

Civil Society Input to the 2019 EASO Annual Report on the Situation of Asylum in the EU

Thank you for the opportunity to provide information regarding the situation of Asylum in Austria. We have outlined in this report some of the major issues and developments in the asylum system as we see them through our work with asylum seekers.

Our Expertise

The team of Caritas Legal advisors are available on a daily basis to provide legal advice to asylum seekers in the Caritas Asylum Centre¹.

There is no need for prior appointments and we have interpreters in all the main languages available. We provide legal advice to over 2500 asylum seekers per year at any stage of their asylum procedure, be it a Dublin procedure, substantive procedures for international protections, preliminary examinations of subsequent applications or subsequent applications themselves. In addition we represent several hundred asylum seekers in front of the immigration authority (Bundesamt für Fremdenwesen und Asyl "BFA") and in front of the administrative court (Bundesverwaltungsgericht "BVwG"). In the course of both our work at the drop in asylum center and as legal representatives for asylum seekers we draft legal submissions and appeals in all manner of cases and all stages of applications for international protection. We are one of the few organisations who can provide legal assistance and representation at the immigration authority.

Currently there are no formal qualification requirements for case workers at the BFA. There are case workers who have no further formal qualifications other than school qualifications. Given the complex nature of asylum claims and the necessary in depth knowledge of not only particular countries but also their cultural aspects, we have noticed that this can present a problem. For example the case worker doesn't understand the response of the asylum seeker in the interview because they haven't understood the cultural context of the answer.

As a result of our front line work with asylum seekers and our regular work at the BFA and the BVwG we are in a position to report not only on the current legal situation of the asylum procedure in Austria but what this actually means in practice for the individual applicants.

Our report is divided into two parts. The first part deals with general observations regarding the asylum system as a whole. The second part deals with observations regarding vulnerable asylum seekers and victims of gender based violence.

PART ONE – GENERAL ASYLUM SYSTEM

¹ <https://www.caritas-wien.at/hilfe-angebote/asyl-integration/beratung-fuer-fluechtlinge/asylrechtsberatung/>

The main issues of concern are:

1. The introduction of the Federal Agency for Supervision and Support Services (“Federal Agency”) (Bundesagentur für Betreuungs- und Unterstützungsleistungen, “BBU” GmbH).
2. The widespread/systematic and arbitrary revocation of asylum and international protection by the immigration authority;
3. The introduction of security detention (Sicherungshaft);
4. An effective access to the labour market for asylum seekers;
5. Ability to make subsequent applications – Austrian law regarding new “facts and findings”
6. The Afghanistan Expert appointed by the BVwG Mr Mahringer;

1. Federal Agency for Supervision and Support Services (Bundes Agentur für Betreuungs- und Unterstützungsleistungen, BBU GmbH)

On 19 June 2019 the Austrian Parliament adopted a law establishing a new Federal Agency for Supervision and Support Services (Bundes Agentur für Betreuungs- und Unterstützungsleistungen, BBU GmbH). Several tasks which were formally contracted out to independent NGOs (ARGE und VMÖ) were contracted by the government to provide legal advice in Dublin procedures and following decisions made by the BFA. (These contracts have now been terminated with effect from 01.01.2021). In Austria, including importantly the provision of legal advice, will now be carried out by an ostensibly quasi-government organization. According to the new law the Federal Agency will carry out the following services:

- a. Provision of basic material care for asylum seekers according to the Reception Directive during Dublin Procedures and preliminary examinations of subsequent applications for international protections (“Zulassung im Folgeverfahren”)
- b. Provision of legal advice for asylum seekers;
- c. Provision of assistance for voluntary return;
- d. Provision of interpreters and translators for asylum procedures;
- e. Provision of human rights observers to monitor deportations.

Basic material care in the Federal Agency is scheduled to start from 01.07.2020. All other services will commence from 01.01.2021.

A detailed legal analysis of the concerns regarding the Federal Agency can be found under in the Legal Note from ECRE from 5 July 2019 in English².

Under the new law legal advice will be provided to asylum seekers in Dublin procedures but also in preliminary examinations of subsequent applications for international protection. Both constellations are legally very complex, especially subsequent applications which demand an in depth knowledge of any previous application to be to clarify the relevance of new submissions.

