The Austrian Migration and Asylum Law under the Impact of the European Migration Crisis 2015

Gerhard Muzak*

Contents

I. General remarks

The Austrian migration and asylum law has undergone constant change, particularly so in the last three decades.[1] At the same time, this area has become increasingly important both at the national and international level. Accordingly, there has been a

* Ao. Univ.-Prof. Dr. Gerhard Muzak is an Associate Professor at the Department of Constitutional and Administrative Law at the University of Vienna; gerhard.muzak@univie.ac.at.

[1] For the development of Austrian asylum law see Magdalena Pöschl, 'Migration und Mobilität', in Österreichischer Juristentag (ed.), *Verhandlungen des 19. Österreichischen Juristentages*, vol. I/1 (Wien: Manz, 2015) pp. 9-97; Gerhard Muzak, 'Die Kasuistik, Komplexität und Kurzfristigkeit des österreichischen Fremdenrechts', in Österreichischer Juristentag (ed.), *Verhandlungen des 19. Österreichischen Juristentages*, vol. I/2 (Wien: Manz, 2015) 23-47, pp. 24-30; Josef Rohrböck, *Das Asylgesetz 1991* (Wien: Orac, 1994), pp. 33-7.

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 138-151, https://doi.org/10.25365/vlr-2020-4-1-138.

significant increase in the density as well as complexity of the legal norms.[2] Also, the general trend towards a restrictive approach to immigration has become noticeable. In Austria today, migration law is very relevant in legal practice, which is reflected by an exorbitant number of decisions of the Administrative Court (VwGH) as well as the Constitutional Court (VfGH)[3]. These matters have also been an integral part of the public debate for more than a quarter of a century. During election times this topic is discussed in a polemical and irrational manner.

The relevant legal provisions have been frequently amended in the last years. They have also become much more complex, especially with regard to procedural matters. Since the Treaties of Amsterdam (1999) and Lisbon (2009) came into effect, EU law has become more influential due to a shift of competences and an increase in EU law-making in the field of asylum. These developments were among the reasons for the last major reform in 2005[4] which concerned the Asylum Act[5], the Aliens Police Act[6] and the Settlement and Residence Act[7]. These acts constitute the legal foundation of the current Austrian migration and asylum law. The Asylum Act regulates international protection (asylum according to the Geneva Convention relating to the status of refugees and subsidiary protection), whereas the Settlement and Residence Act governs medium and long term stays of six months or more and stays for work purposes. The Aliens Police Act does not only regulate alien police matters like expulsion; it also governs those aspects of short time stays, which are not fully harmonized under Union law (especially national visas). Additionally, there is a separate act that concerns the employment of third-country nationals. All these laws

[2] To illustrate this with some numbers: in 1968 the Asylum Act (*Asylgesetz – AsylG*) had only sixteen sections, in 1991 the amount was still manageable at twenty-eight. By 1997 it already had forty-six sections and by now it has seventy-five sections.

[3] To demonstrate the workload of Austria's High Courts of public law: In 2019, a total amount of 7.256 cases were brought to the Administrative Court, 3.705 regarding asylum and aliens' law. The number of cases on the subject of this matter in front of the Constitutional Court is even higher: Concerning only asylum law, the number even exceeded 75% of the total number of 5.219 new cases.

[4] Austrian Federal OJ I (*Bundesgesetzblatt I*) 2005/100; all Austrian federal statutes can be accessed via https://www.ris.bka.gv.at/Bund/ with their title, amendments can be found by their OJ number. See the overview by Wolf Szymanski, 'Fremdenrechtspaket 2005' (2005) *migralex* 68-73; with focus on the Asylum Act see Lamiss Magdalena Khakzadeh, 'Das AsylG 2005 – Neuerungen und verfassungsrechtliche Fragen' (2005) *migralex* 74-82.

[5] *Asylgesetz 2005 – AsylG 2005*, Austrian Federal OJ I 2005/100 as last amended by Austrian Federal OJ I 2020/146.

