



TRANSNATIONAL PARTNERSHIP  
INTEGRATED WAYS  
(TCA ID 4399)

*Report on Legal Situation of Asylum Seekers  
in Austria and Poland*

EDI (Poland)  
FLUEQUAL (Austria)

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## **Introduction**

The *Report on Legal Situation of Asylum Seekers in Austria and Poland* emerged from the proceedings of the Working Group composed of **Education for Integration** (Poland) and **FluEQUAL** (Austria) projects' representatives. Both projects, realized within the framework of EQUAL Community Initiative, focused on creating successful methods of asylum seekers' integration in the labor market. In cooperation, they created the "Integrated Ways" transnational partnership in order to compare best practices experienced in domestic projects.

The Report was based on information regarding domestic legal systems provided by each transnational partner. In order to facilitate processing of information, a special *Legal Questionnaire* was compiled to be filled out by each partner to highlight the most important issues remaining in the Report's scope of interest. Some essential conclusions were drawn from that comparison. The Working Group agreed that the characteristics of asylum seekers' legal situation in the course of refugee status determination process (RSDP) tend to strongly affect their pre-integration, also in the labor market, despite the fact that asylum seekers in general do not have the right to work in the hosting country.

Both questionnaires were enclosed in the Report for a detailed legal reference. As for a practical reference regarding the situation of asylum seekers, the Reader should turn to another product of the Integrated Ways Working Group, the *Integration Manual*, co-created by transnational partners and edited by FluEQUAL.

The Report was prepared by Jagiellonian University Human Rights Center, the coordinating partner of the domestic partnership of "Education for Integration" project.

## **1. Filing of asylum application**

An important issue analyzed during the cooperation of “Integrated Ways” partners from Austria and Poland was the act of filing the asylum application in both countries. It is essential in view of the 1951 Geneva Convention that the domestic system of filing applications for international protection assures the aliens coming to the countries member-states of the Convention and aliens that are already in the country the effective possibility of applying for international protection on the basis of a well-founded fear of being persecuted on the grounds listed in the Convention.

The structure of such a system should be aimed at granting access to a rapid refugee status determination (RSD) screening, as well as full compliance with the non-refoulement principle. It is extremely important for persons already present in the hosting country to have an opportunity to apply for refugee status if the situation in their country of origin unexpectedly changes (the so-called refugees sur place). Any domestic provisions securing the right to apply for refugee status only to persons on the border and not for refugees sur place shall be contrary to the principles of the Geneva Convention.

According to the information placed in the “Questionnaire concerning the legal situation of asylum seekers in Austria and Poland” prepared by the partners of transnational partnership “Integrated Ways” as the basis for this Report, there are some differences in the system of filling applications for international protection in these countries. The main difference is that according to the Austrian Asylum Act of 2005 an asylum seeker can file the application while in the reception center. Polish Protection of Aliens Act of 2003, on the other hand, provides for an obligation to file the application on the border (if entering to Poland), or in a specially designated unit of the Border Guard in Warsaw (if already present on Polish territory). It is important to bear in mind that the Border Guard is a military unit and the guards are armed and wearing uniforms. It may have serious implications for the subsequent legal situation (and the outcome of RSD examination) of the asylum seeker. The person who is asking for protection because of being persecuted in her/his country of origin is in most cases traumatized. Such a person will not give all information of acts of persecution in the country of origin to officers in uniforms because of fear and assumption of

possibility of not being admitted into the country. As a result his/her further testimonies given during the obligatory interview will not be considered reliable. In many cases it is the basic reason to deny his/her application for refugee status in Poland. The admission procedure is by far one of the most important stages of RSD proceedings, it therefore should be welcomed as contributing to pre-integration that Austrian law introduced the option of filing the application while already at a safe location of the reception center.

While analyzing the problem of filling an application and procedure of applying for refugee status it is important to remember that almost all of asylum seekers do not speak the hosting country's national language. It creates a demand for the authorities to prepare leaflets and all required forms in languages that are understandable for asylum seekers. It does not, at the same time, mean that all the information has to be prepared in the mother tongue of the applicant, however one could easily foresee problems in situations where asylum seekers speak very rare languages. Such difficulty shall not discharge the authorities from the obligation of delivering all the necessary information to the asylum seeker in a language that he might be reasonably expected to understand. It is essential to inform asylum seekers about their rights and obligation in asylum procedure, effective measures to exercise those rights as well as the consequences of lack of compliance with those obligations.

Comparing legislation in Poland and Austria it has to be stressed that regulations in that matter are similar. The major difference is that in Austria, apart from traditional leaflets, asylum seekers receive such information in audio-visual form. It is a very efficient solution, especially taking into account that many of asylum seekers are illiterate (entirely or functionally). The system of control over authorities who are responsible for providing the asylum seekers with relevant information in an understandable language is very interesting. In Austria, an asylum seeker is asked during his/her asylum, interview if he/she was informed in an understandable language or if he/she received a leaflet with all information. It could prove to be a good solution in Poland, where the application form of the application for refugee status is often filled out by the Border Guard officer on the basis of oral answers obtained from the applicant. Needless to say that Border Guard officers do not receive proper training in procuring refugee status sensitive information, as well as recognizing and dealing with traumatized applicants. The Office for Repatriation and Aliens should

supervise the Border Guard in discharging its obligation to duly inform the applicants about RSD-related matters. As of today, the information is presented only in written form and very often comes down to the asylum seeker signing the statement that he/she has understood all the information provided without actually looking into it and requesting clarifications of all doubts or unclear issues. However in language understandable to him/her, all of the above often makes the information procedure fictional, as important matters remain incomprehensible and hard to memorize for the applicant, therefore changes of Polish regulations in the direction of Austrian system (together with the possibility of filing the application not at the Border Guard unit) should be considered desirable.

The final problem concerning the filing of application for refugee status is the structure of the application. In view of the provisions of Geneva Convention, each person as an individual subject of law should enjoy a separate RSD screening aimed at determining any individual circumstances justifying his well-founded fear of persecution. If a system of a joint family application is to be created, it has to comply with all the procedural standards of administrative proceedings, as well as the requirement of "individualization" that can be inferred from the Geneva Convention. It does not seem a fortunate solution when the decision of granting or denying refugee status taken after such "joint procedure" automatically covers all members of the family without scrutiny of the circumstances which individually concern each member. The RSD decision should be based on individual circumstances and evidence and should not cover all members of the family applying for international protection. That does not mean that the family unity principle cannot be observed, as there are other measures (than the derivative refugee status) of realizing it.

Comparing provisions referring to family applications in asylum acts of Austria and Poland some similarities can be highlighted however it has to be stated that the Austrian system is much clearer and efficient. Even if there is a joint procedure, like in Poland, separate decisions are taken for each person. It introduces an undoubtedly higher procedural standard for the asylum seeker who is the addressee of the decision than in Poland, where the decision of the head of the family (the spouse or/and the parent) automatically covers the remaining family members without any individualized screening as to even the probability of their separate refugee grounds. Furthermore, relevant provisions state that

only the person that actually filed the application on behalf of the family (usually, due to cultural factors, the father) is the party to the proceedings, which makes him/her the solitary addressee of the decision. It should be outlined that in light of Polish provisions family members do have the option of applying for asylum separately. Due to the lack of legal assistance in admission proceedings, however, they are almost often unaware of this option or its legal and practical consequences, as well as they tend to predict that on that basis they will be separated, or some of them not admitted into the country.

Nevertheless, even the system in which separate decisions are taken cannot be recognized as optimum if it is not based on the evidence and information particularly connected to the addressee of the decision.

## **2. Structure of immigration authorities**

Austria and Poland have similar structure of immigration authorities exercising jurisdiction over asylum applications. It is based on two instances of administrative agencies, higher instance considering appeals from lower instance's refugee status determination (RSD) decisions.

Both Austrian (Federal Asylum Agency, FAA) and Polish (Office for Repatriation and Aliens, ORA) first resort asylum agencies are supervised by the respective minister of interior. Importantly, the FAA has field offices in all Austrian federal states, while the ORA has its only office at its seat in Warsaw, regardless of the explicit statutory clause that enables the supervising minister to establish local departments of the Office. Lack of ORA's local branches is consistent with the government's policy of dislocating asylum seekers within the capital city of Warsaw or in its close proximity. Despite the organizational convenience, this tendency has to be perceived as an obstacle for asylum seekers' integration (especially as the average-size centers for asylum seekers tend to host more than 150 inhabitants). Austrian approach, with field offices, as well as support structures for asylum seekers dislocated around the country, should be viewed as more contributing to pre-integration.

In both countries RSD decisions can be appealed to higher instance administrative authority (in Austria the Independent Federal Asylum Review Board, in Poland the Refugee Board), whose decision can be appealed to administrative court. Although the right to a judicial review is essential to RSD

proceedings, in both countries administrative courts issue rulings of the so-called non-reformatory character (i.e. they can only remand the case back to the agency, and not directly grant asylum).

### **3. Asylum seeker's detention**

In both countries the grounds for ordering asylum seeker's detention are similar and most typically related to the circumstances as illegal entry, illegal stay or deportation proceedings pending, regardless of stage. Contrary to Polish regulations, Austrian law permits to detain an asylum seeker whose application allows for an assumption that Austria will not be the member state responsible for examining the application pursuant to the Dublin II regulation. However statutory grounds for detention listed in Polish provisions may be interpreted extensively, immigration authorities do not tend to do so, usually ordering detention on the "typical" grounds, as referred to above. Also, there is an important jurisdictional difference: in Poland asylum seeker's arrest can be ordered by court, whereas in Austria it can be imposed by administrative decision, which causes an inevitable difference in the standard of protection. Both systems provide for an appeal against detention orders, as well as require the orders to be re-examined in a designated period of time. In Poland a detainee can be released on the basis of an administrative decision (though detained only by court).

Polish law explicitly excludes certain categories of asylum seekers from detention orders, those being unaccompanied minors and traumatized or disabled applicants. It should be viewed as a negative tendency that minor applicants are arrested and detained in Austria.

Importantly, neither Polish nor Austrian law provides for mandatory legal assistance for asylum seekers in detention. Regardless of NGO activity in that field, some form of assistance (no less than legal counsel) is necessary, as detainees' access to information, as well as freedom of activity in the proceedings (filing motions or appeals) is extremely limited. It has to be borne in mind that criminal proceedings of a non-art. 1 F character should have no influence whatsoever on the outcome of an asylum seeker's RSD proceedings.

Austrian and Polish procedures of ordering asylum seeker's detention (arrest) seem to meet basic standards flowing in that respect from the 1951

Geneva Convention and principles of successful integration, as both systems appear to be oriented on the non-detention type of RSDP, as well as a rapid release of a detained applicant once the grounds of his/ her detention cease to exist.

#### **4. Particular procedural safeguards in RSD proceedings**

In Austria and Poland RSD proceedings are based on the general provisions administrative procedure, therefore they are quite similar in principle. Austrian law, however, introduces a more elaborate system of procedural safeguards for effective protection of asylum seekers' rights throughout the proceedings.

Contrary to the Austrian mechanism, Polish authorities cannot declare the application inadmissible for any reason whatsoever and reject it on that ground. Polish asylum procedure introduces the notion of a "manifestly unfounded application", nevertheless in case such application is filed the immigration authority has to issue a regular administrative decision denying the refugee status to the applicant. In Austria, an additional stage of "admission procedure" takes place after filing the application, where a pre-judgment as to the application's admissibility is rendered.

Significantly, in Poland there is no state-sponsored legal assistance (as either counsel or representation) for asylum seekers with regard to the proceedings before administrative authorities. The prospect of applying for legal assistance emerges only in judicial proceeding, after two RSD decisions had already been issued and the production of evidence completed. By contrast, Austrian law provides for a mandatory adviser for every asylum seeker in the admission procedures. Admission procedures shall be deemed as an essential part of RSDP, as both Austrian and Polish asylum application forms provide detailed questions as to the reasons for leaving the applicant's country of origin. Usually, the information given by the applicant in the application is later examined in light of the information provided by the applicant at the asylum interview. Any lack of coherence may be interpreted by the immigration authority as lack of the applicant's credibility.

Also, the (Austrian) Federal Minister of the Interior appoints "refugee advisers" that are supposed to assist asylum seekers in proceedings before the

administrative agencies once the application is submitted and upon their (i.e. the applicants') request. A refugee adviser provides information, counsel, legal representation, as well as assistance in asylum seekers' repatriation. Creating of a parallel position would be a great relief to asylum seekers in Poland, significantly reducing their sense of disorientation in the proceedings. The problem concerning Austrian refugee advisers is the number of their working hours, still too low in relation to the demand.

Importantly, both systems secure the applicant's right to the presence of person indicated by him/her (or his/her legal representative) during the mandatory asylum interview.

All forms of psychological care in both countries are entirely NGO-provided, as medical benefits do not encompass psychotherapy. Polish Protection of Aliens Act includes a separate chapter on treatment of persons whose physical or mental condition allows for an assumption that they have been subjected to violence or who are disabled. Among others, they are entitled to indicate the sex of the agency officer, as well as demand that a psychologist be present during the interview. Also in light of Austrian asylum act due consideration has to be given to the traumatized asylum seeker's specific needs. Importantly, his/her asylum claim cannot be dismissed in the admission procedure.

In case of both systems effective steps shall be taken to the decrease the duration of RSD proceedings. Especially the situation in Austria calls for an urgent reform, where an average three (2 administrative + judicial) instances procedure can last for 4 to 7 years (in Poland that average never exceeds 3 years). This inevitably creates a sense of a protracted, bureaucratic situation, especially as asylum seekers do not have the full work permit.

It should be concluded that Austrian law of asylum proceedings has taken measures to deal with asylum seekers' disorientation resulting from the lack of knowledge of the language, relevant legal provisions, as well as the day-to-day reality of the hosting country. In Poland those steps have still to be taken, in form consistent with the character of the flow of asylum migrants.

It should be outlined that the "two-stage" model (encompassing the pre-judgment of application's admissibility) shall not necessarily be perceived as limiting the right to apply for international protection, as long as that pre-judgment is carried out with a proper level of scrutiny, and that there is an effective remedy against such rejection, that will suspend its enforcement in

compliance with the non-refoulement principle and the right to due process of law. As far as practical observations are concerned, such a pre-judgment, if functional, should also be introduced in Poland in order to facilitate identification of the non-asylum flow of migration, whose presence leads to deterioration of asylum jurisprudence (especially with respect to its procedural standards) to the obvious detriment of persons that actually fall within the scope of the conventional definition of refugee.

### **5. Family unity principle in domestic asylum legislation**

Both Austrian and Polish domestic asylum systems introduce procedural safeguards that reflect the family unity principle. It remains in question whether all those mechanisms comply with the provisions of the 1951 Geneva Convention.

As far as the RSDP is concerned, Polish Protection of Aliens Act introduced a mechanism of a “joint” application (see the “Filing of asylum application” section). Relevant provision stipulates that the application filed by an asylum seeker can encompass his/her spouse and minor children, who as a result shall automatically be covered by the applicant’s RSD decision. That same provision, however, states that only the person filing the claim shall be deemed party to the asylum proceedings – accordingly, persons encompassed by the application do not have the right to appeal against the decision, as well as there is no mandatory asylum interview conducted with them (they can only be summoned to testify as witnesses).

