschueren/Informationsbroschuere_Asylverfahren_in_Oesterreich_EN.pdf
(Accessed 20 July 2020).

¹⁹⁸Ibid.

3rd Instance: Appeal before the Supreme administrative Court (VwGH) or the Constitutional Court (VfGH)

The VfGH only rules on alleged violations of Constitutional rights and according to the European Convention on Human Rights. Any asylum applicant willing to appeal to this court challenging the decision of the BVwG, should be in position to prove that the decision made by the BVwG is in breach of his/her rights granted by Austrian the constitution. The appeal must be done within 6 weeks after receiving the BVwG's decision.

Appeals before the Supreme administrative Court and Constitutional court are done writing, applicants are advised to mention that the European Convention on Human rights (ECHR) is part of Austria's constitutional law. Therefore, violation of the Right to Life Articles 2, Prohibition of Torture Article 3 and Right to respect for private and family life Article 8 of the ECHR would be in violation by the refusal of refugee status. The only challenges at this stage of appeal is that the applicant is not heard in person in these courts, the courts only requests for written statements from the Federal administrative court (BVwG).

For appeals for revision before the Supreme Administrative Court and appeals before the Constitutional Court, a lawyer is mandatory, and costs are covered directly by the refugees themselves. On top of covering legal costs, refugees have to pay an amount totaling to €240 as application costs to these courts.¹⁹⁹ NGOs cannot represent asylum seekers before the Constitutional Court or the Supreme Administrative Court as this can only be done by an attorney-at-law. this cause a big challenge to Asylum seekers as this legal help does not come free of charge hence most of them opt-out after receiving a decision from the BVwG.

In the 2017-2022 government's program, the government tried to announced restrictions in the asylum procedure, including the abolition of the onward appeal before the Administrative and High Courts. This move was highly criticized by the Federal Administrative Court and Austrian Constitutional Court as an undue departure from uniform rule of law standards in a particularly sensitive human rights area.²⁰⁰ So far, no proposals were until now presented.

¹⁹⁹Interview with Marty (Queer Base).

²⁰⁰Österreichischer verwaltungsgerichtshof, "Verwaltungsgerichtshof spricht sich gegen den geplanten Ausschluss der außerordentlichen Revisionen in Asylverfahren aus" https://www.vwgh.gv.at/medien/mitteilungen/regierungsprogramm_2017_2022.html (Accessed 20 July 2020).

In case these 2 Courts agree with the decision made by the BVwG, and in that case, a negative decision, that means the Austrian national remedies are exhausted, the said refugee MUST leave Austria. But not all times a refugee receives a return order, that either voluntary departure or deportation is possible.

Reasons as to why Refugees fail in the asylum process in Austria.

Failing in the asylum process in Austria would arise to different reasons, both factual and as well legal reasons can make one fail at any stage in the asylum process. Some of the legal reasons would include;

Credible well-founded fear: when accessing a “well-founded fear” as written down in Art. 1 of the Geneva convention, two elements must be put into consideration; the subjective and the normative aspect (UNHCR). Fear is understood as “a state of mind and a Subjective condition” of the asylum applicant which must be supported by objective situations during the asylum interview. Dahlvik (2018) argue that “the claim that “well founded” fear of persecution, a requirement for the asylum, can be rationalized through the shared understanding of their cause puts the victim in a “Violent double bind”, independently of hoe the claimant acts, it always seems to be wrong. The person is labeled either as a liar or as a performer who is too bad or too good”.

Internal protection or Internal flight alternatives: During the asylum Interview, a refugee must show that no any part of his/her country is safe for him to live in or that he/she tried to move to other parts of his country but could still not get protection from his/her Government, (Article 8, Qualification directive 2011/95/EU). During the Asylum interview, the interviewee is asked whether he tried to live in other parts of his country, and in case he says no, then that would mean that he does not qualify for International protection.

Exclusion, article 12 of the Qualification directive exclude people from gaining international protection, if a person committed crimes against peace, war crime or crimes against humanity or if a person committed serious non-political crime outside the country of refuge prior to his/her admission as a refugee. This doesn't exclude people who were forcefully recruited into terrorist organisations for example. So, if it is found out during the interview that such a

person was involved in such acts, then he/she has no chance by law to get Asylum in Austria. Articles 1 (D), (E), and F of the 1951 refugee convention further confirms that such a person should not qualify for International protection.

Most of the reason for denying refugees international protection in Austria are however factual reasons that are sometimes in control of the refugees themselves. Some of the factual reasons include;

Lying at any stage of the Interview: this is more common especially when it comes to age and nationality, with age, minors are more favored in the Austrian asylum system, so some refugees would like to use the easy way of saying they are below the age of 18, this is also due to the fact that minors get more benefits and are more protected by law. for example, minors are eligible to foster care and have better accommodation facilities in Austria, some people would want to use the system in such a way to get such benefits even though they might be above 18. But in case the asylum officials doubt any applicant of their age, then they are subjected to take a medical examination to prove their age. Lying about the country of origins happens to refugees who come from “Safe countries of Origin” such people would try to use other countries as their countries of origins but the in most cases have few chances to walk away with it due to the intensive questioning at the BFA when it comes to confirming out people’s countries of origin.

Forgetting about torture events during the interview: during the asylum interview, it is important that a refugee explains in detail the events that happened to him in order. It is however proved that traumatizing event cannot be told in order. However, the authority would prefer someone to remember everything that happened to them, not forgetting the exact time and dates. In most cases, if an asylum seeker wouldn’t prove that, he loses credibility and stands high chances of receiving a negative decision.

Inter-cultural differences: most of the interviewers in the asylum process are Austrian, hence having the Austrian culture with them. Refugees on the other hand coming to Austria have got their own culture hence a culture clash sometimes is not inevitable. In my culture for example, looking down while answering to someone older than you or more powerful than you would be a sign of respect, in Austria, looking down while talking to someone would be a sign showing that someone is lying. Credibility is what interviewers are looking for from

the interviewee, so, such cultural differences can be a big part in deciding someone's fate in the asylum process. The Austria Interior Ministry is trying hard so that its referent and judges are well familiar with such cultural differences through supporting protects like, Intercultural Competence trainings (IKT). Trainings are offered by IOM to the referent and the judges through AMIF.

Incompetent interpreters: for some languages especially for people from African countries, finding a qualified competent interpreter might be even impossible in Austria, this means that applicants will have to use a second language while conducting an interview. This creates a communication gap between the applicant, the interpreter and the person in charge of decision making. Dahlvik (2018) further explains the lack of viable alternative while commissioning interpreters in Austria, some interpreters do not even know German very well which means that they even don't know how to translate certain words in German, in a long run, the translations will be different from what the asylum applicant said hence many negative decisions.

Chapter 4: The Return of rejected asylum seekers from Austria

Following an Asylum summit that took place on 20 January 2016, the return of rejected asylum seekers was considered a major issue in Austria as a national policy priority.²⁰¹ with representatives of the Federal states, provinces and cities, it was concluded that the removal of rejected Asylum seekers be intensified and that Voluntary returns be increased. Article 61 (1) of the Aliens police act gives powers to the BFA to issue a return order as soon as the ones application for international protection is reject and no other legal stay is granted.

According to the 2019 statistics from the Austrian Federal Ministry of the Interior, a total of 50.038 decisions were made that year, out of which, 31.862 decisions were negative, 13.862 decisions turned out to be positive.²⁰² This means that, over 70% of the asylum decisions in Austria turned to be negative hence subjected to return.

Table 3: Final asylum decisions of the year 2019 by type of decision.

	pos rk	neg rk	Summe
Asylentscheidungen	9.723	10.373	20.096
Entscheidungen Subsidiärer Schutz	2.246	7.375	9.621
Entscheidungen Humanitärer Aufenthaltstitel	1.958	14.114	16.072
Sonstige Entscheidungen			4.249
Summe	13.927	31.862	50.038

Source: Austrian Federal Ministry on Interior.

²⁰¹S. Rosenberger and A. König, “Welcoming the Unwelcome: The Politics of Minimum Reception Standards for Asylum Seekers in Austria” *Journal of Refugee Studies*, Vol. 25, no. 4, 2012, pp. 537–554.

²⁰²BM.I, “Asylum statistics 2019”, https://www.bmi.gv.at/301/Statistiken/files/Jahresstatistiken/Asyl-Jahresstatistik_2019.pdf (Accessed 20 July 2020).

Voluntary return

Many refugees would prefer to return to their homeland as soon as they no longer fear persecution (UNHCR Austria). Home is where everyone wants to be and when it comes to returning of refugees, it should always happen in dignity and informed decision.²⁰³ The European Union put up a fund totaling to €3.137 Billion under the Asylum, Migration Fund (AMIF) that is to run for seven years between 2014-2020, and one of the main objective of this fund is to ensure that refugees who fail in their Asylum process are returned to their respective countries either voluntarily or by force (Deportation).²⁰⁴ the allocation for Austria is €96.22 Millions, this money is channeled through the Austrian ministry of Interior that overlooks at who qualifies to put this money to better use.²⁰⁵

In Austria, if a refugee decides to leave voluntarily, for example, when the situation in the home country stabilizes, or when the situations that forced one to leave are no longer in place,²⁰⁶ such a person is eligible to a wide range of benefits such as, payment of travel costs, financial start assistance, medical care during transfer, travel organization and flight booking, etc.²⁰⁷

The same applies to refugees who fail in their asylum applications, they are also entitled to voluntarily leave the country and are also entitled to the same treatment as those whose situation back home normalizes. Voluntary return does not categorize refugees who should benefit from it. In case a refugee fails in the asylum process, he or she can contact either Caritas²⁰⁸, Verein Menschenrechte Österreich (VMÖ)²⁰⁹ as well as the International Organisation for Migration (IOM)²¹⁰ in order to start planning his or her journey back home.

