



International Organization for Migration (IOM)



European Migration Network

FAMILY REUNIFICATION OF THIRD-COUNTRY NATIONALS IN AUSTRIA



Rainer Lukits

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Translation: Dr. Robert Schlarb

Layout and print: AV+Astoria Druckzentrum GmbH

Publisher: International Organization for Migration,
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EUROPEAN MIGRATION NETWORK

The European Migration Network (EMN) was launched in 2003 by the European Commission by order of the European Council in order to satisfy the need for a regular exchange of reliable information in the field of migration and asylum at the European level. Since 2008, Council Decision 2008/381/EC has constituted the legal basis of the EMN and National Contact Points (NCPs) have been established in the EU Member States (with the exception of Denmark, which has observer status) plus Norway.

The EMN's role is to meet the information needs of European Union (EU) institutions and of Member States' authorities and institutions by providing up-to-date, objective, reliable and comparable information on migration and asylum, with a view to supporting policymaking in the EU in these areas. The EMN also has a role in providing such information to the wider public.

The NCP Austria is – pursuant to an agreement with the Federal Ministry of the Interior – located in the Research and Migration Law Department of the Country Office for Austria of the International Organization for Migration (IOM). The IOM office was established in 1952 when Austria became one of the first members of the organization. The main responsibility of the IOM Country Office is to analyse national migration issues and emerging trends and to develop and implement respective national projects and programmes. The National Contact Point Austria is co-financed by the European Commission and the Austrian Federal Ministry of the Interior.

The main task of the NCPs is to implement the work programme of the EMN including the drafting of the annual policy report and topic-specific studies, answering Ad-Hoc Queries launched by other NCPs or the European Commission, carrying out visibility activities and networking in several forums. Furthermore, the NCPs in each country set up national networks consisting of organizations, institutions and individuals working in the field of migration and asylum.

In general, the NCPs do not conduct primary research but collect and analyse existing data and information. Exceptions might occur when these

are not sufficient. EMN studies are elaborated in accordance with common study templates in order to achieve comparable results within the EU and Norway. Since the comparability of the results is frequently challenging, the EMN has produced a glossary, which ensures the application of similar definitions and terminology in all national reports.

Upon completion of national reports, the European Commission with the support of a service provider drafts a synthesis report, which summarizes the most significant results of the individual national reports. In addition, topic-based policy briefs, so-called EMN Informs, are produced in order to present selected topics and compare national results in a concise manner. All national studies, synthesis reports, informs and the Glossary are available on the website of the European Commission Directorate-General for Migration and Home Affairs.

TABLE OF CONTENTS

1. INTRODUCTION	7
1.1 Topic of study	7
1.2 General remarks	8
1.3 Recent developments in family reunification	8
1.4 Definitions	13
1.5 Methodology	15
2. POTENTIAL BENEFICIARIES OF FAMILY REUNIFICATION	17
2.1 Potential sponsors	17
2.2 Family members entitled to family reunification	21
3. REQUIREMENTS FOR SUBSEQUENT MIGRATION OF FAMILY MEMBERS	24
3.1 Accommodation to local standards, health insurance and secure means of subsistence	24
3.2 Integration measures	30
3.3 Waiting period and quota requirement	37
3.4 Public order and security	38
3.5 Challenges and good practices	39
4. THE FAMILY REUNIFICATION PROCEDURE	41
4.1 Application	41
4.2 Responsible authorities	41
4.3 Establishing identity and family membership	43
4.4 Special considerations for minors	44
4.5 Duration of the procedure	47
4.6 Challenges and good practices	48
5. RIGHTS OF FAMILY MEMBERS ARRIVING IN AUSTRIA UNDER FAMILY REUNIFICATION	52
5.1 Access to education	52
5.2 Access to gainful employment	54
5.3 Right to an independent residence permit	55
5.4 Right to renewal of a residence permit	57
5.5 Permanent residence and citizenship	58

6. SELECTED COURT RULINGS RELATING TO FAMILY REUNIFICATION	59
6.1 Rulings by the courts at European level	59
6.2 Court rulings at national level	62
7. STATISTICS	64
8. SUMMARY AND CONCLUSIONS	66
ANNEX	69
A.1 List of translations and abbreviations	69
A.2 List of sources	72

1. INTRODUCTION

1.1 Topic of study

The topic of this study is family reunification of third-country nationals in Austria, in other words the possibility for third-country nationals in Austria to bring their family members to the country later. For the purposes of this study, “family reunification” is defined as the (lawful) entry into and residence in Austria by family members of a third-country national residing lawfully in the country, with the goal of preserving the family unit. In this case it is not relevant whether the family relationships came into being before or after the entry of the individual reunifying the family (sponsor).¹ The study is limited to the family reunification of third-country nationals in cases where both the sponsor and the family members joining that individual are third-country nationals.² Third-country nationals are persons who are not citizens of the European Union and who do not enjoy the European Union right to free movement (see EMN, 2014:283; Section 1.4). Hence EEA citizens and Swiss citizens are not covered by this study (cf. Hailbronner/Thym, 2016:68).³ Similarly, the possibility specified in the Dublin III Regulation⁴ for asylum seekers to be reunified with their families is not included in this study.

The legislation currently applicable in Austria requires a distinction to be made in cases of family reunification between procedures under the Settlement and Residence Act and procedures under the Asylum Act. The Asylum Act makes provision for family reunification only for persons granted asylum and beneficiaries of subsidiary protection (Art. 35 para 5

- 1 See Art. 2 (d) Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Family Reunification Directive), OJ 2003 L 251/12.
- 2 Cf. Art. 3 para 1 Family Reunification Directive.
- 3 Cf. Art. 2 para 1 subpara 6 Settlement and Residence Act; Art. 2 para 1 subpara 20b Asylum Act.
- 4 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III Regulation), OJ 2013 L 180/31–59; see in particular Art. 8–10.

Asylum Act). Family reunification under the Settlement and Residence Act, on the other hand, is possible for individuals holding a residence title based on the Settlement and Residence Act as well as for persons granted asylum (Art. 46 Settlement and Residence Act; see Section 2.1). This study addresses family reunification under either the Settlement and Residence Act or the Asylum Act.

