

# Detention Pending Removal and Alternatives to Detention in Austria

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## IMPRINT

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## SUMMARY

Detention pending removal as well as the alternatives to detention specified under Austrian law play a key role in Austria's migration policy. Especially regarding detention pending removal, there have been far-reaching changes in the law since 2015. The factors determining whether detention is ordered include the risk of absconding and proportionality of the measure. In Austria, detention pending removal can only be imposed on individuals where the purpose of detention (i.e. securing the procedure for issuing a measure to terminate a residence permit) cannot be achieved by means of an alternative (ultima-ratio-principle). In the law, three possible – not exhaustively listed – alternatives are mentioned, specifically (1) the obligation to take up residence at designated quarters, (2) the obligation to report to authorities and (3) the obligation to provide a surety.

The number of decisions on detention pending removal and orders for alternative measures peaked sharply from 2016 to 2017 (by a factor of 2.4, from 2,050 to 4,967 decisions/orders) – also as a result of the migration events in 2015. The number of decisions/orders later levelled off, reaching 3,578 in 2020. Viewing the number of detention cases relative to alternative cases, detention is seen to have been imposed far more frequently during the period examined. Detention was imposed in about 92 per cent of cases in 2016 to 2019. Only in 2020 (81.7 %) did the share decrease. According to the Austrian authorities, this development is due to the fact that the option of alternative measures is increasingly used due to the legal and individual case-related circumstances. Data indicating the relative frequency of specific alternatives to detention are not recorded.

This study identifies several advantages associated with applying alternatives to detention, but also specific challenges. Obvious advantages for the affected include the fact that personal freedom of movement is maintained. The State on the other hand benefits from the lower costs compared to detention pending removal. Challenges for the affected arise when individuals are compelled to take up residence in remote places as access to advice and support from non-governmental organizations (NGOs) may be difficult due to local conditions. The obligation to report to authorities can represent a frequent challenge particularly in rural areas, if police stations are not staffed at all times.

Depending on the actual possibilities, legal assistance can be granted free of charge to foreigners in procedures pending with the Federal Office for Immigration and Asylum. Legal counsellors are provided mandatorily and free of charge at the moment a decision is taken (also when detention pending removal/alternative measures are ordered). Among other things, legal counsellors support foreigners in filing a complaint and in appeal proceedings before the Federal Administrative Court.

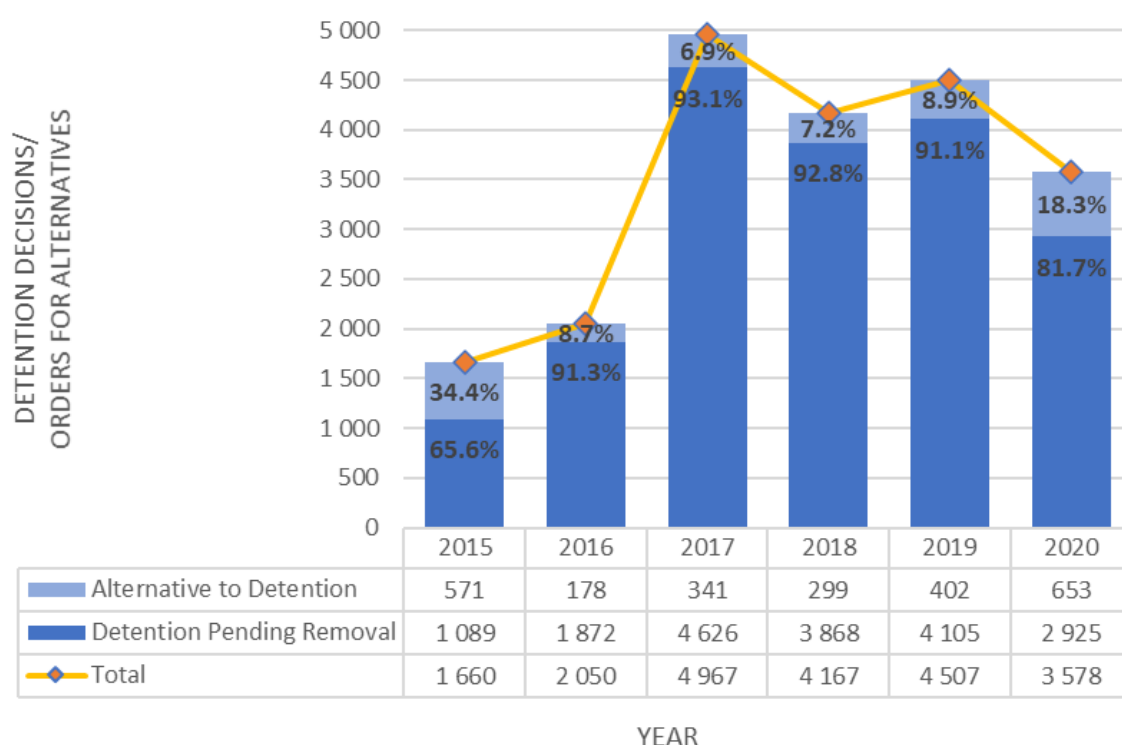
State-provided social and psychological support for individuals in pending procedures, in detention or in an alternative to detention depends on the person's residence status and whether access to material reception conditions is part of this status. There are also differences regarding health care. Foreigners in detention are generally entitled to medical services, in the case of foreigners in an alternative to detention, emergency medical care is guaranteed in any case.