A much clearer “family procedure” mechanism has been introduced by Austrian asylum procedure. However applications of asylum seekers family members shall be examined separately by the authority, the procedures shall be conducted jointly and all family members shall receive the same scope of protection. A separate administrative decision shall be issued to each asylum-seeker, which clearly increases the procedural quality of the decision. Polish law, unlike the Austrian, does not introduce, for its own purposes, the definition of an asylum seeker’s “family member”. Austrian definition, however, is parallel to the definition introduced by the Dublin II regulation, and shall be viewed as too restrictive (as family members it understands the spouse, as well as parents and unmarried minor children).

Austrian Asylum Act introduces a legal presumption that asylum application of a family member of a person granted refugee status, subsidiary protection or an asylum seeker shall be deemed as an application for the same sort of protection. That provision, if interpreted restrictively, may constitute a threat to the right to apply for international protection (given that e.g. the spouse of a person granted subsidiary protection can meet the conditions to be recognized as refugee).

As it can be seen, both systems have introduced the so-called derivative refugee status, that (in certain, proscribed situations) can be granted to the refugee's family member(s) regardless of whether they fulfill the conventional requirements for that recognition. That mechanism's legitimacy in light of the 1951 Convention remains questionable.

## **6. Unaccompanied minors**

Many of asylum seekers arriving in both Austria and Poland are minors. If minor asylum seekers are not accompanied by their legal representatives, the country responsible for examining their application should ex officio provide them with assistance and legal representation. Austrian and Polish legislation seems to be similar in that respect. In each procedure legal representation as well as person or institution responsible for actual care should be appointed to the unaccompanied minor by the respective authority (in Poland it is the family court). Both procedures put emphasis on providing special safeguards for unaccompanied minor asylum seekers. Such statutory provisions remain in line with other international obligations regarding the rights of children, especially the Convention on the Rights of Child, to which both Austria and Poland are parties.

Polish procedural standard protecting unaccompanied minors seems to remain at a slightly higher level than Austrian as full court control has been established over appointing both legal and actual representative of the minor. Also, placing him/her in a public orphanage (as substitute for a regular center for asylum seekers) requires a court decision. Moreover, according to Polish regulations unaccompanied minor asylum seekers cannot be detained for the reasons set forth in the Protection of Aliens Act.

The obligatory RSD interview has to be organized in the way sensitive of the age of the minor and her/his personal experiences. Presence of psychologist and legal representative of the minor is obligatory. The minor has the right to

demand the presence of adult who is important to her/him if that presence will not disturb the course of the interview.

All above-mentioned procedural features concerning unaccompanied minors lead to the assumption that both Austrian and Polish procedures care for a special focus on the minor's well-being in the course of the proceedings, as he/she is particularly susceptible to the negative psychological influence of the events that lead to applying for international protection.

## **7. Domestic provisions regarding the Dublin II regulation.**

Common asylum policy in the European Union is one of the areas of legislative activity of EU institutions. Among the most important acts in this area is the so-called Dublin II Regulation<sup>1</sup>, which determines the EU member state responsible for considering application for refugee status lodged in one of the member states by a third country national. The Regulation (however directly binding in all member states) had to be properly implemented by the member states, which has place up to the present.

According to the Regulation's provisions, an asylum applicant may be transferred to the member state where that applicant had previously filed application for international protection. The country of first application and contact (in practice - the country where the asylum seeker was first fingerprinted) is responsible for examining his/her application for refugee status.

As a consequence, it is important is to establish a special procedural regime which will guarantee the asylum seekers at least some guarantee of participation in the transfer other EU country. The most important issue concerning the Dublin II procedure is that the asylum seeker him/herself is not a party to the Dublin II proceedings. In light to the executive regulation issued on the basis of Dublin II (1586/2003), only states shall be deemed the parties to the procedure of determining the member state responsible for examining the application. Accordingly, the applicant himself cannot e.g. file an appeal against another member state's decision or file a motion to be transferred on the grounds of humanitarian or sovereignty clause. It should be concluded that domestic laws should introduce mechanisms that would give the applicant at

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<sup>1</sup> Council regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national (OJ 50/1, 25.02.2003).

least some extent of influence over initiating the Dublin II proceedings under certain circumstances.

Neither Poland nor Austria have established such provision in their national legislation (that does not include the provisions obligating the authorities to inform about the Dublin II-related matters, as it has originally been introduced by art. 3.2 of the regulation).

### **8. Appeal against RSD decisions**

The right to appeal is a basic human rights related to any legal procedure regardless of its character - a safeguard of due process of law, included, among others, in art. 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. This notion encompasses not only the appeal in court proceedings but also in the proceedings before administrative authorities, where an application is re-examined by administrative authority independent of the first resort authority. The administrative due process of law includes the right to have one's case considered by an independent court.

The right to appeal is essential also in administrative procedure. The procedures of granting status of refugee in Poland and Austria are administrative procedures and respective general acts apply. When analyzing solutions and instruments provided by the domestic acts many similarities may be observed. The most important safeguard is that in both countries the right to administrative appeal was effectively secured and that in both Austria and Poland the appeal is considered by authority other than (and independent of) the first resort authority.

Among basic effects (consequences) of an appeal in modern administrative procedures is the so-called 'suspending effect', meaning that in case of filing an appeal the administrative decision is not enforceable until the final (appellate) decision is issued in the case. It is extremely important in asylum cases where the enforcement of a negative first instance decision usually equals to the departure from the country responsible for recognizing the application and is likely to jeopardize her/his life or health. At this point it has to be stressed that in both Austrian and Polish procedure the appeal renders the above-mentioned effect. Importantly, in both countries this principle does not apply to the proceedings before administrative courts. Despite filing an appeal to court, the second instance administrative decision remains enforceable and the appellant

has to depart from state territory. The appellant, along with the appeal, can file a motion to withhold the enforcement of the decision, but that effect does not occur automatically and the motion is rarely granted.

Both administrative procedures are similar also in the scope of recognition of appeal authorities. The Refugee Board in Poland and Independent Federal Asylum Review Board in Austria have power to review the decision of first instance administrative agency and grant refugee status to the appellant (the so-called reformatory powers). Neither Polish nor Austrian authorities are obligated to conduct a complementary asylum interview, however they are entitled to do so.

In Poland as well as in Austria an asylum seeker has the right to appeal to administrative court from second instance administrative decision. Also similar is that in both countries courts have no authority to review administrative decisions but only to quash them and remand the case to either the first and second instance administrative agency. It is characteristic for countries of the German type of administrative judiciary, whereas, for example, in Italy the appeal from the decision of the appropriate administrative authority is entertained by civil provincial court which has power to quash and review the decision by granting refugee status.

An issue worth highlighting is the right to re-apply for refugee status in case a previous application from the same asylum seeker was rejected by a final decision. It has to be stressed that in general administrative procedures another application in the case already considered by a final and binding decision is inadmissible (the *res iudicata* principle). Situation of asylum seekers is substantially different and that difference should be taken into account by legislators in states party to the 1951 Geneva Convention. Due to changes in the circumstances in the country of origin a person previously denied refugee status can become a refugee *sur place* before departing from the country where his/her asylum decision had been issued.

Both Austria and Poland provide the asylum applicant with (or, to be more precise, do not deprive him of) the right to file a subsequent application for international protection. The potential problem lies within the stage of pre-judgment as to the character of circumstances on which that subsequent application was founded. Authorities responsible for examining that application can reject it during the submission procedures if they come to conclusion that

circumstances of application are identical to those on which the already decided application was founded. It therefore should be required for the authorities to carefully check all information that might lead them to rejecting the second application on the basis of *res iudicata* (case already considered).

### **9. Prospect of receiving subsidiary protection**

Austria and Poland are parties to the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). According to the provisions of this international agreement it is prohibited to treat any person in cruel or inhuman way. Such disposition of the Convention resulted in the parties' obligation to provide protection not only on their territories but also have to protect aliens who are present within their territorial jurisdiction from being expelled to countries where they could face the treatment violating the provisions of ECHR.

Accordingly, the European Union has established legislation providing for an obligation of implementation to national legislation an institution of the so-called 'subsidiary protection'. This kind of international protection is granted to persons whose applications for status of refugee were rejected on the grounds of the lack of merit, the general situation in countries of their origin leads to the assumption that in case of their return they will be subjected to treatment in violation of the provisions of ECHR.

According to domestic legislations both Austria and Poland provide forms of subsidiary protection. Austrian provisions explicitly introduce the notion of internal flight alternative as a negative requirement. No such provisions have been introduced in Poland, one might argue, however, that they can be inferred from the general aim of international protection.

A provision common for both countries is that subsidiary protection is not given without time-limit. Because of legal character of the protection it is provided only for the time during which situation in country of origin of asylum seeker constitutes a danger to his/her basic human rights stipulated in article 3 of European Convention of Human Rights. If the situation in country of origin ceases to constitute a threat to asylum seeker's basic human rights, he/she can be expelled from the country of his/her subsidiary protection.

In both Austria and Poland, authorities responsible for considering application for refugee status in case of dismissal of the application have to ex

officio examine if conditions for granting subsidiary protection occur in individual case.

## **10. Situation in the labor market**

Asylum seeker's legal situation in the labor market is not satisfactory – neither in Austria nor in Poland. Under Polish law, an asylum applicant can apply for a work permit only if his RSD proceedings before the first instance immigration authority have exceeded the period of one year due to circumstances beyond his/her control. Even if that occurs, obtaining the permit is very difficult in practice due to other requirements (among others, an alien has to present an “assurance of employment” certificate from the prospective employer; a work permit is expensive, costs over 220 Euro), so a substantial number of asylum seekers perform illegal labor.

In Austria, an asylum seeker can apply for a seasonal work permit (3 months after applying for asylum), also quite hard to obtain in practice. At the moment there are first attempts with community work for the authorities, which legally is not regarded as regular labor, therefore most of labor law provisions (incl. minimum wage) do not apply and the remuneration is very low.

Both countries' systems are calling for a broader access to the labor market for asylum seekers. In Poland the effective unemployment is low, contrary to the official rate of 17 %, resulting from very high labor costs which force a considerable amount of workers not to register their labor). A total separation of asylum seekers from Polish labor market creates a serious obstacle to their integration. In Austria, on the other hand, an access to the labor market for asylum seekers with temporary residence permit is necessary. Due to the long duration of asylum proceedings (several years) asylum seekers lose their professional and personal skills in this long waiting period out-of-work. This causes a lot of social problems and financial efforts for the integration to the labour market after being recognized as a refugee.

A broader access to labor market for asylum seekers should be accompanied by a fair and effective system of recognizing the non-asylum flow of immigration aimed at employment-related purposes, as it could be expected that broadening the access to the labor market might contribute to the increase of influx of economic migrants applying for international protection.

## **11. Deportation of asylum seeker**

In case the applicant does not fulfill the conditions set forth by the 1951 Geneva Convention nor the conditions for subsidiary protection or if his/her presence on the territory of country responsible for examining the application is undesired for security or public safety reasons, he/she can be expelled. Comparing legislation in Austria and Poland it one comes to conclusion that statutory reasons for alien's deportation are similar. Major differences lie within the procedures of issuing and enforcing the deportation order. According to Austrian regulations, a deportation order can be suspended by the police for a period which must not exceed a year, if the deportation is unacceptable because of the refoulement-protection clause or because it is actually impossible.

In Poland the difference concerns procedural issues. Person can be obliged by the Office for Repatriation and Aliens or the Refugee Board to depart from Polish territory no later than a designated date (in case of Office's decision it is a maximum of 30 days of serving the decision, Board's – 14 days).

It has to be noted that in case of the Board's decision, the maximum statutory period for the departure from Polish territory shall be viewed as limiting the right to due process of law. The Board cannot prolong the 14-day period, whereas the applicant has 30 days (of serving the decision) to file an appeal to administrative court. Other than in Austria, in Poland more than one institution is responsible for process of deportation. The administrative authority issuing a deportation order is **wojewoda** (representative of the executive branch of central government in each of 16 provinces) of the province in which the person eligible for the order resides. The person who was obliged to depart from Poland can appeal against the decision of deportation to Office for Repatriation and Aliens within 14 days of serving it to its addressee. Filing an appeal withholds the enforcement of a deportation order.

Only possibility of not being expelled from Poland is if his/her **spouse** is a Polish citizen or possesses a permanent residence permit.

It should be concluded that deportation provisions in Austrian and Polish domestic regulations comply with the non-refoulement principle and the due process of law, especially an appeal against the deportation order.



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## *Report on Legal Situation of Asylum Seekers*

in Austria (FLUEQUAL) and Poland (EDI)

### Questionnaire

For POLAND  
(persons responsible: Jacek Borek, Andrzej Kula)

Questionnaire prepared by  
Jacek Borek  
Andrzej Kula  
"Education for Integration – Partnership for Refugees"



Project realized with support of the funds from the European Social Fund – Community Initiative  
EQUAL

Kraków, December 2006

Dear Partners,

We hereby present to you the **Questionnaire on the legal situation of asylum seekers** put together by the EDI (Education for Integration) project staff for the purposes of preparing the following **Report on the legal situation of asylum seekers** in Austria, Italy and Poland. The answers from the questionnaire are expected to serve as a basis to evaluate a comparative study on asylum seekers' legal situation in each of three countries with regard to the so-called **pre-integration processes**, i.e. integration of asylum seekers. Particular emphasis is going to be put on the **labor market issues**.

We kindly request you to complete this questionnaire and return it to the following e-mail address: [equal@juhrc.org](mailto:equal@juhrc.org). Should you have any additional questions concerning the questionnaire or the following legal report, please contact us via e-mail for clarifications.

The questionnaire consists of 31 questions divided into three blocks:

- 1) asylum procedure,
- 2) social benefits for asylum seekers,
- 3) asylum seekers' position on labor market (marked with yellow, blue and brown color respectively).

Throughout the questionnaire, a person that has filed an asylum claim, but not yet received his or her final (i.e. not subject to an appeal) decision is referred to as the "**asylum seeker**" or the "**applicant**" (unless stated otherwise). Whenever the questionnaire mentions an "**unaccompanied minor**", it refers to an unaccompanied minor that has filed an asylum application.

Some questions highlight the key aspects that the answer should cover. **That does not mean the answer should be limited to those aspects**. Should you decide the answer requires elaborating on, do not hesitate to do so. As this is a questionnaire concerning legal matters please make sure to fully regard the substantive and procedural law

governing the issues raised in the questions and make it clear whenever you are describing how given provisions work in practice.

As for the relevant legal acts, there is no need to include the actual number of article or paragraph containing the provision in each answer. We would, however, appreciate the enclosing of **a separate list of relevant acts** (both of parliamentary and governmental origin) in case a further reference is needed.

Finally, in the course of evaluating the questionnaire, you are going to be asked to separately comment on the parts of the legal report regarding directly the situation in your country.

