Diritto, Immigrazione e Cittadinanza
Fascicolo n. 1/2017

AUSTRIAN ASYLUM LAW

di Ulrike Brandl

Abstract: *Early 2016 the Austrian Government decided to limit the number of applications for international protection for the following years. The raising number of applications in 2015 had led to controversial political debates and to amendments of the laws. One amendment created the possibility that the numbers could be limited by decree. In fact such a decree has not been adopted so far, though a concrete proposal was published in 2016. As there was uncertainty whether EU Law allows such caps, the Government asked for expert opinions. Art. 72 TFEU would –according to the advisory opinion –constitute a suitable legal basis for measures allowing a non-acceptance of further applications. Following the closure of the Balkan route the numbers dropped significantly in 2016. Despite this development plans exist to introduce another limit (half of the planned number). At the end of February 2017 the Government agreed to amend the Asylum Act and related Acts again and to adopt a so-called Integration Act*

Abstract: *All'inizio del 2016 il governo austriaco aveva inteso limitare il numero di domande per protezione internazionale per gli anni a venire. Il crescente numero di richieste nel 2015 aveva portato ad un inasprimento del dibattito politico e all'approvazione di modifiche legislative, che consentivano, tra l'altro, la possibilità che il numero di domande fosse limitato per decreto. In realtà il decreto non venne adottato nonostante una proposta presentata nel 2016, in quanto si dubitava della compatibilità di tale misura col diritto dell'Unione, tanto che il Governo decise di richiedere il parere di alcuni esperti. Secondo tale parere, l'art. 72 TFUE potrebbe in realtà costituire un'idonea base giuridica per misure che prevedano la possibilità di non accettare delle domande. A seguito poi della chiusura della rotta balcanica, il numero dei richiedenti è diminuito sensibilmente nel corso del 2016, nonostante ciò, esistono ancora progetti tesi ad introdurre un limite alle domande (pari alla metà del numero programmato) e ad emendare di nuovo la legge sull'asilo.*

AUSTRIAN ASYLUM LAW

di Ulrike Brandl*

SUMMARY: 1. Introduction. – 2. The Austrian asylum procedure, competent authorities, judicial control and trends in recent jurisprudence. – 2.1. Admissibility procedure. – 2.2. Procedure on the merits. – 2.3. Judicial control. – 3. Various kinds of residence permits for humanitarian or other reasons. – 4. Family procedures. – 5. Legal basis for Austrian caps. – 6. Temporary Border Controls. – 7. Closure of the Balkan route in early 2016. – 8. Current debates and changes.

1. Introduction

In 2015, Austria received 88.340 applications for international protection.[1] This is an increment of 214% compared to 2014.[2] The main increase took place in summer and autumn 2015,[3] when many prospective applicants reached the European Union entering Greece via Turkey and then continued via non-EU-States on the Balkan to other Member States of the EU. The raising number of applications led to controversial political debates, to amendments of the laws and to the creation of the legal basis for limiting the number of applications by decree.[4] The discussion about the so-called caps started in January 2016. The Austrian Government decided to limit the number of new applications for international protection to 37.500 in 2016 and to introduce limits for the following years as well.[5]

* Ass.Prof. Dr. Ulrike Brandl, Department of Public Law, Public International Law European Union Law, University of Salzburg.

1. Statistics are available on the website of the Ministry of the Interior and on the website of the Federal Office for Aliens Affairs and Asylum. Annual statistics for 2015 reveals a number of 88.340 applications for international protection, see http://www.bmi.gv.at/cms/BMI_Asylwesen/statistik/files/Asyl_Jahresstatistik_2015.pdf, p. 3.

2. See above http://www.bmi.gv.at/cms/BMI_Asylwesen/statistik/files/Asyl_Jahresstatistik_2015.pdf, p. 3.

3. See above, p. 3. In January 2015 the increase was 171.58%, in June already 335.29%, in September 269.62% and in December only 73.73%.

4. See the amendment of the Asylum Act in 2016, FLG (Federal Law Gazette) I No. 24/2016. Unofficial translations of certain Austrian Laws are available on http://www.unhcr.at/. See for the Asylum Act index.php?id=448&L=0&no_cache=1index.php?id=448&L=0&no_cache=1. Asylum Act, Bundesgesetz über die Gewährung von Asyl, FLG I No. 100/2005, amended by FLG I No. 75/2007 (VfGH), FLG I No. 2/2008 FLG I No. 4/2008, FLG I No. 29/2009, FLG I No. 122/2009, FLG I No. 135/2009, FLG I No. 38/2011, FLG I No. 50/2012, FLG I No. 67/2012 (VfGH), FLG I No. 87/2012, FLG I No. 68/2013, FLG I No. 144/2013, FLG I No. 70/2015, FLG I No. 10/2016 (VfGH), FLG I No. 24/2016.

