

**Office of the United Nations High Commissioner for Human Rights**

**Report of mission to Austria focusing on the human rights  
of migrants, particularly in the context of return  
15-18 October 2018**



OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

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TABLE OF CONTENTS

1. Introduction ..... 1

2. Overview of applicable national legal and policy framework ..... 3

3. Main Findings ..... 5

    a. Identification of migrants in situations of vulnerability and assistance ..... 5

    b. Training and capacity ..... 7

    c. Access to information and legal counseling ..... 9

    d. Due process and the right to effective remedy ..... 10

    e. Pre-removal detention ..... 11

    f. Right to family life and the best interests of the child ..... 12

    g. Access to services..... 13

    h. Oversight and civic space ..... 14

    i. Data collection and disaggregation ..... 15

4. Conclusions and recommendations..... 16

1. Introduction

1. With the significant increase in arrivals of refugees and migrants<sup>1</sup> to Europe since 2015, the European Union and its Member States have prioritized the return<sup>2</sup> of irregular migrants. The European Union considers that such a policy has a deterrent effect on irregular migration<sup>3</sup> and that a sustainable return and readmission policy reduces incentives for irregular migration.<sup>4</sup> In December 2017, the Government of Austria adopted a programme proposing stricter migration measures to enable swift and efficient expulsion of failed asylum seekers or undocumented

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<sup>1</sup> There is no universal and legal definition of “migrant”; OHCHR uses the term “International migrant to refer to “any person who is outside a State of which they are a citizen or national, or, in the case of stateless person, their State of birth or habitual residence”. See OHCHR/GMG Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations (2018).

<sup>2</sup> OHCHR uses ‘return’ as an umbrella term to refer to all the various forms, methods and processes by which migrants are returned or compelled to return to their country of origin or of habitual residence, or a third country. This includes, *inter alia*, deportation, expulsion, removal, extradition, pushback, handover, transfer or any other return arrangement. The use of the term ‘return’ provides no determination as to the degree of voluntariness or compulsion in the decision to return, nor of the lawfulness or arbitrariness of the return. See OHCHR/GMG Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations (2018).

<sup>3</sup> See [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/effective\\_return\\_policy\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/effective_return_policy_en.pdf)

<sup>4</sup> See, for example, the Proposal for a Regulation of the European Parliament and of the Council for an Asylum and Migration Fund, Strasburg, 12.6.2018, p. 7.

migrants. While recognizing the sovereign prerogative of Austria to govern migration within its jurisdiction, OHCHR recalls that State policies and measures must be within the bounds of international law, including Austria's human rights obligations.

2. From 15 to 18 October 2018, an OHCHR team, led by the Chief of the Americas, Europe and Central Asia Branch, visited Austria<sup>5</sup> in order to assess the human rights situation of migrants, with a particular focus on laws, policies and practice related to the return of migrants to their countries of origin or to third countries. This mission was the sixth OHCHR visit to a European country since 2016 focusing on assessing the human rights situation of migrants.<sup>6</sup> The purpose of the mission was to gain a better understanding of the situation, identify human rights protection gaps in the process of returns of migrants from Austria, and to offer recommendations to the Government and other stakeholders.

3. The Austrian authorities provided the OHCHR team with full support in the preparation and conduct of the mission. The Minister of Foreign Affairs, Ms. Karin Kneissl, greeted the mission on 16 October at the premises of the Austrian Integration Fund.<sup>7</sup> The OHCHR team met with representatives of the Ministries of Foreign Affairs, Interior, Labour and Social Affairs, the Division of Women's Affairs and Equality in the Federal Chancellery, judges of the Federal Administrative and Supreme Administrative Courts, the Ombudsperson Board, and the staff of two reception centres and four detention centres where migrants were being held. The team also interviewed migrant men, women, boys and girls and met with other stakeholders, such as United Nations partners, civil society organizations and lawyers.

4. The findings of this report are also based on the information gathered by the team, including communications from relevant Government institutions, official statistics, reports by national and international organizations, views and observations by international and regional human rights mechanisms, OHCHR interviews of migrants, transcripts of interviews conducted by immigration officers, judicial decisions on asylum and return, and media reports. In line with its methodology on human rights monitoring, OHCHR exercised due diligence to assess the credibility and reliability of sources and has cross-checked the information gathered to confirm its validity.

5. The information collected by OHCHR indicates that a legal protection system concerning migrants is largely in place in Austria. Administrative decisions such as return orders can be appealed before independent courts; alternatives to detention are prescribed in law; the authorities have ensured the provision of free legal counseling to migrants, including in pre-removal detention, through the involvement of civil society organizations; and Interior Ministry case officers deciding on migration claims undergo mandatory pre-and post-deployment training, with human rights elements.

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<sup>5</sup> The OHCHR team held meetings and visited pre-removal detention centres in Vienna, and visited the reception centres in Traiskirchen and Schwechat, and the detention centre in Vordernberg.

<sup>6</sup> In 2016, OHCHR undertook visits to Greece, Italy, Bulgaria, the Republic of North Macedonia and France, five countries in Europe, focusing on the human rights situation of migrants at international borders and in transit. In October 2017, the Office issued a public summary report of key trends identified in these countries. See [https://www.ohchr.org/Documents/Issues/Migration/InSearchofDignity-OHCHR\\_Report\\_HR\\_Migrants\\_at\\_Europes\\_Borders.pdf](https://www.ohchr.org/Documents/Issues/Migration/InSearchofDignity-OHCHR_Report_HR_Migrants_at_Europes_Borders.pdf)

<sup>7</sup> The Austrian Integration Fund (ÖIF) is a fund of the Republic of Austria offering integration services on a national level. It aims at providing language, professional and social integration to asylum beneficiaries and migrants based on their rights and obligations in Austria. See <https://www.bmeia.gv.at/en/integration/the-austrian-integration-fund/>

6. At the same time, the OHCHR team identified areas where improvements could contribute to increased protection of migrants and compliance with international human rights norms and standards. For instance, it was observed that migrants in vulnerable situations or in pre-removal detention, are more likely to face human rights protection gaps. Responsibilities for independent internal and external oversight rest almost entirely on the courts and ombudsperson (*Volksanwaltschaft*), limiting the space for civil society to monitor the human rights of migrants.

