The Legal Status of Tolerated Aliens in Austria through the Lens of the Fundamental Right to Human Dignity

Kevin Fredy Hinterberger and Stephan Klammer*

Contents

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Toleration, i.e. the status of being a tolerated alien ('Duldung'), cannot be considered a 'typical' legal status such as that of a refugee. It does not address a specific category of persons. Rather, toleration can in many European countries be considered a 'catch-all clause' for those aliens[1] that can for various reasons neither be deported nor fulfil the requirements of another legal status.

In general, a return decision forms the legal basis, i.e. the title, of a deportation. The measure of deporting someone has to be legally permissible and factually possible. In practice, however, deportations often cannot be executed for legal or factual reasons. Under these circumstances, toleration serves the aim of solving practical problems arising between aliens irregularly staying in the country and public authorities.[2] Given that only around 300 persons are accorded the status of 'tolerated alien' each year, toleration cannot be considered a very common legal instrument in Austria[3], especially in comparison to the statistics for Germany.[4] One reason seems to be the wide margin of discretion accorded to the competent national authority in Austria ('Bundesamt für Fremdenwesen und Asyl', BFA) and the restrictive interpretation of the factual grounds of toleration.[5] At the same time, however, the precariousness that goes hand in hand with the status of toleration makes this a particularly appealing field of scholarly enquiry.

The present contribution analyses in detail the legal status of tolerated aliens in Austria and the rights attached to it. Section I deals with the legal scope of said status. At the beginning, the historical development of the status of toleration and the legal grounds in the Alien Police Act ('FPG 2005') are described. Subsequently, toleration is classified according to the relevant EU Law.

Section II focuses on the rights appertaining to the status of being a tolerated alien. These include access to social benefits, health care, the labour market and the perspective of regularisation. Since access to these rights is linked to the status of

[1] For a good overview of the situation of non-returnable third-country nationals see Mathilde Heegaard Bausager, Johanne Köpfli Møller and Solon Ardittis, 'Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries' (European Commission 2013) HOME/2010/RFXX/PR1001, 68–73.

[2] Cf. Kevin Fredy Hinterberger and Stephan Klammer, 'Das Rechtsinstitut der fremdenpolizeilichen Duldung' (2015) 3 migraLex 73.

[3] Cf. 7947/AB v 18.4.2016 zu 8373/J (25. GP). According to the Ministry of Interior 2016 were 270 and 2017 231 identity cards for tolerated aliens were issued.

[4] At the end of 2017 around 160.000 foreigners were legally tolerated in Germany, cf. BT-Drs 19/633, 38–40.

[5] See Section I.B.2.

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being a tolerated alien, a doctrinal approach demands a clear separation between tolerated aliens and other irregularly staying aliens. In a first step, the legal situation in Austria will be depicted. This analysis will show whether the Austrian legal situation is in conformity with EU law. In this context, Art. 1 of the Charter of Fundamental Rights (CFR) has particular relevance. It stipulates that human dignity is inviolable and must be respected and protected. The question whether a right to welfare entitlement for tolerated aliens can be derived from Art. 1 CFR will be considered.

I. Legal Scope of the Status of Toleration

Initially, a brief overview of the terms used in this contribution and their definitions must be given. Austrian law defines aliens ('Fremde') as persons who are not Austrian citizens.[6] Third-country nationals ('Drittstaatsangehörige') are all aliens excluding Union-citizens, EEA-citizens and Swiss citizens.[7] Barriers of deportation describes the legal or factual grounds because of which deportations cannot be executed. Generally, the term 'alien' is used in the context of Austrian law, whereas the term 'third-country national' is used in the context of EU and human rights law.

Aliens are only allowed to (temporarily) stay in Austria if they fulfil the necessary requirements (e.g. visa, residence permit, temporary visa-free stay for persons from specified countries of origin).[8] An irregular stay ex lege leads to the initiation of a return procedure and hence to the issue of an order of removal. In the case of third-country nationals, this is termed a 'return decision'.[9] Once a return decision issued against an alien has become legally binding, said person has the obligation to leave Austrian territory. If this obligation to return is not respected 'voluntarily', the competent authority may execute it by force. So-called deportation has to be legally permissible and factually possible. If a deportation cannot be carried out and the requirements of another legal (protection) status are not fulfilled, toleration status in the sense of a 'catch-all clause' can be an option.

There are several legal obstacles to deportation based on fundamental rights provisions. If they are found to apply to a particular case, deportation is inadmissible.

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[6] § 2(4) Nr. 1 FPG 2005.

[7] § 2(4) Nr. 10 FPG 2005 and Art. 3 Nr. 1 Directive (EC) 2008/115 of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348/98 (Return Directive).

[8] According to the provisions of the FPG 2005 every stay is irregular, unless it is explicitly stipulated otherwise; cf. § 31 FPG 2005.

[9] § 52 FPG 2005. Regarding EEA citizens, Swiss citizens and privileged third-country nationals the measure is called expulsion ('Ausweisung') according to § 65 FPG 2005.

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The fundamental principle of non-refoulement plays a central role. It prohibits states from deporting individuals to their countries of origin when there are substantial grounds for believing that the person would be at risk of an Art. 2 or 3 ECHR violation (e.g. torture).

Furthermore, there are several factual grounds that may, in practice, prevent states from deporting an alien. States face massive challenges if no readmission agreement exists between the expelling country and the country of origin or if the foreign embassies are unwilling to cooperate, refusing to issue travel documents[10] for the deportation or to attest to the identity of an individual.[11] On the aliens' side, practical obstacles may arise from the fact that the individuals concerned do not possess valid passports or identity documents or that they are unwilling to cooperate on verifying their identity.

A. Historical Development of Toleration in Austria

Legal and factual barriers against deportation were first introduced in Austria at the beginning of the 90s. The so-called postponement of deportation ('Abschiebungsaufschub') in the presence of practical circumstances that make deportation impossible was regulated in § 36 Fremdengesetz 1992 (FrG 1992).[12] The legislator's intention was to create a certain amount of legal certainty for persons that cannot be deported for legal or practical reasons by tolerating their stay for a specified period of time, after which the possibility of deportation was re-assessed.[13] This provision remained identical in the Fremdengesetz 1997 (FrG 1997)[14] and in the Fremdenpolizeigesetz 2005 (FPG 2005)[15].

It was also in the 1990s that legal obstacles to deportation were first implemented in Austria.[16] These made deportation inadmissible if there were substantial grounds for

[10] See Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals, and repealing the Council Recommendation of 30 November 1994, OJ 2016 L 311/13.

[11] Sieglinde Rosenberger, Ilker Ataç and Theresa Schütze, 'Nicht-Abschiebbarkeit: Soziale Rechte im Deportation Gap' (Österreichische Gesellschaft für Europapolitik Policy Brief 2018) 2.

[12] Bundesgesetz über die Einreise und den Aufenthalt von Fremden (Fremdengesetz – FrG), BGBl. I 838/1992.

[13] ErlRV. 582 BlgNR. 18. GP, 47f (with regard to § 36 FrG 1992).

[14] §§ 56(2) in conjunction with 13a FrG 1997; Bundesgesetz über die Einreise, den Aufenthalt und die Niederlassung von Fremden (Fremdengesetz 1997 – FrG), BGBl. I 75/1997.

[15] § 46a Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetitel, BGBl. I 100/2005 (FPG 2005).

[16] § 13a Fremdenpolizeigesetz (FrG) in the version of BGBl. I 190/1990.

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the assumption that the person would be subjected to torture or other forms of inhumane or degrading treatment in the country of destination. This provision remained unaltered for a long time and was only extended insofar as a formal procedure was introduced that ended in a written decision ('Bescheid'). When the AsylG came into effect,[17] the procedure for the assessment of obstacles to deportation fell, in certain cases, to the refugee board ('Asylbehörde') rather than the aliens' police department ('Fremdenpolizei'). The refugee board combined the assessment with its (negative) decision on the application for asylum.[18] Irrespective of whether an application for asylum had been filed, the aliens' police department remained competent to assess, within the context of an expulsion or residence ban procedure, whether there were substantial grounds for the assumption that the person in question would be under threat in the country they had indicated.[19] These provisions were introduced with the FPG 2005[20] and still are in effect today.