² <https://www.ecre.org/wp-content/uploads/2019/07/Legal-Note-5.pdf>

Concerns regarding the access to legal advice is that in Dublin Procedures the access to legal advice in the Federal Agency will be limited by time (applicants can only receive legal advice to reply to the BFAs intention to reject the application if the interview is set within 24-72 hours after the BFA makes its intention clear through a formal notice ("Mitteilung"). This leaves the applicant's access to legal advice in the hands of the BFA and when the BFA sets the time for the interview. Furthermore all access to legal advice in the Federal Agency is generally limited by "available resources". Legal advice will also be provided for an appeals process.

It was a clear priority of the government when the law was introduced that less appeals should be submitted by asylum seekers. Indeed this was one of the driving forces behind establishment of the Federal Agency – as can be seen by reference to the submissions to parliament made by the government (white paper) regarding the goals for the new Federal Agency³.

Through our broad access to asylum seekers via the drop in center and through the cases we have represented before the authorities and courts we have experienced first-hand the essential nature of quality legal advice in the appeals process and how this can directly affect the outcome of a case. Most importantly legal advice cannot be provided on the basis of objective criteria. Effective legal advice must be based around the principle of the best interests of the client.

Many asylum seekers approach our legal advice service because they have concerns about the appeal that has been lodged on their behalf. In many cases this concern was indeed founded. Appeals are submitted without having spoken in depth with the client, without the use of a translator or even worse appeals are not submitted because the legal advisor sees no chance of success after only a cursory assessment of the case. In many cases (but not all) this is due to a lack of time and resources which will only be compounded in the new Federal Agency which has even more limited resources (see below).

In many instances we have taken on these cases and won them simply through the provision of quality in depth legal advice and taking the time to understand and represent the persecution faced by the individual.

It should be noted that 40% of decisions made by the asylum authority (BFA) are amended or set aside by the court⁴. This demonstrates the extent to which the asylum authority is making unfounded decisions and the necessity for quality appeals to uphold the rule of law and legal process.

Given that the government envisages there will be a need for 85,000 legal consultations and 6600 cases to be represented at court, to be carried out by a foreseen 110 legal advisers, it can be assumed that there will be a general lack of resources leading ultimately to a lack of legal advice⁵.

³ See page 5, goal 2 -

https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00127/imfname_741195.pdf

⁴ cf Annual Report of the Bundesverwaltungsgericht 2018

https://www.bvwwg.gv.at/allgemeines/taetigkeitsbericht/taetigkeitsbericht_start.html

⁵ see government submissions page 3 and 13

https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00127/imfname_741195.pdf

The government claims to have taken account of the concerns of civil society that the state not only issues the decisions but also offers legal advice on its own decisions in the form of the Federal Agency by establishing a legal company which will effectively employ the legal advisers thus taking them out of the direct control of the state. The issues with the legal advice to be provided in the Federal agency is that government wishes to establish objective criteria for bringing an appeal. This denies the legal adviser the opportunity to act in the best interests of the client and bring an appeal, even if this is against the express wishes of the government remains doubtful.

Ultimately many factors flow into the provision of quality independent legal advice. In depth knowledge of the law is just one factor. The ability to establish trust, especially given the sensitive nature of international protection cases, the correct setting, the true appearance of independence, the use of trusted translators all flow into achieving effective legal advice. It is difficult to see how these factors can be upheld in state run environment, where the state is also the decision maker.

Concerns including a lack of independence of and assurance of the quality of legal advice in the regarding the Federal Agency have also been raised by the Austrian Law Society (Rechtsanwaltskammer)⁶. The extent to which there will still be access to external legal advisors remains unclear.

A campaign has also been initiated by several NGOs with the support of Amnesty International to raise awareness of the need for truly independent legal advice⁷.

2. Revocation of subsidiary protection and asylum

In Austria beneficiaries of sub protection need to formally apply for their subsidiary protection to be extended. Initially the status is granted for one year, then for 2 years at a time.

a. Revocation of subsidiary protection

A major recent development in the practice of the BFA is that now with every application to renew subsidiary protection a revocation procedure is arbitrarily initiated.

Applicants from several countries are affected – Afghanistan, Iraq, Somalia, Chechnya, Georgia (not an exhaustive list).