1.2 General remarks

The target readers of this study comprise in particular decision-makers at both EU and national levels, practitioners, academic researchers and the general public.⁵

Following the introduction, which includes definitions and the description of the methodology applied, the second chapter examines the potential beneficiaries of family reunification. The third chapter discusses additional requirements needing to be met by third-country nationals for family reunification. The fourth chapter describes the family reunification procedure in detail. Chapter 5 is devoted to a discussion of the various rights enjoyed by members of families who have been reunited in Austria. Chapter 6 discusses a selection of rulings by European and Austrian courts in cases of family reunification. The next chapter presents statistical data. The last chapter provides a summary of the study and draws several conclusions. Separate sections are devoted to good practices and to potential challenges arising in the context of family reunification.

The Annex provides a list of translations and abbreviations in English and German and a list of sources.

1.3 Recent developments in family reunification

Austrian legislation governing the family reunification of third-country nationals is determined to a decisive extent by the Family Reunification Directive (2003/86/EC) and by the right to respect for

5 See Art. 1 and Art. 9 para 2 Council Decision 2008/381/EC of 14 May 2008 establishing a European Migration Network, OJ 2008 L 131/7–12.

private and family life as laid down in Art. 8 of the ECHR, the European Convention on Human Rights (refer for example to Peyrl/Neugschwendtner/Schmaus, 2015:126). The prohibition of discrimination specified in Art. 14 ECHR also plays a key role in family reunification (see also Czech, 2016).⁶ The right to respect for family life is also defined in Art. 7 of the EU Charter of Fundamental Rights.⁷ The EU Charter of Fundamental Rights ranks equally to the Treaties of the EU and is additionally binding for the Member States within the scope of application of European Union law (Art. 6 TEU and Art. 51 para 1 CFR).⁸

The Family Reunification Directive was implemented in Austria essentially through the Aliens Law Package 2005.⁹ Since then, the provisions governing family reunification are mainly specified in the Settlement and Residence Act as well as in the Asylum Act. The right to private and family life is considered specifically in Art. 11 para 3 Settlement and Residence Act and in Art. 35 para 4 subpara 3 Asylum Act. The respect for private and family life also provides the basis for the possibility of family reunification extended pursuant to Art. 35 para 2 Asylum Act to beneficiaries of subsidiary protection, since the Family Reunification Directive is not applicable to that category of individuals (see also Hailbronner/Thym, 2016:325–326).¹⁰

The Geneva Refugee Convention, in contrast, plays only a minor role in family reunification in practice.¹¹

- 6 See for instance ECHR, 6 November 2012, *Hode and Abdi v. the United Kingdom*, Application No. 22341/09.
- 7 Charter of Fundamental Rights of the European Union, OJ 2016 C 202/389–405.
- 8 Court of Justice of the European Union, 26 February 2013, *Åklagare v. Hans Åkerberg Fransson*, C-617/10, para 17–23.
- 9 Aliens Law Package 2005, FLG I No. 100/2005; see Aliens Law Package 2005, Government Proposal, Explanatory Notes, p. 2 and 11, available at www.parlament.gv.at/PAKT/VHG/XXII/I/I_00952/fname_040777.pdf (accessed on 15 November 2016).
- 10 Art. 3 para 2 (c) of the Family Reunification Directive; *Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification*, 4 April 2014, COM (2014) 210 final, available at <http://eur-lex.europa.eu/legal-content/DE/TXT/?uri=celex:52014DC0210> (accessed on 3 November 2016), para 6.2.
- 11 Interview with Daniel Bernhart, Austrian Red Cross, 19 October 2016; see also Administrative High Court, 24 March 1999, 98/01/0513; 23 March 1988, 87/01/0319; Asylum Court, 30 December 2009, C5 247101-0/2008.

In general the provisions governing family reunification can be observed to have been subject to numerous changes in recent years (refer for example to Peyrl/Neugschwendtner/Schmaus, 2015:125; Kraler et al., 2013:12).

Among the changes resulting from the **Act Amending the Aliens Law 2009** was the raising of the minimum age for spouses within the framework of conventional family reunification from 18 to 21.¹²

When the **Act Amending the Aliens Law 2011**¹³ became effective as of 1 July 2011, the measure referred to as “German Before Immigration” (*Deutsch vor Zuzug*) and aimed at language integration was introduced. This means that, before obtaining certain residence titles, family members are generally required to provide evidence of at least elementary proficiency in German at a very simple level.¹⁴ To promote the integration of third-country nationals already settled in Austria, the period allowed for completing the required Module 1 of the Integration Agreement was shortened to two years from the previous five. The reason given for this step was that third-country nationals now have to demonstrate elementary proficiency in German even before entry (Wiener/Benndorf, 2011:34f, 38f). The mandatory demonstration of German proficiency prior to entry also sparked some criticism. One of the specific criticisms was that the requirement is compulsory. The step was also criticized as resulting in unequal treatment compared with EU citizens and family members of top-level employees (Peyrl/Neugschwendtner/Schmaus, 2015:58f; cf. Bichl/Schmid/Szymanski, 2011:56).

At the national asylum summit held on 20 January 2016 a resolution relating to family reunification was adopted which provides for a more

12 Art. 5 subpara 4 Act Amending the Aliens Law 2009, FLG I No. 122/2009, available at www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2009_I_122/BGBLA_2009_I_122.pdf (accessed on 9 November 2016); Act Amending the Aliens Law 2009, Government Proposal, Explanatory Notes, p. 41, available at www.parlament.gv.at/PAKT/VHG/XXIV/I/I_00330/fname_167909.pdf (accessed on 9 November 2016).

13 Act Amending the Aliens Law 2011, FLG I No. 38/2011, available at www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2011_I_38/BGBLA_2011_I_38.pdf (accessed on 3 November 2016).