An amendatory law, the Fremdenrechtsänderungsgesetz 2009, combined legal and practical obstacles to deportation and created the legal concept of 'toleration' enshrined in § 46a FPG 2005. This provision forms the basis for the status of being a tolerated alien analysed in this article.[21]

B. Requirements for Toleration in Austria

1. Legal Obstacles to Deportation

The legal status of toleration can neither be derived from international law nor from EU law. However, (Member) States have certain human or fundamental rights obligations that may constitute legal obstacles to deportation and lead to the inadmissibility of a deportation.

In this regard, the principle of non-refoulement plays a central role. It is one of the corner stones of international refugee law and is contained in all international and

[17] § 8 Bundesgesetz über die Gewährung von Asyl (Asylgesetz 1997 – AsylG) in the version of BGBl. I 76/1997.

[18] Cf. Johannes Feßl and Irene Holzschuster, *Asylgesetz 2005 Kommentar* (Schinnerl 2006) 54.

[19] § 75 FrG 1997.

[20] § 51 FPG 2005 in the version of BGBl. I 70/2015.

[21] BGBl. I 122/2009.

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regional human rights treaties.[22] In Europe, it is enshrined in Art. 2 and 3 ECHR.[23] The absolute nature of this obligation bears witness to its importance. The principle of non-refoulement cannot be derogated in times of emergency according to Art. 15(2) ECHR. Hence, an infringement can never be justified in the name of public interest.[24]

According to the well-established case-law of the European Court of Human Rights (ECtHR) and subject to their treaty obligations, states have the right to control the entry of third-country nationals into their territory and the stay of these persons.[25] According to said case-law, states are not obliged to grant a third-country national a residence permit or more broadly, a right of residence. If a state wants to return a third country national, however, said state has to assess whether the principle of non-refoulement would be violated. In this case, expulsion and deportation would be inadmissible. The central question is, therefore, whether a removal would expose the persons concerned to a real risk of an Art. 2 or 3 ECHR violation. A state would violate Art. 3 ECHR in cases 'where substantial grounds have been shown for believing that the person concerned, if [returned or] extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'.[26]

In this regard, it does not matter if said 'real risk' results from the overall security situation in the country of origin, from certain individual risk factors or the combination of both. Any form of state persecution falls within the scope of protection of Art. 3 ECHR.[27] However, it is not necessary that the persecution

[22] See Fabiane Baxewanos, 'EU-Migrationskontrolle und "Schlepperei"' (2015) Juridikum 13, 14 with reference to Art. 33(1) Geneva Refugee Convention, Art. 2 and 3 ECHR, Art. 19(2) CFR, Art. 22(8) American Convention on Human Rights, Art. 5 African Charter on Human and Peoples' Rights, Art. 3 Convention against Torture, Art. 7 International Covenant on Civil and Political Rights, Art. 14 Universal Declaration of Human Rights.

[23] Cf. Gerhard Muzak, Die Aufenthaltsberechtigung im österreichischen Fremdenrecht (Manz 1995) 11ff; Ewald Wiederin, Migranten und Grundrechte (NWV 2003) 38ff.

[24] Cf. Thurin, Der Schutz des Fremden vor rechtswidriger Abschiebung (2. edition, Springer 2012) 228.

[25] See only Abdulaziz, Cabales and Balkandali v UK Nr 9214/80, 9473/81 and 9474/81 (ECtHR 28.5.1985) para. 67.

[26] Soering v UK Nr 14038/88 (ECtHR 7.7.1989) para. 88.

[27] The *Soering* case was the first one in which the ECtHR decided upon the compatibility of a deportation or extradition with Art. 3 ECHR: The ECtHR noted that it falls within the responsibility of the returning or extraditing State if the person returned or extradited is subject to an Art. 3 ECHR violation; Soering v UK (Fn 26) para. 85ff.

emanates from a state or non-state actor or body.[28] The ECtHR held in *D v UK* that the deportation of a seriously ill person can amount to an Art. 3 ECHR violation in 'exceptional circumstances'.[29] Contrary to other Art. 3 ECHR violations that result from an actor or body, a deportation only amounts to a violation of this kind in cases where a very high threshold is met.[30] The ECtHR has lowered this high threshold in 2016.[31] In a Grand Chamber decision, it stated that the case-law of the ECtHR had to be clarified because not only persons close to death should be protected from removal:[32] '"Other very exceptional cases" within the meaning of the judgment in N. v. the United Kingdom (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy'.

The non-refoulement principle is also an essential part of the Charter of Fundamental Rights (CFR).[33] Art. 19(2) CFR stipulates that no one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. The aim of the codification was to integrate the relevant case-law of the ECtHR into the CFR.[34] The Court of Justice of the European Union (CJEU) has already dealt with several questions with regard to legal obstacles to deportation according to Art. 19(2) CFR. The CJEU stressed that the principle of non-

[28] Cf. Thurin (Fn 24) 122.

[29] D v UK Nr 30240/96 (ECtHR 2.5.1997) para. 53.

[30] The ECtHR justified this with the reasoning that the ECHR in general only protects civil and political rights. The high threshold is necessary to not overburden the health care system of the Convention States. Cf. Arnaud Berthou, 'EGMR verbessert Schutz vor Refoulement bei Krankheit und mangelnden medizinischen Behandlungsmöglichkeiten im Herkunftsstaat', [2017] 1 FABL, 2; see also N. v Germany Nr 26565/05 (ECtHR 27.5.2008) para. 44: 'Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.

[31] Paposhvili v Belgium Nr 41738/10 (ECtHR 13.12.2016).

[32] Cf. Johanna Mantel, 'Neue Entscheidungen des EGMR', [2017] 1–2 Asylmagazin 33 with reference to Paposhvili v Belgien (Fn 31) para. 182f.

[33] Charter of Fundamental Rights of the EU, OJ 2000 C 364/1.

[34] Emanuel Matti, 'Artikel 19 GRC' in Michael Holoubek and Georg Lienbacher (eds), *GRC-Kommentar. Charta der Grundrechte der Europäischen Union* (2. edition, Manz 2019) para. 18.

refoulement is guaranteed as a fundamental right and, hence, as a subjective right that can be legally enforced.[35] According to Art. 52(3) CFR, Art. 19(2) CFR and Art. 3 ECHR guarantee the same level of protection.[36]

aa) Toleration on the Basis of the Principle of Non-Refoulement

The first legal ground for toleration is stipulated by § 46a(1) Nr. 1 FPG 2005. It covers said International and EU law obligations and establishes legal obstacles to deportation on the basis of the non-refoulement principle. According to this provision, non-refoulement protection covers all states with the exception of the country of origin. This specific detail makes sense against the background of the fact that applications for international protection relate to the country of origin.[37] If a person cannot be returned to their country of origin because they would be subject to an Art. 2 or 3 ECHR violation, they would be granted the status of subsidiary protection.[38] According to the case-law of the Austrian Supreme Administrative Court ('Verwaltungsgerichtshof', VwGH), a case-by-case examination is necessary with regard to the question whether the person in question would be subject to an Art. 3 violation in their country of origin and, hence, would be granted the status of subsidiary protection.[39]

bb) Toleration on the basis of the withdrawal of the status of international protection

The second ground for toleration is stipulated by § 46a(1) Nr. 2 FPG 2005. It is similar to the first one in that it also relates to the non-refoulement principle. It targets cases where the status of refugee ('Asylberechtiger') or subsidiary protection had been granted in a procedure for international protection,[40] but was afterwards withdrawn.[41] Refugee status might be withdrawn if a refugee commits a very serious crime;[42] in the

[35] C-373/13 H.T. [2016] para. 65 and C-181/16 Gnandi [2018] para. 53. See Section II.B.1 for a definition of subjective right.

[36] See regarding the same level of protection C-353/16 MP [2018] para. 38ff. The procedural rights play a central role with regard to Art. 19(2) CFR; cf. Gnandi (Fn 35) para. 54; C-180/17 X, Y [2018] para. 28.

[37] § 51(2) FPG 2005, cf. VwGH 28.8.2014, 2013/21/0218 and VwGH 20.12.2016, Ra 2016/21/0109.

[38] § 51(2) FPG 2005 in conjunction with § 8 AsylG 2005.

[39] VwGH 21.5.2019, Ro 2019/19/0006; VwGH 31.7.2014, Ra 2014/18/0058.

[40] §§ 3 and 8 AsylG.

[41] §§ 7 and 9 AsylG.

[42] § 7(1) Nr. 1 in conjunction with § 6(1) Nr. 4 AsylG.