5. See below 5.

In 2016 the situation changed. The numbers reveal that the caps were already exhausted,[6] but the amount is not really that much higher than the planned number. The decrease compared to 2015 is more than 52.37 %. Consequently, there was no immediate need to take further measures and to adopt a decree based on the Asylum Act.[7]

2. The Austrian asylum procedure, competent authorities, judicial control and trends in recent jurisprudence

The present Austrian Asylum Act was adopted in 2005 and entered into force on 1 January 2006.[8] It has been amended around 20 times since then.[9] In 2013 the administrative structures were reformed and a new administrative court system was established.[10] Procedural rules concerning asylum procedures were amended and the competence to decide about applications for international protection as well as about certain aliens law areas was allocated to the Federal Office for Aliens Affairs and Asylum.[11] The Federal Administrative Court was established in 2013 and started its work in 2014. The Court has jurisdiction for deciding complaints in asylum cases and in certain aliens law areas.[12]

The legal acts comprising the Common European Asylum System were implemented by the Asylum Act,[13] several procedural acts and by the Act on Basic Care for applicants.[14]

6. From January to the end of December 42.073 applications were counted, this is a 52.37% decrease compared to 2015, monthly statistics for 2016, available on http://www.bmi.gv.at/cms/BMI_Asylwesen/statistik/files/2016/Asylstatistik_Dezember_2016.pdf.

7. See below 5.

8. See fn. 4.

9. See for the amendments fn. 4.

10. Federal Law on the Establishment and Organisation of the Federal Office for Aliens Affairs and Asylum, Bundesgesetz über die Einrichtung und Organisation des Bundesamtes für Fremdenwesen und Asyl, FLG I No. 87/2012 and FLG I No. 68/2013, FLG I No. 70/2015. Federal Law on the Structure of the Federal Administrative Court, Bundesgesetz über die Organisation des Bundesverwaltungsgerichtes, FLG I No. 10/2013, FLG I No. 50/2016. See FLG I No. 51/2012 for the amendments of the Constitution regarding the Establishment of Administrative Courts.

11. Bundesamt für Fremden- und Asylwesen, Federal Office for Aliens and Asylum Affairs, abbreviation used in German BFA, legal basis see fn. 10. The unofficial UNHCR translation uses the term Federal Office for Immigration and Asylum.

12. Federal Law on the Procedures before the Administrative Courts, Bundesgesetz über das Verfahren der Verwaltungsgerichte , FLG I No. 33/2013, FLG I No. 82/2015 (VfGH). See also FLG I No. 51/2012, fn. 9.

13. See fn. 4.

14. Federal Law on Basic Care (Bundesgesetz, mit dem die Grundversorgung von Asylwerbern im Zulassungsverfahren und bestimmten anderen Fremden geregelt wird, FLG No. 405/1991, FLG No. 314/1994, FLG I No. 134/2000, FLG I No. 98/2001, FLG I No. 101/2003, FLG I No. 32/2004, FLG I No. 100/2005, FLG I No. 2/2008, FLG I No. 4/2008, FLG I No. 122/2009, FLG I No. 38/2011, FLG I No. 87/2012, FLG I No. 68/2013, FLG I No. 70/2015.

2.1. Admissibility procedure

The Austrian system makes a distinction between the admissibility procedure and the procedure on the merits. Secs. 4, 4a and 5 Asylum Act provide for criteria determining the admissibility of a claim. An application has to be rejected if an applicant is able to find protection in a safe third country outside the Dublin system. Sec. 4 (2) defines the criteria for safety in a third country. There is a rebuttable legal presumption for the safety in a third country, if the person has access to a status determination procedure for being recognised as a refugee according to Art. 1 A (2) 1951 Refugee Convention or if the access is guaranteed via another safe third country. Austria allows the application of the safe third country clause in the countries considered as safe countries. A further requirement is the right to stay in that country during the procedure and the protection against *refoulement* in the respective state. The authorities have to establish if the person has access to that country.[15] In practice, only a very small percentage of applications is rejected on the legal basis of the safe third country clause. The Federal Administrative Court e.g. decided that the Federal Office has to make investigations, whether a status granted to Chechen Refugee in Azerbaijan can be renewed upon return and the person will have access to that country and will be protected there.[16]