7. OHCHR further noted that there is no general right to legal aid in asylum and foreigners' law matters. Insufficient attention seems to be paid to the quality of legal counselling and translation. Appeals do not systematically have suspensive effect. There is a high prevalence of pre-removal detention in comparison with less coercive alternatives. There is also a lack of comprehensive approach and dedicated training, capacity and guidance to ensure compliance with international human rights norms and standards, including ensuring gender-responsiveness and identifying and assisting migrants in vulnerable situations. Contrary to international human rights standards, Austrian law permits the detention of children above 14 years of age for immigration purposes in certain circumstances. There is insufficient statistical information pertaining to the forced returns and deportations of migrants, including necessary disaggregation.

8. Thus, OHCHR is concerned that in addition to frequent amendments to the legal framework introducing stricter provisions, important protections for the human rights of migrants are being eroded.

9. OHCHR has the mandate to promote and protect the human rights of all. This includes migrants, regardless of their status, in particular those who are in vulnerable situations, excluded and marginalized. OHCHR stands ready to continue cooperating with the Government of Austria, including through provision of technical assistance to implement recommendations made in this report and to support the Government in fulfilling human rights obligations towards migrants.

## **2. Overview of applicable national legal and policy framework**

10. Pursuant to the Aliens Police Act ("FPG"), the Federal Office for Immigration and Asylum ("BFA") is the department of the Ministry of Interior dealing with asylum matters. BFA is competent to issue return decisions to third-country nationals residing irregularly in Austria.<sup>8</sup>

11. If third-country nationals file an asylum application in Austria, they may only be deported once an enforceable decision has been issued. A negative asylum decision is delivered together with a return decision. If asylum is not granted, a decision is made on subsidiary protection or protection for humanitarian reasons. If BFA determines that another country is responsible to consider an asylum application under the EU "Dublin Regulation"<sup>9</sup>, the migrant will receive a transfer decision and be returned to that country within six months. The transfer decision can be appealed to the Federal Administrative Court. However, the appeal has no automatic suspensive effect, although the court may grant such effect within one week. In addition, an

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<sup>8</sup> Article 52, para. 1 FPG.

<sup>9</sup> The Dublin Regulation sets down the criteria and the mechanisms of determination of the Member State in charge of examining the request of international protection presented by a third-country national or by a stateless person in one of the European Union States.

accelerated “fast track” procedure can be used to speed up the asylum process when a migrant comes from a country that is considered by the Government as “safe”.<sup>10</sup>

12. Since 2017, Austria adopted stricter legal provisions with the aim of stepping up the enforcement of returns of rejected asylum seekers.<sup>11</sup> These measures include heavier administrative fines or imprisonment for individuals failing to comply with return decisions;<sup>12</sup> and the extension of pre-removal detention periods.<sup>13</sup> Furthermore, the list of countries considered “safe” has been expanded and there are plans by the Ministry of Interior to further shorten “fast track” processes.<sup>14</sup>

### *Pre-removal detention*

13. Detention can be ordered by BFA to secure a return procedure where a risk of absconding exists based on a non-exhaustive set of circumstances,<sup>15</sup> and detention is considered as proportionate. Detention can also be ordered pursuant to the Dublin Regulation. BFA retains discretion with regard to identifying the risk of absconding and applying detention.

14. If the authorities consider there is a risk of absconding, they must first examine whether an alternative to detention, referred to as a “lenient measure” in national law, can be applied to the individual.<sup>16</sup> Article 77(3) FPG enumerates three such lenient measures : (a) reporting obligations (b) the obligation to take up residence in a certain place of accommodation and (c) the deposit of a financial guarantee.<sup>17</sup>

15. Austrian law prohibits the pre-removal detention of children under the age of 14<sup>18</sup> yet permits the detention of children under 14 who are held together with their parents, provided

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<sup>10</sup> See [https://www.bfa.gv.at/files/broschueren/Informationsbroschuere\\_Asylverfahren\\_in\\_Oesterreich\\_EN.pdf](https://www.bfa.gv.at/files/broschueren/Informationsbroschuere_Asylverfahren_in_Oesterreich_EN.pdf).

<sup>11</sup> The measures were also adopted to reflect a 2017 Recommendation of the European Commission: See “Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC”, available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302\\_commission\\_recommendation\\_on\\_making\\_returns\\_more\\_effective\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_commission_recommendation_on_making_returns_more_effective_en.pdf)

<sup>12</sup> Authorities can impose a fine between EUR 5,000 and 15,000. Imprisonment of a maximum of six weeks is a substitute penalty for individuals unable to pay the fine. 2017 Act Amending the Aliens Law, Article 2(82).

<sup>13</sup> The November 2017 amendments to the Aliens Police Act extend the maximum duration of pre-removal detention from 4 to 6 months for adults, and from 2 to 3 months for children above the age of 14. In line with the European Union Return Directive, detention may be further extended for an additional period of 12 months in cases where the removal operation is likely to last longer owing to: (a) a lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries.

<sup>14</sup> Verordnung der Bundesregierung, mit der Staaten als sichere Herkunftsstaaten festgelegt werden (Herkunftsstaaten-Verordnung – HStV), amended and expanded in 2016 and 2018.

<sup>15</sup> Article 76 FPG: the risk is considered on the basis of a number of criteria, including whether:

- (a) The person has avoided or hampered a deportation order;
- (b) The person has violated a travel ban;
- (c) An enforceable expulsion order exists or the person has absconded during the asylum procedure or during the removal procedure;
- (d) The person is in pre-deportation detention at the time he or she lodges the application;
- (e) It is likely that another country is responsible under the Dublin Regulation, namely as the person has lodged multiple applications or, based on past behavior, is likely to travel on to another country;
- (f) The person does not comply with alternatives to detention;
- (g) The person does not comply with cooperation or reporting duties; and
- (h) There is a sufficient link with Austria such as family relations, sufficient resources or secured residence.

<sup>16</sup> FPG, articles 76–81.

<sup>17</sup> The amount is to be determined on a case-by-case basis and must be proportionate, to a maximum amount of €1,717.46. For more information, see Asylum Information Database in <https://www.asylumineurope.org/reports/country/austria>.

<sup>18</sup> FPG, article 76(1).

the facilities are deemed appropriate for children.<sup>19</sup> Alternative measures to detention should be applied in the case of children over the age of 14, unless certain facts demonstrate that the aim of the detention, namely securing removal, cannot be achieved.<sup>20</sup> In such cases, a maximum of three months detention can be imposed.<sup>21</sup>

16. An appeal against a detention order can be made to the Federal Administrative Court, which will usually issue a decision within one week of the appeal. Every four weeks, BFA must verify whether detention is still proportionate. If the individual remains detained for longer than four months, the Federal Administrative Court must decide whether pre-removal detention is still permissible. BFA is required to forward the pertinent files to the Federal Administrative Court at least one week before the end of the four-month period.<sup>22</sup>

#### *Non-refoulement / safeguards from return*

17. If an application for asylum is dismissed on the merits or if asylum status has been revoked, BFA should grant subsidiary protection status on the basis of articles 2 (right to life) and 3 (prohibition of torture) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: the European Convention on Human Rights). Subsidiary protection holders receive a residence permit for one year with a possibility of renewal for additional two year periods. After a five-year stay, an individual can apply for a European Union permanent residence card.

