E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
*RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX*

# REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN AUSTRIA IN 2004

submitted to the Network by **Manfred NOWAK** and **Alexander LUBICH**

on 3 January 2005

Reference: CFR-CDF/AT/2004

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Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lithuanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), M. Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moyse (Luxembourg), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par O. De Schutter, assisté par V. Verbruggen.
Les documents du Réseau peuvent être consultés via :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice, Freedom and Security), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

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# CHAPTER I : DIGNITY

## Article 1. Human Dignity

*Legislative initiatives, national case law and practices of national authorities*

A study[1] on the **use of language and expressions by the Austrian law enforcement officials** examining in total 394 written complaints of persons involved in police action and the subsequent official internal communication of the authorities revealed that in many cases the language used by police officers in the discourse with involved civilians (suspects, witnesses, bystanders, complainants) on the one hand and in written reports in police files on the other hand is not adequate to the situation. Often sufficient susceptibility to personal dignity is missing. The scientists noticed the wide-spread phenomenon that police officers tend to exalt themselves while at the same time degrade their communication partners by way of speaking loud or even shouting, by employing cynicism, and by addressing people informally and without the politeness usually expected between unfamiliar persons. Moreover, it could be discovered that in internal police reports persons, in particular, foreigners, are addressed not with their names but with reference to their utter appearance, ethnic origin or social standing, for example, "the black", "the Romanian", "the unemployed", "the blonde" "the black-haired", "the Asian", "the Muslim", etc. although this would only be admissible for purposes of distinction between several people so long as the person's name is not known. Otherwise the stereotypical repetition even of at first sight perfectly appropriate references like "Black-African" becomes discriminatory. Instead the correct address should always be Mr. or Ms. followed by the respective family name.
Drawing on this scientific linguistic analysis of police language, the Human Rights Advisory Board, which had initially encouraged the Minister to commission the study in 2001, issued several recommendations[2] which centre on the proper education of police cadets in the Security Academy as well as on further training courses for police officers and civil servants. It is recommended to develop a special module dealing with the topic of "(discriminatory) use of language" and to ensure that the teaching personnel for the security forces are specially trained and sensitive to that issue so that the personal dignity of the civilians having contact with the police is preserved.

*Positive aspects*

**In January 2004, the Supreme Court[3] determined that the decisions by the inferior courts previously stating that the expression "damn nigger/negro" ("*Scheiss-Neger*") used by a traffic police officer during a stop-and-search operation did not touch upon the human dignity of the person addressed violated the law.**

In summer 2002 a police officer stopped the car of a Congolese citizen and recognised refugee Sedon N. When the driver wanted his papers back, the policeman called him a "damn nigger/negroe", which was witnessed by several people. Sedon N., living with his family in Austria, decided to have criminal proceedings initiated against the policeman by the Public Prosecutor's Office. However, at the Linz District Court the judge immediately closed the proceedings arguing that the committed offence did not amount to an insult directed against the person for belonging to an ethnic group or race violating his human dignity and therefore was not such as to be prosecuted *ex officio*, as provided by section 117 paragraph 3 of the

[1] Internationales Zentrum für Kulturen und Sprachen (Projektleitung) „Studie zum Sprachgebrauch der österreichischen Exekutive. Eine diskursanalytische Untersuchung schriftlicher Beschwerden und des behördlichen Schriftverkehrs", available at http://www.menschenrechtsbeirat.at (23.12.2004).
[2] Empfehlung des MRB aus dem Bericht „*Sprachgebrauch in der Sicherheitsexekutive*" of March 2004, available at http://www.menschenrechtsbeirat.at (23.12.2004).
[3] OGH 14.01.2004, 13 Os 154/03.

Criminal Code. Rather, it was a normal insult against a single person that could only be prosecuted by and at the expense of the person aggrieved. Following the appeal by the Public Prosecutor, the Linz Regional Court confirmed the decision stating that a violation of human dignity could only be assumed if someone was directly or indirectly and plainly denied the right to be considered a human being, which could not be inferred from the used expression. Moreover, the insult was directed against an individual person and not against the black race as a whole. The Supreme Court finally corrected the decisions after the Procurator General instigated a revision of the case before the highest court by filing a plea of nullity for the consistency of the law and held that the expression "damn nigger/negro" degrades the addressed person for his or her belonging to the black race and also violates the human dignity of the individual concerned. While the Ministry of Justice and the Public Prosecutor welcomed the decision for clarifying the law by duly taking into consideration the right to human dignity, the victim's lawyer remarked that the judgement of the Supreme Court did not result in renewed proceedings in the case at hand as the violation of the law by the inferior courts had no negative impact or disadvantage for the accused police officer. Only internal disciplinary proceedings are pending. It is thus conceived to bring the case before the European Court of Human Rights.[4]

**Article 2. Right to life**

Rules regarding the engagement of security forces (use of firearms)

*Legislative initiatives, national case law and practices of national authorities*

**Following the complaint of Ms Wague, whose husband had died during a police operation in Vienna in July 2003,[5] the Vienna Independent Administrative Tribunal declared the operation unlawful and heavily criticised the refusal of the involved police officers to give testimony in the proceedings that caused much public attention.[6] The Ministry of the Interior appealed the decision which is now pending before the Administrative Court.**

On 29 January 2004 the Vienna Independent Administrative Tribunal chaired by Wolfgang Helm found that the six police officers involved lawfully applied handcuffs in order to bring Mr Wague to a psychiatric hospital but breached the law and human rights when they subsequently started to fix him on the ground with his face down by using massive force and their body weight, partly standing on him, and by mistreating him, while 3 ambulance men including an emergency physician called for assistance were standing by. Also the application of shackles on the legs of the then already motionless Mr Wague was held to be unlawful. Chairman Helm was particularly upset by the continuous refusal of the police officers summoned as witnesses before the Tribunal to answer any questions concerning the arresting procedure of that night. Repeatedly the officers invoked their right to remain silent for reasons of not incriminating themselves, even though they were reminded that they only had the right to refrain from answering single questions. As the police officers consequently persisted in their behaviour the chairman responded with the announcement of disciplinary measures and also addressed the issue in his reasoning by saying that such understanding of esprit de corps as demonstrated by the police officers in the hearings would effectively mean the end of the rule of law. In an interview with the daily *Die Presse*, Mr Helm explicitly said that "the officers are representing the state and are thus bound to give account before the organs of the state (…) If this becomes routine, we can close down the tribunal."[7] The policemen justified their outspoken silence before the Independent Administrative Tribunal by referring to the

[4] „Als ‚minderwertig' abqualifiziert" in *Die Presse* of 6 March 2004.
[5] See Report on the Situation of Fundamental Rights in Austria in 2003, p11.
[6] UVS Wien 29.01.2004, GZ 02/13/6598/2003.
[7] „Den Verwaltungssenat zusperren" in *Die Presse* of 17 January 2004.

pending court proceedings in this case, although the investigations on account of negligent manslaughter under particularly dangerous circumstances carried out by the Public Prosecutor were at that time only directed against the emergency physician and "unknown perpetrators". Later in April, the Public Prosecutor's Office confirmed that the investigations were specified and directed also against four policemen who were hence considered as direct suspects next to the physician, basing its decision on the results of the expert opinion dealing with the underlying questions of emergency medical aid coming to the essential conclusion that presumably the four officers did not do everything they could have done to prevent the death of Mr Wague.[8] This step gave rise to some hope that the prosecutor would deal with the issue in a more unbiased way than the police, given that these conclusions contrast sharply with the previous findings of the Bureau of Internal Affairs (*Büro für Interne Angelegenheiten - BIA*) subordinate to the Ministry of the Interior that could not see any hints for a wrongful behaviour of the involved police officers and found that they had acted correctly. The fact that the investigations against police officers were conducted by another branch of the police, meaning in effect that the police are investigating themselves with little prospect for an impartial approach and without supervision by an independent authority, was immediately and, as it appeared, rightly criticised by the Human Rights Advisory Board in 2003. However, it remains that one and a half year after the incident there is still no indictment, a fact that the Public Prosecutor blamed mainly on one of the commissioned experts who did not manage to deliver the medical expert opinion together with a requested complementary part for a period of almost one year.[9] It is to be hoped that the Public Prosecutor will soon decide on this question

**Another case where the use of firearms by the police in doubtful circumstances led to fatal injuries of the victim is that of the 28-year-old ethnic Kurd Binali Ilter who attacked a policeman with a small glass bottle of mineral water. In the first decision of the Independent Administrative Tribunal, which was called to decide on the legality of the deadly police action upon a complaint submitted by his brother, the Chairman saw nothing unlawful in the police operation but his decision was annulled by the Constitutional Court for being completely arbitrary. The case was remitted to the Tribunal for carrying out renewed proceedings which are still outstanding to date. In the mean time, the police officer accused of negligent manslaughter was acquitted at first instance by the Vienna Regional Criminal Court but the decision has not yet become final as the Public Prosecutor immediately appealed against it.**

Mr Ilter, who was in a state of mental disorder due to his schizophrenia, was shot by the police in Vienna on 31 August 2002 after he threw a small glass bottle of mineral water (0,33l) onto a police car and started to attack the police officers on the scene with a second bottle in his hand. He was reported to the police when he tried to rob a fashion store and the handbag of a woman on the street, but the shopkeeper and the woman both said later that they realised he was not of sound mind and could easily be driven away. On 29 June 2004 the Constitutional Court[10], upon a complaint by the family of Mr Ilter, quashed the prior decision of the Vienna Independent Administrative Tribunal that had found the use of firearms legal and justified by self-defence and demanded the renewal of the proceedings. In its judgement the Constitutional Court said that the decision of the Tribunal was arbitrary as it lacked any reasoning on the significant question whether the use of firearms was necessary by all means in the circumstances of that case or if the situation could have been brought under control also with other less harmful means, thereby violating the constitutional principle of equality before the law and the right to life. The new decision of the Tribunal has not yet been rendered.
Meanwhile, on 3 December 2004, the criminal proceedings in the Vienna Regional Criminal Court against the police officer Christian S. who had fired the two deadly shots ended with an

[8] *Die Presse* of 17 April 2004.
[9] *Falter* No 42/04.
[10] VfGH 29.06.2004, B 1452/03.

acquittal of the accused. The judgement was essentially based on two expert opinions which made it possible for the judge to assume that the use of the firearm by the policeman was justified by self-defence in the given situation. The "independent" expert heard by the court on shooting and operation techniques, being employed by the Salzburg Police Department, is directly responsible for the shooting training in the Ministry of the Interior and was therefore rejected as biased by both the Public Prosecutor and the attorney of the victim's family. Nevertheless the judge defended him and he presented the key conclusions of his opinion by declaring that the accused had no other opportunity than firing the two shots into Mr Ilter's chest due to his deficiencies in knowledge, operational training and joint action. Moreover, he claimed that it was almost impossible in an emergency situation even for a person well trained in the use of firearms to fire well targeted shots, which applies even more so for the accused policeman Christian S. who had a total of 39 training hours since his entry into service in 1993 and fired in average 312 training shots per year. The next expert being renowned for his technical and practical experience with weapons has no links with the police and he was of the opinion that the shots into the waist were not necessary but should have been directed also to his lower extremities. He criticised that the officer did not even try to shoot at his legs and recommended an inspection of the site, but the judge refused and initially did not want to read out his written opinion.[11] The forensic expert later explained that even instant and efficient medical treatment could have saved the fatally wounded Mr Ilter due to his internal bleedings and that it was impossible for medical laymen to realise how serious the injuries were. Asked by the judge what injuries a 0.33l glass bottle filled with mineral water could normally cause the expert replied that broken bones or cuts from splintered glass were possible but hardly any life threatening injuries, however, in seldom cases such an attack could take a lethal course. So the judge preferred to follow the experts' opinions that the accused could not personally be blamed for his bad training in the use of firearms and operation tactics and that it could not be completely excluded that the use of the bottle might under special circumstances have led to fatal injuries and acquitted the police officer. Since the Public Prosecutor announced to file an appeal the decision is not final.

**The third case involving the deadly use of firearms by the police was again treated in the Vienna Independent Administrative Tribunal[12] and concerned the death of the Romanian citizen Nicolae J. after the police stopped his lorry in a car chase. The operation was found to be unlawful, but so far criminal proceedings have not been launched against the responsible police officer.**

Four policemen were at the scene, two from the special operations forces WEGA and two from the regular city police, and tried to get control of the man who ran amok and carried a knife. One of the WEGA officers attempted to de-escalate the situation by addressing the man who had left the cockpit of his lorry and stood in a niche of a wall. But the man suddenly ran back to his lorry, jumped in and started to move back and forward again. When the same WEGA officer fired a warning shot he left the lorry again and ran towards one of the city police officers who felt to be attacked. His colleague then fired the fatal shot into the man's back from a distance of about 10 metres to help his colleague out, as he claimed in the proceedings before the Tribunal. One policeman also defended the shot by testifying that Nicolae J. made stabbing moves with his knife while standing in the niche at the wall, however, this statement was not confirmed by an eye witness of the operation, who said that he was relatively calm but wondered why he managed to return and get back in his lorry despite the presence of four policemen. She further remarked that the actions taken by the police officers did not seem to be very structured. On 18 August 2004 the chairman of the Tribunal closed the proceedings holding that the officers failed to make plausible that the

[11] „Wie in der Türkei" in *Falter* No 44/04.
[12] „UVS-Urteil zu getötetem Amokfahrer: Polizeieinsatz rechtswidrig" in Online Dienst der *Tiroler Tageszeitung* of 18 August 2004 (http://www.tirol.com), *Die Presse* of 19 August 2004.

assisted self-defence was necessary in that very situation. Being excessive and disproportionate the use of the firearm was thus found to be unlawful.

*Positive aspects*

**The tragic death of Cheibani Wague who suffocated in consequence of the police trying to fix him on the ground in a face-down position, and the course of the subsequent police investigation led the Human Rights Advisory Board to issue two comprehensive reports, one on the "Application of coercive police measures – Minimising the risks in problematic situations"[13] with special attention to the methods of arresting and fixing a person, and the second on the "Reaction to the alleged human rights violations"[14] analysing how the state, in particular the police and law enforcement authorities, copes with being confronted with human rights violation.**

In its special session on 2 September 2003, the Human Rights Advisory Board (HRAB) tasked a working group consisting of physicians, experts from the Ministry of the Interior and members of the Advisory Board with preparing a report on the question whether the applicable rules and guidelines for the fixing of persons on the ground sufficed or could be improved. On 20 April 2004 the finalised report which extended beyond the mere medical-technical questions of the fixing process to include a comprehensive observation of the course of police operations from a human rights point of view, could be adopted by the Advisory Board. The recommendations focus on the four areas training, de-escalation, fixing measures, and post-processing. As to the adequate training of policemen and –women, the HRAB emphasised the importance of the practical implementation of new guidelines which are useless if they are not brought to the attention of the police officers on the streets and conveyed with a sustainable impact on the way police officers act in practise. The aim must thus be to make officers sensitive for situations that run the risk of escalating and to provide them with the knowledge to handle difficult situations without violating human rights. Also preventive in nature are the measures recommended under the principle of de-escalation. The officers should learn how to deal with strongly emotionalised persons, mentally disabled persons, or marginalised groups with different cultural or social backgrounds, including alternative ways of action beyond traditional behavioural patterns. After weighing the risks, this may also mean to pause with the enforcement action, postpone or even abort it. Concerning the fixing measures it is important that they are diligently documented and that counteractions of the person concerned are not exclusively regarded as resistance but also as possible indications for a life-threatening situation, which would then require immediate checks of the vital functions. In the post-processing phase the involved officers should receive psychological counselling and the entire police operation that escalated or turned out problematic should be thoroughly analysed and evaluated so that others can learn from it.
The right to life, protected on the national and international level, obliges the State to carry out an official examination without delay of any incident where a person suffers a violent death in a course of action attributable to the State in an efficient, independent and unbiased manner. Victims of human rights violations have the right to an efficient remedy and reparations and the State is under an obligation to rectify the committed wrongs. In the view of the HRAB this must be done by closely observing the following steps, namely by ending persistent violations of human rights; ascertaining the underlying facts and circumstances accompanied by an open information policy; providing an official declaration or court decision restoring the dignity, the reputation and the rights of the victim and its relatives

[13] Bericht des MRB zum „*Einsatz polizeilicher Zwangsgewalt – Risikominimierung in Problemsituationen*" of April 2004, available at http://www.menschenrechtsbeirat.at (23.12.2004).
[14] Bericht des MRB zur „*Reaktion auf behauptete Menschenrechtsverletzungen*" of July 2004, available at http://www.menschenrechtsbeirat.at (23.12.2004). In its Annual Report 2003 the Human Rights Advisory Board regretted that only 50% of the recommendations issued so far have been implemented fully or at least predominantly.

respectively; by expressing a public excuse to the victim including the acknowledgement of the established facts and of the political responsibility; by imposing judicial, administrative or disciplinary sanctions on those being individually responsible; and by incorporating these principles in human rights trainings. The Advisory Board therefore recommends elaborating a comprehensive model for investigations into charges of abusive violence by State organs along the sketched lines and comparing the different approaches taken in other countries. Due to the experiences made in the case of Mr. Wague's death the HRAB also reminded the authorities and the Ministry of the Interior to exercise public restraint in drawing preliminary conclusions and giving statements that could be interpreted as biased. Finally, referring to the persistent refusal to give testimony in the proceedings before the Vienna Independent Administrative Tribunal of the officers involved in the police action leading to the death of Cheibani Wague, the Human Rights Advisory Board made clear that the individual right not to incriminate oneself cannot be taken as a pretext for the State not to abide by its obligation to do everything it can to examine and resolve the case.

*Reasons for concern*

It is to be noted that the reported cases of police violence or misuse of firearms by police officers have a common feature. With the exception of members of special police units the vast majority of police officers cannot properly cope with situations that tend to escalate due to their training deficits. Many incidents of the police violating human rights could have been avoided if the policemen involved had received a better education in methods of de-escalation, operation techniques, the use of firearms, and in acting as a structured team with a clear division of tasks. It appears from the analysis of the above cases that police officers are not adequately prepared and lack the specific knowledge for operations that imply the danger of getting out of control. It is therefore recommended to develop training courses for officers on how to act and react in escalating situations and additional instructions for the use of firearms in self-defence.

Domestic violence (especially as exercised against women)

*Legislative initiatives, national case law and practices of national authorities*

Parliament adopted the comprehensive legislative package reforming the Code on Criminal Procedure (*Strafprozessordnung*) in Austria which also contains measures that will bring a **better protection and status for victims in the criminal proceedings** and is expected to benefit notably women who are subject to domestic violence. The new regulations will implement the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, but will not come into force before January 2008. Amnesty International expressed its disappointment about this fact.

Other relevant developments

*Legislative initiatives, national case law and practices of national authorities*

On the hot day of 19 August 2004, **Edwin Ndubu, a 37-year-old Nigerian citizen** imprisoned for drug-dealing **died in the prison of Krems-Stein after a rage attack**. After the usual one-hour walk in the yard provided by law the detainee should return to his prison room but violently resisted all attempts to calm him down. In his rage the man, infected with HIV and suffering from hepatitis C, took a bread knife out of his pocket and attacked several prison wards. Members of a specially trained unit finally managed to bring him down in his cell after the use of pepper spray and teargas allegedly had no impact. A physician then gave him an injection with tranquilising Valium and he was moved to a high-security prison room where he died shortly afterwards. The attack left five officers and another inmate with injuries and the uncertainty of an infection with HIV. The quickly carried out autopsy was said in a

preliminary report to the Ministry of Justice to have revealed signs for a heart attack due to the bad general physical condition of Mr Ndubu in combination with extreme stress and massive shortness of breath following the inhalation of teargas. But it was also leaked that the body of the dead prisoner was covered all over with haematoma which casts some doubts on whether the wards acted proportionately. Nevertheless the coroner's report concluded that there were no coherent hints for mistreatment and therefore it is rather unlikely that the Public Prosecutor will further investigate the case. In the mean time the prison ward union demanded to equip the staff with electro-shock devices so that inmates running amok could easily be controlled and the risk of an infection for prison wards be reduced. Amnesty International quickly warned in a response of such devices being willingly used for torture.[15] On 10 October the five officers involved each received a certificate of commendation together with a one-time payment of EUR 2.000,-- and were praised by the Minister of Justice for their "unparalleled commitment".
According to the Ministry of Justice[16], the usual procedure in case a prison ward is suspected of any misconduct against a prisoner is such that the competent superior authority is informed and, if necessary, disciplinary proceedings are initiated. In any case where an inmate dies under unclear circumstances the Public Prosecutor will order an autopsy and the necessary investigations, as happened also in the aftermath of the death of Edwin Ndubu. However, there is no mandatory further education on how to act in crisis situations or special training courses for prison wards other than the courses in constitutional law and psychology during their basic education that would address the issues of human rights and de-escalation methods.

## Article 3. Right to the integrity of the person

Rights of the patients

*Positive aspects*

For the first time in Austria, a **law deals comprehensively with the special situation of patients in nursing homes, hospitals and comparable institutions** and provides a clear legal framework for the work of the care personnel and guidance on ensuing questions regarding the protection of the fundamental right of the patients to personal freedom and its justified limitations in this context. Taking into account the vulnerability of old or physically and mentally disabled patients the Stay at Care Institutions Act (*Heimaufenthaltsgesetz*)[17] is to be welcomed for delineating the rights and remedies of the patients against ill-treatment and the corresponding duties of the care personnel.

Other relevant developments

*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

According to information received from the Federal Chancellery, there is now a four party consensus on the necessity to sign and ratify the **Council of Europe Biomedicine Convention** but it remains unclear when this common understanding will be transformed into a legal act.[18]

[15] *Falter* No 35/04.
[16] Ministry of Justice, written response to a questionnaire of 27 December 2004.
[17] Federal Law Gazette (BGBl) I No 11/2004.
[18] Requested contribution by the Federal Chancellery, received on 28 December 2004.

*Legislative initiatives, national case law and practices of national authorities*

**Austria is about to transpose** Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions (**Biotechnology Directive**) as the Government introduced a respective bill to Parliament on 16 September 2004.[19] Presently dealt with in the Economics Committee, the draft legislation closely follows the wording of the Directive. For reasons of setting ethical limits in the field of biotechnological patents the catalogue of forbidden patents shall be formulated more precisely and comprehensively. Furthermore, a special reference to the key provisions of the Reproductive Medicine Act (*Fortpflanzungsmedizingesetz*) shall be included in the Patent Act (*Patentgesetz*) to underline their importance for the interpretation of the public order clause.

## Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

Conditions of detention and external supervision of the places of detention

### Penal institutions

*Legislative initiatives, national case law and practices of national authorities*

**Almost exploding numbers of prisoners in Austrian penal institutions led to an unbearable situation and sometimes even disastrous conditions for detainees and prison wards and prompted much public discussion about what remedial measures should be pursued. Depending on the different attitudes about the general purpose of the penal system the suggestions for improvement and relief differed widely.**

On the reference date of 1 December 2004 Austrian prisons counted a total of 9.043 inmates which marks the preliminary end of a continuous rise of the number of imprisoned persons.[20] Since 1 January 2002, when 6.840 persons were imprisoned, the numbers almost exploded by 32% leading to a state of emergency in the penal system that is driven to the verge of becoming unmanageable. Franz Pauser, chairman of the prison ward union, warned in a passionate appeal in a press conference on 17 December that the situation was getting out of control as the prisoners had to stay in their cells for 23 hours a day due to the huge lack of supervising personnel.[21] "Aggression, stress and emotions are running high", said Wolfgang Gratz, Professor for Criminology and member of the prison experts group *Kriminalpolitische Initiative*, "but large numbers of prisoners are no law of nature, politics have always intervened".[22]
While the Ministry of Justice blames the increase of crime in the Vienna area, particularly the (organised) crimes against property by eastern European criminals (not including the accession countries in 2004) for the extremely tense situation in the prisons, it is evident from a comparison between the figures on detention pending trial and detention after conviction that the problem is certainly also homemade. Over a period of four years the number of detainees pending trial rose by 50% while the corresponding development of the number of imprisoned convicts only showed an increase by 13%. Furthermore, it should be noted that the share of foreigners in pre-trial detention is about 60%, while their share in detention after conviction is only around 40%.[23] Taking together all criminal convictions (imprisonment, sentences on probation, and fines) the ratio between Austrian citizens and foreigners is 70:30. It follows from these rates and the fact that the rise of the occupancy in detention centres is considerably higher than the general rise in the crime rate that the judiciary is more readily

[19] Regierungsvorlage 615 d.B. XXII. GP.
[20] Ministry of Justice, written response to a questionnaire of 27 December 2004.
[21] "Bitte um Hilfe, bevor es Tote gibt" in *Die Presse* of 18 December 2004.
[22] "Gedränge im Knast" in *Falter* no. 21/04.
[23] *Der Standard* online (http://www.derstandard.at) of 4 November 2004.

prepared to impose detention pending trial on foreign offenders. On 21 October the ranking of the countries of origin of foreign judicial detainees saw Nigeria on top with 440 persons, then the former Yugoslavia with 377 persons, followed by Romania (256), Georgia (253) and Turkey (239).[24] The reason for that development is seen in the fear of judges that foreign offenders not settled in Austria may escape justice by fleeing the country if they are not kept in detention, and thus they often tend to employ a fairly wide interpretation of the conditions for detention pending trial even in cases of minor thefts where a sentence suspended on probation is likely.

Unfortunately it must be said that the Government failed to react accordingly and quickly enough in order to ease the dramatic conditions in the Austrian prisons. Short-term measures conceived in the Ministry of Justice comprise the extension of detention capacities by building new prisons (a new prison is envisaged in Leoben, Province of Styria, to accommodate 200 prisoners) or extending the existing prisons, and measures to reduce the occupancy in particular by accelerating the devolution of the enforcement of the sentence to the respective state of origin of the foreign inmates. But there are no definite commitments to employ more staff despite repeated requests by the Ministry of Justice. Instead, in an immediate measure in mid-December, the Defence Ministry deployed 70 soldiers who were said to have volunteered for the operation to assist in the prisons, whereby it was pledged that the soldiers would not have any contact with the inmates but would be used for video surveillance and access control.

One project that was first voiced in January by the then Minister of Justice, Dieter Böhmdorfer, was the creative idea to finance the building of a prison in Romania and negotiate an agreement that would oblige Romania to take over the responsibility for the enforcement of sentences against their nationals directly after their arrest in Austria upon the application of the Public Prosecutor. Together with the suspects the translated files and evidence would be sent to the Romanian authorities. Similar negotiations were supposed to be underway between Romania and Italy.[25] The Council of Ministers approved the idea on 12 May 2004 after Romania signalled that it would be prepared to co-operate in this undertaking and legal doubts about the legality of transferring suspects or prisoners to the state of origin against their will under international law were dispelled. Costs for detention as well as the building costs for a new prison were said to be ten times lower in Romania: while one day of detention costs EUR 10 in Romania, it is EUR 100 in Austria. If the enforcement of sentences of the approximately 300 Romanian prisoners in Austria could be outsourced to that country this would save EUR 10 million per year, according to calculations by the Ministry of Justice. The Ministry is also convinced that the maintenance of EU-standards in the penal system should be guaranteed by the Romanian efforts to comply with the requirements of chapter 28 on "Justice and Home Affairs" in the framework of the accession negotiations with the European Union. If everything works out properly, the project will allegedly create a win-win situation. Romania gets financed a new modern prison built by an Austrian construction company and can expect a positive impact for the employment situation in the Romanian town of Caracal, which is the most likely place for the project to be realised. Austria on the other hand may save money and would gain some free space in its overcrowded prisons. The Romanian offenders, finally, would have the major advantage to be closer to their relatives and in a familiar environment where they can communicate in their own language, provided, of course, that the European minimum standards for the treatment of detainees are observed. Whether this is truly an effective way that deserves to be followed is however questionable, as such co-operation does not address the real causes responsible for the influx of criminals from that area. Repeated critique about the plans also came from the opposition parties that objected to the undertaking by calling it red herring and pure populism and demanded instead reforms concerning the conditional early release, the conditions for imposing pre-trial detention, therapy for drug consumers instead of punishment, and the clarification of the

[24] *Die Presse* of 16 December 2004 referring to data provided by the Ministry of Justice.
[25] „Gefängnis in Rumänien" in *Die Presse* of 19 January 2004.

definition of the term "professional" (*gewerbsmäßig*) in connection with a crime such as shoplifting.[26]

*Reasons for concern*

Regarding the elaboration of a new **Regulation on Police Detention (*Anhalteordnung*)**, the HRAB was prompted to dedicate an own profound inquiry, which started in 2002, into the conditions of detention followed by a subsequent set of recommendations dealing with that issue.[27] The results of the work were feeding a catalogue of guidelines providing minimum standards for the detention of persons that closely rely on the standards recommended by the European Committee for the Prevention of Torture and shall be permanently kept up to date. **Improvements to be made concern various areas**, notably the immediate detention conditions (site, size, equipment and condition of the prison cell, air ventilation, sufficient light), sanitary rooms, clothing, possibility of activities and occupation, possibility of walking outdoors in the yard, food, personal hygiene (showers, toilet, access to hygiene products), contact with outside persons (contact with relatives, friends, lawyers, interpreters; telephone calls, letters, visits). The catalogue is primarily meant to be used as a uniform standard and yardstick for the commissions visiting places of police detention in order to facilitate their work, but is, of course, also addressed to the law enforcement authorities so that they can fight drawbacks and remedy deficiencies where they arise. It was also stressed by the HRAB that the different legal basis and duration of the detention should be taken into account by the revised Police Detention Regulations and implemented by the police so that a suspect of murder is treated differently as regards the degree of restrictive security measures applied than a person detained merely for the purpose of effecting his or her deportation.

**Institutions for the detention of persons with a mental disability**

*Legislative initiatives, national case law and practices of national authorities*

In Austria, ever more **persons with mental disorder and a criminal record are not adequately accommodated** in specially equipped institutions but in regular prisons. An official of the Ministry of Justice said that currently a clear regression is experienced in the penal system with the number of detainees with mental disbilities exploding, whereas at the same time the medical staff is not increasing.[28] Although the Detention Act (*Unterbringungsgesetz*) provides for persons with mental disabilities that they primarily receive ambulant treatment and only be detained against their will in cases where the patients might harm others or themselves, the ambulant treatment was skipped for budgetary reasons. As a consequence mentally disabled persons become criminal more quickly and more often end up in prison. Within three years the total number of persons detained in Austrian prisons has risen by 30% of which a considerable part must be regarded as mentally instable or ill. In the prison Krems-Stein, for example, of about 830 detainees one third should better be treated in psychiatric centres.[29] In the prison Vienna-Josefstadt the number of youths doubled within the period from September 2003 to July 2004 and, according to a responsible judge, more than half of them are in an exceptional mental state.[30] Thus about 450 personnel are missing overall in order to ensure a functioning enforcement of sentences and coercive measures. It is this mixture of overcrowded prisons and the increase of persons with mental problems together with a pressing shortage of personnel that creates dangerous tensions resulting in

[26] „Haftexport als Sparmaßnahme" in *ORF online* and „Gefängnisbau in Rumänien wir konkret" in *Der Standard*, both of 11 October 2004.
[27] Empfehlung des MRB zur „*Überarbeitung der AnhO*" of January 2004 and Empfehlung des MRB zur Erarbeitung eines Konzepts für „*Mindeststandards von Anhaltebedingungen*" of June 2004, both available at http://www.menschenrechtsbeirat.at (23.12.2004).
[28] „Für immer ruhig gestellt" in *Falter* No 28/04.
[29] Für immer ruhig gestellt" in *Falter* No 28/04.
[30] „Friedlich geschnarcht" in *Falter* No 29/04.

aggressive behaviour of the inmates and sometimes violent assaults of the prison wards. A case that shows the tip of the iceberg is the death of the mentally disabled inmate Ernst K. in the Krems-Stein prison that already happened three years ago but was widely portrayed in the media again this year when pictures turned up showing the dead body of Mr K. tied to a bed with leather belts in a special prison cell and his broken and bleeding nose taped with a tamponade.[31] This clearly gives the impression of a severe human rights violation, but officially Ernst. K. died a natural death (heart failure) and the Ministry of Justice insisted that there were no hints pointing to a third party fault in connection with the demise of the inmate. However, Minister Karin Miklautsch later declared to be shocked about the pictures which were allegedly unknown to her and the responsible officials in the Ministry of Justice, although they were all the time attached to the respective court files, and she ordered an independent re-examination of the case by a judicial commission. The results of the commission's work, which also planned to shed light on a suicide that occurred in a wire cage in the detention centre for mentally disabled persons in Göllersdorf and the incident in the Schwarzau prison for female convicts where a young detainee died from suffocation after vomiting, have not been presented to date.