Sec. 4a provides for rejection of the application if the applicant was recognised as a refugee or received the status of a subsidiary protected person and if the person has already found protection in a Member State of the European Economic Area or Switzerland. In current jurisprudence there are only very exceptional cases where due to special reasons a return to a State, where a person already found protection was declared to be inadmissible. The Court held e.g. that for a family with traumatised family members a return to Bulgaria was not admissible because of the very special health situation documented by medical expertise and because of further facts concerning the special situation of the applicant family.[17]

The most frequently used reason for rejection is the responsibility of another Member State of the Dublin system. As long as the relocation decisions of September 2015[18] apply

15. See Federal Administrative Court W192 2013342-1, 1.4.2015, Bosnia/Hercegovina as a safe third country. The Court decided that a return to Bosnia would be an unjustified interference regarding Art. 8 ECHR as members of the applicant's family already lived in Austria and the applicant was supported by them.

16. See Federal Administrative Court L518 2109232-1/6E, 6.8.2015.

17. See Federal Administrative Court W192 2131678-1/10E et al., 8.9.2016.

18. Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, p. 146. Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, O.J. L 248/80, 24.9.2015, p. 80. The decisions suspend the application in the Préamble of the Regulation, para. 18: «The measures to relocate from Italy and from Greece, as set out in this Decision, entail a

no Dublin returns to Italy and Greece take place. The authorities have to decide on an individual basis, if Dublin decisions about the responsibility of other countries are justified. Jurisprudence of the Federal Administrative Court and the High Administrative Court made clear that the authorities have to investigate the situation of the applicant in respect to the reception conditions, the application of *refoulement* guarantees and procedural rules in other Dublin States. The authorities do have to make a full assessment of the situation upon return. The High Administrative Court decided in several cases that certain categories of applicants, e.g. families with small children, might not be transferred to Hungary unless the investigations lead to the conclusion that for this vulnerable group adequate reception conditions would be provided there.[19]

The Federal Administrative Court had to decide whether Dublin returns to Croatia might be based on the criterion that the applicant entered the territory of the EU illegally. The case was brought to the High Administrative Court.[20] This Court held that the authorities and the Federal Administrative Court have to decide in each individual case if the person entered Croatia illegally or if the entry was legal.

The authorities have to investigate whether the entry was organised by Croatia or if it was officially tolerated. Following this decision, a high number of similar cases was referred back to the first instance for further investigations. The High Administrative Court also referred to the pending Slovenian case before the Court of Justice of the European Union (CJEU)[21] and decided that in all cases, where the questions raised by the Slovenian Court are relevant for the decision, the authorities have to postpone the decision making process until the CJEU delivers the judgment. In this case, the Slovenian court asked the CJEU to assess if irregular crossing under Article 13 (1) Dublin III-Regulation has «to be interpreted independently or in conjunction with Article 3 (2) of Directive 2008/115 on return and Article 5 of the Schengen Borders Code which define illegal crossing of the border».[22] The Court further asked, whether the concept of irregular crossing in the circumstances of the present case is to be interpreted as meaning that there

temporary derogation from the rule laid down in Article 13(1) of Regulation (EU) No 604/2013 according to which Italy and Greece would have been otherwise responsible for the examination of an application for international protection based on the criteria set out in Chapter III of that Regulation, as well as a temporary derogation from the procedural steps, including the time-limits, laid down in Articles 21, 22 and 29 of that Regulation».

19. See High Administrative Court, Ra 2015/20/0116, 15.10.2015, Ra 2015/18/0113, 8.9.2015, W192 2109914-1, 7.9.2015. The Court referred to the *Tarakhel* judgment by the ECtHR, where the Court based the reasoning on the special vulnerable situation of children in transfer situations to a country where no adequate reception conditions exist. European Court of Human Rights, *Tarakhel v. Switzerland*, Judgment 4 November 2014, No. 29217/12.

20. See High Administrative Court, Ra 2016/18/0224, 16.11.2016.

21. Request for a preliminary ruling from the Vrhovno sodišče Republike Slovenije (Slovenia) lodged on 14 September 2016, *A.S. v. Republic of Slovenia*, Case C-490/16, OJ C 419, 14.11.2016, 34.