Thank you for your cooperation

EDI Project staff, JUHRC

**NOTE: Following abbreviations were used in the questionnaire:**

**RSD** – refugee status determination (essential aim of asylum proceedings)

**RSDP** – refugee status determination procedure

**Dublin II regulation** – Council regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national (OJ 50/1, 25.02.2003)

**ECHR** – European Convention on Human Rights and Fundamental Freedoms, 1949

**Relevant statutory law:**

- Protection of Aliens Act (2003), **PAA**
- Aliens Act (2003), **AA**
- Administrative Procedure Code (1960), **APC**
- Social Benefits Act (2004), **SBA**
- Private International Law Act (1965), **PILA**
- Promotion of Employment and Labor Market Institutions Act (2004), **PELMIA**

1. BRIEFLY DESCRIBE THE **FILING** OF AN ASYLUM APPLICATION. Include:

**a) Public authority that can receive the application (e.g. border control/ police/ both/ other). Same authority if the application filed on the territory (i.e. not on the border/ airport)?**

Asylum application are filed with the **Office for Repatriation and Aliens** (*Urząd do Spraw Repatriacji i Cudzoziemców*, hereinafter URiC or the Office) in any given **Border Guard** unit's office located at Poland's border (all official border checkpoints, including airports). All asylum seekers *sur place* (i.e. lodging the application while already on Polish territory and not upon crossing the border) file their applications in a specially designated office of Warsaw's Border Guard unit.

The duties of Border Guard encompass technical matters (receiving the application, photographing and registering the applicant, submitting his fingerprints to the EURODAC system), as well as assessing whether the applicant's presence on Polish territory is legal and whether art. 1 F of the 1951 Geneva Convention might be applied in his case. There is no possibility of filing the application directly with the Office, i.e. without processing it through the Border Guard. The application has to be filed by the asylum seeker in person, otherwise it will not be processed.

Physical presence on either Polish territory or Polish border is prerequisite for filing an asylum application.

**b) Whether, how, when and in what language is the applicant informed about his or her rights and obligations regarding the legal proceedings, as well as the state responsible for examining the asylum claim (see: Dublin II regulation, Art. 3 § 4)**

The Border Guard office that receives the application is obligated to inform the applicant, in a language that he understands, about the principles of asylum proceedings, as well as his rights and obligations and the consequences of not

complying with those obligations. The applicant has to be informed about organizations providing assistance to asylum seekers. Relevant provision does secure any obligatory form of the above information (contrary to the Dublin II regulation, see below).

In accordance with art. 3 § 4 of the Dublin II regulation, the applicant has to be informed **in writing** in a language that (s)he may reasonably be expected to understand regarding the application of the regulation, its time limits and its effects.

**c) Structure of the asylum application - whether one application can be filed by more than one applicants (e.g. close relatives or a family as a whole). If not - is the right to stay of the spouse or/ and children of the asylum applicant secured for the time of his RSDP?**

Applicant's spouse and/or minor children can be included in his/her application. Individual grounds for granting refugee status of persons included in the application are not examined and applicant's RSD decision automatically covers them (in case of granting the refugee status to the applicant, they benefit from the so-called derivative refugee status). Family cannot apply for status as a whole (i.e. one "applicant"), nor can any relatives different than spouse or minor children be included in an application. The spouse is included in the application upon his/her prior consent expressed in writing.

Importantly, applicant's spouse or minor children can be included and covered by his/her application only if they were present upon initial filing of that application. If the spouse or minor children join the applicant on Polish territory after his/her application has already been filed, they will need to file separate applications, their conventional grounds to be examined individually. Nonetheless, in practice the outcome of such "following cases" seems to be secondary to (i.e. have the same content as) the decision issued in the case of the spouse that lodged his/her application first.

Also, a child that is born on Polish territory (while its parents/mother already in asylum proceedings) will need to have a separate application filed for him (one of the parents files the application on its behalf). Relevant provision, however, stipulates that the child's RSD decision has to follow the decision issued in its parents' case.

**d) Is there a possibility of granting refugee status *ex officio*, i.e. without a prior application?**

**No**, refugee status may be granted only following asylum seeker's application.

**2. IS THE APPLICANT SUBJECT TO (OR ELIGIBLE FOR) DETENTION OR ARREST UPON FILING THE CLAIM? Include:**

According to the relevant statutory provision, asylum applicant "shall not be detained" upon filing the application "unless" certain conditions regarding his/her situation occur.

**a) Conditions for detaining and holding in detention while in asylum proceedings**

The asylum applicant shall not be detained, unless:

- 1.** upon lodging the application (s)he is either an illegal alien on Polish territory or (s)he is trying to enter Poland through an official crossing point but has no right to legally do so (in particular, no valid visa);
- 2.** before lodging the application (s)he attempted or committed illegal

border-crossing;

3. before lodging the application s(he) was ordered to leave Polish territory or received an order of deportation
4. after lodging the application a disclosure of information occurs that would normally make him/her eligible for a deportation order.

The latter point is very broad, as there are ten statutory bases for ordering a foreigner's deportation, among them acts such as committing tax evasion.

As one might note, the above-mentioned conditions will in practice be fulfilled by the vast majority of asylum applicants. The actual principle is therefore quite contrary to the supposed direction of the provision.

As far as interpretation is concerned, it remains an open question whether **the term "unless"** means that the applicant *shall* or *may* (i.e. upon the court's discretion) be detained when one of the conditions is fulfilled. In practice, detention orders are issued mostly in cases of applicants that are illegal aliens already on Polish territory.

An **unaccompanied minor** applying for refugee status, as well as traumatized applicant cannot be detained under any circumstances (pursuant to PAA. There is no exemption from detaining or arresting an unaccompanied minor in course of criminal proceedings).

**b) Authority issuing a warrant of detention (arrest). An effective right to appeal against the decision/ ruling? Authority ordering the release**

A detention warrant can be issued only by court. The applicant has the right to appeal against that warrant within 7 days of receiving it, provisions of the Criminal Procedure Code apply accordingly.

In case where there is a reasonable probability (based on the evidence of the case) that the applicant will be granted refugee status or subsidiary protection the Head of the Office for Repatriation and Aliens can release the applicant from detention. He may however deny the release for reasons of public safety or homeland security. If the Head of the Office denies to release the applicant, the latter has the right to appeal that decision to court. In case of the applicant being actually granted refugee status or subsidiary protection, he can be released by either the Head of the Office or the Refugee Board (depending on who issued the final decision, i.e. decision that is not subject to further administrative appeal).

As far as other grounds for ordering release are concerned (health condition, in particular) the applicant can be released only by court.

**c) Place: prison or detention center for illegal aliens? What authority supervises the detention centers?**

Depending on the circumstances of the case, an asylum seeker may face two types of detention. Usually, (s)he is placed in a **detention center for foreigners** (i.e. not just asylum seekers, but also other foreigners guilty or suspected of immigration offences).

A detention center is not a prison and does not fall within the competence of the Prison Guard. It can be supervised by either by the Police or the Border Guard, depending on the Minister's of the Interior regulation (delegated legislation made under Aliens Act 2003) that establishes the given center.

Should the court conclude that an asylum seeker may constitute a threat to public safety or homeland security, it can put him/her in **pre-deportation custody**. It does not amount to a deportation order (though normally this type of custody is designated for illegal aliens with deportation orders pending). In such custody the applicant is more closely guarded than in a detention center, though it is also not

a prison (pre-deportation custody is exercised in separate cells located at chosen Police and Border Guard stations).

**d) Time: any provisions determining the maximum period of detention?**

The court orders applicant's detention for 30 days. That period is subject to prolongation (by court only), the total time of detention cannot, however, exceed one year.

**e) Legal assistance or representation provided to the applicant? State-sponsored or NGO run?**

There is no obligation to appoint an attorney to the applicant for the purposes of the proceedings of ordering detention. Similarly, there is no mandatory legal representative for an applicant held in detention with regard to his asylum proceedings. The applicant has to be informed about organizations providing assistance to asylum seekers as well as UNHCR Representative, and his contact with them secured (either by phone or mail).

**3. WHICH PUBLIC AUTHORITY IS RESPONSIBLE FOR CONDUCTING THE REFUGEE STATUS DETERMINATION (RSD) PROCEEDINGS? Include:**

**a) Its name. Where is it based?**

There are two state agencies administering immigration affairs, both seated in the capital city of Warsaw.

The **Office for Repatriation and Aliens** (Polish name *Urząd do Spraw Repatriacji i Cudzoziemców*, URiC. Website [www.uric.gov.pl](http://www.uric.gov.pl) has an English version) issues first instance asylum (including refugee status) decisions. The **Refugee Board** (*Rada do Spraw Uchodźców*, website [www.rada-ds-uchodzcow.gov.pl](http://www.rada-ds-uchodzcow.gov.pl) has an English version) considers appeals against Office's decisions.

**b) Structure (incl. federal (central)/ federal (central) with local branches/ entirely local)**

Both immigration agencies are central (Poland is a unitary state, therefore the notion of "federal" does not apply) and seated in Warsaw.

The Office is headed by the Head of the Office appointed by the Prime Minister, candidate presented by the Minister of the Interior. Formally, all immigration decisions are issued on behalf of the Head of the Office. The Head of the Office is supervised by the Minister of the Interior. The Aliens Act enables the Minister of the Interior to establish local branches of the Office, none has been created so far.

The Board consists of 12 members appointed for a five-year term by the Prime Minister from among candidates presented by the Minister of Interior and (separately) by the Minister of Justice. No less than half of the Board's members should have LL.M. education. The Board considers appeals in three-member panels (one member in cases determined by the Office as manifestly unfounded claims).

**4. ENUMERATE THE PROCEDURAL SAFEGUARDS CONCERNING UNACCOMPANIED MINORS.**

The PAA includes a separate chapter on rules applicable to the RSDP of an unaccompanied minor. The PAA does not introduce its own definition of "a minor", therefore general rules apply. Polish Private International Law Act ("minor" being a notion of private law) stipulates that natural person's legal capacity, as well as the capacity to perform acts in law is governed by the law of that person's state. That is particularly important in case of an applicant who has not attained 18 years of age but has entered into civil marriage prior to filing the asylum application.

In case of the lack of identification documents and reasonable doubt as to his/her age the applicant can be inspected by a doctor in order to assess his/her age. The applicant can refuse to consent to such an examination, which however can result in his/her asylum application not being processed.

According to PAA, **two guardians** shall be appointed for an unaccompanied minor:

- appointed by court for the purposes of **legal representation** of an unaccompanied minor in asylum proceedings;
- appointed by the Head of the Office from among its employees for the purposes of **actual care** of the minor and his belongings. The latter guardian shall possess the qualifications of a social worker as provided in the Social Benefits Act (e.g. certain type of university education completed).

Under explicit provision, an unaccompanied minor cannot be detained with respect to his asylum proceedings.

An unaccompanied minor might be transferred to a center for asylum seekers or a public orphanage, in both cases following a **court's order**.

The **asylum interview** has to be conducted in a manner that takes into account the age and personal features of the minor. Apart from the officer, both guardians shall be present at the interview, as well as a psychologist or a professional educationist. An adult person indicated by the minor might be present if it will not impede the proceedings. A psychologist or professional educationist present at the interview shall prepare a written opinion describing minor's physical and mental condition.

There are certain statutory requirements regarding **the officer responsible** for an unaccompanied minor's RSDP. They consist of a combination of university education requirements and practical experience or training.

In case of a negative outcome of RSDP, the unaccompanied minor shall be transferred to the proper authorities of his country of origin.

## 5. BRIEFLY DESCRIBE THE HIGHLIGHTS OF THE **RSD PROCEEDINGS**. Include:

### **a) Legal provisions directly regarding the asylum interview**

The provision stating that interviewing the applicant is mandatory in RSDP is the only one directly addressing the asylum interview.

Such provision is necessary, as pursuant to general provisions governing administrative proceedings (APC) a party's testimony has a status of subsidiary evidence, admissible only if relevant facts of the case have not been established and no other evidence is available.

The officer conducting the interview is making a written record of applicant's testimony. He is providing the applicant with a copy of that record only upon the

applicant's express request.

**b) Legal counseling or assistance to the applicant. State or NGO-provided?**

As far as legal provisions are concerned, no legal aid (free of charge legal assistance) has been provided for the applicant. Such a prospect exists, however, under new bill currently discussed in the parliament.

Lack of mandatory legal aid upon applicant's request is a consequence of the generally underdeveloped system of legal aid in Poland. **Legal aid is provided only as representation in court proceedings.** There are no provisions providing it in proceedings before administrative agencies, or as counsel only.

**c) Legal representation in the course of administrative proceedings regarding RSD. Legal capacity to represent - a professional lawyer (an attorney) only?**

General provisions of the APC apply to legal representation in RSDP. Accordingly, any person enjoying **legal capacity to perform acts in law** (under Polish law usually a person who has attained the age of 18 and has not been fully or partially incapacitated, e.g. due to mental illness) can represent the applicant in administrative proceedings, including RSDP.

Representation by a non-professional does not create an attorney-client relationship (e.g. attorney-client privilege).

**d) Communication – interpreter; language of the proceedings (e.g. can the applicant file motions in his native language). Language assistance while in proceedings**

RSDP is the only type of administrative proceeding where the administrative agency has to adjust to the language spoken by a party. According to PAA, immigration authorities have to provide

- translation of all documents admitted as evidence in RSDP;
- interpreter at the asylum interview;
- all obligatory information for the applicant in the language that he/she understands.

**e) Psychological care while in the course of proceedings (traumatized applicant)**

No psychological care has been provided for the applicants in RSDP.

The PAA has a separate chapter on the conduct with applicants "whose physical or mental condition implies that they have been subjected to violence or who are disabled". These provisions, however, do not grant psychological care to the applicant, but determine how a traumatized or disabled applicant should be treated and approached in the course of proceedings. Most importantly:

- the applicant has to be approached with extreme tact and care;
- he is interviewed at the place of his stay;
- a psychologist is present at the interview;
- if necessary, an interpreter of the sex indicated by the applicant or a doctor is present at the interview;
- all actions on the part of the authorities have to be carried out by an officer that has completed a course on conduct with victims of crimes, persons subjected to violence, as well as disabled persons. The applicant can indicate the sex of that officer.

Traumatized or disabled applicant cannot be detained for reasons set forth in PAA.

**f) Any legal provisions specifically addressing the gender of applicant in the course of proceedings (for example, conducting the asylum interview by the person of the same sex as the applicant)**

Only in case of traumatized or disabled applicants, see above.

**g) Free access to records of the case (the entire documentation regarding the case in the possession of the authority) secured? Enumerate the exclusions**

As a rule, the applicant has a free access to all records of his case at any moment of the proceedings, with the right to make notes and copies of documents. That rule does not apply to any information that constitutes a state secret (a notion defined in a separate act).

Also, the Office may issue a decision that the records of a particular case or their part will be held confidential for reasons of important state interest (e.g. security). Such a decision can be appealed.

If the applicant proves his/her substantial interest in doing so, he/she can obtain a copy of the records of his/her case certified by the Office. The "interest" is usually other legal proceedings.

**h) Are there any provisions directly addressing the family unity principle?**

Yes, see answers to [questions 1 c\) and 7.](#)

**i) Is there a time provision (i.e. a time limit for immigration authorities) regarding conducting the RSD screening and issuing the decision? Are there any motions (remedies) available against immigration authorities' lack of activity in the proceedings? What is the average duration of asylum procedure in practice?**

The PAA stipulates that the first instance asylum decision should be issued within **6 months** of the date of filing the application. If the Office finds that period insufficient, it can issue a decision postponing that time limit to a certain date (importantly, such a decision cannot be appealed sooner than in the appeal against the RSD decision).