14 Art. 1 subpara 52 Act Amending the Aliens Law 2011; Art. 21a Settlement and Residence Act.

stringent asylum procedure through “restrictive subsequent migration of family members”.¹⁵

The changes introduced as of 1 June 2016 included stricter provisions on family reunification involving persons granted asylum and beneficiaries of subsidiary protection.¹⁶ One example was to extend to three years, from the previous one, the waiting period for family members of beneficiaries of subsidiary protection.¹⁷ In addition, family members of persons granted asylum and of beneficiaries of subsidiary protection are now generally required to provide evidence of adequate health insurance coverage, of accommodation to local standards and of a secure means of subsistence. Exceptions apply in particular to family members of persons granted asylum where family reunification is applied for within three months of recognition as a refugee.¹⁸ This amendment, which makes use of the legal possibilities of the Family Reunification Directive (Czech, 2016:16), sparked widespread public debate.¹⁹ It was pointed out that people unable

15 Federal Chancellery, *Asylgipfel am 20. Jänner 2016, Gemeinsame Vorgangsweise von Bund, Ländern, Städten und Gemeinden*, para 8, available at <http://bka.gv.at/DocView.axd?CobId=61858> (accessed on 3 November 2016).

16 Federal Act Amending the Asylum Act 2005, the Aliens Police Act 2005 and the Federal Office for Immigration and Asylum Procedures Act, FLG I No. 24/2016, available at www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2016_I_24/BGBLA_2016_I_24.pdf (accessed on 3 November 2016).

17 Art. 1 subpara 13 of the amendment.

18 See Art. 1 subpara 12–14 of the amendment.

19 See for instance Der Standard, *Amnesty: Asylberggrenze ist Aushöhlung der Menschenrechte*, 24 February 2016, available at <http://derstandard.at/2000031666997/Amnesty-Asylberggrenze-ist-Aushoehlung-der-Menschenrechte> (accessed on 10 October 2016); Salzburger Nachrichten, *UNHCR gegen Verschärfungen bei Familienzusammenführung*, 7 October 2015, available at www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/unhcr-gegen-verschaerfungen-bei-familienzusammenfuehrung-168585 (accessed on 10 October 2016); Kurier, *Flüchtlingskrise: Österreich will für neue Asyl-Werber unattraktiver werden*, 30 November 2015, available at <http://kurier.at/politik/inland/fluechtlingskrise-oesterreich-will-fuer-neue-asyl-werber-unattraktiver-werden/167.049.518> (accessed on 8 November 2016); Salzburger Nachrichten, *Viel Begutachtungskritik an „Asyl auf Zeit“*, 30 November 2015, available at www.salzburg.com/nachrichten/dossier/fluechtlinge/sn/artikel/viel-begutachtungskritik-an-asyl-auf-zeit-175253 (accessed on 8 November 2016); Wiener Zeitung, *Umstrittenes Asylpaket steht*, 27 April 2016, available at www.wienerzeitung.at/nachrichten/top_news/815358_Umstrittenes-Asylpaket-steht.html (accessed on 9 November 2016); Der Standard, *Asyl auf Zeit: Auf Kosten der Flüchtlinge*, 26 January 2016, available at <http://derstandard.at/2000029824392/Asyl-auf-Zeit-Auf-Kosten-der-Fluechtlinge> (accessed on 9 November 2016); Wiener Zeitung, *Das Ende des Familiennachzugs*, 3 November

to be reunited with their closest relatives would find it difficult to integrate into society.²⁰ Another concern is that the three-year waiting period for beneficiaries of subsidiary protection could result in families sending even younger children to Europe in future so that these children can bring their parents in later.²¹

The changes recently introduced and the ensuing public debate are signs of the **political significance** associated with family reunification of third-country nationals in Austria, particularly when persons granted asylum and beneficiaries of subsidiary protection are concerned.²²

2015, available at www.wienerzeitung.at/784024 (accessed on 9 November 2016); Die Presse, „Asyl auf Zeit“: Kritik aus dem Parlament, 17 February 2016, available at http://diepresse.com/home/politik/innenpolitik/4928002/Asyl-auf-Zeit_Kritik-aus-dem-Parlament?_vl_backlink=/home/politik/innenpolitik/index.do (accessed on 9 November 2016).

- 20 Der Standard, *Expertin: Härte bei Familiennachzug verhindert Integration*, 4 April 2016, available at <http://derstandard.at/2000034102692/Expertin-Haerte-bei-Familien-nachzug-verhindert-Integration> (accessed on 10 October 2016); Wiener Zeitung, *Das Ende des Familiennachzugs*, 3 November 2015, available at www.wienerzeitung.at/784024 (accessed on 9 November 2016); cf. Die Presse, *Unbegleitet, minderjährig: Allein auf dem Weg nach Europa*, 23 December 2015, available at <http://diepresse.com/home/politik/aussenpolitik/4893561/Unbegleitet-minderjaehrig-Allein-auf-dem-Weg-nach-Europa> (accessed on 9 November 2016); cf. see also Court of Justice of the European Union, 10 July 2014, *Naime Doğan v. Bundesrepublik Deutschland*, C-138/13, para 34.
- 21 Die Presse, *Unbegleitet, minderjährig: Allein auf dem Weg nach Europa*, 23 December 2015, available at <http://diepresse.com/home/politik/aussenpolitik/4893561/Unbegleitet-minderjaehrig-Allein-auf-dem-Weg-nach-Europa> (accessed on 9 November 2016).
- 22 See for instance Die Presse, *Mitterlehner im Interview zu Asyl auf Zeit und Familiennachzug*, 24 September 2015, available at http://diepresse.com/home/politik/innenpolitik/4828492/Mitterlehner_So-Unrecht-hat-Orban-ja-nicht (accessed on 9 November 2016); Kleine Zeitung Online, *Ministerrat beschließt „eines der schärfsten Asylgesetze Europas“*, 26 January 2016, available at www.kleinezeitung.at/s/politik/fluechtlinge/4912034/Fluchtlingskrise_Ministerrat-beschliesst-eines-der-schaerfsten (accessed on 9 November 2016); Wiener Zeitung, *„Asyl auf Zeit“ für Faymann ein Signal*, 26 January 2016, available at www.wienerzeitung.at/nachrichten/oesterreich/politik/797497_Asyl-auf-Zeit-fuer-Faymann-ein-Signal.html (accessed on 8 November 2016); Heute online, *Gemischte Reaktionen auf „Asyl auf Zeit“*, 26 January 2016, available at www.heute.at/1253443 (accessed on 9 November 2016); Kronen Zeitung, *Neues Asylgesetz „eines der schärfsten in Europa“*, 26 January 2016, available at www.krone.at/Oesterreich/Neues_Asylgesetz_eines_der_schaerfsten_in_Europa-Gesetz_beschlossen-Story-492904 (accessed on 9 November 2016).