18. BFA can also – *ex-officio* – grant residence status based on the right to family or private life, or other humanitarian reasons, for instance:

- if the individual has resided in Austria for at least five years;
- if his/her stay has been tolerated for at least one year; or
- if the individual is a victim of human trafficking or violence.

19. The individual can also be granted tolerated stay if removal is not permissible or is not possible due to reasons for which the person is not responsible.<sup>23</sup> However, these individuals are not granted legal residence status in Austria.<sup>24</sup>

20. Prior to return, the person concerned undergoes a medical examination within 24 hours of the scheduled removal to determine whether he/she is fit for air travel.

### **3. Main Findings**

#### **a. Identification of migrants in situations of vulnerability and assistance**

21. Migrants in vulnerable situations are persons who are unable to effectively enjoy their human rights, are at increased risk of violations and abuse and who, accordingly, are entitled to call on a duty bearer's heightened duty of care, including in all processes concerning decisions on their return.

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<sup>19</sup> FPG, article 79(5).

<sup>20</sup> FPG, article 77(1).

<sup>21</sup> FPG, articles 77(1) and 80(2).

<sup>22</sup> Federal Office for Immigration and Asylum Procedures Act, article 22a, para 4.

<sup>23</sup> This time limit is 18 months.

<sup>24</sup> FPG, article 31, para. 1a, sub-paragraph 3.

22. However, the laws relating to the reception of asylum seekers do not foresee a mechanism for identifying persons in vulnerable situations, including in detention.<sup>25</sup> According to the OHCHR team's observations and information it received, 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..

23. The team has received information from multiple stakeholders, and has seen BFA decisions, suggesting that interviews of asylum seekers and migrants by the police and BFA officials often take place in an atmosphere of distrust. These seem to focus more on identifying so-called "Dublin cases" and so-called "safe country cases", than on supporting individuals to provide exhaustive accounts that might also bring to light a situation of vulnerability. Moreover, judges and lawyers dealing with asylum and returns mentioned cases of victims of gender-based violence who were not encouraged or able to provide a full account of their experiences in a gender-responsive manner (beyond same-sex interviewing), including in a court hearing. When victims were ready to share their experiences, it was often too late in the process to impact decisions on asylum or return.

24. Late disclosure of vulnerability by the claimant during the asylum procedure should not automatically lead to an adverse judgment on their credibility, especially as reluctance to identify the actual extent of abuse or persecution may stem from feelings of shame, trauma, fear, or may not be understood as relevant in the absence of specific questioning by officials. Furthermore, the OHCHR team learned that confidentiality at all stages of the judicial process was not always ensured.

25. Failure to identify situations of vulnerability hinders migrants' rights to an individual assessment, to liberty and to be protected from *refoulement*, as well as due process rights at each stage of the returns and appeals processes. Such failure may additionally limit access to other human rights protections concerning counselling, rehabilitation, and health services.

*"I left with my seven-year-old brother but the boat capsized and my brother died. (...) All has changed and it's not worth living for" – Unaccompanied migrant boy in a reception centre who has tried to commit suicide several times.*

26. The team learned that there was generally little cooperation among different actors, including governmental entities and a broad range of civil society organizations working with migrants in vulnerable situations. A good practice identified during the mission are training sessions delivered to the Ministry of Interior on identification and support to victims of trafficking, in close collaboration with IOM and the non-governmental organization Intervention Centre for Trafficked Women and Girls (LEFÖ-IBF).<sup>26</sup>

27. The team was also informed by the Ministry of Interior of the existence of an internal decree on the identification and support to victims of trafficking. In addition to this internal regulation,

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<sup>25</sup> The Federal and some Länder Basic Care laws provide for the consideration of special needs of persons in vulnerable situations in the basic care system.

<sup>26</sup> IOM Austria is currently implementing a three-year project (2017-2019) that provides the BFA with training on identifying victims of trafficking and acquiring intercultural competences, which is funded by the Ministry of the Interior and the EU's Asylum Migration and Integration Fund, see <http://www.iomvienna.at/en/asyl-train>. LEFÖ-IBF is a civil society organization working on behalf of the Ministry of the Interior, the Women's Affairs and Equality Division of the Federal Chancellery and the Ministry of Justice.

OHCHR would invite Austrian authorities to provide for a reflection and recovery period in the law in order to strengthen identification practices.<sup>27</sup>

28. While States are under an obligation not to return victims when they are at serious risk of harm (including intimidation, retaliation and re-trafficking), there are concerning reports that in so-called “Dublin cases” and “safe countries”, and through the associated “fast track” return process, potential victims of trafficking, particularly women, have been forced to return to countries they had fled due to traffickers. This practice has also reportedly applied to migrants in other situations of vulnerability.

*“There are significant efforts taken by the authorities to get those people out of the country, be it in Dublin cases, be it in cases of families where some of the family members cannot be deported because of illness, be it in cases of persons in psychiatric treatment” – Representative of Amnesty International*

29. The team notes with concern reported cases of forcible return of family members of migrants who have a right to remain temporarily due to a situation of vulnerability, including pregnancy and urgent mental health needs. The migrants entitled to protection were effectively given the “choice” of foregoing their right to temporarily remain and agreeing to a “voluntary return” in order to be with their family, without regard to the exacerbation of vulnerability this may cause.

30. The emphasis on expediency of asylum decision-making and returns processes leaves insufficient time to properly identify and support migrants in vulnerable situations.

#### **b. Training and capacity**

31. Closely linked to the identification of vulnerability is the capacity of officials to comply with international human rights norms and standards. The Ministry of Interior indicated that articles 3 (prohibition of torture) and 8 (right to family life) of the European Convention on Human Rights are included in mandatory e-learning trainings for all BFA case officers, and that the latter undergo mandatory internal pre-deployment training on “theoretical principles and practical knowledge”<sup>28</sup>. Further relevant training is provided to officers on a voluntary basis, such as the European Asylum Support Office training modules on interviewing vulnerable persons and children; a training-of-trainers module on gender, gender identity and sexual orientation; in-person courses on interviewing vulnerable persons in cooperation with the United Nations High Commissioner for Refugees (UNHCR); and an intercultural training in cooperation with the International Organization for Migration (IOM). As good practices, the BRIDGE initiative between the Government and UNHCR aims at providing on-the-job training as well as specific assessment methods for the evaluation of asylum procedures.<sup>29</sup>

32. Despite the availability of training programmes, the team learned that capacity gaps remain. In particular, there are no compulsory training modules or specific mandatory guidelines or protocols for BFA officers dedicated to human rights, gender-responsiveness or the identification and assistance to migrants in vulnerable situations<sup>30</sup>. Furthermore, although a few civil society organizations have been involved in the elaboration and implementation of

<sup>27</sup> This would be a period during which victims would be given support, time and space to decide on their options, including whether they will cooperate with criminal justice agencies in the prosecution of their exploiters.