If the 6-month term (or the additional term indicated by the Office) lapses without the RSD decision being issued, the applicant can file an official **complaint with the Refugee Board** about not receiving the RSD decision within the time limit determined by the statute or indicated by the Office.

Independently, the applicant can file **an appeal to administrative court** against administrative authority's inaction in the proceedings.

If the refugee status is to be refused on the basis of "manifest unfoundedness" of the application, the RSDP decision shall be issued within **30 days** of filing the manifestly unfounded claim.

**j) Does the applicant's temporary travel (or illegal flight) to a safe third country affect his RSD proceedings? Can a temporary travel document be issued to an asylum seeker?**

The applicant is expressly obligated to stay on Polish territory until he/she receives his/her RSD decision and notify about every change of his/her place of residence in Poland.

If the applicant needs to travel outside Poland while in his RSDP, he can file a motion to suspend his RSDP with the proper authority (the Office or the Board). Such motions are decided on a case-to-case basis, with regard to the totality of the circumstances of the particular case.

If the applicant leaves Polish territory without informing the immigration authorities, his RSDP is subject to discontinuation (termination) due to the lack of the proceedings' substance (as the absence of the party is regarded).

No travel document can be issued by Polish authorities to an asylum applicant.

(An attempt of) Illegal border-crossing is punishable by up to 3 years of imprisonment.

**k) Are there any provisions directly addressing the so-called manifestly unfounded claims?**

The PAA has a separate provision regulating manifestly unfounded claims (MUC) for asylum. **The application shall be deemed manifestly unfounded if:**

- It **"gives no grounds whatsoever to conclude"** that the applicant fulfills the conditions for being recognized refugee, set forth in Art. 1 A of the Geneva Convention. Examples included in the PAA are: applicant providing other reasons for applying for asylum than a well-founded fear of persecution; applicant providing no information related to applicant's fear of persecution whatsoever; applicant providing facts that are obviously false, unlikely, contradictory or incoherent.
- It **"was originally intended to misinform the immigration authorities or misuse the [RSDP] proceedings"**. Examples included in the PAA are: the applicant not informing the immigration authorities about his prior asylum applications filed in other country (-ies); applicant not revealing his true identity; applicant not revealing or destroying important evidence of the case; applicant filing an asylum application for the sole purpose of avoiding deportation; applicant not arriving at his asylum interview, changing his place of stay without a prior notification, as well as leaving Polish territory before receiving his/her RSDP decision;  
unless the applicant had a reasonable explanation to do so.
- It indicates that the applicant came from a safe country of origin or a safe their country, to which he/she has the right to return.

**6. ARE THERE ANY PROCEDURAL SAFEGUARDS SPECIFIC FOR ASYLUM PROCEDURE (i.e. that do not exist in general administrative proceedings)? (For example: obligatory legal counseling for the applicant, different standard of proof, authorities' obligation to interview the applicant)**

Only several specific procedural safeguards have been introduced into asylum proceedings. Among them are the following:

- the applicant can submit evidence in languages other than Polish
- an administrative hearing (asylum interview) is obligatory in RSDP
- applicant's contact with NGOs providing assistance for asylum seekers, as well as with local UNHCR's representative has been expressly secured

**a) Do general rules of production of evidence apply?**

**Yes**, the part of asylum proceedings pertaining to gathering evidence is regulated by general provisions of Administrative Procedure Code. The sole exception is the **asylum interview (hearing)** conducted to receive applicant's deposition regarding the circumstances of his case. The nature of this exception refers to the

obligatory character of the hearing, whereas in light of the APC evidence in form of a testimony of a party to an administrative case is admissible only when no other evidence is available and the facts of the case have not been fully ascertained (secondary evidence).

The **burden of proof** lies on both the applicant and the immigration authorities.

Polish law does not use the notion of the **standard of proof**, instead the administrative authority decides whether the concrete fact has been proven on the basis of all evidence available and the totality of circumstances of the case.

7. IN REFERENCE TO QUESTIONS **1 d)** AND **5 f)** (FAMILY UNITY) - CAN APPLICANT'S CLOSE RELATIVES (SPOUSE, CHILDREN) BE GRANTED **REFUGEE STATUS** ON THE SOLE BASIS THAT THE APPLICANT WAS GRANTED REFUGEE STATUS (EVEN IF THEY HAVE NO WELL FOUNDED FEAR OF PERSECUTION THEMSELVES)? IF NO, CAN THEY BE GRANTED ANY OTHER FORM OF LEGAL STAY?

**Yes**, the Protection of Aliens Act provides for a **derivative refugee status**, being granted to the spouse and children of an applicant that has been granted refugee status on the basis of his/her well-founded fear of persecution. Prerequisite for being granted refugee status pursuant to the family unity principle is for the relative to have been included in the application (see above, question 1).

Nonetheless, pursuant to the Aliens Act, a relative of a recognized refugee (i.e. not asylum applicant) can obtain a **temporary stay permit** in Poland.

8. DOES YOUR DOMESTIC LAW PROVIDE A SEPARATE DEFINITION OF THE TERM '**FAMILY**' OR '**CLOSE RELATIVES**' FOR THE PURPOSES OF IMPLEMENTING THE FAMILY UNITY PRINCIPLE?

No express definition has been introduced. In light of relevant legal provisions spouse and children are the only relatives subject to family reunification, regardless of its legal form. The Dublin II regulation introduced a separate definition of a "family member" for its own purposes.

Neither are there any provisions pertaining to religious marriages (e.g. Muslim), cohabitation, or same-sex relationships (whether formal or not). Consequently, any persons involved are not regarded as "relatives" for the purposes of effecting family unity or reunification. Polish law prohibits polygamy (punishable by up to 2 years of imprisonment).

9. DOES YOUR DOMESTIC LAW INTRODUCE ANY FORM OF **SUBSIDIARY PROTECTION**? Please provide its original name.

Only in 2003 has the Protection of Aliens Act introduced a form of subsidiary protection (Polish name **zгода na pobyt tolerowany**, literally translated as a "tolerated stay permit").

In principle, it is granted to persons, who upon returning to their country of origin face **infringement of their fundamental rights** (other than well-founded fear of persecution), in particular those listed in ECHR. A person benefiting from non-refoulement on the basis of art. 3 of ECHR is likely to be granted that form of protection.

Importantly, immigration authorities are obligated to conduct the screening for

subsidiary protection grounds each time they dismiss an application for refugee status, due to the much lower standard for receiving it.

10. BRIEFLY DESCRIBE THE PROCEDURE OF **LODGING AN APPEAL** AGAINST THE DECISION DENYING REFUGEE STATUS AND (OR) SUBSIDIARY PROTECTION. Include:

**a) Time limit (in days/ weeks/ months) for filing the appeal?**

The usual time limit is **14 days** of serving (delivering) the RSD decision on the applicant. In case of manifestly unfounded claims, however, the time limit is **3 days**.

**b) Appellate authority: judicial (court) or administrative authority responsible for examining the appeal?**

Refugee Board is a collective administrative body, see question 3.

**c) (In reference to question 5.C) Same rules of representation before the higher (appellate) authority and before the lower authority?**

Yes.

**d) The 'suspending effect': does filing an appeal withhold the enforcement of the decision (e.g. denying refugee status ordering deportation)**

Yes, in case of filing an appeal the decision is not subject to enforcement until the case is considered by the Refugee Board (second instance decision is subject to immediate enforcement).

**e) Is the applicant interviewed/ entitled to interview by the appellate authority?**

Only if either he demands an additional hearing or if the Board concludes that some facts of the case have not been fully ascertained and that an additional hearing (interview) is necessary. Same rules apply to producing other evidence before the Board.

**f) Do the appellate authority's powers include the possibility to directly grant the appellant refugee status or subsidiary protection?**

Yes. If the Refugee Board overturns the Office's decision, it can either grant refugee status or remand (send) the case back to the Office for re-consideration.

11. ANY REMEDY AVAILABLE AGAINST APPELLATE DECISIONS?

**a) In particular, is a judicial review of public authority decision(s) available? If so, does that include a judicial appeal to a higher court?**

Yes, final administrative decisions (i.e. not subject to further administrative appeal) can be appealed to two instances of **administrative courts**. Importantly, an appeal to court does not have the "suspending effect" – the decision is subject to enforcement regardless of filing the appeal. The appellant, however, may file an additional claim to the Board or (if that proves ineffective) to the court for withholding the enforcement of the decision.

**b) What is the character of these courts, i.e. are they federal (central)?**

The system of administrative courts encompasses 16 district administrative courts and the Supreme Administrative Court. All appeals against the Board's decisions

are filed with the district administrative court in Warsaw, which has exclusive jurisdiction.

An appeal against administrative court's sentence can be filed (in any case) with the Supreme Administrative Court.

**12. DESCRIBE CONDITIONS FOR RE-APPLYING FOR REFUGEE STATUS IN CASE OF A PRIOR DENIAL. ARE THERE ANY SPECIFIC PROVISIONS CONCERNING SECOND OR THIRD ASYLUM APPLICATION BY THE SAME APPLICANT?**

No particular requirements have been introduced for an applicant to re-apply for refugee status following a prior denial.

If, however, he/she has been granted subsidiary protection and subsequently re-applies for refugee status, he/she cannot receive support (accommodation and financial benefits) in the course of his/her following RSDP.

**13. BRIEFLY DESCRIBE THE PROCEDURE OF ORDERING DEPORTATION. Include:**

If an asylum seeker is denied both refugee status and subsidiary protection and that ruling is enforceable, the Office or the Board shall **obligate him/her to depart from Polish territory** no later than a designated date (in case of Office's decision it is a maximum of 30 days of serving the decision, Board's – 14 days).

**Note:** in case of the Board's decision, the maximum statutory period for the departure from Polish territory shall be viewed as limiting the right to due process of law. The Board cannot prolong the 14-day period, whereas the applicant has 30 days (of serving the decision) to file an appeal to administrative court.

Should the applicant not fulfill that obligation and overstay the designated period, he becomes eligible for a mandatory **deportation order** issued by the proper authority.

**a) Authority issuing deportation orders**

The administrative authority issuing a deportation order is **wojewoda** (representative of the executive branch of central government in each of 16 provinces) of the province in which the person eligible for the order resides.

**b) Appeal against a deportation order. Appellate authority. Highlights of appellate proceedings (include time limits for filing an appeal, as well as the "suspending effect" i.e. does filing of an appeal result in withholding of the order's execution).**

A deportation order can be appealed against to the Office for Repatriation and Aliens within 14 days of serving it to its addressee. Filing an appeal withholds the enforcement of a deportation order. General provisions of APC apply (appellate decision upholding the order is enforceable).

**c) Conditions for withholding/ suspending the enforcement of a deportation (regard to the family unity principle?)**

If the person involved had been denied both refugee status and subsidiary protection (and those rulings are enforceable), he/she cannot be deported only if his/her **spouse** is a Polish citizen or possesses a permanent residence permit.

14. ARE THERE ANY DOMESTIC ACTS (PARLIAMENTARY OR GOVERNMENTAL) OR SEPARATE LEGAL PROVISIONS ADDRESSING (e.g. FACILITATING THE ENFORCEMENT OF) THE **DUBLIN II REGULATION**? Include:

**a) Means of informing the applicant about the practical consequences of the Dublin II provisions, as well as obtaining information about the applicant in order to determine the state responsible for examining his claim**

The applicant shall be informed about effect of DII regulation along with other information regarding RSDP. In practice, the applicant is required to read and sign a statement informing about the regulation's effect.

The PAA stipulates that administrative authority receiving the application (the Border Guard) is obligated to gather information relevant for DII purposes and pass it to the Office along with the application.

**b) Is the applicant entitled to self-initiate the procedure of sending him to the state responsible, e.g. by filing the proper application to the authorities of the receiving state and appealing in case of denial? (Dublin II and its executive regulation regulate only actions undertaken by member states involved in the DII procedure)**

**No.** General provisions of the Dublin II regulation apply, therefore the applicant involved is **not a party** to the procedure of determining the member state responsible for examining his/her asylum application. Applicant's only means of initiating that procedure is to inform the Office of DII-relevant circumstances on basis of which the Office may file an application to the proper authority of the state potentially responsible. Accordingly, only the Office (and not the applicant himself) can appeal against other member state's decision dismissing such application. See the executive regulation (1586/2003) to the Dublin II regulation.

**15. HOUSING: HOW DOES THE STATE PROVIDE ACCOMODATION FOR ASYLUM SEEKERS? Include:**

**Note:** Unless expressly stated otherwise, all answers delivered in the “blue” section address relevant statutory law, in this case the PAA as well as several governmental orders issued on the basis of PAA. For a **practical reference**, please turn to the Polish section of the “Integrated Ways Integration Manual” edited by FluEqual Project.

**a) Form: private houses/ hotels /camps /centers. Forms of housing listed by respective laws.**

The PAA states that the Head of the Office is responsible for organizing centers for asylum seekers and that this task may be commissioned by the Office to other institutions or persons (implicitly: NGOs, by concluding a civil contract).

**b) Who issues regulations of living/ behavior/ conduct in the facilities/ centers**

It is issued (as an order) by the Minister of Interior.

**c) Housing for families different than for individuals?**

Only addressing provision (located in the abovementioned order) declares that the applicant should be accommodated in a room together with his family members, if (technically) possible.

**d) Individuals: persons of opposite sex accommodated separately (buildings/ floors)?**

No provisions addressing that matter.

**e) Open/ close – allowed to move freely around the country/ obligated to stay within the surrounding of the assigned center?**

Asylum seekers are free to move around the country (they do not have to stay in the center, just as they do not have to apply for material support in RSDP), however they shall notify the Office of any change in their place of residence in Poland.

All centers for non-detained asylum seekers are of open character. Its residents can leave centers' premises, they are, however required to deposit their internal (center) ID card at the gate while leaving, as well as return by 11 PM. If an asylum seekers accommodated in the center leaves that center for more than 3 days without notifying the center's director. Asylum seekers may receive guests in the center daily from 10 AM to 4 PM.

**f) Possible to apply for receiving financial equivalent instead of the right to stay in a center? On what conditions**

**Yes**, material support can be provided to an asylum seeker as a financial equivalent to cover the expenses of living outside the center (it also encompasses the entitlement to free medical care). It shall be granted only if the applicant (or his/her family member) cannot stay in the center due to either health or security reasons.

**g) Possible to prolong the state-provided housing after the decision on refugee status/ subsidiary protection is issued? For how long?**

**Yes**, in case of granting refuge status or subsidiary protection, for a maximum period of 3 months, upon request only.

**16. HOW IS THE ADMINISTRATION OF THE HOUSING FACILITIES ORGANIZED? Include:**

**a) Is the housing run by the state (e.g. immigration authorities), local, or municipal government? Entirely or partially?**

The sole statutory provision addressing organization of centers for asylum seekers declares that the Office "can commission organization of centers to other persons" (see also 15 a). As the Office has never chosen to commission that task in any scope whatsoever, the abovementioned provision remains dormant, and all following questions have no merit.