Minors under the age of 14 are legally exempt from detention pending removal in Austria. No detention pending removal may be ordered against them. However, adults who are soon to be removed and who are in detention pending removal may be allowed to be accompanied by minors entrusted to their care, provided that this is not against the best interests of the child. Special rules have been set out for other vulnerable groups such as minors over the age of 14 and ill persons. Based on the principle of proportionality and against the background of the European Convention on Human Rights (ECHR), any vulnerabilities identified in the course of the investigation of the relevant facts must be taken into account. However, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has in the past criticized the fact that the identification of vulnerable persons in asylum and return procedures, including detention pending removal, tend to be random and unsystematic.

## INTRODUCTION

Detention pending removal as well as the alternatives (i.e. alternatives to detention pending removal) specified under Austrian law play a key role in the country's migration policy. In relation to detention, a number of legislative changes have been introduced since 2015, including more precise definitions of the criteria for imposing detention but also amendments to implement applicable EU law and lowering the minimum age for compulsory application of an alternative to detention. According to the Federal Office for Immigration and Asylum and the Federal Ministry of the Interior, currently there are no plans to expand existing alternatives to detention or create new ones. Nonetheless, the issue is relevant due to European developments, especially in view of the new pact on migration and asylum.<sup>1</sup>

**Figure 1: Number of detention decisions and orders for alternatives to detention issued for third-country nationals in Austria (2015–2020)\***



*Notes:* \*Data on detention 2015–2016 refer to persons in detention pending removal, not to detention decisions issued. Alternatives to detention: third-country nationals are not differentiated from EU citizens in 2015–2016, so that the figures include both categories.

*Source:* Federal Ministry of the Interior, 2018:24–27; Written input: Federal Ministry of the Interior, 10 February 2021.

During the period under examination (2015–2020), detention pending removal was imposed on third-country nationals far more frequently than an alternative: 18,485 decisions imposing detention compare with 2,444 cases in which alternatives were ordered (see figure 1).

At the same time, relative to cases in which detention was imposed, the share of alternative cases increased from 8.9 per cent to 18.3 per cent between 2019 and 2020 (Federal Ministry of the Interior,

<sup>1</sup> Interview with Cansel Öztürk (Federal Ministry of the Interior) and Alexander Scharfegger (Federal Office for Immigration and Asylum), 4 February 2021.

2018:24–27).<sup>2</sup> According to the Federal Office for Immigration and Asylum, this development is due to the fact that the option of an alternative measure is increasingly being used as a result of the legal and individual circumstances.<sup>3</sup> According to the Asylkoordination Österreich, the increase in alternative measures in 2020 was particularly due to the outbreak of COVID-19. Judging from the small share of alternative cases in relation to detention cases, the authorities would nonetheless appear to primarily impose detention, says the Asylkoordination Österreich.<sup>4</sup>

#### Info Box 1: Definitions<sup>5</sup>

**Detention pending removal:** non-punitive administrative measure ordered by an administrative or judicial authority(ies) in order to restrict the liberty of a person through confinement so that another procedure may be implemented.

**Alternative to detention:** Non-custodial measures used to monitor and/or limit the movement of third-country nationals in advance of forced return or deciding on the individual's right to remain in the Member State, such as regular reporting, the surrender of a financial guarantee or travel documents, electronic monitoring.

## LEGAL BASIS

EU legislation provides detailed rules for the detention pending removal of migrants under international protection and return procedures and sets out the grounds on which a person may be deprived of liberty. The relevant guidelines state that detention pending removal should only be "ultima ratio" (see Info Box 2). Accordingly, the use of alternatives to detention pending removal is prioritized. Alternatives to detention are considered to be a practical application of the principles of necessity and proportionality to avoid arbitrary deprivation of liberty (Art. 8 Reception Directive, para 16 Return Directive).

In this sense, the Return Directive allows for the detention pending removal of migrants in removal proceedings only in order to prepare his/her removal and/or to carry out the removal procedure, if the use of less coercive measures is not sufficient. Article 15, para 4 Return Directive specifies that detention is justified only as long as there is a reasonable prospect of removal. Each Member State shall determine a limited duration of detention which shall not exceed six months. However, Member States may extend detention for a maximum of a further twelve months if the person concerned does not cooperate or there are difficulties in obtaining documents from a third country.

The Federal Office for Immigration and Asylum is responsible for deciding whether detention pending removal or an alternative to detention is to be ordered (Art. 3 para 2 subpara 4 Federal Office for Immigration and Asylum Procedures Act).

Pursuant to Art. 76 para 2 Aliens Police Act 2005, detention pending removal is permitted in three cases:

- (1) Where necessary to ensure procedures to decide applications for international protection – that is, in anticipation of taking a measure to terminate the particular individual's stay – and provided that the individual's stay threatens public order or security,<sup>6</sup> a risk of the individual absconding exists, and detention is proportionate;

<sup>2</sup> Written input: Federal Ministry of the Interior, 10 February 2021.

<sup>3</sup> Interview with Cansel Öztürk (Federal Ministry of the Interior) and Alexander Scharfegger (Federal Office for Immigration and Asylum), 4 February 2021.