[6] *Fremdenpolizeigesetz – FPG*, Austrian Federal OJ I 2005/100 as last amended by Austrian Federal OJ I 2020/146.

[7] *Niederlassungs- und Aufenthaltsgesetz – NAG*, Austrian Federal OJ I 2005/100, as last amended by Austrian Federal OJ I 2020/146.

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 138-151, https://doi.org/10.25365/vlr-2020-4-1-138.

have been amended several times and in some aspects quite comprehensively, and in recent years there has also been a tendency towards increasingly casuistic, unsystematic provisions. The many reforms often occurred as consequences of specific incidents. Additionally, the Procedural Rules for the Federal Office for Immigration and Asylum[8] and the Integration Act[9] regulate the procedures at the competent government agency and extend the criteria for successful integration. However, their main points did not change in substance; they have just been transferred from the previous acts to the new ones. Only some of these changes resulted from EU law requirements.

At first glance, one might be surprised by the quantity and significance of the national provisions on migration and asylum, given that this is one of the areas which are determined by EU law. Art. 78 TFEU provides for a common policy, paragraph 2 even refers to a common European asylum system.[10] Still, the central issues concerning the prerequisites for granting protection and the asylum procedure continue to be determined only through directives: the Procedures Directive 2013/32/EU[11] and the Status Directive 2011/95/EU[12] leave the member states considerable leeway for implementation.

II. The Austrian Practice during the Migration Crisis

So what was the influence of the 2015 refugee crisis on the Austrian migration and asylum law? A central element of European asylum law is the Dublin III Regulation (EU) 2013/604[13]. In summer and fall 2015, this system became ultimately ineffective

[8] *BFA-Verfahrensgesetz – BFA-VG*, Austrian Federal OJ I 2012/87 as last amended by Austrian Federal OJ I 2020/146.

[9] *Integrationsgesetz – IntG,* Austrian Federal OJ I 2017/68 as last amended by Austrian Federal OJ I 2020/42.

[10] See Daniel Thym, 'Art. 78 AEUV', in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds.), *Das Recht der Europäischen Union: EUV/AEUV* (München: C.H. Beck, 2015), para. 11; Gerhard Muzak, 'Art. 78 AEUV', in Thomas Jaeger and Karl Stöger (eds.), *Kommentar zu EUV und AEUV* (Wien: Manz, 2012), para. 15.

[11] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

[12] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

[13] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 138-151, https://doi.org/10.25365/vlr-2020-4-1-138.

as all member states along the so-called 'Balkan route' neither applied a Dublin procedure nor made use of their discretionary powers to examine the applications themselves. Instead, they let the migrants proceed to the next state, sometimes even without registering their personal details. This was also how it was done in Austria. Not even random checks were carried out, although most of the migrants obviously would have needed visas. The Dublin III Regulation does not provide for such an approach. There is no other legal basis for this 'waving-through' attitude either. At the European level, it is interesting to note that Council Directive 2001/55/EC of 20th July 2001 on temporary protection in the event of a mass influx of displaced persons was not invoked. It provides for rights of residence through a Council Decision in exactly this kind of critical situation. Apparently, it was not possible to reach the consensus needed for such a decision in regard to Syria and Afghanistan, which have been the most significant countries of origin in this period. The Austrian migration law, in section 62 of the Asylum Act, provides for rights of residence in cases of a mass influx of refugees via a federal government regulation. This national instrument, which is in the discretion of the government and which would have had the same effect as the Council Directive 2001/55/EC was not used either due to political reasons. Furthermore, its conformity with EU law is doubtful. The approach taken appears questionable also from a legal policy point of view given that the laws on migration aim to maintain public peace, order and safety. While it appears plausible that due to the mass influx it was not possible to undertake seamless checks, the fact that sometimes this was not even attempted not only potentially contributed to an increased influx of migrants; eventually it also made public order and safety more fragile.