²⁰³UNHCR, “Voluntary return” <https://help.unhcr.org/austria/voluntary-return/> (Accessed 20 July 2020).

²⁰⁴European Commission, “Asylum, Migration and Integration Fund (AMIF)” https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en (Accessed 20 July 2020).

²⁰⁵BMI, “Asylum, Migration and Integration Fund (AMIF)”, <https://www.bmi.gv.at> (Accessed 20 July 2020).

²⁰⁶UNHCR, “Voluntary return” <https://help.unhcr.org/austria/voluntary-return/> (Accessed 20 July 2020).

²⁰⁷BFA, “Voluntary departure and return assistance a fresh start, new prospects” <http://www.voluntaryreturn.at/en/> (Accessed 20 July 2020).

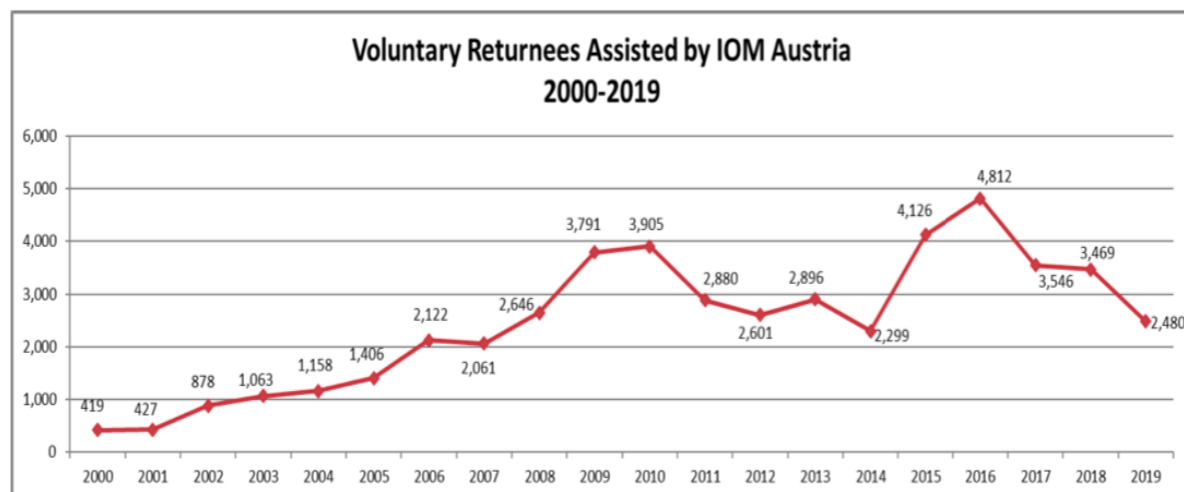
²⁰⁸Caritas &DU, “Rückkehrhilfe” <https://www.caritas-wien.at/hilfe-angebote/asyl-integration/beratung-fuer-fluechtlinge/rueckkehrhilfe/> (Accessed 20 July 2020).

²⁰⁹Verein Menschenrechte Österreich, “Rückkehrberatung” <http://www.verein-menschenrechte.at/rueck.html> (Accessed 20 July 2020).

²¹⁰IOM, “Assisted Voluntary Return and Reintegration” <https://austria.iom.int/en/assisted-voluntary-return-and-reintegration> (Accessed 20 July 2020).

In Austria, NGOs and other institutions undertake return counselling, while the International Organization for Migration (IOM) carries out the organisation of the return in the majority of the cases.²¹¹

Figure 3: A Line graph showing total number of voluntary returnees between 2000-2019



Source: IOM Country office for Austria.

IOM signed a memorandum of understanding in the year 2000 with the Austrian ministry of Interior to carry out voluntary return in the framework of “General Humanitarian programme”, the Austrian ministry through AMIF covers most of the costs including the travel costs for most of the returnees.²¹²

Afghanistan and Iran are the major beneficiaries of this scheme, with 126.86% and 26.17% respectively.²¹³ with more male than female beneficiaries. As of Age, most of the beneficiaries are between the age of 18-34 years old.²¹⁴

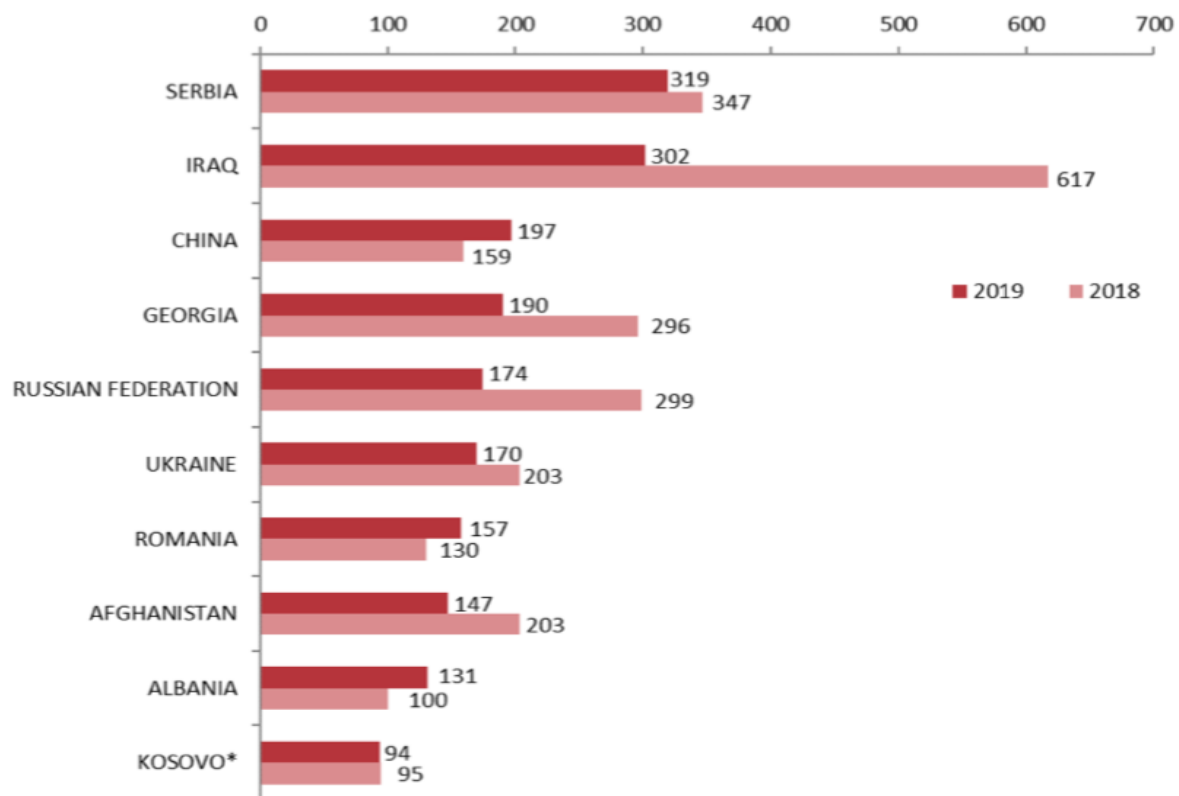
²¹¹EMN, “Return Migration in Austria” https://www.emn.at/wp-content/uploads/2017/01/PS_III_Return_FINAL_ENG_lr.pdf (Accessed 20 July 2020).

²¹²IOM, “Assisted Voluntary Return and Reintegration from Austria”, https://austria.iom.int/sites/default/files/IOMAustria_AVRRStatistics2019.pdf (Accessed 20 July 2020).

²¹³Ibid.

²¹⁴Ibid.

Figure 4: A Graph showing the top 10 countries of Return in 2019.



Source: IOM Country Office for Austria

The voluntary return scheme benefits not only refugees but also migrants who are willing to return home but have no means to do so, that's why in figure 7 above, the main beneficiaries of the voluntary return are nationals of Serbian. In 2016, a scheme of monetary return assistance was introduced for nationals of Afghanistan, Morocco and Nigeria. The earlier an asylum seeker decided to return voluntarily, the higher the amount of monetary assistance. If applicants decide to return voluntarily within three months after filing the application, they receive EUR 500, unless they have filed a complaint against the decision of the asylum authority. If an asylum seeker decides to return voluntarily within six months, the amount is EUR 250, later on the amount is EUR 50.²¹⁵

²¹⁵Federal Office for Immigration and Asylum, *Neues Rückkehrhilfeprogramm für Asylweber aus Afghanistan, Marokko und Nigeria*, <http://www.bfa.gv.at/presse/thema/detail.aspx?nwid=4F717067766351484946513D&ctrl=2B7947437976465443374D3D> (Accessed 20 July 2020).