**Centres for the detention of juvenile offenders**

*Legislative initiatives, national case law and practices of national authorities*

Although the principle of **strict separation of youths and adults in the penal system** is provided by section 55 paragraphs 1 and 2 of the Juvenile Court Act, it is only possible to comply with this rule in the larger prisons in Vienna-Josefstadt, Graz-Jakomini, Innsbruck, Salzburg, Klagenfurt and Schwarzau.[32] In all these detention centres there exist special parts of the building that are reserved and adapted for juvenile offenders. However, after the dissolution of the Vienna Juvenile Court in 2003 and its integration into the Vienna Regional Criminal Court, there is only one special detention centre in Gerasdorf exclusively for the accommodation of juvenile offenders. According to the information provided by the Ministry of Justice, in these larger prisons 20 juvenile offenders are on average detained per year. Frankly, this number appears to be very low, as in March 2004 in Vienna-Josefstadt alone more than 200 prisoners were under 21 years old and are thus considered by law as juvenile offenders.[33] In smaller court prisons the shortage of space together with the requirement to separate accomplices in pre-trial detention can cause a common accommodation of youths and adults. Moreover, the Ministry of Justice sometimes applies a buddy concept where selected juvenile offenders are put to pairs with an adult with a view to support their special mental state or personal development.

*Reasons for concern*

It must be demanded that the principle of separate detention for juveniles and adults is strictly adhered to, unless the well-being of the youth justifies another form of detention. A common accommodation for other reasons such as lack of space or even as a means of punishment should be avoided as far as possible and concepts ought to be developed to remedy any unsatisfactory situation. The rising number of prisoners must not be taken as an excuse.

**Centres for the detention of foreigners**

[31] See, for example, the respective articles in *Falter* Nos. 28/04 and 29/04.

[32] Ministry of Justice, written response to a questionnaire, received on 27 December 2004.
[33] „Häftlingsflut und Bitterkeit" in *Die Presse* of 17 March 2004.

*Reasons for concern*

In Austria, the **detention of foreigners pending their deportation** to the country of origin or to a safe third state is still effected **in regular police detention centres** together with persons suspected of having committed a criminal offence. In the first quarter of 2004 the police have kept in detention 1012 persons from 50 different nations - mostly undocumented workers, small-time criminals or persons without means - while the corresponding figure for 2003 was 864 persons. Poles, Romanians, Bulgarians, Serbians, Nigerians, Chinese and nationals from Georgia make up the largest groups of detainees. The overcrowded and inappropriate police detention centres contribute to a tense climate promoting aggressive behaviour towards others and desperate acts of auto-aggression such as the recent suicide of a 35-year-old Serbian national in the Rossauer Police detention Centre in Vienna. In a Recommendation of the Human Rights Advisory Board (HRAB) in October 2004[34], it is therefore urgently suggested to stop this practise and to establish a special detention centre that is exclusively used for the detention of aliens pending their deportation and in which the restrictions on the right to personal liberty are kept to what is absolutely necessary in order to ensure that the foreigner can be expelled at the end of the procedure. In the mean time, the HRAB called upon the Minister of the Interior to further promote the concept of "open stations" and areas of "enforcement with open cells" gradually and speedily for foreigners forced to stay in the regular police detention centres pending deportation. While the positive experiences that have been made with the police detention centres involved in the pilot projects were considered by the Advisory Board as promising (in Wels and Linz the number of hunger strikes and incidents of self-mutilation considerably decreased), it insisted that the new successful concepts should be legally entrenched and integrated into a revised Statutory Regulation on Police Detention (*Anhalteordnung*)[35] including exact criteria for the access of detained foreigners to open stations as well as for the exclusion of a person from the application of relaxed enforcement conditions.

Particularly **serious concerns** were raised by the Human Rights Advisory Board **in connection with the detention of minors pending deportation**. First the Advisory Board urged the Minister of the Interior to fully implement the recommendations that were made in the past on the entire topic given that in the beginning of 2004 the Ministry had only complied with less than 50% of the suggested measures.[36] It was recalled that coercive measures such as detention against foreign minors should really be imposed as a measure of last ressort and that other less restrictive means should be taken into consideration more often. Then the HRAB proceeded to criticise the widely established practise to keep minors in solitary confinement as alarming development that was inconsistent with international standards and the recommendations of the HRAB. Minors belonging to the so-called vulnerable group that deserve special attention and treatment by the authorities should thus be kept in solitary confinement only in necessary cases where there is a violent potential directed to other inmates or the person itself, a danger of infection, a request to that end by a court of law during criminal proceedings, or upon the minor's own wish. Under no circumstances should the police lock minors in solitary cells only to comply with the requirement of separate detention from adults laid down in section 4(3) of the Police Detention Regulations (*Anhalteordnung*) and thereby expose them to disadvantages for reasons of lacking capacities and structural deficiencies of the buildings. On the contrary, minors should be granted privileged treatment in detention, e.g. under normal circumstances it would be preferable to leave the cell doors open during the day.

[34] Empfehlung des MRB zur Schaffung einer „*Spezialeinrichtung für den Vollzug der Schubhaft*" und Anhalteformen in den Polizeianhaltezentren, of October 2004, available at http://www.menschenrechtsbeirat.at (23.12.2004).
[35] Federal Law Gazette (BGBl.) II No 128/1999.
[36] Die Umsetzung der Empfehlungen - Ergebnisse der Evaluierung IV/2003, made public in 2004 and available at http://www.menschenrechtsbeirat.at (23.12.2004).

Other relevant developments

*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

**A delegation of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) made a ten-day visit to Austria which began on 14 April 2004.** During the visit, which was the Committee's fourth periodic visit to Austria, the members of the delegation were particularly interested in the safeguards provided to persons detained by the police, the treatment of foreign nationals held captive under the Aliens Act, the conditions for the detention of juvenile prisoners, and the situation of prisoners sentenced to undergo psychiatric treatment. In the course of the visit, the CPT had consultations with the responsible Ministers of the Austrian Government and also discussed with a member of the Austrian Ombuds Office and the chairman of the Human Rights Advisory Board. In addition, talks were held with several senior officials from the Ministries. The Committee visited various police stations, institutions, district headquarters and detention centres operated by the police, three penal institutions and one psychiatric hospital in Linz. At the end of the visit, the CPT gave the Austrian authorities its first preliminary evaluation results. The report on the fourth visit of the CPT to Austria is expected to be made public soon.

**Article 5. Prohibition of slavery and forced labour**

Trafficking in human beings (in particular for sexual exploitation purposes)

*Positive aspects*

Concerning the **fight against trafficking in human beings**, especially children and women, the obligations flowing from recent international instruments such as the Optional Protocol to the UN Convention of the Rights of the Child and the Framework Decision of the Council of 19 July 2002[37] which aims at combating trade in human beings and was supposed to be transformed into national law by 1 August 2004 led to **several adaptations in criminal law**. [38]Accordingly, the prohibitions on trafficking in human beings (section 104a of the Criminal Code) and transborder trade with prostitution (section 217) have been revised and the penalties raised to ten years of imprisonment for the most qualified form of commitment. Section 104a thus constitutes the new general provision against trafficking in human beings for the purposes of sexual exploitation, exploitation by the removal of organs and exploitation of labour. The penalties for the different forms of procuration were generally increased.

Protection of the child (fight against child labour – especially with purposes of sexual exploitation or child pornography - and fight against the sexual tourism involving children)

*Legislative initiatives, national case law and practices of national authorities*

The Criminal Law (Amendment) Act 2004[39] provides for a **better protection of the sexual integrity and self-determination of the child**. A new section 215a prohibits the promotion of prostitution and pornography of minors by outlawing the recruiting, offering, and broking of minors for the purposes of prostitution or pornographic performances, and their abuse in this connection. Moreover, the prohibition of the abuse of a special relationship with a minor for sexual reasons in section 212 has been extended to grandparents and all members of the medical professions. With regard to the broking of sexual contacts with children and 14 to 18-

[37] Official Journal L203 of 1 August 2002.
[38] Federal Law Gazette (BGBl) I No 15/2004.
[39] Federal Law Gazette (BGBl.) I No 15/2004.

year-old minors for money the penalties were considerably raised from previously 6 months of imprisonment to a maximum term of 5 and 2 years respectively. In addition, in order to have better tools for the fight against sex tourism, the law now provides for an extension of the extraterritorial jurisdiction of Austrian courts for crimes committed abroad by Austrian nationals under sections 215a and 207b(2) and (3), the latter being the gender neutral follow-up provision for the old discriminatory and unconstitutional section 209.

Other relevant developments

*Legislative initiatives, national case law and practices of national authorities*

Amidst discussions about a general reform of the military forces and an ensuing reduction of the duration of the service for conscripts jointly with an appropriate reduction of the **alternative civilian service**, suggestions were repeatedly voiced to create a compulsory general social service for women and men alike in order to guarantee in the future the functioning of non-profit aid and relief organisations. However, such ideas cannot easily be brought in conformity with the prohibition in Article 4 paragraph 2 of the European Convention of Human Rights to subject a person to forced or compulsory labour other than for the exceptions listed in paragraph 3. The Ministry of the Interior established a working group commissioned with finding the best solution for a reform of the alternative service. While the results are still expected, there is a clear tendency for a reduced compulsory service for conscientious objectors accompanied by the possibility for a voluntary extension for men and a voluntary social year for women with some attractive benefits attached to it such as professional recognition, pension times, etc.

## CHAPTER II : FREEDOMS

### Article 6. Right to liberty and security

Pre-trial detention

*Positive aspects*

By **exceeding the minimum requirements laid down in Article 5 § 5 ECHR** for compensation to be afforded by the State in case of unlawful pre-trial detention, the new Austrian **Compensation (Criminal Proceedings) Act**, which is dealt with in more detail under Article 48 below, needs to be considered as a very positive development in 2004.

Detention following a criminal conviction (including the alternatives to the deprivation of liberty and the conditions for the access to release on parole)

*Legislative initiatives, national case law and practices of national authorities*

**The massive increase of the number of detainees in Austria has led to discussions about new alternative forms to the classic enforcement of sentences in prison cells and a better use of existing tools but, unfortunately, no real progress has been made in practice so far.**

In Austria, between 1000 and 1400 persons a year end up in prison simply because they were in default of paying the fines to which they were sentenced by a court for minor offences. After the ruling coalition parties in principle agreed to seek alternatives to the deprivation of liberty in these circumstances like working in public institutions, the Ministry of Justice is examining the feasibility of this political aim but appears to be worried about the ensuing additional costs that might be out of proportion to the expected benefit.[40] Other methods, presently discussed, for avoiding imprisonment where it is not absolutely necessary include house arrest supervised with electronic devices and to ease the conditions for early release on probation.
In spring the independent prison experts group *Kriminalpolitische Initiative* presented a position paper combining several suggestions for effecting an improvement in the Austrian penal system.[41] Based on the experiences made in the more liberal western court districts that a reduction of imprisoned persons and the duration of imprisonment do not mean a loss in security for the population and the serious concerns that in overcrowded prisons the modern enforcement of sentences and the re-socialising efforts can no longer be maintained, the experts suggest specific measures to combat the present negative development. First, the question of whether or not in a given case a crime is to be considered as qualified for having been committed in a "professional" manner should be decided pursuant to objective criteria (repeat offenders) and not according to the mindset of the criminal. Secondly, if a conviction to an unconditional imprisonment is unlikely, detention pending trial should only in exceptional circumstances be imposed, always taking into account the principle of proportionality and the dangerousness of the suspect. Thirdly, alternative methods of open enforcement should be offered in cases of short terms of imprisonment or possibly also in the final phase of an imprisonment and accompanied by qualified attendance, such as communal works of public utility, day-by-day enforcement, open stations, and electronically supervised house arrest. The latter measure has been successfully practised in Sweden since 1999. Fourthly, in order to prevent the prisoners from sliding back into criminality after their release

[40] « Putzen statt sitzen » in *Die Presse* of 26 November 2004.
[41] Grafl/Gratz/Höpfel/Hovorka/Pilgram/Schroll/Soyer „Kriminalpolitische Initiative: Mehr Sicherheit durch weniger Haft!" JRP 2004, 61.

the instrument of conditional early release should be employed more often, even though this would also require relaxing the legal conditions for its application. It is striking that in Germany 92% of all convicted perpetrators are released before the end of their term, whereas the corresponding rate in Austria is very low at 19%. Fifthly, the experts recommend a better quality management of the penal system and a continuous evaluation of all coercive measures. In an interview in the Vienna weekly *Falter*, the then Minister of Justice Dieter Böhmdorfer commented on the suggestions of the expert group but only supported the idea to impose mandatory communal works instead of imprisonment. He also showed some openness for early release on probation as this was also contained in the Coalition Programme of the Government, but at the same time recalled the case of Marc Dutroux adding that the security of the population is imperative and may not be jeopardised by a generous policy of releasing criminals. It is to be hoped that his successor in that position Karin Miklautsch is more susceptible for a concept that operates very successfully in other states like Germany and Switzerland.
Another proposal specifically addressed to the issue of foreigners coming to Austria in order to commit offences against property came from Maria Fekter, MP for the governing conservative People's Party.[42] She presented the idea to simply expel a foreign offender without roots in Austria to his home country after his or her conviction and to issue a Schengen-wide entry prohibition for ten years. If the person is caught within that time on the territory of a Schengen-state, the imposed sentence is reactivated and the foreigner sent to prison. The concept should only apply to nationals of safe third states and if the deportation is preferable to imprisonment in the concrete case.

Deprivation of liberty for foreigners (in order to prevent their unauthorised entry on the territory with a view to their removal, including their extradition)

*Reasons for concern*

In a Recommendation[43] concerning the urgent report of the competent fact-finding commission the recently established refoulement zone (*Zurückweisungszone*) in the special transit area of the Vienna International Airport in Schwechat following a visit on 25 June 2004, the Human Rights Advisory Board (HRAB) qualified the accommodation of persons at that place as deprivation of liberty with a view to the settled case-law of the European Court of Human Rights, the Constitutional Court and the Independent Administrative Tribunal for Lower Austria. Such interference with the fundamental right to personal liberty definitely requires an empowerment of the executive by law that is in conformity with Article 5 ECHR and the Constitutional Law on the Protection of Personal Liberty (*BVG über den Schutz der persönlichen Freiheit*), however, sections 53 and 54 of the Aliens Act (*Fremdengesetz*) do not provide a sufficient legal basis. It follows from both the jurisprudence of the European Court of Human Rights and the Constitutional Court that an interference with the right to liberty of persons by restricting their free movement in order to prevent their unauthorised entry on the Austrian territory is only permitted if they can leave the country any time and are also given the possibility to organise their leave. The HRAB strongly recommended changing the practise of the authorities so as to be consistent with the law and constitutional imperatives.

[42] „Bitte um Hilfe, bevor es Tote gibt" in *Die Presse* of 18 December 2004.
[43] Empfehlung des MRB zum Dringlichkeitsbericht der zuständigen Kommission des Menschenrechtsbeirats zur „*Zurückweisungszone am Flughafen Schwechat*" of September 2004, available at http://www.menschenrechtsbeirat.at (23.12.2004).

Other relevant developments

*Legislative initiatives, national case law and practices of national authorities*

In January the **Constitutional Court annulled[44] provisions in section 11 of the Military Powers Act** (*Militärbefugnisgesetz*[45]), **which authorised the arrest of persons** being suspected upon good and sufficient cause of preparing or having just prepared an attack on an object of military protection or in case the person is searched for having committed such a (generally non-punishable) preparatory act, for violating the right to liberty as enshrined and safeguarded in Article 5 ECHR and the Constitutional Law on the Protection of Personal Liberty 1988 (*Bundesverfassungsgesetz über den Schutz der persönlichen Freiheit*). Nevertheless the Court granted the Government a period until 31 December 2004 before the annulment would become effective. The Court ruled that the extensive empowerment of military authorities to arrest persons already at a time where their activity does not yet amount to an offence under criminal law cannot be reconciled with the guarantees of the fundamental right to personal liberty and security. Furthermore, the Court also considered unconstitutional a regulation that provided for the handing over of an arrested person to the police within 24 hours, because this would effectively mean an unjustified delay as compared to the general requirement of an immediate transfer to the competent court, especially as there were no stipulations on how the police should proceed after the arrested person was transferred from military to police custody.
In an attempt to repair the objected provisions of the Military Powers Act the Government introduced a respective Bill which passed Parliament to become law just on time before the lapse of the period the Constitutional Court had granted.[46] A temporary arrest of a person by specially authorised military staff on duty is therefore only possible if such person is caught in the act of committing an offence or directly after having committed an offence that falls in the jurisdiction of the Regional Courts against a military object protected by law.

## Article 7. Respect for private and family life

### Private life

Intelligence and security services

*Legislative initiatives, national case law and practices of national authorities*

In its judgement dating from 23 January 2004[47], the Constitutional Court found unconstitutional for lack of an effective remedy a regulation in the Military Powers Act (*Militärbefugnisgesetz*) that permitted the military intelligence services to investigate and to collect data on a preliminary and preventive basis for the purposes of reconnaissance by means of requesting information from other authorities, observation, audio and video recording, and employing undercover agents without sufficient legal protection, let alone judicial control. The only control afforded by law was an ex post control exercised by a specially mandated legal protection officer who was supposed to be informed about a sensitive reconnaissance operation only upon his own request. After an amendment to the Act was adopted by Parliament recently, the legal protection officer must now be informed in any case before an investigative operation is started and shall then deliver a statement on the legality of the undertaking and also inform the Minister of Defence. The data collection or other investigative measures may be carried out only after the statement is provided or after three days have passed since the legal protection officer was notified, except a delay of the

[44] VfGH 23.01.2004, G 363/02.
[45] Federal Law Gazette (BGBl) I No 86/2000.
[46] Federal Law Gazette (BGBl) I No 133/2004 of 9 December 2004.
[47] VfGH 23.01.2004, G 363/02.

operation would result in an irreparable damage to national security, in particular the operational readiness of the military forces, or the security of persons. Although the new wording of section 22 can be considered an improvement, it must be very much doubted that it meets all constitutional requirements in the absence of an effective preliminary control by an independent organ. However, the qualified majority in Parliament could not be reached that would have been necessary to establish an independent organ exempt from the duty to abide by the instructions of the competent Minister of Defence and to grant that organ the power to issue binding statements on the legality of the conceived interference with fundamental rights.

Right to the protection of family life and right of the public to have access to information

*Legislative initiatives, national case law and practices of national authorities*

On 21 December 2004, the Council of Ministers approved the **draft legislation** submitted by the Ministry of Justice which will eventually **amend the Media Act to provide a clear legal basis for the protection of private life and personal rights on the internet**. At present, judges had to grant protection against interferences with the personal rights of others on the internet, such as untrue statements or deliberate misrepresentations, degrading pictures and insults, libel and slander, by way of analogy with the old law. But often this was not an easy task in the light of the specificity of the internet and left open the crucial questions whether all provisions of the Media Act were applicable in this regard and who is the responsible "owner of the medium" the law repeatedly refers to. The new regulations put the issue of liability for web content on the same footing with the traditional media and require naming the responsible person for the content in the imprint. It is also intended to regulate the liability for violations of personal rights in chatrooms: if the internet forum is moderated the supervisor assumes responsibility for the posted statements jointly and severally with the author and is obliged to intervene and remove offensive postings as soon as possible by taking into account the diligence of a reasonable journalist. If offensive web content is not removed, the court upon application of the victim shall be empowered to order the deletion of the site and to fix a sum of up to EUR 2.000 as compensation for each day the order is not complied with. Finally, while the limited liability of journalists for violations of personal rights is not lifted, at least the maximum amounts payable shall be raised from EUR 36.000 to EUR 50.000. This is seen as a compromise between the freedom of expression and the right to respect for private life. However, this cap solution appears to be too rigid for balancing these fundamental rights as the proposed amounts are still very low and will not deter powerful media from carrying out deliberate "dirty" campaigning in the future.

Voluntary termination of pregnancy

*Legislative initiatives, national case law and practices of national authorities*

In the **Province of Salzburg**, the new Social Democrat Governor pledged to enable the **voluntary termination of pregnancy in public hospitals**. Although abortion exercised by a physician was made legal in Austria under certain circumstances in the 1970s it is still not considered as a right and in western provinces under the influence of the Catholic Church a certain reservation including among the majority of physicians has endured to date. Thus the Governor's announcement prompted some protests on the streets of opponents and was in the beginning not approved either by Provincial representatives of the People's Party, being the conservative coalition partner. However, finally the People's Party in the Province of Salzburg agreed to the plan and accordingly voluntary terminations of pregnancy will be possible as from 1 April 2005.

**Family life**

Removal of a child from the family

*Legislative initiatives, national case law and practices of national authorities*

Last year Austria was convicted by the European Court of Human Rights for breach of Article 8 ECHR in the case *Sylvester v. Austria*[48] concerning the failure of the Austrian authorities to effect the return of a child to her father within a reasonable time after the mother abducted her to Austria, thereby violating the right of the father to a family life with his daughter. As a consequence, **procedural modifications coming into force on 1 January 2005** were adopted by Parliament[49] to avoid the repetition of a similar case. Hence, acknowledging the sensitive nature of the matter, the jurisdiction for deciding on the right of child custody in circumstances of abduction will be concentrated on certain District Courts, and it will be mandatory that a registered attorney represent the interests of the applicant living abroad.

The right to family reunification

*Legislative initiatives, national case law and practices of national authorities*

The **immigration quota** determining the number of new immigrants admitted to Austria **including family reunification was further reduced for 2005**. Instead of 8.050 initial residence permits in 2004 only 7.500 new permits are authorised for the next year. For the purposes of family reunification a maximum of 5.460 permits will be issued, which are 30 less than in the previous year. Once the quota is exhausted applicants are rejected and forced to wait for a chance in the following year. Not covered by the strict regime are, of course, all initial residence permits for family members of Austrians and EU/EEA citizens; of 16.300 permits granted in the first half of 2004 only 18% were issued under the quota system.[50] The statutory regulation, which was approved in a majority vote by the General Affairs Committee of Parliament (*Hauptausschuss*) pursuant to the Aliens Act, thus continues the restrictive policy in the field of immigration.

Private and family life in the context of the expulsion of foreigners

*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

**In *Radovanovic v. Austria*[51] the European Court of Human Rights found a violation of Article 8 ECHR after Austria, in exercising a residence prohibition of unlimited duration, expelled an 18-year-old Serbian national who had previously been convicted of aggravated burglary and therefore sentenced to 30 months of imprisonment, 24 of which were suspended on probation. Considering the merits of the case, the European Court was of the opinion that the expulsion was too harsh a means taken by the authorities without a pressing social need in the given situation, particularly as the applicant spent his life from the age of ten lawfully residing in Austria and because of his young age at the time of the offences, the stronger family and social ties with Austria than with Serbia and Montenegro, the suspension of the biggest part of the sentence and the lack of previous criminal records. The prevention of crime and disorder could have equally be achieved by less intrusive measures, such as the issuance of a residence probation of a limited duration.**

[48] Eur. Ct. H. R., *Sylvester v. Austria* (Applications Nos. 36812/97 and 40104/98) judgement of 27 April 2003, commented in the Report on the Situation of Fundamental Rights in Austria in 2003, p.16.
[49] Federal Law Gazette (BGBl) I No 111/2003 and No 112/2003 of 12 December 2003.
[50] Biffl, G., Bock-Schappelwein J. „*Zur Niederlassung von Ausländern in Österreich*“, WIFO-Studie im Auftrag des BM für Inneres, August 2004.
[51] Eur.Ct.H.R., *RadovaNovic v. Austria* (Application No 42703/98) judgement of 22 April 2004.

Mr Jovo Radovanovic, a national of Serbia and Montenegro, was born in Vienna in 1979, but spent his childhood until the entry in secondary school with his grandparents in the former Republic of Yugoslavia and only school holidays with his parents in Vienna. At the age of 10 he returned to Austria, lived with his parents and completed a three-year vocational training as a butcher. In 1997 the Vienna Juvenile Court convicted him of aggravated robbery and burglary and sentenced him to thirty months' imprisonment, out of which twenty-four were suspended on a probationary period of three years. The judgement became final without appeal.

The same year the Vienna Federal Police Office (*Bundespolizeidirektion Wien*) issued a residence prohibition of unlimited duration against the applicant. It referred to Section 18 §§ 1 and 2 (1) of the 1992 Aliens Act (*Fremdengesetz*) according to which a residence prohibition is to be issued against an alien, if he has been sentenced to more than three months' imprisonment by a final judgment of a domestic court. The Vienna Public Security Authority (*Sicherheitsdirektion*) ruled on the appeal of the applicant that although the applicant had been continuously living in Austria with his family for eight years and acknowledged an interference with the applicant's rights under Article 8 of the Convention, the interest in the prevention of crime and disorder (Article 8 § 2 of the Convention) prevailed over the applicant's interest in staying in Austria. The Constitutional Court declined to deal with the matter and remitted the complaint with the Administrative Court which finally dismissed the claim, referring to the Court's finding in *Moustaquim and Beldjoudi* that the persons concerned had had stronger family ties in the host country than the applicant. On 4 February 1998 the applicant was expelled to the former Federal Republic of Yugoslavia, now Serbia and Montenegro. At that time, proceedings concerning the applicant's request to revoke the residence prohibition in view of the 1997 Aliens Act were still pending. Pursuant to Section 38 § 1 (4) of the 1997 Aliens Act, a residence prohibition may not be issued "where a foreigner has grown up in Austria from an early age on and has been lawfully residing there for many years"; residence prohibitions which have not expired must be regarded under the 1997 Aliens Act and if found unlawful they have to be revoked. The Vienna Public Security Authority finally dismissed the appeal in April 1998 since the applicant had not grown up in Austria form an early age onwards but left Austria when he was seven months and did not return until he was ten. The applicant did not appeal to the Constitutional Court and the Administrative Court.

The applicant argued that his rights under Article 8 ECHR were violated for the administrative authorities had wrongly found that the measure was necessary in a democratic society by failing to take into consideration the long period of lawful residence of himself and his family, his strong integration in Austria after having passed secondary school and vocational training in the host State, the lack of family ties to Serbia and Montenegro after his grandparents had died and by ignoring the positive prognosis of the Juvenile Court which had suspended most of the penalty. On the other hand, the Government held that due to the seriousness of the offence and the severity of the penalty, the issuance of a residence prohibition of unlimited duration constituted a pressing social need.

The Court noted that undoubtedly the residence prohibition constituted an interference with the applicant's right to respect for his private and family life and that the interference was in accordance with the law and pursued a legitimate aim, namely the prevention of disorder or crime within the meaning of Article 8 § 2 of the Convention and that therefore States parties have the power to deport aliens convicted of criminal offences. However, authority decisions must struck a fair balance between the applicant's right to respect for his private and family life and the prevention of disorder and crime on the other. The whole dispute, therefore, concentrated on the question whether the interference was "necessary in a democratic society". Although the applicant was not a second generation immigrant the Court held that the criteria as established in cases of second generation immigrants who have not yet founded a family of their own in the host country were applicable to the present case and include the nature and gravity of the offence, the length of the stay in the host country and family ties and social ties in the host country. However, the instant case was not to be compared with previous cases in which the applicants had been sentenced to long terms of unconditional

imprisonment for dealing with drugs. "Without disregarding the serious nature of the offences", the Court finally found that "the applicant committed them as a juvenile, that he had no previous criminal record and that the major part of the relatively high sentence was suspended on probation". Furthermore, the Court acknowledged that "family and social ties with Austria were much stronger than with Serbia and Montenegro" and concluded that the measure imposed on the applicant had been "overly rigorous" and that "a less intrusive measure, such as a residence prohibition of a limited duration would have sufficed". Accordingly, there has been a violation of Article 8 of the Convention.
As regards claims in respect of pecuniary and non-pecuniary damages as well as regards the reimbursement of costs and expenses, the Court held that the case was not ready for decision and therefore reserved the said question.

**Article 8. Protection of personal data**

Protection of personal data (in general, right of access to data, to have them rectified and right to a remedy)

*Legislative initiatives, national case law and practices of national authorities*

In the Austria Convention tasked with elaborating a new Federal Constitution there was **consensus to give more weight to the duty to provide information to the public upon request than to the official secrecy**, which shall be relaxed accordingly. Only in areas with a direct impact on the national security, namely questions of defence and internal and external security the secrecy will prevail over the interest of individuals requesting information. As Waltraud Kotschy, head of the Data Protection Commission, commented in the daily *Die Presse* of 17 March 2004, this agreement is not meant to erode the fundamental right to data protection and cannot affect the prohibition on providing information on personal data.

By passing the Civil Procedure (Amendment) Act 2004[52] a provision was included to become section 83 of the Courts Act (*Gerichtsorganisationsgesetz*) which is supposed to balance the **right to the protection of personal data** vis-à-vis organs of the judiciary with the right to a fair trial. In addition, sections 84-85 grant the right of everyone who believes to have been violated in his or her right to data protection to submit a complaint to the superior court, thereby **creating a respective remedy in the field of the judiciary**.

Last year the European Court of Justice had ruled in a judgement combining several preliminary references emanating from Austria that it was for the national courts to decide whether or not the interference with fundamental rights of domestic legislation ordering public-dominated enterprises to reveal the income figures of their employees together with their names was proportionate to the legitimate aim of securing an efficient spending of public funds. In drawing on the reasoning of the Constitutional Court in its judgement of 28 November 2003, which dealt with the same issue, the **Supreme Court**[53] reversed the previous decisions of the lower courts and **granted the applicant a preliminary injunction** against his employer, the Public Broadcasting Corporation ORF, **prohibiting the transfer of his personal data including his income to the Court of Audit for further processing** in the framework of the Court of Audit's legal duty to control the economic activities and the efficiency of administration of public institutions and enterprises such as the ORF. In its decision it doubted that such far-reaching interference with the fundamental rights of data protection and private life as guaranteed by Article 8 ECHR was necessary to ensure that the income of employees of public enterprises is kept within reasonable limits. Rather this legitimate aim could also be achieved by forwarding the relevant data in anonymous form.

[52] Federal Law Gazette (BGBl) I No 128/2004.
[53] OGH 21.01.2004, 9 ObA 73/03f und 9 ObA 77/03v.