III. Legal measures resulting from the migration crisis

A. Time limited Asylum Status?

The events surrounding the refugee crisis left their mark on aspects of the Austrian migration and asylum law. While the refugee crisis was characterized by the non-implementation of some of the legal norms central to the migration and asylum policy, the subsequent tendency was to return to a less lenient approach, not least under the pressure of a changing public opinion that had shifted from a widespread 'culture of welcome' towards scepticism and rejection. A key point of the 2016 amendment of the Asylum act [14] was a change to the provisions applicable if the need

an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

[14] Austrian Federal OJ I 2016/24.

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 138-151, https://doi.org/10.25365/vlr-2020-4-1-138.

for protection expires.[15] This was referred to in the public debate as 'temporary asylum'. Whereas the Status Directive allows for the protection status to be limited initially to three years[16], in Austria, following a tradition that had until this point survived all amendments to the asylum law, the right of residence used to be granted for an indefinite period. A closer look at these new Austrian provisions shows, however, that the proposed concept of temporary asylum was not realized. Essentially, what was introduced was an annual review of the risk of persecution in the country of origin in the first three years after protection was granted; if this risk no longer exists, a revocation procedure is to be initiated, like it had been the case already in the past. This does not constitute a time limit of the status in the sense that it expires after three years, thus requiring a formal application for its renewal.[17]

Another aspect of the Austrian approach during the migration crisis attracted even more attention: On 20th January 2016, members of the Austrian federal government declared in a press conference that no more than 37,500 asylum applications should be filed in 2016.[18] Subsequently, expert opinions were obtained by the Austrian government on the issue of the admissibility of such restrictions[19], which concluded that such an upper limit was not provided for in the Refugee Convention and was therefore unlawful, but at the same time affirmed the admissibility of other 'emergency measures'. Thus, a new chapter entitled "Special Provisions for the Preservation of Public Order and the Protection of Domestic Security during the Operation of Border Controls" was added to the Asylum Act.[20] It authorizes the federal government to determine, by means of a regulation, that there is a threat to the maintenance of public order and the protection of national security. The legal

[15] § 3 (4) to (4b) in conjunction with § 7 (2a) Asylum Act 2005 as amended by Austrian Federal OJ I 2016/24. See Kevin Fredy Hinterberger, 'Das österreichische Asylgesetzänderungsgesetz 2016 als Antwort auf die europäische Migrationskrise' (2016) *ZEuS-Sonderband 2016* 185-206.

[16] Art. 24 of the Status Directive 2011/95/EU (OJ 2011 L337 p. 9).

[17] In this sense the Parliamentary Committee Report AB 1097 BlgNR 25. GP 1 states, that if the relevant circumstances in the country of origin do not change or if there are no other grounds for withdrawal, the residence permit is extended ex lege for an indefinite period; see also Gerhard Muzak, 'Aktuelle Herausforderungen für das Europäische und Österreichische Flüchtlingsrecht' (2017) EuR 109-117, pp. 113-4.

[18] This was announced after a summit on asylum between representatives of the federal government, the federal states and the municipalities. Later on, this number was described as a 'benchmark'. For the following years, corresponding numbers have been announced (35,000 for 2017, 30,000 for 2018, 25,000 for 2019). These determinations are of no legal relevance.

[19] Walter Obwexer and Bernd-Christian Funk, *Gutachten – Völker-, unions- und verfassungsrechtliche Rahmenbedingungen für den beim Asylgipfel am 20. 1. 2016 in Aussicht genommenen Richtwert für Flüchtlinge* (2016).

[20] See Gerhard Muzak, 'Aktuelle Herausforderungen', pp. 114-115.

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 138-151, https://doi.org/10.25365/vlr-2020-4-1-138.

effects of these regulations amount to a suspension of central provisions of asylum law, some of which are also prescribed by EU law. According to section 37 of the Asylum Act, the Federal Minister of the Interior may, by means of a regulation, establish registration points at the border. Applications for international protection by migrants who are not entitled to enter the federal territory must be filed in person with an agent of the public security service at the Schengen internal border (s. 38 para. 1 Asylum Act). Instead of the regular procedure at an initial reception centre, the admissibility of a rejection at the border or removal is determined against the standards of Articles 3 and 8 ECHR, and, if admissible, such measures shall be executed (s. 38 para. 3 Asylum Act). Especially relevant here is the connection to the legal area of human rights and fundamental freedoms, particularly to the ECHR, which assumes constitutional rank in Austria, and the CFREU, given that legal acts in migration and asylum matters may constitute an invasion into such rights, particularly regarding the prohibition of torture (Art. 3 ECHR) and in certain cases also the right to private and family life (Art. 8 ECHR, Art. 7 CFREU).