<sup>4</sup> Interview with Lukas Gahleitner-Gertz (Asylkoordination Österreich), 3 February 2021.

<sup>5</sup> The definitions are based on the EMN Glossary Version 5.0 (European Migration Network, 2018:15, 25).

<sup>6</sup> In order to meet this criterion, according to Art. 67 para 1 of the Aliens Police Act 2005, the personal behaviour must constitute a real, present and substantial danger affecting a fundamental interest of society.

- (2) Where necessary for ensuring procedures to allow a measure terminating an individual's stay or the individual's removal to be ordered, and provided that a risk of absconding exists and detention is proportionate; or
- (3) Where the conditions set out in Art. 28 para 1 and 2 of the Dublin Regulation are met. The particular individual can not only be detained because he/she is subject of a Dublin procedure. For the purpose of securing transfer procedures, persons may be taken into detention pending removal if (a) a significant risk of absconding exists, (b) the case has been individually reviewed, (c) detention is proportional and (d) no other less drastic measure can be applied.

#### **Info Box 2: Regulations and legal provisions**

##### **Relevant Austrian regulations:**

- Agreement between the Federal State and the Provinces on Basic Care - Art. 15a of the Federal Constitutional Act<sup>7</sup>
- Aliens Police Act 2005<sup>8</sup>
- Detention Regulation<sup>9</sup>
- Federal Act Establishing the Federal Agency for Reception and Support Services as a Private Limited Company<sup>10</sup>
- Federal Office for Immigration and Asylum Procedures Act<sup>11</sup>
- General Administrative Procedures Act 1991<sup>12</sup>
- General Social Insurance Act<sup>13</sup>
- Regulation on the Implementation of the Aliens Police Act<sup>14</sup>

##### **Relevant EU legislation:**

- Dublin Regulation (2013/604/EU)<sup>15</sup>
- Reception Conditions Directive (2013/33/EU)<sup>16</sup>
- Return Directive (2008/115/EC)<sup>17</sup>

Detention pending removal can be imposed on aliens only where the purpose of detention cannot be achieved by means of an alternative to detention (Art. 76 para 1 Aliens Police Act 2005). If the need for securing the return procedure is affirmed by the Federal Office for Immigration and Asylum prior to issuing a measure terminating an individual's stay, the Federal Office must examine whether a less severe means of securing the return procedure is also sufficient before imposing detention pending removal. A need for securing the return procedure is recognized where the conduct of the individual involved indicates that the person would withdraw from the procedure, with a risk of absconding.

To illustrate the factors to be considered, the Aliens Police Act 2005 lists for example:

- Whether an alien impedes or evades return or removal;
- Whether a foreign national has violated requirements or any obligations to cooperate;
- How well a foreign national is established in Austrian society.

<sup>7</sup> FLG I No. 80/2004.

<sup>8</sup> FLG I No. 100/2005, in the version of federal law FLG I No. 121/2015.

<sup>9</sup> FLG II No. 128/1999, in the version of federal law FLG II No. 439/2005.

<sup>10</sup> FLG I No. 53/2019.

<sup>11</sup> FLG I No. 87/2012, in the version of federal law FLG I No. 146/2020.

<sup>12</sup> FLG No. 51/1991, in the version of federal law FLG I No. 58/2018.

<sup>13</sup> FLG No. 189/1955, in the version of federal law FLG I No. 35/2021.

<sup>14</sup> FLG II No. 450/2005, in the version of federal law FLG II No. 227/2018.

<sup>15</sup> Regulation 2013/604/EU, OJ L 180, pp. 31–59.

<sup>16</sup> Directive 2013/33/EU, OJ L 180, pp. 96–116.

<sup>17</sup> Directive 2008/115/EC, OJ L 348, pp.98–107.

Certain criteria are applicable only to specified groups of individuals or categories of cases, such as those pertaining to asylum seekers (Art. 76 para 3 subpara 4–6 Aliens Police Act 2005).

It is possible to combine and also expand the individual reasons that indicate a risk of absconding (Eppel and Reyhani, 2016:2.8.2). In any case, the statutory provision of Art. 76 para 3 Aliens Police Act 2005 and the case law of the highest courts clearly define the scope of discretion of the authorities in assessing the risk of absconding.<sup>18</sup> However, the fact that the authorities are granted legal discretion in determining the risk of flight is criticized by legal scholars and NGOs (AIDA, 2020:104; Eppel and Reyhani, 2016:2.8.2).

The criteria of necessity and proportionality must always be met before detention pending removal is imposed (Art. 76 para 2 Aliens Police Act 2005; Art. 28 para 2 Dublin Regulation). In order to determine this, a case-by-case balancing of the public interest in securing the termination of residence and the protection of the right to personal freedom is carried out (Filzwieser et al., 2016:1233).