Due to the arbitrary nature of these revocation procedures and completely different approaches and decisions depending on the case worker and the BFA in charge of the case, applicants find themselves in a very vulnerable position. By way of example of the arbitrary nature of the procedure, even in cases where the situation in the home country has improved subsidiary protection was extended because the applicant was well integrated (which of course is not legally relevant to the examination of the need for international protection). In other cases where the security situation the country of origin remained very severe international protection was revoked and a humanitarian visa was granted despite excellent integration.

⁶ https://www.parlament.gv.at/PAKT/VHG/XXVI/SNME/SNME_04091/imfname_747934.pdf

⁷ <https://www.fairlassen.at/>

Furthermore the Supreme Administrative Court (Verwaltungsgerichtshof "VwGH") adjudicated that revocation does not merely depend on an improvement of the situation in the country of origin but is also possible if the individual situation of the applicant has changed e.g. they have more experience in the work force, more education (even if the education they might have received and the work experience they might have gained is of no use to them in their country of origin).

With regard to Afghanistan the BFA initiates revocation proceedings with the assertion that the situation in the home country has improved and no longer meets the threshold required for a breach of Art. 3 ECHR. Especially with regards to Afghanistan the BFA claims that there are "new" internal flight alternatives in Mazar –e-Sharif and Herat. These apparent new factual circumstances are often "coming to light" only 6 months or even just a year after the original final decision, where such circumstances had already been excluded. The authority makes no effort to show how these new factual circumstances are sufficiently significant and demonstrating a definitive change. Nevertheless subsidiary protection is revoked.

A further development is that revocation procedures are initiated as soon as beneficiaries of international protection travel to countries even merely bordering their country of origin. There is a blanket assumption that the applicant has travelled to their country of origin. Proving the contrary can be very difficult if applicants did not keep hold of receipts. Often they have stayed with family and are unable to "prove" (eg via hotel receipts) how long they stayed in one place.

The uncertainty is compounded by that fact that no clear picture of the decisions of the court regarding revocation cases has emerged. Many cases of revocation have been confirmed by the court – although many were where the applicants had a criminal conviction. This means there remains a huge level of uncertainty for applicants during these proceedings and there is very little they can do to improve their chances of success.

Persons with subsidiary protection can change to Long Term Residence Status ("Daueraufenthalt EU") after five years according to the Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. But they have to have a relatively high level of German (B1), sufficient income and their own flat. Many persons are not able to reach these requirements (despite great efforts to find well paid work) and therefore are at risk of being returned, despite many years in Austria. The difficulties are accentuated by the immigration authority dealing with regular migration in Vienna ("MA 35") has also become more restrictive in granting Long Term Residence Status.

b. Revocation of asylum

Asylum is also being revoked from persons who have had asylum status for many years (many even since 2003/2004). Cases are initiated, as above, if refugees travel to countries neighboring to their home country. If someone has had asylum for more than five years, it can only be revoked if that person has a serious criminal conviction. Asylum can otherwise only be revoked after five years if the authority for regular immigration (MA35) grant Long Term Residence Status ("Daueraufenthalt EU). This cannot be granted even if there is a mild conviction.

The main nationality effected is Chechen.

In many cases, even if there may be grounds to revoke protection, the authorities are not assessing whether people might still be in danger if returned and whether they are protected by the non-refoulement principle.

c. Effects of revocation procedures

The result of these arbitrary revocation procedures on the beneficiaries of international protection cannot be underestimated. Beneficiaries remain in a position of extreme uncertainty for long periods. Cases including appeals can last up to two years. This causes not only unnecessary additional emotional stress but has severely negative consequences on their ability to integrate successfully. Other agencies such as the Job Service (Arbeitsmarktservice “AMS”) or the Benefits Agency (“MA 40”) assume that the initiation of revocation procedures means that protection has effectively been withdrawn resulting in benefits being wrongly withdrawn and access to the employment market being halted. Families have been left in dire financial straits as a result of these continuing errors. There are also major knock on effects regarding integration – be it access to language courses or to work. A lack of attendance is then used against the applicant as proof of a lack of integration even though they are not to blame for the lack of access.