An examination of section 38 para 3 Asylum Act as special rule to see whether it complies with fundamental rights shows that it meets the substantial requirements of the relevant ECHR provisions.[21] In those cases in which the coercive measures would violate the principle of non-refoulement as derived from Art. 3 ECHR and explicitly laid down in Art. 19 para. 2 CFREU, or the right to private and family life pursuant to Art. 8 para. 2 ECHR, such measures may not be imposed even if an emergency regulation is applicable. However, it appears doubtful whether effective legal protection within the meaning of Art. 13 ECHR or Art. 47 CFREU (right to an effective remedy and to a fair trial) is provided. Art. 47 CFREU is not restricted, as is Art. 6 ECHR, to criminal law proceedings and civil rights, and thus also plays a role in asylum law. In the absence of an obligation to assess asylum applications in terms of their substance, the only legal remedy is to lodge a so-called 'Maßnahmenbeschwerde' with the competent administrative court. This is the general remedy available against such coercive measures. If it is upheld, entry shall be permitted and the application for international protection shall be processed (s. 41 para. 2 Asylum Act). However, in practice it can only be lodged from abroad, from the territory of the respective neighbouring country of Austria. Whether this is sufficient from the point of view of legal protection is not something that can be assessed in an abstract sense but on a case-by-case basis in the light of the particular situation in the respective state. In the course of an interpretation in conformity with the constitution, this aspect will have to be considered when examining the decision

[21] See also Gerhard Muzak, 'Aktuelle Herausforderungen', p. 115.

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 138-151, https://doi.org/10.25365/vlr-2020-4-1-138.

against the principle of non-refoulement. The actual effectiveness of the remedy is closely connected to the risk of a chain deportation that would infringe Art. 3 ECHR.

At the level of European Union law, Austria here relies on the *ordre public* provision of Art. 72 TFEU.[22] It is however doubtful whether it actually allows such far-reaching exceptions to secondary law at the national level. This also raises the question – not yet answered by the ECJ – whether Art. 78 para. 3 TFEU, which authorizes the Council to take provisional measures in the event of a sudden influx of third-country nationals, regulates this matter exclusively. Such EU law provisions, after all, aim at the suspension of secondary law.[23] The Austrian legislator is of the opinion that concurrent provisions at the member state level would also be admissible on the basis of Art. 72 TFEU.[24] In September 2016, the Federal Minister of the Interior sent out a draft version of such an emergency regulation[25], but no such regulation has yet been issued. Remarkably, in the discussion as to whether such a regulation should be enacted, the arguments did always refer to the numbers of applications for international protection at a certain time. As shown above this would not be in conformity with the law which does not at all comprehend numbers as a relevant criterion.

B. Introduction of border controls

The refugee crisis also resulted in several states temporarily reintroducing controls at the national borders within the Schengen area. The Schengen Borders Code[26] authorizes the Member States to implement these controls at the national level as a last resort in the event of a serious threat to public policy or internal security (Art. 25 et seq.) for an initial period of 30 days. The total period may not exceed six months; under exceptional circumstances, it may be extended to a maximum period of two years. The Schengen Borders Code also enables the Council to recommend border controls between member states in exceptional cases (Art. 29 para. 2).

[22] See Parliamentary Comittee Report AB 1097 BlgNR 25. GP. 4.

[23] Gerhard Muzak, 'Art. 78 AEUV', para 12; dissenting Daniel Thym, 'Art. 78 AEUV', para 48.