<sup>28</sup> Response received from the Ministry of Interior on follow-up questions (10 December 2018).

<sup>29</sup> <https://www.unhcr.org/dach/at/was-wir-tun/asyl-in-oesterreich/projekt-bridge>.

<sup>30</sup> Ibid.



voluntary training programmes, it appears they have not been consulted on the elaboration and implementation of existing mandatory training materials.

33. Consequently, and in addition to the sharp increase in BFA staff numbers over recent years, many case workers may not be adequately trained in using techniques that are responsive to the needs of migrants, particularly those in situations of vulnerability. This has an impact on the quality of the interviews, assessments made and decisions taken by BFA officers. It also restricts a migrant's ability to talk about their experiences and provide a comprehensive statement.

34. In a number of cases obtained by OHCHR and based on information received, negative decisions made by BFA were based on personal views and involved biased questioning in interviews and wrongful gender and racial stereotyping. It was also reported that gender-specific considerations are not systematically adopted, such as ensuring that women are interviewed separately, without the presence of male family members. In a widely reported case, the wording of a negative decision concerning a gay asylum-seeker was based on harmful stereotypes about homosexuality and how a gay person should be behaving.<sup>31</sup> During the OHCHR mission, the team received information that the case officer involved in that case was still reviewing and conducting interviews.<sup>32</sup> Even when the information about the sexual orientation of individuals was not disputed, there were reported cases where gay people were returned in a fast-track procedure to countries considered as "safe", yet criminalizing homosexuality.

35. Not taking sufficient account of the gender-specific experiences, views and needs of individuals can lead to protection gaps. Although gender mainstreaming across the Government is one of the main areas of work of the Division on Women's Affairs and Equality, it does not seem to extend to BFA or to judicial actors involved in asylum and return cases.

36. During the OHCHR mission, it also became evident that this gap in training and capacity extends to other key stakeholders, such as immigration detention guards, translators/interpreters and legal and return counsellors in detention facilities. Judicial actors noted that they do not receive dedicated training on migrants in vulnerable situations and do not have specific expertise or guidance. In addition, from the information received, there do not seem to be specific protocols or specialized chambers or dockets within the Federal Administrative Court concerning migrants in vulnerable situations, with the necessary expertise and confidentiality considerations. For example, the Federal Administrative Court ruled in June 2018 that, although it was acknowledged that an applicant had homosexual relationships, it found that these relationships were not an expression of a homosexual identity but rather a "situation-related" homosexuality or bisexuality.<sup>33</sup> OHCHR notes that the BRIDGE initiative seeks to enhance coordination between the courts, promoting the exchanges of experts with interested judges in workshops, which is to be welcomed.

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<sup>31</sup> <https://www.nytimes.com/2018/08/16/world/europe/gay-afghanistan-man-asylum-austria.html>.  
<https://www.theguardian.com/world/2018/aug/15/austria-accuses-afghan-asylum-seeker-of-pretending-to-be-gay>.

<sup>32</sup> According to government information "the employee concerned was immediately deprived of his decision-making power, an order was issued for comprehensive retraining and he was unable to perform any official duties independently during this time".

<sup>33</sup> Case number: L521 2135460 -1  
[https://www.ris.bka.gv.at/Dokumente/Bvbwg/BVWGT\\_20180621\\_L521\\_2135460\\_1\\_00/BVWGT\\_20180621\\_L521\\_2135460\\_1\\_00.pdf](https://www.ris.bka.gv.at/Dokumente/Bvbwg/BVWGT_20180621_L521_2135460_1_00/BVWGT_20180621_L521_2135460_1_00.pdf) Page 49.

### c. Access to information and legal counseling

*“I have tried to call the counsellor at the BFA but was told that they cannot give any information and that I should email them. How am I supposed to email them from here [detention]?” – Migrant man interviewed by OHCHR in pre-removal detention.*

37. Good quality and independent legal representation as well as the provision of timely, continuous and understandable information are essential for migrants to be able to navigate complex legal systems. Legal aid is also vital to ensure the right to a fair trial and equality before the law. In 2015, the United Nations Human Rights Committee recommended that Austria “ensure that legal aid and representation of adequate quality are systematically made accessible throughout the entire asylum procedure.” The European Court of Human Rights has found that preventing an applicant from submitting reasons against his expulsion and from having his case reviewed with the participation of his counsel amounted to a violation of the procedural guarantees of Article 1 of Protocol 7 of the European Convention on Human Rights.”<sup>34</sup>

38. In addition to having the right to competent, independent, free and confidential legal and other assistance, migrants are also entitled to accessible information and interpretation services.<sup>35</sup> One concern in this regard is the availability, quality and professionalism of the interpreters assigned to cases. This is an essential issue given the importance of the accuracy of the information contained in the interview reports for the determination of the right of a migrant to be granted some form of protection. One migrant with whom the OHCHR team spoke was reportedly pressed by his interpreter to quickly sign his interview report “without creating unnecessary problems”. Interpreters are provided by BFA and are available for most languages of the countries of origin. However, interviews may also be conducted in a language the asylum-seeker is deemed to understand sufficiently and interpretation is often not done by accredited interpreters. One Urdu-speaking migrant told OHCHR that he had been provided with a Farsi-speaking interpreter and ended up signing an interview report he did not fully understand.

39. Austrian law does not recognize a general right to free legal counsel for migrants. An asylum seeker is entitled to free legal counsel in the admissibility procedure but not when his case is reviewed on the merits.<sup>36</sup> On appeal, an asylum seeker has a general right to free legal aid before the Federal Administrative Court but not when the latter’s decision is appealed to the Supreme Administrative Court.<sup>37</sup> Thus, in 2017, the Supreme Administrative Court granted 440 applications for legal aid (22 %) and rejected 1,572 (78 %). A similar trend was observed in the first nine months of 2018 when the Supreme Administrative Court granted 273 requests (15 %) and dismissed 1,566 (85 %). The high rejection rate is based on the fact that the Supreme Administrative Court has held that most applications do not have a real prospect of success. Regarding third-country nationals who are not asylum seekers, free legal counselling is an entitlement on appeal only.