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case of beneficiaries of subsidiary protection the commission of a crime[43] as such is sufficient to end the status of protection.[44] The aim in this cases is simultaneously to withdraw the status of protection and all rights attached to it.[45] After protection has been withdrawn, the persons concerned are relegated to the status of being merely 'tolerated'.

cc) Toleration according to Art. 8 ECHR

§ 46a(1) Nr. 4 FPG 2005 stipulates the third ground for toleration. It addresses those cases where deportation would violate the right to respect for private and family life. Both the ECHR and the CFR guarantee the right to respect for private and family life regardless of the legal status of persons.[46] The scope of protection of Art. 8(1) ECHR covers the core family, which are spouses and parents and their minor children. Other relations are only protected if an additional feature of dependency exists that goes beyond conventional ties.[47]

Infringements may be justified for certain reasons. Art. 8(2) ECHR stipulates: 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

If the BFA wants to issue a return decision, it has to balance the private interests of the individual and the public interests of the Austrian State.[48] The BFA may come to the conclusion that a medical treatment in Austria is necessary in a particular case

[43] In the sense of § 17 of the Austrian Criminal Code ('Strafgesetzbuch') in the version of BGBl. I 70/2018.

[44] § 9(2) Nr. 3 AsylG. See in more detail regarding the obvious tensions with EU law, C-369/17 Ahmed [2018] para. 42ff; VwGH 6.11.2018, Ra 2018/18/0295; Antonia Wagner, 'Subsidiärer Schutz zwischen rechtspolitischem Gestaltungsspielraum und unionsrechtlichen Vorgaben', Blog Junge Wissenschaft im öffentlichen Recht, <https://www.juwiss.de/41-2019> accessed on 28.3.2019.

[45] ErlRV. 330 BlgNR. 24. GP, 9.

[46] Art. 7 CFR and Art. 8 ECHR guarantee the same level of protection; Art. 52(3) CFR; cf. Laura Pavlidis, 'Artikel 7 GRC' in Michael Holoubek and Georg Lienbacher (eds), *GRC-Kommentar. Charta der Grundrechte der Europäischen Union* (2. edition, Manz 2019) para. 4 and 51. This is why only Art. 8 ECHR will be dealt with.

[47] A.S. v Switzerland Nr 39350/13 (ECtHR 30.6.2015) para. 49; Khan v Germany Nr 38030/12 (ECtHR 23.4.2015) para. 38; cf. also Rudolf Feik, 'Recht auf Familienleben' in Gregor Heißl (ed), *Handbuch Menschenrechte* (Facultas 2008) 187.

[48] § 9(1–3) BFA-VG.

and, therefore, the personal interests of the person concerned outweigh public interest.[49] For instance, persons in an advanced state of (high-risk) pregnancy or currently undergoing medical therapy[50] have to be tolerated. In contrast to temporary inadmissibility, the BFA may also come to the decision that a return decision is permanently inadmissible for grounds related to the private or family life of the individual concerned.[51] These cases have a right to a residence permit on the basis of Art. 8 ECHR and, thus, have to be regularised.[52]

2. Practical Obstacles to Deportation

Practical obstacles to deportation are not derived from any international or other legal obligations. This relates to the fourth ground for toleration, which is stipulated in § 46a(1) Nr. 3 FPG 2005. This provision deals with aliens that cannot be deported for practical reasons. The provision is applicable only, however, if the persons concerned are not responsible for the fact that the deportation is not executable. The concept of 'responsibility' is defined in greater detail in § 46a(3) FPG 2005:[53] e.g. if an alien does not cooperate in establishing his or her identity or does not do everything in his or her power to obtain a return document. Since 2017, the law is quite explicit regarding this point. Aliens with a legally binding return decision are even obliged to go to the embassy of their country of origin and apply for such a document.[54] If they do not fulfil their obligation to cooperate, they are not entitled to toleration on factual grounds.[55]

[49] Cf. VwGH 23.3.2017, Ra 2017/21/0004.

[50] VwGH 28.4.2015, Ra 2014/18/0146; VwGH 23.3.2017, Ra 2017/21/0004. However, in certain cases a serious disease might result in the granting of subsidiary protection according to § 8 AsylG 2005; cf. Kevin Fredy Hinterberger and Stephan Klammer, 'Abschiebungsverbote aus gesundheitlichen Gründen' in Christian Filzwieser and Isabella Taucher (eds), *Asyl- und Fremdenrecht Jahrbuch 2017* (NWV 2017) 111.

[51] § 9(3) BFA-VG.

[52] § 55 AsylG 2005; cf. Franziska Fouchs and Claudia Schweda, 'Die Neuregelung der humanitären Aufenthaltstitel im Asylrecht' [2014] migraLex 58, 58ff; Kevin Fredy Hinterberger, Arbeitsmarktzugang von Fremden mit "Duldung" oder "Aufenthaltstitel aus besonders berücksichtigungswürdigen Gründen" – Eine gleichheitsrechtliche Analyse' [2018] 2 DRdA 104, 109ff.

[53] See also VwGH 30.6.2015, Ra 2014/21/0040 or the Austrian Supreme Court of Justice ('Oberster Gerichtshof', OGH) 27.3.2012, 4Ob213/11.

[54] § 46(2) FPG 2005 and § 36(2) BFA-VG.

[55] VwGH 19.9.2019, Ra 2019/21/0073.

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C. Classification of Toleration According to EU Law

The Austrian toleration status is not the equivalent to a residence permit, because it does not constitute an irregular stay according to § 31(1a) Nr. 3 FPG 2005.[56] From a formal perspective, a person is tolerated from the moment on he or she is issued a so-called toleration card ('Duldungskarte').[57]

The Austrian Aliens' Police Law only knows two categories of stay: regular or irregular. In view of this fact, a paradox emerges: on the one hand, the BFA decides that deportation is inadmissible and that the person concerned is obliged to stay on Austrian territory; on the other hand, it is made clear that this stay cannot be regarded as lawful.

The EU has already issued several acts that determine how Member States have to proceed when they want to issue a return decision. In this regard, the EU has wide competences and has already made use of them.[58] Since 1999, the EU has focused on harmonizing the return procedure and making it more effective.[59] The Return Directive emerged from a need to harmonise regimes and became the EU's central tool for 'combatting'[60] irregularly staying migrants. 'Irregularly staying' is used as a synonym for 'illegally staying'[61] in the Return Directive. According to the preamble, the main aim of this Directive is the establishment of 'an effective removal and repatriation policy'[62] while fully respecting the fundamental rights and human dignity of migrants.[63]

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[56] ErlRV. 330 BlgNR. 24. GP, 30.

[57] One exception form this general rule are those aliens that are tolerated on the basis of the withdrawal of international protection. They are by law tolerated from the moment of the decision of the BFA or the Administrative Court; § 46a(6) FPG 2005.

[58] Art. 79(2) lit. c TFEU.

[59] Cf. Commission Communication on a More Effective Return Policy in the EU – a Renewed Action Plan, COM(2017) 200 final and Steve Peers et al (eds), *EU Immigration and Asylum Law Vol II: EU Immigration Law* (2. edition, Brill 2012) 484ff.

[60] In this sense Art. 79(1) TFEU; cf. Kevin Fredy Hinterberger, Regularisierungen irregulär aufhältiger Migrantinnen und Migranten (Nomos 2020) 163ff.

[61] Art. 3 Nr. 2 Return Directive.

[62] Recital 2 Return Directive and C-534/11 Arslan [2013] para. 42, 60; cf. Carsten Hörich, *Abschiebungen nach europäischen Vorgaben – Auswirkungen der Rückführungsrichtlinie auf das deutsche Aufenthaltsrecht* (Nomos 2015) 31f.

[63] C-146/14 PPU Mahdi [2014] para. 38 with reference to Recital 2 and 11 Return Directive; cf. Hörich (Fn 62) 307.

Article 6(1) Return Directive lays down the general rule for the termination of an irregular stay.[64] Member States are obliged to issue a return decision and, if necessary, to enforce it (by means of deportation).[65] A return decision is any 'administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return'.[66] Additionally, three exceptions to the general rule of issuing a return decision are stipulated.[67] One deals with irregularly staying migrants who are already in possession of a residence permit of another Member State.[68] One specifies how Member States have to proceed if an irregularly staying migrant is taken back by another Member State, according to a bilateral agreement.[69] However, the most important exception is stipulated in Article 6(4) Return Directive: according to this provision, Member States have the option to terminate an irregular stay via the granting of a residence permit to an irregularly staying migrant.[70] This exception stems from Member States' sovereignty as a principle of international law.[71] To terminate an irregular stay, such residence permits have to establish a lawful stay according to the respective domestic law provisions.[72]

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[64] 'Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5'. See C-61/11 PPU El Dridi [2011] para. 35.