Protection of the private life in the processing of medical data

*Legislative initiatives, national case law and practices of national authorities*

**The practice of some public health officers to use information on the state of health of persons with a driving licence taken from the annual tax declarations provided by the tax authorities and to summon these persons for carrying out a medical examination caused some excitement among the concerned.**

Many owners of a driving licence were summoned in spring 2004 by public health officers to undergo an official medical examination in order to find out if they were still healthy enough to drive a car. Public health officers are exempt by law from the duty to treat medical records confidentially. As a consequence several persons lost their unlimited entitlement to drive a car and got their papers limited for a period of three years. The information feeding the suspicions came from the own tax declarations of the persons concerned who wanted to save money by applying for tax reductions on the grounds of exceptional financial burdens they had faced due to medication costs or the expenses for medical devices. Persons with various illnesses were concerned: diabetes, prostate ailments, kidney transplantations, even chronic snoring was said to impair the ability to drive a care for its negative impact on the performance of the heart. The Minister of the Interior stopped this practice by instructing all public health officers not to order any more examinations on the basis of medical data forwarded by the tax authorities. The drivers' associations welcomed this decision but ARBÖ, for example, quickly added that they were of course not opposed to people with alcohol problems losing their driving licence as this would be both in the interests of the concerned and the other participants in traffic.[54]

Video surveillance in public fora

*Legislative initiatives, national case law and practices of national authorities*

**A recent amendment to the Security Police Act (*Sicherheitspolizeigesetz*)[55] authorises the police to install video surveillance systems in certain public places known for criminal activity and to record the data while taking into account the principle of proportionality. Serious human rights concerns remain as to the lack of any independent preliminary control of the executive.**

Previously the collection and processing of personal data by means of audio or video recording was permitted only in order to prevent a criminal offence or dangerous attack on the security of the population. But for a bugging operation to take place the police need a concrete suspicion against a person or criminal organisation and good evidence to convince the judge to issue the authorising decision. Moreover, video surveillance without recording is currently used by the traffic police to be able to react to traffic congestions and accidents and in case of big events with masses of people like soccer games or large demonstrations. The new regulation extends the powers of the security authorities to include preventive observation of public places with high risk for criminal activity like airports, railway stations, parks, pedestrian zones, etc. The data may be recorded and kept for 48 hours. Afterwards the data must be deleted, unless there is good reason for suspecting a person of criminal activities in which case the data may be used as evidence. Before such surveillance can become operative the intended measure must be notified to the legal protection officer in the Ministry of the Interior. Furthermore the surveillance measure must be publicly announced by the

[54] "Strasser : Maulkorb für Amtsärzte" in *Die Presse* of 11 March 2004, "Führerschein befristet wegen Scuppenflechte" in *Die Presse* of 16 March 2004.
[55] Adopted by the National Council (Parliament) on 9 December 2004, but not yet proclaimed in the Federal Law Gazette.

mounting of signs in order to inform the population with a view to respecting their private sphere but equally to deterring potential perpetrators. Normally video surveillance shall suffice but in special circumstances additional audio surveillance will be used as well, in which case a special notification of the public is necessary. Any such observation may only be started after the lapse of three full days or, alternatively, after a statement on the legality of the measure by the legal protection officer. However, this statement reflecting the legal protection officer's views is not binding on the authorities; rather it shall only be taken into account when the decision is taken by the Minister who is politically responsible to Parliament. Unfortunately, the weakness of this construction from a human rights point of view is the lack of any real preliminary control of the executive by a judicial or other independent organ. There are also no regulations on whether or not the police can use incriminating material gained from an observation of a public place which is later found to be unlawful. While the police expects a positive impact on the security of the population and argues that the law authorises the police to do nothing more than private persons and companies can already do, experts on data protection warn of the consequences on the personal rights and demand general restrictions of the right to video surveillance. It is highly problematic that far reaching powers are granted to the police while at the same time effective independent control mechanisms were not established (mainly for reasons of a lacking majority for a corresponding constitutional provision in the law-making process). Instead the preliminary control shall be exercised by a civil servant of the Ministry of the Interior appointed for a period of two years. Similar surveillance systems will hence be possible also in the field of the border control.

## Article 9. Right to marry and right to found a family

Marriage

*Legislative initiatives, national case law and practices of national authorities*

**On 12 December 2003, the Constitutional Court decided that the prohibition in Austrian law for same-sex marriages neither contravened the equality principle nor the right to marry nor the right to private and family life.[56] The Court insisted that only the question of access to marriage was at issue and not if the legislator possibly discriminated against homosexual relationships by privileging spouses in certain areas of the law.**

The judgement concerned a complaint by two male Austrian nationals living in Vienna who wished to marry and therefore applied to the local Civil Registry Office for leave to get married. The application was rejected by reference to section 44 of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) which only permits the marriage of persons with different sex. After, on appeal, the Governor of Vienna upheld the negative decision of the Civil Registry Office a complaint was filed with the Constitutional Court arguing that the restriction of marriage to persons of different sex was unconstitutional as it violated the principle of equality before the law and also the rights stemming from the European Convention of Human Rights, notably the right to marry in Article 12. The complainants pointed to the recent developments in many European countries that either provided for equal access to marriage for homosexuals or established the possibility to enter into registered civil partnerships. Moreover, it was argued that the predominant purpose of marriage was the duty to mutual support and assistance, which could be equally accomplished in a same-sex marriage, while the former aspects of conceiving children and inseparability have been diluted over time. The Constitutional Court took a conservative approach by insisting that the institution of marriage was, as a matter of principle, directed at the possibility of parenthood

[56] VfGH 12.12.2003, B 777/03.

and neither the Austrian Constitution nor the European Convention on Human Rights demanded the extension to relationships of another nature. The Court proceeded to support its stance by citing the *Cossey*-judgement[57] of the European Court of Human Rights and went on to claim that the change in case-law that came with the *Goodwin* case[58] could not foster the position of the complainants. Thus, when it could not find a clear authority on the issue, the Constitutional Court almost rushed to dismiss the complaint. In August 2004 eventually, the two men that failed to succeed on the domestic level filed a complaint with the European Court of Human Rights. It will be interesting to see how the Strasbourg Court will deal with this controversial issue under Article 12 as compared to its case-law under Articles 8 and 14 (see the summary of the judgement *Karner v. Austria*[59] in the Report on the Situation of Fundamental Rights in Austria in 2003, p. 34).

Control of marriages suspect of being simulated

*Legislative initiatives, national case law and practices of national authorities*

The alien police have noticed an **increase in fictitious marriages between Austrian citizens and foreigners** so that the latter is granted a residence permit by the authorities. In an interview[60] in April 2004 the head of the department, Willfried Kovarnik, said that in 2003 an estimated number of 5000 simulated marriages were entered into. The "price" for the desired marriage certificate varies but on average EUR 6.000 is demanded. The police currently focus on professional brokers from Africa who are searching in their home country for men wishing to live in Austria, and over here in Austria they try to convince women to agree to such marriages. Apart from that, there are also many Austrians who simply want to boost their income by concluding a marriage with foreign persons they do not know. In case of a suspicion the police is forced to carry out cumbersome investigations on whether the couple truly lives together as spouses normally do. Where this is possible, though, the foreigner loses the Austrian citizenship and the residence permit and is eventually deported. The Austrian cannot be punished and may proceed to marry again.
But concluding unconsummated marriages is not the sole method for circumventing the strict conditions and quota regulations applicable in the field of immigration. With effect of 1 July 2004, Parliament recently passed a law[61] intended to render the adoption of adults more difficult, as the experience has shown that this legal possibility was increasingly abused by foreigners wishing to live and work in Austria. About 2000 to 4000 fictitious adoptions of adults take place every year, according to estimates by the police. While previously any justified interest was sufficient for the judiciary to allow the application, the law considerably tightened the conditions for the adoption of adults by requiring the proof of a close relationship as a family for at least 5 years or that the person to be adopted devotionally cared for the future parents. In addition, the adoption of adults will only be allowed under the condition of reciprocity in international private law.

[57] Eur.Ct.H.R., *Cossey* (Application No 10843/84), judgement of 27 September 1990, which concerned the special case of transsexual persons.
[58] Eur.Ct.H.R., *Goodwin* (Application No 28957/95) judgement of 11 July 2002.
[59] Eur.Ct.H.R., *Karner v. Austria* (Application No 40016/98), judgement of 24 July 2003.
[60] "Scheinadoptionen werden erschwert" in *Die Presse* of 22 April 2004.
[61] Federal Law Gazette (BGBl) I No 58/2004 of 21 June 2004.

## Article 10. Freedom of thought, conscience and religion

Reasonable accommodation provided in order to ensure the freedom of religion

*Legislative initiatives, national case law and practices of national authorities*

Generally, the debate on the issue of displaying **religious symbols in schools** or other public buildings is not flying high in Austria but recently in May 2004 an incident was reported concerning a 13-year-old girl who was forbidden to wear a headscarf by the principal of a secondary school in Linz, Upper Austria, by reference to the school regulations which had been adapted to include a prohibition on wearing any headgear in the classroom whatsoever.[62] When her father complained about this procedure, the school authorities were quick to clarify that the freedom of religion with its constitutional safeguards in Article 14 of the Bill of Rights 1867 (*Staatsgrundgesetz*) and Article 9 ECHR was paramount. On 23 June 2004, the Ministry of Education, Science and Culture issued a binding Decree[63] to all schools and subordinate authorities stating that any restrictions in rules of the school or other regulations on the wearing of headscarves by female Muslim pupils were unlawful.

The question of **ritual slaughtering** was also highly debated in public and Parliament when a new uniform Federal Animal Protection Act (*Tierschutzgesetz*)[64] should be substituted for the varying laws of the provinces. Protests by the Islamic and Jewish Religious Communities against the initial Government proposal, which ignored the problem altogether, finally led to a revised wording of section 32 trying to balance the religious necessity of ritual slaughtering with the aim of protecting animals from pain and torments. Ritual slaughtering is thus allowed, if compellent religious imperatives of a recognised religious community so require and the competent authority issued a licence. For obtaining such a licence, the applicant must ensure that the slaughtering is carried out as quickly as possible by qualified persons in the presence of a veterinarian and that the animal is effectively narcotised immediately after the throat cut. After these significant changes, the law now seems to be in line with the case-law of the Constitutional Court, which held in an important judgement[65] in 1998 that the old religious custom of ritual slaughtering does not violate public order or morality and must therefore prevail as fundamental right over legitimate concerns of animal protection.

Protection against harassment especially of religious minorities

*Legislative initiatives, national case law and practices of national authorities*

**Anti-Semitically motivated offences** are on the rise again after a fairly calm year in 2003 with only 3 cases in the entire year. In the first half of 2004 the law enforcement authorities have already counted 13 offences committed against Jews or Jewish institutions. According to the Jewish Religious Community (*Israelitische Kultusgemeinde*) they received 124 threatening letters in the period from November 2003 to September 2004. Nevertheless the situation is not particularly alarming.

Despite the global terrorist threat and the often drawn linkage between Islam and terrorism, **islamophobia** is not a very big issue in Austria. Apart from singular comments of politicians and representatives of the Catholic Church that expressed general reservations against Islam, the situation is still calm. According to a representative of the Islamic Faith Community in

[62] See the daily *Oberösterreichische Nachrichten*, "Linzer Hauptschuldirektorin erließ Kopftuchverbot für junge Muslimin" of 15 May 2004.
[63] Erlass des Bundesministeriums für Bildung Wissenschaft und Kultur vom 23.6.2004, GZ ZI 20.251/3-III/3/2004.
[64] Federal Law Gazette (BGBl) I No 118/2004.
[65] VfGH 17.12.1998, B 3028/97.

Austria, islamophobia is mainly confined to verbal insults on persons who are recognised as believing in Islam for their utter appearance (headscarves, beards), web postings with anti-Islamic paroles and hate e-mails addressed to the Islamic Faith Community or other Islamic institutions; only rarely would there be physical attacks on the grounds of religion.

*Positive aspects*

For the authorities in Austria the protection of the freedom of religion for the moderate community and the fight against radical Islamists and Islamic terrorists are seen as two sides of the same coin. The Federal Office for the Protection of the Constitution and Combating Terrorism (*Bundesamt für Verfassungsschutz und Terrorismusbekämpfung*) therefore maintains a **constant dialogue with the Islamic Faith Community** in order to observe and isolate radical Muslims. Both the Federal Office and the Islamic Faith Community stress the importance of co-operation and the positive fact that there is one integrative organisation for the contacts with the authorities.[66] So far the model works out well and contributes to keeping an acceptable climate between the Muslim community and the Christian majority in Austria. But it would be recommendable if the authorities and politicians actively promote the integration of Muslims by better supporting pro-Western moderates in their attempts to offer alternatives to Quran Schools and radical clubs.

Civil service related to conscientious objection

*Legislative initiatives, national case law and practices of national authorities*

**Core powers of the state entailing decisions with an impact on human rights must not be outsourced to be exercised by private institutions**, the Constitutional Court ruled in its judgement[67] dating from 15 October 2004 on the re-organisation of the civilian service. The statutory regulation (*Übertragungs-Verordnung*)[68] which, following a public tender, had vested the Red Cross with the entire **administration of the civilian service** and the empowering provisions in section 54a of the Civilian Service Act (*Zivildienstgesetz*)[69] were thus declared unconstitutional. In its reasoning the Court held that regardless of its alternative character the civilian service nevertheless was a mandatory service closely linked to the military service. During the civilian service the person is subject to considerable restrictions concerning his education, professional activity and place of residence, etc., which constitute a far-reaching interference with his fundamental rights. As a consequence, all decisions implying such an interference with fundamental rights such as the distribution of civilian servants (i.e. persons carrying out civilian service), changes of the allocated tasks, exemption from the duty to serve, must necessarily be taken by state organs and can by no means be transferred to an independent private institution. Even if a civilian servant works for a private institution during the time of his service the underlying duty remains a duty vis-à-vis the state, which in turn cannot escape its obligation to ensure that the encroachment on fundamental rights of the persons doing their service is kept to a minimum. In order to find a regulation that is consistent with the Constitution and the system of fundamental rights the Government was granted a period until 31 December 2005 before the annulment will take effect.

[66] "Terrorbekämpfung beginnt mit Dialog" in *Die Presse* of 5 April 2004.
[67] VfGH 15.10.2004, G 36/04, V 20/04.
[68] Federal Law Gazette (BGBl) I No 140/2002.
[69] Federal Law Gazette (BGBl) No 679/1986 as last amended by BGBl I No 133/2000.

**Article 11. Freedom of expression and of information**

Freedom of expression and information (in general)

*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

**An injunction by Austrian courts against *Neue Kronenzeitung* prohibiting comparing advertising without disclosing information about differences in reporting style as regards the coverage of foreign and domestic politics, economy, culture, science, health, environmental issues and law, was said by the European Court of Human Rights to breach Article 10 ECHR.[70] Although States parties to the Convention have a margin of appreciation when assessing the necessity of an interference with Art 10 ECHR, the impugned measure was disproportionate for its impact had made future advertising involving price comparisons nearly impossible for the applicant company.**

Krone Verlag GmbH & Co KG, the owner of the daily newspaper *Neue Kronenzeitung* with its registered office in Vienna, alleged that the injunction issued against it under the Unfair Competition Act by the Salzburg Regional Court was in breach of its right to freedom of expression, within the meaning of Article 10 of the Convention, in so far as it prohibited the applicant company from comparing the sales prices of the *Neue Kronenzeitung* and *Salzburger Nachrichten* without disclosing the differences in their reporting styles as regards coverage of foreign or domestic politics, economy, culture, science, health, environmental issues and law.
The Court held that, undoubtedly, there had been an interference with Article 10 of the Convention and also acknowledged that, firstly, the interference was prescribed by law, namely by Section 1 and 2 of the Unfair Competition Act, and that, secondly, served a legitimate aim, namely "the protection of the reputation or rights of others" within the meaning of Article 10 § 2 of the Convention. Thus, the dispute concentrated on the question on whether there had been "a pressing social need" for the issuance of the said injunction. Referring to its case-law, the Court reiterated that the States Parties' margin of appreciation in assessing the necessity of an interference was "subject to European supervision as regards both the relevant rules and the decisions applying them". At the same time it stressed the importance of the governments' margin of appreciation in the context of unfair competition and advertising and held that the question of proportionality and lawfulness could only be assessed in the light of the circumstances of the single case. In the present case the domestic courts have given priority to the protection of the reputation of the other competitor and the rights of the consumers against misleading advertising. When looking further at the impact of the injunction, the Court found that future advertising involving price comparison would have to disclose information on how the company's reporting style differs on matters of foreign or domestic politics, economy, culture, science, health, environmental issues and law. Consequently, the Court considered the injunction to be "far too broad, impairing the very essence of price comparison" and, moreover, found its practical implementation highly difficult and permanently at risk of the imposition of fines in the case of non-compliance. The Court concluded that "when balancing the conflicting interests involved and taking account of the impact of the injunction on the applicant company's possibilities in future for advertising involving price comparison, the Austrian courts have overstepped their margin of appreciation in the present case, and that the measure at issue was disproportionate, and therefore not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention." Accordingly, there has been a violation of Article 10 of the Convention.

[70] Eur.Ct.H.R., *Krone Verlag GmbH & Co KG v. Austria* (Application No 39069/97), judgement of 11 December 2003.

The applicant company was awarded EUR 688,22 in respect of pecuniary damage, EUR 6.000,-- in respect of costs and expenses and EUR 200,-- in respect of additional interest.

*Legislative initiatives, national case law and practices of national authorities*

**Highly questionable secret investigations have been launched by the Federal Office of Crime Investigation (*Bundeskriminalamt*) and continued for several months against two critical lawyers active in the protection of human rights after a member of staff of the Ministry of the Interior belonging to the inner circle advising Minister Ernst Strasser provided allegedly suspicious material.**

Even jurists of the Ministry, who preferred to remain anonymous, remarked in the Vienna weekly "Falter" that they had not experienced anything comparable where incriminating material should be found to discredit a certain person and that these investigations were a shame coming close to the old Inquisition.[71] One of the lawyers, Nadja Lorenz, chairperson of the NGO SOS Mitmensch and substitute member of the Human Rights Advisory Board, was suspected of calling for disobedience against the law (*Aufruf zum Ungehorsam gegen Gesetze*) because of an interview she gave in a newspaper in which she had called for assistance to asylum seekers. The other one, Georg Bürstmayr, then already chairing one of the fact-finding commissions of the Human Rights Advisory Board, was suspected of facilitating the smuggling of human beings (*Schlepperei*) because his business cards were found among the belongings of some Chechnyan refugees that were intercepted by the police when they tried to pass the border between Austria and the Czech Republic. These refugees were members of the same group of 74 Chechnyans that already tried to enter Austria last year and credibly requested the protection of asylum law but were at that time successfully "invited" by the authorities to withdraw their asylum applications and to return to the Czech Republic, as the Minister of the Interior proudly reported on TV. This practice was fiercely criticised by Amnesty International and also the Human Rights Advisory Board started investigating the case and came to the conclusion that it appeared from the facts that refugees being in the majority ethnic Chechnyans were hindered in the border town of Gmünd to claim their right of asylum by threats or similar unlawful measures. In the mean time the human rights lawyers Georg Bürstmayr and Nadja Lorenz contacted the group of Chechnyans, reconstructed the events of that night of 31 October to 1 November 2003 with detailed protocols and eventually filed a complaint with the Independent Administrative Tribunal, which is still pending and will probably be decided next year. It was on that occasion that Georg Bürstmayr distributed his business cards to his clients explaining that they could address him if they needed legal advice. Whereas Nadja Lorenz giving an interview to the daily newspaper "*Der Standard*" did nothing but express that "[i]n case heavily traumatised persons are threatened by deportation, it is necessary to help them", which the investigators construed as criminal call on the public to hide illegal immigrants from the authorities. The investigations were carried out secretly without informing the lawyers of the suspicion against them and finally the files were transmitted to the Public Prosecutor's Office on 13 October 2004. Apparently the charges were so insubstantial that the Prosecutor abandoned the criminal proceedings quickly on 15 October. However, on the political level the cases remained on the agenda. When in a Parliamentary questioning of 28 October 2004, initiated by MP Terezija Stoisits of the Green Party, the Minister of the Interior was asked about his involvement in the case and what he thought about these methods exercised by a subordinate authority, he denied that he was informed about the investigations and emphasised that this was nothing but a routine course of action by the police which happens daily. Asked further why he did not reappoint Mr. Bürstmayr as chair of one of the commissions of the Human Rights Advisory Board, just as he did with all other members, the Minister replied that an equally qualified woman had applied for the respective position. MP Helene Partik-Pablé of the Freedom Party came to the assistance of the Minister by expressing that she was, as a

[71] *Falter* nos. 44/04 and 45/04.

matter of principle, of the opinion that generally no members of NGOs should be on the Human Rights Advisory Board as these people would bring along enormous prejudices against the police which they should then supervise objectively. Finally, after severe and persistent protests by Amnesty International, the Austrian Bar Association, the Judges' Association, and most of all the Human Rights Advisory Board the Minister had to give in an in mid November he reappointed Georg Bürstmayr chairman of one of the Vienna commissions of the Advisory Board.

It follows from the foregoing, that there are major concerns on the investigations conducted by the Ministry of the Interior against the said lawyers for several reasons. First, the allegations seem to have been raised without any substantial facts that would support them, otherwise the criminal proceedings would not have been stopped by the Public Prosecutor within a few days. Secondly, the persons investigated against are outspoken critics of authorities in questions of human rights, especially in asylum law, and professionally engaged in delicate cases with human rights implications (Nadja Lorenz is representing the widow of Cheibani Wague, who died possibly after ill-treatment by the police; Georg Bürstmayr had repeatedly and successfully brought asylum cases before the Constitutional Court). Thirdly, there is a striking closeness of the transmission of the files to the Public Prosecutor with the time when the commission members of the Human Rights Advisory Board were due to be appointed for a new period. Mr. Bürstmayr was the only chairman whom the Minister of the Interior refused to reappoint with reference to the pending criminal investigations. For Nadja Lorenz ongoing criminal proceedings would have had direct consequences on her entitlement to defend clients before the competent court, so long as the proceedings had lasted against herself. Fourthly, this can also be seen as an indirect attempt to exert influence on the Human Rights Advisory Board. Heinz Patzelt, Secretary-General of Amnesty International in Austria, pointed out that so far as the facts are known this "clearly smacks of classic political prosecution".[72] Amnesty International brought these investigations to the attention of the UN Special Rapporteur on Human Rights Defenders.

Taking together all aspects, what happened clearly gives rise for strong concerns that by order of the Ministry of the Interior arbitrary and politically motivated prosecution was initiated so as to intimidate two engaged lawyers and to exert pressure on the Human Rights Advisory Board as a whole. Nevertheless, the Human Rights Advisory Board was able to ward off the attack on its independence by successfully insisting on the appointment of Georg Bürstmayr and thereby showed that it is an effective and inconvenient supervisory body for the Ministry of the Interior and their subordinate authorities.

Another concern in connection with this affair is the wide ambit of section 281 of the Criminal Code prohibiting any call on the general public for disobedience against the law which appears to encroach on the fundamental right to freedom of expression over and above what is necessary in a democratic state.[73] The excessive provision should be revised, even though it is not applied very often, so that it meets the requirements of Article 11 of the Charter and Article 10 of the ECHR.

## Article 12. Freedom of assembly and of association

Freedom of civic association

*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

**In *Wallmann et al. v. Austria* (Communication No. 1002/2001) the UN Human Rights Committee had to deal with a complaint regarding the compulsory membership of the**

[72] Interview in the Vienna weekly *Falter* no. 44/04.

[73] This concern was first raised by Amnesty International in a communication on the most ardent human rights topics in Austria in 2004.

**author's hotel to the Regional Section of the Austrian Chamber of Commerce and the imposition of membership fees. However, the Committee found that there were no indications that the Austrian Chamber of Commerce established by law as a public law organization with mandatory membership did amount to a circumvention of the right to free association as laid down in Article 22 ICCPR.**

The authors of the communication are Franz Wallmann (first author) and his wife, Rusella Wallmann (second author), both Austrian nationals, as well as the "Hotel zum Hirschen Josef Wallmann" (third author), a limited partnership including a limited liability company, represented by Mr. and Mrs. Wallmann for the purposes of this communication. Since December 1999 the second applicant holds 100 percent of the shares of both the limited liability company and the limited partnership.
The authors claim to be victims of a violation of Article 22 § 1 of the Covenant, because the limited partnership's compulsory membership with the Regional Chamber of Commerce, combined with the obligation to pay annual membership fees, effectively denies their right to freedom of association, including the right to found or join another association for similar commercial purposes. Furthermore, they stated that Article 22 of the Covenant was applicable to the Chambers, since they perform the functions of a private organization representing its economic interests.
Due to Austria's reservation to Article 5 § 2 (a) of the Optional Protocol the Committee declared the communication inadmissible as regards the first author since "the same matter" had already been examined by the European Court of Human Rights. The communication was also declared inadmissible as regards the third author, for a limited partnership was not an individual and therefore couldn't submit a communication under the Optional Protocol. The communication was admissible as regards the second applicant who by way of holding 100 percent of the shares of the limited partnership is in her capacity as partner liable for the third author's obligations vis-à-vis its creditors and therefore directly and personally affected by the compulsory membership of the "Hotel zum Hirschen Josef Wallmann" to the Chamber. However, as regards her claim that high annual amount of the membership fee (*Grundumlage*) *de facto* prohibited the exercise of the right to associate freely outside the Chambers, the claim was declared inadmissible under Article 2 OP for failure to substantiate whether the annual payments to the Chamber were so onerous as to constitute a relevant restriction on her right to freedom of association.
As regards the second author's communication claiming that the compulsory membership with the Chamber of Commerce and the imposition of a membership fee violated her right to free association, the Committee considered that "once the law of a State party established commerce chambers as organizations under public law, these organizations were not precluded by Article 22 of the Covenant from imposing annual membership fees on its members, unless such establishment under public law aimed at circumventing the guarantees contained in Article 22." However, in the instant case the qualification of the Austrian Chamber of Commerce as a public law organization, as envisaged in the Austrian Constitution as well as in the Chamber of Commerce Act of 1998, did not appear to amount to a circumvention of Article 22 of the Covenant. Therefore, there has been no violation of Article 22 of the Covenant.

### Article 13. Freedom of the arts and sciences

Freedom of research

*Legislative initiatives, national case law and practices of national authorities*

After an intensive discourse among the members of the **Bioethics Commission** advising the Federal Chancellery in bioethical questions that was accompanied by considerable public

attention and lobbying a report[74] was presented in July 2004 that, supported by the majority, **suggests to relax the general prohibition of the so-called pre-implantation diagnosis (PID)**, which is method for detecting genetic deficiencies in embryos created by artificial insemination prior to their implantation. In moving away from its strict previous position the Commission's recommends to the Government allowing the PID in cases where it can be assumed that a serious genetic defect of the embryo would make the implantation itself impossible or where a genetic defect is so serious that a successful pregnancy cannot be expected. Supporters praise that after implementation of the recommendations women having a fertilised egg cell implanted are no longer left in the dark and also point to the significant risks for the fetus of the examination of the amniotic liquor which is possible from the 16th week of pregnancy onward. Critics, especially the Catholic Church and closely linked organisations like "Aktion Leben", fear that the PID is abused to produce "designer babies" and may lead to a distinction between valuable and less valuable life.[75]

## Article 14. Right to education

Access to education

*Legislative initiatives, national case law and practices of national authorities*

Representatives of the coalition parties have demanded that, as a general rule, all pupils beginning their first year in primary school ought to be able to have command of the German language. Current figures from Vienna, where the **language problems of pupils** are most evident, show that the performance of 19% of all pupils up to 15 years-old cannot be assessed because of lacking German language skills. It is therefore intended that non-German speaking children acquire the necessary language skills before the compulsory education begins at school. To further this, the idea was voiced to offer a general last free year in kindergarten. Otherwise, and as a last resort children of immigrants should be sent to a one-year preparatory class and effectively lose one year in their school history.[76] In a press communication of 2 December 2004 Elisabeth Hlavac, MP for the Social Democrats, welcomed the proposal to offer language courses before the children of immigrants start school but also remarked that the Government need not be surprised about the negative developments in school after it had reduced the well-tried system of a second teacher in the classroom especially devoted to those children for budgetary reasons.

## Article 15. Freedom to choose an occupation and right to engage in work

The right for nationals from other member States to seek an employment, to establish himself or to provide services

*Legislative initiatives, national case law and practices of national authorities*

**Another case that was adjudicated upon by the Constitutional Court[77] during the period of examination and caused much public attention and media coverage concerned the question of recognition of a same-sex marriage validly entered into by a German and a US-citizen in the Netherlands for the purposes of an Austrian residence permit. Although the case clearly touched on questions of Community law, namely the reading of spouse in Council Regulation 1612/68 on the free movement of workers including**

[74] "PräimplantationsdiagNostik (PID)" – Bericht der Bioethikkommission beim Bundeskanzleramt of July 2004, available at http://www.bka.gv.at/bioethik (28.12.2004).
[75] *Die Presse* of 15 and 19 January 2004.
[76] "Nur mit Deutsch in die Schule" in *Die Presse* of 29 October 2004.
[77] VfGH 14.10.2004, B 1512/03.

**family reunification, the Constitutional Court refused to follow the suggestion of the complainant to ask the European Court of Justice for a preliminary judgement in this matter.**

On 7 September 2001 a German national married his male homosexual partner Lon Langston Williams, a US-citizen, in the Civil Registry Office in Delft in the Netherlands, after a new law permitted same-sex marriages. Later, when the German national was offered a position in an international organisation in Vienna, he wanted to accept and claimed his right to freedom of movement and residence including the right to family reunification for third state nationals. However, the Austrian authorities refused to recognise the same-sex marriage concluded in the Netherlands and consequently denied Mr. Williams a residence permission on the basis of section 47 paragraphs 2 and 3 of the Aliens Act. The case finally reached the Constitutional Court which, in a judgement delivered on 14 October 2004, did not share the fundamental rights concerns and the doubts about the conformity of the decision with Community law. The central argument of the Court was that the legislator fulfilled its obligations imposed by Article 10 of Regulation 1612/68 without discriminating against "other relationships" than marriage because these were doomed to fail from the outset to have common children. It is supposed that the Constitutional Court somewhat missed the point as the question here was not about equal treatment of marriage with "other relationships" but of giving effect to a valid marriage concluded in another Member State. Apart from that the argument also fails to convince as heterosexual people unable to reproduce themselves are not excluded from marriage, even though the conception of children is desired by law. Moreover, the Council Regulation 1612/68 does not require the existence of children for invoking the rights pertaining to the freedom of movement and residence. Nevertheless the Constitutional Court stated that it was not for the Court to examine "if the interpretation by the authorities complies with Community law and the (national) legislator fulfilled its requirements in all aspects", without giving reasons for this opinion or further explanations. It is submitted that the Court acted in violation of Community law when it refused to recognise the same-sex marriage under foreign law without determining the scope of the term "spouse" as it applies in Community law. Since this is without any doubt a question of interpretation of Community law on which there is no settled case-law of the European Court of Justice, the Constitutional Court should have interrupted the proceedings in order to address the ECJ with this crucial question. It also appears that the judgement falls short of the requirements posed by the ECHR and the jurisprudence of the European Court of Human Rights on Article 8 in conjunction with the non-discrimination provision in Article 14. As can be inferred from the case *Karner v. Austria*[78], the Court of Human Rights will not accept a differential treatment on the grounds of sex or sexual orientation unless it is necessary to achieve a legitimate aim. Currently the case is pending before the Administrative Court, which will have to decide whether Mr. Williams is to be granted the status of spouse due to his marriage under Dutch law which would be impossible under Austrian law. His lawyer has already announced that he would call upon the Court to request a preliminary ruling from the European Court of Justice.

Access to employment for asylum seekers

*Reasons for concern*

It is deplorable that the **domestic legal framework de facto prevents asylum seekers from taking up an employment**. Notwithstanding the present difficulties on the labour market lowering the barriers of access would end the enforced idleness of asylum-seekers by enabling them to earn money in a legal way and thus make them less dependent from public support.

[78] Eur.Ct.H.R., *Karner v. Austria* (Application No 40016/98), judgement of 24 July 2003.

**Article 16. Freedom to conduct a business**

Freedom to conduct a business

*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

Recently, the European Court of Justice[79] ruled that **Austria failed to fulfil its obligations under Articles 43 and 49 EC by denying the self-employed exercise of certain medical-technical professions** (laboratory service, radiological service, orthoptic service) due to § 7a of the Act on higher medical-technical services (*Bundesgesetz über die gehobenen medizinisch-technischen Dienste)*. The necessity of a contract of employment discriminated against EU nationals who are members of the same profession and entitled to freedom of establishment and to provide services. Although Austria didn't contest the violation it didn't take appropriate legal measures to allow the self-employed exercise of these professions within the time-limit set by the commission in the course of the proceedings.

**Article 17. Right to property**

The right to property and the restrictions to this right

*Legislative initiatives, national case law and practices of national authorities*

By adopting the **Product Piracy Act** (*Produktpirateriegesetz*) Parliament passed complementary domestic regulations to ensure the proper enforcement of Council Regulation (EC) 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights.