22. See above, questions 2. and 3.

is no irregular crossing of the border where the public authorities of a Member State organize the crossing of the border with the aim of transit to another Member State of the EU.[23]

The Austrian Federal Administrative Court asked the CJEU in a preliminary procedure to answer questions regarding time limits contained in the Dublin III-Regulation.[24] The Court wants to know if the applicant has a right to claim that the responsibility has been transferred to the requesting Member State on the ground that the six months transfer period has expired. The Court bases the question on the interpretation of the right to an effective remedy. The second question asks, whether is it also necessary that the obligation to take charge of, or to take back the person concerned has been refused by the responsible Member State.[25]

Complaints against decisions rejecting application based on Secs. 4, 4a and 5 Asylum Act have to be decided by the Federal Administrative Court. Complaints do not have suspensive effect. The Court however has to grant suspensive effect, if the criteria enumerated in Sec. 17 Act on Procedures before the Federal Office for Aliens Affairs and Asylum[26] are fulfilled. In cases where such a rejection ruling is issued in conjunction with a measure to terminate residence or where an enforceable deportation decision already exists, suspensive effect has to be granted, if it can be assumed that the alien's deportation to the country would constitute a real risk of violation of Arts. 2, 3 or 8 ECHR or of Protocol No. 6 or Protocol No. 13 to the Convention or would represent a serious threat to his life or person by reason of indiscriminate violence in situations of international or internal conflict.[27]

23. See above.

24. High Administrative Court, Ra 2015/20/0231, 31.3.2016. CJEU, Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 12 April 2016 - *Majid (or Madzhdi) Shiri*, Case C-201/16, OJ C 260, 18.7.2016, p. 18.

25. See above.

26. Act on Procedures bevore the Federal Office for Aliens Affairs and Asylum, Bundesgesetz, mit dem die allgemeinen Bestimmungen über das Verfahren vor dem Bundesamt für Fremdenwesen und Asyl zur Gewährung von internationalem Schutz, Erteilung von Aufenthaltstiteln aus berücksichtigungswürdigen Gründen, Abschiebung, Duldung und zur Erlassung von aufenthaltsbeendenden Maßnahmen sowie zur Ausstellung von österreichischen Dokumenten für Fremde geregelt werden), FLG I No. 87/2012, as amended by FLG I No. 68/2013, FLG I No. 144/2013. FLG I No. 40/2014, FLG I No. 41/2015 (VfGH), FLG I No. 70/2015.

27. See the unofficial translation available on unhcr.at: «In the decision whether an appeal against an order for removal from the country is to be allowed suspensory effect, due account shall be taken of the European Union law principles contained in article 26 (2) and article 27 (1) of the Dublin Regulation and the need for effective implementation of European Union law».

2.2. Procedure on the merits

After the admissibility decision, a procedure on the merits of the claim is conducted. The authorities have to investigate all the facts and information about the applicant and the country of origin information. They conduct a personal hearing. The Federal Office has to grant asylum, if the criteria enumerated in the Qualification Directive and the 1951 RC are fulfilled. There is no need to proof these criteria but to make them credible. If the claim for asylum is denied, the authorities decide whether the person is granted subsidiary protection.

The High Administrative Court demands that the facts have to be clearly established through investigations conducted by the administrative authorities. The facts necessary for deciding the case have to be suitably and thoroughly investigated and have to show the actual situation at the time when the decision is taken by the Court. The administrative authorities have to reveal the reasoning of the credibility assessment and the Court has to share the results of this assessment.[28]

A complaint against a negative decision has to be filed with the Federal Office for Aliens Affairs and Asylum. The complaint is a remedy against the denial of asylum or subsidiary protection. If the latter has been granted, the person may file a complaint against the denial of asylum. According to the law, the Office would have to decide in a preliminary decision, which does not happen in practice. The complaint, the preliminary decision and the files have to be submitted to the Federal Administrative Court.[29] The time limit for the complaint is two weeks. In case the complainant is an unaccompanied minor the limit is four weeks.