The actors involved in return counselling are of the opinion that this financial bridging is not crucial for the decision to return home (Black et al. 2004). The most important reasons are private/family reasons, such as homesickness, separation from the family, illness and/or death of relatives in the home country as well as the lack of perspectives resulting from insecurity and the duration of the asylum procedure and the difficult living conditions for asylum seekers in Austria are named as important motives for return by all actors involved in return counselling.²¹⁶

Forced Return

Refugees who have exhausted all legal avenues to remain in Austria or who have committed offences, receive a return decision from BFA or from the Court. According to Eurostat, every year around a quarter of a million people are subject to such orders across Europe. The vast majority of them leave voluntarily. However, when illegally-staying non-EU nationals refuse to comply with the return decision, as a last resort they may be forcibly returned to their home countries.²¹⁷

According to the European Commission 2019 Annual Report on Migration and Asylum, Austria issued 13.960 return orders in 2019,²¹⁸ of those, 3.940 people were deported back to their countries of origin.²¹⁹ In the same year, as seen in figure 6 above, 2.480 people return home voluntarily. In total, 6.420 people returned either voluntarily or forced to return. This covers less than half of the people issued with a return order in 2019.

On the EU level, the EU “Joint return operations” coordinated by Frontex allows member states to jointly organize returns jointly. If one Member State organises a return operation by air to a specific country of return and has some spare capacity on the plane, it can invite other Member States to take part. The organising Member State informs Frontex about its intention to conduct a return flight and requests the assistance of Frontex to coordinate this operation. Frontex then dispatches this information to all other Member States.²²⁰

²¹⁶EMN, “Return Migration in Austria” https://www.emn.at/wp-content/uploads/2017/01/PS_III_Return_FINAL_ENG_lr.pdf (Accessed 20 July 2020).

²¹⁷Frontex, “Return”, <https://frontex.europa.eu/operations/return/> (Accessed 20 July 2020).

²¹⁸European Commission, “Annual Report on Migration and Asylum” https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_arm2019_synthesis_report_final_en_0.pdf (Accessed 21 July 2020).

²¹⁹Ibid.

²²⁰Frontex, “Return”, <https://frontex.europa.eu/operations/return/> (Accessed 20 July 2020).

The legal bases for return of refugees and migrants in Austria can be found in the Austrian Aliens Police Act (FPG). The Aliens police is responsible for carrying out forced return operations in Austria. Other actors involved in forced return include; NGOs active in the attendance of detainees pending deportation, these provide relief supplies, information of detainees on their legal situation, getting into contact with relatives, medical problems, preparation of social activities pending deportation, e.g. Movies, sports, books etc. NGOs still active include; Verein Menschenrechte Österreich, Caritas and Diakonie.²²¹

Article 76 of the Aliens police act allows the Austrian authority to arrest and detain a person who is pending deportation, but more lenient measures for children under the age of 14 were set out in article 77 (FPG) as well as if the authority beyond reasonable doubt proves that the objectives of detention pending deportation can be achieved by the use of more lenient measures. The most important grounds for detention pending deportation are to secure the expulsion procedure, to implement a residence ban, or to secure the transit through Austrian territories.

Following the death a Nigerian Asylum seeker, Markus Omufuma on 1st May 1999, after suffocating on the airplane while he was being deported back to Nigeria,²²² new guidelines and directives were introduced in the deportation sphere, these directives include; special trained bodies of the public security service are the only ones allowed to carry out deportations especially by airplanes, a thorough medical examination must be carried out on the person to be deported so as to make sure that people to be deported are in good health condition, in order to enhance mutual trust, there should be a personal meeting between the deportee and the escorting personnel, public security services are further more trained in legal issues relevant to for deportation as well as appropriate use of physical strength, first aid as well as basic English.²²³ Furthermore, on the chartered flight, deportees are accompanied not only by public security service but also a medical doctor together with an independent human rights observer that ensure that all deportees are in good health and that the execution of the deportation complies with human rights standards.²²⁴

²²¹EMN, "Return Migration in Austria" https://www.emn.at/wp-content/uploads/2017/01/PS_III_Return_FINAL_ENG_lr.pdf (Accessed 20 July 2020).

²²²Wikipedia, "Marcus Omufuma" https://en.wikipedia.org/wiki/Marcus_Omofuma (Accessed 20 July 2020).

²²³EMN, "Return Migration in Austria" https://www.emn.at/wp-content/uploads/2017/01/PS_III_Return_FINAL_ENG_lr.pdf (Accessed 20 July 2020).

²²⁴Ibid.

Not all times that a return order is issued to a failed asylum applicant, that return is either voluntarily or forced is possible,

4.1: Impossibility to return

“6,165 people are so-called "tolerated stay" migrants, whose removal is impossible either for practical reasons (such as a lack of documents or the country of origin's refusal to accept them) or because their removal would contravene the Refugee Convention. According to the Kurier the Interior Ministry has confirmed this figure but would not make an official comment on the situation”²²⁵ (The Local, 20 January 2017).

Not all times a return decision is issued to a rejected Asylum Seeker that a return is possible, this might happen due to Legal or factual reasons;

Legal reasons leading to impossibility to return.

Right to a private and family life under Art. 8 ECHR: Under Austrian law, a return decision may only be issued if this does not violate the individual's right to a private and family life under Art. 8 ECHR (Art. 9 para 1 Federal Office for Immigration and Asylum Procedures Act). In case the applicant has family in Austria, that possess a great challenge in case his/her Asylum is rejected and a return decision is issued. On no grounds will such a person be removed.

Non- refoulment under Art. 21 of the Qualification Directive (Directive 2011/95/EU): a removal may be inadmissible on grounds of non-refoulment, If a return decision is issued according to Art. 52 Aliens Police Act, the Federal Office for Immigration and Asylum has to determine at the same time that a removal of the third-country national to one or more certain

²²⁵The Local, “The 6,165 irregular migrants who can't be deported from Vienna” <https://www.thelocal.at/20170120/the-irregular-migrants-who-cannot-be-deported-from-vienna> (Accessed 20 July 2020).

countries is admissible, unless this is not possible due to reasons for which the third-country national is responsible (Art. 52 para 9 Aliens Police Act). Accordingly, where no such a determination is made, this implies that the third-country national cannot be removed.

Right to life Art. 2, Prohibition of Torture Art. 3 of ECHR and Art. 3 of the Convention against Torture (CAT): a removal is inadmissible if it would lead serious threat to the life or the integrity of the Asylum seeker as a civilian in his country of origin due to arbitrary violence in the course of an international or national conflict going on. Art 3 of CAT further stresses it that no state party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. Art 50(1) of the Alien Police Act further stresses it that deportation shall be inadmissible if it violates article 2 and 3 of the ECHR.

Prohibition of expulsion or return Art. 33 para 1 of the 1951 Geneva Refugee Convention: a removal is inadmissible, if the life or freedom of the third-country national would be threatened on account of the race, religion, nationality, membership of a particular social group or political opinion within the meaning of, unless an alternative for flight exists within the particular country (Art. 50(2) Aliens Police Act).

Factual reasons leading to impossibility to return;

Un clear nationalities: Another challenge for return is the fact that sometimes the identity of third-country nationals is not clear, this may raise difficulties in the acquisition of necessary travel documents. In such cases, language experts may also be used in order to detect cases of assumed nationalities but still it is a challenge to return someone to a country where he doesn't acknowledge as his country of origin.

Luck of travel documents: Most refugees who enter Austria illegally do not possess any travel documents or identification cards, its however the responsibility of the authority in charge to figure out the exact nationality of such refugees and in case of issuing of a return order to such a person, his/her deportation would be impossible since he/she does not have any travel document. Article 46(2) of the Alien Police Act obliges the person to be deported to obtain a travel document himself. This is also in practice very challenging in case the person does not want to be deported.

Cooperation of third-country authorities: The possible refusal of authorities of the return countries to issue the required documents or to readmit citizens is a big challenge to return, if a country doesn't accept to take back its nationals, then Austria cannot return anyone without approval from the authority of the third country. Some countries such as India, Armenia and China take a very long time to process any travel document for a person to be deported, to some countries such as Chechnya, acquiring a travel document through the Russian embassy is almost next to impossible.²²⁶

Refusal of carriage by the airline: The airline may refuse to carry returnees, for instance if this would affect the safety, health or comfort of other passengers or if the mental or physical condition presents a hazard or risk to the returnee, to other passengers, to the crew or to property. This was clearly seen in the case of Gambian Bakery J in April 2006.²²⁷ Furthermore, the airline may refuse to carry unaccompanied children, persons with limited legal capacity or pregnant women.²²⁸ this also poses a big challenge to return.

Resistance of the returnee to return: The resistance of returnees against their return appears to be one of the main challenges to return. Resistance of returnees may take various forms, e.g. physical resistance (Case of Bakery J), absconding, refusing cooperation and going into hiding and self-injury, hunger strikes, and self-injury are also common.