1.4 Definitions

The study is based on the following definitions taken in particular from the Asylum and Migration Glossary of the European Migration Network²³ and from Austrian legislation²⁴:

Persons granted asylum: Foreigners who have been granted asylum status (Art. 3 para 4 Asylum Act; see below).

Third-country nationals: Persons who are not citizens of the European Union within the meaning of Art. 20 para 1 of the Treaty on the Functioning of the European Union (TFEU) and who do not enjoy the European Union right to free movement as defined in Art. 2 para 5 of the Schengen Borders Code (EMN, 2014:283).

International protection: Protection that encompasses refugee status and subsidiary protection status (EMN, 2014:168; see below).

Family reunification: The (lawful) entry into and residence in Austria by family members of a third-country national residing lawfully in the country in order to preserve the family unit, regardless of whether the family relationship arose before or after the resident's entry (Art. 2 (d) Family Reunification Directive).

Refugee: Either a person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned before, is unable or, owing to such fear, unwilling to return to it (EMN, 2014:230).

Beneficiaries of subsidiary protection: Foreigners who have been granted subsidiary protection status (Art. 8 para 4 Asylum Act; see below).

23 See National Contact Point Austria in the European Migration Network, IOM Country Office for Austria, Glossary, available at www.emn.at/en/publikationen/glossar (accessed on 22 November 2016).

24 See Federal Chancellery, *Legal Information System*, available at www.ris.bka.gv.at (accessed on 22 November 2016).

Subsidiary protection: The protection given to a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to their country of origin, or in the case of a stateless person to their country of former habitual residence, would face a real risk of suffering serious harm as defined in Art. 15 of 2011/95/EU, and to whom Art. 17 para 1 and 2 of Directive 2011/95/EU do not apply, and is unable or, owing to such risk, unwilling to avail themselves of the protection of that country (EMN, 2014:278).

Asylum status: The initially time-limited and later permanent right to enter into and reside in Austria which Austria grants to foreigners based on the provisions of the Asylum Act (Art. 2 para 1 subpara 15 Asylum Act).

Subsidiary protection status: The temporary and renewable right to enter into and reside in Austria which Austria grants to foreigners based on the provisions of the Asylum Act (Art. 2 para 1 subpara 16 Asylum Act).

Sponsor: A third-country national residing lawfully in Austria and applying, or whose family members apply, for family reunification with one another (EMN, 2014:271).²⁵

In the context of family reunification, a special distinction needs to be made between the sponsor and the family members entitled to subsequent migration. Where mention is made in the study of family reunification *with* a person, the person referred to is usually the sponsor. Where mention is made of reunification *for the benefit of* certain individuals, reference is generally being made to the family members entitled to subsequent migration. Family reunification *of* certain individuals, on the other hand, includes both the sponsor and the family members. The term “subsequent migration of family members” (*Familiennachzug*) is used synonymously with “family reunification” (*Familienzusammenführung*) in this study. In this case subsequent migration of family members *to* a person refers to the sponsor, while subsequent migration *of* certain individuals refers to the family members.

25 Cf. Art. 2 para 1 subpara 10 Settlement and Residence Act.

1.5 Methodology

The study follows a common study template with a predefined set of questions developed by the European Migration Network (EMN), in order to facilitate comparability of the findings across all European countries participating in the study. The respective national reports and a synthesis report will be published on the EMN website.²⁶

The study is based on legal provisions of Austrian law, rulings of Austrian and European courts, and on publications including legal literature, previous EMN studies, statistics, media reports and various internet sources. The study furthermore takes into account several interviews conducted with experts in the field of aliens law and family reunification. The interviews were conducted with the following individuals: Daniel Bernhart (Austrian Red Cross), Gerald Dreveny (Federal Ministry of the Interior, Department III/5, Asylum and Alien Matters), Christian Fellner (Federal Ministry for Europe, Integration and Foreign Affairs, Department IV.2, Asylum, Refugee and Migration Affairs), Caroline Jennewein (Federal Ministry of the Interior, Department III/5, Asylum and Alien Matters), Carina Royer (Federal Ministry of the Interior, Department III/4, Residence, Civil Status and Citizenship Affairs) and Doris Stilgenbauer (Office of Provincial Government of Lower Austria, Department of Police Affairs and Department of Public Events).

Written responses to study questions were also submitted by the Federal Office for Immigration and Asylum, the Austrian Integration Fund and the Austrian German Language Diploma association. The citations of the interviews and the written responses have been approved by the respective experts.

The list of sources in the Annex provides an overview of the sources of information used. The study was finalized in November 2016 and thus includes only information available up to that time.

The terminology of this study follows in general the current Asylum and Migration Glossary of the European Migration Network (EMN, 2014; see the section above on the European Migration Network).

26 See European Commission, *Reports, Studies, ad-hoc queries and statistics – EMN*, available at http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/index_en.htm (accessed on 23 May 2016).

The study was compiled by Rainer Lukits (Legal Associate, IOM Country Office for Austria) under the supervision of Julia Rutz (Head of Research and Migration Law, IOM Country Office for Austria). Several parts of the study were drafted by Nina Printschitz (formerly Birner, Research and Communications Associate, IOM Country Office for Austria). Saskia Heilemann (formerly Koppenberg, Research Associate, IOM Country Office for Austria) provided major assistance with statistical issues. Special thanks go to Tamara Buschek-Chauvel (former associate with the IOM Country Office for Austria) for providing various suggestions. The author also wishes to express his thanks to the individuals and organizations listed above for sharing their knowledge and experience in expert interviews and through written responses. Thanks go also to Olha Bilous (Administrative Assistant, IOM Country Office for Austria), Tijana Lujic (Research Intern, IOM Country Office for Austria) and Sara Gratt (Media Intern, IOM Country Office for Austria) for typing the expert interviews and for providing other assistance.

2. POTENTIAL BENEFICIARIES OF FAMILY REUNIFICATION

In the context of family reunification, a special distinction needs to be made between the sponsor and the family members in another country. When considering the potential beneficiaries of family reunification, as in all other cases a distinction has to be made between procedures conducted pursuant to the Settlement and Residence Act and procedures pursuant to the Asylum Act (see Section 1.1).

2.1 Potential sponsors

The prerequisite for family reunification is a person already residing in Austria who is a member of the particular family (sponsor).

