

Questionnaire of the Special Rapporteur on the human rights of migrants: Ending immigration detention of children and seeking adequate reception and care for them

AUSTRIAN INPUT, April 2020

Questions:

1. Please provide information on any legislation or policy that prohibits or restricts the use of immigration detention of children and their families in your country. Grateful if you could kindly submit the original text of the legislation or policy, accompanied by an English translation if it is in a language other than English, French or Spanish.

Section 76 (1) Aliens Police Act ([Fremdenpolizeigesetz](#) FPG) states that under-age minors (below 14 years) may not be held in detention pending deportation. Minors between 14 and 16 years can only be detained if accommodation and care are provided that are appropriate for their age and level of development (Section 79 (2) Aliens Police Act). For all minors between 14 and 18 years, the authority has to apply "more lenient measures" than detention according to Section 77 (1) FPG unless specific facts justify the assumption that the purpose of detention pending deportation cannot be attained by more lenient measures (details below 2.). Indications that lenient measures might not be adequate may include the commitment of a criminal offence by the minor, or if the minor has previously taken advantage of more lenient measures to abscond. The relevant decision must be justified in detail and may only be taken if appropriate accommodation and care are guaranteed.

As a rule, minors in detention are held separately from adults. Where a parent or legal guardian is subject to detention pending deportation, minor detainees awaiting deportation should be accommodated jointly with their parent or legal guardian, unless separate detention is necessary to ensure their well-being. There is a special detention facility for families, the "Zinnergasse" in Vienna.

Between 2015 and 2019, administrative detention pending deportation has been imposed on a minor between the age of 14 and 18 years only in one single case.

2. Please provide information on existing non-custodial alternatives to immigration detention of children in your country (e.g. community-based reception solutions) and elaborate how these alternatives effectively enhance the protection of the rights of migrant children and their families.

More lenient measures include (non-exhaustive list) orders to take up accommodation in rooms determined by the Federal Office for Migration and Asylum, to report periodically to a police department or to deposit an appropriate financial deposit with the Federal Office for Migration and Asylum (Section 77 (3) FPG). In general, minors who are 14 years or older can only be detained for a maximum period of three months (Section 80 (2) subpara. 1 Aliens Police Act). It is possible to extend this period under certain circumstances (Section 80 (5) FPG).

3. Please provide information on any existing good practices or measures taken in your country to protect the human rights of migrant children and their families while their migration status is being resolved, including inter alia their rights to liberty, family life, health and education (e.g. by ensuring effective access to *inter alia* adequate reception, healthcare, education, legal advice, family reunion).

Austria fully supports and commits itself to the safeguarding of the best interests of the child according to its obligations under international law as well as the EU Charter of Fundamental Rights. Pursuant to Art. 3 Convention on the Rights of the Child as well as to Art. 1 of the Austrian Federal Constitutional Act on Children's Rights, the best interest of the child must be a priority consideration in all actions undertaken by public and private institutions that affect children. Therefore, the principle to safeguard the best interest of the child is a key priority for Austria in the area of asylum and return.

Once an asylum application has been lodged, unaccompanied minors are *ex lege* provided with a **legal adviser** who represents the interests of unaccompanied minors during the procedure, paying particular attention to the best interests of the child, and taking part in the interview. According to Section 10 [Procedural Act of the Federal Office for Migration and Asylum](#) (Bundesamt für Fremdenwesen und Asyl – Verfahrensgesetz BFA-VG), the legal adviser acts as legal representative for proceedings before the Federal Office and the Federal Administrative Court from the time of arrival of the unaccompanied minor at the first reception centre (§ 49 BFA-VG). Unaccompanied minors up to the age of 14 years may only be questioned in the presence of the legal advisor (Section 10 (6) BFA-VG). After admission of the asylum procedure, legal representation is transferred to the competent child and youth welfare institution.

During the interview of minor asylum seekers, the welfare of the child has to be considered and questions must correspond to the mental development and maturity of the minor. To this end, the first step is to assess the applicant's development and wait for a "warming-up" phase, which serves to minimise possible fears of the interview or the authorities and to establish a basis of trust. The decision-makers are trained and prepared for this by internal and external trainers (experts from child and youth psychology and/or legal psychology). This ensures that minor asylum seeker can present their experiences during the interview in a protected setting, forming the basis for a comprehensive, well-founded decision. Several projects were carried out with UNHCR, establishing comprehensive, uniform, binding standards for treatment of unaccompanied minors during the asylum procedure. A child-oriented information brochure was developed, providing legal information about the asylum procedure in a language and layout suitable for children, and about other services such as return counselling, Dublin counselling, family search, etc.

During the ongoing asylum procedure, asylum seekers receive so-called basic care, which includes: accommodation in suitable accommodation with respect for human dignity and family unity; adequate food, pocket money, medical care, safeguarding of health care, measures for persons in need of care; information, counselling and social support; transport costs (including for school attendance); measures to structure the daily routine; benefits in kind or in cash to obtain the necessary clothing; return counselling. In addition to comprehensive medical care, psychological support is also provided as part of basic care.

Minors who are recognised refugees are subject to compulsory schooling; minors who are asylum seekers of school age are allowed to attend school as long as they have a valid right of residence in Austria.

4. Please indicate any challenges and/or obstacles in the development and/or implementation of non-custodial alternatives to immigration detention of children and their families.c

N/A

5. What support could other stakeholders (other than your Government) provide to strengthen the development and/or implementation of non-custodial alternatives to immigration detention of children and their families that enhance the protection of their rights?

With regards to alternatives to detention, currently the family-accommodation facility in Vienna, Zinnergasse, is run by an NGO in cooperation with the police. This arrangement is regarded as a good practice example.