[24] Denying the compliance with Union law to that effect Peter Hilpold, 'Quotenregelungen zur Bewältigung des Flüchtlingsproblems – ein rechtlich gangbarer Weg' (2016) *migralex* 58-67, p. 65.

[25] This draft was published on the homepage of the Austrian Federal Ministry of the Interior https://www.bmi.gv.at/. The period of consultation ended on 5 October 2016.

[26] European Parliament and Council Regulation (EU) No 399/2016 (OJ 2016 L 77 p. 1) on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 138-151, https://doi.org/10.25365/vlr-2020-4-1-138.

The Austrian Border Control Act[27] in s. 10 para. 2 authorizes the Federal Minister of the Interior to issue a regulation according to which certain sections of the Schengen internal border may for a specific period only be crossed at designated border crossing points. In August 2015, such a regulation was issued and has since been repeatedly extended. It is still in force today in a modified form. Contrary to this regulation, migrants were mostly not checked, especially during the migration crisis in late summer 2015, initially not even randomly upon entry nor within the country. Although the regulation applied to the entire federal territory, border controls were in fact carried out only sporadically and only at those crossings particularly affected by great numbers of refugees (esp. Nickelsdorf, Spielfeld). The then effective regulation[28], which was valid until 13 November 2019, and the subsequent regulations[29] apply to the borders with Slovenia and Hungary in general. As the current refugee movement into the EU (e.g. via Bosnia) continues to be quite strong, there is an argument in terms of legal policy for the border checks to be maintained. The main argument against this is that border checks must be carried out at the external border (e.g. between Bosnia and Croatia) anyway and that it can be assumed that also Austria's neighboring states, such as Slovenia as a state having an external border of Schengen, will fulfil their respective obligations under EU law. However, it seems doubtful whether these Austrian checks are in conformity with EU law, in particular whether the two aforementioned EU law provisions may indeed be used alternately, resulting in permanent checks at the Schengen internal borders.[30]

C. Other amendments more restrictive

In the following years, some minor amendments introduced more restrictive conditions for the migrants concerned. This trend was encouraged by the fact that after the National Council elections in 2017 the government was made up of a 'centre-right coalition' of the Austrian People's Party (ÖVP) and the Freedom Party (FPÖ).

---

[27] *Grenzkontrollgesetz – GrekoG*, Austrian Federal OJ I 1996/435 as last amended by Austrian Federal OJ I 2018/93.

[28] Austrian Federal OJ II 2019/114.

[29] After the lecture it was prolonged by Austrian Federal OJ II 2019/316 until 14 May 2020, by Austrian Federal OJ II 2020/177 until 11 November 2020 and by Austrian Federal OJ II 2020/469 until 11 May 2021.

[30] By the way it has to be mentioned that in the meantime between finishing the manuscript and publishing there are additional border controls at the borders of almost all neighbouring countries during certain times because of the „corona crisis": Austrian Federal OJ II 2020/84, 2020/91, 2020/102, 2020/147, 2020/253, 2020/469, 2021/10, 2021/57, 2021/90; Filip Lukacic, 'Vorübergehende Wiedereinführung von Grenzkontrollen an Binnengrenzen' (2020) *migralex* 34-41, p. 34.

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 138-151, https://doi.org/10.25365/vlr-2020-4-1-138.

Hardly ever did these amendments change fundamental structures and principles. Most of the time it was more about details. In this respect, the refugee crisis reinforced the already existing trend towards even more casuistic and unsystematic provisions.

For instance, a Federal Constitutional Act on the Housing and Distribution of Migrants in Need of Protection and Assistance[31] was passed, which temporarily withdrew competencies from the federal provinces to allow exceptions to the building law for emergency accommodations and to compel municipalities to take in migrants.