40. Two organizations are contracted to provide State-sponsored legal aid to migrants: *Verein Menschenrechte Österreich (VMÖ)* and *ARGE Rechtsberatung (Diakonie Flüchtlingsdienst)*

<sup>34</sup> *Nolan and K. v. Russia*, ECtHR, Application No. 2512/04, Judgment of 12 February 2009, para. 115.

<sup>35</sup> Principle 3, Guideline 2, OHCHR/GMG Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations (2018); Working Group on Arbitrary Detention, Revised Deliberation No. 5 on deprivation of liberty of migrants (2018), para. 33.

<sup>36</sup> See §§ 49-50 BFA-VG

<sup>37</sup> See § 61 para 1 Supreme Administrative Court Act in conjunction with § 63 para 1 of the Code of Civil Procedure.

and *Volkshilfe Oberösterreich*). VMÖ also collaborates with and is funded by the Ministry of Interior to provide advice on voluntary return assistance and help authorities with “Dublin” transfers. VMÖ’s independence and the quality of its assistance, counselling and monitoring have been questioned by different counterparts the team interviewed, including public officials. VMÖ explained to OHCHR that its role is to “*uphold the rule of law and not necessarily be the defender or the advocate of the migrant who often don’t help themselves*”.

41. As reported in the media and raised with concern by several interlocutors, the Ministry of Interior is in the process of establishing a “Federal Agency for the Provision of Care and Support” that would, among other responsibilities, assume critical tasks related to asylum and return, including legal counselling currently provided by civil society organizations.<sup>38</sup> OHCHR regards it essential for the Government to ensure sufficient space for a plurality of civil society actors to meaningfully promote and protect the human rights of migrants within migration processes and policies. This includes providing independent legal counselling and assistance, and facilitating administrative procedures and legal remedies.

#### **d. Due process and the right to effective remedy**

42. As evidenced by several cases reviewed by the OHCHR team, and as highlighted above, the manner in which BFA has carried out some assessment interviews and made decisions raises concern. For instance, the team learned that during interviews, BFA staff sometimes pressed migrants to disclose detailed information about their sexual relationships and dismissed accounts of traumatic events as incomplete or incoherent, disregarding the significant effects trauma may have on memory, or refusing to believe migrants’ accounts based on wrongful stereotyping, prejudices and bias. In some cases, the Federal Administrative Court held that BFA had acted “completely arbitrarily” and failed to carry out an individualized assessment of the legality of deportation in accordance with the principle of *non-refoulement*.<sup>39</sup> In 2017, the Federal Administrative Court annulled or amended nearly 37 per cent of BFA decisions on foreigners’ and asylum cases.<sup>40</sup>

43. Migrants who receive negative asylum decisions, removal orders or immigration detention orders can appeal these decisions before the Federal Administrative Court at the first instance, and before the Constitutional Court or Supreme Administrative Court at the second instance. Yet, it is of concern that not all cases on appeal have automatic suspensive effect. While the courts are still able to grant suspensive effect, individuals must either apply for this separately or, in the context of appeals at first instance, the court is required to assess within one week whether suspensive effect should be granted. This implicates an additional procedure that has to be finalized within a very short timeframe. In addition to reducing the time limits for lodging appeals in certain cases, these rules risk undermining due process safeguards and the right to an effective remedy, as well as the principle of *non-refoulement*.

44. The Supreme Administrative Court has regularly cancelled decisions of the Federal Administrative Court when it failed to hold hearings in cases involving migrants. However, the Supreme Administrative Court does not usually hold hearings in asylum cases. In addition, no special measures are in place to ensure the right to be heard for migrants in vulnerable

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<sup>38</sup> <https://www.oe24.at/oesterreich/politik/Riesen-Wirbel-um-neue-Asyl-Agentur/352602696>.

[https://www.oe24.at/oesterreich/politik/Kickl-Neue-Asyl-Agentur-kommt/352507534\\_](https://www.oe24.at/oesterreich/politik/Kickl-Neue-Asyl-Agentur-kommt/352507534_)

[https://www.ots.at/presseaussendung/OTS\\_20181017\\_OTS0004/oesterreich-kickl-schafft-neue-asyl-agentur](https://www.ots.at/presseaussendung/OTS_20181017_OTS0004/oesterreich-kickl-schafft-neue-asyl-agentur).

<sup>39</sup> BVwG, W189 2122464-1/4E, 24.05.2016; BVwG, I416 2148888-1/9E, 27.03.2017.

<sup>40</sup> BVwG, Tätigkeitsbericht 2017, p 25.

situations, such as victims of sexual violence or trafficking. The team also heard complaints from multiple stakeholders that BFA staff were ill-equipped to appropriately handle such cases. Legal provisions and implementing measures to ensure legal representation for children and same sex interviewing are welcome but insufficient to address the various challenges.<sup>41</sup>

45. The team was concerned that migrants had limited access to these procedural protections in pre-removal detention. Immigration detention is ordered by BFA with an automatic judicial review only after four months. According to information from 2017, only 16 per cent of migrants subject to immigration detention challenged the lawfulness of their detention, in comparison to asylum cases, where almost all cases are appealed.<sup>42</sup> This could be in part due to the fees and costs associated with such petitions at the first instance court, which do not apply in asylum cases.

*“I have been here [in detention] for four months and have not seen a judge” – Migrant man interviewed by OHCHR in pre-removal detention.*

46. OHCHR notes with concern that the Government of Austria viewed compliance with interim measures issued by United Nations human rights treaty bodies as conflicting with its obligations under European Union law. Interim measures can be issued in exceptional cases of individual complaints, where a treaty body deems it necessary to prevent irreparable harm to the victim of alleged violations. In cases concerning returns, interim measures are key to ensuring meaningful protection of migrants’ human rights and preventing violations upon return.

#### **e. Pre-removal detention<sup>43</sup>**

47. The right to liberty is a key protection guaranteed to all individuals under international human rights law, which involves a presumption of liberty and that any form of deprivation of liberty in the context of migration should only be ordered as a measure of last resort.<sup>44</sup> Austrian law governing pre-removal detention provides for deprivation of liberty only if less restrictive alternatives are not suitable and if the measure is proportionate. However, the law provides a non-exhaustive list of what could constitute a risk of absconding or make detention a proportionate measure. For instance, a lack of cooperation with authorities regarding the implementation of return decisions, the existence of multiple asylum requests, or previous criminal misdemeanours are some of the criteria applied. While jurisprudence requires the entire behaviour of the migrant to be taken into consideration, the broad scope of the law risks undermining the principle that pre-removal detention is applied as an *ultima ratio*.