[65] C-38/14 Zaizoune [2015] para. 32 and 33.

[66] Art. 3 Nr. 4 Return Directive.

[67] Cf. Peers et al (Fn 59) 490 and Pieter Boeles et al, *European Migration Law* (2. edition, Intersentia 2014) 392. See also Recital 11 Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, [2017] OJ L 66/15: 'Member States should systematically issue a return decision'.

[68] Art. 6(2) Return Directive. See C-240/17 E [2018] para. 44-48.

[69] Art. 6(2) Return Directive. See E (Fn 68) para. 44-48.

[70] Art. 6(4) Return Directive; cf. Mahdi (Fn 63) para. 88: 'enables'. In this sense Alan Desmond, 'Regularization in the EU and the US: The Frequent Use of an Exceptional Measure' in Anja Wiesbrock and Diego Acosta Arcarazo (eds), *Global Migration: Old Assumptions, New Dynamics Vol I* (Praeger 2015) 70.

[71] Cf. David Martin, 'The Authority and Responsibility of States' in Thomas Alexander Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (Asser 2003) 31 and Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (CUP 2009) 2ff.

[72] See in this sense Fabian Lutz, 'Article 14 Return Directive' in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law. A Commentary* (2. edition, Beck 2016) para. 13 and particularly the English version of the first sentence of Article 6(4) Return Directive. Cf. also Benedita Menezes Queiroz, *Illegally Staying in the EU: An Analysis of Illegality in EU Migration Law* (Hart 2018) 155.

To sum up, according to the general structure of the Return Directive, Member States have to terminate an irregular stay either through the enforcement of a return decision or through the granting of a residence permit.[73] If Member States do not initiate one of the two procedural steps, they would violate the Return Directive.[74]

In general, the CJEU does not establish an obligation to regularise and Member States *may* grant residence permits to irregularly staying migrants if a return decision temporarily cannot be executed.[75] They are only obliged to grant the migrants concerned a written confirmation[76] which allows for quick verification of their status in case of police checks.[77]

Having said this, one must examine whether the Austrian toleration status is in line with the Return Directive. Issuing a toleration card to a migrant means that the Austrian State officially declares that deportation is temporarily suspended or prohibited because the return decision cannot be enforced.[78] This can be qualified as postponing the removal according to Article 9 Return Directive. The postponement of the removal or the written confirmation cannot be considered a lawful stay.[79] Art. 9(1) Return Directive lays down the obligation of Member Status to postpone the removal 'when it would violate the principle of non-refoulement'. According to Art. 9(2) Return Directive, the removal may be postponed if it cannot be executed for practical or technical reasons, such as lack of transport capacity.

Art. 9 defines the 'postponement of removal'. However, the term 'postponement' includes a temporal component. An essential requirement for the issuing of a return decision is its legal enforceability.[80] Consequently, if a return decision is definitely not enforceable and, hence, neither is the removal, an obligation to grant a residence permit is triggered. If a return and, hence, a return decision, would violate the

[73] Cf. Peers et al (Fn 59) 490; Hörich (Fn 62) 73ff. See further also Hinterberger and Klammer (Fn 50) 111.

[74] European Commission, Annex to the Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks, C(2017) 6505, 19f, 45, 63f; cf. Menezes Queiroz (Fn 72) [91] and Hörich (Fn 62) 73 and 92 with further references.

[75] Mahdi (Fn 63) para. 87-89.

[76] Recital 12 and Art. 14(2) Return Directive.

[77] European Commission, Return Handbook, C(2017) 6505, 65.

[78] See Section I.B.

[79] Hinterberger (Fn 60) 146ff.

[80] Cf. Hörich (Fn 62) 71ff.

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principle of non-refoulement stipulated in the ECHR, Member States are obliged to grant a residence permit. In this case, the issuing of a return decision already violates the Return Directive, because enforcement would violate this absolute right. In this regard, Article 6(4) Return Directive stipulates: 'Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory'. According to our reading, the 'may'-clause in Article 6(4) Return Directive has to be interpreted as a 'shall'-clause to effectively protect fundamental rights as guaranteed, in this case, by the principle of non-refoulement. The discretion of Member States – to decide between initiating a return procedure and issuing a residence permit – is reduced to an obligation to regularise.[81] Further case-law of the CJEU supports this reading to effectively protect fundamental rights. In a case concerning the Family Reunification Directive the CJEU clarified: 'In the final analysis, while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights'.[82]

So far, the CJEU has not answered the question how Member States have to deal with permanent barriers of deportation. In *Mahdi* the CJEU held that 'the purpose of the directive is not to regulate the conditions of residence on the territory of a Member State of third-country nationals who are staying illegally and in respect of whom it is not, or has not been, possible to implement a return decision'.[83] However, this decision only dealt with practical obstacles to deportation and the inadmissibility of detaining non-returnable third-country nationals. In the *Abdida* case, which deals with the principle of non-refoulement and seriously ill third-country nationals, the CJEU decided that legal obstacles to deportation that are based on medical reasons have to be in line with the corresponding case-law of the ECtHR: 'In the very exceptional cases in which the removal of a third country national suffering a serious illness to a country where appropriate treatment is not available would infringe the principle of non-refoulement, Member States cannot therefore, as provided for in Article 5 of Directive 2008/115, taken in conjunction with Article 19(2) of the

[81] In this sense Hörich (Fn 62) 125f and Hinterberger and Klammer (Fn 50) 119. Furthermore, the ECtHR held that already the issuing of an expulsion in case of an Art. 3 ECHR violation would be inadmissible; cf. Paposhvili v Belgien (Fn 31) para. 199ff.

[82] C-540/03 Parliament/Council [2006] para. 104; siehe auch C-578/08 Chakroun [2010] para. 44 and 63.

[83] Mahdi (Fn 63) para. 87.

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Charter, proceed with such removal'.[84] However, in the *Abdida* case the CJEU did not deal with the question whether a legal obstacle to deportation obliges Member States to regularise a third-country national. The CJEU has solely noted that 'the basic needs of third-country nationals who are staying illegally but who cannot yet be removed should be defined according to national legislation, the fact nevertheless remains that that legislation must be compatible with the requirements laid down in that directive'.[85] It would be highly desirable for the CJEU to finally decide upon this question and clarify if permanent obstacles to deportation trigger an obligation to regularise.

Consequently, legally tolerating migrants is generally in accordance with the Return Directive in cases where a return procedure was initiated, and a return decision was issued, but could not yet be enforced. However, toleration seems to be in accordance with the Return Directive only in those cases in which obstacles to deportation are of a temporary nature.[86] Removal cannot be 'postponed' permanently and situations of protracted irregularity would not be in accordance with Article 9 Return Directive. Consequently, if a return decision – and hence removal – is definitely not enforceable, an obligation to grant a residence permit is triggered. If a return, and hence a return decision, would violate the principle of non-refoulement stipulated in the ECHR, Member States are obliged to grant a residence permit.

II. Rights Attached to the Status of Tolerated Aliens

Nevertheless, even though the Austrian toleration status is not regarded as a lawful stay, it is a status that grants more rights than an irregular stay does. Tolerated migrants enjoy restricted access to the labour market and to social benefits; moreover, their irregular stay does not amount to an administrative offence, as that of other irregularly staying migrants in Austria does.[87] The following section starts with an overview of the legal situation in Austria (II.A.). It then goes on to analyse obligations arising from primary and secondary EU law (II.B.) and to assess whether the Austrian Law is in accordance with these provisions, especially Art. 1 CFR (II.C.).

[84] C-562/13 Abdida [2014] para. 48.

[85] Abdida (Fn 84) para. 54 and see further para. 55.

[86] See in more detail Hinterberger (Fn 60) 160-162.

[87] § 120(5) Nr. 2 in conjunction with § 120(1) FPG 2005.