Amendments from 2016[32] initially concerned technical aspects, namely an extension of the powers of police officers to determine a person's identity, combined with the authorization to use appropriate data applications. The power to remove foreigners who had entered the country illegally from Austrian territory without further proceedings (deportation) was extended from one week to two weeks starting from the date of entry. An important aspect is the establishment of a three-year waiting period for family reunification for those enjoying subsidiary protection[33], which the Constitutional Court subsequently considered to be compatible with the right to respect for private and family life (Art. 8 ECHR) and the principle of equality (Art. 7 Federal Constitutional Act [B-VG]), on account of the provisional character of their residence.[34]

An amendment passed in 2017[35] further increased the number of regulations in the area of migration law through a new 'Integration Act'. The legislator's aim is to promote the integration of foreigners who are legally in the country and to introduce them to European values. Its core instrument, though, the so-called 'Integration Agreement', which primarily stipulates a legal obligation to acquire the German language, had already been included years earlier in the Settlement and Residence Act. However, in the case of asylum seekers and those entitled to asylum under the Refugee Convention, failure to comply with these obligations may not result in administrative penalties and measures terminating residence. Therefore, this group of persons had previously not been within the intended scope of the law primarily.

---

[31] *Bundesverfassungsgesetz über die Unterbringung und Aufteilung von hilfs- und schutzbedürftigen Fremden*, Austrian Federal OJ I 2015/120.

[32] Austrian Federal OJ I 2016/24 and 25.

[33] § 35 (2) Asylum Act; see Philip Czech, 'Die Neuerungen des Asylrechtspakets 2016 – Einschränkungen des Familiennachzugs' (2016) FABL 15-22, pp. 17-20.

[34] Austrian Constitutional Court 10. 10. 2018, E 4248/2017; decisions of the Austrian Constitutional Court can be accessed via https://www.ris.bka.gv.at/Vfgh/ with their case number.

[35] Austrian Federal OJ I 2017/68; see Philip Czech, 'Integriert Euch!' (2017) FABL 23-35.

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 138-151, https://doi.org/10.25365/vlr-2020-4-1-138.

Since this amendment, they have been facing a reduction of the minimum welfare benefits as a legal consequence of non-compliance.

While not formally part of migration law, the the Integration act simultaneously adopted the 'Anti Veiling Act',[36] despite its broad formulation, de facto constitutes a burqa ban. The general compatibility with human rights and fundamental freedoms, of such a provision is now recognized in the case-law of the European Court of Human Rights[37]. The true purpose of the new Austrian law is rather indirectly expressed through a reference in the law to the purpose of integration by participation in society (section 1).

Another amendment from 2017[38] extended the powers of the immigration authorities, for example by introducing powers to enter and search and a longer admissible period for the detention of deportees, and restricted the freedom of movement of asylum seekers by means of territorial restrictions and requirements concerning the places of residence. A more fundamental new element of the Austrian asylum law is the introduction of an obligation to cooperate in obtaining documents necessary for forced departure (departure certificates). In practice, the lack of such documents often prevents the enforcement of measures to terminate residence. While the initiation of revocation of asylum status has been simplified by the same amendment, this cannot derogate the limited conditions laid down by international law (referring, in particular, to war crimes and other serious crimes).[39]

Reduced time periods to file an appeal have for years been a feature of legal amendments[40] as well as of Constitutional Court rulings that followed; the Constitutional Court repealed differently circumscribed provisions, which granted only two instead of four weeks for the remedy to the competent administrative court. The Constitutional Court saw no need to regulate the matter under Art. 11 para. 2 B-VG. Most recently[41], this was primarily justified on the grounds that, conversely to the situation of the petitioner, the authorities do not have sufficient means to speed

---

[36] *Anti-Gesichtsverhüllungsgesetz – AGesVG*, Austrian Federal OJ I 2017/68.

[37] ECHR 1. 7. 2014 S. A. S./France; 11. 7. 2017 Dakir/Belgium.

[38] Austrian Federal OJ I 2017/145.

[39] See for example Art. 1 para. F of the Geneva Convention on Refugees.

[40] Most recently Austrian Federal OJ I 2018/56 concerning the revocation of asylum status and the simultaneous admissibility of measures terminating residence.

[41] VfSlg 20.193; decisions of the Austrian Constitutional Court can be accessed via https://www.ris.bka.gv.at/Vfgh/ not only with their case number, but also with their collection number if – as in this case – they are published in the official collection.