The High Administrative Court interpreted the procedural provisions and elaborated a number of criteria to determine, whether the Federal Administrative Court has to conduct an oral hearing. The Court has the obligation to conduct a hearing, if certain facts determine the necessity to hear the applicant. The Court interpreted the requirements established in the Act on Procedures before the Federal Office. Sec. 21 (7) allows that an oral hearing is dispensed with, if «the facts appear from the case documents in relation to the appeal to be clarified or it unequivocally emerges from the investigations to date that the allegations do not correspond with reality».[30]

28. See High Administrative Court, Ra 2014/20/0017, 28.5.2014.
29. See fn. 26.
30. See fn.28.

Together with the decision to reject the application for international protection, an expulsion order must be issued, unless reasons related to the right to family and private life according to Article 8 ECHR prevail over public interest and order.[31]

Jurisprudence reveals that a high percentage of Syrian applicants was granted asylum and only a small percentage received subsidiary protection. Recognition rates for 2016 (January to November) show that 461 Syrian applicants received subsidiary protection, whereas 13.891 were granted asylum.

2.3. Judicial control

Complaints against decisions denying asylum or subsidiary protection have to be decided by the Federal Administrative Court. As mentioned above the Court also decides on complaints against the rejection of applications based on Secs. 4, 4a and 5 Asylum Act. Austrian legislation provides for one level of regular jurisdiction by the Federal Administrative Court. The Court has to decide about facts and law.

The Federal Administrative Court renders a final decision on the merits if all facts are established. If not, the case is referred back to the Federal Office for Aliens Affairs and Asylum.

The persons concerned have the possibility to file a remedy, called revision, to the High Administrative Court (Art. 133 (4) Federal Constitution, B-VG, § 25a Act on the High Administrative Court)[32] against a decision of the Federal Administrative Court. The Federal Administrative Court has to decide whether such a revision is admissible. A revision has to be permitted if one of the reasons enumerated in Sec. 25a Act on the High Administrative Court is fulfilled. The Court has to allow a revision if a legal question has to be solved which has fundamental importance, especially because the decision deviates from previous jurisprudence of the High Administrative Court, if there is no such jurisprudence or because there is no consistent jurisprudence with regard to the legal question (Art. 133 (4) Federal Constitution). If the Federal Administrative Court does not allow a revision, the person may file an extraordinary revision to the High Administrative Court.

Appeals against the negative decision denying the asylum application on the merits have suspensive effect unless the Federal Office does not allow suspensive effect.[33] Sec.

31. See fn. 28.

32. Act on the High Administrative Court, Verwaltungsgerichtshofgesetz, FLG No. 10/1985 in the version FLG I No. 194/1999, most recent amendment FLG I No. 50/2016.

33. See the information available on AIDA, Asylum Information Database, http://www.asylumineurope.org/reports/country/austria/asylum-procedure/general/short-overview-asylum-procedure.

18 (1) Act on Procedures before the Federal Office provides for a number of grounds for not allowing suspensive effect. These include, *inter alia,* the applicant's attempt to deceive the Federal Office concerning his or her identity or nationality or the authenticity of documents or the lack of any reasons for persecution. Further reasons are if the allegations made by the asylum seeker concerning the danger he or she faces are manifestly unfounded or if an enforceable deportation order and an enforceable entry ban was issued against the asylum seeker prior to the lodging of the application for international protection. The Court has to grant suspensive effect, if it can be assumed that the decision would constitute a real risk of violation of the principle of *non-refoulement* according to Austria's international obligations, or would represent a serious threat to their life or person by reason of indiscriminate violence in situations of international or internal conflict.

It is also possible to file a complaint to the Constitutional Court if the person claims that a constitutional right has been violated (Art.144 Federal Constitution).

3. Various kinds of residence permits for humanitarian or other reasons

The Asylum Act provides for several possibilities to issue residence permits on humanitarian reasons or also on reasons, where legal obligations exist to allow the residence of a person, but where regular immigrations procedures do not contain a legal basis to issue residence permits. The Asylum Act contains detailed rules and requirements for issuing such permits. Not all details are mentioned here.

Sec. 54 (1) Asylum Act enumerates permits, which may be granted to third-country nationals on various reasons. These permits are either combined residence and work permits or standard residence permits. Sec. 55 Asylum Act provides for the obligation to issue a residence permit, if such measure is necessary for the preservation of private and family life within the meaning of Art. 8 ECHR.[34] Sec. 56 Asylum Act contains a provision on the issuance of residence permits in cases "particularly deserving of consideration". This type of permit is issued if persons who do not get a status, but already stayed in Austria for a certain period of time and are to a certain extend already integrated in Austria. The Asylum Act contains several detailed rules defining the requirements for issuing such permits. Sec. 57 (1) contains the obligation to grant residence permits (special protection residence permits), if the third-country national has been granted