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This article does not deal with Union citizens and the corresponding case-law of the CJEU regarding access to social benefits.[88] The reason for this is that the legal status of Union citizens is privileged and, hence, cannot be compared to that of third-country nationals.[89]

A. The Legal Situation in Austria

One of the central questions regarding aliens irregularly staying in Austria is how they are able to cover their 'basic needs'.[90] This term is used by the CJEU and describes inter alia access to housing, food, and health care. In Austria all of these issues are subsumed under the term 'primary care' ('Grundversorgung'). On the basis of an agreement between the federal government ('Bund') and the federal states ('Länder'), the primary care system for aliens in need of help and protection has been harmonised.[91] However, not every alien irregularly staying in the country is entitled to primary care, but only those who are not deportable due to legal or practical reasons.[92] Hence, until the BFA has decided upon the inadmissibility of the deportation and has issued a toleration card,[93] irregularly staying aliens are not entitled to primary care. As a consequence, these persons have no right to health care, which is linked to the entitlement to primary care. It remains to be seen whether this is in accordance with EU law.[94]

Even though there is no legal right to primary care benefits for irregularly staying aliens who are not tolerated, actual practice differs between federal states. For

[88] Cf. Johannes Peyrl, 'The judgments of Brey, Dano and Alimanovic: A case of derogation or a need to solve the riddle?' in Sandra Mantu, Paul Minderhoud and Elspeth Guild (eds), *EU Citizenship and Free Movement Rights* (2020) 105, 105ff with further references.

[89] See Art. 21 TFEU and Directive (EC) 2004/38 of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158/77.

[90] C-163/17 Jawo [2019] para. 92 and C-233/18 Haqbin [2019] para. 46.

[91] Vereinbarung zwischen dem Bund und den Ländern gem. Art. 15a B-VG über gemeinsame Maßnahmen zur vorübergehenden Grundversorgung für hilfs- und schutzbedürftige Fremde (Asylwerber, Asylberechtigte, Vertriebene und andere aus rechtlichen oder faktischen Gründen nicht abschiebbare Menschen) in Österreich (Grundversorgungsvereinbarung – Art. 15a B-VG, GVV), BGBl. I 80/2004 and Grundversorgungsgesetz-Bund (GVG-Bund) in the version of BGBl. I 56/2018.

[92] Art. 2(1) Nr. 4 GVV. See in more detail Michael Frahm, 'Zugang zu adäquater Grundversorgung für Asylsuchende aus menschenrechtlicher Perspektive' [2013] juridikum 464, 469f.

[93] See Section I.B.-C.

[94] See Section II.B.

instance, aliens irregularly staying in Vienna receive primary care regardless of whether they are officially tolerated.[95]

Irregularly staying aliens – including tolerated ones – generally have no access to the labour market.[96] One exception are aliens who are tolerated on the basis of the withdrawal of the status of international protection.[97] This group of persons has restricted access to the labour market with a work permit.[98]

It has already been said that the stay during the toleration is irregular.[99] Therefore, it is interesting to analyse legal options which are currently available to irregularly staying aliens for the procurement of a residence permit, resulting in a regular status. In 2009, for the first time, a provision was adopted in Austria that granted aliens who are non-returnable for legal or practical reasons access to a residence permit.[100] Essential requirement for obtaining such a permit is that the person has been tolerated for one year and the requirements for toleration were still given.[101] Furthermore, the person concerned must not have been convicted of a crime.[102]

In 2012, the competence for issuing such a residence permit was transferred to the BFA and, since that time, and the relevant provision was transferred to § 57(1) Nr. 1 AsylG 2005.[103] According to this provision, the requirements for obtaining a residence permit granting special protection ('Aufenthaltsberechtigung besonderer Schutz') are the following: The alien concerned must have been tolerated for at least one year on the basis of § 46a(1) Nr. 1 or 3 FPG 2005 and must not constitute a danger to the security of Austria or have been convicted of a crime. It has to be pointed out that not all toleration grounds grant access to a residence permit of this kind. Aliens that are tolerated on the basis of the withdrawal of the status of international protection[104]

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[95] § 1(3) Wiener Grundversorgungsgesetz in the version of LGBl 49/2018.

[96] See in more detail Hinterberger (Fn 52) 106f.

[97] § 46a(1) Nr. 2 FPG 2005 and see in more detail Section I.B.1.bb.

[98] See in more detail Hinterberger (Fn 52) 107–109.

[99] See already Section I.

[100] Fremdenrechtsänderungsgesetz 2009 – FrÄG 2009, BGBl. I 122/2009.

[101] § 69a Niederlassungs- und Aufenthaltsgesetz (NAG) in the version of BGBl. I 29/2009. § 69a NAG covered only the toleration grounds according to § 46a(1) Nr. 1 and 3 and excluded the toleration on the basis of the withdrawal of the status of international protection.

[102] See Fn 43.

[103] BGBl. I 87/2012.

[104] See Section I.B.a.bb.

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cannot obtain a residence permit granting special protection and, hence, are permanently tolerated. It is interesting to note that these are the same aliens that have restricted access to the labour market.[105]

The residence permit granting special protection entitles the holder to a temporary stay of twelve months in Austria[106] and access to the labour market with a work permit according to the Aliens' Employment Act ('Ausländerbeschäftigungsgesetz', AuslBG).[107] The work permit is issued after an assessment of the labour market situation.[108] Furthermore, tolerated aliens may obtain a residence permit on the basis of Art. 8 ECHR.[109]

B. Legal Situation According to EU Law

This section focuses on the relevant EU law, beginning with an analysis of Art. 1 CFR. This primary EU law provision enshrines the fundamental right to human dignity. In view of this fact, we will address the question whether a right to welfare benefits for tolerated third-country nationals can be derived from Art. 1 CFR.[110] In addition, the minimum basic rights according to the Return Directive are examined with a view towards the same question.

1. Primary EU Law: Art. 1 CFR

The CFR is part of primary EU law. Art. 1 CFR stipulates that human dignity is inviolable and that it must be respected and protected. From the beginning of the negotiations it was clear that human dignity should get a special place in the CFR, which is why it was codified in Art. 1.[111] Art. 1 CFR can be considered as a principle giving expression to a general scale of values ('allgemeiner Wertemaßstab') and as a

[105] There are certain tensions with the Austrian constitutional law; Hinterberger (Fn 52) 111.

[106] § 54(2) AsylG 2005.

[107] Cf. § 4(1) Nr. 1 AuslBG.

[108] § 4(7) Nr. 5 AuslBG. Cf. Hinterberger (Fn 52) 111.

[109] According to § 55 AsylG 2005. Cf. Hinterberger (Fn 60) 331-333 and 344f.

[110] See already Diego Acosta Arcarazo, 'The Charter, detention and possible regularization of migrants in an irregular situation under the Returns Directive: Mahdi' [2015] 52 CML Rev 1361, 1369-1371 and 1374.

[111] Claudia Fuchs and Patrick Segalla, 'Artikel 1 GRC' in Michael Holoubek and Georg Lienbacher (eds), *GRC-Kommentar. Charta der Grundrechte der Europäischen Union* (2. edition, Manz 2019) para. 1.

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subjective right ('subjektives Recht')[112] and, thus, has a dual legal nature.[113] This is especially interesting for Austria, because human dignity is not codified in the Austrian catalogue of fundamental rights.[114]

A related question is whether the fundamental rights enshrined in the CFR are applicable to a specific case. Pursuant to Art. 51(1) CFR, EU institutions and Member States are bound by the CFR provisions 'only when they are implementing Union law'.[115] If a Directive has been transposed into national law, there is no doubt that a Member State has been 'implementing Union law' and, hence, the CFR is applicable.[116] For the purposes of the present contribution, this means that regarding the return of irregularly staying third-country nationals the Return Directive is the relevant secondary EU law. Consequently, the CFR is applicable to every procedural step of a return procedure.[117] The obligations laid down by the CFR are thus relevant for the group of persons that the present contribution focuses on, i.e. non-returnable third-country nationals: in their case, as outlined above,[118] the execution of the return decision has been postponed and hence, the return procedure is still ongoing.[119]

aa) Human Dignity as a Principle

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[112] See for the distinction Tobias Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' [2019] 56 CML Rev 1201.

[113] Cf. Catherine Dupré, 'Article 1' in Steve Peers et al (eds), *The EU Charter of Fundamental Rights* (Hart 2014) para. 27 and Anna Groschedl, 'Menschenwürdige Aufnahmebedingungen als grundrechtliches Gebot im Asylverfahren' [2015] 3 migraLex 66, 68.