According to the Federal Office for Immigration and Asylum, the provision of alternatives to detention depends, among other factors, on the individual's willingness to return. If the individual is willing to leave the country voluntarily, this can be an examination criterion against the imposition of detention pending removal.<sup>19</sup> It should be noted however, that the mere unwillingness to leave does not justify detention as a means of ensuring the individual's departure (Filzwieser et al., 2016:1235). Where individuals are already in detention, the Federal Office for Immigration and Asylum can decide to terminate detention and order an alternative. This option is mainly considered with foreigners who show a willingness to cooperate in measures to terminate their stays or who agree to return voluntarily.<sup>20</sup> Detention, in contrast, is to be imposed on aliens not complying with obligations relating to one or more alternatives to detention (Art. 77 para 4 Aliens Police Act 2005).

As part of the decision-making procedure at the Federal Office for Immigration and Asylum, an interview is conducted with the foreigner concerned. Although not required by law, such questioning commonly takes place and is carried out either by staff members of the Federal Office for Immigration and Asylum or by officials of the provincial police directorates, the latter in particular since the outbreak of COVID-19. In cases, where there is an imminent risk of absconding, questioning does not take place.<sup>21</sup> According to the Diakonie Rechtsberatung, questioning by the Federal Office for Immigration and Asylum – although not explicitly required by law – would be necessary in every case, especially before detaining individuals pending their removal. Yet, reportedly, questioning does not always take place.<sup>22</sup>

The Federal Office for Immigration and Asylum reports that since the set-up of the Federal Office in 2014 and the associated procedural changes regarding detention pending removal, as well as the related change in jurisdiction in appeal proceedings from the Independent Administrative Panel to the Federal Administrative Court, a comprehensive decision-making practice has developed regarding the prerequisites for ordering precautionary measures and the distinction between detention pending removal and alternatives. In principle, the importance of alternatives has increased in recent years.<sup>23</sup>

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<sup>18</sup> Written input: Federal Ministry of the Interior, 10 August 2021.

<sup>19</sup> Interview with Cansel Öztürk (Federal Ministry of the Interior) and Alexander Scharfegger (Federal Office for Immigration and Asylum), 4 February 2021.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Interview with Jana Zunker (Diakonie Flüchtlingsdienst), 4 February 2021.

<sup>23</sup> Interview with Cansel Öztürk (Federal Ministry of the Interior) and Alexander Scharfegger (Federal Office for Immigration and Asylum), 4 February 2021; Written input: Federal Ministry of the Interior, 10 August 2021.

## ALTERNATIVES TO DETENTION

If the purpose of detention can be achieved by means of an alternative, three corresponding – not exhaustively listed – options exist under law, specifically (1) the obligation to take up residence at designated quarters, (2) the obligation to report to authorities and (3) the obligation to provide a surety (Art. 77 para 3 Aliens Police Act 2005). Before the alternative to detention can be ordered, the individual involved must have been processed for identification purposes or have consented to such processing for the purpose of establishing the individual's identity (Art. 77 para 2 Aliens Police Act 2005). Detention is to be imposed on aliens not complying with obligations relating to one or more alternatives to detention (Art. 77 para 4 Aliens Police Act 2005).

Statistical data indicating the relative frequency of specific alternatives to detention are not recorded.<sup>24</sup> Yet, as an alternative to detention, the deposit of a surety as referred to in Art. 77 para 3 subpara 3 of the Aliens Police Act 2005 does not very often come into question because of the financial situations of the individuals affected (Heilemann and Lukits, 2017:49). As alternatives to detention, the obligations to report to authorities and take up residence at designated quarters (Art. 77 para 3 subpara 1 and 2 Aliens Police Act 2005) are usually imposed in combination,<sup>25</sup> so that equal frequency of these two measures can be assumed. In contrast to detention pending removal, the law does not explicitly provide for a maximum duration for the ordering of alternative measures.

As already explained, the imposition of detention pending removal is only an "ultima ratio". Notwithstanding, alternatives to detention bring some advantages, but also challenges. A general advantage of using alternatives to detention is that their costs are lower than those of detention pending removal. An advantage for the persons concerned is that their personal freedom respectively their freedom of movement is less restricted.<sup>26</sup> One general challenge, identified by Diakonie Flüchtlingsdienst, is the fact that, unlike for detention pending removal, no maximum duration is specified under law for alternatives to detention.<sup>27</sup>

### Info Box 3: Alternatives to detention

#### **Obligation to take up residence at designated quarters**

The persons concerned can be obliged to stay in designated quarters. On the one hand, the regional police directorates are authorized to procure quarters (Art. 77 para 9 Aliens Police Act 2005), while on the other, the individuals concerned can also be required to reside at private dwellings or residence facilities operated by NGOs (Global Detention Project, 2020:16). The family accommodation at Zinnergasse in Vienna plays a key role here. This facility serves as accommodation for particularly vulnerable persons, including families, unaccompanied minors and individuals with disabilities (Heilemann and Lukits, 2017:47).

**Legal basis:** Art. 77 para 3 subpara 1 Aliens Police Act 2005; Art. 77 para 9 Aliens Police Act 2005.

**Responsible authorities:** Federal Office for Immigration and Asylum and the provincial police directorates

#### **Specific advantages:**

- Individuals usually remain in the accommodation familiar to them and are able to maintain their social environments.<sup>28</sup>
- People staying in private accommodation have better access to NGOs that offer legal counselling.<sup>29</sup> However, this applies especially to people living in urban areas (see challenges).

<sup>24</sup> Written input: Federal Ministry of the Interior, 10 August 2021.