34. This requires that the third-country national has completed the first module of the so called integration agreement (Sec. 14a Settlement and Residence Act) or is, at the time of the ruling, pursuing a permitted occupation from which the earnings reach the monthly de minimis threshold (Sec. 5 (2) of the General Social Security Act FLG I No. 189/1955). If only the first condition exists, a standard residence permit shall be granted.

temporary leave to remain in the Austria for at least one year (Sec. 46a, (1), subparagraph 1 or 3 Aliens Police Act)[35] and the conditions continue to exist. Temporary leave to remain means that a return decision has been taken, but where the persons cannot be returned for various reasons. These reasons are, *inter alia*, *non-refoulement* obligations not allowing a deportation to the country of origin or practical reasons, which are not attributable to the person concerned. In many cases practical reasons exist, when countries of origin do not issue return certificates or simply do not accept the return of a person.

4. Family procedures, restrictions introduced in 2016

Austrian law provides for rules on family procedures. Sec. 34 Asylum Act contains provisions, which allow that applicants who are already in Austria get the same status as an already recognised member of the family. The provision also applies, if the anchor person still is an applicant for protection.

The authority has to grant the same type of status, if it is not possible to continue an existing family life, within the meaning of Art. 8 ECHR in another country. This precondition will be abolished by the next amendment.[36] Other requirements have to be fulfilled as well, e.g. that there is no procedure for withdrawing asylum or subsidiary status pending. A family member of a person under subsidiary protection could be granted asylum as well. In practice this happens only in very exceptional cases. The Asylum Act stipulates that applications in respect of an asylum-seeker's family members shall be examined separately. The procedures are conducted jointly, all family members receive the same scope of protection. If an alien is to be granted de facto protection against deportation (Sec. 12 a (4) Asylum Act) such protection is also granted to his family members.

Sec. 35 Asylum Act is applicable if family members still stay in another country and intend to apply for a status in Austria. Applications for entry have to be lodged with diplomatic and consular authorities.

Before an amendment in 2016 persons who have been granted asylum and subsidiary protection had the same possibilities for family reunification based on the Asylum Act. Since then entry for family members of subsidiary protected persons is only granted after

35. Federal Act on the Conduct of Aliens Police Operations, the Issue of Documents for Aliens and the Granting of Entry Permits, Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetiteln, FLG I No. 157/2005, most recent amendment FLG I No. 24/2016.

3[6]. For the text see 290/ME XXV. GP - Ministerialentwurf – Gesetzestext, available at https://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00290/imfname_614755.pdf.

three years. The diplomatic or consular authority has to make a written record of the content of the documents submitted to it. Applications for entry have to be forwarded to the Federal Office. The diplomatic or consular authority shall issue an entry visa without further formality if the Federal Office has given notification that asylum status or subsidiary protection status is likely to be granted.

5. Legal basis for Austrian caps

Austria decided to enact a legal basis for limiting the number of new applications in 2016.[37] The numbers however were already agreed before the legal basis was created. The amendment of the Asylum Act provides for the possibility that the Government together with the Main Committee of the National Assembly may adopt a decree to limit the acceptance of applications or to adopt other emergency measures.

As already elaborated elsewhere[38] it is not easy to find out, why exactly 37.500 persons should be the limit for 2016 and 127.500 until 2019. The total limit of 127.500 is equal to 1.5 % of the population. The numbers seem to be artificial. Reports suggest that reception capacities (in the Federal States and in the Communities), labour market data, economic considerations and administrative capacities played a crucial role. The calculation was based on quite similar but not completely identical considerations, which were taken into account when the resettlement schemes in the EU were elaborated. The outcome was the result of negotiations, presumptions and calculations and took the reception capacities of the Federal States into account.

The Government also decided to ask for expert opinions, if EU law allows to limit the number of applications. The two experts (*Prof. Bernd-Christian Funk* and *Prof. Walter Obwexer*) delivered their advisory opinions combined in one document on 29 March 2016.[39] One part of the opinion refers to the question which legal parameters exist to base the intended measures on legal acts in conformity with European Union and Public International Law. The conformity of the measures with EU Law is developed from mainly two arguments. One argument concerns the interpretation of Art. 20 (4) Dublin III-Regulation. This provision determines which State is responsible to conduct the Dublin-determination procedure. Art. 20 (4) stipulates that where an application for

37. See fn. 4.

38. See *Brandl, U.*, In search of a legal basis for the Austrian asylum caps, 31 May 2016, available on EU Immigration and Asylum Law and Policy, http://eumigrationlawblog.eu/in-search-of-a-legal-basis-for-the-austrian-asylum-caps/.