[114] Both the Austrian Constitutional Court ('Verfassungsgerichtshof', VfGH) and the OGH recognise human dignity as a fundamental value ('allgemeinen Wertungsgrundsatz') and basis for interpretation ('Auslegungsmaßstab') of the Austrian legal system; see VfSlg 13.635/1993 and OGH 14.4.1994, 10 Ob 501/94. For a good overview of fundamental social rights in Austria Theo Öhlinger and Manfred Stelzer, 'Der Schutz der sozialen Grundrechte in der Rechtsordnung Österreichs' in Julia Iliopoulos-Strangas (ed), *Soziale Grundrechte in Europa nach Lissabon* (Nomos 2010) 497. For a good overview of human dignity within the Austrian legal system see Groschedl (Fn 113) and Christoph Bezemek, *Grundrechte* (Facultas 2016) para. 6.

[115] Cf. Andreas Wimmer, 'Die Anwendung der Grundrechte-Charta durch Verwaltungsbehörden und nicht-oberinstanzliche Gerichte als Normenkontrollmaßstab' [2015] 3 ZÖR 511, 517ff, in particular 519f or Wolfgang Weiß, 'Grundrechtsschutz durch den EuGH: Tendenzen seit Lissabon' [2013] 8 EuZW 287, 288f.

[116] C-617/10 Åkerberg Fransson [2013] para. 27f.

[117] Hörich (Fn 62) 32. Cf. also Acosta Arcarazo (Fn 110) 1376 and C-554/13 Z. Zh. und I.O. [2015] para. 59.

[118] See Section I.C.

[119] Art. 9 Return Directive and cf. Hörich (Fn 62) 121 and 127ff.

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The CJEU already stated in 2001 that the fundamental right to human dignity was a 'general principle' of 'Community law' at that time.[120] The entering into force of the Lisbon Treaty in 2009 underlined the importance of human dignity in the legal system of the EU. The explanations relating to the Charter clarified that human dignity 'constitutes the real basis of fundamental rights'.[121] Furthermore, human dignity is enshrined in the preamble of the CFR. Consequently, it has to be considered a legal principle, which means that it is essential for the interpretation of all CFR provisions.[122]

In this regard, the case-law of the ECtHR has to be taken into consideration, even though, for reasons of brevity, the present contribution does not address this issue.[123] According to the ECtHR, human dignity is 'the very essence of the convention'[124] and constitutes a 'fundamental principle'.[125] It has to be noted that the ECHR does not include a provision on human dignity; however, it can be derived from Art. 3 and 8 ECHR.

bb) Human Dignity as a Right

The dual legal nature of human dignity is disputed,[126] leaving open the question whether it can be solely considered as a principle or whether it also is a right that can be enforced legally by individuals against a specific Member State.[127] According to the prevailing and our personal opinion, Art. 1 CFR has to be considered as a

[120] C-377/98 Netherlands/Parliament and Council [2001] para. 69ff, in particular para. 70.

[121] Explanations relating to the CFR, OJ 2007 C 303/17; in this sense Dupré (Fn 113) para. 1–3 and 6.

[122] Cf. Wolfram Höfling, 'Artikel 1' in Peter J Tettinger and Klaus Stern (eds), *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta* (Beck 2006) para. 14 and Martin Borowsky, 'Artikel 1' in Jürgen Meyer (ed), *Charta der Grundrechte der Europäischen Union* (Nomos 2014) para. 28.

[123] See in more detail Lennart von Schwichow, *Die Menschenwürde in der EMRK* (Mohr Siebeck 2016).

[124] Pretty v UK Nr 2346/02 (ECtHR 29.4.2002) para. 66.

[125] VC v Slovakia Nr 18968/07 (ECtHR 8.11.2011) para. 107.

[126] See Fn 113.

[127] Fuchs and Segalla (Fn 111) para. 3.

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fundamental *right*.[128] Art. 1 CFR has a negative and positive dimension.[129] This follows from the wording, because human dignity must not only be 'respected', but also 'protected'. Advocate General Trstenjak has stressed the 'positive protective function' that is inherent in Art. 1 CFR in her Opinion in the *NS* case.[130] Furthermore, the CJEU has underlined this protective duty of Member States in relation to the Reception Conditions Directive and the minimum standards for the reception of asylum seekers.[131] The CJEU also reflected upon this issue in the above-mentioned *Abdida* case, which dealt with the issue of human dignity in relation to non-returnable third-country nationals and the Return Directive.[132]

cc) Meaning and Scope of Human Dignity

Even if human dignity has to be understood as a fundamental *right* that can be legally enforced,[133] its meaning and scope is still unclear. The term 'dignity' covers every individual irrespective of the nationality or other characteristics.[134] Thus, it includes third-country nationals and stateless persons regardless of their legal status,[135] also extending to non-returnable third-country nationals.[136]

To clarify the meaning of human dignity, it is worth looking at Art. 53 CFR. This provision stipulates that the CFR provisions have to be interpreted in accordance with the Member States' constitutions. In the constitutions of Member States, the right to human dignity is enshrined either explicitly or implicitly.[137] Art. 1 German Basic Law

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[128] Borowsky (Fn 122) para. 32ff with further references; Barbara Cargnelli-Weichselbaum, 'Bedeutung der Menschenwürde in der Rechtsprechung des VfGH zur Mindestsicherung' in Patricia Hladschik and Fiona Steinert (eds), *Menschenrechten Gestalt und Wirksamkeit verleihen. Making Human Rights Work. Festschrift für Manfred Nowak und Hannes Tretter* (NWV 2019) 525, 535; Groschedl (Fn 113) 68f with further references; Fuchs and Segalla (Fn 111) para. 20.

[129] Bezemek (Fn 114) § 6 para. 5.

[130] C-411/10 NS [2011] Opinion of the Advocate General, para. 112.

[131] C-179/11 Cimade [2012] para. 42–45 and 56; C-79/13 Saciri [2014] para. 35; recently Haqbin (Fn 90) para. 46–50 and 56.

[132] Abdida (Fn 84) para. 42.

[133] See regarding the legal enforcement Julia Iliopoulos-Strangas, 'Klassifizierung – Aufstellung und Rechtsnatur der sozialen Grundrechte' in Julia Iliopoulos-Strangas (ed), *Soziale Grundrechte in Europa nach Lissabon* (Nomos 2010) 865, 932ff and Lock (Fn 112) 1216-1218.

[134] Cf. Dupré (Fn 113) para. 28f and Fuchs and Segalla (Fn 111) para. 30.

[135] Dupré (Fn 113) para. 28.

[136] Recital 2 Return Directive and Abdida (Fn 84) para. 42.

[137] Dupré (Fn 113) para. 17 with further references. See further Fn 114.

('Deutsches Grundgesetz', GG)[138] had by far the greatest influence on the wording of Art. 1 CFR as evidenced by the fact that the two provisions are almost identical.[139] A common core of the constitutional traditions of the Member States is that Art. 1 CFR stipulates a state obligation to provide a minimum level of subsistence.[140] The case of the German Constitutional Court ('Bundesverfassungsgerichtshof', BVerfG) regarding the Asylum Seekers' Benefits Act ('Asylbewerberleistungsgesetz') is highly relevant here. In this decision the BVerfG held that Art. 1(1) in conjunction with Art. 20(1) GG 'ensures a fundamental right to the guarantee of a dignified minimum existence'.[141] The case-law of the French Council of State ('Conseil d'Etat') goes into a similar direction.[142] The 'meaning and scope [of an EU law provision] must normally be given an autonomous and uniform interpretation throughout the European Union'[143] according to the case-law of the CJEU. Hence, Art. 1 CFR has to be interpreted in this way[144] and its meaning and scope have to be defined by the CJEU.[145] However, the common core of the constitutional traditions of the Member States outlined above has to be taken into account regarding the question of a right to a minimum level of subsistence.

To sum up, a right to social benefits or to a minimum level of subsistence can be derived from Art. 1 CFR if otherwise the human dignity of an individual would not

[138] GG in the version of BGBl. I 2347.

[139] Borowsky (Fn 122) para. 26; Fuchs and Segalla (Fn 111) para. 15–19; Dupré (Fn 113) para. 18f.

[140] Dupré (Fn 113) para. 31 with further references.