<sup>25</sup> Interview with Cansel Öztürk (Federal Ministry of the Interior) and Alexander Scharfegger (Federal Office for Immigration and Asylum), 4 February 2021.

<sup>26</sup> Ibid.

<sup>27</sup> Interview with Jana Zunker (Diakonie Flüchtlingsdienst), 4 February 2021.

<sup>28</sup> Interview with Cansel Öztürk (Federal Ministry of the Interior) and Alexander Scharfegger (Federal Office for Immigration and Asylum), 4 February 2021.

<sup>29</sup> Interview with Lukas Gahleitner-Gertz (Asylkoordination Österreich), 3 February 2021.



- As opposed to police detention centres, at the Zinnergasse family accommodation higher standards are observed regarding accommodation suited to families.<sup>30</sup>

**Specific challenges:**

- Individuals who are required to reside at the Zinnergasse family accommodation face challenges as they are removed from familiar surroundings, including their social environment.<sup>31</sup>
- The move from a rural area to the Zinnergasse family accommodation in Vienna can, in certain cases, be a challenge for individuals.<sup>32</sup>
- Where individuals are housed in rural areas, access to legal assistance can be difficult due to local circumstances.<sup>33</sup> Access to legal assistance is similarly problematic at the Zinnergasse family accommodation, which is located on the outskirts of Vienna.<sup>34</sup>

**Obligation to report to authorities**

Individuals subject to the obligation must report to a designated station of the competent regional police directorate at least every 24 hours.

**Legal basis:** Art. 77 para 3 subpara 2 Aliens Police Act 2005; Art. 77 para 6 Aliens Police Act 2005.

**Responsible authorities:** Federal Office for Immigration and Asylum and the provincial police directorates

**Specific advantages:**

- No specific advantages are known.

**Specific challenges:**

- Particularly in rural areas, this requirement can pose a challenge, if police stations may not be staffed at all times.<sup>35</sup>

**Obligation to provide a surety**

As an alternative to detention, the deposit of a surety with the Federal Office for Immigration and Asylum can be required (Art. 77 para 3 subpara 3 Aliens Police Act 2005). The amount of the surety needs to be appropriate and proportionate to the individual case (Art. 13 para 1 subpara 1 Regulation on the Implementation of the Aliens Police Act). It must not, however, exceed 200 per cent of the reference amount defined in the General Social Insurance Act.<sup>36</sup> The surety is refunded as soon as no further grounds exist for applying the alternative to detention (Art. 13 para 1 subpara 3 Regulation on the Implementation of the Aliens Police Act). Any individuals withdrawing from procedures or from measures under the Aliens Police Act forfeit previously deposited sureties (Art. 13 Regulation on the Implementation of the Aliens Police Act).

**Legal basis:** Art. 77 para 3 subpara 3 Aliens Police Act 2005; Art. 13 para 1 subpara 1 and subpara 3 Regulation on the Implementation of the Aliens Police Act; Art. 293 para 1 (a) (bb) General Social Insurance Act.

**Responsible authority:** Federal Office for Immigration and Asylum

**Specific advantages:**

- No specific advantages are known.

**Specific challenges:**

- This alternative to detention does not come into question very often due to the financial situations of the individuals affected (Heilemann and Lukits, 2017:49).
- A challenge is the administrative handling of the deposit of sureties, especially with regard to the return of the surety.<sup>37</sup>

<sup>30</sup> Interview with Lukas Gahleitner-Gertz (Asylkoordination Österreich), 3 February 2021.

<sup>31</sup> Interview with Jana Zunker (Diakonie Flüchtlingsdienst), 4 February 2021.

<sup>32</sup> Interview with Cansel Öztürk (Federal Ministry of the Interior) and Alexander Scharfegger (Federal Office for Immigration and Asylum), 4 February 2021.

<sup>33</sup> Ibid.

<sup>34</sup> Interview with Lukas Gahleitner-Gertz (Asylkoordination Österreich), 3 February 2021.

<sup>35</sup> Interview with Cansel Öztürk (Federal Ministry of the Interior) and Alexander Scharfegger (Federal Office for Immigration and Asylum), 4 February 2021.

<sup>36</sup> The reference rate pursuant to Art. 293 para 1 (a) (bb) of the General Social Insurance Act is currently EUR 882.78.

<sup>37</sup> Interview with Cansel Öztürk (Federal Ministry of the Interior) and Alexander Scharfegger (Federal Office for Immigration and Asylum), 4 February 2021.

## COMPLAINT PROCEDURES

Complaints against the legitimacy of detention or an alternative to it are possible once the measure has been ordered, while complaints against detention are handled differently from those relating to alternatives. Any detention or alternative ordered by the Federal Office for Immigration and Asylum is generally at this point not yet reviewed ex officio by a court.

For the legitimacy of detention to be reviewed in a particular case, the person affected must lodge a complaint with the Federal Administrative Court. This court has the duty of deciding within one week (Art. 22a para 2 Federal Office for Immigration and Asylum Procedures Act) whether, based on the detention decision, the individual has been and may continue to be lawfully detained (Eppel and Reyhani, 2016:2.8.6.). The proportionality of detaining the individual is also periodically reviewed ex officio by the Federal Administrative Court, initially after four consecutive months and every four weeks thereafter (Art. 22a para 4 Federal Office for Immigration and Asylum Procedures Act). In the event that a complaint is rejected by the Federal Administrative Court, a complaint may be lodged with the Constitutional Court or an appeal can be filed with the Supreme Administrative Court if certain conditions are met (AIDA, 2020:111).