48. The effects of this wide-ranging criteria are evident in practice. For example, the OHCHR team spoke to migrants who, despite having family in Austria, found themselves in pre-removal

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<sup>41</sup> Article 20, Bundesrecht konsolidiert: Gesamte Rechtsvorschrift für Asylgesetz 2005, Fassung vom 11 February 2019.

<sup>42</sup> Response to parliamentary inquiry, 18 August 2018.

See at [https://www.parlament.gv.at/PAKT/VHG/XXVI/AB/AB\\_01001/imfname\\_706803.pdf](https://www.parlament.gv.at/PAKT/VHG/XXVI/AB/AB_01001/imfname_706803.pdf); BVwG, Tätigkeitsbericht 2017, p. 24 and information received by the Federal Administrative Court.

<sup>43</sup> While international human rights standards on the deprivation of liberty include guidance on conditions of detention, the scope of this report does not extend to cover conditions of detention. For further information on conditions of detention, the Austrian Ombudsperson’s Office regularly issues monitoring reports and recommendations.

<sup>44</sup> International Covenant on Civil and Political Rights, article 9 (1); Convention Relating to the Status of Refugees, article 31 (1).

detention. Some also had a past criminal record in Austria and felt that the pre-removal detention constituted an unfair additional punishment.

49. The fact that Austrian law provides alternative measures to detention, such as reporting requirements, is positive. However, resort to lenient measures has diminished in recent years, while detentions have significantly increased. According to statistics provided by the Ministry of Interior following a parliamentary inquiry, between 2015 and 2017, the number of migrants subjected to lenient measures decreased from 571 to 348. During the same period, the number of migrants subjected to detention decisions more than tripled, from 1,436 to 4,627.<sup>45</sup>

50. In this regard, the OHCHR team was also concerned that no official statistics are collected on the average duration of pre-removal detention or regular custody pending deportation, nor are detention statistics generally disaggregated by sex or age. This impedes oversight to monitor and address potential overuse of and lengthy pre-removal detention.

*“They said I was arrested because I am not allowed to travel. I want to go to Italy to get my papers. I am the only one paying school fees and medicine for my children. How can I send money to her [my mother] if I am in prison?” – Migrant woman interviewed by OHCHR wanting to return to Italy where she has status.*

51. As a general rule, pregnant and nursing women, survivors of torture or trauma, migrants with particular physical or mental health needs, LGBTI individuals and others who have specific needs or are particularly at risk of violence should not be detained.<sup>46</sup> Based on its observations and information received, OHCHR is concerned that migrants in vulnerable situations and with specific needs were sometimes detained. Staff at immigration detention centres, including medical staff, were often unprepared to handle such cases, in part due to training and capacity gaps. In response to the OHCHR team’s inquiry about the provision of appropriate medicines for migrants’ needs, an officer of an immigration detention centre stated: *“sometimes they try to fool the doctor. They just want it [medication] to misuse it”*.

#### **f. Right to family life and the best interests of the child**

52. The principle of the best interest of the child is anchored in the Austrian legal system, namely in the constitution and civil code. According to Austrian law, the child’s best interests must be a priority consideration in all actions taken by public and private institutions that affect children. BFA informed the team that it applies this principle when it issues return decisions.

53. According to BFA, unaccompanied migrant children are provided with a legal adviser acting as a guardian from the moment they arrive in a reception centre. While the OHCHR team did not encounter any children in detention during the visit, it expresses concern that the detention of children above 14 years of age for immigration purposes is permissible under Austrian law, which contravenes international human rights standards.<sup>47</sup>

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<sup>45</sup> Response to parliamentary inquiry, 18 August 2018.

See at [https://www.parlament.gv.at/PAKT/VHG/XXVI/AB/AB\\_01001/imfname\\_706803.pdf](https://www.parlament.gv.at/PAKT/VHG/XXVI/AB/AB_01001/imfname_706803.pdf).

<sup>46</sup> Principle 8, Guideline 3, OHCHR/GMG Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations (2018).

<sup>47</sup> Convention on the Rights of the Child, articles 2, 3, 9, 22 and 37, Convention on the Rights of Migrant Workers and Members of their Families, general comment No. 2, para. 33; joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, para. 5; Working Group on Arbitrary Detention, Revised Deliberation No. 5 on deprivation of liberty of migrants (2018), para 11.

54. The team identified a general need to strengthen referral mechanisms in reception centres and learned about inconsistency in referrals to child and youth welfare offices.

55. The OHCHR team is also concerned about reports it received of negative consequences for family life arising from the deletion of article 16(3) of the Federal-Office Procedure Act. The effect of this amendment is that not all appeals of asylum claims of family members are granted suspensive effect. OHCHR was thus informed about cases in which families were separated by deportation of one member as a result of this amendment despite the legal requirement that an individual assessment be undertaken for each family member.

56. The “buddy system” practice that teams up an Austrian adult with an unaccompanied child asylum-seeker (e.g. used by the Salzburg Child and Youth Ombudsman) is a good practice. Another welcome practice involves the briefings provided by IOM to non-governmental organizations operating as return counselors on child protection in the framework of assisted voluntary return and reintegration as well as on support to medical cases.

#### **g. Access to services**

57. In the area of access to services, Austrian law reflects European Union law, namely the Reception Conditions Directive,<sup>48</sup> according to which asylum seekers are entitled to basic care (material reception conditions) if they do not have sufficient means. Applicants who receive a final negative decision, including in cases of envisaged or pending appeals to the high courts, are entitled to basic care provided they cooperate with the competent authority regarding their return. If they get a positive decision, they continue to receive such care for an additional four months.<sup>49</sup>

58. The team learned about ongoing discussions in Austria related to the adoption, at the federal level, of a fundamental law in the area of social assistance, with the objective of harmonizing the “needs based minimum assistance schemes” legislation and practice across the nine Austrian provinces. On 13 March 2019, the Federal Government adopted a draft Basic Law on Social Assistance as well as changes to the Integration Act. According to the draft law, recognized refugees are entitled to full social aid benefits on equal footing with Austrian citizens if they can demonstrate sufficient German language skills. On the other hand, beneficiaries of subsidiary protection are only entitled to core benefits of social aid, reduced and limited to the level of the basic care and welfare support, with no possibility to receive full social aid.