[141] BVerfG 18.7.2012, 1 BvL 10/10, 1 BvL 2/11; BVerfG 125, 175; an English translation of the decision can be found at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/ls20120718_1bvl001010en.html. Cf. Marina Kaspar, 'Aufenthalt und soziale Gerechtigkeit: Der Aufenthaltsstatus von Asylberechtigten und subsidiär Schutzberechtigten als Differenzierungsgrund in der Mindestsicherung' in Florian Kronschläger et al (eds), *Recht vielfältig – Perspektiven des Öffentlichen Rechts: Tagung der österreichischen Assistentinnen und Assistenten des Öffentlichen Rechts* (2018) 135, 149 with further references.

[142] Maximilian Steinbeis, 'Der Dschungel von Calais, der Conseil d'Etat und die Menschenwürde' (Verfassungsblog, 24.11.2015) <https://verfassungsblog.de/der-dschungel-von-calais-der-conseil-detat-und-die-menschenwuerde/> accessed on 29.3.2019.

[143] C-225/16 Ouhrami [2017] para. 38.

[144] Cf. Robert Rebhahn, Sozialleistungen an "international Schutzberechtigte und Schutzsuchende" – Möglichkeiten zur Differenzierung gegenüber Staatsangehörigen (Gutachten für die Österreichische Bundesregierung, 29.3.2016) 38. For a more cautious approach see Dupré (Fn 113) para. 20.

[145] In a similar way the German BVerfG has done this in relation to Art. 1 GG; cf. Groschedl (Fn 113) 68 and the cited case-law at Fn 173.

be respected and protected.[146] Groschedl has already outlined the meaning and scope in a precise manner: the term 'human dignity' as used by the CJEU in its case-law covers at least the continuous satisfaction of basic needs, which are food and housing.[147] In our opinion, access to health care has to be included as another basic need that can be derived from the case-law of the CJEU regarding the Return Directive.[148]

For reasons of brevity, other state duties that might be derived from Art. 1 CFR cannot be dealt with in the present contribution. What is clear, however, is that the term human dignity cannot be reduced to a guarantee of a minimum level of subsistence because its meaning and scope are much broader[149] and not finite.[150] For example, other interesting topics in relation to Art. 1 CFR are equality, physical integrity, and personal identity or individuality.[151] In the present contribution the standards of the case-law of the CJEU have been depicted and applied to a specific group of persons, *in concreto* non-returnable third-country nationals. This does not mean that those standards are not also applicable to other groups of persons.

Another open question is how Art. 1 CFR is related to other more specific fundamental rights like Art. 4 (prohibition of torture and inhuman or degrading treatment or punishment) or Art. 34(3) CFR.[152] According to the latter 'the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices'.[153] According to prevailing opinion, Art. 34(3) CFR does not stipulate a (legal) right but rather lays

[146] Dupré (Fn 113) para. 31 with further references. In this sense also Rebhahn (Fn 144) 37.

[147] Groschedl (Fn 113) 71. In this sense also Hinterberger (Fn 52) 108f.

[148] See Section II.B.2.

[149] Cf. von Schwichow (Fn 123) 13–26.

[150] Cf. Fuchs and Segalla (Fn 111) para. 34.

[151] Cf. Fuchs and Segalla (Fn 111) para. 19 and 35.

[152] Both Art. 4 CFR and Art. 3 ECHR are not addressed in the present contribution for reasons of brevity.

[153] Furthermore, it has to be noted that according to the wording of Art. 34(3) CFR ('in accordance with [...] national laws') Member States have to determine the form of the applicable provisions ; cf. Dragana Damjanovic, 'Artikel 34' in Michael Holoubek and Georg Lienbacher (eds), *GRC-Kommentar. Charta der Grundrechte der Europäischen Union* (2. edition, Manz 2019) para. 44–48. It seems like that there are still some open questions regarding the reference to national law in Art. 34(3) CFR; cf. C-571/10 Kamberaj [2012] para. 81.

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down a principle.[154] Cargnelli-Weichselbaum expresses another opinion based on the case-law of the CJEU:[155] In the *Kamberaj* case, the CJEU uses the term 'right' – as in the wording of Art. 34(3) CFR.[156] Hence, the provision has to be understood in the same way as Art. 1 CFR and stipulates a (legal) right.[157] This is why Cargnelli-Weichselbaum convincingly proposes that Art. 1 CFR in conjunction with Art. 34(3) CFR guarantees a right to a minimum level of subsistence because said provision has its origins in human dignity.[158] However, the question how both of these CFR provisions are related to each other has yet to be clarified by the CJEU.

dd) Résumé

To sum up, Art. 1 CFR has to be understood as a legally enforceable subjective right. It entails the protective duty of Member States to guarantee non-returnable third-country nationals – irrespective of whether they are recognised by the state as such – a minimum level of dignified subsistence. This obligation can possibly be also derived from Art. 1 in conjunction with Art. 34(3) CFR. The 'discovery' of this right to welfare benefits for non-returnables can be justified with the fact that human dignity 'constitutes the real basis of fundamental rights'.[159] Dupré has convincingly argued that Art. 1 CFR also offers protection against those fundamental rights violations that could not be predicted at the moment of its drafting.[160] This includes the right to a minimum level of subsistence for non-returnables. Said right encompasses at least the continuous satisfaction of their basic needs, i.e. food, housing, and health care.

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[154] Cf. Iliopoulos-Strangas (Fn 133) 931; Hans Dieter Jarass, *Charta der Grundrechte der Europäischen Union* (3. edition, Beck 2009) Art. 34 para. 7; Alexia Bierweiler, *Soziale Sicherheit als Grundrecht in der EU* (Boorberg 2007) 180; Damjanovic (Fn 153) para. 19f; Beate Rudolf, 'Artikel 34' in Jürgen Meyer (ed), *Charta der Grundrechte der Europäischen Union* (Nomos 2014) para. 20–22. For a different approach see Jennifer Tooze, 'Social Security and Social Assistance' in Tamara K Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Hart 2003) 161, 185.

[155] Cargnelli-Weichselbaum (Fn 128) 534–536.

[156] Kamberaj (Fn 153) para. 92.

[157] Heading into a similar direction Tooze (Fn 154) 185.

[158] In this sense also Dupré (Fn 113) para. 31.

[159] Explanations relating to the CFR, OJ 2007 C 303/17; in this sense Dupré (Fn 113) para. 1–3 and 6 and see already Section II.B.1.

[160] Dupré (Fn 113) para. 7.

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This entitlements must not only be enshrined in law, but individuals must also have effective access to them, because otherwise Art. 1 CFR would be violated.[161] In the *Cimade* case, for instance, the CJEU stressed that the abolition of the minimum standards for the reception of asylum seekers violates Art. 1 CFR.[162] This view is further supported by the fact that human dignity is inviolable. Consequently, human dignity can be considered an absolute right[163] and, as a result, Member States are obliged to continuously guarantee a minimum level of dignified subsistence.[164]

2. Secondary EU Law: The Return Directive

After analysing the CFR-provisions, the relevant secondary EU law will be examined regarding the rights attached to the status of tolerated third-country nationals. The postponement of removal pursuant to Art. 9 Return Directive has already been dicussed.[165] Art. 14(1) Return Directive lays down certain 'minimum basic rights'[166] for third-country nationals if their removal has been postponed pursuant to Art. 9 Return Directive. Art. 14 Return Directive and, therefore, the CFR is applicable to non-returnables – as already mentioned above.[167] A look at the negotiations[168] on Art. 14 Return Directive shows that initially, a minimum standard of conditions of residence[169] should have been laid down by reference to the relevant provisions in the Receptions Conditions Directive from 2003.[170] However, Member States expressed concerns that this would be 'perceived as an "upgrading" of the situation of irregular

[161] For an overview of the practical difficulties see FRA, *Fundamental rights of migrants in an irregular situation in the European Union* (Publications Office of the European Union 2011) 65f.

[162] Cimade (Fn 131) para. 56.

[163] Dupré (Fn 113) para. 34f.

[164] In this sense Groschedl (Fn 113) 72 and recently Haqbin (Fn 90) para. 50.

[165] See already Section I.C.

[166] Lutz (Fn 72) para. 4. The European Commission also uses the term 'rights'; cf. European Commission, Return Handbook, C(2017) 6505, 63f.

[167] See already Section I.C. and, in particular, Section II.B.1.

[168] Cf. Fabian Lutz, The Negotiations on the Return Directive (Wolf 2010) 64.