In addition the initiation of revocation procedures prevent the possibility of family reunification. Given that the procedures, including appeal time can last over 2 years, this causes great distress and frustration for beneficiaries and is indeed a clear frustration of their right to family reunification.

3. Security Detention

The Austrian government wishes to introduce a new form of detention of asylum seekers. This desire stems from the murder of a civil servant in Dornbirn in Vorarlberg by an asylum seeker⁸.

The Austrian government is planning to introduce detention for asylum dangerous asylum seekers (“Sicherheitshaft”) as covered by Article 8 of the Receptions Directive 2013.

This law would impinge on the personal freedom of the asylum seeker in a way which breaches the Austrian law on Personal Freedom rooted in the Austrian constitution. This law contains an exhaustive list of the reasons which allow personal freedom to be limited (strong suspicion of a crime, a conviction or to effect a removal). This means that the introduction of a new law for preventative security detention would in theory require a change to the constitution. Furthermore, if the list where personal liberty can be restricted is extended under the constitution the new law could not be restricted to asylum seekers but would affect all persons in Austria.

4. Lack of implementation of European Law – Access to Labour Market for Asylum Seekers

⁸ <https://www.derstandard.at/story/2000097661851/opfer-der-toedlichen-messernach-toedlicher-messerattacke-war-leiter-des-sozialamts>

In the 2018 EASO reported on the decision by the administrative court that applicants should have effective access to the labour market:

“The Austrian Federal Court delivered a judgement relevant to applicants’ entitlement to work and stated that applicants should indeed have effective access to the labour market based on the provisions of the recast RCD.502”⁹.

The Job Service (“AMS”) is now appealing the decision and hoping to have it set aside by the VwGH. It is not clear what the outcome will be but we hope that the clear rights of asylum seekers will not be further eroded. To our knowledge there is no decision at this stage.

5. Current Request for a Preliminary decision.

The supreme administrative court (VwGH) in Austria has requested a preliminary ruling from the European Court of Justice. The question regards subsequent applications. In Austria if new facts come to light which concern issues which already existed during a previous asylum application these new facts cannot be the base of a subsequent application? Rather they can only be asserted through applying for proceedings to be reopened (“Wiederaufnahme”). This application has to be made within two weeks of the applicant gaining knowledge of the new facts/evidence. Furthermore the applicant can bear no blame for not presenting the facts/evidence in the previous case. Understandably asylum seekers are not going to be aware of these complicated provisions and will have no way of knowing or be able to prepare such a complicated application – especially in regard to proving that the application is being made within a two week deadline. Finally there are two options where the application needs to be lodged depending on where the final decision was made. In short the process is incredibly complicated. No lay person is able to make a successful application without legal assistance (which they have to access within the time limit), they are unlikely to even know that such a possibility exists and as such are rarely in a position to be able to assert these rights effectively.

The question that has been brought before the European Court of Justice is whether this Austrian application for a reopening of the previous application (“Wiederaufnahme”) is actually in line with Art 40 (2) and (3) of the Procedures Directive 2013/32/EU¹⁰. This provision allows asylum seekers to make a subsequent application if new elements or findings have arisen. It is not linked to any time limit or other procedural hurdles. Therefore it remains open whether the Austrian system is in conformity with European law.

6. Court appointed Expert Mr Mahringer

Karl Mahringer was appointed by the administrative court (Bundesverwaltungsgericht) as an expert on Afghanistan in February 2017 tasked with providing expert advice on the social

⁹ See page 148 EASO Annual Report on the Situation of Asylum in the European Union 2018

¹⁰ EU 2019/0008-1 (Ro 2019/14/0006), vom 18. Dezember 2019

https://www.vwgh.gv.at/rechtsprechung/vorabentscheidungsantraege_an_den_eugh/ro_2019140006_2.pdf?7c5ho5

situation in Afghanistan. However, Mr Mahringer used his research to then make statements on the security situation in Afghanistan thereby overstepping his original mandate. However, as seen below, his opinion on the security situation was used as the reasoning for subsidiary protection being rejected for many asylum seekers.

For NGOs representing Afghan asylum seekers, it was immediately clear that Mr Mahringer's expertise was more than questionable. Criticism included that his report read like a travel guide, claiming that Afghanistan was a safe country and 70 percent of persons fleeing the country were economic migrants. Both assertions were purportedly founded on

interviews with over 600 Afghans. However, contrary to the requirements of an expert opinion neither the questionnaires used nor the raw data or the sample size was revealed.