39. Gutachten Völker-, unions- und verfassungs-rechtliche Rahmenbedingungen für den beim Asylgipfel am 20. Jänner 2016 in Aussicht genommenen Richtwert für Flüchtlinge, available on http://images.derstandard.at/2016/03/30/GutachtenRichtwertfurFluchtlinge-Endversion.pdf.

international protection is lodged with the competent authorities of a Member State by an applicant who is on the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present. The latter Member State shall be informed without delay by the Member State which received the application and shall then, for the purposes of this Regulation, be regarded as the Member State with which the application for international protection was lodged. (This State is not necessarily responsible for conducting the asylum procedure.) Based on an interpretation of the wording of Art. 20 (4) Dublin III-Regulation the opinion concludes that the responsibility to start the determination procedure is solely linked to the place of application.

Border controls, which prevent the entry of applicants, would make the neighboring State responsible for the conduct of the determination procedure. The expert concludes that this result is only achieved when border controls are carried out on the territory of the other State. The opinion acknowledges that Art. 20 (4) Dublin III-Regulation was not designed for that purpose, the interpretation of the wording would however allow to allocate the responsibility to conduct the determination procedure to the neighbouring states.

It is clear that the provision was not created to allocate a responsibility for the determination based on a mere presence. According to the rules on a determination of the jurisdiction of a State, responsibility would already be given when a person is under Austrian jurisdiction, e.g. when an Austrian border guard controls the entry of a person even if that control takes place outside the country. Austrian jurisdiction would also create the responsibility to conduct the determination procedure.

In practice, the other Dublin State would then be responsible for conducting the determination procedure. The expert opinion does not refer to the relocation decisions. These decisions however do not allow a Dublin return to Italy as long as they are in force. According to Recital 23 of the Préamble of the relocation decision, Arts. 21, 22 and 29 of the Dublin-Regulation are temporarily derogated.[40] As Art. 20 is not explicitly mentioned, the conclusion may be legitimate that Art. 20 is not temporarily derogated. This would however mean that the Austrian practice to reject applicants at the border would be possible, though it would contravene the object and purpose of the relocation decisions. The aim of these decisions is undoubtedly to reduce the pressure on the Italian asylum system.

40. See above 2. a.

Art. 72 TFEU would – according to the expert opinion – also constitute a suitable legal basis for measures allowing a non-acceptance of further applications. As Austria received around 89.000 applications last year[41] a comparably high number in 2016 would significantly undermine Austrian security. Art. 72 TFEU states that this Title of the Treaty shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. According to the expert opinion, the reception capacities (housing, education, medical care, social care) are already exhausted. New arrivals could significantly threaten the functioning of state institutions. Thus measures to limit the numbers could be based on Art. 72 TFEU.

The advisory opinion describes a scenario where even core State functions are threatened by the current applicants in Austria. This is however far from the real situation. The current situation would not allow the adoption of emergency measures in the form of strictly limiting the number of applications. There is neither a real threat for internal security nor a necessity to adopt caps with regard to the maintenance of law and order. The opinion also admits and analyses that human rights provisions, especially the prohibition not to violate Art. 3 ECHR, must also be guaranteed even in times of emergency.

In the opinion of the present commentator, every person under Austrian jurisdiction has the right that such a decision is made by Austrian authorities in a procedure based on all procedural safeguards including the availability of an effective remedy against a negative decision.

Furthermore a closure of the borders for applicants for international protection would be an act contrary to the solidarity provisions in the TFEU. These provisions - especially Art. 80 TFEU - demand cooperation in general and also in times of increasing numbers of applicants and does not allow the introduction of caps without a consultation and cooperation with the affected States.

Caps are not jet implemented. In autumn 2016, a draft decree was published. The reactions were controversial. The draft contains a quite detailed analysis, which should show that the Austrian capacities to receive new applications are exhausted. The draft referred to reception capacities, the schooling system, labour market data and a number of other data, which should undermine the lack of further capacities. Still applications for international protection are accepted, though the number has been reached.

41. http://www.bmi.gv.at/cms/bmi_asylwesen/statistik/start.aspx.