**Article 18. Right to asylum**

Asylum proceedings

*Legislative initiatives, national case law and practices of national authorities*

**The preliminary asylum statistics[80] for 2004 show a remarkable decrease of the applications as compared to the preceding years, which may be attributable to the fact that after the eastern enlargement Austria is no longer a country with an external EU border (the Schengen border remained, however, as it stood before the accession of the new countries). By way of contrast, the costs for the Federal care regime for the duration of the stay of asylum seekers in the country are on the rise.**

From January to November 2004 a total of 22.812 persons applied for asylum in Austria, which is a decrease of 25% in comparison with the year 2003. Most people came from the Russian Federation (i.e. Chechnya) with 5.665 applications. The corresponding recognition rate, which correlates positive and negative decisions, is at 92.80% (2.474 pos., 192 neg.). Serbia and Montenegro follows with 2.538 applications and a recognition rate of 30.50% (369 pos., 841 neg.). India has 1.767 applications and a rate of 0%, next is Nigeria (1.737 – 0.69%), followed by Georgia (1.657 – 11.26%), Moldova (1.259 – 4.37%), Turkey (1.031 –

[79] ECJ, C-81/03 *Commission v. Austria*, judgement of 9 September 2004.

[80] Ministry of the Interior, "*Asyl- und Fremdenstatistik November 2004*" available at http://www.bmi.gv.at (28.12.2004).

13.80%), Afghanistan (705 – 85.82%), Pakistan (551 – 3.51%), and the People's Republic of China (514 – 4,74%). Per 30 November 2004, 24.413 cases could be concluded and became final, but there is still a huge backlog of more than 35.000 applications.
The following table provided by the Ministry of the Interior shows the state of fulfilment of the quota by each Federal Province which was agreed in the Article 15a-Agreement on the basic care for asylum seekers:

| Federal Province | actual | relative quota | absolute quota | difference | fulfilled % | | deviation from quota % | |
|---|---|---|---|---|---|---|---|---|
| **Burgenland** | 674 | 3,4554% | 947 | -273 | 71,20 | % | -28,80 | % |
| **Carinthia** | 1.223 | 6,9639% | 1.908 | -685 | 64,11 | % | -35,89 | % |
| **Lower Austria** | 5.260 | 19,2434% | 5.272 | -12 | 99,78 | % | -0,22 | % |
| **Upper Austria** | 3.970 | 17,1394% | 4.695 | -725 | 84,56 | % | -15,44 | % |
| **Salzburg** | 1.284 | 6,4152% | 1.757 | -473 | 73,06 | % | -26,94 | % |
| **Styria** | 3.440 | 14,7307% | 4.035 | -595 | 85,25 | % | -14,75 | % |
| **Tyrol** | 1.360 | 8,3843% | 2.297 | -937 | 59,21 | % | -40,79 | % |
| **Vorarlberg** | 775 | 4,3707% | 1.197 | -422 | 64,73 | % | -35,27 | % |
| **Vienna** | 9.408 | 19,2971% | 5.286 | 4122 | 177,97 | % | 77,97 | % |
| **Total** | 27.394 | | | | | | | |

Source: Ministry of the Interior (Dept. III/5) 2004.

The overall costs for the Federal caretaking regime for asylum seekers including personnel, infrastructure, transports, social security, hospital costs, medication, etc. amounted to EUR 47,582.998 million (32.364 applications) in 2003, whereas the preliminary costs from 1 January to 12 December 2004 (23.809 applications) add up to approximately EUR 55,800.000 million. The caretaking costs per person per day have steadily increased from EUR 73,-- in 2000 to EUR 130,-- in 2003.

**The widely criticised 2003 amendment to the Asylum Act 1997 was under scrupulous examination by the Constitutional Court this year after the Provincial Governments of Upper Austria and Vienna as well as the Independent Federal Asylum Tribunal have filed complaints challenging the law on numerous points. The institutional complainants shared concerns that many of the new restrictive regulations on asylum seekers would violate fundamental rights.**

On 15 October 2004 the Constitutional Court delivered an exceptionally long and detailed judgement comprising more than 200 pages[81], in which it annulled three important provisions, even though it could not draw on the provisions of the Geneva Convention on Refugees and take them as a judicial yardstick, as the Convention does not rank at constitutional level which the Court seemed to regret, though. Regarding the other contested provisions that "survived" the Court's scrutiny as they could be construed in a way that make them compatible with the Constitution and fundamental rights the comprehensive decision could be considered as sort of interpretation guide for the application of the law by the civil servants of the Asylum Authority.
In particular, the Court deemed as unconstitutional the general prohibition for applicants to bring new evidence to the attention of the authorities in order to restate or refine their case in the second instance of asylum proceedings. While it acknowledged a legitimate interest in speeding up the procedure, it noted that due to the special nature of the asylum proceedings most applicants would find themselves in an extraordinary physical and mental state when they are first interrogated immediately after entry and, furthermore, cannot instantly check the

[81] VfGH 15.10.2004, G 237, 238/03, G 16, 17/04, G 55/04.

correctness of the translation of their statements on which they have to rely because in most cases they do not understand the German language. As there is thus a high potential for misunderstandings between the authority and the applicant and with a view to the gravity with which a possible wrong decision of the asylum authority bears on the respective applicant, the Asylum Act did restrict the right to offer new evidence too excessively only to cases of medically indicated traumatisations.

Secondly, the general exclusion of suspensive effect of an appeal against a negative first instance decision, meaning in effect that an asylum seeker could be deported while his or her appeal was still pending, was held to be unconstitutional. The Court ruled that it was unlawful to burden the appellant with all the consequences of a potentially incorrect decision so that the remedy used to challenge it, in fact, becomes ineffective.

Finally, the Constitutional Court annulled a provision in the Asylum Act according to which asylum seekers shall at once be taken in detention pending deportation if they apply for asylum again within one year after a final negative decision. The Court found that the legislator did not take into account at all that a consequential application within that period may not in all cases be abusive but could still be reasonable and have prospect of success because of a change in law or of the factual situation.

The rest of the contested provisions that were inserted into the Asylum Act by the amendment 2003 was upheld by the Constitutional Court in its judgement, mainly because it found a possibility to read them in a way that was reconcilable with Constitutional requirements and fundamental rights. In the following the most important provisions are outlined in short: As regards the concepts of safe third states and safe states of origin, the Court stressed that these could only amount to a general legal presumption which must be refutable on the occasion of an individual examination. Never could these concepts be seen as absolute bars for a person to be admitted to individual asylum proceedings, as exceptionally the personal circumstances of an asylum seeker could point against the safety of those states. This clarification confirms the standing practice of the Independent Federal Asylum Tribunal denying in its decisions even some of the neighbouring EU countries the status of a safe third state.[82] As to the provision allowing the personal search of asylum seekers on the occasion of the application, the Constitutional Court declared that it could not be construed so as to allow a search in all circumstances without recourse to the individual case. Rather, an interference with the fundamental right to respect for private life may only be justified if the asylum seeker does not properly co-operate in determining his or her identity and the facts concerning the refuge. The duty to stay at the initial reception centres following the application combined with the threat to be taken into detention pending deportation in case of non-compliance was interpreted by the Constitutional Court as compulsory stay at times during the proceedings where the personal presence is necessary (e.g. interrogation, medical examinations), thereby not amounting to a violation of the fundamental right to personal freedom.[83]

Asked on the day of the proclamation of the judgement, Karl Korinek, the President of the Constitutional Court, used unusually frank words in expressing his expert opinion about the amendment to the Asylum Act: "Politely spoken the legal quality of the law is not good – it is a systematically bad law, for example with references to paragraphs that do not exist."[84] The Austrian office of the UNHCR and NGOs like Amnesty International and SOS Mitmensch that have objected to the amendment from the beginning and have constantly fought against making Austrian asylum law even more restrictive broadly welcomed the judgement of the

[82] This applies namely to Slovakia, the Czech Republic and Italy; the latter was repeatedly declared unsafe following a leading decision in 2002 for the lack of an adequate judicial review in the appeals procedure and the material danger of "domino deportations" (UBAS, 17 October 2002, GZ: 220.884/30-II/04/02).

[83] From 1 May to 31 July 2004 a total number of 49 asylum-seekers were brought to detention centres in order to effect their deportation for leaving the initial reception centre without justification, written response to Parliament by Minister Ernst Strasser on the situation of asylum-seekers after the new Asylum Act, Anfragebeantwortung 2058/AB (XXII. GP) of 22 September 2004.

[84] Ö1 Mittagsjournal (radio news) of 15 October 2004.

Constitutional Court as the return of the rule of law in asylum matters and as good example for the functioning of the domestic system of checks and balances. Clearly, the asylum authorities are now equipped with a sort of manual on how to interpret and apply the provisions of the Asylum Act correctly[85] and it is to be hoped that the authority of the Constitutional Court is persuasive enough to prevent at least the most obvious violations of the rights of asylum seekers in the future practice. That this may be a long road, though, is evidenced by the fact that in the night from 4 to 5 November, the aliens police effected the deportation of two Chechnyan women and an eight-year-old child to Poland directly after the negative first instance decision that included the deportation order, acting in clear defiance of the judgement of the Constitutional Court. The Ministry defended the decision arguing that the judgement had not yet been officially announced in the Federal Law Gazette.[86]

About one month after the annulment of important sections of the Asylum Act by the Constitutional Court the Ministry of the Interior released plans of reform. However, these **plans** contained nothing but a **further tightening of the asylum law** with the cornerstones being the confinement of the right to free movement to a specific province, the exclusion of the possibility to a final appeal to the Administrative Court, and the introduction of a special preventive security detention for asylum seekers who are suspected of having committed a criminal offence or apply for asylum in prison. These ministerial suggestions were heavily criticised by various experts in constitutional law. Bernd-Christian Funk, professor of constitutional law and deputy chairman of the Human Rights Advisory Board, said that all those restrictions stem from the wrong philosophy that in case of doubt an asylum seeker is a person that has to be encountered with utmost suspicion.[87] The conceived elimination of the judicial review by the Administrative Court in asylum proceedings would be a step into the wrong direction and a cut back on the rule of law. "Nobody shall be punished for applying for asylum", assisted his academic colleague Theo Öhlinger when referring to the general area restrictions for asylum seekers which he deemed unconstitutional. Even the President of the Constitutional Court was prompted to express his disapproval of the intention to exclude the asylum proceedings from the jurisdiction of the Administrative Court since this would mean a peculiar deviance in the system of judicial review and run counter a recent agreement in the Austria Convention undertaking to draft a new Constitution not to exclude any administrative area from the jurisdiction of the Administrative Court.[88] Huge concerns were also expressed by NGOs and both opposition parties. Terezija Stoisits, MP for the Green Party, called the plans an "amok run against the rule of law". In an attempt to defend the proposal for a more rigorous stance, the Ministry of the Interior launched statistics allegedly showing an increase of criminals in asylum seekers, but in fact the statistics only showed that 40% of the asylum seekers were suspected by the police of having committed a criminal offence; the Ministry could not provide any numbers on asylum seekers that were actually convicted by a criminal court. Amnesty International and Caritas claimed that these figures were unreliable and inappropriately interfered with the presumption of innocence as they implied the notion that a person against whom the police is investigating would automatically be guilty of a criminal offence, and did moreover not distinguish between petty crimes and more serious and violent crimes.

On 18 November, Parliament passed an Act on the harmonisation of the different pension systems which also contained the clandestine **abolition of the entitlement of asylum seekers to receive family allowance**.

[85] Heinz Patzelt, Secretary General of Amnesty International in Austria, in a press communication of 15 October 2004.
[86] Amnesty International, press release of 16 November 2004.
[87] Austria Press Agency, 19 November 2004; daily newspaper Die Presse of 20 November 2004.
[88] *Die Presse* of 26 November 2004.

As was made public in January 2004, the Constitutional Court objected to deal with a complaint by the **Independent Federal Asylum Tribunal** (*Unabhängiger Bundesasylsenat - UBAS*) for the lack of any real prospect to succeed.[89] It was purported that its organisational transfer from the Federal Chancellery to the Ministry of the Interior was unconstitutional. The appeals tribunal in asylum matters feared in accordance with NGOs that irrespective of its constitutionally guaranteed independence the Minister of the Interior would hence be in a position to exercise undue influence on the members of the tribunal through decisions affecting the financial resources and equipment. A senior member confirmed[90] the increasing pressure that is exerted on the Tribunal by the Ministry by way of demanding weekly statistics on the progress of the work, providing lists of cases to be dealt with preferentially concerning in particular criminals, prostitutes and asylum seekers who have been staying in the Federal caretaking regime for a long time, and finally public criticism on the low output of decisions while at the same time ignoring the pressing lack of staff in the Independent Federal Asylum Tribunal. In August 2004 the activity report of the Independent Federal Asylum Tribunal for the years 2002 and 2003 was released and showed a significant increase of its workload.[91] During that period 22.078 appeals have been filed with the tribunal in total, meaning a rise by 75% compared to the previous two years while the number of members has remained constant at 35. Of the 6.702 cases that were examined on substance only 3.512 came out with upholding the decision of the Federal Asylum Authority. In 2.015 cases the decision was remitted to the first instance for procedural deficiencies and in 1.175 cases the appeals tribunal granted asylum to the appellant. The rest of cases was rejected on formalities without deliberations. Unofficial figures for 2004 show that of 4000 appeals decisions on substance 2700(!) were overruled, that is more than two thirds of all cases, which does not cast a very positive light on the quality of the decisions of the first instance Federal Asylum Authority. Another problem is the overburdening workload of the appeals tribunal. For the current year 2004 an expected overall amount of about 9000 cases will be dealt with on appeal, whereas the Tribunal with its 35 members and 14 senates was originally designed for only 5.500 cases per year. Therefore, it appears to be inevitable that the Tribunal be adequately equipped with personnel, that is additional jurists for the establishing of a minimum of three more senates and, equally important, a much higher number of non-judicial staff assisting the senate members so that at least the yearly workload can be covered. At present, there are only 9 non-judicial assistants employed who are mainly occupied with keeping up to date the various country documentations.

The practical implementation of the concept of **initial reception centres** (*Erstaufnahmestellen*), which is provided for in the latest amendment to the Asylum Act and applicable since 1 May 2004, is far from being accomplished. Three camps - Traiskirchen, Thalham, and Schwechat – have been designated as initial reception centres for asylum seekers where each application shall be examined within 72 hours followed by a first decision on whether it is justified, manifestly ill-founded or requiring further investigations. However, the capacities of these camps differ widely: Traiskirchen in Lower Austria is the major location designed to accommodate a maximum of about 1000 asylum seekers but currently packed on average with 1500 asylum seekers, whereas Thalham in Upper Austria cannot admit more than 200 persons; the same low capacity is true for Schwechat, being the airport next to Vienna, which receives all asylum seekers coming to Austria by plane. In fact, the vast majority of asylum seekers are concentrated in Traiskirchen, which is a small town of 5.300 inhabitants, meaning that one in four persons living there is an asylum seeker. As a result serious local tensions have developed and recurring protests are organised by the mayor and the population that feel that they have to bear a disproportional share of burden and that they are left alone with their problems by the responsible politicians, notably the Minister of the

[89] VfGH 25.11.2003, B 804/03.
[90] Telephone call on 13 December 2004 with a member of the Independent Federal Asylum Tribunal who preferred to remain anonymous.
[91] UBAS activity report for 2002/2003.

Interior. Although the purpose of the new approach clearly is to accelerate the asylum proceedings and to reduce the number of asylum seekers in the camps, it appears that those expectations have not been met in practice so far, mainly because of a significant lack of qualified personnel that would be needed to treat the load of cases. In a response to Parliament the Minister of the Interior stated that of approximately 5000 applicants for asylum during the period between 1 May 2004 and 25 July 2004 1242 were arrested by the police in order to be transferred to one of the three initial reception centres.[92] Nevertheless the asylum department in the Ministry of the Interior responding to a questionnaire claimed, unfortunately without any reasoning, that in their opinion the concept of the initial reception centres stood the practical test and only pointed to the fact that the Constitutional Court in principle confirmed in its judgement of 15 October 2004 that admission proceedings prior to the actual asylum procedure are consistent with the constitution.[93]

After the initial reception in the three asylum centres, the asylum seekers are spread over the country and taken care of in accommodation that should be available and provided by the provinces according to the proportional quota that was fixed together with the basic 60:40 division of the financial burden in an agreement between the federation and the provinces in December 2003 (so-called "**Article 15a – Basic Care Agreement**", as this is the corresponding legal basis in the Austrian constitution).[94] Pursuant to its Article 11, the cost-sharing agreement between the Federation and the Provinces will be applicable until 30 April 2005 at the latest, after that date the whole costs for the basic care of persons during their pending asylum proceedings will have to be borne by the Federation alone. While this agreement initially seemed to put an end to the infinite struggle of responsibility, jurisdiction and competence, it does not work properly in practice because of the Minister's pledge not to establish places for asylum seekers in municipalities against the will of the local mayors. While the Minister's repeated argument is that imposing the accommodation of asylum seekers on a municipality would be counterproductive for a peaceful co-existence and integration into local life, it unduly shifts the political responsibility to the level of local government where such delicate questions cannot be dealt with properly. As a direct result, most provinces cannot provide the number of places needed and agreed, only Vienna and Lower Austria managed to fulfil the quota so far (see table above). Unsurprisingly, the Provincial Governments have struggled to convince the mayors to provide places for asylum seekers, but very few could actually be found to cooperate in the rather unpopular undertaking. A positive example is the town of Landeck, Tirol, where the mayor Engelbert Stenico opened a former local inn for 63 asylum seekers and was subsequently re-elected, which he explained by his employing an active information policy towards the population. In Upper Austria, the Governor thus declared that the power of the municipalities concerned to "veto" the allocation of asylum seekers will be confined to accommodations of more than 60 persons. Vorarlberg, which found the assigned quota of 4,37% (600 to 700 asylum seekers) unacceptable for lack of places in the Province, suggested to take over only the costs for the caretaking of the said number of persons who should then be accommodated in other Provinces. The Provincial branch of the Caritas in Vorarlberg countered that not long ago during the war in Bosnia it was possible for the authorities to receive more than 3000 refugees so that the provision of places for some hundred persons should not pose a major problem.[95] In September, Josef Plank, member of the Provincial Government in Lower Austria and responsible for asylum matters, voiced the idea that each of the 2359 Austrian municipalities accept one refugee family in order to solve the persisting problem of sufficient accommodations. While the Minister welcomed the proposition, critics pointed out that small municipalities would generally be overburdened and that the necessary medical, social and

[92] Parliament, Written response on the situation of asylum-seekers after the new Asylum Act, Anfragebeantwortung 2058/AB (XXII. GP) of 22 September 2004.
[93] Ministry of the Interior, written response to a questionnaire of 21 December 2004.
[94] Federal Law Gazette (BGBl) I 80/2004, in force since 1 May 2004.
[95] Cf. the daily *Die Presse*, 7 April 2004.

legal care could not be granted if the caretaking of asylum seekers is decentralised in such a radical way. Instead, it would be much more effective to adapt those military barracks which are no longer in use due to the restructuring of the Austrian Army for the purposes of asylum seekers, as was inter alia remarked by Terezija Stoisits, human right's speaker for the Green Party.[96] Several times the Government indeed considered to open some of the empty barracks but yet did not go beyond the stage of announcements: at a convention of the governing Conservative Party (ÖVP) in St. Wolfgang Chancellor Wolfgang Schüssel said that it was accorded with Defence Minister Günter Platter to provide two barracks in Steyr and Kufstein for a period of two years in order to contribute to a relief of the tense situation of asylum seekers. It appears that the priorities lie more on the sale of the military properties so as to finance the ongoing reform of the military forces than on any serious deliberations on how to use them in the context of the Federal caretaking of asylum seekers. Furthermore, the Chancellor insisted that refugees being found guilty of a criminal offence in Austria might not expect to be granted the right to permanently stay in the country.
A further serious blow came when Carinthia unilaterally declared the agreement discharged in November 2004 arguing that the underlying purpose of the agreement was frustrated when the numbers of asylum seekers turned out to be much higher than on the basis of projections at the time the agreement was concluded. In response, the Minister of the Interior called upon Carinthia to stick to the agreement and to fulfil its obligations. The Provincial Government of Styria has also announced to fight Carinthia's drawback with all legal means, not so much for humanitarian reasons but mainly for the fact that otherwise the respective share of the remaining Provinces adhering to the agreement would grow correspondingly.

In April 2004 the asylum debate reached a **new public climax** when the two non-governmental organisations *Caritas* and *Diakonie*, both specialised in helping refugees in need, stopped to admit any more asylum seekers into their overcrowded accommodations in Vienna. The Caritas alone said that they had provided places to 700 persons and could not provide any further even with best intentions; it was first and foremost the Minister of the Interior that failed to fulfil his obligations. Newly incoming asylum seekers were thus briefed about the situation and sent to the Ministry of the Interior being the competent authority for the provision of places for asylum seekers in need together with a city map. In a reaction, Ernst Strasser, the Minister of the Interior, denounced this procedure a "brutal and inhuman campaign of the Caritas" taking asylum seekers hostage for merely political reasons. The Minister presumed that the Caritas tried to exercise pressure on the Governors of the Federal Provinces in advance of the agreement that would lay the responsibility on their shoulders as of 1 May but agreed that the Provinces should do better in their preparations to provide a sufficient number of places to sleep. The City Government of Vienna, being among the few Provinces that fulfilled the quota, declared that they had no sympathy whatsoever for the quarrel between the NGOs and the Minister of the Interior, which led to more and more persons roaming the streets in the night and using public transport; instead there should be a common approach by all stakeholders to solve the problem. The NGOs rejected the charges and recalled that they stepped in for humanitarian reasons to soften the hardships asylum seekers had to endure because of essentially political omissions of the Government and were not in a position to substitute themselves for the authorities commissioned by the Austrian constitution to act in this case. In this connection the Caritas also pointed to the fact that in contrast to what the Minister of the Interior repeatedly claimed there were cases of asylum seekers in need that were expelled from the Federal caretaking regime simply because of "lack of space".[97] Clearly, this proceeding is in violation of the obligations stemming from the Geneva Convention and other international human rights treaties.

[96] Cf. the daily *Die Presse*, 16 September 2004.
[97] Cf. Facsimile of a transcript of the internal asylum-seekers information system (Asylwerber-Informationssystem - AIS) run by the Ministry of the Interior, printed in the daily *Die Presse*, 9 April 2004, p.11.

On the occasion of the transformation of the **biggest asylum-camp in Traiskirchen** into an initial reception camp on 1 May 2004 the Ministry of the Interior launched plans to gradually transfer all permanently residing asylum seekers to other accommodations so as to provide space for newly arriving refugees. According to the mayor of Traiskirchen, Friedrich Knotzer, the Ministry of the Interior pledged to reduce the inmates of the camp to about 200 to 300 people in the course of May.[98] However, more realistic seemed to be numbers voiced by officials of the Ministry who spoke of not more than 1000 asylum seekers in the long run. Indeed, in the first days of May 70 persons were brought in coaches from Traiskirchen to Vorarlberg, 100 to accommodations in Carinthia and another 50 to Salzburg and the situation seemed to relax slowly. However, at the end of June the camp in Traiskirchen again registered more than 1600 asylum seekers, even though the number of applications for asylum sank at the same time. While the Ministry again blamed the Provinces for not providing enough places, the mayor of Traiskirchen, frustrated from the developments, started to mobilise the media and local people and agitated against the unbearable situation of his town. He called for a strict curfew for asylum seekers and a refurbishment of the whole camp. When experts from the UNHCR visited the initial reception camps Traiskirchen and Thalham several times during May, they were very much concerned about the police detention-like character and the fact that all adult asylum seekers were systematically body-searched, although the Asylum Act permits this only in cases where objects and documents are retained that could help identify the refuge route and the reasons for refuge. The UNHCR report[99] further complained about the deficient access to medical and psychological treatment and the lack of qualified interpreters, who in some cases even carried out the interrogations themselves. The legal advisors, provided by law, were generally found to be little experienced and left without the necessary means to do independent research. In October, the District Administrative Authority of Baden issued a decision on European Homecare, the private German company running the camp in Traiskirchen, ordering the immediate evacuation of one of the buildings for its miserable and dangerous state and ensuing serious hygienic and medical deficiencies. The debate was instantly reheated and the Minister of the Interior reacted by announcing that each day 50 persons would have to leave Traiskirchen until there were 240 dwellers less in the camp; if possible, these people would be transferred to other available accommodations but in case the Provinces did not provide further places he could not exclude the possibility of some asylum seekers being left uncared on the streets. Recently, it was reported that asylum seekers were refused entry into the camp in Traiskirchen when they carried food and drinks. The measure was defended by the director for hygienic reasons, because more and more asylum seekers started to cook themselves leaving the kitchens dirty.[100]

Since the new accelerated asylum procedure demanding a first decision on the application within 72 hours could jeopardise the rights of asylum seekers, section 24(3) of the Asylum Act (*Asylgesetz*)[101] requires that each applicant shall immediately receive **information sheets** containing all necessary information. In practice, three information sheets of altogether ten pages have been elaborated by the Federal Asylum Authority and translated into 36 languages but it is very doubtful whether the information given is truly comprehensible for asylum seekers. The association "Work Group Linguistic Rights" (*AG Sprachenrechte*) asked four academic experts to examine the information sheets from an ethnological, linguistic, psychiatric and psychotherapeutic viewpoint respectively. The result was disastrous.[102] Sentences were generally too long and the vocabulary used was too complicated and aligned to "officialese" to allow the average asylum seeker to understand at first reading. Much criticised were also the questions on experienced traumatic incidents and sexual exploitation,

[98] Cited in the daily *Die Presse* of 5 April 2004.
[99] UNHCR Preliminary Report on the Initial Reception Camps of 26 May 2004, available at http://www.unhcr.at/index.php/aid/1571 (27.11.2004).
[100] Cf. the Vienna weekly *Falter* no. 47/04, p.11.
[101] Federal Law Gazette (BGBl.) I No 76/1997 last amended by BGBl I No 101/2003.
[102] Expert opinions accessible via http://www.sprachenrechte.at (Asyl) (27.11.2004).

as they required a self-diagnosis and did not take into account the differences in other cultures where the sexual sphere is considered most private and intimate. These were questions that required a very cautious dialogue building on mutual trust and could not be decided on the basis of a questionnaire. On the other hand they were also described as an invitation to desperate asylum seekers to invent traumatic experiences that could then hardly be told apart from real trauma by the civil servants of the Federal Asylum Authority. Confronted with these charges the speaker for the Minister of the Interior defended the information sheets with the reference that any single sentence had been accorded with the UNHCR and for the illiterate there were even touch-screens available with videos displaying the course of the asylum procedure.[103]

Austria has received a good proportion of the means in the **European Refugee Fund**. As was made public this year, almost EUR 1.6 million were transferred to Austria in 2003, which were spent primarily on legal advice, an information project of the Federal Asylum Authority and voluntary return counselling. For the current year 2004 the Ministry of the Interior confirmed that Austria receives the sum of EUR 2.2 million.[104]

The Federal Asylum Authority started to co-operate with the association "*Menschenrechte Österreich*" (Human Rights Austria) in order to determine the exact **origin of asylum seekers by way of linguistic expert opinions**. The so-called "country-experts" of the association, who have no academic education, are asked to conduct phone interviews with asylum seekers and assist the civil servants of the Asylum Authority with opinions describing the impression they have of the origin of the interviewed person. The project costs EUR 63.326,-- in the first year, a sum which is equally shared between the Ministry of the Interior and the European Refugee Fund. The UNHCR heavily opposed the method and considered the money wasted because of the anonymous nature of the opinions and the lack of any reasonable quality standards for the experts, which made it far from certain that the results could really be used in the asylum proceedings.[105]

In the forefront of a meeting in October with the then designated Commissioner for Justice and Home Affairs, Rocco Buttiglione, Minister Ernst Strasser made clear in an interview that it was his intention to insist on the building of **reception camps for refugees outside the European Union**, namely in North Africa and the Ukraine. The measures, resembling the concept initially pushed by the United Kingdom, were targeted to prevent that refugees could apply for asylum in the European Union including, of course, Austria. The Minister said it was out of question and perfectly clear that no asylum proceedings would be carried out in such camps.

*Positive aspects*

It should be mentioned under this head that the unsatisfactory general situation and treatment of asylum seekers has prompted unusual and creative engagements such as the very positive **private initiative** of the *Raiffeisen* bank and the *UNIQA* assurance company which announced on 15 October 2004 to step in for the omissions of the authorities by adapting two buildings in Vienna owned by them for the caretaking of persons in need. Thanks to those companies a total of 150 places shall at the final stage be established for asylum seekers, who will then be taken care of by the NGO *Arbeitersamariterbund*. This initiative was widely welcomed by NGOs active in the field of migration and asylum and also by the Green party who called on other companies to follow the good example of combining public relations with providing real help.

[103] Cf. the Vienna weekly *Falter* no. 29/04, p. 11.
[104] Ministry of the Interior, written response to a questionnaire, received on 21 December 2004.
[105] Cf. the Vienna weekly Falter no. 47/04, p. 11.

*Reasons for concern*

In 2004 there remain several reasons for concern in Austria regarding the **treatment of asylum seekers in practice and the underlying policy**. A consistent policy on how to tackle the recurring issues and problems in the field of asylum and immigration on the foundations of human rights and procedural guarantees taking into account the international obligations stemming from the Geneva Refugee Convention and also Council Directive 2003/9/EC concerning minimum standards on the reception and caretaking of asylum seekers is still missing. Unfortunately, though, there seems to be some kind of political calculation behind all the measures taken and not taken respectively with a view to creating a general negative climate for asylum seekers and a negative attitude in the population that maintains the impression of asylum seekers being a source of permanent troubles. Rather unsurprisingly, a survey carried out shortly after the surprising resignation of Minister Ernst Strasser revealed that the majority of Austrians want a more restrictive asylum law: 39% of the persons interviewed found that the asylum policy is too lenient while on the opposite side 25% thought that the current approach taken by the Government is too stringent.[106] It would thus be recommendable to entrench the fundamental rights of asylum seekers and the corresponding obligations of the state at constitutional level in order to ensure a better protection for the individual refugee during the asylum proceedings and at the same time allow the judiciary to measure the applicable law and the practice of the asylum authorities vis-à-vis a higher standard. While it is admitted that the right to asylum is in many times abused for economical reasons by persons dreaming of a better life, it would still be recommendable to adopt a policy that differentiates more between the individual fates of the refugees and is cautious about arriving at general judgements.

Recognition of the status of refugee

*Legislative initiatives, national case law and practices of national authorities*

Following the case of 74 Chechnyans being refused entry to Austrian territory by the authorities and rejected at the border to the Czech Republic in 2003 notwithstanding their obvious intentions to apply for asylum in Austria, the **Human Rights Advisory Board** investigated the case and presented its concluding Recommendation in March 2004.[107] Denouncing this incident, the HRAB **recommended strictly ordering the Gmünd District Administrative Authority to accept all applications for asylum** and to abstain from exerting any undue pressure on asylum seekers with a view to their refraining from or withdrawing an application.

Unaccompanied minors seeking asylum

*Legislative initiatives, national case law and practices of national authorities*

In 2004, as the preliminary figures from the Ministry of the Interior show, the **total number of unaccompanied minors** from January to November adds up to **1.307**, of which 95 were under 14 years, 942 persons under 18 years, and 270 persons were found to be adults.

[106] Survey with a sample of 400 persons conducted by OGM and reported in *Die Presse* of 15 December 2004.

[107] Empfehlung des MRB zum Dringlichkeitsbericht der zuständigen Kommission des Menschenrechtsbeirats zum „*GÜP Gmünd*" of March 2004, available at http://www.menschenrechtsbeirat.at (23.12.2004).

**Article 19. Protection in the event of removal, expulsion or extradition**

Prohibition of removals of foreigners to countries were they face a real and serious risk of being killed or being subjected to torture or to cruel, inhuman and degrading treatments.