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 138-151, https://doi.org/10.25365/vlr-2020-4-1-138.

up the administrative and judicial proceedings, for example in the form of shorter deadlines for decisions.

Another amendment from 2018[42] allows the authorities to confiscate the mobile phones of asylum seekers and to analyze the data in order to determine the routes they took from their country of origin.[43] Interestingly, according to a response by the Federal Minister of the Interior to a parliamentary question, this highly invasive method, which, however, might indeed help to objectify the results of asylum procedures, has not yet been applied due to data protection concerns. At the same time, the authorities also have the power to confiscate cash up to EUR 840, which, apart from a personal allowance of EUR 120, is to be used for the cost of the Basic Welfare Support. Whether the resulting adverse treatment of asylum seekers who carry cash as compared to those with bank or credit cards is justifiable in terms of the principle of equality remains questionable.

Amendments to citizenship law, in particular the abolition of the shorter residence requirement for persons entitled to asylum[44], were also adopted at the same time.

In 2019, there has been a particularly controversial discussion about the reorganization of the provision of legal assistance to asylum seekers.[45] Until now this has been provided by private associations, namely the 'Diakonie', which is affiliated with the Protestant Church, and 'Verein Menschenrechte Österreich', which has close ties to the Ministry of the Interior. In the future, legal advice will be delivered by the Federal Agency for Care and Support Services[46], which is a branch of the Federal Ministry of the Interior. Above all, this raises the question whether the legal advisors' autonomy and independence from instructions, as stipulated by law, are actually guaranteed.

Also – like the burqa ban – not strictly part of migration law is the new provision on social assistance that came into force on 1st June 2019[47], which can result in a waiting period throughout the payments are reduced if the language skills are inadequate.

---

[42] Austrian Federal OJ I 2018/56.

[43] §§ 35b, 38a Aliens Police Act, § 39a Procedural Rules for the Federal Office for Immigration and Asylum.

[44] Ten instead of six years according to § 11a (7) Citizenship Act (*Staatsbürgerschaftsgesetz – StbG*), Austrian Federal OJ I 1985/311 as last amended by Austrian Federal OJ I 2020/146.

[45] Austrian Federal OJ I 2019/53.

[46] § 52a Procedural Rules for the Federal Office for Immigration and Asylum.

[47] Previously called the minimum benefit; Austrian Federal OJ I 2019/41. After the lecture the law was partly repealed by the Austrian Constitutional Court because he found it to not be in conformity with the constitution; VfGH 12. 12. 2019, G 164/2019.

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 138-151, https://doi.org/10.25365/vlr-2020-4-1-138.

On the one hand, this seems problematic with regard to EU citizens; infringement proceedings under Union law are currently pending. On the other hand, this also indirectly creates an unequal treatment of recognized refugees compared to Austrian citizens, which raises concerns with regard to the requirement under Art. 24 of the Refugee Convention to treat recognized refugees and citizens equally in social law.

IV. Final remarks

On the whole, the refugee crisis and the legislative changes of the subsequent years present an ambivalent picture. The summer and autumn of 2015 saw massive deficits in the enforcement of both EU and domestic Austrian law. Neither the Dublin system nor Austrian migration law were applied. Later, Austria took the opposite approach towards the 'securisation' (in the sense of overemphasis of security) mentioned by speakers before, with top officials quoting maximum numbers that had never been adopted and would also be contrary to international law. Consistent enforcement of the laws already in force would potentially result in these numbers not being reached anyway. I would, therefore, like to conclude by emphasizing one aspect that has received little attention in the discussion, namely that of the rule of law. Observing its principles seems particularly important to me in an area like migration and asylum law, which is controversially and emotionally debated. This also includes that laws need to be transparent and easy to understand. Currently even experts of Austrian migration and asylum law are sometimes unsure of what regulations mean or how they apply. Therefore, a comprehensive reform of migration and asylum laws should be undertaken soon; this recodification should involve a close examination of whether the numerous detailed rules and exceptions, in particular special procedural rules, are necessary.