According to the Aliens Police Act, a return order will never expire, if voluntary or forced return is not possible now, a person will stay in Austria until his return is accomplished at a later date. Article 46a (1) of the Aliens police Act provides for a “*temporary leave to remain*” in case the reason for departure are far beyond control of the third country national.

²²⁶EMN, “Return Migration in Austria” https://www.emn.at/wp-content/uploads/2017/01/PS_III_Return_FINAL_ENG_Ir.pdf (Accessed 22 July 2020).

²²⁷Void, online movie, <http://www.voidthemovie.com/index.html> (Accessed 22 July 2020).

²²⁸Austrian Airline Art. 7, General conditions of carriage for passengers and baggage – Vienna, June 2017, https://www.austrian.com/Info/LegalRegulations/ConditionsOfCarriage.aspx?sc_lang=en&cc=AT (accessed 22 July 2020).

Chapter 5: Temporary leave to remain in Austria.

In case a refugee can neither voluntarily nor be forced to return back to his country after exhausting all legal avenues to grant him/her legal stay in Austria, he/she then dives into a situation of “tolerated stay”. Important to note is that tolerated stay is not a legal stay in Austria but rather shows that a person is tolerated to stay in Austria or the person cannot be deported back to his country. The said person then qualifies to get a “Toleration admission card” pursuant to article 46a (4) of the Aliens Police Act. Important to note is that this card only serves as proof of identity in procedures before the Federal office, it is only valid for one year and can only be renewed for another year in each case upon application by the refugee. (article 46a (5)).

One of the main reasons as to why the temporary admission card was created, on one hand, Austria did not want to have people on its territory without any title, so, by providing this avenue, it gives a title to many people in this situation and on the other hand protect the same people from being fined. Any third country national who has no legal rights to stay in Austria or who continue to stay in Austria even with an expired visa are fined when found, so, the tolerated stay acts as a mean to protect people from being fined by the Authority.²²⁹

There are two different situations under which a refugee can end up in a tolerated situation to stay in Austria;

- a) when a refugee exhausts all legal remedies to stay in Austria without acquiring and legal stay at all levels, in this having a return order but cannot be return either willingly or by force, and
- b) when one acquired international protection and somewhere committed an offence leading to the withdraw of the protection. Such a person would also qualify for temporary admission card.²³⁰

²²⁹Interview with Bischof Thiemo (Asylum counsellor from Diakonie)

²³⁰Ibid.

Deportation Centre in Serbia

On 22nd of September 2019, the then ex Austrian Interior Minister, Herbert Kickl in a Televised Interview, in his words said *“Ich hab mir da durchaus etwas überlegt. Und ich sag das heute auch das erste Mal: Wir haben in meiner Ministerverantwortung auch einen Vertrag mit Serbien zustande gebracht, wo wir Leute, die in Österreich einen negativen Bescheid haben, die das Land verlassen müssen, aber nicht von ihren Ländern zurückgenommen werden, dann in ein anderes Land – ist gleich Serbien – bringen, damit es nur einen Unterschied macht, ob jemand rechtskräftig hier aufhältig sein darf oder eben nicht”* (Watch from 56:48).²³¹ Translated would literally be *“I thought about it. And I say it today for the first time: while I was a minister we did a contract with Serbia, it says that people which get negative in Austria but whom can’t go back to their countries, be brought in a other country -Serbia in that case- so that it only makes a difference if someone is legal here or not”* The Idea is that all Refugees who fail in their asylum process but cannot either voluntarily or forced back to their home countries, be deported to Serbia.

Currently, negotiations are still going on between Serbia and Austria on a proposed agreement between both countries, following a parliamentary inquiry into the matter,²³² the current interior minister Karl Nehammer in his written answer to the inquiry clearly stated that his ministry is still in plans on setting up a deportation center in Serbia.²³³ together with the Austrian Chancellor Sebastian Kurz, the idea of coming up with a reform of the European Asylum and Migration policy landed them to the idea of constructing a deportation center outside Austria, hence choosing Serbia to be the best option where Refugees who fail in the Asylum process should be deported.

Since the temporary leave to remain in Austria is not a legal status, the idea is that all people who are in Austria should have a known status. Either legal or illegal as said by Herbert Kickl. Those falling in between will have to be deported to Serbia.

²³¹ ‘Herbert Kickl – IM ZENTRUM – Wer Schützt den Staat – 22 September 2019’ [online video], 2019, <https://www.youtube.com/watch?v=NhNuBdr6Tdw&feature=youtu.be> (Accessed 11 August 2020).

²³²Parliamentary inquiry 866/J (XXVII. GP), https://www.parlament.gv.at/PAKT/VHG/XXVII/I/I_00866/fname_782030.pdf (Accessed 11 August 2020).

²³³Bundesministerium Inneres, Written Answers 923/AB von 14.04.2020 zu 866/J (XXVII, GP), https://www.parlament.gv.at/PAKT/VHG/XXVII/AB/AB_00923/imfname_791360.pdf (Accessed 11 August 2020).

5.1: Human Rights and benefits granted to Refugees with a temporary leave to stay in Austria.

In 2004, following heated debates and discussions between the federal government authorities and the provincial authorities, a “Basic welfare support agreement” was reached. This was mainly to put the EU reception condition directive into practice and driving it to become Austrian national law. The main aim was to solicit for ways of how to provide for humane living standards for Asylum seekers. During the admissibility procedure, the Government through its ministry of Interior is responsible to take care of the Asylum seeker and to cover all necessary costs, once the Authority clarifies that Austria is responsible to take on the said asylum application, following the dispersal scheme (burden sharing), Asylum seekers are then allocated to different provinces within Austria. Then the costs are then split up between the federal government and the provinces in a ratio of 60:40 respectively. A fair sharing of asylum seekers in Austria is implemented however with many challenges as some provinces are reluctant to take on their maximum required share, this means that, some provinces like Vienna are left to take on the biggest share of Asylum seekers through this scheme (Rosenberger and König 2011). Rosenberg and König further argues that “these regional governments (who fail to take on their required share of asylum seekers) must instead offer financial compensation to regional governments willing to host more asylum seekers than demanded”.

Refugees with a temporary leave to stay under Art. 2 paragraph 1 subparagraph 1 of the Basic Welfare Support Agreement also qualify for such support. But still, this largely depends on which province in Austria a refugee is officially registered to stay. Among the 9 provinces in Austria, it is only in Vienna that people with tolerated stay continue to receive this basic support, all other provinces stop to provide such support as soon as one receives a return order.²³⁴ In an interview with Marty Huber from Queer Base, an NGO that is providing accommodation to LGBTIQ+ refugees in Austria, the main challenge the organization is facing are the refugees in the temporary leave to stay situation, especially those that are not registered in Vienna, she expressed her concerns especially that now it is next to impossible to change residence from one province to another.

²³⁴Interview with Marty (Queer Base).

Marty expressed her concerns especially the fact that basic welfare support to refugee is a state responsibility, and in that case, if a refugee cannot be deported, he/she should still be able to receive this support from the government wherever one is registered in Austria.

Right to housing, article 21 of the convention relating to the status of refugees puts it upon states to provide for lawfully staying refugees adequate housing with the same standards as other third country nationals legally staying in the country. In Vienna, refugees granted temporary leave to stay continue to live in the same facilities as they lived during their asylum process. In an interview with Emran (name changed), a refugee from Bangladesh who could not be deported because the Bangladesh embassy could not get him a travel document and now staying in one of the Queer Base residences, he had to lose his place of residence in Lower Austria when he received a last negative decision from the Federal administrative court, thanks to Queer Base, he now has a place to stay in Vienna.²³⁵ This shows how state derogate from their responsibilities when it comes to providing for basic rights to refugee. If such Organisations like Queer base are not in place, many people would be homeless in Austria. Other refugees who are still in the asylum process continue to get adequate housing, thanks to the Austrian government. According to the basic welfare support agreement, each Refugee is entitled to receive €17 per day, this covers housing and food costs per day for refugees who live in a collective facility like in Traiskirchen and Thalham. For facilities that allow self-catering like House Erdberg, Refugees then get more additional €40 in the name of pocket money (Rosenberger and König 2011).