*Legislative initiatives, national case law and practices of national authorities*

**Despite pending asylum proceedings, the Minister of Justice extradited the Russian national Akhmet A. from the secessionist province of Dagestan to the Russian Federation, where he is under a clear threat of being tortured.**

The extradition was based on a request by the Russian Attorney General to the Austrian authorities which charged Akhmet A. of having kidnapped two Russian soldiers and of illegally possessing and carrying a firearm. On 25 September 2003 the Vienna Court of Appeal, which is forced by law to rely on the information provided by the foreign authorities, declared the extradition admissible after it was easily satisfied with the Russian pledge that it would honour the European Convention of Human Rights. Notwithstanding severe protests by amnesty international the Minister of Justice approved of the extradition by basically arguing that an extradition was no deportation and on 24 February 2004 Akhmet A. was finally deported to Russia, where he was immediately sent to prison. What makes this case so outstanding from the viewpoint of human rights is that simultaneously to the extradition procedure asylum proceedings were pending, in which the applicant argued that he was persecuted and threatened with torture. The appalling decision of the Ministry of Justice to extradite before the asylum authorities could examine the case on substance and under the principle of non-refoulement, constitutes a blatant violation of his fundamental rights as guaranteed by the Geneva Refugee Convention and the UN Anti-Torture Convention and also violates the Austrian Asylum Act. It is in clear contrast to the standing case-law of the Constitutional Court, which forbids the deportation of an asylum seeker as long as his or her case is not decided, and of the European Court of Human Rights, which forbids extraditions if there is a material risk of the person to be extradited suffering from inhuman or degrading treatment. Otherwise, if extradition requests by a state prevailed over applications for asylum by a national of that state, the protection afforded by the Geneva Convention would be washed out completely. Amnesty International thus called upon the Ministry of Justice not to interpret the unclear Austrian legal provisions in a way that effectively allows other states to allege criminal conduct in order to get hold of a national wanted for other reasons.[108] The human rights organisation is also concerned that the Austrian authorities do not maintain an obligatory monitoring system to examine whether the state having requested the extradition truly observes the fundamental rights of the extradited person.

*Positive aspects*

In the **extradition case of Sholam Weiss**, which was dedicated much space in the two preceding reports on Austria, the Government notified the UN Human Rights Committee of the fact that the Ministry of Justice worked on an amendment to the Extradition and Legal Assistance Act (*Auslieferungs- und Rechtshilfegesetz*) which is based on the concluding views adopted by the Committee in its decision on the complaint of Mr Weiss against his extradition to the United States. In January 2004, Parliament passed the respective law[109], which is now supposed to be in conformity with the requirements of the right to an effective remedy as it provides for the possibility of an appeal. Austria, moreover, informed the U.S. Department of

[108] Amnesty International, Contributions to the present report submitted to the authors upon request. See also http://www.amnesty.co.at/presse/2004/008_04_oesterreich.html (1.1.2005).
[109] Federal Law Gazette (BGBl.) I No 15/2004.

Justice about the views of the UN Human Rights Committee and asked to be notified about all procedural steps taken by the United States after the extradition of the complainant.[110]

[110] Requested contribution by the Federal Chancellery, received on 28 December 2004.

## CHAPTER III : EQUALITY

### Article 20. Equality before the law

Equality before the law

*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

**In *Pohl et al. v. Austria*[111] the UN Human Rights Committee did find no violation of Article 26 CCPR. As regards the different calculation systems for contributions of the land owners to the costs of construction of municipal sewerages in the municipality of Salzburg city and all the other municipalities in the province of Salzburg, the Committee could not conclude that the different pays were linked to anything else than the applicability of two different laws. As regards the calculation in the city of Salzburg and its failure to differentiate between owners of land designated as either "rural" or "building land", the Committee held that the difference in pay "was not linked to a particular place of residence within the municipality of Salzburg but depended on their assignment to a particular zoning area", which could not be considered as either discriminatory or arbitrary.**

The authors, four Austrian nationals residing in the municipality of Salzburg, alleged a violation of their rights under Article 26 of the Covenant, claiming that the differentiation between landowners in the Municipality of Salzburg and elsewhere in the Province of Salzburg, as well as the lack of differentiation between owners of parcels zoned "rural" and owners of parcels zoned "building land" within the Municipality of the City of Salzburg, with respect to the payment of landowners' contributions to new sewerage constructions was discriminatory. The authors owned "rural land" and claimed that the criterion of square metres disadvantages them by imposing on them contributions that were disproportionately higher than for everyone residing in the rest of the province of Salzburg where a system relying on the criterion of available living space was applied, without there being any indication that the construction of sewerages in the City of Salzburg was three or four times more expensive than elsewhere in the Province of Salzburg. Secondly, as regards the calculation system in the Municipality of Salzburg, the only criterion of the size of the plot was discriminatory for it failed to consider the differences between rural and building land, although since the introduction of the 1992 Zoning Law, which absolutely prohibits any construction on plots designated as "rural", while owners of plots on "building land" remain free to construct new or replace old homes preferred owners of "building" plots, which can be occupied by a large number of residents using the newly constructed sewerage, over owners of "rural" plots, usually occupied by only a few residents living in single-family homes, who must pay the same or even larger contributions.
The Committee observed that the third author's claim under Article 26 of the Covenant has become moot with the fulfilment of his payment obligations against the fourth author who had bought the third author's plot of land. The communication therefore was declared inadmissible, under Article 1 of the Optional Protocol, insofar as the third author is concerned. As regards the fourth author's claim of a violation of Article 14 CCPR for the denial of the Municipality of Salzburg to allow him join the assessment proceedings as a party, the Committee rejected this claim for lack of substantiation. Thus, the communication was admissible to the extent that it appeared to raise issues under Article 26 of the Covenant, insofar as the first, second and fourth authors were concerned.

[111] UN Human Rights Committee, *Pohl et al. v. Austria* (CCPR/C/81/D/1160/2003), decision of 23 August 2004

While the Committee did not exclude that "residence" may be a "status" that prohibits discrimination, it noted that the alleged failure to distinguish between "urban" and "rural" plots of land was not linked to a particular place of residence within the municipality of Salzburg but depended on their assignment to a particular zoning area. The Committee also took note of the State party's explanation that the degree of contributions for "rural" parcels did depend on how much of the plot its owner sought to have designated as an area where a building may be constructed. The Committee concluded that the failure to distinguish between urban "building land" and "rural" plots of land with a building site is neither discriminatory by reference to any of the grounds mentioned in Article 26 of the Covenant, nor arbitrary.
With regard to the claim that the different treatment of landowners in the City of Salzburg and landowners elsewhere in the Province of Salzburg, concerning the calculation of their landowners' contributions for the construction of new sewer systems for their plots of land, was not based on objective and reasonable criteria, as required by Article 26 of the Covenant, the Committee noted that, as admitted by the authors, landowners' contributions would still be three to four times higher even if calculation was based on the size of the living space of the dwelling situated on the plot of land. Therefore, it could not be concluded that "the different levels of contributions in- and outside the City of Salzburg resulted exclusively from the different calculation methods applied under the 1976 Salzburg Provincial Landowners' Contributions Act and the 1962 Act applicable to the other municipalities in the Province of Salzburg". Accordingly, the Committee could not find a violation of Article 26 CCPR.

**As expected, the European Court of Justice gave judgement[112] against Austria after the European Commission sued for breach of the freedom of movement for workers. The Court considered it a clear case of discrimination as regards conditions of employment when Austrian law excluded EU nationals employed in Austria from standing for election to the Chamber of Labour (*Arbeiterkammer*); the same was true for non-EU nationals for whom special agreements between the Community and non-Member States are applicable. The decision is thus in one line with its own views already laid down in a preliminary judgement[113] of 8 May 2003 regarding the interpretation of the association agreement with Turkey and findings previously adopted by the UN Human Rights Committee on 4 April 2002 and the ILO Committee of Experts on the Application of Conventions and Recommendations in 2003, respectively, on similar complaints regarding the elections to work councils.[114]**

By denying workers who are nationals of other Member States of the European Union or the European Economic Area the right to vote and stand as candidate in elections to the Chamber of Labour, the Republic of Austria has failed to ensure equality of treatment in respect of "other conditions of employment" and thereby breached its obligations under Article 39 EC, Article 8 of Council Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, as amended by Council Regulation 2434/92 of 27 July 1992, and Article 28 of the Agreement on the European Economic Area. Secondly, Austria has failed to fulfil similar provisions contained in agreements between the Community and non-Member States prohibiting discrimination as regards conditions of work against these non-EU-citizens legally employed in a Member State.

*Legislative initiatives, national case law and practices of national authorities*

The competent **Ministry of Economics and Labour** declared in a **first reaction to the judgement of the European Court of Justice** that it is planned to introduce to Parliament a bill for the amendment of the relevant provisions in the Industrial Relations Act

[112] ECJ, C-465/01 *Commission v. Austria*, judgement of 16 September 2004.
[113] ECJ, C-171/01 *Gemeinsam ZajedNo et al.*, judgement of 8 May 2004.
[114] See in this regard the Report on the Situation of Fundamental Rights in 2003, p 32.

(*Arbeitsverfassungsgesetz*) and the Chamber of Labour Act (*Arbeiterkammergesetz*) in order to comply with the judgement. Since it had been evident for a longer time that all foreign employees must be granted the right to vote and to stand as candidate in elections to the Chamber of Labour and the work council, the Ministry issued a Decree in spring guaranteeing citizens from EEA-states and from states with association agreements the right to stand for the 2004 elections to the Chamber of Labour.[115] In these elections migrant interest groups (*Bündnis Mosaik, Bunte Demokratie für alle, Neue Bewegung für die Zukunft*) won mandates in the Provinces of Lower Austria (1), Vienna (4) and Vorarlberg (4) corresponding to 1,1% of the votes.

**Article 21. Non-discrimination**

Protection against discrimination

*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

Austria signed the **Additional Protocol to the Convention on Cybercrime** of the Council of Europe on 30 January 2003 but has not ratified it to date.

**In *Woditschka and Wilfing v. Austria*[116], a follow-up case to the *L. and V. v. Austria* judgement 2003, the European Court of Human Rights saw no need for deviation from its previous finding on the discriminatory nature of national legislation providing for a different age of consent for male homosexuals. Austria was thus again found in violation of Article 14 in conjunction with Article 8 for lack of particularly weighty reasons to justify different ages of consent for the protection of male adolescents against consensual homosexual contacts with adults, while young women in the same 14 to 18-years age bracket did not need such protection against relations with either adult men or women. The mere repeal of section 209 of the Austrian Criminal Code is, in itself, insufficient to rectify the harm inflicted under the old law.**

Woditschka and Wilfing, two Austrian nationals, were convicted under section 209 of the Criminal Code at the material time for consensual homosexual contacts with adolescents, respectively. The first applicant, born in 1979, was sentenced to a fine of ATS 4,500 (approximately EUR 330) with 75 days' imprisonment in default for about ten contacts with a 17year-old in September 1999. The sentence was suspended on probation. The second applicant, born in 1964, was sentenced to fifteen months of imprisonment, fourteen of which were suspended on probation for a homosexual relationship with a 17year-old from March 2001 to August 2001, when the applicant was arrested and spent 32 days in a pre-trial detention. The sentence was revised by the second instance to only 10 months on probation. The applicant was granted a stay of the execution of his sentence and upon the applicant's request for pardon the Federal President finally granted the remission of the remaining sentence.
The Court declared the applications admissible and, since the convictions still stood and forms of compensations were missing completely, it held that the repeal of section 209 of the Criminal Code in 2002 did not affect the applicants' victim status.
The applicants claimed that relying on Article 8 of the Convention taken alone and in conjunction with Article 14 their right to respect for their private life had been violated and the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable. Referring to the *L. and V.*

[115] *Die Presse* of 18 September 2004.
[116] Eur.Ct.H.R., *Woditschka and Wilfing v. Austria* (Application Nos. 69756/01 and 6306/02), judgement of 21 October 2004.

*vs Austria* judgement in 2003, the Court reiterated that Austria had not offered convincing and particularly weighty reasons justifying differential treatment of homosexual acts since recent research proved that sexual orientation was established at the beginning of puberty and a European consensus was in favour of equal ages of consent. Thus, as in the *L. and V.* judgement, "to the extent that Art 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, those negative attitudes could not of themselves be considered by the Court to amount to sufficient justification for differential treatment any more than similar negative attitudes towards those of a different race, origin or colour." The Court found no reason to deviate from this previous finding and therefore held that there has been a violation of Article 14 in conjunction with Article 8 and no necessity to rule on a violation of Article 8 taken alone.
Having regard to the amounts awarded in *L. and V.* the first applicant was awarded EUR 15.000,-- in respect of non-pecuniary damage due to feelings of distress, humiliation and being stigmatised as a sexual offender; the second applicant was awarded EUR 20.000,--, taking into account his pre-trial detention. Both applicants were awarded the costs of the domestic criminal proceedings completely and EUR 3.000,-- respectively for cost and expenses of the Convention proceedings on an equitable basis. Taking all amounts together Austria is obliged to pay EUR 61.000,--. The Court, however, dismissed their claim for future costs linked to removing the consequences of the violation of the Convention found because the Court considered them "speculative".
However, the judgement entails direct positive effects only for the two applicants themselves who are now entitled to a renewal of their criminal proceedings with subsequent acquittal. As is repeatedly emphasised by Helmut Graupner of the *Platform Against Art. 209*[117], only persons whose victim status is determined by a judgement of the European Court of Human Rights can successfully seek compensation and rehabilitation under the domestic legal system. All others who did not dare or could not afford to go the costly and arduous road to Strasbourg remain stigmatised and without compensation for the pecuniary and personal damage they have suffered.

*Legislative initiatives, national case law and practices of national authorities*

**Apart from the regrettable fact that Austria did not attempt to extend the protection against discrimination beyond the minimum requirements, the final transposition of the two Equality Directives by the Austrian Parliament in domestic law leaves severe doubts about whether even these European minimum standards have actually been met.**

Austria was in clear delay with the transposition of Directives 2000/43/EC and 2000/78/EC when Parliament finally enacted the bunch of legislative measures on 26 May 2004 meant to implement the European requirements in the field of anti-discrimination, which came into force on 1 July 2004. Nevertheless, on 19 July 2004 the European Commission started an infringement procedure against Austria for not having informed the Commission about the status of implementation of the Directives and for the failure of most of the Federal Provinces to comply with the European requirements in time. Initially, it was hoped that the new provisions could be adopted on Federal level before the end of 2003 but continuing debates within the Parliamentary Equal Treatment Committee led to several adjournments of the final voting in the plenary session. On 18 March 2004 the Committee held a hearing not open to the public where experts of civil society (NGOs, social partners, academics) in the field of anti-discrimination could voice their concerns and suggestions for improving the draft legislation. The critique of the experts resulted in the inclusion of the right of specialised interest groups and ant-discrimination organisations to engage in court or administrative proceedings on behalf of the person discriminated against or to take part as amicus curiae if

[117] Cf. http://www.paragraph209.at (22.12.2004), and LAMBDA newsletter of 22 October 2004 "European Court of Human Rights Again Condemns Austria".

the plaintiff agrees. The so-called Litigation Association[118] (*Klageverband*) which is open to NGOs dealing with different kinds of anti-discrimination issues is an important improvement as it institutionalises the expertise of the NGOs and lowers the threshold for victims of discrimination to seek justice, but it cannot act as a substitute for a lawyer where the law requires professional legal representation (i.e. amount in dispute more than EUR 4000,--). Moreover, the minimum amount for damages was slightly lifted as compared to the Government draft.
The adopted measures actually consist of three separate acts, namely the Equal Treatment Act (*Gleichbehandlungsgesetz*[119]) prohibiting discrimination on the grounds of gender, race, ethnic origin, religion and belief, age, and sexual orientation as it might occur between private parties, the Federal Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz*[120]) applicable to Federal civil servants in the area of employment, and the Act establishing the Equal Treatment Commission and the Ombuds Office for Equal Treatment (*Gesetz über die Gleichbehandlungskommission und die Anwaltschaft für Gleichbehandlungsfragen*[121]) regulating the tasks and composition of these institutions. Of the Federal Provinces only Vienna[122], Styria[123] and in parts Lower Austria[124] have so far adapted their laws to meet the requirements of the two Directives. While the Viennese law was criticised by the opposition for not going beyond the grounds of discrimination foreseen in the Equality Directives and establishing a "toothless" mere counselling and advisory ombuds office[125], the Lower Austrian Provincial Equal Treatment Act does not even address other areas than the relations between the Province and its civil servants and employees.
Finally, it is lamentable that the opportunity to extend the scope of application of the protection against discrimination for reasons of religion and belief, age, and sexual orientation to other areas outside the narrow field of employment was not seized, in particular as the different treatment of victims of discrimination depending on the underlying ground might not stand the test before the Constitutional Court and might also fall short of the obligations of the general prohibition of discrimination in Article 14 ECHR in the exercise of the Convention rights and Protocol no. 12 which will enter into force on 1 April 2005.

**In at least two decisions on racist behaviour of bouncers and managers of clubs against black persons the Upper Austrian Independent Administrative Tribunal gave a doubtful reasoning to support its overruling the decisions of the first instance that initially fined the alleged discriminators.**

Another area where discrimination on the grounds of race and ethnic origin frequently occurs is the clubbing and disco scene. Some owners of bars, clubs and discotheques maintain a policy of refusing entry to foreigners or people with dark skin. In one case even an Afro-Austrian politician for the Green Party was affected. On 7 July 2001 Michael Chukwuma wanted to enter a bar in Linz with two friends but was told by the bouncer that no foreigners are admitted. Even after proving his Austrian nationality by showing his passport, he was denied access with the words "No blacks!". Mr. Chukwuma filed a complaint with the competent District Administrative Authority which sentenced the bouncer and the two managers of the club with a fine of EUR 750,-- respectively. But on appeal the Upper

[118] Currently four organisations are members of the litigation association, namely BIZEPS (disabled persons' association), Österreichische Gehörlosenbund (Austrian Association of Deaf Persons), HOSI Wien (gay and lesbian association) and ZARA (anti-racism organisation).
[119] Federal Law Gazette (BGBl.) I No 66/2004.
[120] Federal Law Gazette (BGBl.) I No 65/2004.
[121] Federal Law Gazette (BGBl.) I No 66/2004.
[122] Vienna Anti-Discrimination Act of 30 June 2004, Provincial Law Gazette (LGBl.) No 35/2004.
[123] Styrian Equal Treatment Act of 6 July 2004, Provincial Law Gazette (LGBl.) No 66/2004.
[124] Lower Austrian Equal Treatment Act of 1 July 2004, Provincial Law Gazette (LGBl.) No 66/2004, however without regulations on the Non-employment related scope of the Racial Equality Directive.
[125] *Die Presse* of 21 April 2004 citing Maria Vassilakou, Member of the Vienna Provincial Parliament, commenting on the draft legislation.

Austrian Independent Administrative Tribunal[126] quashed the decision and the sentences after sitting in private, explaining that with a view to feared drug dealing it was justified to admit only those foreigners that belong to the permanent guests of the house. The same Tribunal already employed a similar reasoning in an earlier decision in which it stated that it was absolutely legitimate to single out persons who may at first sight appear as drug dealers and continued by finding such conduct could not be qualified as discrimination as it were justified from the viewpoint of a diligent and reasonable entrepreneur. Mr. Chukwuma already announced to bring his case before the European Court of Human Rights for violation of Article 14 in conjunction with Article 8 ECHR.
An amendment to the Trades Regulation Act (*Gewerbeordnung*) proposed by the Green Party with the aim of tightening the sanctions for innkeepers with a discriminatory policy towards foreign-looking guests is stuck in the Parliamentary Committee on Economic Affairs since 5 October 2004.[127] In addition to the existing possibility to sentence a discriminator to an administrative fine, an entrepreneur found guilty of discriminatory conduct in relation to his or her customers or clients in more than one instance shall lose the business licence.

In a decision[128] dated 11 November 2003, which was made public in early 2004, the **Supreme Court lifted the conviction that had previously been imposed on a homosexual man pursuant to the old section 209 of the Criminal Code** for his sexual contacts with 15 to 18 year old adolescents. The revision proceedings were instigated by the victim of this discriminatory provision after the European Court of Human Rights ruled in favour of him in 2003 and found a clear violation of his fundamental rights by Austria. The initial conviction caused significant sensation as the "calendar-case" because the accused was sentenced merely on the basis of diary-like notes written on his calendar, even though the male youths with whom he had sexual relations could never be identified. It is to be welcomed that the Supreme Court stated in the revision that the successor provision in section 207b incriminating abusive sexual contacts with adolescents irrespective of their sex could not be applied retroactively. Moreover, the Court confirmed that the prerequisites for the compensation for wrongful imprisonment were complied with.

The Parliamentary Response by the Minister of Justice[129] to a question concerning the **practise of the courts in executing the follow-up provision in section 207b** of the Criminal Code, which is worded in a gender-neutral way, showed that more than three quarters of the criminal proceedings in the first half of 2004 were initiated on account of suspicion concerning abusive male homosexual relations. All persons imprisoned under section 207b during that time were homosexual men. Although the Government always stressed that it was only intended to punish abusive sexual relations with young people that are seduced by improper means, it is evident from those figures that the new section 207b is considered by the judiciary as primarily prohibiting homosexual contacts with adolescents, just as it was explicitly stated in the old section 209. Thus, the fears of opponents have materialised that warned of the law generally creating the suspicion of a criminal offence for relationships between adults and 14 to 18 year olds. In many cases the Public Prosecutor launched investigations merely upon the fact that a sexual contact was on hand without any further circumstances pointing to an abuse. In one case investigations were started against a man who posted ads on the internet inviting male youths under 18 to contact him, even though this is perfectly legal. As the *Platform Against Art. 209* rightly noted, the current enforcement of the provision by the Public Prosecution is comparable to starting criminal proceedings for rape in each case where sexual contacts have taken place. It would be preferable indeed, if section 207b were seen by courts and law enforcement authorities as an independent provision without any linkage to the former section 209, as has also been demanded by the European

[126] Reported in *Die Presse* of 11 May 2004.
[127] Private Members' Bill - Entschließungsantrag 235/A(E) (XXII. GP).
[128] OGH, 11 Os 101/03, decision of 11 November 2003.
[129] Anfragebeantwortung 2020/AB XXII. GP, delivered on 8 September 2004.

Parliament in a Resolution[130] calling on Austria to enforce section 207b in a non-discriminatory manner.

An amendment to the University Act 2002 (*Universitätsgesetz*) and ensuing secondary legislation have further complicated the **Austrian system of tuition fees for university education** and increased doubts about its being fair and non-discriminatory.[131] As a principle, Austrian nationals and nationals of states where bilateral or international agreements provide for equal treatment have to pay EUR 363,-- per semester, whereas all other foreign nationals are obliged to pay the double amount. However, the Minister of Education, Science and Culture is empowered to determine countries where a different regime shall be applied; at the same time the rector of each university may grant individual leave from paying tuition fees. Thus students from certain least developed countries have now been granted the right to the reimbursement of their fees. On the other hand, students from countries like Bulgaria and Romania that were hitherto privileged are no longer exempted from paying tuition fees, unless they could convince their university to exercise mercy.

*Positive aspects*

**Several EQUAL-projects are currently running in Austria that aim at combating racism and xenophobia by promoting mutual understanding and respect in corporate cultures, building up intercultural and anti-racist competence, and understanding diversity as an asset.**

For example, the project "*Verschiedene Herkunft – Gemeinsame Zukunft*"[132] (different origins – common future) operating in four model towns and municipalities in Lower Austria (Krems, Guntramsdorf, Hainburg and Traismauer) with a high percentage of migrants strives to work out guidelines for integration. Codes of conduct that shall prevent companies from developing structural and cultural racism are the goal of the project "*Gleiche Chancen im Betrieb, Betrieb ohne Rassismus*"[133] (equal opportunities at work, workplaces without racism). A second project addressing private companies called "*Open Up*"[134] focuses on elaborating a template for a non-discriminatory employer/works council agreement which is accompanied by the NGO Initiative Minderheiten (Initiative Minorities) and shall finally be widely distributed. Recently, an EQUAL-project could be finished that was training more than 60 persons from many different backgrounds such as the police, non-governmental organisations, private and semi-public companies, to become certified intercultural mediators.[135]

*Reasons for concern*

The **concerns regarding the new law on anti-discrimination** in Austria centre on the supposedly deficient transposition of the Racial Equality Directive and the Employment Equality Directive. It appears to be very likely that the European Commission, which has already announced to institute legal proceedings against Austria for failure to comply in time, will not be satisfied either with the quality of some parts of the implementing law, namely, the shift of burden of proof and the sanctions regime. Moreover, the composition and financial equipment of the Equal Treatment Commission are supposed to fall short of the required

[130] European Parliament, Resolution on the Situation as regards Fundamental Rights in the EU (2002), of 4 September 2003, para.79.
[131] Sections 91 and 92 of the University Act, Federal Law Gazette (BGBl) I No 120/2002 as last amended by BGBl I No 96/2004, and Statutory Regulations on Tuition Fees BGBl II No 55/2004 and II No 366/2004.
[132] http://www.equal-noe-lak.at (20.12.2004).
[133] http://www.gleichechancen.at (20.12.2004).
[134] http://www.openup.at (20.12.2004).
[135] "*Qualifizierung von InterkulturLotsen*" (training of intercultural mediators), see http://www.interkulturlotsen.at (20.12.2004).

Community standards, given that its members shall be appointed exclusively from the sphere of the social partners and not from independent civil society organisations or pressure groups, that it is presided by the Minister for Health and Women's Issues, and that membership in the Commission is only honorary. All these aspects strongly diminish the independence and the effectiveness of this body. Also, as regards the status of the Ombudspersons for Equal Treatment it is questionable whether not granting them independence by a special constitutional provision does not in effect hamper their work.
Although the law being in force since 1 July 2004 provides for the appointment of two new Ombudspersons and new members of the two additional senates of the Equal Treatment Commission, the posts are still vacant which makes it rather unlikely that the two institutions will become fully operational in their new composition before spring 2005.
A clear chance was missed to establish a real anti-discrimination law that would apply to all forms and grounds of discrimination without restriction to certain areas, in particular as it is foreseeable that after the entry into force of Protocol no. 12 to the ECHR there will be need for adaptation anyway. Besides it is doubtful whether the different treatment of victims of different kinds of discrimination is in conformity with the constitutional principle of equality before the law.
It is also problematic that Austria has so far not adopted the Equal Opportunities (Disabled Persons) Act (*Behindertengleichstellungsgesetz*), which is dealt with under Article 26.

Fight against incitement to racial, ethnic, national or religious discrimination

*Legislative initiatives, national case law and practices of national authorities*

In a decision rejecting an application by the daily **Neue Kronen Zeitung** for an injunction, the Vienna Regional Civil Court confirmed that the Austrian newspaper **transports "racist and anti-Semitic undertones"**. In the proceedings the expert opinion of linguist Ruth Wodak left no doubt that, as she concluded in her analysis, in particular the articles of two columnists frequently contain intimations of xenophobic, racist, and anti-Semitic nature. It should be noted that the Neue Kronen Zeitung is by a wide margin the market leader of the dailies with a market share of over 43%.[136]

*Positive aspects*

In its fight against **racist or neo-Nazi websites** on the internet **Stopline**, a platform created by the Association of Austrian Internet Providers (ISPA), is increasingly successful. From January to August 2004 Stopline registered 103 reports on suspicious sites with allegedly extremist right-wing content, of which 33 were considered as illegal under Austrian law and brought to the attention of the police. Each year Stopline presents a report on its activities and countermeasures.[137]

Remedies available to the victims of discrimination

*Reasons for concern*

When looking at the contents of the Federal Acts purporting to implement the Equality Directives it is supposed that Austria did not only formally breach Community law by belatedly transposing the Directives but also missed to fulfil all substantial aspects contained therein. As regards the **shift of burden of proof** the Austrian provisions deviate from the text of the Directives. The Equal Treatment Act provides that the victim of discrimination is under the obligation to establish a prima facie violation of his or her rights under the Act, whereas the alleged perpetrator must then try to refute the charges by merely showing the plausibility

[136] Reported in *Der Standard*, "Antisemitische Untertöne" of 9 September 2004.
[137] Information provided by the Austrian RAXEN Focal point.

that the different treatment was due to another motive than the discriminatory motive claimed by the victim or that a special justification applies (ss. 12 para. 12, 26 para. 12, 35 para. 3, 51. para 9 of the Equal Treatment Act). It is at least doubtful whether this procedural construction fully shifts the onus on the alleged perpetrator in the form it was conceived by the Directives. Furthermore, the Directives demand the setting up of a **sanction system** that is effective, proportionate and sufficiently dissuasive. In the Austrian regulations compensation claims focus on the principle of reparation and include pecuniary and non-pecuniary damages, what is missing though is a punitive element in the compensation regime that truly deters potential discriminators.

Protection of Gypsies / Roms

*Positive aspects*

The town and surrounding region of Oberwart, in the Province of Burgenland, is one of the major traditional settlement areas of the Austrian Roma population. Economically disadvantaged it is not easy to find a job there even for non-Roma, but the **unemployment rate of Roma is especially high** at around two thirds of the population. "Integration durch Arbeit"[138] (integration through work) is an **EQUAL-project carried out by Caritas Burgenland** that specifically addresses this structural problem by offering paid jobs of a few hours a week where the employed can rather flexibly decide themselves when, how often and for how long they want to work. These "start-up employments" are hoped to render the participants eventually fit for the regular labour market.
**Another project successfully running in Oberwart undertakes to reduce the higher failure rate and worse performance of Roma children in school** and to encourage them to go on to higher schools by applying a special education programme – additional learning support and leisure groups with non-Roma pupils - organised by the Roma association "Verein-Roma" in co-operation with the adult education centre in Oberwart (Volkshochschule Oberwart).

Other relevant developments

*Positive aspects*

Under the **Community Action Programme on combating discrimination** a competition was organised in which teachers and pupils were invited to come up with ideas and projects on the issue of discrimination.[139] The award winning school was a Catholic private school that opened its doors also for pupils of a different faith following a process of discussing and coming to terms with cultural and religious diversity after in 2001 a Muslim girl wanting to attend the school was rejected.

Most cities and municipalities, first and foremost the city of Vienna[140], maintain a policy of allocating subsidised **council housing** (*Gemeindewohnungen*) exclusively to Austrian nationals. Nevertheless there are some noteworthy exceptions that deserve to be mentioned as positive developments. While the city of Salzburg allocates communal flats to foreigners in a number that reflects their share of the population, the towns of Krems and Guntramsdorf in Lower Austria that are especially progressive in their attitude towards integration of migrants and both participate in the EQUAL-project on the elaboration of model guidelines for a

[138] http://www.ida-equal.at (21.12.2004).
[139] School competition against discrimination „*Rechte haben macht den Unterschied*", at http://www.rechtehaben.info (21.12.2004).
[140] It should be mentioned though that for more than 10 years the Government of Vienna promotes the idea of intercultural housing projects where people of different cultural backgrounds live together and often successfully socialise.

comprehensive concept of integration policy on the local level have completely discarded the nationality requirement. Moreover, local government in Krems strive to counter social tensions and conflicts among dwellers and to create good neighbourly relations by offering training courses for voluntary conflict mediators and through the establishment of an intercultural centre. Similar guidelines for an active and positive approach towards migrants and their social situation have been developed by the city of Dornbirn, Vorarlberg.