Desserteur Refugee Advisers (a Vienna based NGO providing legal advice to refugees) paid for an expert Mr Stefan Weber, an expert in researching plagiarism, to assess Mahringer's "expert opinion". His conclusion was that Mahringer's report did not demonstrate the "three basic qualities of scientific work - traceability, validity, reliability"¹¹. As a result of this groundwork by the Vienna based NGO the Regional Court for Civil Cases responsible for the list of court appointed experts finally initiated formal review proceedings of his eligibility as a court expert. It should be noted that even at this stage the BVwG extended Mahringer's appointment to provide expert evidence for the court.

Finally, almost two years later Mahringer has been deleted from the list of experts¹². It is estimated that over 444 people were deported to Afghanistan on the back of his "expert opinion that the country was safe"¹³. Civil Society was more than disappointed that the BVwG did not react earlier and more promptly to the clear signs and evidence that Mahringer was not in any way qualified to be opining whether refugees can reasonably return to Afghanistan.

PART TWO – ISSUES REGARDING VULNERABLE ASYLUM SEEKERS AND VICTIMS OF GENDER BASED VIOLENCE

Our main concerns are:

¹¹ <https://www.derstandard.at/story/2000084286342/umstrittener-afghanistan-gutachter-mahringer-vor-dem-aus>

¹² <https://www.derstandard.at/story/2000103141449/umstrittenerafghanistan-gutachter-mahringer>

https://ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=f0cf3fc8-7b21-4dff-a483-8b1bc2f55794&Position=1&Abfrage=Bvwg&Entscheidungsart=Undefined&SucheNachRec htssatz=True&SucheNachText=True&GZ=&VonDatum=01.01.2014&BisDatum=14.05.2019 &Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSiz e=100&Suchworte=Marth&Dokumentnummer=BVWGT_20190502_W170_2208106_1_00

¹³ <https://www.derstandard.at/story/2000107925766/enthobener-gutachter-mahringer-hinterliess-444-problemausweiungen>

1. Provision of material reception conditions for applicants with special reception needs, including victims of gender-based violence
2. Qualification
3. Procedural Safeguards
4. Procedures under the Dublin III Regulation

1. Provision of material reception conditions for applicants with special reception needs, including victims of gender-based violence

Identifying victims of gender-based violence still is challenging and complex. Contrary to relevant provisions laid down in the EU Reception Conditions Directive (2013/33/EU)¹⁴, in Austria no assessments of special reception needs, along with identification of vulnerable applicants, are in place. Assessment of special reception needs rather are made unsystematically on an ad-hoc basis.

Due to a lack of identification of special reception needs (e.g. victims of gender based violence) throughout the procedure, such cases often are underreported and identification continues to be lacking once the case was referred to the local provinces. The GREVIO CoE Expert Committee criticized that in Austria, many shelters particularly in rural areas are lacking good infrastructure to counselling centers or support services (including info-provision about rights and services), special needs often can't be identified within reasonable time¹⁵. It must be assumed that there continues to be a large number of unreported cases of gender-based violence due to the lack of information for the victim on her rights or where to report and seek help, fear of the perpetrator, stigma and cultural norms.

In addition, the GREVIO CoE Expert Committee criticized that support services for victims of female genital mutilation, sexual violence and "honour" crimes are insufficient in Austria¹⁶, which has a strong implication on asylum seeking women and girls.

Insufficient info provision and insufficient access to support services, including safe accommodation and legal support, increases the fear of deportation or loss of residence status, which is a very powerful tool used by perpetrators to prevent victims of violence against women and domestic violence from seeking help from authorities or from separating from the perpetrator.

In many facilities multilingual asylum-seekers are used as interpreters when no multilingual staff members are available. This support is often seen as very problematic by asylum-seekers, especially when conversations concern private matters, family issues or are in the context of medical examinations. Especially for women it is difficult to address medical questions or female health topics in front of other asylum-seekers. Furthermore, hearing

¹⁴ According to Art 22 EU Reception Conditions Directive (2013/33/EU), Member States are obliged to assess special protection needs of vulnerable persons within reasonable time. According to Art 21 EU Reception Conditions Directive *inter alia* victims of different forms of gender based violence (rape, sexual exploitation, human trafficking, and female gender mutilation) are defined as applicants with special reception needs.