Other basic welfare support enjoyed by refugees who are granted “temporary leave to stay” include; health care, the provision of adequate food, necessary clothing and a monthly allowance of €40 Per week (Art. 6 para 1 Basic Welfare Support Agreement). Still this will depend on where one is registered, for those refugees registered in Vienne, yes, they continue to enjoy this support, but of one is registered in any other 8 provinces, then this support is also not available anymore once one receives a return order. Peter Hacker (The Executive City Councilor for Social Affairs, Public Health and Sports,

²³⁵Interview with Emran (Refugee from Bangladesh).

in 2017 said “..... *the important thing is to make sure that Vienna does not become home to “neglected ghettos of undocumented migrants, it’s better that undocumented migrants should receive some form of social benefits which guarantee a basic standard of living, rather than have them slip through the net and wandering the city with no support - and possibly turning to crime”*.²³⁶

Queer base is trying hard to make sure that all refugees in its care are registered in Vienna, although it is a long and tiresome process, they tried to make an agreement with the City of Vienna to allow them transfer Queer Refugees who are assigned to other provinces to bring them to Vienna because Vienna is not only safe and open for Queer Refugees, but also that its welfare support for refugees is much more better than that of other provinces.²³⁷

Wage-earning employment (article 17 of the 1951 refugee convention). Refugees in Austria who have been granted international protection, subsidiary protection or a visa are allowed to access the job market. However, refugees who have a temporary leave cannot directly access to the job market since they do not have a legal right to stay in Austria. In an Interview with Marko (name changed on his request), a refugee from Serbia who was granted the temporary leave to stay in Austria because of family reasons, he explained his frustrations especially when it comes to working in Austria, to offer him a work permit, AMS (Austrian Public Employment Service) requires him to get a job contract first on his own so that they can offer him a work permit, the problem is that, whenever he goes to look for jobs, they might need someone who wants to start work the next day or in few days, and in order to start to work, he has to get a work permit which can take about two months for AMS for process his work permit.²³⁸ this frustrates many people in Marko’s situation. According to the basic welfare support agreement, access to employment for Asylum seekers and refugees falls under the Law on the employment of foreign workers. However, Asylum seekers and refugees have got some exclusions such as; not being able to access seasonal work due to the ministerial degree that limits the issuing of work permits specifically for seasonal jobs (Rosenberger and König 2011)

²³⁶The Local, “The 6,165 irregular migrants who can’t be deported from Vienna” <https://www.thelocal.at/20170120/the-irregular-migrants-who-cannot-be-deported-from-vienna> (Accessed 20 July 2020).

²³⁷Interview with Marty Huber (Queer Base).

²³⁸Interview with Marko (Refugee from Serbia).

In an Interview with Emran from Bangladesh, he said he failed to get a job to work legally, in an effort to provide for his family in back home, he decided to work illegally and he does cleaning jobs especially in Hostels around Vienna, he works for €5 per hours which is for him ok for now since he can collect some little money to help his family. He continues to receive basic welfare support since he is registered in Vienna. When asked about the challenges he face during work, apart from not being paid sometimes, he said others are just minor challenges which he seemed not bothered and did not want to talk deeper about them. This clearly shows how desperate people in that situation are, working under slave like situations and not being paid yet they cannot complain to anyone since their jobs are not legal.

The City of Vienna in its efforts to be regarded as the city of Human rights continues to provide safe haven for refugees. The city does not only provide the best social benefit for refugees at all levels but also creates platforms like “start Wien” or “More the one perspective”, platforms where recognized refugees are linked to possible employers, these platforms are further funded by the city of Vienna.

Public education (article 22 of the 1951 refugee convention): Elementary education is Austria is free of charge, in an Interview with Andreas (working with Tralalobe), an organisation that takes care of refugees who are under 18 years of age, he said that all refugees under their care do go to school, at whichever stage of their asylum process, be it rejected or tolerated to stay, education does not stop. The only challenge such children face is losing focus and not being motivated to attend school since they are sure that they will be deported as soon as they reach 18 years of age, said Andreas. Refugees who have been granted temporary leave to remain can also join University and other tertiary colleges. University initiatives such as the MORE Program, an initiative by UNIKO (Universities Austria) that provides refugees a space for reflection and find out whether University studies is an option for them.²³⁹

Social security (article 24 of the 1951 refugee convention): the refugee convention obliges states to offer refugees legally staying in Austria legal provisions in respect of employment injury, occupational diseases, maternity, sickness, old age, death, unemployment, family responsibilities and other benefits covered by social security schemes.

²³⁹UNIKO, “MORE Flüchtlingsinitiative der Universitäten”, <https://uniko.ac.at/themen/more/index.php?lang=EN> (Accessed 24 July 2020).

That is well applied to legal staying refugees in Austria, however, refugee with a temporary leave to stay are completely not covered with this scheme. In an interview with Marty Huber of Queer Base, she confirmed that such a scheme only applies to refugees with International protection, subsidiary protection or Visa. Since tolerated refugees are awaiting deportation, their access to the labor market is still limited and if one does not work legally in Austria, he is left out of the social security scheme.

Freedom of Movement (article 26 of the 1951 refugee convention): the convention obliges state parties to allow refugees staying lawfully on the territory choose their place of residence and to be able to move freely within the borders of the territory. Austria fulfills this duty on both refugees and those who are offered temporary leave to remain in Austria. They can both access all parts of the country at any time but when it comes to choosing places of residence, those a temporary leave to remain in Austria are only allowed to registered residence within their registered federal territory. A refugee with tolerated stay cannot change address to Graz once registered in Vienna for example, but refugees with International protection are free to registered residence in any part of Austria.

Table 4: Summary of initiatives and support for refugees with International protection, Subsidiary protection Vis-a-vis refugees with temporary leave to stay in Austria.

Rights and Benefits	International Protection and Subsidiary protection	Temporary leave to remain
employment	<p>Automatic non-limited working permit.</p> <p>Comprehensive competence checks of the AMS</p> <p>Competence clearings within the Integration Year Act</p> <p>Qualifikationspass [qualification pass] of the AMS Vienna and WAFF</p> <p>innovative online tools: berufsannerkennung.at</p> <p>ÖIF: provision of individual support for recognition and assessment procedures</p>	<p>Work permit offered by AMS upon getting a job</p>

	Mentoring for Migrants by AMS	
Health	<p>E-card (Covered by the minimum income support)</p> <p>Mental health Counseling facilities for traumatised persons (MA 17, Diakonie and Caritas.</p>	E-card (For those in Vienna) covered by the basic welfare support
Social assistance (In case of no employment)	Minimum Income (Mindestsicherung), €917 that covers housing and other basic costs like food and transport.	Basic welfare support (Grundversorgung), for those registered in Vienna. it also covers housing and transport costs. (€40 weekly) for food.
Family	<p>Entitled to family reunification</p> <p>As part of the family reunification, refugees who cannot be accommodated by their relatives due to space are provided separate facilities covered by the basic welfare support</p>	Not entitled to any family support or family reunification measures
Education	<p>Mandatory schooling for children below 15 years of age.</p> <p>More Initiative for those who want to go to universities.</p> <p>Financial support for children to buy scholastic materials.</p> <p>Start Wien Jugend College: acquisition of skills by refugees who are no longer in age of compulsory education.</p> <p>Youth College offers the possibility of education to minors and young adults who are either asylum seekers, recognized refugees or beneficiaries of subsidiary protection. include basic modules such as maths, English and IT as well as German and specialised modules and support programmes.</p>	<p>Mandatory schooling for children below 15 years of age.</p> <p>More Initiative for those who want to go to universities.</p>

Residence	<p>3 years legal residence, thereafter unlimited residence</p> <p>International protection: qualifies for citizenship after 10 years of uninterrupted residence in Austria.</p> <p>Subsidiary protection: qualifies for citizenship after 15 years of uninterrupted residence in Austria</p>	<p>1 year non-legal residence</p> <p>Special Protection residence permit (Article 57 asylum act 2005): after 1 year with temporary leave to stay.</p>
Integration	<p>ÖIF, AMS coordinate provision of vocation-specific technical language courses</p> <p>ÖIF: Intercultural competence course, counselling of new migrants, workshops for refugees, scholarships and awards, language courses</p> <p>City of Vienna: StartWien youth college, Women's college,</p>	Not entitled to integration benefits Austria
Freedom of movement	Freedom of movement within Austria, article 88 FPG, convention travel document that allows refugee to travel to other countries other than the country of origin.	Freedom of movement only within Austria.

Source: Own compilation

Challenges faced by refugees with temporary leave to remain in Austria

as already mentioned, temporary leave to remain in Austria is not a legal right of stay, but just an administrative move that allows people not to leave without any documentation, however, the status does not guarantee any rights like those obtained by beneficiaries of international protection or subsidiary protection.

In my Interview with Emran from Bangladesh, Emran confessed of a life challenge that he is going through, he told me that he is over forgetting about everything, he even forgot about our planned meeting that we did a day before, this is clearly a sign that he is traumatized. Marty Huber from Queer Base also acknowledged the same, most of her clients are having signs of PTSD (Post Traumatic Stress Disorder). Queer Base is working together with Diakonie in providing specialized treatment to refugees who are traumatized with the Austrian Asylum system.

In my Interview with David (32), a refugee from Nigeria, who is staying in Austria for almost twelve years without any legal documents. He failed in the asylum process and was offered a yellow identification card (Card for people with temporary leave to stay in Austria). During that year, he narrates as saying that the year 2011 was the hardest year in his life, that's when he got a yellow card and was registered to stay in Burgenland. Meaning that he lost all his social welfare support and was left to venture for himself, without any legal permission to work, David was convinced to start selling drugs in order to be able to sustain a normal life. Few days into the business, he was arrested by police and was sentenced to 24 months by the court. Upon his release, he was given a green identification card (tolerated stay card), which even limits his freedom of movement because he is not even allowed to cross past his province of registered address (Burgenland). He does black jobs to earn a living in Austria. He came to Austria when he was 21 years of age and now, he is 32 years old and still counting. He lost hope and a sense of direction in his life but with the help of the Nigerian community in Vienna and friends, he is still able to survive.