Much public and political resonance caused the suggestion by Christoph Drexler, being the Conservative majority leader in the Provincial Parliament of Styria, for an **equal treatment of homosexual partnerships** according to the motto: "Equal rights for equal love". In the following debate the opposition parties welcomed the unexpected push for advancement of the legal framework in this matter from a representative of the conservative People's Party. Some of his party colleagues agreed with Drexler's plea that there was time for a modern and non-discriminatory regulation of hetero- and homosexual partnerships in addition to the classic marriage, as for example the Minister of the Interior remarked in a TV-interview.[141] The Greens quickly suggested establishing a registered civil pact (*Zivilpakt*) so that Austria catches up with the development in many European countries that have recently introduced the possibility for homosexuals to enter into a legally recognised partnership.[142] However, it soon became clear after the governing People's Party started an internal process to find a common position that a homosexual marriage was unconceivable. Equally, the concept of a registered partnership open to same-sex persons did not find a majority. Nevertheless, the working group installed by the conservatives screened the law for provisions and regulations that were discriminatory for homosexuals. On 22 September 2004, the party executive board drawing on the results of the working group decided unanimously to rid the law from residual discriminations as they were found to exist in the areas of tenancy law, insolvency law, the law of succession, tax law, social security law, leave for family care, etc. Still reserved for heterosexual married couples shall be the right to adopt children. Organisations fighting for the rights of homosexuals have continued to criticise that these meagre changes would not end the general discrimination on grounds of sexual orientation. Even though the initial drive for reform seems to be lost, some noteworthy improvements for homosexual persons in Austria are to be expected in the near future.

*Reasons for concern*

In March 2004, the **independent anti-racism organisation ZARA**, which collects information on racist-motivated discrimination and documents incidents uncovering racist attitudes, presented its **annual report 2003**.[143] Despite operating on an insecure financial basis ZARA could establish itself as first address for receiving complaints against racism: 650 cases were brought to the attention of the association last year which is more than twice as much compared to the previous year. The figures and cases are however not representative of the whole situation in Austria and cannot be taken as a tendency for increasing racism as the estimated number of unknown cases is much higher. The rise in the number of reported cases is rather due to the effective work of ZARA in counselling and aquainting victims with their rights. Generally, there was more violence in 2003 and an increase in the complaints concerning the areas of employment and housing (discriminatory advertisements). Most of the persons confronted with racism had dark skin.[144]

Two incidents of **differential treatment on the grounds of sexual orientation** that happened in Austria in 2004 illustrate that the anti-discrimination Directives (and implementing national law) in force are not sufficient since they do not cover the important area of access to goods

[141] ZiB 3 news of 23/24 August 2004.
[142] *Die Presse* of 21 June 2004, "ZIP statt Schwulenehe".
[143] ZARA Racism Report 2003 (*Rassismusreport*), available at http://www.zara.or.at (21.12.2004).
[144] ZARA Racism Report 2003 and *Die Presse* of 11 March 2003.

and services. The first case concerns the frustrated attempts of the gay and lesbian association *Homosexuelle Initiative (HOSI)* on the occasion of the 25th anniversary of their foundation to have two rapid trains, one going from Passau to Vienna and the other going from Salzburg to Innsbruck, named after their organisation for the duration of one year. The Austrian Railway Company (*ÖBB*), which in principle offers this marketing possibility to everyone, disapproved of this train patronage and simply cancelled the order. "Unfortunately", Kurt Krickler, Secretary-General of HOSI remarked, "we have no legal means of redress against the refusal of the Austrian Railway Company."[145] Ulrike Lunacek, MP for the Green Party, announced that she intended to demand in a Parliamentary questioning an explanation from the competent Minister Hubert Gorbach, why it was possible that the privatised but state-controlled Austrian Railway Company denied a human rights organisation this kind of advertisement, whereas the Ministry of Social Affairs could tag slogans on train wagons like "Family Country – Austria".[146]
The second case that shows the insufficient protection from discrimination in the private sector for other grounds than race regards a dancing school in Innsbruck, Province of Tyrol, which did not allow a lesbian couple to participate in one of their dancing courses. As the law stands, the prevailing contractual freedom forces homosexual persons to endure such differential treatment of private persons or companies in the provision of goods and services.[147]

**Article 22. Cultural, religious and linguistic diversity**

Protection of linguistic minorities

*Legislative initiatives, national case law and practices of national authorities*

In the Austria Convention, a multi-partisan body consisting of Government representatives, members of Parliament, the social partners, other stakeholders and experts, commissioned with elaborating a new constitution for Austria, the working group on fundamental rights also discussed the question of **redrafting the rights and entitlements of ethnic minorities**. While the working group agreed not to formulate a definition of an ethnic minority, there was consensus that the scope of application should not be confined to the traditional ethnic minorities which have been recognised in Austria for a long time.[148]

Regarding the **unresolved issue of additional sign posts and village indications in the language of the recognised Slovene minority in the Federal Province of Carinthia** pursuant to the judgement of the Constitutional Court in December 2001 (as was reported in the two previous years) the year 2004 must be considered a lost year having passed without any progress made on the issue. With a view to various anniversaries of important incidents to be celebrated in Austria in 2005, high representatives of the governing People's Party have pushed for a resumption of the talks with the relevant political organisations of the Slovene minority. However, the Freedom Party, being the junior partner in the coalition government, have applied the brakes arguing that "for the far majority of the Slovene population this was no longer an issue"[149] and that anyway a series of preliminary talks still had to be held in the forefront.

[145] Information provided by HOSI per e-mail on 21 November 2004.
[146] "Kein Zug für Homosexuelle" in the Vienna weekly *Falter* no 47/04.
[147] Reported in *Der Standard* of 2 July 2004 and the regular LAMBDA newsletter of HOSI.
[148] Protocol of the 23rd meeting of the working group dating from 6 September 2004, pp. 5-6.
[149] ORF online of 24 September 2004 citing Martin Strutz, the majority leader of the Freedom Party in the Provincial Parliament of Carinthia.

Other relevant developments

*Positive aspects*

Following an empirical study of **intercultural education in Austrian schools**[150] the Ministry of Education, Science and Culture, which funded this study, launched an internal process that shall come up with the issuance of a Decree on intercultural education in classrooms accompanied by supplementing materials for teachers.

**Article 23. Equality between men and women**

Gender discrimination in work and employment

*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

**The opinion of General Advocate Jacobs submitted to the European Court of Justice on an action filed by the Commission against Austria suggests that the Austrian regulation generally prohibiting the employment of women in the mining industry is violating the non-discrimination requirement in Community law.[151]**

Austrian law prohibits the employment of women in the mining industry as regards work in a high-pressure atmosphere and as divers. Since it is common ground between the parties that the legislation at issue treats men and women differently as regards employment in the mining industry, the question therefore is whether, as Austria submits, such different treatment is permissible because it falls within the derogation set out in Article 2(3) of the Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. As regards the written submissions by Austria, it contends in particular that "it is clear, as a general rule and from a biological point of view, that women do not have the same build as men and are physically weaker; in consequence, physically strenuous work in the underground mining industry entails greater physical strain on their part and exposes them to greater health risks than men". Austria also submitted that this was not simply a case about night work which exposes women and men to the same physical strain and that the Court's case-law holding that prohibitions on night work for women are contrary to the Directive was accordingly not applicable. The prohibition on the employment of women in the mining industry aimed at protecting women and was, therefore, justified under Article 2 (3) of the Directive. While the General Advocate conceded that Article 2 (3) was aimed at addressing needs which are specific to women and which may therefore justifiably be protected in certain situations, he restricted this protection to 'pregnancy and maternity'. He proceeded by stating that "Article 2(3) does not therefore allow women to be excluded from a certain type of employment on the ground that they should be given greater protection than men against risks which affect men and women in the same way and which are distinct from women's specific needs of protection, such as those expressly mentioned".
Furthermore, Austria cannot invoke the applicability of ILO Convention No 45 according to the first paragraph of Article 307 EC and, referring to Article 2 of the Convention which prohibits the employment of women in the underground mining industry, justify national legislation which is incompatible with the Directive, since Austria had the opportunity to lawfully denounce ILO Convention No 45 and thereby ensure equal treatment of men and

[150] Fillitz, T. (ed.) *Interkulturelles Lernen. Zwischen institutionellem Rahmen, schulischer Praxis und gesellschaftlichem Kommunikationsprinzip*, Innsbruck, Studien Verlag 2003.
[151] ECJ, C-203/03 *Commission v. Austria*, opinion delivered on 8 July 2004.

women in accordance with the Directive as regards access to employment in the underground mining industry.
Thus, the General Advocate concluded that since Austria has not adduced any evidence that mining work gives rise to risks which affect men and women differently or to risks which are specific to women and from which they need particular protection within the meaning of Article 2(3) of the Directive (i.e. in cases of pregnancy and maternity), Austrian provisions excluding all women from the exercise of work in a high-pressure atmosphere and as divers cannot be justified. He therefore calls upon the Court to declare that Austria failed to fulfil its obligations under Articles 2 and 3 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

**In a preliminary ruling in the case of *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v. Wirtschaftskammer Österreich*[152] pending before the Supreme Court of Austria, the European Court of Justice held that a national provision allowing to take military or civilian service into account when calculating termination pays is not discriminatory against people taking parental leave since due to the different nature of the underlying grounds workers who benefit are not in comparable situations. While the military and civilian service are performed on a compulsory basis in the public interest, times of parental leave are taken voluntarily in the private interest of the family. A difference in treatment, as regards termination pays, thus does not contravene Austria's equal pay obligations under Article 141 EC and Article 1 of the Council Directive 75/117/EEC of 10 February 1975.**

Three questions on the interpretation of Article 141 EC and Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women were raised in proceedings between Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten ('the Gewerkschaftsbund'), a trade union representing employees in the private sector, and Wirtschaftskammer Österreich, an Austrian economic chamber, concerning a claim for equal termination payments for men and women workers.
The Court approved the first question whether a national provision that allows to take compulsory military or civilian services into account when calculating the termination payment depending on the length of employment falls within the ambit of the term "pay" of the said provisions.
As to the second and third questions concerning the difference in treatment, from the point of view of termination payments, between workers who take parental leave and those who perform military or civilian service, the Court reiterates that "the principle of equal pay enshrined in Article 141 EC and Directive 75/117, like the principle of non-discrimination of which it is a specific expression, assumes that the male and female workers whom it benefits are in comparable situations". However, in the instant case, both services were of a different nature: parental leave is taken voluntarily to raise one's children and firstly has to be differentiated from maternity leave and secondly from the compulsory character of a military or civilian service that is performed in the public and not in the private interest of the worker. The Court therefore concludes that "in each case, the suspension of the contract of employment is thus based on particular reasons, more precisely the interests of the worker and family in the case of parental leave and the collective interests of the nation in the case of national service. As those reasons are of a different nature, the workers who benefit are not in comparable situations". Accordingly, "Article 141 EC and Directive 75/117 do not preclude the calculation of a termination payment from taking into account, as length of service, the duration of periods of military service or the civilian equivalent performed mainly by men but not of parental leave taken most often by women".

[152] ECJ, C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v. Wirtschaftskammer Österreich,* judgement of 8 June 2004.

*Legislative initiatives, national case law and practices of national authorities*

On its homepage the Ministry for Health and Women Affairs posted **two reports containing statistics on the issue of gender equality in employment**. The first deals with methods for a non-discriminatory evaluation of the work performance and organisation of the work (*Diskriminierungsfreie Arbeitsbewertung und Arbeitsorganisation*)[153], the second examines the issue of qualified part-time employment in Austria (*Qualifizierte Teilzeitbeschäftigung in Österreich*)[154].

**Article 24. The rights of the child**

Other relevant developments

*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

**Austria ratified the Optional Protocol to the Convention of the Rights of the Child** on the sale of children, child prostitution and child pornography on 6 May 2004 (date of receipt by the UN).

In the course of the second periodic round of reports the **Committee on the Rights of the Child** requested[155] Austria to give detailed information on further efforts undertaken to address the issue of sexual exploitation and trafficking of children, child poverty, practice of corporal punishment, quality of education, juvenile justice, integration of refugee children, unaccompanied children of asylum seekers. In particular, the Committee is interested in the policies and procedures dealing with asylum seeking children after the amendment to the Asylum Act in 2003, and in the situation of juvenile justice facilities and the reasons for the dissolution of the Juvenile Justice Court in Vienna in July 2003 and its impact on the situation of children in conflict with the law.

*Legislative initiatives, national case law and practices of national authorities*

Section 194 of the Criminal Code was newly inserted by the Criminal Law (Amendment) Act 2004 to prohibit the **broking of child adoptions by granting the child's parents money** or other benefits with a view to closing a lacuna which scrupulous people abused to offer babies from poor families in developing countries for adoption by Austrian couples.

**Article 25. The rights of the elderly**

Specific measures of protection for the elderly (ill-treatment and isolation)

*Legislative initiatives, national case law and practices of national authorities*

A **reform of the law of succession abolishing the possibility to testate orally** under normal circumstances adopted by Parliament[156] in June 2004 will better protect old persons from fraudulent attempts to forge a favourable testament against the true will of the person declaring his or her last will. Under the old law an oral testament was valid if it was declared

[153] See www.bmgf.gv.at/cms/site/attachments/0/9/5/CH0266/CMS1087560110832/gesamtbericht1.pdf in German (30.12.2004).
[154] See www.bmgf.gv.at/cms/site/attachments/4/7/5/CH0267/CMS1097155830148/endbericht_qtz.pdf in German (30.12.2004).
[155] UN Committee on the Rights of the Child, List of Issues (Austria) CRC/CQ/Aut/2 of 14 October 2004.
[156] Federal Law Gazette (BGBl) I No 58/2004 of 21 June 2004.

in the presence of at least three witnesses who themselves did not receive any benefits. In the future this should solely be possible at court or before a notary public and in a life-threatening emergency situation.

Other relevant developments

*Legislative initiatives, national case law and practices of national authorities*

The Chamber of Labour published a report with statistics and tables on the present situation of **long-term geriatric care and future perspectives** for its development (*Bericht der AK zur geriatrischen Langzeitpflege – Situation und Entwicklungsperspektiven*)[157].

**Article 26. Integration of persons with disabilities**

Protection against discrimination on the grounds of health or disability

*Legislative initiatives, national case law and practices of national authorities*

Although initially there had even been hopes that an **Equal Opportunities (Disabled Persons) Act** (*Behinderten-Gleichstellungsgesetz*) would be adopted by Parliament in 2003 on the occasion of the European Year of persons with disabilities, a whole year later the proposed legislation is **still a draft** stuck in the preliminary process of lawmaking because it repeatedly failed to pass the Council of Ministers in December 2004. While the Minister of Finance had concerns about the cost implications, the Minister of Economics and Labour objected to the possibility of a lawsuit by disabled persons' interest organisations. Nevertheless the draft, which is intended to implement the last missing chapter of the Equal Employment Directive 2000/78/EC on Federal level, definitely reached the final stage of lawmaking and is expected after last-minute refinements to be introduced to Parliament soon. On the contents the opinions differ widely even among disability organisations. Better an Act on equal opportunities for disabled persons than no Act at all, is the unequivocal opinion of the umbrella organisation ÖAR while the responsible Minister Herbert Haupt and MP Franz-Joseph Huainigg called it a milestone.[158] But others like Martin Ladstätter of the organisation Bizeps and Theresia Haidlmayr, MP for the Greens, deem it wrong to enact a law that does not contain important aspects such as a general guarantee that new buildings have no access barriers, a right to public transport without barriers, recognition of the Austrian sign language[159], or the right to integration in the field of education, or the right to personal assistance.

*Positive aspects*

The Vienna branch of the Federal Social Office (*Bundessozialamt*) offers **assistance at workplace to persons with disabilities** and carries the costs. 40 disabled employees thus have personal assistants accompanying them on the way to work and provide help whenever necessary so that persons with disabilities can exercise their profession. The service is available for all persons with a higher degree of physical or mental impairment which cannot be compensated by technical means. However, since this model requires a good organisational talent and a well-planned agenda, it is not the appropriate solution for everyone.

[157] See http://www.arbeiterkammer.at/pictures/d9/MuG87.pdf in German (30.12.2004).
[158] *Die Presse* of 7 December 2004.
[159] In a respective Resolution of 17 November 2004 (E-76 NR/XXII. GP) Parliament called upon the Government to introduce an amendment to the Federal Constitution so as to officially recognise the sign language.

Section 1 paragraph 3 of the E-Government Act[160], which was enacted in March 2004 and deals with the use of electronic media and communication in the framework of public administration, provides that until 1 January 2008 **all public internet sites must be adapted in a way that allows persons with (visual) disabilities to access those sites without encountering barriers or complications according to international standards**.

For the first time since 1996, when the automatic adaptation to inflation had been cancelled, the **special care allowance (*Pflegegeld*) will be raised by 2%** with effect of 1 January 2005. The allowance is paid to about 300.000 persons with disabilities in 7 stages, ranging from EUR 148,30 for persons in need of more than 50 hours of special care per month to EUR 1.562,10 for persons needing care for more than 180 hours a month, in order to cover their additional needs. For 2006 a similar adaptation was announced by the Minister of Social Affairs.

Professional integration of persons with disabilities: positive actions and employment quotas

*Legislative initiatives, national case law and practices of national authorities*

The **special programme for the integration of disabled persons in the field of employment** "BABE 2003/2004" (*Bundesweites arbeitsmarktpolitisches Behindertenprogramm*)[161] is available on the homepage of the Ministry for Social Security, Generations and Consumer Protection.

[160] Federal Law Gazette (BGBl) I No 10/2004.
[161] See:
http://www.bmsg.gv.at/cms/site/attachments/5/3/2/CH0055/CMS1057914735913/babefuerinternet72dpi.pdf in German (30.12.2004).

## CHAPTER IV : SOLIDARITY

### Article 27. Workers' right to information and consultation within the undertaking

No significant developments to be reported.

### Article 28. Right of collective bargaining and action

The right of collective action (right to strike) and the freedom of enterprise or the right to property

*Legislative initiatives, national case law and practices of national authorities*

According to a first instance judgement of the Vienna District Court for Commercial Affairs, which was reported in the media in May 2004, the **Vienna Lines Public Transportation**, a private company owned by the City of Vienna, is **obliged to pay damages in contract to their clients holding a season ticket for they could not use the services during a strike** of the company's employees on 3 June 2003 against the Government's plans to reform and harmonise the pension system. The possible precedent granted each plaintiff EUR 1,14 for pecuniary damages plus costs, but the judgement is not final yet. The defendant company fully appealed the judgement arguing that they had no chance whatsoever to calm the situation as it was a political manifestation of their employees and not directed against the policy of the enterprise. Even though the current amount to pay was ridiculous, it was a question of principle since it could be possible that on the basis of that decision each of the 300.000 owners of season tickets demands the money back, the spokesman for the company added.[162] In a similar case the publicly owned Austrian railway company ÖBB avoided a series of lawsuits by voluntarily extending the validity of the season tickets by three days. It appears that at the end of the day the Supreme Court will have to resolve the contentious matter.

### Article 29. Right of access to placement services

Other relevant developments

*Legislative initiatives, national case law and practices of national authorities*

With the new law on the **reform of the labour market** (*Arbeitsmarktreformgesetz*)[163] it will be more difficult for the unemployed to reject an offer for a job in another professional field while at the same time the income protection guaranteeing that a certain level is not underrun is improved. If an unemployed person refuses to accept the new job offered by the placement service even though it fulfils all conditions, he or she will lose the entitlement to unemployment benefit for the duration of the refusal, in any case for a minimum of six weeks. As has been outlined in the Report on the Situation of Fundamental Rights in Austria in 2003, the regulations are based on an agreement between the social partners and are intended to make the placement procedure more flexible.
The law also contains an amendment to the Placement Service Act (*Arbeitsmarktservicegesetz*) which obliges the Austrian placement service AMS to work out an **individual assistance concept for every unemployed person** (*Betreuungsplan*). On the basis of the skills and specific qualifications of the unemployed it shall be undertaken to draw

[162] "Je Kunde 1,14 Euro Ersatz für Streiktag" in *Die Presse* of 7 May 2004.
[163] Federal Law Gazette (BGBl) I No 77/2004 of 14 July 2004.

up a detailed programme with all measures intended to be taken. In case no consensus can be reached the regional office of the placement service shall determine the individual assistance concept alone by taking into account the interest of the unemployed person so far as possible. In principle, the plan shall be adhered to but it is not binding in the sense that it grants a right that a certain measure is carried out.
What is **not contained in the package is the option for self-employed persons to join in the unemployment insurance system**. This model, building on the Danish example, was strongly promoted by the Minister of Economics and Labour with a view to offering a social security net primarily aimed at founders of start-up companies against the high entrepreneurial risks. According to the proposal, the monthly contributions should lie between EUR 72,-- and EUR 241,--. To avoid that the system is abused by entrepreneurs on the brink of insolvency a provision was built in that would allow the self-employed to decide for or against the insurance only every five years. However, the draft sent out to stakeholders and the public for appraisal did not receive the approval of the social partners and so additional talks proved to be necessary.

### Article 30. Protection in the event of unjustified dismissal

No significant developments to be reported.

### Article 31. Fair and just working conditions

Working time

*Legislative initiatives, national case law and practices of national authorities*

The Working Time Act and the Act regulating the times of rest (*Arbeitszeitgesetz und Arbeitsruhegesetz*)[164] were amended so as to transpose **Council Directive 2000/79/EC** concerning the organisation of the **working time of the on-board personnel** in civil aviation. Hitherto the flying crew were completely exempt from the protection afforded by the two Acts.

### Article 32. Prohibition of child labour and protection of young people at work

No significant developments to be reported.

### Article 33. Family and professional life

Parental leaves

*Positive aspects*

With some restrictions, the **right to part-time employment for parents** is now guaranteed by a law[165] that was passed in Parliament in June 2004. As from 1 July 2004 parents are entitled to part-time employment until the seventh birthday of the child if they are employed **in enterprises with more than 20 employees** and their employment lasted for at least three years without interruptions. The exact modalities of the part-time employment such as its start, duration and working times have to be agreed with the employer. Both parents may at the same time apply for part-time employment. In case there is no agreement with the employee applying for part-time employment and negotiations also failed between the parties

[164] Federal Law Gazette (BGBl) I No 159/2004.
[165] Federal Law Gazette (BGBl) I No 64/2004 of 22 June 2004.

under the auspices of the court, the employer is forced to eventually sue at the Labour Court in order to prevent the employee from unilaterally exercising his right. The court must allow the objection if the company's interest outweigh the interest of the employee. Regarding the issue of dismissal during such employment, the law foresees possible tensions between the parties in particular if right is exercised against the will of the employer and therefore grants full protection from dismissal until the fourth birthday of the child, afterwards a dismissal can be objected by the employee for its motives at court.
The right to part-time employment as it now stands is certainly the result of a compromise between the necessities of business life and the interests of working parents with young children. While it is clear that parents employed in companies with less than 20 employees are still excluded if the employer refuses the consent, the new law still deserves to be mentioned as a positive development.

Other relevant developments

*Legislative initiatives, national case law and practices of national authorities*

The Ministry of Education, Science and Culture pursues **plans to increase the number of schools where the children have the possibility to stay at school in the afternoon** under the attendance of teachers. In the next two years the offered places should be extended by 20% from presently 45.000 to 55.000. While the Social Democrats criticise the lack of ambition in the plan and demand as much as 100.000 places of child attendance in the afternoon until 2010, the Ministry announced to ascertain the real demand by means of questionnaires sent to 4.400 schools al over Austria so that specific solutions can be found.[166]

**Article 34. Social security and social assistance**

Social assistance and fight against social exclusion (in general)

*Legislative initiatives, national case law and practices of national authorities*

In an **attempt to afford social security to undocumented workers employed in private households or in other mini-jobs**, the Ministry of Economics and Labour came up with the idea to establish the so-called **"provision of services cheque"** (*Dienstleistungsscheck*). Since it is very common under these circumstances not to notify to the Social Security Authorities even services provided on a regular basis mainly for financial reasons and the complicated procedure, the undocumented worker is left without any social security. Cheques would be widely obtainable at banks, postal stations, tobacconists, etc. and cost EUR 10,-- each. Then, after the name and particulars of the employee and the social security number of the employer are added, the cheques would be sent to the Social Security Authorities, which in turn would transfer the salary reduced by the (moderate) contributions for social security. According to the Ministerial draft[167] sent out for appraisal, the model should be applicable up to an income of about EUR 600,-- a month. However, several aspects remain ambiguous: if undocumented workers hold no work permit they will hardly be persuaded by the cheque to make their illegal employment official; if the cheque affords cheap social security, it might be widely abused and probably drive many persons with minor employments under EUR 600,-- from the regular system into the new system where there is no protection in the field of labour law; otherwise, if the deductions for health, pension and accident insurance are too high, it might miss its goal. It remains to be seen how these problems are tackled when the Ministerial draft becomes a Government proposal which is presented to Parliament.

[166] See http://www.bmbwk.gv.at/schulen/04/Nachmittagsangebote11004.xml (2.1.2005) and "Ideologisch befrachteter Nachmittag" in *Die Presse* of 9 February 2004.
[167] See http://www.bmwa.gv.at/BMWA/Aktuelles/Arbeit/dienstleistungsscheck.htm (2.1.2005).

In its biannual **report on the personal income of employees** in Austria (*Einkommensbericht*) delivered by the Court of Audit in 2004 the statistical data contained therein may be used to examine the issue of poverty.[168]

Social assistance for undocumented foreigners and asylum seekers

*Reasons for concern*

**The social situation of asylum seekers not admitted in the Federal care programme is still precarious.** Many of them that cannot find alternative accommodation provided by private aid and refugee organisations are therefore homeless, and without an official address it is impossible to receive financial support from the social security system. Absent the problem with all its perilous consequences this also means that the asylum proceedings of these persons cannot be continued for official communication and decisions cannot be served to the recipient.

**Article 35. Health care**

Access to health care

*Legislative initiatives, national case law and practices of national authorities*

In 2004, the Ministry for Health and Women's Affairs issued a report containing statistical data on the access to psychiatric and psycho-social care in Austria (*Bericht über die psychiatrische und psychosoziale Versorgung in Österreich*).[169]

*Reasons for concern*

Regarding the issue of **health care for asylum seekers** the sad situation has not changed in comparison with the year 2003. Only those who were lucky to get a place in the Federal care regime have sufficient access to medication and medical treatment in case of illness or injuries. As has already been mentioned in the concerns under Article 34 it is in particular the group of unsheltered people among asylum seekers that face enormous difficulties to receive the needed medical treatment

Drugs (regulation, decriminalisation, substitutive treatments)

*Legislative initiatives, national case law and practices of national authorities*

The Federal Austrian Institute for Health Issues (*Österreischisches Bundesinstitut für Gesundheitswesen*) posted their **Drug Scene Report 2004** on the internet.[170]

[168] See report in German (30.12.2004) http://www.rechnungshof.gv.at/Berichte/Einkommen/Einkommen_2004_01/Einkommen_2004_01.pdf.
[169] See report in German (30.12.2004) http://www.bmgf.gv.at/cms/site/attachments/9/9/5/CH0118/CMS1098965386003/oesterreichischer_psychiatriebericht_2004.pdf.
[170] See report in German (30.12.2004) http://www.oebig.at/upload/files/CMSEditor/Bericht_zur_Drogensituation_2004_dt.pdf.

Other relevant developments

*Legislative initiatives, national case law and practices of national authorities*

The Austrian Federal Institute for Health Issues presented its **2004 report on the health of men** (*Männergesundheitsbericht*),[171] which underscores the unique role of Austria in Europe in this field. The general **Health Report 2004** (*Gesundheitsbericht*)[172] was made public this year by the Ministry for Health and Women's Affairs and is also available on the internet.

**Article 36. Access to services of general economic interest**

Access to services of general economic interest in the economy of networks: transports, posts and telecommunications, water-gas-electricity

*Legislative initiatives, national case law and practices of national authorities*

The Chamber of Labour produced two recent papers on the topic which are supported by statistical data, one study on the **liberalisation of the services of general economic interest** (*Liberalisierung öffentlicher Dienstleistungen in der EU und Österreich*)[173] and the other on the special issue of ensuring the **provision of electric energy** (Sicherung der heimischen Elektrizitätsversorgung)[174], which can both be downloaded from their website.

**Article 37. Environmental protection**

Right to a healthy environment

*Legislative initiatives, national case law and practices of national authorities*

Following the Kyoto agreement on the global reduction of greenhouse gases which sets for Austria the goal of a 13% reduction of the relevant emissions, **Parliament enacted a law establishing a system for the trade in emission certificates for greenhouse gases** (*Emissionszertifikategesetz*).[175] With effect of 1 January 2005 the Act requires the operator of a facility listed in the annex to apply for a permit granting the emission of greenhouse gases. Without that permission the respective facility may not be operated. The emission certificates allocated on the basis of the application can either be used to cover the own emissions or be traded on the (international) market.

Other relevant developments

*Legislative initiatives, national case law and practices of national authorities*

After the European Commission had sued Austria before the European Court of Justice in September 2003 for failure to transpose **Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms**, the Austrian Parliament adopted an amendment[176] to the Genetic Engineering Act

[171] See report in German (30.12.2004) http://www.oebig.at/upload/files/CMSEditor/PUBLIKATION_Maennergesundheitsbericht_2004.pdf.
[172] See report in German (30.12.2004) http://bmgf.cms.apa.at/cms/site/attachments/9/0/1/CH0083/CMS1091709051535/gboe_2004_internet_korrigiert.pdf.
[173] See http://www.arbeiterkammer.at/www-402-IP-12523.html in German (31.12.2004).
[174] See http://www.arbeiterkammer.at/www-402-IP-16170.html in German (31.12.2004).
[175] Federal Law Gazette (BGBl) I No 46/2004 of 30 April 2004.
[176] Federal Law Gazette (BGBl) I No 126/2004 of 16 November 2004.

(*Gentechnikgesetz*) and the Food Stuffs Act (*Lebensmittelgesetz*) which finally implemented the Directive.

**Article 38. Consumer protection**

Protection of the consumer in contract law

*Legislative initiatives, national case law and practices of national authorities*

**Austria implemented Directive 2002/65/EC** of the European Parliament and of the Council of 23 September 2002 **concerning the distance marketing of consumer financial services** in domestic law by means of the Distant Financial Services Act (*Fern-Finanzdienstleistungsgesetz*).[177] Accordingly, the lacuna that has been left by the former Distant Marketing Act (*Fernabsatzgesetz*) was closed and bank and insurance services are now included into the system of consumer protection. Information duties of the financial service provider and the consumer right to have the contract rescinded are at the core of the new law. The periods to be observed for withdrawal are 14 days in general and 30 days regarding contracts for retirement provisions. No rescission is possible with stock exchange transactions.

[177] Federal Law Gazette (BGBl) I No 62/2004 of 21 June 2004.

## CHAPTER V : CITIZEN'S RIGHTS

### Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

No significant developments to be reported.

### Article 40. Right to vote and to stand as a candidate at municipal elections

Right to vote and to stand as a candidate for EU citizens non nationals of the member State

*Legislative initiatives, national case law and practices of national authorities*

In 2004, **two municipal elections have taken place in Austria in the Provinces of Tyrol and Salzburg**. However, the Provincial Governments do not maintain central statistics on the participation of EU citizens in municipal elections. The only figure obtainable was that on the number of EU citizens that have registered themselves as voters in the Province of Salzburg, which was said to be 2956 persons.[178] Since an EU citizen living in Austria is only required to register once for the whole duration of his or her stay and not each time anew before an election, the number is steadily increasing but it does not give a clear hint on how many EU citizens actually took part in the elections. No promotion was launched in the election campaign that specially addressed EU citizens and called for participation. The registration process is very easy; the application form can either be filled in on-line or submitted to the municipality in the classic way on which occasion the applicant must prove his or her identity and formally declare that he or she has the right to vote in the home Member State.[179]

Right to vote and to stand as a candidate at municipal elections for third country nationals

*Legislative initiatives, national case law and practices of national authorities*

**In a widely observed judgement[180] of 30 June 2004 the Constitutional Court annulled provisions in the Vienna Municipal Electoral Regulations (*Wiener Gemeindewahlordnung*) by holding that the Federal Constitution does not permit the right to vote and to stand as candidate for foreigners on municipal level (or district level in Vienna) with the sole exception of EU-citizens.**

The Constitutional Court argued that the Federal Constitution provides for a uniform electoral system in elections to the National Council (Federal Parliament), the Provincial Parliaments and the Municipal Councils. As a basic principle, derived from Article 1 of the Constitution, only Austrian citizens may avail themselves of the franchise. Pursuant to the standing case law of the Court the District Representations in Vienna are general representative organs just as the Federal Parliament. For this reason the right to participate in elections to those District Representations is reserved to Austrian citizens living in the respective district, which makes the enactment of a law unconstitutional that introduces the possibility for foreigners to vote at district level. The sole exception to that general rule applies to nationals of other EU Member States residing in Austria due to Article 19 EC.
Given that renowned jurists like Heinz Mayer, professor for constitutional law in Vienna, were of the opinion that the right to vote for all residents irrespective of their nationality at

[178] Telephone call on 13 December 2004 with an official of the Statistics Department of the Office of the Provincial Government in Salzburg.
[179] Electoral information for Non-Austrian EU citizens available on http://www.help.gv.at (29.11.2004).
[180] VfGH 30.06.2004, G 218/03.

district level as granted in the Vienna Municipal Electoral Regulations was in perfect conformity with the Austrian Constitution, its guardian, the Constitutional Court, missed a clear chance to let a promising project develop. It is deplorable that the Constitutional Court employed a very literal interpretation of the term "people" in particular as the District Representations do not have any lawmaking competences whatsoever. Granting migrants political participation rights at the local level would probably have had a very positive impact on the integration of foreigners in Vienna.