¹⁵ Council of Europe, GREVIO Baseline Evaluation Report Austria, accessible at: <https://rm.coe.int/grevio-report-austria-1st-evaluation/1680759619>

¹⁶ Council of Europe, GREVIO Baseline Evaluation Report Austria, accessible at: <https://rm.coe.int/grevio-report-austria-1st-evaluation/1680759619>

emotional stories from fellow residents is very challenging for asylum-seekers used as interpreters.

In cases of women with unclear residence status or in cases of persons with irregular stay who seek protection against domestic violence in women's shelters, it is not guaranteed in every case that these women can get basic services ("Grundversorgung"). Moreover, there is a lack of institutions concentrated on the specific situation of these women and their children.

In Austria there is no country wide referral pathway for victims of SGBV neither is there a more specified referral pathway for victims of trafficking in human beings. Furthermore, insufficient services and the lacking concept of a country wide safe accommodation and coordinated support – in particular for minor victims of trafficking in human beings – has

already been criticized by the GRETA CoE Expert Committee in 2015¹⁷ and continues to be a problem.

In addition, due to geographic restrictions (Gebietsbeschränkungen) imposed by law in order to ensure the facilitation of return to the country of origin or a transfer to an other EU Member State under the Dublin III Regulation, there is uncertainty by staff of safe houses or other relevant support service providers who would be able to provide protection whether they can offer their support, if this would imply violating the geographic restriction as service provision would be "outside" the legally restricted area.

It is unclear how and if adequate reception and support for applicants of international protection with special reception needs (including safe accommodation for victims of SGBV, trafficking in human beings, etc) will be provided once the planned Federal Reception and Support Agency (Bundesbetreuungsagentur) will begin providing accommodation and whether provisions and guarantees laid down not only in the EU Reception Conditions Directive but also laid down in the CoE Istanbul Convention and in the EU Directive 2011/36/EU ('Anti-Trafficking Directive') will be met sufficiently particularly for victims of gender-based violence.

2. Qualification

Applications which are based on gender-based violence often are rejected either due to a lack of "intensity" of the claimed harm, lack of credibility or the assumption that the country of origin might be able and/or willing to protect the claimant from further harm. In addition, the concept of "internal flight alternative" often is applied incorrectly or without due consideration of the local realities.

There continues to be lacking awareness about the impact of "sur place"-activities on international protection needs among different actors and institutions involved to protect women and children from gender-based violence in the receiving countries (women's shelters, criminal courts, family courts, police, etc.) once such "sur place"-activities have been realized¹⁸. It is thus important to improve knowledge and training about legal

¹⁷ Council of Europe: Group of Experts on Action against Trafficking in Human Beings, Recommendation CP(2015)14 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Austria, 30 November 2015, available at: <https://www.refworld.org/docid/5857fcfc4.html>

¹⁸ See also EU Reception Conditions Directive (Directive 2013/33/EU) on coordinated support of service providers and authorities (e.g. Art 5, 18, 23ff)

provisions on divorce, separation, guardianship, etc. as well as on harmful traditional practices in the countries of origin on the one hand and on conflict of law rules in reception countries in family- and divorce law on the other hand.

There continues to be a lack of awareness about the impact of evidence and/or outcomes of court-procedures (family court, criminal court, etc.) and police-investigations on assessments on well-foundedness of the fear of persecution and real risk of serious harm.

Case law on how to apply the concept of a membership of a particular social group according to Art 10(1)(d) EU Qualification Directive is inconsistent which is of particular relevance for e.g. victims of gender-based violence.

3. Procedural Safeguards

According to EU Directive 2013/32/EU (Recast Directive)¹⁹ Member States should endeavor to identify applicants in need of special procedural guarantees before a first instance decision on international protection is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.

Austrian High Courts continue to remit cases to the lower court (Federal Administrative Court) or lower authority (Office for Immigration and Asylum, BFA) due to procedural shortcomings or lack of investigation about gender-based violence to come to a new decision²⁰.