In order to lodge a complaint against an alternative to detention that has been ordered, the individual concerned must first request a legal remedy pursuant to Art. 57 para 2 of the General Administrative Procedures Act 1991. An investigation is usually initiated in response, which subsequently results in an administrative decision by the Federal Office for Immigration and Asylum. Only this decision can be challenged through a complaint, as specified in Art. 7 para 1 subpara 1 of the Federal Office for Immigration and Asylum Procedures Act (Filzwieser et al., 2016:1258). The Federal Administrative Court overturns or amends detention decisions in cases where, for example, one of the three necessary preconditions is not met – a risk of absconding, proportionality and a lack of an alternative achieving the same purpose (Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice, 2019:2). Based on a written response to a question raised in Parliament in 2019, on average in the (business) years 2015–2018, 60 per cent of the decisions issued by the Federal Office for Immigration and Asylum were confirmed by the Federal Administrative Court and 22 per cent were overturned or amended (Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice, 2019:2).<sup>38</sup>

## HEALTH CARE

While foreigners in detention are guaranteed medical care, medical care for those in alternatives to detention depends on their residence status. A distinction is to be made here between individuals receiving material reception conditions based on Art. 2 para 1 of the Agreement on Basic Care - Art. 15 Federal Constitutional Act – and asylum seekers in particular – and those not entitled to these conditions. Individuals receiving material reception conditions are generally entitled to medical care as defined in the General Social Insurance Act (Art. 6 para 1 subpara 5 Agreement between the Federal State and the Provinces on Basic Care - Art. 15 Federal Constitutional Act). Other foreigners are not entitled to this type of medical care. Yet, it should be noted here that it is prohibited to terminate a foreigner's benefits under material reception conditions if this would jeopardize any emergency medical care needed by that individual (Art. 6 para 4 Agreement between the Federal State and the Provinces on Basic Care - Art. 15 Federal Constitutional Act).

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<sup>38</sup> According to the parliamentary question response, formal decisions account for the remaining decisions.

## LEGAL, SOCIAL AND PSYCHOLOGICAL SUPPORT SERVICES

In proceedings pending with the Federal Office for Immigration and Asylum, foreigners may be granted free legal counselling depending on the actual possibilities. Legal counselling for asylum seekers includes assistance in procuring an interpreter and advice on the asylum procedure as well as the prospects of being granted the status as recognized refugee or beneficiary of subsidiary protection status. If no legal advice is provided, the foreigner shall be provided with legal and procedural information free of charge upon request (Art. 49 para 1 Federal Office for Immigration and Asylum Procedures Act).

When ordering detention or an alternative, the Federal Office for Immigration and Asylum has, according to Art. 52, para 1 Federal Office for Immigration and Asylum Procedures Act, the duty of informing the individual concerned in writing that free legal assistance will be provided, hence that they are legally entitled to free legal assistance. Legal advisers support and advise foreigners and asylum seekers in lodging complaints with the Federal Administrative Court and in ensuing proceedings, as well as in procuring interpreters. During counselling, the individuals concerned are advised as to the likelihood of complaints leading to a favourable ruling. Complainants also have the option of requesting legal representation by their legal advisers in the proceedings (Art. 52 para 1 and 2 Federal Office for Immigration and Asylum Procedures Act). Legal assistance has been provided by the Federal Agency for Care and Support Services since 1 January 2021 – previously, NGOs were responsible for this (Asylkoordination Österreich, n.d.). Besides the Federal Agency for Care and Support Services, numerous NGOs provide legal assistance (Asylkoordination Österreich, n.d.). The fact that the Federal Agency for Care and Support Services is now responsible for legal counseling is considered critical by Asylkoordination Österreich with regard to the monitoring of human rights compliance, as the new regulation has restricted the access of non-State actors to persons in detention pending removal.<sup>39</sup>

According to the Federal Ministry of the Interior, in accordance with Art. 12 of the Federal Office for Immigration and Asylum Procedures Act, every person who has been detained pending removal is informed of the reasons for detention pending removal pursuant to Art. 76 para 2 subpara 1 to 3 of the Aliens Police Act 2005 in a language that he or she understands, at the latest when the decision is issued.<sup>40</sup>

Despite these measures, according to Diakonie Rechtsberatung, in some cases foreigners do only find out why they are being held in detention pending removal during the legal counselling session. This uncertainty, as well as the uncertain duration of the detention, can lead to enormous stress for the persons concerned. It is also problematic that detention reviews by the authorities are not covered by the right to legal counsel provided for by law. Among other things, the short deadline (one week) as well as the scarce resources and varying distribution of NGOs in the provinces make it virtually impossible for some persons in detention pending removal to seek counsel or representation in detention review proceedings. According to Diakonie Rechtsberatung, the accessibility of NGOs for persons who are, as an alternative to detention, accommodated in rural areas is also a challenge. Another problem is that the legal right to free legal advice only applies to proceedings before the Federal Administrative Court (Art. 52 para 1 Federal Office for Immigration and Asylum Procedures Act), but not before the supreme courts.<sup>41</sup>

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<sup>39</sup> Interview with Lukas Gahleitner-Gertz (Asylkoordination Österreich), 3 February 2021.