The events of recent years have, however, for the first time raised a problem in the area of migration and asylum law, which, although some had argued to the contrary, had not really existed before, namely the quantitative aspect of migration. Such a massive influx of foreigners, which affects only a few Member States, can undoubtedly be a legitimate reason for new laws. At the same time, the aspect of 'securisation' already mentioned in other lectures becomes evident[48]: many new provisions serve to avert real or assumed threats to public security. On the whole, the aim should be mastering the balancing act between preventing the risk of overstraining the asylum and migration systems and the social security and medical care sectors, as well as

[48] See for example the lecture of Mitja Horvat, 'Migration and security' presented at the Slovenian - Austrian Conference "Managing Migration and the Rule of Law" on September 29th in 2019; Magdalena Pöschl, 'Migration und Mobilität', pp. 46-8.

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 138-151, https://doi.org/10.25365/vlr-2020-4-1-138.

preventing political conflicts and taking necessary measures against terrorism,[49] while at the same time safeguarding the rule of law and the fundamental rights of those concerned.

[49] These risks are explained in detail and comprehensibly in the Parliamentary Comittee Report AB 1097 BlgNR 25. GP 13-23.

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 138-151, https://doi.org/10.25365/vlr-2020-4-1-138.

V. Bibliography

Philip Czech, 'Die Neuerungen des Asylrechtspakets 2016 – Einschränkungen des Familiennachzugs' (2016) *Fremden- und Asylrechtliche Blätter* 15-22

Philip Czech, 'Integriert Euch!' (2017) *Fremden- und Asylrechtliche Blätter* 23-35

Peter Hilpold, 'Quotenregelungen zur Bewältigung des Flüchtlingsproblems – ein rechtlich gangbarer Weg' (2016) *migralex* 58-67

Kevin Fredy Hinterberger, 'Das österreichische Asylgesetzänderungsgesetz 2016 als Antwort auf die europäische Migrationskrise' (2016) *Zeitschrift für Europarechtliche Studien – Sonderband 2016* 185-206

Lamiss Magdalena Khakzadeh, 'Das AsylG 2005 – Neuerungen und verfassungsrechtliche Fragen' (2005) *migralex* 74-82

Filip Lukacic, 'Vorübergehende Wiedereinführung von Grenzkontrollen an Binnengrenzen' (2020) *migralex* 34-41

Gerhard Muzak, 'Art. 78 AEUV', in Thomas Jaeger and Karl Stöger (eds.), *Kommentar zu EUV und AEUV* (Wien: Manz, 2012)

Gerhard Muzak, 'Die Kasuistik, Komplexität und Kurzfristigkeit des österreichischen Fremdenrechts', in Österreichischer Juristentag (ed.), *Verhandlungen des 19. Österreichischen Juristentages*, vol. I/2 (Wien: Manz, 2015) 23-47

Gerhard Muzak, 'Aktuelle Herausforderungen für das Europäische und Österreichische Flüchtlingsrecht' (2017) *Europarecht* 109-117

Walter Obwexer and Bernd-Christian Funk, *Gutachten – Völker-, unions- und verfassungsrechtliche Rahmenbedingungen für den beim Asylgipfel am 20. 1. 2016 in Aussicht genommenen Richtwert für Flüchtlinge* (2016)

Magdalena Pöschl, 'Migration und Mobilität', in Österreichischer Juristentag (ed.), *Verhandlungen des 19. Österreichischen Juristentages*, vol. I/1 (Wien: Manz, 2015)

Josef Rohrböck, *Das Asylgesetz 1991* (Wien: Orac, 1994)

Wolf Szymanski, 'Fremdenrechtspaket 2005' (2005) *migralex* 68-73

Daniel Thym, 'Art. 78 AEUV', in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds.), *Das Recht der Europäischen Union: EUV/AEUV* (München: C.H. Beck, 2015)

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 138-151, https://doi.org/10.25365/vlr-2020-4-1-138.