Sponsors in this case can generally only be spouses, registered partners or parents of unmarried minor children (Art. 2 para 1 subpara 9 Settlement and Residence Act). In cases of family reunification under the Asylum Act, minor children are also specified as possible sponsors by law. Pursuant to the Asylum Act, any marriage or registered partnership must, however, already have existed in the country of origin or prior to entry (Art. 35 para 5 Asylum Act).²⁷

When, as specified in Art. 23 para 4 Settlement and Residence Act, children migrate to be reunified with their families, the child's mother is normally deemed the sponsor for that purpose. In this case the father is only recognized as the sponsor if he becomes solely entitled to provide care and education on grounds other than the mother's waiving of this right. In cases of joint guardianship, for example, this would mean that family reunification would be possible with the mother but not with the father of the child. The resulting concerns on constitutional grounds in view of the potential for unequal treatment of mothers and fathers were rejected by the Administrative High Court. In its reasoning the Administrative High Court referred to a Constitutional Court decision handed down on a similar

27 See Art. 9 para 2 Family Reunification Directive.

provision concerning lawful residence, which, however, applies only to the first few months of a child's life.²⁸ It needs to be questioned, therefore, whether the Constitutional Court decision referred to can in fact be applied accordingly to the provision on family reunification.

Besides family membership, the legal residence status of the sponsor is a decisive factor in family reunification (cf. AT EMN NCP, 2015:36; Buschek-Chauvel/Chahrokh, 2015:20). According to Austrian law, the following categories of third-country nationals are considered as sponsors potentially eligible to reunite a family:

- Red-White-Red Card holders (Art. 46 para 1 Settlement and Residence Act);
- Red-White-Red Card Plus holders (Art. 46 para 1 Settlement and Residence Act);
- Holders of a Permanent Residence – EU residence title (Art. 46 para 1 subpara 2 and Art. 50 Settlement and Residence Act);
- (Former) EU Blue Card holders (Art. 46 para 3 Settlement and Residence Act);
- Holders of a Settlement Permit (Art. 46 para 4 and 5 Settlement and Residence Act);
- Holders of a Settlement Permit – Dependant (Art. 46 para 4 Settlement and Residence Act);
- Holders of a Settlement Permit – Gainful Employment Excepted (Art. 46 para 5 Settlement and Residence Act);
- Holders of a Temporary Residence Permit, with the exception of posted workers, self-employed persons, school pupils and persons providing social services (Art. 69 Settlement and Residence Act);
- Persons granted asylum (Art. 46 para 1 subpara 2 Settlement and Residence Act and Art. 35 para 1 Asylum Act);
- Beneficiaries of subsidiary protection (Art. 35 para 2 Asylum Act).

Family reunification with third-country nationals is generally more difficult than with Austrian citizens. Within the scope of family reunification with Austrian citizens, a decisive distinction is made as to

28 Administrative High Court, 5 September 2006, 2006/18/0243; Administrative High Court, 20 June 2002, 2002/18/0094; Constitutional Court, 8 March 2000, G1/00.

whether or not Austrian citizens have exercised their right of residence under EU law (or under the EC-Switzerland Agreement on the free movement of persons) for more than three months (citizens who have exercised their right to freedom of movement).

In contrast to family reunification with third-country nationals, **family reunification with Austrian citizens who have not exercised their right to freedom of movement** is generally not subject to a quota. Furthermore, family reunification is permitted with such Austrian citizens for a larger group of family members than with third-country nationals. This group of “other family members” includes three categories of individuals. The first consists of the parents or grandparents of the Austrian sponsor or of their spouse or registered partner, provided that the latter persons actually provide financial support to them. The second category comprises an unmarried partner living in a de facto union with the sponsor, where the sponsor actually provides financial support to such a partner. The third category includes family members who already received financial support from the sponsor in the country of origin, who were already members of the sponsor’s household in the country of origin or who have serious health problems which make personal care by the sponsor unavoidably necessary (Art. 47 Settlement and Residence Act). Other family members can obtain only a Settlement Permit – Dependant, however, which initially does not entitle them to pursue gainful employment (Art. 8 para 1 subpara 6 Settlement and Residence Act).

The law specifies **family reunification with beneficiaries of subsidiary protection** at the earliest three years from the date when subsidiary protection is granted. Additional requirements are accommodation to local standards, adequate health insurance coverage and a secure means of subsistence, except where the family members are the parents of an unaccompanied minor (Art. 35 para 2 and 2a Asylum Act).

The provisions governing family reunification with beneficiaries of subsidiary protection are for the most part identical to those in the Asylum Act applying to **family reunification with persons granted asylum**. In particular the scope of the family members falling under the provisions is uniformly defined for beneficiaries of subsidiary protection and persons

granted asylum (Art. 35 para 5 Asylum Act; see Section 2.2). An exception is the three-year waiting period, beginning from the date when international protection is granted, which applies only to beneficiaries of subsidiary protection (see Section 3.3 below). On the other hand, the requirements for accommodation to local standards, adequate health insurance coverage and a secure means of subsistence are waived only for persons granted asylum who apply for family reunification within three months of obtaining international protection (Art. 35 para 1 and 2 Asylum Act; see Section 3.1).

Unlike beneficiaries of subsidiary protection, persons granted asylum can also apply for family reunification based on the Settlement and Residence Act (Art. 46 para 1 subpara 2 (c) Settlement and Residence Act). Consequently, family reunification is also possible in the case of persons granted asylum who were not yet married or registered as partners in their countries of origin or before entering Austria, whereas beneficiaries of subsidiary protection do in general not have this option.²⁹

Austrian law makes no provision for family reunification as defined in this study for the following categories of third-country nationals:

- Third-country nationals residing in the country illegally;
- Asylum seekers;
- Persons holding residence titles for exceptional (humanitarian) reasons (Art. 54 Asylum Act);³⁰
- Holders of a Temporary Residence Permit for posted workers, self-employed persons, school pupils or persons providing social services (Art. 69 para 2 Settlement and Residence Act).