<sup>40</sup> Written input: Federal Ministry of the Interior, 10 September 2021.

<sup>41</sup> Interview with Jana Zunker (Diakonie Flüchtlingsdienst), 4 February 2021.

Social and psychological counselling is provided to individuals in detention but not in all cases (AIDA, 2020:109). According to the Federal Ministry of the Interior, in contrast to the prison system, there is no legal mandate to provide these and similar services for police detention, i.e. also for detention pending removal. However, clinical psychological and health psychological care is offered at the Vordernberg detention center and the Vienna police detention center. These are facilities that are intended for longer-term detention pending removal (over 7 days). Psychotherapeutic treatment or social work support is not provided but can be provided by external providers if justified.<sup>42</sup> We are not aware of similar services being offered to individuals in an alternative to detention. Again, this does not include individuals receiving material reception conditions, since they have access to counselling and social support (Art. 6 para 1 subpara 8 of the Agreement on Basic Care - Art. 15 Federal Constitutional Act). NGOs nonetheless offer social and psychological support regardless of the residence status (Asylkoordination Österreich, n.d.).

## VULNERABLE GROUPS

Vulnerability is among the considerations and criteria used to decide whether to order detention or an alternative to detention (National Contact Point Austria in the European Migration Network, 2014:22). Detention of minors under the age of 14 is prohibited (Art. 76 para 1 Aliens Police Act 2005). In the case of minors aged 14 and over, the Federal Office for Immigration and Asylum has the obligation to apply an alternative to detention unless certain facts justify the assumption that such measures will be unable to achieve the purpose of detention (Art. 77 para 1 Aliens Police Act 2005). Exceptions apply to minors accompanying guardians in detention pending removal (Art. 79 para 5 Aliens Police Act 2005).

Other vulnerable groups are not expressly mentioned in legislation requiring alternatives to detention. However, any vulnerabilities are already examined in each individual case before detention pending removal or alternative measures are ordered, as part of the investigation of the relevant facts, and special consideration is always given to them when they are determined. Consideration is also given to the potential vulnerability of individuals who have been affected by violence.<sup>43</sup> In addition, a checklist has been devised for staff members of the Federal Office for Immigration and Asylum, to help identify individuals affected by human trafficking (Schlintl and Sorrentino, 2021:60). The checklist was developed in cooperation with key actors working in this area,<sup>44</sup> as part of the project "Identification of potential trafficked persons in the asylum procedure" (IBEMA II).<sup>45</sup> However, the Office of the United Nations High Commissioner for Human Rights (OHCHR) criticized in 2018 that "... the identification of people in vulnerable situations throughout the asylum and return procedures, including in pre-removal detention, tends to be random and unsystematic, for instance only when vulnerabilities are clearly visible, or dependent on disclosure by the individuals themselves" (OHCHR, 2018:6). Detention represents interference with an individual's constitutional right to personal freedom, consequently, the Federal Office for Immigration and Asylum must review each individual case. Based on the principle of proportionality, potentially existing vulnerabilities are considered as well. Where no risk exists of the person absconding due to family relationships or the individual's state of health, an alternative to detention must be applied (National Contact Point Austria in the European Migration Network, 2014:22). Based on a review of the proportionality of detention, an individual's poor state of health can also be recognized as sufficient grounds for applying an alternative instead (Eppel and Reyhani, 2016:2.8.4)

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<sup>42</sup> Written input: Federal Ministry of the Interior, 10 September 2021.

<sup>43</sup> Interview with Cansel Öztürk (Federal Ministry of the Interior) and Alexander Scharfegger (Federal Office for Immigration and Asylum), 4 February 2021; Written input: Federal Ministry of the Interior, 10 August 2021.

<sup>44</sup> IOM Austria together with the Federal Office for Immigration and Asylum, the Criminal Intelligence Service Austria, Drehscheibe (Municipal Department 11 of the City of Vienna), the United Nations High Commissioner for Refugees (UNHCR) Austria, LEFÖ-IBF, MEN VIA.

<sup>45</sup> Written input: Katie Klaffenböck (IOM Austria), 23 March 2021.

## CONCLUSION

In Austria, detention pending removal can be imposed on individuals only where the purpose of detention cannot be achieved by means of an alternative (Art. 76 para 1 Aliens Police Act 2005). The risk of absconding and proportionality are the main aspects determining whether detention pending removal is imposed (Art. 76 para 1 and 2 Aliens Police Act 2005). A person's potential vulnerabilities, which are determined within the investigation of the relevant facts, are also considered in assessing proportionality. Where no risk exists of the person absconding due to family relationships or the individual's state of health, an alternative to detention must be applied (National Contact Point Austria in the European Migration Network, 2014:22). In practice, an interview with the foreign person concerned is carried out as part of the decision-making process. This questioning is not required by law, which, however, would be desirable according to an NGO.<sup>46</sup> In 2018, OHCHR criticized that the identification of vulnerable persons tends to be "random and unsystematic" (OHCHR, 2018:6). In addition, the legal discretion available to the authorities in determining a risk of absconding is seen as problematic (AIDA, 2020:104; Eppel und Reyhani, 2016:2.8.2).