**b) If it is private-run: how do the authorities verify compliance with respective laws and regulations? Does the housing undergo regular controls? How often? Is the system of control effective enough to ensure equal treatment of the asylum seekers living in centers**

**c) What essential conditions have to be met by a person or a company to open or administer a centre/ house for asylum seekers**

**d) Same regulations apply to all housing facilities for asylum seekers? Who issues each set of regulations (if more than one)? Does that depend on the type of housing?**

**e) De facto, does private administration deliver asylum seeker housing of a standard complying with respective legal provisions?**

**17. DO ASYLUM SEEKERS ACCOMODATED IN STATE-PROVIDED (WHETHER STATE-OR PRIVATE-ADMINISTERED) HOUSING RECEIVE FOOD OR SELF-PREPARE IT? Include:**

Meals in centers are served three times a day (breakfast, dinner, supper). Nevertheless, kitchen facilities (incl. appliances) shall be available to asylum seekers in every center.

**a) Compliance with specific dietary needs of customary (e.g. vegetarian) or religious origin**

**Yes**, on basis of general provisions declaring that asylum seeker's cultural identity shall be respected in the center.

**b) Fulfillment of dietary needs based on medical condition**

If the center cannot fulfill asylum seeker's dietary needs listed in a medical diagnosis, asylum seeker can be granted financial equivalent for food in order to purchase and prepare food consistent with his/her diet.

**c) In case of food being provided, is there a possibility of applying for a financial equivalent necessary to self-prepare the meals?**

Only in case of dietary needs that the center cannot fulfill, see b).

**18. LIST SOCIAL BENEFITS OTHER THAN HOUSING THAT ASYLUM SEEKERS ARE ENTITLED TO OBTAIN. Do not include medical and psychological care (question 20). Include:**

**a) Whether different types of benefits are financial or in other form (e.g. services)**

Financial benefits are:

1. monthly spending money for purchasing items of personal hygiene, as well as to cover other personal expenses
2. a single sum for the purchase of clothing and footwear adequate to the season (i.e. summer/ winter)
3. financial equivalent instead of (the center-provided) food if additional conditions are fulfilled
4. financial equivalent instead accommodation in the center if additional conditions are fulfilled

Non-financial benefits are:

1. accommodation in the center
2. food provided in the center
3. textbooks and other materials for asylum seekers' children that attend Polish public schools
4. public transport tickets purchased by the applicants for travels related to asylum proceedings or medical appointments (in practice, they often receive reimbursements)
5. Health care

**b) Any benefits specifically addressing the issue of number and age of asylum seekers' children**

**No additional benefits.** The amounts granted differ depending on the number of children in the family (in case of the "accommodation equivalent", per capita benefit is lower in larger families).

**c) Eligibility criteria for receiving social benefits? Same rules for an asylum seeker – unaccompanied minor?**

The only difference was introduced by Minister's order with regard to the number of family members of asylum seekers receiving the "accommodation equivalent".

**d) Are asylum seekers eligible for any benefits available for citizens?**

**No.** In case of most benefits the minimum requirement as to alien's legal status in Poland is subsidiary protection ("tolerated stay permit").

**e) Are social benefits provided by federal (central) or local authorities?**

All RSDP - related benefits granted on the basis of the PAA are provided by the Office (central immigration authority).

All other benefits (if available to asylum seekers) are provided by local authorities (usually - municipal centers for social care).

**f) Financial support (benefits) – what authority (what act) determines how much money is an asylum seeker entitled to? Does the financial support differ depending on the place of asylum seeker's residence?**

Amounts of financial benefits received by asylum seekers are strictly determined by a separate order of the Minister of Interior. Size of some benefits depends on the number of asylum seeker's minor children.

**g) Do the authorities reimburse asylum seeker's expenses related to participation in the asylum proceedings (e.g. filing motions, traveling to immigration authorities' offices)?**

Asylum seekers receive reimbursement for tickets purchased for any RSDP-related travels (by law, they should receive purchased tickets, not reimbursement). All RSDP-related procedural activity (filing motions or appeals) is free from administrative fees or taxes.

**h) Are any of the benefits semi-optional, i.e. can the asylum seeker obtain a financial equivalent instead?**

"Accommodation equivalent" or "food equivalent" shall be granted only if additional circumstances take place (i.e. not upon mere request).

**19. CAN THE ASYLUM SEEKER CHOOSE NOT TO LIVE IN STATE-PROVIDED HOUSING?**

If so:

Receiving a financial equivalent instead of state-provided accommodation is not an alternative. Asylum seeker shall be granted such equivalent only on basis of significant health or security reasons (**see 15 [f] for details**).

**a) Is "independent housing" supported by the state, e.g. by helping the asylum seeker find an apartment to lease?**

No other form of housing for asylum seekers than centers has been introduced by the PAA. Asylum seekers that have been granted the "accommodation equivalent" can, however, seek assistance in finding a room (apartment/ flat) to lease at a local Municipal Center for Social Care (general regulations concerning MCSCs' activities concerning Polish citizens will apply).

**b) Does the asylum seeker receive money to cover the expenses of "independent housing" (e.g. money to cover monthly rent)**

The "accommodation equivalent" (see 15 f) shall cover the rent for independent housing.

20. DESCRIBE TO WHAT SCOPE OF **MEDICAL CARE** BENEFITS ARE THE APPLICANT AND HIS FAMILY ENTITLED WHILE IN ASYLUM PROCEEDINGS? Include:

- a) Legal form (e.g. health security of all asylum seekers covered by the government? Federal, central or local authorities responsible?) and its practical consequences (e.g. free of charge treatment only in designated clinics or hospitals?)**

Asylum seekers are entitled to medical care of a "range equivalent to the basic insurance option available for Polish citizens at Narodowy Fundusz Zdrowia", National Health Fund, authority responsible for public health insurance. Asylum seekers are not formally insured, **the Office** concludes contracts with particular health care providers instead (individual, i.e. doctors, dentists, nurses, as well as institutional, like hospitals or clinics). Each center for asylum seekers has a doctor's/nurse's office that deals with basic problem or refers the patient to the hospital for an advanced diagnosis or specialized treatment.

- b) Full range of medical services or only chosen treatments? Full access to medical care for children and pregnant women?**

The range of medical services available to asylum seekers is quite broad (some expensive were excluded). In practice, applicants referred to a medical specialist have to wait one to eight weeks for an appointment, which is, however, common also in case of Polish citizens benefiting from basic option of government-financed health insurance.

- c) Providing funds for purchasing the prescribed medications?**

Not explicitly regulated by statutory law. Prescriptions are usually left with the nurse in the center, who orders medicines as prescribed. Costs are covered by the Office's healthcare funds.

- d) Psychological care for traumatized applicants?**

**No.** Psychological care available to the applicants is exclusively NGO-provided and not on a regular basis (therefore rarely amounts to a treatment).

21. DESCRIBE THE NATURE OF ASYLUM SEEKERS' **RIGHT TO EDUCATION**. Include:

- a) Level of schooling: primary/ secondary/ tertiary schools? Only undergraduate or also graduate?**

- b) Do applicants' children under 18 (or unaccompanied minors) fall within the scope of obligatory education (in most EU states regarding persons between 8 and 18 years of age)?**

**To a) and b).** Compulsory schooling for Polish citizens aged 7 to 18 covers all aliens that reside in Poland, including asylum seekers (both unaccompanied minors and children covered by their parents' asylum applications). Public primary (age 7-16) and secondary (age 17-19) schools do not charge fees. Asylum seekers are not entitled to higher (tertiary, university) education.

- c) Are kindergartens available for asylum seekers?**

**No,** as they are not included in the compulsory education scheme.

- d) Do children attending classes receive all necessary materials (textbooks, stationery) or do their parents receive additional funds to purchase them?**

Children of asylum seekers that reside in the centers are provided with all materials necessary to attend public schools (that theoretically includes fees, which in practice are not charged).

Asylum seekers that received the financial equivalent instead of accommodation in the center (see above) are supposed to purchase the materials on their own.

**22. ARE ASYLUM SEEKERS ENTITLED TO LANGUAGE COURSES? Include:**

Relevant provision of the PAA states that the Office **may organize** free of charge Polish lessons for applicants accommodated in the centers, as well as provide them with all materials necessary for such tuition. The Office has exploited this provision partially, organizing lessons only for minors (applicants' children) preparing to attend primary or secondary public schools.

Free language tuition for adults is organized on a regular basis by NGOs. See the respective part of the Integrated Ways Integration Manual.

- a) Are they free of charge?
- b) What are the means of encouraging asylum seekers to participate?
- c) Who runs the courses – who is responsible (federal/ central or local authorities/ NGO/ other, e.g. Church)
- d) Is a minimum number of hours declared in respective provisions?

**23. ARE THERE ANY ADDITIONAL SAFEGUARDS FOR WOMEN'S RIGHTS IN THE COURSE OF ASYLUM PROCEEDINGS? IN PARTICULAR, REGARDING PREGNANCY, SOLITARY GUARDIANSHIP OR TRAUMA?**

**No** other than in general gender-related provisions. See: safeguards related to applicant's gender described in question **5 e) and f)**.

**24. ARE THERE ANY PARTICULAR PROVISIONS REGARDING THE BENEFITS OF PERSONS THAT HAD ALREADY BEEN GRANTED SUBSIDIARY PROTECTION, BUT CHOSE TO APPLY FOR REFUGEE STATUS ANYWAY (OR FOR THE SECOND TIME)? DO SUCH PERSONS RECEIVE BENEFITS IN THE SAME WAY AS APPLICANTS OTHERWISE (e.g. IF NOT IN ASYLUM PROCEEDINGS) ILLEGAL?**

Under PAA, asylum applicant that has been granted **subsidiary protection** prior to filing the asylum application **cannot be granted** any RSDP-related benefits and material support.

**25. DOES THE APPLICANT HAVE THE RIGHT TO WORK? IS IT CONDITIONAL?**

Asylum seekers **do not have the right** to perform any form of labor whatsoever.

**26. IN CASE ASYLUM SEEKER DOES NOT HAVE THE RIGHT TO WORK, CAN HE APPLY FOR A WORK PERMIT (as other legal aliens)?**

As already mentioned, the PAA requires the Office to issue the RSD decision

within 6 months of filing the asylum application.

If his/her **first instance decision** has not been issued within **12 months** of filing the application, asylum seeker **can apply for a work permit** just as other legal aliens in Poland (i.e. pursuant to PELMIA 2004).

In order to apply for a work permit, the applicant receives (upon his/her request) **an official certificate** from the Office stating that his/her first instance asylum proceedings have exceeded 12 months' time due to the circumstances beyond his/her control.

Asylum seeker's work permit application is normally examined under PELMIA 2004 (i.e. he/she does not receive a permit automatically, other applicable conditions have to be met).

27. IS THE ASYLUM SEEKER **ENTITLED TO A FREE-OF-CHARGE PARTICIPATION IN VOCATIONAL TRAINING** AIMED AT ADJUSTING QUALIFICATIONS TO THE NEEDS OF THE LOCAL OR NATIONAL LABOR MARKET? Include:

There is **no legal obligation** for immigration authorities to organize vocational training for asylum seekers.

Asylum seekers **do not have the right to register with labor offices** (administered by local authorities) in order to take part in vocational training for the unemployed. They are entitled to such registration only after they receive subsidiary protection.

Some training and courses are organized by NGOs, not on a regular basis though.

- a) Are there any courses aimed specifically at asylum seekers?
- b) Any **form of cooperation** between the authorities and NGOs in organizing such courses?
- c) Any courses aimed exclusively at **women**?

(Note: please stress the difference between legal obligations and practice, i.e. whether the authorities are obligated to organize the actual course or it is an entirely private NGO initiative)

28. CAN THE ASYLUM SEEKER PERFORM **COMMUNITY WORK** THAT IS NOT REGARDED AS "LABOR"? Include:

**No exemptions** were introduced from the rule stated in question 25, therefore questions listed below do not apply.

- a) What activities does that work encompass? Is that decided by the authorities or determined in national or local law?
- b) Any minimum or maximum amount of community work time? Overtime possible?
- c) Is a contract being signed with the applicant?
- d) Is the applicant obligated to pay tax?
- e) Do provisions determining the minimum wage apply?
- f) Do labour law provisions protecting employees apply?
- g) Is the asylum seeker eligible for social security applicable to employees?
- h) Does performing community work entitle the applicant to participate in professional courses?

29. DESCRIBE THE LEGAL CONSEQUENCES THAT ASYLUM SEEKER MIGHT FACE FOR **PERFORMING LABOR ILLEGALLY**. Include:

**a) The nature of consequences (e.g. pecuniary)**

Statutory law introduces two types of sanctions for aliens performing labor illegally (without proper permit), that is **a fine** (from 1000 to 5000 PLN, equal approx. to 270 to 1330 EUR) or **a deportation order**.

**b) Influence on asylum proceedings?**

No particular RSDP-related sanctions were introduced for asylum seekers performing labor illegally.

Pursuant to Aliens Act deportation orders shall not be issued with regard to persons with their RSDP pending and if one has already been issued it is not subject to enforcement (the *non-refoulement* principle).

30. DOES **SUBSIDIARY PROTECTION** ENCOMPASS THE RIGHT TO WORK?

**YES**, an asylum seeker granted subsidiary protection is entitled to legally perform labor without any further conditions (in particular, having to obtain a work permit, as most of other legal aliens).

31. LIST LEGAL PROVISIONS (IF ANY) THAT EXPRESSLY DIFFER THE SITUATION OF **MALE AND FEMALE** ASYLUM SEEKERS IN RELATION TO LABOR MARKET

There are **no such legal provisions**.

This is the end of the questionnaire. Should you decide that some issues needed more focus or remained untouched, please let us know in the space below. We will certainly include your comments in the legal report.

Again, thank you for your cooperation.



TRANSNATIONAL PARTNERSHIP  
INTEGRATED WAYS  
(TCA ID 4399)

*Report on Legal Situation of Asylum Seekers*

in Austria (FLUEQUAL) and Poland (EDI)

Questionnaire

for FluEqual/**AUSTRIA**  
(persons responsible: Andrea Stadlmair)

Questionnaire prepared by  
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"Education for Integration – Partnership for Refugees"



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Kraków, December 2006

Dear Partners,

We hereby present to you the **Questionnaire on the legal situation of asylum seekers** put together by the EDI (Education for Integration) project staff for the purposes of preparing the following **Report on the legal situation of asylum seekers** in Austria, Italy and Poland. The answers from the questionnaire are expected to serve as a basis to evaluate a comparative study on asylum seekers' legal situation in each of three countries with regard to the so-called **pre-integration processes**, i.e. integration of asylum seekers. Particular emphasis is going to be put on the **labor market issues**.

We kindly request you to complete this questionnaire and return it to the following e-mail address: [equal@juhrc.org](mailto:equal@juhrc.org). Should you have any additional questions concerning the questionnaire or the following legal report, please contact us via e-mail for clarifications.

The questionnaire consists of 31 questions divided into three blocks:

- 4) asylum procedure,
- 5) social benefits for asylum seekers,
- 6) asylum seekers' position on labor market (marked with yellow, blue and brown color respectively).

Throughout the questionnaire, a person that has filed an asylum claim, but not yet received his or her final (i.e. not subject to an appeal) decision is referred to as the **"asylum seeker"** or the **"applicant"** (unless stated otherwise). Whenever the questionnaire mentions an **"unaccompanied minor"**, it refers to an unaccompanied minor that has filed an asylum application.