Special cases can arise in which third-country nationals belonging to the categories listed may nonetheless become eligible for family reunification. This can specifically occur where the right to family life as specified in Art. 8 of the European Convention on Human Rights (ECHR) would otherwise be violated. This might occur in exceptional, individual

29 Art. 35 para 5 Asylum Act; Art. 9 para 2 Family Reunification Directive.

30 However, after one year as a holder of a “Residence Permit” or a “Residence Permit Plus” under the Asylum Act, a switch to the Settlement and Residence Act and thus family reunification is possible (see Art. 41a para 9 Settlement and Residence Act).

cases where private interests in family reunification clearly outweigh public interests.³¹

2.2 Family members entitled to family reunification

In addition to a sponsor residing in Austria, another prerequisite for family reunification is that certain members of the sponsor's family are still staying in another country. Only spouses, registered partners and unmarried minor children generally belong to this group of family members entitled to family reunification (Art. 2 para 1 subpara 9 Settlement and Residence Act). The parents of minor children additionally fall within the scope of family reunification under the Asylum Act.

This means that **family reunification for the benefit of parents** is permitted by law only in the case of persons granted asylum and beneficiaries of subsidiary protection (see Art. 35 Asylum Act and Art. 2 para 1 subpara 9 Settlement and Residence Act). Family reunification for the benefit of parents corresponds to subsequent migration of other family members under the Asylum Act, except that parents of unaccompanied minor persons granted asylum or subsidiary protection are not required to meet the conditions of having secure means of subsistence, adequate health insurance coverage and accommodation to local standards (Art. 35 para 2a Asylum Act; see Section 3.1).

Registered partners and spouses normally have to be at least 21 years of age as of the date of application (Art. 2 para 1 subpara 9 Settlement and Residence Act). This age limit does not apply to family reunification under the Asylum Act (Art. 35 para 5 Asylum Act). Yet, pursuant to Art. 35 para 5 Asylum Act, any marriage or registered partnership with beneficiaries of subsidiary protection or persons granted asylum must have already existed in the country of origin or prior to entry (Art. 35 para 5

31 See ECHR, 19 February 1996, *Gül v. Switzerland*, Application No. 23218/94, para 36–43; 28 November 1996, *Ahmut v. the Netherlands*, Application No. 21702/93, para 67–68; 21 December 2001, *Şen v. the Netherlands*, Application No. 31465/96, para 31, 36; 1 December 2005, *Tuquabo-Tekle And Others v. the Netherlands*, Application No. 60665/00, para 42–44; 28 May 1985, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Application No. 9214/80, 9473/81 and 9474/81, para 67; Constitutional Court, 13 December 2005, B 1159/04.

Asylum Act).³² The spouse's or registered partner's entry into Austria can nonetheless be approved based on the right to private and family life in accordance with Art. 8 ECHR, if the private interests of the third-country nationals concerned outweigh public interests.³³

Austrian law has no provision for marriages between same-sex partners but only for registered partnerships.³⁴ As a rule, however, a same-sex marriage contracted in another country is to be recognized as being equal to a registered partnership as defined in Austrian law (Schoditsch, 2014:103; Traar, 2010:103). Thus, same-sex spouses are theoretically eligible for family reunification as well (see also Section 4.6).

On the other hand, there is no legal provision for family reunification of unmarried partners living in a *de facto* union (Art. 2 para 1 subpara 9 Settlement and Residence Act; Art. 35 para 5 Asylum Act; cf. AT EMN NCP, 2015:36).

Besides natural and adopted children, **family reunification** is also possible **for the benefit of stepchildren** (Art. 2 para 1 subpara 9 Settlement and Residence Act). The term "stepchild" (Ger. *Stiefkind*) is not defined more specifically in Austrian aliens law. Yet provisions governing statutory health insurance define a person's stepchild as the natural child of that person's spouse or registered partner where that child does not descend from that person and even if the child's other natural parent is still alive. The relationship between a stepchild and step-parent continues to exist after the marriage or registered partnership is terminated.³⁵ In view of the fact that the term "stepchild" is not defined in aliens law, recourse has to be taken to legislators' understanding of the term as given in social insurance law. Accordingly, it is not required for the stepchild to be *de facto* dependent on the sponsor.

32 See also Art. 9 para 2 Family Reunification Directive.

33 Constitutional Court, 6 June 2014, B 369/2013.

34 See Art. 1 ff Registered Partnership Act, FLG I No. 135/2009, in the version of FLG I No. 25/2015.

35 Art. 78 para 3 Farmers' Social Insurance Act, FLG No. 559/1978, in the version of FLG I No. 53/2016; Art. 56 para 2a Civil Service Health and Accident Insurance Act, FLG No. 200/1967, in the version of FLG I No. 53/2016; Art. 83 para 3 Social Insurance Act for Trade and Industry.

There is no legal provision in Austria for **family reunification for the benefit of majority-age children** (Art. 2 para 1 subpara 9 Settlement and Residence Act and Art. 35 para 5 Asylum Act). Yet the right to private and family life as specified in Art. 8 ECHR can lead in individual cases to majority-age children also being considered as family members for the purpose of family reunification, for instance in the case of children with disabilities.³⁶

Nor are other individuals who are legally, financially, emotionally or materially dependent on the sponsor considered eligible for family reunification pursuant to any provision of law.

Where, however, the particular circumstances of an individual case lead to the private interests in family reunification outweighing public interests in maintaining compliance with migration regulations, the right to private and family life requires by way of exception that even such individuals be considered family members whom the legal definition of the term does not recognize as such.³⁷

36 Administrative High Court, 17 November 2011, 2010/21/0494.

37 Administrative High Court, 17 November 2011, 2010/21/0494; 11 February 2016, Ra 2015/22/0145; 20 July 2016, Ra 2016/22/0025; 4 August 2016, Ra 2016/18/0123; ECHR, 1 December 2005, *Tuquabo-Tekle And Others v. the Netherlands*, Application No. 60665/00.

3. REQUIREMENTS FOR SUBSEQUENT MIGRATION OF FAMILY MEMBERS

In addition to membership in an eligible sponsor's family (see Chapter 2 above), other legal requirements need to be met as a rule for family reunification. These especially include legal entitlement to accommodation meeting local standards, adequate health insurance coverage, a secure means of subsistence, evidence of German proficiency and available capacity under a quota.

Here too, when considering the requirements to be met for family reunification, a distinction has to be made between procedures conducted pursuant to the Settlement and Residence Act and procedures pursuant to the Asylum Act (see Section 1.1).