59. The team is concerned that limiting access in this manner may not meet the international human rights law criteria according to which any differential treatment on the basis of legal status should be in accordance with the law, pursue a legitimate aim and remain proportionate to the aim pursued.<sup>50</sup> Therefore, it encourages the Government to ensure that any changes in access to schemes are based on objective and reasonable criteria.

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<sup>48</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN>

<sup>49</sup> After this period, refugees can access the needs-based minimum benefit, which is dependent on certain prerequisites, and receive different amounts based on varying criteria in the different Länder. Additionally, some Länder have introduced compliance with an “integration contract” and participation in integration measures as a prerequisite to access the benefits or as a possibility to increase the maximum amount.

<sup>50</sup> Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights, E/C.12/2017/1, para 5.

## **h. Oversight and civic space**

60. The State should ensure that migration responses are monitored by independent public bodies, as well as allow for external monitoring by civil society, to ensure transparency and accountability while protecting migrants' confidentiality.<sup>51</sup> BFA has an internal system in place for quality management concerning decisions on the protection extended to migrants in the context of returns, including a dedicated unit and focal points across BFA to ensure quality, provide support and further development. However, from the information received from State and non-State actors alike, it does not seem that this system includes monitoring the fulfilment of case officers' duties without discrimination and with due account for the human rights of migrants, including gender-responsiveness, adherence to the best interests of the child and adequate identification and assistance to migrants in vulnerable situations. Moreover, the results of the monitoring do not seem to be publicly available.

61. As a good practice, the "*Volksanwaltschaft*" (ombudsperson) is mandated to carry out independent monitoring, particularly in pre-removal detention, and has made a number of recommendations to improve existing conditions, some of which have not been implemented.<sup>52</sup> As part of its *ad hoc* "observation of police operations", the ombudsperson also monitors forced returns (including charter flights), albeit not systematically. The OHCHR team learned that the ombudsperson has not been involved in monitoring BFA interviews, assessments and decisions on asylum and returns and related processes. VMÖ has been systematically monitoring charter flights for forced return and deportation but, as noted above, their independence and the quality of their human rights work has been called into question.

*"There is a clear attempt of the Ministry of Interior to drive NGOs out of all asylum related areas"* - Representative of a civil society organisation interviewed by OHCHR.

62. The OHCHR team is concerned that the space for civil society to conduct activities in the context of returns is reducing, particularly when it concerns monitoring. For example, in a widely reported case, BFA sought prosecution for criminal libel against the head of the asylum department of a civil society organization, Diakonie, for expressing views on the high percentage of negative decisions on asylum adopted by BFA that were quashed by the Federal Administrative Court.<sup>53</sup> Although the public prosecutor has since dropped the case, this situation has had a chilling effect on civil society organizations advocating for the human rights of migrants. In another widely reported case, in 2018, the Ministry of Interior sent out an email to all province police headquarters stating that communication with specific media outlets alleged not to report favourably should be kept to "the minimum legally possible" without "offering them any benefits such as exclusive access."<sup>54</sup> The email also recommended

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<sup>51</sup> See Global Migration Group, Principles and Guidelines on the human rights protection of migrants in vulnerable situations, Principle 17 (2); see also OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders, Guidelines 1(8), 5 (6), 8 (19), 10 (9).

<sup>52</sup> Recommendations have also concerned separation of families. See for example, [https://volksanwaltschaft.gv.at/downloads/dtnmv/aob-annual-report-2017\\_gesamt.pdf](https://volksanwaltschaft.gv.at/downloads/dtnmv/aob-annual-report-2017_gesamt.pdf) (pages 263-264, 232-239).

<sup>53</sup> <https://kurier.at/chronik/oesterreich/nach-kurier-berichten-asylamt-zeigte-kritiker-an/400134605>; <https://diepresse.com/home/innenpolitik/5506802/Amnesty-wirft-Asylamt-einen-Einschuechterungsversuch-vor>; <https://kurier.at/chronik/oesterreich/van-der-bellen-aeussert-sich-kritisch-zu-bfa-anzeige/400150884>. See also on the high number of quashed decisions by the court, the subsection on due process and effective remedy above.

<sup>54</sup> <https://kurier.at/politik/inland/geheimpapier-kickls-brisante-medienkontrolle/40012733>; <https://www.telegraph.co.uk/news/2018/09/25/austria-accused-muzzling-press-police-told-withhold-information/>

proactively making public sex crimes and sharing with the media a suspect's nationality and residency or asylum-seeking status.<sup>55</sup> The Ministry of Interior has since stated the email was only a suggestion and “not an obligation or directive” for press officers and that it was not ordered directly by the Minister.

63. Other concerns raised by civil society actors include reported efforts to move reception and pre-removal detention centres to hard-to-reach places outside cities, which would reduce their ability to continue to regularly monitor and provide assistance and counselling; the frequency of amendments to the legal framework for migrants; and the planned establishment of a “Federal Agency for the Provision of Care and Support”, which would significantly diminish the role of civil society organizations in asylum and returns processes.

#### **i. Data collection and disaggregation**

64. States should regularly collect, analyse, and publish available disaggregated statistical data and trends concerning the human rights situation of migrants, including in the context of returns, while protecting personal data and the right to privacy. Anonymized disaggregated data is critical to obtain an accurate account of the different experiences, situations and needs of migrant women, girls, men, boys and those who identify with other identities. It helps inform the public and counter misconceptions, harmful stereotypes and xenophobia. It can also contribute to effective age and gender-responsive laws, policies and practices that are in line with human rights law. It further allows for the identification, monitoring and analysis of protection gaps, including for migrants in an irregular situation, and potentially discriminatory practices or targeting.

65. While the Government systematically collects disaggregated data on migrants who have received asylum or subsidiary/humanitarian protection, the OHCHR team noted that statistical information pertaining to the situation of migrants in the context of returns was insufficient. It was often not public or accessible to other Government entities and/or civil society, not regularly collected and inconsistent in methodology, and lacked adequate disaggregation, in particular by sex, age, migratory and legal status, disability, country of origin, and other relevant variables.

66. There is, for example, insufficient disaggregated statistical information on:

- voluntary returns broken down by legal status (including by those who have an obligation to return and those who do not), whether assistance was provided, and the entity assisting the return;
- voluntary returns out of pre-removal detention broken down by length of detention;
- forced returns and deportations, including by ground and destination and entity carrying out the return;
- revocations of protection or tolerated stay and subsequent return;
- appeals of BFA return decisions and their outcomes (broken down by court, including appeals of court of first instance, and by legal representation, e.g. VMÖ, Diakonie or NGO/private);

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<https://www.thelocal.at/20180926/kickl>; <https://www.dw.com/en/austrian-interior-ministry-under-fire-for-plans-to-curb-media/a-45627913>.