In addition to proportionality and necessity, which limit the use of detention pending removal, there are a number of advantages to the use of alternatives. For authorities, these include reduced costs. One advantage for the individuals concerned is that their personal freedom and in particular freedom of movement are less restricted.<sup>47</sup> Despite the legal restriction and the factual advantages that speak in favor of the use of alternatives to detention, statistics show that detention pending removal was ordered for third-country nationals much more frequently than an alternative in the period 2015–2020. On average, detention was ordered in roughly 86 per cent of cases compared with an alternative in 14 per cent. Yet the share of alternative cases has been increasing since 2018, rising from 8.9 per cent in 2019 to 18.3 per cent in 2020 (Federal Ministry of the Interior, 2018:24–27).<sup>48</sup> According to the Federal Office for Immigration and Asylum, this development is caused by the fact that the option of alternative measures is increasingly being used due to the legal and individual case-related circumstances.<sup>49</sup>

In particular, there are three alternatives to detention. Of these and in the practice so far, the obligations to report to authorities and to reside at designated quarters are applied foremost and usually in combination. As an alternative to detention, the requirement to deposit a surety is imposed in relatively few cases due to the financial situation of the affected.<sup>50</sup> No detailed statistics are recorded on the frequency with which the various alternatives to detention are ordered.<sup>51</sup> The lack of detailed statistics poses a major challenge for assessing detention pending removal and alternatives to detention in Austria. This situation has been criticized both by Asylkoordination Österreich and in national and international reports addressing detention pending removal in Austria (Austrian Court of Audit, 2016:175; OHCHR, 2018:12).<sup>52</sup>

Individuals are legally entitled to free legal assistance after detention, or an alternative is imposed (Art. 52 para 1 Federal Office for Immigration and Asylum Procedures Act). Distinctions are made between foreigners in detention and those subject to an alternative with respect to the medical, social and psychological services provided to each group. Medical care is guaranteed during detention (Art. 10 para 1 Detention Regulation). Social and psychological counselling is also provided, but not in all cases (AIDA, 2020:109). Whether medical care is afforded to individuals in alternatives to detention depends on the particular person's residence status and whether it entails access to material reception conditions. Foreigners receiving material reception conditions have access to medical care, counselling and social support, while those outside this scope can access emergency medical treatment – which is always guaranteed (compare Art. 6 para 1 subpara 8 and Art. 6 para 4 Agreement between the Federal State and the Provinces on Basic Care - Art. 15a Federal Constitutional Act).

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<sup>46</sup> Interview with Jana Zunker (Diakonie Flüchtlingsdienst), 4 February 2021.

<sup>47</sup> Interview with Cansel Öztürk (Federal Ministry of the Interior) and Alexander Scharfegger (Federal Office for Immigration and Asylum), 4 February 2021.

<sup>48</sup> Written input: Federal Ministry of the Interior, 10 February 2021.

<sup>49</sup> Interview with Cansel Öztürk (Federal Ministry of the Interior) and Alexander Scharfegger (Federal Office for Immigration and Asylum), 4 February 2021.

<sup>50</sup> Ibid.

<sup>51</sup> Written input: Federal Ministry of the Interior, 10 August 2021.

<sup>52</sup> Interview with Lukas Gahleitner-Gertz (Asylkoordination Österreich), 3 February 2021.

## METHODOLOGY

The present study was carried out by Alexander Spiegelfeld (Research and Communication Associate, IOM Austria) under the supervision of Saskia Heilemann (Research Associate, IOM Austria) in the framework of the European Migration Network (EMN). The author would like to thank Martin Stiller (Legal Associate, IOM Austria) for his valuable comments as well as Jonas Begemann, Laetitia Derrough and Ava Novidi (Interns, IOM Austria) for various kinds of support in the specific stages of compiling the study.

The study period is from 2015 to 2021. The sources used were legal texts, national and international publications as well as internet sources. The interview partners deserve special thanks for contributing their knowledge and experience through expert interviews and written questionnaires.

Personal interviews were conducted with the following experts:

- Lukas Gahleitner-Gertz, Spokes Person and Asylum Expert of the NGO Asylkoordination Österreich;
- Cansel Öztürk, Consultant, Federal Ministry of the Interior;
- Alexander Scharfegger, Head of the Coordination Office in the Regional Directorate Carinthia of the Federal Office for Immigration and Asylum;
- Jana Zunker, Legal Adviser of the NGO Diakonie Flüchtlingsdienst gem. GmbH.

Written information was obtained from the following institutions and persons:

- Federal Ministry of the Interior, department V/5/b;
- Katie Klaffenböck, MA, project manager at IOM Austria.

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

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Federal Act Establishing the Federal Agency for Care and Support Services as a Private Limited Company, FLG I No. 53/2019.

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, Deportation Orders, Tolerated Stay and Measures to Terminate Residence as well as the Issuance of Austrian Documents to Aliens (Federal Office for Immigration and Asylum Procedures Act), FLG I No. 87/2012, in the version of federal law FLG I No. 146/2020.

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## EUROPEAN MIGRATION NETWORK

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

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

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

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

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

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

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