Common mental health disorders (including PTSD and depression): in an interview with Andreas Diendorfer (Tralalobe), he said that PTSD is highly prevalent in children under his care, in particular, refugee children present with anxiety disorders, depression, alcoholism, and drug abuse as a consequence of traumatic experiences related to war, lack of close family members and physical abuse on the long journey to Austria. This is also exacerbated by the failure in the asylum process and the threat of deportation. Tralalobe is offering psychological and mental health support to its clients through its private partners and companies in Austria so that they continue to help the young stars in managing a decent life in Austria. Most of the children in Tralalobe's care come from Afghanistan and Bangladesh.

Thanks to Amber Med, an NGO with doctors providing free medical treatment on voluntary basis to refugees without any health insurance,²⁴⁰ this has benefited a lot of refugees especially those with the temporary leave to remain in Austria. In an interview with David, he narrated the pain he went through after having a bicycle accident that left him with a broken clavicle bone, he did not know what to do next as he knew that hospital was not where he has

²⁴⁰Diakonie Flüchtlingsdienst, "AmnerMed" <https://fluechtlingsdienst.diakonie.at/einrichtung/ambermed> (Accessed 27 July 2020).

to go for treatment because of lack of insurance, but he was in touch with a social worker from Diakonie who helped him contact Amber Med hence a free operation for his injury.

People in such a situation are highly vulnerable to Human Trafficking, in an interview with Andreas Diendorfer, the most challenge faced by his organization is kids who tend to run away trying to go to France, to them, most of the kids just disappear without any notice in the hope that in France, they will not be deported back to Kabul (Afghanistan). Such kids are high target to traffickers if they end up in wrong hand. “These kids use smugglers who they pay to drive them to France” said Andreas.

Chapter 6: Conclusions and Recommendations

The EU Charter of fundamental rights provides specific rights to refugee, but it is not widely exploited when it comes to refugee protection. Asylum lawyers and counselors should use the charter together with other documents when fighting for the rights of refugees. Given the binding nature of the charter, asylum practitioners can use its standards to enhance the protection afforded to those seeking international protection. The same charter can also be used to interpret relevant EU asylum Regulations and Directives.

Basic welfare fare support provided to refugees especially to those still in the asylum process is very crucial in supporting refugee and making sure that at least people have a place to stay and have food. Other provinces in Austria that withdraw the support especially to refugees with a temporary leave to remain are causing more harm than good. It puts the already vulnerable group of people into a situation that is causing them more suffering. I would urge other provinces to use the example of the Vienna, Vienna continues to provide this support to people with a temporary leave to remain because once they withdraw the support, the crime rate will automatically increase because those people will still find other means of survival.

Austria should allow refugees to work at all levels, those who are still in the Asylum process and those who are temporarily staying in Austria. The Asylum process in some cases take more than Five years, and temporary leave to remain can as well take a long time. in my opinion, if such people are allowed to access the job market without a lot of bureaucracy and limitations, they might not even be in need of the basic welfare support since they will be able to provide for themselves. Asylum seekers and Refugees should as well be allowed

access to seasonal jobs, COVID 19 has as well proved a challenge for seasonal workers from the neighboring countries to come to Austria, this gap can be filled with the available labor from refugees who are locked up in camps and are not allowed to work. If given the opportunity, Refugees can play a big part in the economic growth of host countries hence a win-win situation.

Refugee support and protection is a state responsibility. Austria should fully take up this responsibility and provide for refugees equally. This responsibility should not be pushed upon NGOs and CSOs. At the moment, its NGOS like Diakonie, Caritas and others who are providing for accommodation especially to those refugees who are denied any legal status to stay in Austria and on the other hand cannot be deported. They the state can provide this temporary leave to remain, it should continue looking after those people and take full responsibility in all spheres of their lives.

Since the temporary leave to remain takes years and people in such a situation might stay like that for ages, I would suggest that considering them for integration like other refugees with international protection or subsidiary protection would be a best practice. Closing such people out with integration just limits their capability and efforts to integrate yet they will not go anywhere soon. They need to learn the language, learn a skill so as to be able to gain from that time they are still here. Such skills can as well be helpful when they go back home at a later time. at least they can start up something like a business back home and not just being idle and wasting time without being allowed to do anything.

Refugees who fail in their asylum process and want to voluntarily return home are given €500, together with paying their travels fares. Money as a tool to seduce people to return back home wouldn't be bad, but it is not the best practice in my view. Research has already shown that, most refugees would want to return home because of home sickness, influence of family members or lack of a perspective in Austria. When it comes to using money, first of all, refugees spend a lot more than €500 to come to Austria anyway. If it is to use financial means as a way to increase voluntary return, let it be above €3000 (the Swiss model). Because then a person would at least do something when they go back home, but €500 Euro will attract the least number of people.

Refugees who are issued with a return decision but do not possess a travel document are required by law (article 46(2), FPG) to acquire a travel document from the respective embassies themselves. Remember, Austria does not have some of the embassies here, that means that refugees have to travel to Germany or other countries to get a travel document, but remember that during that period, a person cannot travel outside Austria because of lack of a travel document. In such a situation, refugees are left with very few options but remember that someone has to show full cooperation with the authority in order not to be given a limited time for voluntary return, this creates frustrations and stress to many refugees because they are told to go back to the authority they are running away from. I would suggest that, Austria should take up full responsibility to acquire travel documents for refugees who have to return home because Austria has got full diplomatic potential to do so if they want to.

Desperate situations call for desperate measures, a temporary leave to stay causes a lot of uncertainties, especially to the recipients, coupled with limited means of survival, people tend to find a way of how they can manage their lives, lack of easy means for acquiring food, clothing and other basic needs for survival leads many into dangerous ideas, selling of drugs is the easiest and more profitable business that is left for people in that situation. They are high targets to be recruited by Mafias and thus, in a long run, many end up in prison as such activities are illegal in Austria.

Refugees Vs Economic migrants: Refugees who do not qualify for international protection might also have a possibility to get subsidiary protection or qualify for a visa in Austria. Qualifying for a Visa means that someone is only entitled to work and pay taxes in Austria. This takes away some of the rights and benefits a refugee would have got once getting international protection, hence a refugee be turned into economic migrant. Refugees are in need of protection and thus demand in the labor market in Austria cannot be justified to deny those in need of international protection to be turned into a source to fill up the labor gap.

The basic welfare support as agreed upon by the federal government and the federal provinces in 2004, entitles each refugee and asylum seeker to receive €17 per day to cover costs of food and accommodation. 16 years ago, the prices of goods and services were much lower as compared to today, everything now almost doubled in prices, coupled with inflation and all other factors. Without any doubt, this scheme should be revised so that it reflects the current situation of the ever-increasing prices of commodities. In that way, refugees will be

able to purchase the required food and pay for other basic needs so as to live a humane life in Austria. At least, let the same financial support offered to nationals who are in destitute a destitute situation also be applied to asylum seekers and refugees with a voluntary leave to stay.

The reasons as to why Refugees cannot return back to their home countries either voluntarily or by being removed are far beyond their control. Take for instance, the right to private and family life (Art. 8 ECHR), many refugees cannot go back because they already have families in Austria, by deporting such refugees to Serbia, it will break up their families apart and will automatically be in violation of Art. 8 of ECHR. There are many questions one would ask him/her self as to how this can even work in practice? How about children? How about refugees from Serbia like Marko who cannot be deported back to Serbia due to legal reasons? How about those who are staying in Austria because of health reasons? Deporting refugees who fail in their asylum process in Austria to Serbia leaves a lot of questions to be answered, and if the government succeeds in its plans, a lot of human rights violation will come up where by Austria will in a long run end up being dragged to the ECtHR. every refugee who cannot go back home either voluntarily or by being removed has got genuine reasons as to why such a scenario is happening. Austria should just find a way of how to legalise their stay in Austria.

Chapter 7: Bibliography

International Treaties and Conventions

Convention Against Torture, (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 02 September 1990) 1577 UNTS 3.

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

Optional Protocol Relating to the Status of Refugees (adopted 31 Jan 1961) 6223 UNTS 267.

Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 04 October 1967) 606 UNTS 267.

UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, <https://www.refworld.org/docid/4538834f11.html> (accessed 23 June 2020)

UN General Assembly, Declaration on Territorial Asylum, (Adopted at the 1631st plenary meeting, 14 Dec. 1967; In: Resolutions adopted by the General Assembly during its 22nd session), Volume I, 19 September-19 December 1967

Universal Declaration of Human Rights (Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948).

UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 15 (Rev.1), Civil and Political Rights: The Human Rights Committee, May 2005, No. 15 (Rev.1), <https://www.refworld.org/docid/4794773c0.html> (accessed 25 June 2020).

European Instruments

Charter of Fundamental Rights of the European Union, (adopted 2 October 2000, entered into force 1 December 2009) 2012/C 326/02

Council Directive, Directive 2008/115/EC of the European parliament and of the council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, <https://www.refworld.org/docid/496c641098.html> (Accessed 10 June 2020).

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 04 November 1950, entered into force 03 September 1953) ETS 5.

Council of the European Union, Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, 7 August 2001, OJ L.212/12-212/23; 7.8.2001, 2001/55/EC <https://www.refworld.org/docid/3ddcee2e4.html> (Accessed 05 June 2020).