Some questions highlight the key aspects that the answer should cover. **That does not mean the answer should be limited to those aspects.** Should you decide the answer requires elaborating on, do not hesitate to do so. As this is a questionnaire concerning legal matters please make sure to fully regard the substantive and procedural law governing the issues raised in the questions and make it clear whenever you are describing how given provisions work in practice.

As for the relevant legal acts, there is no need to include the actual number of article or paragraph containing the provision in each answer. We would, however, appreciate the enclosing of **a separate list of relevant acts** (both of parliamentary and governmental origin) in case a further reference is needed.

Finally, in the course of evaluating the questionnaire, you are going to be asked to separately comment on the parts of the legal report regarding directly the situation in your country.

Thank you for your cooperation

EDI Project staff, JUHRC

**NOTE: Following abbreviations were used in the questionnaire:**

**RSD** – refugee status determination (essential aim of asylum proceedings)

**Dublin II regulation** – Council regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national (OJ 50/1, 25.02.2003)

32. BRIEFLY DESCRIBE THE **FILING** OF AN ASYLUM APPLICATION. Include:

- e) **Public authority** that can receive the application (e.g. border control/ police/ both/ other). Same authority if the application filed on the territory (i.e. **not** on the border/ airport)?

An application for international protection shall be deemed filed if an alien in Austria makes a request for protection against persecution to an agent of the public security service or to a security authority or at an initial reception centre.

An application for international protection shall be deemed submitted if it is filed in person by the alien at an initial reception centre, including in cases where the alien is transferred there (Article 17).

- f) Whether, how, when and in what language **is the applicant informed** about his or her rights and obligations regarding the legal proceedings, as well as the state responsible for examining the asylum claim (see: Dublin II regulation, Art. 3.4)

In the initial reception centres (in St. Georgen im Attergau and Traiskirchen) asylum seekers get information-sheets in the most common languages, including information about the legal procedure and the Dublin II regulation.

The related clause is Article 17 paragraph 9: The Federal Minister of the Interior shall issue an explanatory leaflet setting out an asylum-seeker's rights and obligations. A copy of this leaflet shall be provided at the latest upon submission of the application,

at the initial reception centre, in a language understandable to the asylum-seeker. The leaflet shall be prepared in advance in those languages which it may be assumed will be understandable to asylum-seekers. In particular, the leaflet shall draw attention to the obligation of asylum-seekers to place themselves at the disposal of the authorities for purposes of procedures pursuant to the present federal law and to the legal consequences of any breach.

In the Federal Asyl Agency and its branches in most of the federal states information is furthermore passed on in audio-visual form.

During the interview at the Federal Asylum Agency the receipt of the information leaflets is checked.

The problem is that the content of the leaflets is not always congruent. Not every leaflet is updated when necessary and completely. Some of the content is wrong. Some important pieces of information, like the right to consult legal assistance, are transported inadequately.

- g) Structure of the asylum application - whether **one application** can be filed by **more than one applicants** (e.g. close relatives or a family as a whole). If not - is the right to stay of the spouse or/ and children of the asylum applicant secured for the time of his RSD proceedings?

If a family member of:

1. an alien who has been granted asylum status;
2. an alien who has been granted subsidiary protection status or
3. an asylum-seeker

files an application for international protection, such application shall be deemed to be an application for the granting of the same protection (Article 34).

“Family member” means the parent of an under-age child, the spouse or the, at the time of filing the application, under-age unmarried child of an asylum-seeker or of an alien to whom subsidiary protection status or asylum status has been granted, insofar as in case of spouses the family already existed in the country of origin.

Applications in respect of an asylum-seeker’s family members shall be examined separately by the authority; the procedures shall be conducted jointly and all family members shall receive the same scope of protection. A separate administrative decision shall be issued to each asylum-seeker.

- h) Is there a possibility of granting refugee status *ex officio*, i.e. without a person’s claim?

No.

**33. IS THE APPLICANT SUBJECT TO (OR ELIGIBLE FOR) DETENTION OR ARREST UPON FILING THE APPLICATION. Include:**

- f) Conditions** for detaining and holding in detention while in asylum proceedings
- g) Authority** issuing a warrant of detention (arrest). An effective right to appeal against the decision/ ruling? Authority ordering the **release**

a) and b) In the case of an asylum-seeker or alien who has filed an application for international protection, the aliens police authority having territorial jurisdiction may issue an order for that person to be detained pending deportation as a procedural security measure in connection with the imposition of an expulsion order pursuant to article 10 of the 2005 Asylum Act or as a deportation security measure (article 76, paragraph 2 Austrian Asylum Law):

1. If an enforceable expulsion order has been issued against him (article 10 of the 2005 Asylum Act), even if that order is not final;
2. If an expulsion procedure has been initiated against him in accordance with the provisions of the 2005 Asylum Act;
3. If an enforceable expulsion order or an enforceable residence ban was imposed on him prior to the filing of the application for international protection or
4. If it may be assumed, on the basis of the outcome of the interrogation, search and photographing and fingerprinting procedures, that the alien's application for international protection will be rejected owing to the absence of responsibility of Austria for examining the application.

Orders for detention pending deportation shall be imposed by administrative decision; such decision shall be rendered in accordance with article 57 of the General Administrative Procedures Act, unless upon the initiation of the procedure for the imposition of the detention order the alien is already for another reason held in custody not constituting simple short-term detention.

If a residence ban or expulsion order becomes enforceable and the supervision of the alien's exit appears necessary, the detention order issued as a procedural security measure shall as from that moment be deemed to have been imposed as a deportation security measure.

If an alien files an application for international protection while being held in detention pending deportation, the detention order may be maintained in force.

The imposition of orders for detention pending deportation may be contested by the lodging of complaints in accordance with article 82 (complain at Unabhängigen Verwaltungssenat/Independent Administrative Review Board).

Problematic is the situation of married couples and families, who are separated by detention. Family members, who come to visit the one arrested, can talk to him for half an hour per week through a pane. Because of the relocation the detainee visits are often impossible at all.

Criticised is also the fact, that minors are still arrested regularly, although according to the law retrospectively to edict they should only be arrested as a last resort. Between 1.1.2006 and 31.3.2006 for example, there were 52 minors kept in detention, thereof 2 at the age between 14 and 16 years.

**h)** Place: prison or detention center for illegal aliens? What authority supervises the detention centers?

Detention pending deportation shall be carried out at detention premises of the aliens police authority which imposed the detention order. If the aliens police authority is unable to carry out the detention order, a request for its execution shall be made to the nearest aliens police authority which possesses detention premises. If such latter authority is also unable to carry out the detention order, a request for its execution shall be made to the director of the court-house jail in whose area of administration the authority is located; that director shall comply with the request provided that this is possible without interference with other statutory duties.

Orders for detention pending deportation that are imposed on aliens who have no domicile in the federal territory may be carried out at detention premises of the nearest aliens police authority which is physically in a position to admit them. If no aliens police authority has any detention premises available, the detention order imposed on such aliens may be carried out at the nearest court-house jail which is physically in a position to admit them; the director to whom the request is made shall comply with the request provided that this is possible without interference with other statutory duties.

An order for detention pending deportation that immediately follows a court sentence of imprisonment may alternatively be executed in a court-house jail or, with the consent of the person concerned, in a penal institution.

If so required for the purposes of deportation, forcible return or transit, the detention order may be executed in detention premises situated en route to the federal border.

Special detention premises shall be maintained for all aliens police authorities. Such premises may be established for a single aliens police authority or, if reasons of expediency or economy so necessitate, for several aliens police authorities jointly. The local administrations responsible for meeting the expenditure of aliens police authorities shall ensure the availability in each province of the number of detention premises which is consistent with the average number of orders for detention pending deportation which are imposed in that province.

**i) Time: any provisions determining the maximum period of detention?**

The authority shall endeavour to ensure that the period of any detention pending deportation is as short as possible.

A detention order shall be maintained in force until the reason for its imposition ceases to exist or until its objective can no longer be achieved. Except in the cases referred to below, detention pending deportation shall be for a period not exceeding two months in all.

If it is not permissible to deport an alien because a final decision has not yet been pronounced concerning an application filed pursuant to article 51 (application for decision about need of protection against Refoulement), the detention order may be maintained in force until the expiry of the fourth week following pronouncement of the final decision but for a period not exceeding six months in all.

If it is not possible or permissible to deport an alien because:

1. The establishment of his identity and nationality is not possible or
2. The necessary entry permit or transit permit from another State is not present or
3. He frustrates the deportation measure by resisting a measure of constraint,

the detention order may be maintained in force for not more than six months within a two-year period by reason of the same facts unless the non-execution of the deportation measure is attributable to the alien's conduct. In such cases, the alien may not be held in detention pending deportation for more than ten months within a two-year period by reason of the same facts. A detention order imposed pursuant to article 76, paragraph (2) Austrian Asylum Law, may be maintained in force for more than six months within a two-year period but for not more than ten months within a two-year period.

In cases where a detention order has been imposed pursuant to article 76, paragraph (2) AAL, such order may be maintained in force up to the expiry of the fourth week following pronouncement of a final negative decision on the application for international protection unless a situation as referred to in subparagraphs 1 to 3 of paragraph (4) above exists. If, in accordance with article 37 of the 2005 Asylum Act, the suspensory effect of an appeal against an expulsion order issued in conjunction with a rejection ruling is allowed, the detention order may be maintained in force until a decision is pronounced by the Independent Federal Asylum Review Board. Furthermore, the detention order may be maintained in force only if the Independent Federal Asylum Review Board issues a rejection or dismissal ruling.

If an alien is held in detention pending deportation for an uninterrupted period of more than six months, the proportionality of the custody shall be re-examined ex officio by the locally competent Independent Administrative Review Board following the day on which the sixth month elapsed and thereafter every eight weeks. The

authority shall submit the administrative records sufficiently in advance to allow the Independent Administrative Review Boards one week to pronounce a decision prior to expiry of the time-limits in question. In so doing, it shall explain why maintaining the detention order in force is necessary and proportionally. The Independent Administrative Review Board shall in all cases declare whether at the time of its decision the essential requirements for the continuation of the detention order are met and whether it is proportionally to maintain the detention order in force.

An alien who is to be detained solely on the grounds set above shall be informed thereof in writing by the authority without delay.

**j) Legal assistance** or representation provided to the applicant? State-sponsored or NGO run?

There is no legal assistance provided to the applicant in detention. 53 % of 1.100 places in detention the "Verein Menschenrechte Österreich" is mentoring, which is explicitly believes that is not required to offer legal advice and assistance in detention. Support is offered and state sponsored, but implemented by NGOs like this "Verein". In some federal states, where other NGOs are assigned for looking after the detainees, forwarding legal claims to legal departments of NGOs works well. The situation depends very much on the detention premise and the NGO caring.

**34. WHICH PUBLIC AUTHORITY IS RESPONSIBLE FOR CONDUCTING THE REFUGEE STATUS DETERMINATION (RSD) PROCEEDINGS? Include:**

c) Its name. Where is it based?

d) **Structure** (incl. federal (central)/ federal (central) with local branches/ entirely local)

The asylum authority of first resort is the Federal Asylum Agency, which is established in subordination to the Federal Minister of the Interior. It has field offices in nearly every federal state. The principal seat of the Federal Asylum Agency is located in Vienna.

Appeals lodged against decisions of the Federal Asylum Agency are ruled on by the independent Federal Asylum Review Board through one of its members or, if laid down by federal law, by review panel. It has branches in Vienna and Linz.

After that, the Federal Minister of the Interior or the asylum seeker himself may lodge complaints on the ground of illegality with the Administrative Court against decisions of the independent Federal Asylum Review Board within six weeks.

**35. ENUMERATE THE PROCEDURAL SAFEGUARDS CONCERNING UNACCOMPANIED MINORS. Include:**

a) Public authority responsible for appointing a guardian

b) Persons eligible for being appointed guardian

An under-age person whose interests cannot be defended by his legal representative shall be entitled to file applications for international protection.

A person under full age whose interests cannot be defended by his legal representative shall be entitled to file and submit applications. In procedures pursuant to the present federal law the legal representative shall be, upon submission of an application for international protection, the legal adviser at the initial reception centre and, following admission of the procedure and assignment to a care centre, the locally competent youth welfare agency of the federal province in which the under-age person was assigned to a care centre. If, prior to the initial interview in the

admission procedure, the legal adviser objects to an interrogation of a person under full age, such interrogation shall be repeated in the legal adviser's presence. (article 16, paragraph 3 AAL)

If the person under full age evades the procedure or a legal representative cannot for other reasons be designated in accordance with paragraph (3) above, the youth welfare agency to which legal representation was last assigned shall be the legal representative until a legal representative has again been designated in accordance with paragraph (3) above. If, in the procedure to date, legal representation was discharged solely by the legal adviser, that person shall continue as the legal representative until legal representation first devolves upon a youth welfare agency in accordance with paragraph (3) above. (article 16, paragraph 4 AAL)

In the case of an under-age person whose interests cannot be defended by his legal representative, the legal adviser shall from his arrival at the initial reception centre be his legal representative. Such aliens may be interrogated (article 19, paragraph (1)) solely in the presence of the legal adviser. In all other respects, paragraphs (3) and (4) above shall apply. (article 16, paragraph 5 AAL)

Problematic is that unaccompanied minors are not represented by a specialized employee of the locally competent youth welfare agency right from the start, but by a legal adviser, who furthermore sometimes is not the same one in every phase of the procedure.

Of concern is moreover that there is no one appointed to take parental custody of unaccompanied minors.

### 36. BRIEFLY DESCRIBE THE HIGHLIGHTS OF THE **RSD PROCEEDINGS**. Include:

#### l) Legal provisions directly regarding the **asylum interview**

Article 19. (1) An alien who has filed an application for international protection shall be interrogated by agents of the public security service upon the filing of the application or during the admission procedure at the initial reception centre. Such interrogation shall be conducted in particular with a view to ascertaining the identity of the alien and the route followed by him and shall not refer to the specific reasons for his flight.

(2) If possible without disproportionate expense, the asylum-seeker shall be interviewed in person by the official of the Federal Asylum Agency who is competent to take the respective decision. An interview during the admission procedure may be dispensed with if the procedure is admitted. An asylum-seeker shall, unless owing to circumstances relating to his person he is unable by testifying to contribute to the establishment of the material facts, be interviewed by the Federal Asylum Agency at least once during the admission procedure and, unless a decision on the application is rendered in the admission procedure, at least once following the admission of the procedure. Article 24, paragraph (3), shall be unaffected.

(3) An interview may be documented with the use of technical sound-recording equipment.

(4) Prior to each interview the asylum-seeker shall be expressly informed of the consequences of false testimony. In the admission procedure, the asylum-seeker shall also be informed that his own statements will be accorded increased credibility.

(5) When appearing before the authority for the purpose of being interviewed, an asylum-seeker may be accompanied by a person enjoying his confidence and by a representative; the asylum-seeker may be accompanied by a person enjoying his confidence or by a representative even if a legal adviser is present. Under-age asylum-seekers may be interviewed solely in the presence of a legal representative.

(6) If an asylum-seeker is in custody for whatsoever reason, he shall be transferred to the asylum authority at its request. Such custody, in particular detention pending deportation, shall not be thereby interrupted.

m) Legal counseling or assistance to the applicant. State or NGO-provided?