<sup>55</sup> *Ibid.*



- pre-removal detention decisions that were appealed and their outcome out of the total number of pre-removal detention decisions (also broken down by actual subsequent return and legal representation, e.g. VMÖ, Diakonie or NGO/private); and
- individuals in pre-removal detention over time/annually (also broken down by family, for longer than three days, longer than one month, 4 months, and 6 months).<sup>56</sup>

67. The abovementioned parliamentary inquiry to the Minister of the Interior highlighted serious gaps in the regular collection and public availability of disaggregated, anonymized statistical information concerning migrants, particularly in the context of pre-removal detention and returns. In the response to the inquiry, the Minister noted that the data collected by BFA was primarily used for internal purposes, and that certain statistical characteristics, such as gender and age, were stored in the raw data, but not immediately available in standardized reporting.<sup>57</sup>

68. Other sources also indicate that the lack of access to an overall systematic overview of publicly available disaggregated data on returns has been an issue for the last three years. Moreover, several public officials observed a lack of coordination among the different ministries, the national statistical office, and between federal and provincial levels on data collection, methodologies, and sharing of anonymized statistical information related to migrants and returns. Where information is collected or recorded inconsistently, this affects the ability to conduct comprehensive data disaggregation, which can lead to distortions and other data quality issues.

#### **4. Conclusions and recommendations**

69. OHCHR welcomes the range of human rights protections available for migrants in Austrian law in the context of returns, while noting they could be used more consistently. Some legal provisions and practices are not fully aligned with international human rights laws and standards and need to be brought in compliance. The authorities should carefully assess the impact of new legal amendments to avoid further erosion of human rights protections for migrants, in particular those in situations of vulnerability.

70. While noting the longstanding cooperation on migration issues between a vibrant, diverse and broad range of civil society actors and the Government, OHCHR is concerned the space for collaboration is shrinking, and encourages the Government to promote and facilitate civil society engagement.

71. OHCHR further encourages a Government-wide approach to migration governance, in which all departments and offices collaboratively contribute to a human rights-based and gender-responsive approach to national migration laws, policies and practices.

72. OHCHR proposes the following recommendations to assist the Government of Austria to fully uphold the human rights of migrants within its policy framework, and is ready to provide technical assistance should the authorities request it:

##### **Identification of migrants in situations of vulnerability**

- Establish, in collaboration with a broad range of civil society organizations, a human rights, gender- and age- responsive vulnerability assessment mechanism within asylum and

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<sup>56</sup> Non-exhaustive list.

<sup>57</sup> Response to parliamentary inquiry, 18 August 2018.

See at [https://www.parlament.gv.at/PAKT/VHG/XXVI/AB/AB\\_01001/imfname\\_706803.pdf](https://www.parlament.gv.at/PAKT/VHG/XXVI/AB/AB_01001/imfname_706803.pdf).

returns processes to ensure appropriate referral, assistance, support procedures and effective protection of migrants' human rights.

### **Training and capacity**

- Develop, in collaboration with relevant international organizations and a broad range of civil society organizations, mandatory guidelines and pre-deployment training for BFA immigration officers and police/guards on their human rights obligations, age and gender-responsiveness and the identification of migrants in situations of vulnerability.
- Develop guidelines and training materials for the judiciary on cases concerning migrants in situations of vulnerability, in collaboration with relevant international organizations and a broad range of civil society actors.
- Ensure that trained staff are available at all sites to provide timely identification of and support to migrants who have experienced trauma and sexual and gender-based violence.

### **Access to information and legal aid**

- Ensure systematic, free, independent, confidential and competent legal and other assistance to migrants, including accessible information and interpretation services.

### **Due process and the right to an effective remedy**

- Guarantee automatic suspensive effect for cases on appeal as a component of the right to an effective remedy.
- Ensure the right to be heard in all migration-related cases, including those challenging immigration detention.
- Establish independent internal and external oversight mechanisms to ensure regular review of the work of BFA officers and other relevant actors in the context of asylum and returns, and allow the publication of monitoring reports.
- Engage in good faith with United Nations treaty bodies and other human rights mechanisms, including with a view to implementing interim measures they issue, in line with Austria's international obligations.

### **Pre-removal detention**

- Ensure that detention is a measure of last resort, for the shortest possible period and only if considered reasonable, necessary and proportional.
- Prioritize the use of non-custodial, human rights-based alternatives to detention.
- Ensure that an individualized assessment of a migrant's situation of vulnerability is taken into account in determining the necessity and proportionality of pre-removal detention.

### **Right to family life and the best interests of the child**

- Develop specific guidance on the determination of the best interests of the child, in accordance with a multidisciplinary procedure, and conduct relevant training.
- Introduce the notion of 'best interest of the child' and the criteria defining it in the Asylum law and in the Aliens Law.
- Ensure that a guardian is appointed from the moment an unaccompanied or separated child is identified.
- Amend laws and practices to ensure that children under 18 years cannot be detained for immigration purposes, including if they are with their parents or legal guardian.
- Ensure the rights to liberty and family life of children by finding alternatives to detention for the whole family.

### **Access to services**

- Ensure respect for the principle of non-discrimination in the preparation of the fundamental law in the area of social assistance and that migrants have access to economic and social rights regardless of their status.
- Ensure that any differential treatment in accessing services between citizens and non-citizens or between different groups of non-citizens is non-discriminatory, and serves a legitimate objective, is proportionate and reasonable.

### **Oversight and civic space**

- Ensure independent internal monitoring of BFA cases, in particular those concerning migrants in vulnerable situations, in line with international human rights standards.
- Support an enabling environment for a broad range of civil society actors, independent of Government contracting, to monitor and advise on the human rights of migrants, including in the context of forced and voluntary returns and in pre-removal detention centres.
- Condemn all instances of violence, intimidation or reprisals against civil society actors and the media stemming from their position or work in relation to migrants.
- Ensure that the development, implementation, monitoring and evaluation of policies and legislative frameworks, locations of reception and pre-removal detention facilities, and establishment of new public institutions are transparent and participatory, and do not lead to restrictions on civil society space and activities.

### **Data collection and disaggregation**

- Ensure regular, publicly available collection and analysis of disaggregated quantitative and qualitative data and information regarding migrants while protecting personal data and the right to privacy.
- Strengthen coordination on data collection and methodologies between the Ministry of Interior and other governmental bodies on migrants in the context of returns, and collaborate closely with the national statistics office, the ombudsperson, parliament, civil society, and United Nations entities.