[169] Cf. European Commission, Return Handbook, C(2017) 6505, 64.

[170] Art. 7-10, 15 and 17-20 Directive (EC) 2003/9 of the Council of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ 2003 L 31/18.

migrants and thus send a wrong policy message, [which is why] a "self-standing" list of rights was established'[171] in Art. 14 Return Directive.[172]

Art. 14(1) lit. a Return Directive concretises the right to family unity which is also enshrined in Art. 5 lit. b Return Directive.[173] Art. 14(1) lit. c Return Directive grants minors access to the basic education system.[174] In this context, the best interests of the child, as stipulated in Art. 5 lit. a Return Directive, shall be a primary consideration.[175] Art. 5 lit. d Return Directive lays down that the special needs of vulnerable persons have to be taken into account if a third-country national is pending return.[176]

Art. 14 lit. b Return Directive is the most far-reaching minimum basic right because it guarantees emergency health care and essential treatment of illness. The CJEU has interpreted this provision in the *Abdida* case: pursuant to Art. 14 lit. b Return Directive, Member States have to provide access to health care for third-country nationals in case their removal is postponed.[177] Furthermore, Member States are required 'to make provision [...] for the basic needs of a third country national [...] where such a person lacks the means to make such provision for himself'.[178] The CJEU argued in accordance with the principle of effectiveness (*effet utile*) that the

[171] European Commission, Return Handbook, C(2017) 6505, 64. It is likely that the 'upgrading' from Member States perspective would have been that irregularly staying third-country nationals would have been compared or equated to asylum seekers; cf. Art. 3 Reception Conditions Directive.

[172] At no time the prior draft of the Return Directive included a reference to the access to the labour market or the substantive reception conditions of the Reception Conditions Directive.

[173] So auch Hörich (Fn 62) 119f and Lutz (Fn 72) para. 5.

[174] According to the Commission the 'the limitation of "subject to the length of their stay" should be interpreted restrictively'; European Commission, Return Handbook, C(2017) 6505, 64. Hence, 'in cases of doubt about the likely length of stay before return, access to education should be granted rather than not'.

[175] Cf. Hörich (Fn 62) 120.

[176] Art. 3(9) Return Directive defines the term 'vulnerable persons'. In general there is often a reference to particularly vulnerable groups and their special needs if human dignity is at stake; cf. Dupré (Fn 113) para. 2.

[177] Abdida (Fn 84) para. 54ff. Furthermore the access must also 'not be made dependent on the payment of fee'; European Commission, Return Handbook, C(2017) 6505, 64.

[178] Abdida (Fn 84) para. 59. It has to be criticised that the wording of the CJEU ('in so far as possible') can be interpreted as somewhat limiting the described duty of Member States. Member States could argue that they have limited resources and, hence, cannot guarantee the minimum existence because of this reason. However, this argument would contradict the absolute nature of the fundamental right to human dignity pursuant to Art. 1 CFR. Consequently, the wording of the CJEU is not limiting the right to welfare entitlement; see Section II.B.1.dd.

rights laid down in Art. 14(1) Return Directive would otherwise 'be rendered meaningless'.[179] The CJEU also made a reference to Recital 2 Return Directive and thus to human dignity when it argued in favour of a state obligation to guarantee basic needs.[180] Consequently, the duty of Member States described here is based on human dignity.

'Based on this logic developed by the ECJ, and in light of the indications provided for in relevant case-law of the ECtHR, it can be derived that enjoyment of the other rights enumerated in Article 14(1) of the Return Directive (such as in particular access to education and taking into account needs of vulnerable persons) also give rise to a concomitant requirement to make provision for the basic needs of the third country national concerned'.[181]

I generally agree with the Commission's view, even though the Commission does not share the opinion that there is a 'general legal obligation'[182] of Member States to cover the basic needs of all third-country nationals pending return. Furthermore, it should 'be noted that it is for the Member States to determine the form in which such provision for the basic needs of the third country national concerned is to be made'.[183] This quote from the CJEU is further supported by Recital 12, which stipulates that the 'basic conditions of subsistence should be defined according to national legislation'.

To sum up, the right to a minimum level of dignified subsistence pursuant to Art. 1 CFR is also guaranteed by the minimum basic rights that are enshrined in Art. 14 Return Directive. In this regard, Art. 14 Return Directive can be understood as a substantive concretisation of Art. 1 CFR. According to the CJEU's ruling in the *Abdida* case, The state's obligation to guarantee that basic needs are met is also based on human dignity. Meeting basic needs includes the continuous provision of food, housing and health care.[184]

[179] Abdida (Fn 84) para. 60.

[180] Abdida (Fn 84) para. 42.

[181] European Commission, Return Handbook, C(2017) 6505, 64.

[182] European Commission, Return Handbook, C(2017) 6505, 64.

[183] Abdida (Fn 84) para. 61.

[184] See already Section II.B.1.cc. and Section II.B.1.dd.

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C. Implications for the Legal Situation in Austria

What implications follow from the analysis of EU law for the legal situation in Austria? Non-returnables have a right to welfare benefits to cover their basic needs. Obligations arising from EU law have no impact on access to the labour market or regularisation perspectives of non-returnables; however, they do have an impact on access to social benefits and health care.

In general, not every irregularly staying alien is entitled to primary care in Austria, but only those who are not deportable because of legal or practical reasons. Hence, until the BFA has decided upon the inadmissibility of a deportation and has issued a toleration card, irregularly staying aliens are not entitled to primary care.[185] Access to housing, food, and health care comes along with primary care entitlement.

Depriving non-returnables of primary care benefits is neither in accordance with the CFR nor with the Return Directive. The protective duty of Member States to guarantee a minimum level of subsistence is based on human dignity. Consequently, all irregularly staying aliens must be entitled to primary care until they are effectively removed from Austrian territory. Art. 1 CFR can be legally enforced as a 'constitutionally guaranteed right'[186] before the Austrian VfGH.[187]

III. Conclusion

According to the well-established case-law of the ECtHR and subject to their treaty obligations, states have the right to control the entry of third-country nationals into their territory and the stay of these persons. At the EU level the Return Directive became the central tool for 'combatting' irregularly staying migrants. According to the Preamble, the main aim of this Directive is the establishment of 'an effective removal and repatriation policy' while fully respecting the fundamental rights and human dignity of migrants. The latter is stipulated in Art. 1 CFR. There are several legal obstacles for deportations that are based on such fundamental right provisions. If they apply to a particular case, deportation is inadmissible.

Legally tolerating migrants is generally in accordance with the Return Directive, because a return procedure was initiated, and a return decision was issued, but could not yet be enforced. However, toleration seems to be in accordance with the Return

[185] See Section II.A. with regard to the different implementations of the federal States.

[186] Art. 144(1) Federal Constitutional Law (Bundes-Verfassungsgesetz) in the version of BGBl. 16/2020; an English translation can be found at https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.pdf.

[187] VfSlg 19.632/2012 and Fuchs and Segalla (Fn 111) para. 28f.

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Directive only in those cases in which obstacles to deportation are of a temporary nature. Removal cannot be 'postponed' permanently and situations of protracted irregularity would not be in accordance with Article 9 Return Directive. Consequently, if a return decision is definitely not enforceable, and hence neither is the removal, an obligation to grant a residence permit arises. If a return, and hence a return decision, would violate the principle of non-refoulement enshrined in the ECHR, Member States are obliged to grant a residence permit.

The status of being tolerated was created for those aliens in Austria who cannot be deported for legal or practical reasons. Toleration status cannot be considered the equivalent of a residence permit, because toleration does not constitute a lawful stay. From a formal perspective, legally tolerated aliens regarded as different from aliens who are irregularly staying and not legally tolerated. This is because of the rights that are attached to the status, which include access to social benefits, health care, the labour market, and the perspective of regularisation.

In general, not every alien irregularly staying in Austria is entitled to primary care, but only those who are not deportable because of legal or practical reasons. Hence, until the BFA has decided upon the inadmissibility of a deportation and has issued a toleration card, irregularly staying aliens are not entitled to primary care. Access to housing, food and health care comes along with primary care entitlement.

Depriving non-returnables of primary care benefits is neither in accordance with the CFR nor with the Return Directive. The protective duty of Member States to guarantee a minimum level of subsistence is based on human dignity. Consequently, all irregularly staying aliens must be entitled to primary care until they are effectively removed from Austrian territory.

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