3.1 Accommodation to local standards, health insurance and secure means of subsistence

As general requirements for family reunification, the Settlement and Residence Act specifies legal entitlement to accommodation meeting local standards, adequate health insurance coverage and a secure means of subsistence (Art. 11 para 2 subpara 2–4 Settlement and Residence Act).

Accommodation to local standards, adequate health insurance coverage and a secure means of subsistence are also required under certain circumstances in order to be granted an entry permit under the Asylum Act. These conditions do not apply to family members of persons granted asylum if the entry permit is applied for within three months of being granted asylum status with final effect, nor do they apply to the parents of unaccompanied minors (Art. 35 Asylum Act).

Accommodation to local standards, adequate health insurance coverage and a secure means of subsistence were introduced only recently, in 2016, as requirements to be met when applying for family reunification

with persons granted asylum after the three-month period.³⁸ This rule is hardly ever applied in practice, however, as the application for family reunification can also be submitted in writing.³⁹ Thus, when individuals are not able to submit their application in person within the three-month period, the deadline can nonetheless be met by submitting a written application.

To safeguard the right to private and family life as defined in Art. 8 ECHR, a residence permit for family reunification can also be approved by way of exception even where these requirements are not met. To determine whether such a case exists, the public interest in maintaining compliance with immigration regulations has to be weighed against the private interests of the family members concerned.⁴⁰ When weighing interests in such cases, the following factors in particular are required to be considered:

- the nature and duration of previous residence and whether the third-country national has been residing illegally in Austria;
- whether a family life actually exists;
- whether the private life is worthy of protection;
- the level of integration;
- any links with the home country;
- an irreproachable criminal record;
- any breaches of public order, especially relating to asylum law, aliens police law and immigration law;
- whether private or family life began at a point in time when the persons concerned had become aware of their uncertain residence status;

38 Art. 1 subpara 12 Federal Act Amending the Asylum Act 2005, the Aliens Police Act 2005 and the Federal Office for Immigration and Asylum Procedures, FLG I No. 24/2016, available at www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2016_I_24/BGBLA_2016_I_24.pdf (accessed on 21 September 2016).

39 Interview with Daniel Bernhart, Austrian Red Cross, 19 October 2016; Interview with Christian Fellner, Federal Ministry for Europe, Integration and Foreign Affairs, 24 October 2016; see Art. 11 para 1 Aliens Police Act; Art. 13 General Administrative Procedures Act; cf. Salzburger Nachrichten, *Eingeengter Familiennachzug betrifft Afghanen stark*, 5 October 2015, available at www.salzburg.com/nachrichten/oesterreich/politik/sn/artikel/eingeengter-familien-nachzug-betrifft-afghanen-stark-168394 (accessed on 9 November 2016).

40 See for instance Administrative High Court, 9 September 2013, 2012/22/0207; 20 August 2013, 2012/22/0027.

- whether the length of the third-country national's previous period of residence was the result of extended delays on the part of the authorities (first sentence of Art. 11 para 3 Settlement and Residence Act; Art. 35 para 4 subpara 3 Asylum Act in conjunction with Art. 9 para 2 Federal Office for Immigration and Asylum Procedures Act).

Pursuant to the Settlement and Residence Act, evidence of a secure means of subsistence, adequate health insurance coverage and accommodation to local standards is required to be submitted with the application (Art. 7 para 1 subpara 5–7 Regulation on the Implementation of the Settlement and Residence Act). The representation authority is charged with taking steps to ensure that the application is correct and complete and is responsible for forwarding it to the competent provincial governor (Art. 22 para 1 Settlement and Residence Act). The competent provincial governor is responsible for determining whether the requirements have been met (Art. 23 para 2 Settlement and Residence Act). The governor of the province can issue a regulation authorizing the district administrative authority to take decisions on all or specified cases on his or her behalf (Art. 3 para 1 Settlement and Residence Act).

In procedures conducted under the Asylum Act, the representation authority is also charged with taking steps to ensure that all of the evidence mentioned above is fully submitted. That authority is subsequently required to forward the application to the Federal Office for Immigration and Asylum. The latter is then responsible for determining whether the requirements specified above have been met or whether reasons exist for allowing an exception based on Art. 8 ECHR (Art. 35 Asylum Act).

When determining whether the applicant is legally entitled to **accommodation meeting local standards**, the decision is based on a prospective assessment. The aim here is to clarify whether reasons exist for assuming that the family members will be able to meet their accommodation needs in future, without becoming homeless and subsequently a risk for public order or security or becoming a financial burden on the Federal State, the provinces or the municipalities.⁴¹ The Administrative High

41 Administrative High Court, 9 September 2014, Ro 2014/22/0032.

Court has ruled that accommodation to local standards exists where a preponderant share of Austrian citizens with a comparable family situation (number and ages of family members and similar features) and living in comparable residential areas or areas of the district make use of comparable dwellings in a manner similar to the individuals concerned.⁴² Accommodation is considered not to meet local standards where the dwelling is clearly over-occupied, is situated in a condemned building or a storage structure or does not have running water, electricity or sanitary facilities.⁴³

Particularly suitable as evidence of legal entitlement to accommodation to local standards are: lease or sub-lease agreements, preliminary agreements relating to property rights, and property ownership certificates (Art. 7 para 1 subpara 5 Regulation on the Implementation of the Settlement and Residence Act). In practice verification is focused initially on legal entitlement to accommodation and only subsequently on whether it meets local standards. In addition, details concerning the above-mentioned circumstances (e.g. condemned buildings) are obtained in practice from the municipality concerned.⁴⁴

The required **health insurance** can be either private or statutory health insurance (see Art. 7 para 1 subpara 6 Regulation on the Implementation of the Settlement and Residence Act). Practically every gainfully employed person in Austria falls under a statutory health insurance scheme.⁴⁵ Statutory health insurance usually also covers spouses, registered partners and children from the point in time when these individuals take up habitual residence in Austria and provided that they do not have separate statutory health insurance.⁴⁶

42 Administrative High Court, 5 May 2000, 99/19/0010; 23 May 2001, 98/19/0104; 23 May 2001, 98/19/0278; 23 May 2001, 99/19/0108.