Persons versed in the law with specialist knowledge of asylum and immigration matters (legal advisers) shall be present alongside asylum-seekers in admission procedures; they shall, in discharging their duties, be subject to the obligation of confidentiality.

In the case of asylum-seekers who are unaccompanied minors, the legal adviser shall take part, as legal representative in the admission procedure, at every interrogation in the initial reception centre and at every interview in the admission procedure.

After that, when the procedure is already admitted, the Federal Minister of the Interior appoints **refugee advisers** in the required number to assist aliens in matter of asylum law.

Refugee advisers shall upon request:

1. provide aliens with information on any questions concerning asylum law unless such questions come within the advisory duties of legal advisers;
2. assist aliens in connection with the filing or submission of an application for international protection;
3. represent aliens in procedures pursuant to the present federal law or, insofar as asylum-seekers are involved, pursuant to the FPG, unless the engagement of a lawyer is stipulated by law;
4. be of help to aliens in connection with the translation of documents and the provision of interpreters and
5. provide aliens, where appropriate, with repatriation advice.

The selection and appointment of legal advisers and refugee advisers is the responsibility of the Federal Minister of the Interior. The latter may, in discharging that responsibility, take into consideration proposals by the United Nations High Commissioner for Refugees (UNHCR), the provincial and municipal authorities and the Asylum and Migration Advisory Board.

n) Legal **representation** in the course of administrative proceedings regarding RSD. Legal capacity to represent - a professional lawyer (an attorney) only?

Possibly the refugee adviser, who often is not engaged for many working hours though. For example, in the federal state of Salzburg, which is in the charge of about 1.300 asylum seekers, the office hours of the refugee adviser in the responsible Federal Asylum Agency amounts two. The asylum seeker can nominate a representative according to his wishes in the whole proceeding, except in the proceeding before the Administrative Court, where the representation by a lawyer is mandatory.

o) Communication – interpreter; language of the proceedings (e.g. can the applicant file motions in his native language). Language assistance while in proceedings

Like in all administrative proceedings, the asylum seeker generally has to get a translator, if he is not able to understand German.

In the interviews before the Federal Asylum Agency and Independent Federal Asylum Review Board asylum seekers get translation into their own language.

Rulings are drafted in German, except the verdict itself, which is translated in the asylum seekers first language:

Article 22 paragraph (1) Decisions on applications for international protection shall be issued in the form of administrative decisions. Such decisions shall contain, in a language understandable to the asylum-seeker, the verdict, instructions concerning rights of appeal and, in the case of decisions rendered in the last resort, the information specified in article 61a of the General Administrative Procedures Act. If an application is rejected as inadmissible pursuant to article 4, the decision shall be accompanied by a translation, in that language, of the relevant statutory provisions. An inaccurate translation shall solely establish the right to reinstatement, subject to the requirements set out in article 71 of the General Administrative Procedures Act.

Appeals can be lodged either in German or in one of the official languages of the United Nations (English, French, Spanish, Russian, Arabic or Chinese). If the asylum seeker attaches to the appeal a paper written by himself in his first language, which is a different language as provided, it generally will be translated at the Independent Federal Asylum Review Board and its content will be taken into consideration.

p) Psychological care while in the course of proceedings (traumatized applicant)

No psychological care while in the course of the proceedings provided by the state. NGOs like ASPIS, Hemayat, Omega-Graz, Caritas Salzburg, Flüchtlingsbetreuung der Volkshilfe Oberösterreich or ZEBRA offer psychotherapy.

Traumatization is relevant only in the admission procedure. When it there can be assumed with a high degree of probability that the asylum-seeker is suffering from a medically significant stress-related mental disorder as a result of torture or like event which:

1. prevents him from defending his interests in the procedure or
2. entails for him a risk of permanent harm or long-term effects,

a notification as referred to in article 29, paragraph (3), subparagraph 5, shall not be effected (notification that it is intended that his application for international protection is to be dismissed). The application shall then not be dismissed in the admission procedure. In the further course of the procedure, due consideration shall be given to the asylum-seeker's specific needs.

The asylum seeker can, though, be deported if the application is rejected because of the responsibility of another member state (Dublin II), the alien is able to find protection in a safe third country or because his case has already been ruled on.

q) Any legal provisions specifically addressing the **gender** of applicant in the course of proceedings (for example, conducting the asylum interview by the person of the same sex as the applicant)

If an asylum-seeker bases his fear of persecution (article 1 A (2) of the Geneva Convention on Refugees) on infringement of his right to sexual self-determination, he shall be interviewed by an official of the same sex unless he requests otherwise. The asylum-seeker shall be informed in a provable manner of the existence of that possibility. g) According to the General Administrative Procedure Act, authorities in an administrative procedure have to grant affected parties access to their files. In the asylum proceeding asylum seekers get copies of their interviews and their decisions.

- r) Free **access to records** of the case (the entire documentation regarding the case in the possession of the authority) secured? Enumerate the exclusions
- s) Are there any provisions directly addressing the **family unity** principle?

Yes, the following:

Article 4 (4) Notwithstanding protection in a safe third country, an application for international protection shall not be rejected as inadmissible if an expulsion order issued in conjunction with the rejection decision would give rise to a violation of article 8 of the European Convention on Human Rights. Rejection by reason of protection in a safe third country shall not take place in particular if:

1. the asylum-seeker is an EEA citizen;
2. asylum status or subsidiary protection status has been granted in Austria to a parent of an under-age unmarried asylum-seeker or
3. asylum status or subsidiary protection status has been granted in Austria to the spouse or to an under-age unmarried child of the asylum-seeker.

Article 34. (1) If a family member (subparagraph 22 of article 2) of:

1. an alien who has been granted asylum status;
2. an alien who has been granted subsidiary protection status (article 8) or
3. an asylum-seeker

files an application for international protection, such application shall be deemed to be an application for the granting of the same protection.

(2) The authority shall, pursuant to an application in respect of a family member of an alien who has been granted asylum status, grant asylum status by administrative decision to the family member if it is not possible to continue an existing family life, within the meaning of article 8 of the European Convention on Human Rights, with the family member in another country.

(3) The authority shall, pursuant to an application in respect of a family member of an alien who has been granted subsidiary protection status where that family member is present in the federal territory, grant subsidiary protection status by administrative decision unless:

1. it is possible to continue an existing family life, within the meaning of article 8 of the European Convention on Human Rights, with the family member in another country or
2. the asylum-seeker is to be granted asylum status.

(4) Applications in respect of an asylum-seeker's family members shall be examined separately by the authority; the procedures shall be conducted jointly and all family members shall receive the same scope of protection. Either asylum status or subsidiary protection status shall be granted, with the granting of asylum status having precedence, unless all applications are to be rejected or dismissed as inadmissible. A separate administrative decision shall be issued to each asylum-seeker.

Applications in family procedures filed with diplomatic authorities

Article 35. (1) A family member of an alien who has been granted asylum status or subsidiary protection status and who is outside Austria shall file an application as referred to in article 34, paragraph (1), with the Austrian diplomatic authority abroad entrusted with consular functions (diplomatic authority). Such application shall additionally be deemed to be an application for the granting of entry authorization.

(2) If the family member of an alien who has been granted subsidiary protection status is outside Austria, that person shall, upon application, be granted entry following the first extension of the limited right of residence of the alien who has already been granted subsidiary protection status unless it may be assumed, on the basis of certain facts, that the conditions required for the granting of subsidiary protection status no longer exist or will no longer exist in three months. Paragraph (4) below shall additionally apply.

(3) If an application is filed pursuant to paragraphs (1) and (2) above, the diplomatic authority shall ensure that the alien completes an application form and questionnaire drawn up in a language understandable to him; the format and text of the application form and questionnaire shall be determined by the Federal Minister of the Interior, in agreement with the Federal Minister of Foreign Affairs and after consultation with the United Nations High Commissioner for Refugees (article 63), in such a way that completion thereof serves to establish the material facts. The diplomatic authority shall also make a written record of the content of the documents submitted to it. Applications in family procedures shall be forwarded to the Federal Asylum Agency without delay.

(4) The diplomatic authority shall issue an entry visa without further formality to an alien as referred to in paragraph (1) or (2) above if the Federal Asylum Agency has given notification that asylum status or subsidiary protection status is likely to be granted. Such notification may be issued by the Federal Asylum Agency only if the Federal Ministry of the Interior, which is to be involved, has given notification that entry is not contrary to public interests within the meaning of article 8, paragraph 2, of the European Convention on Human Rights. The diplomatic authority shall also inform the alien that the application shall be deemed submitted only after presentation in person at the initial reception centre (article 17, paragraph (2)).

t) Is there a **time provision** (i.e. a time limit for immigration authorities) regarding conducting the RSD screening and issuing the decision? Are there any motions (remedies) available against immigration authorities' lack of activity in the proceedings? What is the average duration of asylum procedure **in practice**?

The General Administrative Procedure Act generally precepts a respite of six months for the decision on an appeal. If the decision takes longer, it is possible to lodge a claim against it to the next instance, whereby the competence to decide devolves to it, too (therefore it is often not very useful doing this, because one loses one instance).

The average duration of the asylum proceeding is about one year in the first instance, from one to five (most probable is three or four) in the second one and about one to three in the third one.

u) Does the applicant's temporary travel (or illegal flight) to a safe third country affect his RSD proceedings? Can a **temporary travel document** be issued to an asylum seeker?

Not explicitly, but in the following case:

An asylum-seeker shall have evaded the asylum procedure if:

1. owing to a breach of his duty of cooperation (article 15), his place of residence is not known to the authority and cannot otherwise be readily established by the authority or

2. he voluntarily leaves the federal territory and the file on the procedure is not to be closed as no longer relevant (article 25, paragraph (1)).

(2) Asylum procedures shall be discontinued if an asylum-seeker has evaded the

procedure (paragraph (1) above) and a decision cannot be taken without a further interview or hearing. A discontinued procedure shall be resumed ex officio as soon as the establishment of the material facts is possible. Upon the resumption of the procedure, the time-limit for rendering decisions, as referred to in article 73, paragraph (1), of the General Administrative Procedures Act, shall be re-computed. The resumption of a procedure shall be no longer admissible after the expiry of two years from the time of its discontinuation. If a procedure before the Federal Asylum Agency is to be discontinued, the steps set out in article 26 shall be followed.

Article 26. (1) The Federal Asylum Agency may issue an arrest warrant against an alien who:

1. has evaded the procedure (article 24, paragraph (1)) or
2. has absented himself without justification from the initial reception centre (article 24, paragraph (4)).

There are no temporary travel documents for asylum seekers provided.

37. ARE THERE ANY PROCEDURAL SAFEGUARDS SPECIFIC FOR ASYLUM PROCEDURE (i.e. that do not exist in general administrative proceedings)? (For example: obligatory legal counseling for the applicant, different standard of proof, authorities' obligation to interview the applicant)

b) Do general rules of the **production of evidence** apply?

The main difference is that the authorities responsible for asylum proceedings are special authorities, which do not address general administrative cases.

In the asylum proceeding it is not necessary to proof your statement, but it is sufficient to make the authority believe the facts you tell them.

The asylum proceeding is a *lex specialis* to the General Administrative Procedure Act.

In the asylum proceeding the application has to be filed personally, whereas in the general administrative proceeding one can file an application in written form alone.

See also 5b) and c): Here a special legal assistance is provided, which is not allotted in the general procedure.

Another difference is also that the application is checked before it is accepted and can be rejected without deeper verification as regards content.

38. IN REFERENCE TO QUESTIONS **1 d)** AND **5 f)** (FAMILY UNITY) - CAN APPLICANT'S CLOSE RELATIVES (SPOUSE, CHILDREN) BE GRANTED **REFUGEE STATUS** ON THE SOLE BASIS THAT THE APPLICANT WAS GRANTED REFUGEE STATUS (EVEN IF THEY HAVE NO WELL FOUNDED FEAR OF PERSECUTION THEMSELVES)? IF NO, CAN THEY BE GRANTED ANY OTHER FORM OF LEGAL STAY?

Yes.

39. DOES YOUR DOMESTIC LAW PROVIDE A SEPARATE DEFINITION OF THE TERM '**FAMILY**' OR '**CLOSE RELATIVES**' FOR THE PURPOSES OF IMPLEMENTING THE FAMILY UNITY PRINCIPLE?

No.

b) Do the above-mentioned terms encompass the same-sex marriages or

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|---|
| <p>couples?</p> <p>No.</p>  |
| <p><b>40. DOES YOUR DOMESTIC LAW INTRODUCE ANY FORM OF <b>SUBSIDIARY PROTECTION</b>? Please provide its original name.</b></p>  |
| <p>Yes, Subsidiary Protection (Subsidiärer Schutz) is provided.</p>   |
| <p><b>41. BRIEFLY DESCRIBE THE PROCEDURE OF <b>LOGGING AN APPEAL</b> AGAINST THE DECISION DENYING REFUGEE STATUS AND (OR) SUBSIDIARY PROTECTION. Include:</b></p>   |
| <p>a) Time provision (in days/ weeks/ months) for filing the appeal?</p> <p>2 weeks.</p> <p>b) Higher authority: <b>judicial (court) or administrative authority</b> responsible for examining the appeal?</p> <p>Administrative authority (Independent Federal Asylum Review Board).</p> <p>c) (In reference to question <b>5.C</b>) Same rules of representation before the higher (appellate) authority and before the lower authority?</p> <p>Yes.</p> <p>d) The '<b>suspending effect</b>': does filing an appeal withhold the enforcement of the decision (e.g. denying refugee status ordering deportation)</p> <p>In the conventional proceeding the appeal has suspending effect (first appeal). Not so in the third instance, if the application is rejected before it is accepted and also not in proceedings regarding Dublin II.</p> <p>e) Is the applicant interviewed/ entitled to interview by the appellate authority?</p> <p>The interview by the appellate authority is not obligatory, but always hold.</p> <p>f) Do the appellate authority's powers include the possibility to <b>directly</b> grant the appellant refugee status or subsidiary protection?</p> <p>Yes.</p> |
| <p><b>42. ANY REMEDY AVAILABLE AGAINST APPELLATE DECISIONS?</b></p>   |
| <p>Yes.</p> <p><b>c)</b> In particular, is a <b>judicial review</b> of public authority decision(s) available? If so, does that include a judicial appeal to a higher court?</p> <p>Yes.</p> <p><b>d)</b> What is the character of these courts, i.e. are they federal (central)?</p> <p>Administrative Court (possible third instance) is the highest administrative court in Austria.</p>   |

43. DESCRIBE CONDITIONS FOR **RE-APPLYING** FOR REFUGEE STATUS IN CASE OF A PRIOR DENIAL. ARE THERE ANY SPECIFIC PROVISIONS CONCERNING SECOND OR THIRD ASYLUM APPLICATION **BY THE SAME APPLICANT**?

No re-applying scheduled. If a application in iterated under the same conditions, it is going to by rejected because of the case already decided.

44. BRIEFLY DESCRIBE THE PROCEDURE OF **ORDERING DEPORTATION**. Include:

d) Authority issuing a deportation order

In the asylum proceeding the same authorities issue a deportation, which decide on the case (together with the verdict).

e) **Appeal** against a deportation order. Appellate authority. Highlights of appellate proceedings (include time limits for filing an appeal, as well as the "suspending effect" i.e. does filing of an appeal result in withholding of the order's execution).