**Article 41. Right to good administration**

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

**Article 42. Right of access to documents**

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

**Article 43. Ombudsman**

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

**Article 44. Right to petition**

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

**Article 45. Freedom of movement and of residence**

Right to social assistance for the persons who have exercised their freedom of movement

*Legislative initiatives, national case law and practices of national authorities*

According to information provided by the Ministry of Social Affairs[181], **social assistance for persons in need who have exercised their freedom of movement is not considered as a social right even for EU citizens**, rather health insurance and sufficient means for livelihood are seen as preconditions for the exercise of the right to residence. So, , it would in principle be conceivable to expel an EU citizen if those preconditions are no longer met, unless this would amount to a violation of the person's fundamental right to private and family life. If such person cannot be expelled, he or she must of course not be discriminated against in the access to social assistance. Real social protection of its own right will only be afforded after Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States has been transposed into Austrian law.

[181] Ministry for Social Affairs, Generations and Consumer Protection: written response to a respective question, received per email on 20 December 2004.

Prohibition to enter certain zones or portions of the national territory during particular events

*Legislative initiatives, national case law and practices of national authorities*

The amendment to the Security Police Act (*Sicherheitspolizeigesetz-Novelle*) primarily discussed under Article 8 for its implications on the fundamental right to data protection also contains regulations empowering the Security Authorities to determine specific public places mainly frequented by minors from which persons being under the suspicion of planning to commit a criminal offence in that area (even though not necessarily directed against the minors) may then be sent away and prevented from re-entering by the police. If applicable, such **protection zones** are intended to be established around schools, kindergartens, parks, etc. with a view to shielding vulnerable children from contacts with potential criminals. However, this concept of protection zones interferes with several human rights such as the freedom to move freely, the respect of private life and the presumption of innocence and there are serious concerns whether such wide discretion conferred by law upon the Security Authorities can be justified with the legitimate aim of protecting children.

## Article 46. Diplomatic and consular protection

No significant developments to be reported.

## CHAPTER VI : JUSTICE

### Article 47. Right to an effective remedy and to a fair trial

Legal aid / judicial assistance

*Legislative initiatives, national case law and practices of national authorities*

One aspect of the Civil Procedure (Amendment) Act 2004 (*Zivilverfahrensnovelle*)[182] was to **transpose Council Directive 2003/8/EC into domestic law**, which the Government and Parliament managed to do before the end of the deadline set 30 November 2004. The law now provides for equal access to appropriate legal aid including travel expenses for all EU-citizens and affiliated third state nationals in civil and commercial matters at court in contentious cross-border cases.

Independence and impartiality

*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

**The composition of a disciplinary commission for the employees of municipalities constituted a lack of impartiality, pursuant to the recent decision of the UN Human Rights Committee in *Perterer v. Austria*[183]. It was not reconcilable with Article 14 ICCPR that persons were sitting as senate members of a disciplinary commission that have either been challenged by the author in previous sets of the proceedings according to a procedural guarantee in domestic law or were in continued employment with the municipality which originally had instituted the proceedings against the author. Moreover, the right to equality before the court which entails the requirement of speedy procedures was also violated when in the present case it took 57 months to decide on a question of minor complexity and without the author's fault. However, the Committee found no denial of justice as regards the dismissal of the author's evidentiary requests and neither a violation of the right to equality of arms as regards the service of the trial transcripts after the deadline of appealing against the Disciplinary Commission's decision.**

Austrian national Paul Perterer had been employed with the municipality of Saalfelden in the province of Salzburg since 1980. In 1996 disciplinary proceedings were instituted against him for allegedly having failed to attend hearings on building projects, having used office resources for private purposes, having been absent during office hours and for other professional shortcomings. The trial senate of the Disciplinary Commission first suspended the author from office and finally dismissed him, although the author had challenged the chairman. On appeal of the author the Disciplinary Appeals Commission for Employees of Municipalities (*Disziplinaroberkommission für Gemeindebedienstete*) remitted the case back to the first instance stating that also the chairman can be challenged without reasons pursuant to Section 124 § 3 of the Federal Civil Servants Act (*Bundesbedienstetengesetz*). In the second round of proceedings the author challenged two members of the Disciplinary Commission on the ground that both were employed at the same municipality and therefore were neither impartial nor independent. The Commission did not comply with this request and again dismissed the author from service. The Appeals Commission upheld this dismissal. After complaint with the Constitutional Court which then transferred the case to the

[182] Federal Law Gazette (BGBl) I No 128/2004 of 18 November 2004.
[183] UN Human Rights Committee, *Perterer v. Austria* (Communication No CCPR/1015/2001), decision of 20 August 2004.

Administrative Court, the decision of the Appeals Commission was set aside, holding that the author had been unlawfully deprived of his right to challenge members of the trial senate of the Disciplinary Commission. In a third round of proceedings the author was again suspended from office and again he challenged both the chairman and two other members of the senate. The chair seat was then held by Mr. Maier who had already been the chairperson in the first set of proceedings. Again but this time also after the Disciplinary Commission had dismissed the author's request to admit further evidence and to examine certain witnesses, the author was dismissed. Both the Appeals Commission and finally the Administrative Court confirmed this decision without a public hearing.

The author alleged violations of his rights under Article 14 § 1 read in conjunction with Article 25, and under Article 26 of the Covenant, as his trial was neither "fair" nor "public" nor concluded expeditiously, but was unduly delayed and conducted by bodies biased against him. He argued that proceedings concerning employment matters were "suits at law" within the meaning of Article 14 § 1 of the Covenant irrespective of the status of one of the parties.As regards the admissibility of the communication concerning disciplinary proceedings, the Committee held that "whenever, as in the present case, a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it had to respect the guarantee of equality of all persons before the courts and tribunals as enshrined in Article 14 § 1 and the principles of impartiality, fairness and equality of arms implicit in this guarantee". However, as regards the aspect of the lack of a hearing, the communication was inadmissible under Article 2 of the Optional Protocol since the author had always been represented by counsel and could have requested a hearing before the Administrative Court. Furthermore, the author had not challenged the senate members in the complaint with the Constitutional Court. Thus, for lack of exhaustion of local remedies the communication was declared inadmissible under Article 5 § 2 (b) of the Optional Protocol. Thirdly, to the extent that the author alleged a violation of his rights under Article 26 of the Covenant, the Committee found that he had failed to substantiate, for purposes of admissibility, any claim of a potential violation of that article. The communication was therefore inadmissible under Article 2 of the Optional Protocol, insofar as Article 26 was concerned.

The Committee considered that the author had sufficiently substantiated, for purposes of admissibility, his claim as far as the alleged bias of the members of the trial senate in the third set of proceedings, its rejection of the author's request to hear witnesses and to admit further evidence, its delay in sending him the 1999 trial transcript, and the length of the disciplinary proceedings raised issues under Article 14 § 1 CCPR.

As regards the alleged bias of the members of the trial senate in the third set of proceedings, the Committee observed that "if the domestic law of a State party provides for a right of a party to challenge, without stating reasons, members of the body competent to adjudicate disciplinary charges against him or her, this procedural guarantee may not be rendered meaningless by the re-appointment of a chairperson who, during the same stage of proceedings, had already relinquished chairmanship, based on the exercise by the party concerned of its right to challenge senate members". Thus, there has been a violation of Article 14 § 1 for lack of impartiality of tribunal members.

With respect to the dismissal of the author's evidentiary request, the Committee found that it was not for the Committee to review the domestic tribunal's decisions on the necessity of further witnesses and further evidence and therefore did not find another violation of the author's rights under Article 14 § 1. Neither did it find another violation of Article 14 § 1 as regards the trial senate's failure to transmit the 1999 trial transcript to the author before the end of the deadline for appealing the decision of the Disciplinary Commission of 23 September 1999, since "the author had failed to demonstrate that the late transmittal of the 1999 trial transcript prevented him from raising the alleged irregularities before the Administrative Court, [and] especially since he admitted himself that the alleged manipulation of the testimonies was only discovered by counsel for the present communication".

Regarding the length of the proceedings, the Committee held that the author's right to equality before the courts and tribunals under Article 14 § 1 CCPR has been violated since the delay of

57 months to adjudicate a matter of minor complexity was not attributable to the author but to the state authorities only.

*Reasons for concern*

Although the Human Rights Committee found those violations of Mr. Perterer's right to a fair trial in August 2004, and despite repeated requests by the applicant, the Austrian Government has failed to offer any effective remedy and reparation to him. As in earlier cases, this **policy of the Austrian Government to ignore decisions of the UN Human Rights Committee** seems to be based on the supposedly non-binding nature of the Committee's decisions under the First Optional Protocol to the ICCPR. As the Committee has, however, clearly stated in similar cases, such a defiant Governmental policy constitutes a systematic violation of the obligation of States under Article 2(3) of the Covenant obliging States parties to grant victims an effective remedy in cases of alleged human rights violations. It also obviously shows contempt for the most prominent UN human rights treaty monitoring body which was authorised by the First Optional Protocol to accept and decide on individual complaints against more than 100 States – including Austria – which have decided voluntarily to become a party to the First Optional Protocol.

Another reason for concern are the subtle attempts of the Ministry of the Interior to exert **undue influence on the Independent Federal Asylum Tribunal**, which is the court-like appeals body in asylum matters. As is shown under Article 18 on the right to asylum, the Tribunal is not adequately equipped with staff but was repeatedly blamed by the Minister for the long duration of the appeals proceedings. Moreover, the fact that after an organisational reform the Ministry of the Interior is now directly responsible for the allocation of financial means and human resources is seen by most members of the tribunal as an indirect attack on its legally guaranteed independence.

Publicity of the hearings and of the pronouncement of the decision

*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

**The case of *Alge v. Austria*[184] (Application no. 38185/97) before the European Court of human Rights ended with the finding of two violations of Article 6 ECHR: first for exceeding the reasonable time requirement in proceedings for a permit to install a drainage system on land that was registered as protected wetland; and secondly for the lack of a public hearing before the Administrative Court without exceptional circumstances that would have justified the Court dispensing with the hearing.**

Proceedings instituted on 24 July 1991 by Austrian national Alfred Alge for an exemption permit to install a drainage system on his land that was registered as protected wetland under Ordinance No. 1990/40 of the Regional Law Gazette took nearly 6 years before four levels of jurisdiction. Since cultivating, grazing, draining or using chemical fertilisers was prohibited under this ordinance, the Administrative Court finally held on 17 March 1997 that in the present case agricultural interests did not prevail over interests of landscape protection and that therefore an exemption from the limitations as established in the ordinance could not be granted. The same court did not explain why it refused to hold a public hearing or appoint an expert, although both had been requested by the applicant. The applicant alleged that proceedings had taken unreasonably long and that throughout the proceedings no public hearing had been held.
As to the complaint about the length of the proceedings, the Court observed that the relevant period started on 27 May 1992, when the applicant filed a complaint with the Constitutional

[184] Eur.Ct.H.R, *Alge v. Austria* (Application No 38185/97), judgement of 22 January 2004.

Court against the refusal of the requested permit, and terminated on 1 April 1997 when the Administrative Court's decision was served upon the applicant's counsel. Thus, the proceedings lasted approximately four years and ten months. This period had to be assessed in the light of the criteria as established in the Court's previous findings. In the instant case the Court did not find "any explanation" for the length of the proceedings, particularly for the long period of inactivity before the Administrative Court where proceedings had lasted for more than three years, namely from 4 January 1994 (when the Regional Government filed observations) until 17 March 1997 (when the Administrative Court decided).
As to the complaint about the lack of a public hearing before the Administrative Court, the Court referred to its case-law and thereby recalled that the Austrian reservation in respect of Article 6 § 1 concerning the requirement that hearings be public, had been found to be invalid and that the Administrative Court was the only instance in the proceedings which qualified as a tribunal within the meaning of Article 6 § 1 of the Convention. Since the Court could not establish any exceptional circumstances that would have justified dispensing with a public hearing, there has been a violation of the applicant's right to a public hearing and thus held a violation of Article 6 of the Convention.
The applicant was awarded EUR 3.000,- in respect of non-pecuniary damage and EUR 3.000,- in respect of costs and expenses.

**In *Yavuz v. Austria*[185] the European Court of Human Rights determined a breach of Article 6 §§ 1 and 3 (c) and (d) of the Convention. When the domestic proceedings following the imposition of a fine on the applicant for having illegally employed a Turkish citizen after the expiry of his temporary work permit took more than four years of proceedings without justification, the European Court declared that the state authorities exceeded the reasonable time requirement in violation of Article 6 § 1. As regards Article 6 § 3, the hearing before the Independent Administrative Tribunal was held in absence of the accused although the accused did not unequivocally waive his right to be heard in person. Consequently, there was also a violation of this right and the accused's right to examine the witnesses.**

In April 1993 the Vorarlberg Regional Employment Office (*Landesarbeitsamt*) granted the B. company, whose executive director the applicant was, a preliminary and temporary work permit for A., another Turkish citizen. A month later, however, the B. company was not granted a definitive work permit for A and, four weeks after this decision had been served (24 June 1993), A. lost his right to work under the temporary work permit. The company appealed and also requested suspensive effect. The Constitutional Court refused this request; this decision was served on the applicant's counsel on 12 August 1993.
On 28 October 1993 the Bregenz District Administrative Authority informed Yavuz of its suspicion that he had illegally employed A. between 24 June and 10 August 1993. The applicant replied to the District Administrative Authority that he could not be deemed culpable for the period of time while its complaint had been pending before the Constitutional Court, as it was not until the service of that court's decision that he learned that suspensive effect had not been granted. On 31 March 1994 the District Administrative Authority imposed a fine of 5.000,- Austrian schillings (EUR 363,--) on the applicant for having illegally employed A. after his temporary work permit had expired and thereby having breached Section 28 of the Employment of Foreigners Act (*Ausländerbeschäftigungsgesetz*). The applicant appealed and one year later he and his counsel were summoned by the Vorarlberg Independent Administrative Tribunal to an oral hearing scheduled for 26 May 1995. Both summons were addressed to the counsel obliging him to inform the applicant and including a reference to Section 51 f § 2 of the Code of Administrative Offences that the hearing will also be held in absence of the applicant. Since the applicant's counsel was on a conference at that date and neither sent a colleague as substitute nor informed the applicant, the Tribunal only

[185] Eur.Ct.H.R, *Yavuz v. Austria* (Appl. No 46549/99), judgement of 27 May 2004 as rectified on 9 September 2004.

heard two witnesses, one of them stated that the applicant was in Turkey and the other that A. had worked and had been paid in the relevant period. Although the applicant's counsel requested the adjournment of the day of public pronouncement until Yavuz' return from Turkey, the Tribunal confirmed the first instance decision on 22 June 1995. Invoking Article 6 ECHR, the applicant lodged a complaint with the Constitutional Court which remitted the Case to the Administrative Court. After submissions of the parties, the Administrative Court dismissed the complaint on 1 July 1998. This decision was served on the applicant's counsel on 29 July 1998. Thus, administrative criminal proceedings against the applicant lasted four years and nine months.

The applicant alleged that the length of the administrative criminal proceedings against him was excessive, in breach of Article 6 § 1 of the Convention. Further he complained of unfairness of these proceedings, in particular that he had not been heard in person and that he had no possibility to examine witnesses, in breach of Article 6 § 3 (c) and (d) of the Convention.

Referring to its case-law, the Court reiterated the criteria to assess the reasonable time-requirement and the duty of the States parties to organize their legal system in such a way that their courts can comply with this obligation. The Court found that proceedings were neither complex nor did the applicant contribute to the length of the proceedings. However, the Court noted substantial periods of inactivity before the state authorities, namely one year before the Independent Administrative Tribunal, i.e. between 11 May 1994, when the applicant lodged his appeal, and 2 May 1995, when the Tibunal summoned the parties to the hearing scheduled for 26 May 1995, and secondly almost one and a half year before the Administrative Court, i.e. between 10 January 1997, when the case was ready for a decision as the Tribunal had submitted observations in reply, and 1 July 1998, when the Administrative Court decided on the case. Accordingly, there has been a violation of Article 6 § 1 ECHR.

As regards the alleged unfairness of the proceedings, the Court had to decide on the lawfulness of administrative criminal proceedings in which the applicant had never been heard and, allegedly, never had the possibility to examine witnesses. The Court reiterated that the right of an accused to participate in person in the trial was a fundamental element of a fair trial. Furthermore, an accused may waive the exercise of this right, but to do so his decision not to appear or not to defend himself had to be established in an unequivocal manner. In the present case, however, the accused had never been heard before a tribunal throughout the proceedings, since the Independent Administrative Tribunal, which had held its hearing when the applicant had been in Turkey, was the only tribunal throughout the Austrian administrative criminal proceedings within the meaning of Article 6 of the Convention. The Court noted that the fact that both summons were served on the applicant's counsel did not constitute in itself a violation of Article 6 of the Convention but that cases where the accused had not been summoned in person must be examined "with particular diligence". Thus, in the present case the Tribunal would have had to verify whether the accused had been informed in person about the date of the hearing, knowing even from the witness' statement that the applicant stayed in Turkey at the date of the hearing and receiving a request for a personal hearing of the applicant from the counsel after the service of the minutes of the hearing and before the public pronouncement. The Court therefore considered that the applicant had not unequivocally waived his right to be heard in person. Thus, the failure to hear the applicant before the Vorarlberg Independent Administrative Tribunal was in violation of Article 6 §§ 1 and 3 (c) of the Convention and, consequently, also Article 6 § 3 (d) has been breached as the applicant was excluded from examining witnesses. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (c) and (d) of the Convention.

The applicant was awarded EUR 2.000,- in respect of non-pecuniary damage and EUR 6.981,78 in respect of costs and expenses.

Reasonable delay in judicial proceedings

*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

**The UN Human Rights Committee concluded in *Deisl and Deisl v. Austria*[186] that there was no violation of Article 14 § 1 CCPR, although proceedings concerning building permissions and demolition orders lasted eleven years and eight months since the entry into force of the Optional Protocol for Austria in 1988. Several factors such as the considerable complexity of the proceedings, the fact that the Administrative Court once and the Provincial Government twice had set aside negative decisions on appeal of the authors, the fact that suspensive effect had been granted to the appeal against the demolition order and the length of each stage of the proceedings respectively outweighed any detrimental effects that the legal uncertainty about the outcome of the protracted proceedings might have had on the authors.**

Franz Deisl and his wife Maria Deisl claim to be victims of a violation of Article 14 § 1 and Article 26 of the Covenant, as proceedings concerning an exemption from the building prohibition for plots of land zoned as “rural” and the granting of a retroactive building permission for two dwellings, were neither "fair" nor "public" nor concluded expeditiously, but were conducted by authorities which consistently and deliberately acted to the detriment of their procedural position and discriminated against them. The authors had bought that plot of land situated in Elsbethen, a municipality near the city of Salzburg, in the 1960s. Before they had been formally registered as the owners of the land and without having been informed, the seller had applied for an exception from the zoning regulations in order to change the designation of the plot from "rural" to "residential" which was finally denied by the Salzburg Provincial Government.
As regards the admissibility of the claim, the Committee noted that the 13-year delay in informing the authors about the Provincial Government's decision of 17 October 1969, which disapproved the Municipality's decision to grant them an exemption from the zoning regulations, as well as in deciding on the authors' appeal of 30 July 1974 against the mayor's demolition order of 17 July 1974, both predated the entry into force of the Optional Protocol for the State party. The Committee did not consider that these alleged violations continued to have effects after 10 March 1988, which would in themselves have constituted violations of the authors' Covenant rights. The communication was therefore inadmissible *ratione temporis* under Article 1 of the Optional Protocol, insofar as it relates to the above mentioned delays. As to the State party's argument that the allegedly discriminatory treatment of the authors also predated the entry into force of the Optional Protocol for Austria, the authors have failed to substantiate, for purposes of admissibility, that their allegedly discriminatory treatment was based on one of the grounds enumerated in Article 26. Similarly, they have not substantiated, for purposes of admissibility, that the reasons advanced by the Provincial Government and the Administrative Court for rejecting their request for an exemption from the zoning regulations were arbitrary. The Committee concluded that this part of the communication was inadmissible under Article 2 of the Optional Protocol. Regarding the authors' claim that the absence of any oral hearing throughout the proceedings violated their right to a fair and public hearing under Article 14 § 1 of the Covenant, the communication was declared inadmissible again under Article 2 of the Optional Protocol for the authors, both represented by counsel, never requested an oral hearing and thereby waived their rights to a public process. Referring to its previous findings the communication was also declared inadmissible under Article 2 of the Optional Protocol as regards the lack of authorities qualifying as a tribunal for Article 14 § 1 CCPR did not require States parties to ensure that decisions are issued by tribunals at all appellate stages.

[186] UN Human Rights Committee, *Deisl and Deisl v. Austria* (Communication No CCPR/1060/2002), decision of 23 August 2004.

However, the communication was admissible insofar as the length of the examination of the authors' appeal against the Municipality's decision of 4 February 1987 and the proceedings before the Constitutional and Administrative Courts were concerned, for the authors had sufficiently substantiated that the delays of the proceedings as a whole raised issues under Article 14 § 1 of the Covenant. The issue before the Committee therefore was whether the delays complained of violated the reasonable time requirement, to the extent that they occurred or continued after the entry into force of the Optional Protocol for the State party. The length of the proceedings as a whole, counted from the date of entry into force of the Optional Protocol for Austria (10 March 1988) to the date of the Administrative Court's final decision (3 November 1999), totalled eleven years and eight months. In assessing the reasonableness of this delay, "the Committee based itself on the following considerations: (a) the length of each individual stage of the proceedings; (b) the fact that the suspensive effect of the proceedings vis-à-vis the demolition orders was beneficial, rather than detrimental, to the authors legal position; (c) the fact that the authors did not avail themselves of possibilities to accelerate administrative proceedings or to file complaints simultaneously; (d) the considerable complexity of the matter; and (e) the fact that, during this time, the Provincial Government twice, and the Administrative Court once, set aside negative decisions on appeal by the authors". The Committee considered that "these factors outweighed any detrimental effects which the legal uncertainty during the protracted proceedings may have caused to the authors". Thus, having regard to all the circumstances of the case, their right to have their case determined without undue delay has not been violated.

**The case of *Baumann v. Austria*[187] before the European Court of Human Rights also ended with the finding of a violation of Article 6 § 1 ECHR. In the light of a non-particular complex case in which the applicant did not contribute to the civil proceedings concerning the division of matrimonial property and savings and after having referred to the States parties' duty to organise their legal system in such a way that they can meet with the requirements of a fair process, the Court took "the view that an overall period of thirteen years and five months could not, in itself, be deemed to satisfy the 'reasonable' time requirement in Article 6 § 1 of the Convention". The complaint was manifestly unfounded as regards the alleged unfairness of the cost proceedings for lack of a remedy against the second instance's decision and as regards the alleged unreasonableness of the decision that each party had to bear its own costs.**

In the case of Austrian national Ulrike Baumann civil proceedings started on 15 December 1987, when the applicant filed her request for the division of the matrimonial property and savings following her divorce, and ended on 22 May 2001, when the Regional Court's costs order was served on the applicant's counsel. It thus lasted thirteen years and five months before three levels of jurisdiction, with re-hearings.
Referring to its case-law, the Court reiterated the criteria to assess the compliance with the reasonable time requirement under Article 6 § 1 of the Convention. Examining the present case, the Court held that the financial aspect did not make the civil proceedings particularly complex although they had to be suspended until tax proceedings had been finished. Furthermore, the applicant had only made use of the remedies under domestic law and therefore did not contribute to the proceedings. The Court, referring to the States parties' duty to organise their legal system in such a way that they can meet with each of the requirements of Article 6 of the Convention, took "the view that an overall period of thirteen years and five months could not, in itself, be deemed to satisfy the "reasonable time" requirement in Article 6 § 1 of the Convention". Accordingly, there has been a violation of Article 6 ECHR.
The applicant further complained that the decision that each party had to bear its own costs was unreasonable and that there was no further remedy against the Regional Court's dismissal of her appeal against the costs order. The Court held that Article 6 of the Convention was applicable to cost proceedings but that it was not for the European Court of Human Rights to

[187] Eur.Ct.H.R., *Baumann v. Austria* (Application No 76809/01), judgement of 7 October 2004.

act as an appeal court to decisions of domestic courts. Furthermore, the "legislative policy reflected in the Non-Contentious Proceedings Act (*Außerstreitgesetz*), leaving the costs issue to the discretion of the domestic courts, which take account of the outcome of the proceedings, the financial standing of the parties and their conduct in the proceedings, appeared neither arbitrary nor unreasonable". Since no indications that the cost proceedings did not meet the fair process requirements could be established the claim was rejected as manifestly unfounded, as was the complaint about the lack of a remedy against the Regional Court's decision, since "no provision of the Convention requires a State to grant persons under its jurisdiction an appeal to a Supreme Court acting as a third instance court".
The applicant was awarded EUR 9.000,- in respect of non-pecuniary damage and EUR 5.906,91 in respect of costs and expenses.

**Another case that came before the European Court of Human Rights where the final decision was not delivered within the appropriate time frame is *Girardi v. Austria*[188]. Although there were two complicated sets of proceedings and the applicant Elisabeth Girardi contributed considerably to the length of proceedings against the Youth Welfare Office litigating about the reimbursement of maintenance pays, the Court found a violation of Article 6 § 1 ECHR because the use of all types of remedies cannot be sufficient in itself to explain the extraordinary length of the proceedings. Furthermore, the applicant cannot be blamed for having made use of all remedies available under domestic law. Instead, significant delays were attributable to the Austrian authorities which led to exceeding the reasonable time requirement as enshrined in the Convention.**

Austrian national Elisabeth Girardi is the mother of M, L and R, born in 1973, 1974 and 1976, respectively. The spouses separated in 1982. Custody of L and M was assigned to the applicant, the custody of R to the father. In December 1989 M was admitted in a public girls' home as she refused to stay with her mother. She stayed there until January 1992. From December 1989 until September 1995 custody proceedings concerning the temporary transfer of M's custody to the Vienna Youth Welfare Office for the time M had spent at the girls' home were pending before the Austrian courts.
In a first set of proceedings, on 3 January 1990 the Vienna Youth Welfare Office filed a request on behalf of M that the applicant should pay a monthly contribution to the expenses incurred for M's stay in the girls' home. After the file had been transferred to the competent Juvenile Court and several hearings had to be cancelled because the court's attempts to deliver the summons to the applicant were unsuccessful, the Juvenile Court ordered on 10 February 1992 that the applicant had to pay ATS 2,500 in monthly maintenance for M. The applicant appealed, claiming that she was fit to work to an extent of 75% only. This decision was quashed by the Appeal Chamber in May 1992 and transmitted to the first instance in order to appoint an expert to examine on the applicant's ability to work full or only part-time. Without complying with this decision, it took until 20 May 1998 that the Juvenile Court served a new decision on the applicant in which the amount of monthly contributions was reduced. Referring to the Appeal Chambers decision in 1992, the applicant appealed, relying again on her reduced fitness to work. When the Juvenile Court then finally appointed an expert, the applicant appealed, claiming that already two medical officers (*Amtsarzt*) had confirmed her reduced fitness to work and no third expert opinion was necessary on that issue. This appeal and the numerous other complaints with the President of the Juvenile Court, claiming that documents were missing from the file and that the law clerk (*Rechtspfleger*) I.S. as well as various judges of the Juvenile Court were biased, were dismissed as unfounded. It was also refused to set a time-limit, such as requested by the applicant under Section 91 of the Courts Act. On 17 May 1999 the Vienna Youth Welfare Office withdrew its request dated of 3 January 1990. Thereupon, the applicant withdrew all requests and complaints still pending before the Juvenile Court at that stage. Thus, proceedings lasted more than nine years and four months.

[188] Eur.Ct.H.R., *Girardi v. Austria* (Application No 50064/99), judgement of 11 December 2003.

In a second set of proceedings, the applicant filed a request with the Juvenile Court on 4 September 1990, claiming reimbursement of her expenses incurred from 30 July 1990 to 3 September 1990 when her daughter M stayed with her. In the same month the Youth Welfare Office reimbursed the applicant for M's stay until 21 August 1990. On 10 August 1993 the Juvenile Court dismissed the applicant's request for expenses incurred during the rest of the period. This decision was quashed by the Vienna Court of Appeal in January 1995 and the case was transferred back to the first instance. In 1998 the applicant filed a motion under Section 91 of the Courts Act. A time limit was fixed and within this period the Juvenile Court dismissed the applicant's request for maintenance pays from 4 September 1990. Although the Appeal Chamber dismissed the applicant's appeal and stated that there was no further appeal on points of law in the applicant's case as it did not raise questions of law of fundamental importance *(Ausspruch über die Unzulässigkeit der ordentlichen Revision)*, the applicant filed an extraordinary appeal on points of law *(ausserordentliche Revision)* with the Supreme Court which remitted the case to the Vienna Juvenile Appeal Court, for in non-contentious proceedings it was up to the Vienna Juvenile Appeal Court on whether a further appeal on points of law was admissible. As the applicant did not comply with the Appeal Court's request to remedy her appeal, it rejected her appeal on 25 February 1999. Thus, proceedings lasted for more than eight years and five months.
The Court reiterated the criteria to assess the compliance with the reasonable time-requirement as established in its case-law and therefore held that "the applicant filed a multitude of motions of bias, appeals and requests for extension of time-limits and therefore contributed considerably to the length of the proceedings herself." However, applicants could not be blamed for making full use of the remedies available under domestic law and the conduct of the applicant was not in itself sufficient to explain the extensive length of the proceedings. Instead, significant delays were also attributable to State authorities: in the first set of proceedings, there has been a period of inactivity of more than two years (from 3 January 1990 to 10 February 1992) while the case was pending before the Vienna Juvenile Court, and a further one of six years (from 13 May 1992 to 20 May 1998) before that court took a new decision after the first one had been quashed on appeal. In the second set of proceedings, there has been a period of inactivity of some three years (from 4 September 1990 to 10 August 1993), while the case was pending before the Vienna Juvenile Court, and a further such period of three years and seven months (from 5 January 1995 to 5 August 1998) before that court took a new decision after the first one had been quashed on appeal. Since the Government had not provided any sufficient explanations to justify these delays, the reasonable time-requirement has not been fulfilled. Accordingly, there has been a breach of Article 6 § 1 of the Convention.

The applicant has not filed a claim for just satisfaction. Accordingly, the Court considers that no award can be made under this provision.