Council of the European Union, Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who are Long- Term Residents, 23 January 2004, OJ L. 16-44; 23. 1. 2004, 2003/109/EC <https://www.refworld.org/docid/4156e6bd4.html> (Accessed 06 June 2020).

Council of the European Union, Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC <https://www.refworld.org/docid/3f8bb4a10.html> (Accessed 06 June 2020).

Council of the European Union, Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, 2 January 2006, OJ L 326; 13 December 2005 <https://www.refworld.org/docid/4394203c4.html> (Accessed 8 June 2020).

Council of the European Union, Directive 2011/95/EU of the European parliament and of the council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU <https://www.refworld.org/docid/4f197df02.html> (Accessed 5 June 2020)

Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU <https://www.refworld.org/docid/51d29b224.html> (Accessed 05 June 2020).

Council of the European Union, Directive 2013/33/EU of the European parliament and of the council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, <https://www.refworld.org/docid/51d29db54.html> (Accessed 15 June 2020).
ECtHR, Chahal v. The United Kingdom, no. 22414/93, 15 November 1996.

ECtHR, Conka v. Belgium, Appl. no. 51564/99, 5 February 2002.

ECtHR, Cruv Varas and others v. Sweden, no. 15576/89, 20 March 1991.

ECtHR, Hirsi Jamaa and others v. Italy, no. 27765/09, 23 February 2012.

ECtHR, M.S.S V. Belgium and Greece, no. 30696/09, 21 January 2011.

ECtHR, Saadi v. Italy, 37201/06, 28 February 2008.

ECtHR, Soering V. The United Kingdom, no. 14038/88, 7 July 1989.

ECtHR, Sufi and Elmi v. The United Kingdom, no. 8319/07 and 11449/07, 28 November 2011.

ECtHR, Terakhel v. Switzerland, no. 29217/12, 4 November 2014.

EU Regulation no 604/2013 of the European parliament and of the council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 February 2013, OJ L. 180/31; 29.6.2013, <https://www.refworld.org/docid/58a1ab0d4.html> (Accessed 25 June 2020).

Austrian legal instruments

Federal Act laying down general stipulations concerning procedures before the federal office for immigration and asylum in relation to the granting of international protection, residence permits on grounds deserving of consideration and temporary leave to remain, the imposition of deportation orders and measures to terminate residence and the issuance of Austrian documents to aliens (federal office procedure act)", <https://www.refworld.org/docid/5c863e697.html> (Accessed 17 July 2020).

Federal Act on the Conduct of Aliens Police Operations, the Issue of Documents for Aliens and the Granting of Entry Permits (2005 Aliens Police Act – Fremdenpolizeigesetz 2005), 1 September 2018, <https://www.refworld.org/docid/5c8626fa7.html> (Accessed 5 June 2020).

Federal law concerning the granting of Asylum (2005 Asylum Act – asylgesetz 2005), 1 September 2018, <https://www.refworld.org/docid/5c86285b7.html> (Accessed 5 June 2020).

Federal Law Regulating Basic Welfare Support of Asylum-Seekers in Admission Procedures and of Certain Other Aliens (Federal Government Basic Welfare Support Act 2005 – GVG-B 2005) - unofficial consolidated version - 1 September 2018, <https://www.refworld.org/docid/5c863f647.html> (Accessed 20 June 2020).

Parliamentary inquiry 866/J (XXVII. GP), https://www.parlament.gv.at/PAKT/VHG/XXVII/I/I_00866/fname_782030.pdf (Accessed 11 August 2020).

VfGH Decision U 98/12, 27 June 2012" https://www.asylumlawdatabase.eu/sites/default/files/alddfiles/Original%20Judgment%20VfGH%20U98_12%2C%202012-06-27.pdf (Accessed 17 July 2020).

Written Answers 923/AB von 14.04.2020 zu 866/J (XXVII, GP), https://www.parlament.gv.at/PAKT/VHG/XXVII/AB/AB_00923/imfname_791360.pdf (Accessed 11 August 2020).

All other sources

Asylkoordination Österreich, "Regular Procedure" <https://www.asylumineurope.org/reports/country/austria/asylum-procedure/procedures/regular-procedure> (Accessed 17 July 2019).

Austrian Airline Art. 7, General conditions of carriage for passengers and baggage – Vienna, June 2017, https://www.austrian.com/Info/LegalRegulations/ConditionsOfCarriage.aspx?sc_lang=en&cc=AT (accessed 22 July 2020).

B. Gorlick, The convention and the committee against torture: a compulsory protection regime for refugees, "International Journal of Refugee Law, 1999, Vol 11, no. 3, pp 479 – 495.

B. Günter., D. Rupnow., Migration in Austria, "Innsbruck University press", <https://diglib.uibk.ac.at/ulbtirola/download/pdf/2546704?originalFilename=true> ,Vol 26, pp 38-41, (accessed 13 July 2020).

Baldaccini. A., "The EU Directive on Return: Principles and Protests, *Refugee Survey Quarterly*", Volume 28, no. 4, 2009, Pages 114–138, <https://academic-oup-com.uaccess.univie.ac.at/rsq/article/28/4/114/1550517> (Accessed 13 July 2020).

BFA, "Asylum procedure", https://www.bfa.gv.at/files/broschueren/Informationsbroschuere_Asylverfahren_in_Oesterreich_EN.pdf (Accessed 20 July 2020).

BFA, "Voluntary departure and return assistance a fresh start, new prospects" <http://www.voluntaryreturn.at/en/> (Accessed 20 July 2020).

BM.I reply to Parliamentary Questions, 8 November 2017, https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_13244/imfname_673594.pdf (Accessed 17 July 2020).

BM.I, “Asylum statistics 2019”, https://www.bmi.gv.at/301/Statistiken/files/Jahresstatistiken/Asyl-Jahresstatistik_2019.pdf (Accessed 20 July 2020).

BMI, “Asyl Statistiken” <https://www.bmi.gv.at/301/Statistiken/start.aspx> (Accessed 7 May 2020).

BMI, “Asylum, Migration and Integration Fund (AMIF)”, <https://www.bmi.gv.at> (Accessed 20 July 2020).
Bundesamt für Fremdenwesen und Asyl, “Aufgaben des BFA” <https://www.bfa.gv.at/bundesamt/aufgaben/start.aspx> (Accessed 17 July 2020).

Bundesministerium für Inneres, “Asyl” <https://www.bmi.gv.at/301/Allgemeines/Asylverfahren/start.aspx> (Accessed 17 July 2020).

Castello, c., *The Human Rights of Migrants and Refugees in the European Law*, Oxford University press, 2016.

Caritas & DU, “Rückkehrhilfe” <https://www.caritas-wien.at/hilfe-angebote/asyl-integration/beratung-fuer-fluechtlinge/rueckkehrhilfe/> (Accessed 20 July 2020).

Carton. J “Complicated Refugees: A study of the 1951 Geneva convention Grounds in Aleksandar Hemon’s Life Narrative”, 2018, Pg. 331-347.

Council of Europe, “Treaty office” <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3> (Accessed 23 June 2020).

D. Leithold, “Asylum in Europe”, *Dice Report*, Vol. 13, No. 4, 2015, pp. 55-58, (accessed 1 July 2020)

Dahlvik, J., *Inside Asylum Bureaucracy: Organizing Refugee status determination in Austria*, Switzerland, Springer International publishing AG, 2018.

Diakonie Flüchtlingsdienst, “AmnerMed” <https://fluechtlingsdienst.diakonie.at/einrichtung/ambermed> (Accessed 27 July 2020).

ECRE, “The application of the EU Charter of Fundamental Rights to asylum procedural law” <https://www.ecre.org/wp-content/uploads/2014/10/EN-The-application-of-the-EU-Charter-of-Fundamental-Rights-to-asylum-procedures-ECRE-and-Dutch-Council-for-Refugees-October-2014.pdf> (Accessed 2 July 2020).

ECRE, ECRE Information Note: on the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals” <https://www.refworld.org/docid/496c61e42.html> (Accessed 6 July 2020).

ECRE, Information Note on Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)”, https://www.ecre.org/wp-content/uploads/2016/07/Information_Note_Reception-2015.pdf (Accessed 6 July 2020).

EMN, “Return Migration in Austria” https://www.emn.at/wp-content/uploads/2017/01/PS_III_Return_FINAL_ENG_lr.pdf (Accessed 20 July 2020).

EUR-Lex, “Family reunification” <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133118> (Accessed 6 July 2020).

Eur-lex, “Living conditions for asylum seekers- EU rule” https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A23010502_2 (Accessed 6 July 2020).

EUR-Lex, “Refugees and stateless persons — common standards for qualification” <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex:32011L0095> (Accessed 3 July 2020).

European Commission, “Annual Report on Migration and Asylum” https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_arm2019_synthesis_report_final_en_0.pdf (Accessed 21 July 2020).

European Commission, “Asylum, Migration and Integration Fund (AMIF)” https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en (Accessed 20 July 2020).

European commission, “Migration and Home affairs” https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en (Accessed 5 June 2020).