The BFA and the Administrative Court have repeatedly ignored the right to have a hearing or interview with a case officer/judge (and interpreter) of the same gender in cases of claimed violations of the right of sexual self-determination²¹. Also, Art 15 EU Recast Directive is inadequately transposed as applicants do not have the right to be interviewed by an adjudicator and interviewer of the same sex even where this would be feasible and the request is based on reasonable grounds (e.g. more trust of girls and women in female counterparts)²².

Contrary to UNHCRs' position, that there is no requirement to prove well-foundedness of the claim conclusively beyond doubt²³, case-law shows that applicants who claimed that they were victims of gender-based violence often have to meet a particularly high threshold to

¹⁹ 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.

²⁰ Constitutional Court: 12.06.2015, U1099/2013 et al; 18.09.2015, E1003/2014.

²¹ Constitutional Court: 11.12.2013, U1914/2012 et al; 25.11.2013, U1121/2012 et al; 25.11.2013, U1749/2012 et al; 27.09.2012, U688/12 et al; 27.09.2012, U1606/11, U343/12, U399/12 et al, U999/12, U1515/12; 18.09.2015, E1003/2014; 06.06.2014, U1820/2013; 16.09.2013, U852/2013; 12.03.2013 U1674/12.

²² Constitutional Court: 11.12.2013, U1914/2012 et al; 25.11.2013, U1121/2012 et al; 25.11.2013, U1749/2012 et al; 27.09.2012, U688/12 et al; 27.09.2012, U1606/11, U343/12, U399/12 et al, U999/12, U1515/12; 18.09.2015, E1003/2014; 06.06.2014, U1820/2013; 16.09.2013, U852/2013; 12.03.2013 U1674/12.

²³ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV; online accessible:

<http://www.refworld.org/docid/4f33c8d92.html>: according to para 196 of the UNHCR Handbook, the possibility of a shift of the burden of proof to the state is emphasized: "if the applicant's account appears credible, he [or she] should, unless there are good reasons to the contrary, be given the benefit of the doubt."

see also: UN High Commissioner for Refugees (UNHCR), *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, online accessible: <http://www.refworld.org/docid/3ae6b3338.html>.

prove the reasonableness of the claim and the plausibility of risks in case of a return to the country of origin.

Shortcomings in applying procedural safeguards in cases of victims of gender-based violence and children involved as family members (who had applied for international protection upon having been reunified with their husband or who had applied for international protection as family member) became particularly apparent in 2019 in cessation assessments (which increased in 2019): Normally such assessments were initiated if the BFA had grounds to believe that the flight reasons no longer exist (in cases where asylum was granted) or where beneficiaries of subsidiary protection were accused of having committed a crime. In family procedures or in cases where asylum was granted upon family reunification, “own” flight reasons had often only been assessed regarding the claim of the husband and assessments of own flight reasons of married female partners or children in their initial procedures in many cases were insufficient. Therefore, cessation assessments focusing on claims of husbands or fathers, have the consequence that international protection might no longer be granted for family members as well. Particularly in cases of gender-based violence (e.g. domestic violence) in Austria it was crucial that gender specific aspects of their “own” claim are considered sufficiently.

4. Procedures under the Dublin III Regulation

Contrary to Art 5 Section 5 Dublin III Regulation – gender-sensitive safeguards often are not considered (e.g. lacking information about gender-based flight reasons, independent of that of the partner/father, interpreter/interviewee with same gender.). Even though, an appointed legal adviser must be present at the interview to provide the asylum seeker an opportunity to be heard, legal advisers however are often informed only shortly before the interview, which means that they lack time to study the file or to provide legal counselling before the interview takes place.

There are reported cases of women who became victims of gender based violence, e.g. sexual exploitation or domestic violence in other EU member states. However, women still are very reluctant to report these cases to the police or Asylum Authorities. When asked, women refer to their fear of what impact this could have on the asylum claim and on the perpetrator or fear reprisals (especially in cases of domestic violence, sexual exploitation or trafficking in human beings). Earliest identification of victims of gender based violence in the reception country or in other Member states as transfer countries is core to identify special reception and/or procedural needs and thus impacts the application of the Dublin III Regulation. There are reported cases where the claim of the applicant that she was a victim of trafficking in human beings in an other EU Member State was ignored or was not considered with due diligence.