**In *Morscher v. Austria*[189] a total length of more than six years for planning permission proceedings that were linked to re-allocation proceedings was held by the European Court of Human Rights to exceed the reasonable time requirement. It asserted considerable delays caused by the authorities, whereas the applicant repeatedly made use of remedies to accelerate the proceedings, and thus came to find a breach of Article 6 of the Convention.**

Planning permission proceedings of Austrian national Guido Morscher were linked to re-allocation proceedings and lasted 6 years 3 months and 3 days before four levels of jurisdiction until the Administrative Court finally held that there was "no indication that the applicant's project interfered with the objective of the re-allocation proceedings".
When assessing the length of proceedings in the light of the reasonable time requirement as laid down in Article 6 § 1 ECHR, the Court acknowledged that the case was of some

[189] Eur.Ct.H.R., *Morscher v. Austria* (Application No 54039/00), judgement of 5 February 2004.

complexity but held co-instantaneously that "that fact could not in itself justify the duration of the planning permission proceedings at issue, in particular as it appeared that the re-allocation proceedings were not conducted with due diligence." On 5 June 1999 the Regional Government had discontinued them on the ground that the Weiler Municipality had failed to issue a re-allocation plan within the time-limit provided for by law. Moreover, the applicant had repeatedly made use of remedies to accelerate the proceedings such as his application for a transfer of jurisdiction (*Devolutionsantrag*) with the Regional Government, as the District Authority had not decided within the statutory six-month time-limit and two applications against the Government's failure to decide (*Säumnisbeschwerde*) with the Administrative Court. Significant delays were therefore attributable to the authorities and the Court thus found a violation of Article 6 of the Convention for proceedings had exceeded the reasonable time-requirement.

The applicant was awarded, firstly, EUR 4.000,- in respect of non-pecuniary damage, secondly, EUR 1.293,34 for costs incurred in domestic proceedings in an attempt to prevent or redress the violation found and, thirdly, EUR 2.000,- in respect of costs incurred in the Convention proceedings.

***Pokorny v. Austria*[190], yet another Strasbourg case concerning the excess of the reasonable time limit for domestic proceedings, was brought by the parties to a friendly settlement.**

On 2 October 1992 the Vienna Customs Office (*Zollamt*) opened investigations against Austrian national, Karl Pokorny and a number of other suspects under the Tax Offences Act (*Finanzstrafgesetz*) concerning charges of smuggling. A year later the Customs Office transmitted its final investigations report to the Public Prosecutor's Office (*Staatsanwaltschaft*). It was not before 1 July 1999 that, after the investigating judge conducted further investigations, the Public Prosecutor preferred the indictment on charges of smuggling against the applicant and only two co-accused. On 30 November 1999 the Vienna Regional Criminal Court acquitted the applicant and on 12 September 2000 the Supreme Court dismissed the pleas of nullity and the appeal against sentence. This decision was served on the applicant on 5 October 2000.

The applicant complained under Article 6 § 1 of the Convention about the length of the criminal proceedings.
After the Austrian Government's had offered to pay EUR 6.800,-- to the applicant to cover any pecuniary and non-pecuniary damage as well as costs and after the applicant had accepted this sum as the final resolution of the case, the Court struck the case off the list.

**The case of *Dirnberger v. Austria*[191] concerned the extensive length of criminal proceedings, namely 16 years, in which proceedings never went beyond the first instance. The European Court of Human Rights ruled that Austria had acted in breach of the requirements of Article 6 § 1 of the ECHR.**

On 25 June 1981 preliminary investigations were opened against Austrian national Franz Dirnberger, the then owner of several firms, whose business was trading in fowl and game as well as the processing, importation and exportation of meat. He was suspected of having breached the conditions of the inward processing (*aktiver Veredelungsverkehr*) permit by having exported a different quality of meat than he had imported and by having put the imported meat onto the domestic market without having paid the customs duties. These acts

[190] Eur.Ct.H.R., *Pokorny v. Austria* (Application No 57080/00), friendly settlement of 16 December 2003.
[191] Eur.Ct.H.R., Dirnberger v. Austria (Application No 39205/98), judgement of 5 February 2004.

constituted offences under the Act on Fiscal Offences (*Finanzstrafgesetz*), the Trade in Animals Act (*Viehwirtschaftsgesetz*) and the Export Act (*Außenhandelsgesetz*). In 1984 the applicant was convicted of fraud and sentenced to two and a half years' imprisonment. Subsequently, he was convicted of other criminal offences on two occasions and sentenced to further terms of imprisonment. In 1992 he was eventually released. Meanwhile, the Vienna Customs Office (*Zollamt*) and the Animals and Meat Commission (*Vieh- und Fleischkommission*) submitted reports on the charges in respect of which the proceedings had been opened in June 1981 and the Vienna Public Prosecutor's Office indicted the applicant in respect of these facts in January 1994. On 16 April 1997 the Regional Court finally discontinued the proceedings.
Although there were numerous single charges the Court stated that the case was not particularly complex and that the applicant's conduct did not contribute significantly to the extensive length of the proceedings. It therefore held that there was a violation of Article 6 ECHR.
The applicant was awarded EUR 10.000,- in respect of non-pecuniary damage and EUR 2.000,- for costs and expenses.

**The case of *Löffler v. Austria*[192] resulted in the condemnation of Austria for exceeding the reasonable length of the official liability proceedings instituted by Mr Löffler in March 1993 claiming compensation for damage resulting from his conviction of murder and detention for about six years. As proceedings were still pending before the Vienna Court of Appeal after nearly eleven years at the time when the judgement was delivered, the European Court recalled the duty of the Contracting States to organise their judicial systems with the obligations under Article 6 § 1 of the Convention, which Austria had failed in this case.**

On 10 April 1986 preliminary investigations were instituted by the Linz Regional Court against Austrian national Hans-Peter Löffler on the suspicion of murder. Löffler was remanded on custody and in March 1987 convicted of murder and sentenced to eighteen years of imprisonment. The Supreme Court dismissed the applicant's appeal of nullity in the same year. In June 1992 the Linz Court of Appeal (*Oberlandesgericht*) granted the applicant's appeal against the first instance's dismissal of his request for the re-opening of the criminal proceedings against him. Thus, on 23 June 1992 the applicant was released and new preliminary proceedings were instituted.
The official liability proceedings (*Amtshaftung*) against the Republic of Austria, instituted by the applicant on 10 March 1993, were suspended in March 1994, since criminal proceedings were still pending. In August 1996 the Assize Court acquitted the applicant of the charge of murder, but dismissed his application for compensation for detention (*Haftentschädigung)* under the Criminal Proceedings Compensation Act (*Strafrechtiches Entschädigungsgesetz*). The applicant's appeal on the question of compensation for detention was allowed and the Court of Appeal stated that the applicant was entitled to a compensation under Section 2 § 1 (b) and 1 (c) of the Criminal Proceedings Compensation Act. Official liability proceedings were then continued in September 1996 and joined with the official liability proceedings which the applicant had again instituted in the meantime. After a change in the judge in charge, hearings were held in June 1997, October 1997 and October 1998. In March 1999 the applicant's claim was partly allowed and he was granted ATS 42.912. On appeal of the applicant and the Republic of Austria the Supreme Court delegated the case to the Vienna Court of Appeal in July 1999, which then held a hearing in May 2000 and in October 2000 appointed an expert to assess the applicant's loss of earnings. After the applicant's motion under Section 91 of the Courts Act (*Gerichtsorganisationsgesetz*), the expert finally submitted her opinion in May 2001. The applicant's request under the Courts Act was dismissed and in December 2001 the expert was asked to supplement her opinion. When the expert submitted her supplemented opinion (again too late) another request under Section 91 of the Courts Act

[192] Eur.Ct.H.R., *Löffler v. Austria* (Application No 72159/01), judgement of 4 March 2004.

was dismissed in June 2002 and upon the applicant's request a new expert was appointed on the same matter which submitted her opinion in December 2002. In July 2003 the Regional Court gave a partial decision (*Teilurteil*) and granted the applicant compensation in the amount of approximately EUR 236.000,-- as well as a monthly annuity. Appeal proceedings before the Vienna Court of Appal are still pending.
As regards the length of proceedings, the Court declared the applicant's claim admissible but rejected the complaint as to the alleged unfairness of proceedings, since proceedings were still pending and the fairness of proceedings could only be examined as a whole.
Assessing the facts that contributed to the meanwhile length of about ten years and ten months of official liability proceedings, the Court held that the applicant's conduct did not cause any significant delays. The authorities, however, showed substantial periods of inactivity: one year before the Regional Court before a first oral hearing was held after the applicant had instituted the first official liability proceedings and even three years as regards the second official liability proceedings that had not been suspended although that would have allowed the Government to justify the delays with the pending of criminal proceedings. Even if in the present case proceedings had to be transferred several times to another court in order to avoid bias and although quite extensive taking of evidence was needed, Article 6 § 1 of the Convention still "imposes on Contracting States the duty to organise their judicial systems in such a way that their courts can meet the obligation to decide cases within a reasonable time". Proceedings therefore exceeded the reasonable-time requirement.
The applicant was awarded EUR 6.600,-- in respect of non-pecuniary damage and EUR 2.000,-- for costs and expenses.

**The European Court of Human Rights gave judgement for the applicant in *Malek v. Austria*[193] criticising the long period of six years and one month of proceedings from the Krems Municipal Council's invitation to the applicant to file comments on the charge of illegal parking against her until the Administrative Court's final dismissal of the applicant's complaint as unfounded. Especially the period of inactivity of the Administrative Court lasting for two years and nine months failed to meet the 'reasonable time'-requirement and therefore the judges found a violation of Article 6 § 1 ECHR.**

On 30 January 1996 Austrian national Bettina Malek was invited by the Krems Municipal Council to comment on the charge against her as she was suspected of illegal parking. After having run through proceedings before the Independent Administrative Tribunal and a complaint before the Constitutional Court which remitted the case to the Administrative Court, the dismissal of the applicant's complaint as unfounded by the Administrative Court was served upon the applicant's counsel on 20 February 2002. Thus, a period of six years and one month had to be taken into consideration.
The Court declared the application admissible and, assessing the complexity of the case, the conduct of the applicant and the relevant authorities, it ruled that, regarding in particular the period of inactivity of the Administrative Court of two years and nine months, the length of proceedings was excessive and failed to meet the "reasonable time" requirement in the instant case.
The Court rejected the applicant's claim in respect of non-pecuniary damage and held that the finding of the violation constituted in itself sufficient just satisfaction. It, furthermore, dismissed the applicant's claim for costs and expenses for, as regards the domestic proceedings, only those incurred in an attempt to accelerate the proceedings can be reimbursed and, as regards the Convention proceedings, submissions by the applicant were belated without any explanations.

**A "not particularly difficult" finding of a violation of Article 6 ECHR - to use the European Court of Human Right's words – was the result of the case of *Schluga v.***

[193] Eur.Ct.H.R., *Malek v. Austria* (Application No 16174/02), judgement of 21 October 2004.

***Austria*[194]. Austria was condemned for failure to meet the 'reasonable time' – requirement in all six sets of administrative criminal proceedings, which had as common feature a particularly long period of inactivity of the Administrative Court.**

The Bregenz District Administrative Authority issued penal orders under the Vorarlberg Morals Act (*Sittenpolizeigesetz*) in five cases, sentencing Austrian national Eveline Schluga to up to thirty days of imprisonment and additionally to fines from EUR 10.000,-- to 20.000,-- ; in a sixth case the same authority issued a penal order against the applicant for -aving breached the Aids Act (*Aidsgesetz*) and imposed a fine of ATS 10.000,--. Proceedings started in 1993, 1994 or 1995 respectively and passed the Vorarlberg Independent Administrative Tribunal and the Constitutional Court that referred the cases to the Administrative Court for lack of prospect of the complaints which were partly dealt in joined proceedings. The Administrative Court finally dismissed the applicant's appeals as unfounded. The proceedings, which thus came before four levels of jurisdiction, lasted from four years and five months to seven years and one month in total. Their common feature was that, in each case, a considerable period of inactivity occurred before the Administrative Court between the date on which the Independent Administrative Tribunal submitted its comments and the date when the Administrative Court's decisions were served.
Referring to the criteria established in its previous findings, the Court held that the length of proceedings had been incompatible with the 'reasonable time' requirement. It even considered it "not particularly difficult to determine" a violation of Article 6 of the Convention.
For the applicant could not establish a casual link between the length of the proceedings and the pecuniary damage she had claimed, this claim was rejected. The applicant was awarded a total of EUR 12.000,-- in respect of non-pecuniary damages and EUR 3.000,-- as reimbursement of costs and expenses for the Convention proceedings.

**In *Ullrich v. Austria*[195] the European Court of Human Rights, while admitting that the case showed some complexity and that the applicant's conduct had undoubtedly contributed to the length of the proceeding, again concluded with finding a breach of Article 6 ECHR for exceeding the reasonable time margin in the proceedings.**

In March 1993 welding work was carried out in the applicant's fashion boutique. On 26 May 1995 Austrian national Ingrid Ullrich filed an action for damages alleging that the work of the company had soiled stored clothes and the salesroom and had affected her health. In July 2003 the Salzburg Regional Court finally dismissed the claim for it had become time-barred as the applicant had not duly continued the proceedings after friendly settlement negotiations had failed in August 2001. The Court of Appeal dismissed the applicant's appeal and so did the Supreme Court on 3 December 2003.
As to the admissibility of the complaint, the Court declared it admissible as far as it concerned the length of proceedings but found it manifestly-unfounded as regards the applicant's complaint of unfair proceedings concerning her motion of bias against judge S. at the Regional Court because due to judge S.' own declaration (*Befangenheitsanzeige*) proceedings had been continued by another judge anyway. The Court therefore found no hints for an unfair process within the meaning of Article 6 of the European Convention of Human Rights.
As to the merits, the Court acknowledged that the case was of some complexity and that several requests by the applicant to not schedule any hearings due to ongoing friendly settlement negotiations had contributed to the length of the proceedings. The Court found, however, that "neither the fact that the proceedings were of some complexity, nor the conduct of the applicant were in themselves sufficient to explain the overall length of the proceedings at issue which lasted for eight years and some six months, in particular as the proceedings

[194] Eur.Ct.H.R., *Schluga v. Austria* (Applications Nos. 65665/01, 71879/01 and 72861/01), judgement of 19 February 2004
[195] Eur.Ct.H.R., *Ullrich v. Austria* (Application No 66956/01), judgement of 21 October 2004.

were pending for eight years and some two months before the first instance court." Accordingly, there has been a violation of Article 6 ECHR.
For lack of a casual link between the length of the proceedings and the alleged pecuniary damage, the Court rejected this claim. However, the applicant was awarded a sum of EUR 5.000,-- in respect of non-pecuniary damages and EUR 100,-- for actually and necessarily incurred costs and expenses.

**Again in the case of *Wohlmeyer Bau GmbH v. Austria*[196] the European Court of Human Rights determined a violation of Article 6 ECHR by Austria when civil proceedings were pending 10 years in the first instance with several periods of inactivity of the court due to its failure to supervise properly the speedy conduct of the proceedings by not urging the delivery of the requested expert's opinions earlier.**

The applicant is a limited liability company with its seat in Austria and instituted civil proceedings against 16 clients at the St. Pölten Regional Court on 26 August 1993, claiming approximately two million Austrian schillings (about EUR 145.000,--) for work effected in the construction of semi-detached houses. In the meantime there have been three applications under Section 91 of the Courts Act (*Fristsetzungsantrag gemäß Gerichtsorganisationsgesetz*), several experts submitted their opinions and supplemented them, witnesses have been heard and the judge in charge of the case retired. The case is still pending before the first instance and has already lasted for ten years and some eight months.
As regards the admissibility of the application the Court referred to its case-law, considering an application under Section 91 of the Courts Act an effective remedy which has to be used in the context of complaints about the length of court proceedings. It further stated that there was no such obligation of the applicant to make more effective use of this remedy at other stages of the process. Therefore, the applicant complied with its obligation to exhaust domestic remedies. The application was rejected as regards the alleged bias of the competent judge and a violation of Article 6 of the Convention for unfair proceedings because the applicant company had not lodged a motion challenging the judge for bias and has thus not exhausted domestic remedies.
As to the merits, the Court acknowledged that the case was of some complexity and that the many submissions of both the experts and the applicant company and the defendants were comprehensive and contributed to the length of the proceedings. Nevertheless, they were not sufficient enough to explain the extensive duration of the proceedings. Instead, the Court noted considerable delays while waiting for the expert opinions (one year and seven months, one year and five months and one year and a half, respectively) and held in this context that "an expert's work in the context of judicial proceedings is supervised by a judge who remains responsible for the preparation and speedy conduct of the proceedings". It, therefore, concluded that the proceedings had not been determined within a reasonable time and were therefore in breach of Article 6 ECHR.
The Court rejected the action for damages as regards the alleged pecuniary damage for lack of a casual link but awarded EUR 8.000,-- for non-pecuniary damage due to considerable inconvenience for the applicant company, its director and its shareholders and prolonged uncertainty. The company was further acknowledged a total amount of EUR 7.677,85 for No significant developments to be reported.

**In *Wintersberger v. Austria*[197] the European Court of Human Rights had to deal with another complaint about the undue length of civil proceedings. After a friendly settlement could be reached between the parties, the case was struck off the list.**

[196] Eur.Ct.H.R. *Wohlmeyer Bau GmbH v. Austria* (Application No 20077/02), judgement of 8 July 2004.
[197] Eur.Ct.H.R., *Wintersberger v. Austria* (Application No 57448/00), friendly settlement of 5 February 2004.

Austrian national Dieter Wintersberger was dismissed without notice in May 1988 and ordered to return from his post as director of the Austrian Mint Office (*Hauptmünzamt*, today *Münz AG Austria*) to his former working place at the Ministry of Finance as a civil servant. Five years later, after having lost proceedings before the Vienna Labour and Social Court and the Court of Appeal, the Supreme Court stated the unlawfulness of the applicant's dismissal for he was qualified as a favoured disabled person (*begünstigter Behinderter*) since February 1988. Such employees may not be dismissed without the consent of the Federal Social Office. Wintersberger, therefore, instituted civil proceedings, claiming remuneration resulting from these valid work contracts but proceedings were suspended at first and then never reopened due to the applications of the Ministry of Finance at the Federal Social Office seeking a retroactive authorisation for Wintersberger's dismissal. This retroactive authorisation was finally granted at the level of the Appeals Commission in April 1995. The Constitutional Court then referred the case to the Administrative Court, which in September 1999 considered that the retroactive authorisation for the applicant's dismissal was lawful.
The Austrian government finally offered to pay EUR 11.000 to cover any pecuniary and non-pecuniary damage as well as costs. The applicant accepted this payment as the final resolution of the case. The Court therefore struck the case out of list.

*Reasons for concern*

Regarding the **length of the administrative proceedings**, it should be repeated here what has already been demanded in the Report on Austria in 2003. It is absolutely necessary that the Administrative Court, which in many cases decides as first independent tribunal within the meaning of Article 6 ECHR, be relieved from that burden by setting up Regional Administrative Courts in the Provinces with comprehensive jurisdiction in administrative matters and allowing a further appeal to the Administrative Court solely on a point of law. In its activity report on the year 2003 the Administrative Court called upon Parliament in an almost adjuratory way to completely reform the current system of judicial control of the executive. As much as 4.489 complaints were decided last year on their substance but it took the Court 22 months on average from the date of submission to the final judgement. By way of comparison, until 1995 the average duration of the proceedings was relatively short at 11 months, since then the delays in the proceedings have constantly risen. It is therefore strongly recommended to build upon the general consensus reached in the respective working group of the Austria Convention and to re-organise the entire structure of the system of judicial control of administrative decisions.

Attempts to accelerate the **work of the judiciary** in civil and criminal matters have not gone beyond the stage of proposals so far. While some cases of unreasonable delay of the proceedings can be blamed on the unwillingness of the presiding judge, the majority of the delays is attributable to structural inefficiencies, most of all the shortage of human resources. In November 2004 the judges even came out on strike to emphasise the seriousness of the situation. About 200 more judges and pertaining non-judicial personnel would be needed, which is also acknowledged by the Minister of Justice, in order to achieve the aim of delivering a decision in all cases at first instance within one year at the latest. According to the Ministry the additional costs of EUR 10-15 million per year were justified in the light of damages to the Austrian economy in the amount of EUR 850 million caused by overly long proceedings.[198] Further to that some promising suggestions have already been made. The Judges Association (*Richtervereinigung*) wants the presidents of the courts to be given the possibility to apply to the superior court for a deadline to be set for their slow-working colleague (*Fristsetzungsantrag*). At present it is for the parties to decide on whether or not to apply in cases of delay, but the right is rarely exercised for fear they could lose the case. Moreover, the Ministry of Justice thinks about establishing a special internal controlling department and an internal reporting system in order to supervise the working progress of the

[198] "Justiz: Der lange Weg zum Recht" in *Die Presse* of 29 December 2003.

1688 judges[199]. In civil proceedings, Harald Krammer, President of the Vienna Court of Appeal[200], proposed that the parties could both agree to waive certain procedural rights and intermediary remedies in order to contribute their share to reducing the length of proceedings. A first but very moderate step to ease the situation was taken by the Minister of Finance who granted 20 additional posts for judges for 2005.

Other relevant developments

*Legislative initiatives, national case law and practices of national authorities*

The **European Arrest Warrant** was introduced to domestic law by the Judicial Co-operation in Criminal Matters (European Union) Act (*EU-JZG*)[201] and is applicable since 1 May 2004. According to section 19(4) of the respective domestic Act, before a European arrest warrant is to be enforced by an Austrian court the competent investigating judge shall examine upon objections raised by the person concerned whether the transfer would violate the person's rights as laid down in Article 6 of the Treaty on European Union. Unfortunately, the European arrest warrants are not centrally transmitted and there is no reporting system either, so that no data is available on the number of European arrest warrants transmitted to and from Austria with the effect that it cannot be said if Austrian judges rejected arrest warrants from other Member States on that ground or if there was a case of a European arrest warrant issued by an Austrian judge being rejected by a foreign court for fundamental rights concerns.

**Article 48. Presumption of innocence and rights of defence**

Presumption of innocence

*Legislative initiatives, national case law and practices of national authorities*

The Vienna weekly Falter[202] reported of the **common practise of the Security Authorities to withdraw the passport from released convicts in cases where the passport was used for committing the criminal offence**, i.e. drug trafficking, trafficking in human beings, and other cross-border offences, even though they had fully served their sentences. What appears to be a clear violation of the presumption of innocence and the right to leave one's country is justified by the authorities with reference to sections 14(1) and 15(1) of the Passport Act (*Passgesetz*) which authorise the authorities to take off or deny the issue of a passport if "facts support the assumption that the applicant wants to use the passport" for criminal cross-border activities listed below. Probation officers denounce this measure as severe obstacle to successful re-socialisation.

*Positive aspects*

After Austria had been convicted twice by the European Court of Human Rights in 2002 for breach of the presumption of innocence, the Ministry of Justice began working on a **new law dealing with issue of compensation for wrongful imprisonment by order of a criminal court**. In the past compensation for pre-trial detention was not afforded in cases where the person indicted was subsequently acquitted under the benefit of doubt, because the suspicion could not be fully dissipated. On the basis of the Compensation (Criminal Proceedings) Act 2005 (*Strafrechtliches Entschädigungsgesetz*)[203] this violation of international human rights law will not be continued in the future. Compensation can thus be claimed for unlawful

[199] Figure from 29 December 2003.
[200] "Richter wollen Schnellverfahren anbieten" in *Die Presse* of 22 January 2004.
[201] Federal Law Gazette (BGBl) I No 36/2004 of 30 April 2004.
[202] "Ausreisen verboten" in Falter 20/2004.
[203] Federal Law Gazette (BGBl) I No 125/2004 of 15 November 2004.

detention, for unjustified detention pending trial where the initial suspicion leading to the detention could not be confirmed on trial, and finally when a renewal of criminal proceedings results in an acquittal or lower prison sentence. Next to pecuniary damages, which range between EUR 70,-- and 90,-- per day of imprisonment, it will hence also be possible to get compensation for immaterial damages. In case of contributory negligence of the person detained the amount of compensation may be adapted correspondingly. Finally, the procedure for the compensation proceedings was much improved for the applicant: while formerly a decision by the criminal court acknowledging the claim to compensation was necessary, it is now sufficient to submit a simple request to the Federal Litigation Service (Finanzprokuratur) which may allow the claim and transfer the sum. If their decision is negative or not rendered within three months, the applicant can file a lawsuit with the competent civil court. In the year 2003, payments for wrongful detention amounted to EUR 295.189,-- for 86 approved applications. The ministry of Justice estimates that the new regulations will cost about EUR 500.000,-- to 600.000,--.[204]

Other relevant developments

*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

**By 4 to 3 votes, the narrowest margin possible, the European Court of Human Rights held in *Weh v. Austria*[205] that there was no violation of the right to remain silent and not to incriminate oneself, as protected under Article 6 ECHR. The applicant was punished under Section 134 of the Motor Vehicles Act (*Kraftfahrzeuggesetz*) for not properly disclosing the particulars of the person who had driven the applicant's car at a specific date and time, so that the authority could punish that person for speeding. The applicant had only given inaccurate information and did not comply with Section 102 § 3 Motor Vehicles Act which obliges the registered car owner to disclose the full name and address of the driver. Although the right to remain silent and the privilege against self-incrimination lie "at the heart" of Article 6 ECHR, the Court held that Weh could not be regarded a victim under Article 6 ECHR since the applicant had never been prosecuted himself for speeding and also couldn't establish a concrete risk of being prosecuted thereupon. The dissenting opinion, though, stated that if Weh had been the driver the disclosure of his own name would have been a strong evidence and therefore the question of a violation of his rights enshrined in Article 6 ECHR was not a hypothetical one.**

In March 1995 the Bregenz District Authority (*Bezirkshauptmannschaft*) served an anonymous order (*Anonymverfügung*) upon the applicant in the sum of 800 Austrian schillings, stating that on 5 March 1995 the driver of the car, registered in the applicant's name, had exceeded the city area speed limit of 50 km/h by 21 km/h. When the applicant did not comply with this order, it became invalid due to section 49a of the Law on Administrative Offences (*Verwaltungsstrafgesetz*) and administrative criminal proceedings for exceeding the speed limit were opened against unknown offenders. Furthermore, the applicant as the registered car owner was ordered, under section 103 § 2 of the Motor Vehicles Act (*Kraftfahrgesetz*), to disclose who had been driving his car. The applicant answered that "C.K.[first and family name in full]", living in "USA/University of Texas" was the person who had used the car. The District authority then issued a provisional penal order (*Strafverfügung*) in which it sentenced the applicant under sections 103 § 2 and 134 of the Motor Vehicles Act to pay a fine of ATS 900 (with 54 hours' imprisonment in default) for having submitted inaccurate information instead of the precise information he was obliged to under a provision of constitutional rank. After the applicant's objection against this decision,

[204] "Haftentschädigung vereinfacht" in *Die Presse* of 15 September 2004.
[205] Eur.Ct.H.R., *Weh v. Austria* (Application No 38544/97), judgement of 8 April 2004.

the same authority confirmed its previous decision in a penal order, imposing a fine of ATS 900 (with 24 hours' imprisonment in default). The Vorarlberg Independent Administrative Tribunal (*Unabhängiger Verwaltungssenat*) dismissed the applicant's appeal for he failed to disclose the precise information on the identity of the driver. The Constitutional Court refused to deal with the applicant's complaint for lack of success and finally the Administrative Court again did not rule on the merits pursuant to section 33a of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*) since the amount of the penalty did not exceed ATS 10,000, and no important legal problem was at stake. The applicant was never prosecuted for exceeding the speed limit.

The applicant complained under Article 6 § 1 of the Convention that the obligation to divulge the driver of his car pursuant to section 103 § 2 of the Motor Vehicles Act violated his right to remain silent and the privilege against self-incrimination.

The Court reiterated that the privilege against self-incrimination was one of the key elements of a fair procedure and was closely linked with the presumption of innocence as contained in Article 6 § 2 ECHR. However, while "the heart of the applicant's complaint [was] that he was punished for failure to give information which may have incriminated him in the context of criminal proceedings for speeding, neither at the time when the applicant was requested to disclose the driver of his car nor thereafter [such] proceedings were conducted against him". The Court concluded that therefore the present case was not concerned with the use of compulsorily obtained information in subsequent criminal proceedings and must not be compared with the Court's case-law on that question. Moreover, "it [couldn't] even be said that [criminal proceedings] were anticipated as the authorities did not have any element of suspicion against him" and so the Court found "nothing to show that the applicant was "substantially affected" so as to consider him being "charged" with the offence of speeding within the autonomous meaning of Article 6 § 1 of the Convention". Instead, the applicant had only been "required to state a simple fact – namely who had been the driver of his car – which is not in itself incriminating". Additionally, the applicant had never disclosed himself as the driver but exonerated a third person. Consequently, the Court reiterated that "it is not called upon to pronounce on the existence or otherwise of potential violations of the Convention" and, as regards the present case, held by four to three votes, that "the link between the applicant's obligation under section 130 § 2 of the Motor Vehicles Act to disclose the driver of his car and possible criminal proceedings for speeding against him remains remote and hypothetical". Accordingly, there had been no violation of Article 6 ECHR.

Dissenting opinion:

Agreeing with the Court insofar as in the present case actually no criminal proceedings were opened against the applicant, the judges still considered that when "looking behind the appearances at the reality of the situation, criminal proceedings for speeding were with some probability contemplated against the applicant." They therefore considered that "the request under section 103 § 2 was no more than a preliminary to such proceedings against the applicant" and "proceedings for speeding which were so far conducted against unknown offenders would have been turned into proceedings against the applicant had he admitted to having driven the car and, thus, furnished the prosecution with a major element of the case against him." By way of conclusion, "in these circumstances the applicant was […] substantially affected" and therefore "charged" within the autonomous meaning of Article 6 § 1 of the Convention. The fact that eventually no criminal proceedings for speeding were brought against the applicant, did not remove his victim status.

**Article 49. Principles of legality and proportionality of criminal offences and penalties**

No significant developments to be reported.

**Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence**

No significant developments to be reported.

**APPENDIX: CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (O.J. C-364 OF 18.12.2000)**

## CHAPTER I: DIGNITY

### Article 1: Human dignity

Human dignity is inviolable. It must be respected and protected.

### Article 2: Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

### Article 3: Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
a) the free and informed consent of the person concerned, according to the procedures laid down by law,
b) the prohibition of eugenic practices, in particular those aiming at the selection of persons,
c) the prohibition on making the human body and its parts as such a source of financial gain,
d) the prohibition of the reproductive cloning of human beings.

### Article 4: Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

### Article 5: Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

## CHAPTER II: FREEDOMS

### Article 6: Right to liberty and security

Everyone has the right to liberty and security of person.

### Article 7: Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

### Article 8: Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

### Article 9: Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

### Article 10: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

### Article 11: Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

### Article 12: Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

### Article 13: Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

### Article 14: Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

### Article 15: Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

### Article 16: Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

### Article 17: Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

### Article 18: Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

### Article 19: Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.
2. 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.

## CHAPTER III: EQUALITY

### Article 20: Equality before the law

Everyone is equal before the law.

### Article 21: Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic
features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

### Article 22: Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

### Article 23: Equality between men and women

Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

### Article 24: The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views

freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

### Article 25: The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

### Article 26: Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

## CHAPTER IV : SOLIDARITY

### Article 27 : Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

### Article 28: Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

### Article 29: Right of access to placement services

Everyone has the right of access to a free placement service.

### Article 30: Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

### Article 31: Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

### Article 32: Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

### Article 33: Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

### Article 34: Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.

3. In order to combat social exclusion and poverty, 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 Community law and national laws and practices.

### Article 35: Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

### Article 36: Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

### Article 37: Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

### Article 38: Consumer protection

Union policies shall ensure a high level of consumer protection.

## CHAPTER V: CITIZENS' RIGHTS

### Article 39: Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

### Article 40: Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

### Article 41: Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
a) the right of every person to be heard, before any individual measure which would affect him or her
adversely is taken;
b) the right of every person to have access to his or her file, while respecting the legitimate interests of
confidentiality and of professional and business secrecy;
c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

### Article 42: Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

### Article 43: Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

### Article 44: Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered

office in a Member State has the right to petition the European Parliament.

### Article 45

Freedom of movement and of residence
1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

### Article 46: Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

## CHAPTER VI : JUSTICE

### Article 47 : Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

### Article 48: Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

### Article 49: Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission
which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence.

### Article 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

## CHAPTER VII: GENERAL PROVISIONS

### Article 51: Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

### Article 52: Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under

the conditions and within the limits defined by those Treaties.

Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

### Article 53: Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

### Article 54: Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.