Same as already described.

f) Conditions for withholding deportation (or suspending the enforcement of a deportation order)

On application or ex officio the enforcement of a deportation order can be suspended by the police for a period which must not exceed a year, if the deportation is unacceptable because of the refoulement-protection clause or because its actual impossible.

g) Legal provisions shaping deportation proceedings with regard to the **family unity** principle?

If family members fulfil the requirements for deportation at the same time, police should execute the deportation in respect to their family life.

45. ARE THERE ANY DOMESTIC ACTS (PARLIAMENTARY OR GOVERNMENTAL) OR SEPARATE LEGAL PROVISIONS ADDRESSING (e.g. FACILITATING THE ENFORCEMENT OF) THE **DUBLIN II REGULATION**? Include:

c) Means of **informing** the applicant about the practical consequences of the Dublin II provisions, as well as obtaining information about the applicant in order to determine the state responsible for examining his claim

See 1.b) And also the applicant is informed about Dublin II and the intended procedural method and action in his interview at the Federal Asylum Agency.

d) Is the applicant entitled to **self-initiate** the procedure of sending him to the state responsible, e.g. by filing the proper application to the authorities of the receiving state and appealing in case of denial? (The Dublin II regulation mentions only contacts between states in that matter)

The applicant can only inform the authorities about the reasons, why he thinks he should be send to the responsible state (e.g. a family member is there), and thereby inspire the authorities to do so, but there is no application of any kind provided.

**46. HOUSING: HOW DOES THE STATE PROVIDE ACCOMODATION FOR ASYLUM SEEKERS? Include:**

After filing of an asylum application asylum seekers are accommodated in **reception centers** (2 camps in Austria existing: reception center east "Traiskirchen", and reception center West in "Thalham", Upper Austria), where the admission procedure of the asylum application takes place.

After admission of the asylum application the asylum seeker is transferred to accommodation houses in the provinces and the provincial governments are responsible for hosting the asylum seekers.

Province of Salzburg:

18 **accommodation houses** are existing in Salzburg, most of them are run privately, 2 of them by NGOs.

Special accommodations with 25 places for underaged and unaccompanied asylum seekers are offered (run by NGOs).

Location of the houses mostly in rural municipalities, some of them very isolated.

Single persons live together in shared rooms (separate rooms for men and women), families in most cases in 1 room.

- h) Form: private houses/ hotels /camps /centers. Forms of housing listed by respective laws.
- i) **Who** issues **regulations** of living/ behavior/ conduct in the facilities/ centers
- j) Housing for families different than for individuals?
- k) Individuals: persons of opposite sex accommodated separately (buildings/ floors)?
- l) Open/ close – allowed to move freely around the country/ obligated to stay within the surrounding of the assigned center
- m) Possible to apply for receiving financial equivalent instead of the right to stay in a center? On what conditions
- n) Possible to prolong the state-provided housing after the decision on refugee status/ subsidiary protection is issued? For how long?

**47. HOW IS THE ADMINISTRATION OF THE HOUSING FACILITIES ORGANIZED? Include:**

- a) Is the housing run by the state (e.g. immigration authorities), local, or municipal government? Entirely or partially?
- b) If it is **private-run**: how do the authorities verify compliance with respective laws and regulations? Does the housing undergo regular controls? How often? Is the system of control effective enough to ensure equal treatment of the asylum seekers living in centers
- c) What essential conditions have to be met by a person or a company to open or administer a centre/ house for asylum seekers
- d) Same regulations apply to all housing facilities for asylum seekers? Who issues each set of regulations (if more than one)? Does that depend on the type of housing?
- e) *De facto*, does private administration deliver asylum seeker housing of a standard complying with respective legal provisions?

**48. DO ASYLUM SEEKERS ACCOMMODATED IN STATE-PROVIDED (WHETHER STATE-OR PRIVATE-ADMINISTERED) HOUSING RECEIVE **FOOD** OR SELF-PREPARE IT? Include:**

The operator of the accommodation house has to care for 3 meals per day. It is not possible for the asylum seekers to cook for themselves.

- d)** Compliance with specific dietary needs of customary (e.g. vegetarian) or religious origin
- e)** Fulfillment of dietary needs based on medical condition
- f)** In case of food being provided, is there a possibility of applying for a financial equivalent necessary to self-prepare the meals?

**49. LIST **SOCIAL BENEFITS** OTHER THAN HOUSING THAT ASYLUM SEEKERS ARE ENTITLED TO OBTAIN. Do not include medical and psychological care (question 21). Include:**

When living in the organised accommodation houses, asylum seekers get a financial support:

€ 40,- pocket money per person and month,

€ 150,- for clothing per year and person

€ 200,- per year for every child in the age from 6 - 15 visiting school for manners of school.

Social benefits for asylum seekers in individual accommodation see below (19).

Asylum seekers are supported by social workers. The relation between social workers and clients is 1:170.

Measures for daily structures and leisure activities can be supported by € 10,- per month and person in organised accommodations. This support is granted only for organised activities for groups, which are normally organised by the social workers or local supporting groups.

For unaccompanied minors special measures are provided like clearing procedures, education and language courses. These measures don't exist for adults and even for minors living in their families.

Asylum seekers can not receive social benefits that are available for citizens.

The benefits are determined in the "Grundversorgungsvereinbarung" (treaty between the central government and the federal governments about accommodation and social care for aliens in need of help and protection). The detailed determinations are made by the central act of Grundversorgung and the acts of Grundversorgung in each of the federal countries.

The social benefits are provided by the local authorities in the federal countries (except initial reception centres). The costs are divided in the relation 60 to 40 between the central government (ministry of interior) and the federal countries. If the asylum procedure takes more than one year all costs have to be paid by the central government.

According to the federal system the regulation acts in the single federal countries are different. In Salzburg the local act determines, that social benefits can be finished or diminished, if the asylum seeker does not participate active in the asylum procedure. There is no individual right to get the social benefit in a special form. Therefore the support for clothing is given in vouchers and not in money. The support for visiting the

school is given directly to schools and in form of a starter package.

- a) Whether different types of benefits are financial or in other form (e.g. services)
- b) Any benefits specifically addressing the issue of number and age of asylum seekers' children
- c) Eligibility criteria for receiving social benefits? Same rules for an asylum seeker – unaccompanied minor?
- d) Are asylum seekers eligible for any benefits available for citizens?
- e) Are social benefits provided by federal (central) or local authorities?
- f) Financial support (benefits) – what authority (what act) determines how much money is an asylum seeker entitled to? Does the financial support differ depending on the place of asylum seeker's residence?
- g) Do the authorities reimburse asylum seeker's expenses related to participation in the asylum proceedings (e.g. filing motions, traveling to immigration authorities' offices)?
- h) Are any of the benefits semi-optional, i.e. can the asylum seeker obtain a financial equivalent instead?

**50. CAN THE ASYLUM SEEKER CHOOSE NOT TO LIVE IN STATE-PROVIDED HOUSING?  
If so:**

**Individual accommodation:** After 6 months residence in the province and showing a leasing confirmation the asylum seeker can apply for individual accommodation, that means that he/she can rent a private flat and care for the food by him/herself. In case of individual accommodation there is a monthly financial support for accommodation and food:  
€ 180,-- support for living for adults and € 80,-- for minors  
€ 110,-- support for monthly rent for individuals and € 220,-- for families  
Asylum seekers in private accommodation don't get pocket money, but the support for clothing and the support for visiting school for children from 6 -15.

- a) Is "**independent housing**" supported by the state, e.g. by helping the asylum seeker find an apartment to lease?
- b) Does the asylum seeker receive money to cover the expenses of "independent housing" (e.g. money to cover monthly rent)

**51. DESCRIBE TO WHAT SCOPE OF **MEDICAL CARE** BENEFITS ARE THE APPLICANT AND HIS FAMILY ENTITLED WHILE IN ASYLUM PROCEEDINGS? Include:**

All asylum seekers in the basic welfare system are **in the public health insurance**. This gives full access to medical care. Prescribed medications are free, if they are paid by the insurance. Medications, that are not paid by the insurance, have to be paid by the asylum seekers themselves.  
For treatments, which are not fully covered by the insurance, the federal authorities can pay the costs, but they are not obliged to do this.  
Psychological care can be paid by the insurance, but there is a contingentation for all insured persons. The support for persons in need of social benefits, that is granted to

citizens, is not given to asylum seekers.

- a) **Legal form** (e.g. health security of all asylum seekers covered by the government? Federal, central or local authorities responsible?) and its practical consequences (e.g. free of charge treatment only in designated clinics or hospitals?)
- b) Full **range of medical services** or only chosen treatments? Full access to medical care for children and pregnant women?
- c) Providing funds for purchasing the prescribed **medications**?
- d) **Psychological care** for traumatized applicants?

#### 52. DESCRIBE THE NATURE OF ASYLUM SEEKERS' **RIGHT TO EDUCATION**. Include:

Education is only granted to children, who fall within the age of obligatory education (6-15). This covers the primary and (partially) the secondary level. In the age of obligatory education the children receive the same things for free like citizens or the costs are covered up to the maximum of € 200,-- as described above.

All asylum seekers can take part on all levels of education, but they don't get support for this (Exception: unaccompanied minors).

The visit of kindergartens depends for asylum seekers in organized accommodations from the regulations of the local community. Kindergartens are organized by the communities and the visit is not for free. It depends from the local mayors, whether they allow the free visit of kindergarten or not.

- a) Level of schooling: primary/ secondary/ tertiary schools? Only undergraduate or also graduate?
- b) Do applicants' children under 18 (or unaccompanied minors) fall within the scope of obligatory education (usually concerning persons between 8 and 18 years of age)?
- c) Are kindergartens available?
- d) Do children attending classes receive all necessary materials (textbooks, stationery) or do their parents receive additional funds to purchase them?

#### 53. ARE ASYLUM SEEKERS ENTITLED TO **LANGUAGE COURSES**? Include:

Asylum seekers are not entitled to language courses. Sometimes the support for leisure activities in organized accommodations is used for language courses. They are organized by the social workers or by the federal authorities.

- e) Are they free of charge?
- f) What are the means of encouraging asylum seekers to participate?
- g) Who runs the courses – who is responsible (federal/ central or local authorities/ NGO/ other, e.g. Church)

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|--|
| <p>h) Is a minimum number of hours declared in respective provisions?</p>  |
| <p>54. ARE THERE ANY ADDITIONAL SAFEGUARDS FOR <b>WOMEN'S RIGHTS</b> IN THE COURSE OF ASYLUM PROCEEDINGS? IN PARTICULAR, REGARDING PREGNANCY, SOLITARY GUARDIANSHIP OR TRAUMA?</p>   |
| <p>See 5f), but nothing specifically concerning women's rights.</p>  |
| <p>55. ARE THERE ANY PARTICULAR PROVISIONS REGARDING THE BENEFITS OF PERSONS THAT HAD ALREADY BEEN GRANTED <b>SUBSIDIARY PROTECTION</b>, BUT CHOSE TO APPLY FOR REFUGEE STATUS ANYWAY (OR FOR THE SECOND TIME)? DO SUCH PERSONS RECEIVE BENEFITS IN THE SAME WAY AS APPLICANTS OTHERWISE (e.g. IF NOT IN ASYLUM PROCEEDINGS) ILLEGAL?</p>  |
| <p>Persons, who have been granted subsidiary protection, can be supported by the basic welfare system for the whole time of their protection.</p>  |
| <p>56. DOES THE APPLICANT HAVE <b>THE RIGHT TO WORK</b>? IS IT CONDITIONAL?</p>  |
| <p>Asylum seekers are not allowed to work for the first three month of the asylum procedure (after the reception procedure). Then exists the possibility to get a seasonal labor permit, which also can be renewed.<br/>The conditions for labor permits for asylum seekers are harder than for other aliens residing in Austria – so in practice it is difficult to obtain for asylum seekers.</p>  |
| <p>57. IN CASE THE ASYLUM SEEKER DOES NOT HAVE THE RIGHT TO WORK, CAN HE <b>APPLY FOR A WORK PERMIT</b> (as other legal aliens)? Include:</p>  |
| <p>See 25.</p>   |
| <p>58. IS THE ASYLUM SEEKER <b>ENTITLED TO</b> A FREE-OF-CHARGE PARTICIPATATION IN <b>VOCATIONAL TRAINING</b> AIMED AT ADJUSTING QUALIFICATIONS TO THE NEEDS OF THE LOCAL OR NATIONAL LABOR MARKET? Include:</p>   |
| <p>No, only if there exists a special need for seasonal workers (like in tourism). Then courses are provided by the semi-public "Arbeitsmarktservice" (Work agency) and NGOs.</p> <p>d) Are there any courses aimed specifically at asylum seekers?</p> <p>e) Any <b>form of cooperation</b> between the authorities and NGOs in organizing such courses?</p> <p>f) Any courses aimed exclusively at <b>women</b>?</p> <p>(<b>Note:</b> please stress the difference between legal obligations and practice, i.e. whether the authorities are obligated to organize the actual course or it is an entirely private NGO initiative)</p> |

59. CAN THE ASYLUM SEEKER PERFORM **COMMUNITY WORK** THAT IS NOT REGARDED AS "LABOR"? Include:

Asylum seekers can perform community work for central authorities, federal authorities and the local communities. The central act for basic welfare determines the remuneration for this work with 3 – 5 € per hour.

The NGOs taking part in the Equal-Network "Autarq" (like FluEqual) have made an catalogue of determinations for community work, that aims especially on a remuneration of at least 5 € per hour and courses (professional and vocational training) accompanying community work.

Community work is no professional work. So there are no minimum wages or working contracts. The remuneration is not taxed and no side is obliged to pay insurances (health, age provisions) for this.

Asylum seekers can be obliged to pay for their accommodation or the social benefits can be diminished or finished according to the regulation for free income (which differ between the single federal countries).

- i) What activities does that work encompass? Is that decided by the authorities or determined in national or local law?
- j) Any minimum or maximum amount of community work **time**? Overtime possible?
- k) Is a contract being signed with the applicant?
- l) Is the applicant obligated to pay tax?
- m) Do provisions determining the **minimum wage** apply?
- n) Do labour law provisions protecting employees apply?
- o) Is the asylum seeker eligible for social security applicable to employees?
- p) Does performing community work entitle the applicant to participate in professional courses?

60. DESCRIBE THE LEGAL CONSEQUENCES THAT ASYLUM SEEKER MIGHT FACE FOR **PERFORMING LABOR ILLEGALLY**. Include:

- a) Performing labor illegally is regulated by administrative laws. The punishment is regularly pecuniar. Social benefits can be finished in these cases.

61. DOES **SUBSIDIARY PROTECTION** ENCOMPASS THE RIGHT TO WORK? UNCONDITIONALLY?

Yes, after one year of protection

62. LIST LEGAL PROVISIONS (IF ANY) THAT EXPRESSLY DIFFER THE SITUATION OF **MALE AND FEMALE** ASYLUM SEEKERS IN RELATION TO LABOUR MARKET

Don't exist.

This is the end of the questionnaire. Should you decide that some issues needed more focus or remained untouched, please let us know in the space below. We will certainly include your comments in the legal report.

Again, thank you for your cooperation.