6. Temporary Border Controls

Austria introduced border controls on the Austrian-Slovenian border and on the Austrian-Hungarian border in September 2015. At that time Germany also introduced border controls on the Austrian German border. These controls are authorised until February 2017. Germany already announced the intention to prolong controls. Austria also started preparations to introduce border controls on the Austrian-Italian border in February 2016.[42] As forecasts predicted that smugglers would increasingly use the route from Libya or other North-African States to Italy after the closure of the Balkan route, an increase of applicants arriving from Italy was estimated.

The planned introduction of controls to Italy led to massive criticism from Italy[43] and led to criticism in Austria as well. The Brenner border is a symbolic border because of the historical relations between Austria and Italy. The border is a politically very sensitive border as after the abolition of border controls in the Schengen area, North and South Tyrol felt a kind of unification after decades of border controls separating the two areas. The facilities to introduce border controls were almost ready, but due to protest and due to the fact that the numbers did not significantly increase, the Ministry of the Interior announced that these controls are currently "obsolete".[44] The decision was announced after a meeting between the Italian and Austrian foreign ministers on 13 May.[45] Military personnel and police are present in the border areas and on transit routes and controls are enforced to detect persons who crossed the border illegally entering from Italy.

7. Closure of the Balkan route in early 2016

Austria played a decisive role in the closure of the Balkan route. The Austrian measures - the caps announced in January 2016 and the controls on the Austrian-Slovenian border - intended to cause a domino effect in the States on the Balkan route. The predicted limit should warn the neighbouring States that Austria could close the borders for applicants when the limits are reached. It should also be a signal accompanying Austria's demand for more solidarity in Europe. Austria was also confronted by the political reactions of the neighbouring States Hungary, Slovakia and the

42. http://derstandard.at/2000030950334/Tiroler-Polizei-arbeitet-an-Vorbereitung-von-Grenzkontrollen-am-Brenner.

43. See e.g. *Moloney, L/Zampano, G.*, Italy, Germany Oppose Austrian Border Controls, Austria Proposes New Controls at Brenner Pass Crossing to Italy, The Wall Street Journal, May 5, 2016.

44. http://www.tt.com/politik/landespolitik/11530481-91/80-polizisten-f%C3%BCr-grenzraum-kontrollen-am-brenner.csp.

45. http://derstandard.at/2000036932170/Grenzkontrollen-am-Brenner-bis-auf-weiteres-obsolet.

Czech Republic. Austria was the main transit country for prospective applicants for protection coming from Hungary, who intended to continue to Germany, until Hungary decided to close its borders to Serbia. Since then new arrivals from Hungary nearly stopped. In the opinion of the Austrian Government the measures implemented in these States perfectly demonstrated that a closure of the borders only leads to criticism from other States, but is in fact much easier to handle than to cope with high numbers of applicants.

Austria invited the transit States on the Balkan to attend a meeting in Vienna on 24 February 2016. Slovenia, Croatia, Serbia, Macedonia, Bulgaria, Kosovo, Albania, Bosnia and Montenegro as States directly on the main route or on an alternative route were invited to participate. Neither Greece nor Turkey were asked to attend the conference, which led to massive criticism from Greece and was also seen as a negative signal vis-á-vis Turkey, at that time (before the EU-Turkey deal) the intended main cooperation partner of the EU. Neither Germany, at that time the main target country of persons transiting through Austria, nor representatives from the EU Commission were invited to take part in the conference. The Ministers present at the Conference agreed on a Joint Declaration.[46] A few days later, the domino effect already reached the Macedonian-Greek border, which was first partly (for a few days certain nationalities were allowed to cross) and then completely closed.

8. Current debates and changes

Despite the fact that in 2016 the numbers of applications were lower than expected, the Ministry of the Interior published a proposal for an amendment of the Asylum Act and other acts and to adopt a so-called Integration Act.[47] The amendment was adopted by the Government end of February 2017 and will be referred to the Parliament. The text for the amendment does not comprise the inclusion of the legal basis for caps directly into the Asylum Act. These plans were discussed, but not yet implemented. The amendment comprises changes with regard to residence permits based on family reasons or humanitarian reasons. Persons eligible for such permits have to fulfil certain integration criteria as defined in the proposed Integration Act. Plans exist to cut the reception conditions for applicants, who received a final negative decision in the asylum procedure and who are obliged to leave the country. So far no concrete text has been published and it is not sure, who exactly will fall under these restrictions.

46. See www.bmi.gv.at/cms/cs03documentsbmi/1813.pdf. Managing Migration Together 24 February 2016, Vienna Declaration.

47. See fn. 36.