European Council on Refugees and Exiles, “The EU Charter of Fundamental Rights; an indispensable instrument in the field of asylum”, <https://www.ecre.org/wp-content/uploads/2017/02/The-EU-Charter-of-Fundamental-Rights.pdf> (Accessed 1 July 2020).

Federal Office for immigration and Asylum (BFA), “Asylum procedure” https://www.bfa.gv.at/files/broschueren/Informationsbroschuere_Asylverfahren_in_Oesterreich_EN.pdf (Accessed 5 June 2020).

Federal Office for Immigration and Asylum, *Neues Rückkehrhilfeprogramm für Asylbewerber aus Afghanistan, Marokko und Nigeria*, <http://www.bfa.gv.at/presse/thema/detail.aspx?nwid=4F717067766351484946513D&ctrl=2B7947437976465443374D3D> (Accessed 20 July 2020).

Frontex, “Return”, <https://frontex.europa.eu/operations/return/> (Accessed 20 July 2020).

H. Ondrej, Czech Refugees in Austria 1968-1985, “Directory of open access Journals” https://sites.ff.cuni.cz/praguepapers/wp-content/uploads/sites/16/2016/11/ondrej_hlavac_82-97.pdf, 2016, vol 1, p 82-97, (Accessed 15 July 2020).

Herbert Kickl – IM ZENTRUM – Wer Schützt den Staat – 22 September 2019 [online video], 2019, <https://www.youtube.com/watch?v=NhNuBdr6Tdw&feature=youtu.be> (Accessed 11 August 2020).

International Justice Resource Centre, “Special Rapporteur on Torture and other Cruel, Inhuman or degrading treatment or punishment”, https://ijrcenter.org/un-special-procedures/special-rapporteur-on-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment/#MANDATE_OF_THE_SPECIAL_RAPPORTEUR_ON TORTURE (Accessed 25 June 2020).

IOM, “Assisted Voluntary Return and Reintegration from Austria”, https://austria.iom.int/sites/default/files/IOMaustria_AVRStatistics2019.pdf (Accessed 20 July 2020).

IOM, “Assisted Voluntary Return and Reintegration” <https://austria.iom.int/en/assisted-voluntary-return-and-reintegration> (Accessed 20 July 2020).

J. Ristik, ‘The Right to Asylum and the principle of Non-refoulement under the European Convention of Human Rights’, European Scientific Journal, vol 13, no. 28, 2017 pp. 109- 115, (Accessed 23 June 2020).

James C. Hathaway, “International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative” <https://www.refworld.org/pdfid/3dca73274.pdf> (Accessed 22 June 2020).

K. Butts., K. Hummel., M. Ferrill., S. Ozinga., “Austria and the Refugee crisis: An analysis of American sentiment in social versus print media” https://socialinnovation.usc.edu/wp-content/uploads/2017/09/FINAL-Report_USC_Embassy-of-Austria.pdf (Accessed 13 July 2020).

Ludwig Boltzmann Institute of Human Rights, “Stop of deportation to Greece” <https://bim.lbg.ac.at/en/news/stop-deportations-greece> (accessed 25 June 2020).

M. Böse, R. Haberfellner, A. Koldas., “Mapping Minorities and their Media: The National context – Austria” https://www.zsi.at/attach/MinoritiesMedia_AT2001.pdf (Accessed 15 July 2020).

OHCHR, “Special Rapporteur on Torture and other Cruel, Inhumane and Degrading Treatment or Punishment” <https://www.ohchr.org/en/issues/torture/srtorture/pages/srtortureindex.aspx> (Accessed 25 June 2020).

OHCHR, “The principle of non-refoulment under international law” <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> (Accessed 5 June 2020).

Österreichischer verwaltungsgerichtshof, “Verwaltungsgerichtshof spricht sich gegen den geplanten Ausschluss der außerordentlichen Revisionen in Asylverfahren aus” https://www.vwgh.gv.at/medien/mitteilungen/regierungsprogramm_2017_2022.html (Accessed 20 July 2020).

S. Rosenberger, C. Küffner, R. Hsu, C. Reinprecht., After the Deportation Gap: Non-Removed Persons and their pathways to social Rights, *Göttingen: V&R Unipress*, 18 January 2016, Vol 1, no. 1, pp. 137-150.

S. Rosenberger and A. König, “Welcoming the Unwelcome: The Politics of Minimum Reception Standards for Asylum Seekers in Austria” *Journal of Refugee Studies*, Vol. 25, no. 4, 2012, pp. 537–554.

Subasi Vera, “The integration of Bosnian and Syrian war refugees in Austria in the 1990s and today” <http://othes.univie.ac.at/54013/>, University of Vienna 2018. (Accessed 9 June 2020).

The Local, “The 6,165 irregular migrants who can’t be deported from Vienna” <https://www.thelocal.at/20170120/the-irregular-migrants-who-cannot-be-deported-from-vienna> (Accessed 20 July 2020).

UHCHR, “Committee against Torture” <https://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx> (Accessed 25 June 2020).

UHCHR, “UN’s Committee against Torture issues new guidelines on asylum seekers’ rights” <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22725&LangID=E> (Accessed 25 June 2020).

UNHCR, “A guide to international refugee protection and building state asylum systems” <https://www.unhcr.org/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html> (Accessed 22 June 2020).

UNHCR, “Beyond Detention 2014-2019: A Global Strategy to support governments to end detention of asylum-seekers and refugees”, <https://www.unhcr.org/53aa929f6.html> (Accessed 6 July 2020).

UNHCR, “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees” <https://www.unhcr.org/4d93528a9.pdf> (Accessed 20 June 2020)

UNHCR, “Note on Asylum EC7SCP/4” <https://www.unhcr.org/excom/scip/3ae68cbb30/note-asylum.html> (Accessed on 22 June 2020) .

UNHCR, “Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights” <https://www.unhcr.org/research/working/4552f0d82/protecting-refugees-asylum-seekers-under-international-covenant-civil-political.html> (Accessed 23 June 2020).

UNHCR, “Trainingshandbuch für DolmetscherInnen im Asylverfahren” https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/AUT_UNHCR_Trainingshandbuch_fuer_DolmetscherInnen_im_Asylverfahren.pdf (Accessed 17 July 2020).

UNHCR, “Voluntary return” <https://help.unhcr.org/austria/voluntary-return/> (Accessed 20 July 2020).

UNHCR, Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 23 July 2003.

UNIKO, “MORE Flüchtlingsinitiative der Universitäten”, <https://uniko.ac.at/themen/more/index.php?lang=EN> (Accessed 24 July 2020).

Verein Menschenrechte Österreich, “Rückkehrberatung” <http://www.verein-menschenrechte.at/rueck.html> (Accessed 20 July 2020).

Void, online movie, <http://www.voidthemovie.com/index.html> (Accessed 22 July 2020).

Wikipedia, “Marcus Omofuma” https://en.wikipedia.org/wiki/Marcus_Omofuma (Accessed 20 July 2020).

wikipedia, “Refugee law” https://en.wikipedia.org/wiki/Refugee_law (Accessed 22 June 2020).

Interview

Thiemo, B., Interview, Vienna, 22 June 2020

Marty, H., Interview, Vienna, 15 June 2020

Yousef, E., Interview, Vienna, 19 June 2020

Marko, V., Interview, Vienna, 26 June 2020

Andreas, D., Phone Interview, Vienna, 10 June 2020.

David, K., Phone Interview, Vienna, 10 July 2020.

Abstract

During the recent migration crisis, Austria welcomed a large number of refugees and was also a transit place for many who continued to other European countries especially Germany and Sweden. Refugees who decided for Austria as their final destination had to apply for asylum as a legal process to allow them stay in the Country. However, not everyone who applies for Asylum automatically qualifies for International protection or subsidiary protection. A big number of people failed in the asylum process, and by law, those people have to return or be returned back to their countries of Origin. Returning refugees who fail in the Asylum process has however turned to be a big challenge for Austria as not all refugees who receive a return order can either voluntarily return or be kicked out of the country, this is due to legal or factual reasons that are beyond control of the refugees themselves.

Abstrakt

Während der jüngsten Migrationskrise hieß Österreich viele Flüchtlinge willkommen und wirkte als Transitland für viele, die in andere europäische Staaten, vor allem nach Deutschland und Schweden weiterreisten. Flüchtlinge, die sich für Österreich als Zielland entschieden, mussten um Asyl ansuchen als legalen Prozess ansuchen, um im Land bleiben zu dürfen. Jedoch nicht jeder, der um Asyl ansucht qualifiziert sich automatisch für internationalen oder subsidiären Schutz. Sehr viele Menschen bestanden den Asylprozess nicht, sie müssen laut dem Gesetz in ihre Herkunftsländer zurückgehen beziehungsweise zurückgebracht werden. Flüchtlinge, die den Asylprozess nicht bestanden haben zurückzubringen, stellte eine große Herausforderung für Österreich dar, denn nicht alle Flüchtlinge, die einen Abschiebungsbescheid erhalten haben, können freiwillig zurückkehren oder abgeschoben werden. Das ist aufgrund gesetzlicher und faktischer Gründe, die außerhalb der Kontrolle der Flüchtlinge liegen.