43 Interview with Daniel Bernhart, Austrian Red Cross, 19 October 2016.

44 Interview with Doris Stilgenbauer, Office of Provincial Government of Lower Austria, 24 October 2016.

45 See for instance Art. 4 General Social Insurance Act; Art. 1 Civil Service Health and Accident Insurance Act; Art. 2 Social Insurance Act for Trade and Industry.

46 See for instance Art. 123 General Social Insurance Act; Art. 56 Civil Service Health and Accident Insurance Act; Art. 83 Social Insurance Act for Trade and Industry; Administrative High Court, 20 July 2016, Ro 2015/22/0030; Supreme Court, 25 January 2005, 10 Obs 151/04k.

A third-country national has a **secure means of subsistence** when that person has regular steady income at a level which allows the person to lead a life without requiring social assistance from the Federal State, the provinces or municipalities and which corresponds to a specified reference rate defined in the General Social Insurance Act (Art. 11 para 5 Settlement and Residence Act). The current reference rate is EUR 882.78 monthly for individual persons and EUR 1,323.58 for couples living in the same household, increasing by EUR 136.21 for each minority-age child (Art. 293 General Social Insurance Act; Abermann/Czech/Kind/Peyrl, 2016:161). Determining whether an individual has a secure means of subsistence is a complex matter in practice (see Peyrl/Neugschwendtner/Schmaus, 2015:45–52 for more details).⁴⁷

The courts have ruled that a decision based on a prospective assessment is to be applied to determine whether a secure means of subsistence is given.⁴⁸ Within the scope of the Settlement and Residence Act, a decisive measure of whether an adequate means of subsistence exists is the intended period of stay, whereas the maximum period considered is the validity period of the time-limited residence title issued.⁴⁹ The underlying reasoning is that, in the event of an application for renewal or change of purpose, the secure means of subsistence is generally re-verified anyway (Art. 24 and 26 Settlement and Residence Act). The Settlement and Residence Act specifies that residence titles for the family reunification of third-country nationals are to be issued for a maximum of 12 months (Art. 20 in conjunction with Art. 46 Settlement and Residence Act). The decisive consideration is thus the maximum 12-month period from when the residence title is issued.

It is doubtful whether the court rulings described above can be applied by analogy to family reunification in cases falling under the Asylum Act. Persons granted asylum in Austria are initially issued a residence permit limited to three years (Art. 3 para 4 Asylum Act). The residence permit

47 See also Federal Ministry of the Interior, *Informationsbroschüre über die Unterhaltsberechnung im Niederlassungs- und Aufenthaltsgesetz*, available at www.bmi.gv.at/cms/BMI_Niederlassung/Allgemeine_Informati/2015/Beilage_Unterhaltsbroschre_2016.pdf (accessed on 21 November 2016).

48 See Administrative High Court, 31 May 2011, 2009/22/0278.

49 Administrative High Court, 31 May 2011, 2009/22/0278; Administrative High Court, 11 November 2013, 2012/22/0083; Administrative High Court, 6 August 2009, 2008/22/0391; Provincial Administrative Court Vienna, 30 November 2015, VGW-151/082/10454/2014.

issued to beneficiaries of subsidiary protection, in contrast, is limited to one year when first granted (Art. 8 para 4 Asylum Act). In view of this fact, it would be unjustified to treat persons granted asylum unequally as a result of the longer validity period of the residence permit such individuals hold. The existence of an adequate means of subsistence is also not required to be verified upon renewal of that particular residence permit (Art. 3 para 4 and Art. 8 para 4 Asylum Act). The principle of limiting the scope of the prospective assessment to the validity period of the residence permit issued should not, therefore, be applied by analogy to cases of family reunification based on the Asylum Act. Instead, a “longer period” of about two to three years should probably be used (cf. Peyrl/Neugschwendtner/Schmaus, 2015:47).⁵⁰

As proof of a secure means of subsistence, documents have to be submitted, in particular: pay statements, pay confirmation, employment agreements, preliminary agreements relating to employment matters, confirmations of pension or other insurance payments or evidence of the applicant’s assets (for example in the form of savings deposits) in a sufficient amount (Art. 7 para 1 subpara 7 Regulation on the Implementation of the Settlement and Residence Act).⁵¹ Pay statements from the past six months are usually used in practice, if the employment is still ongoing.⁵² In the decision based on a prospective assessment, the competent authority is also required to consider any promises of employment.⁵³

The **practical impact** of the individual requirements on family reunification and integration of third-country nationals in Austria was the subject of a study carried out in 2013 (Kraler et al., 2013).

50 See also Administrative High Court, 20 September 2011, 2010/01/0001; Provincial Administrative Court Vienna, 30 November 2015, VGW151/082/10454/2014; Interview with Gerald Dreveny, Federal Ministry of the Interior, 24 October 2016.

51 See also Federal Ministry of the Interior, *Informationsbroschüre über die Unterhaltsberechnung im Niederlassungs- und Aufenthaltsgesetz*, available at www.bmi.gv.at/cms/BMI_Niederlassung/Allgemeine_Informati/2015/Beilage_Unterhaltsbroschre_2016.pdf (accessed on 21 November 2016).

52 Interview with Doris Stülgenbauer, Office of Provincial Government of Lower Austria, 24 October 2016.

53 Administrative High Court, 15 December 2011, 2008/21/0002; 27 May 2010, 2008/21/0630.

The study concludes that the income requirement in Austria does not appear to be particularly strict when compared with other European countries. Nevertheless, on closer examination the income requirement reveals itself to be highly selective (Kraler et al., 2013:16–17; see Section 3.5). The study furthermore demonstrated that the income requirement can have a long-term negative impact on the job-related decisions taken by the individuals concerned and in turn on their integration, considering that they give up pursuing goals such as advanced training or language proficiency out of the need to work for a living (Kraler et al., 2013:96, 105). The requirements of accommodation to local standards and adequate health insurance coverage pose only minor challenges in practice, according to the study (Kraler et al., 2013:81–82).

3.2 Integration measures

Based on the different types of family reunification under the Settlement and Residence Act and under the Asylum Act, differing requirements relating to integration are also specified.

Family members are not required to go through a comprehensive integration assessment within the framework of family reunification. Individuals have to demonstrate a basic knowledge of Austria's democratic system, including its underlying principles, as well as of the history of Austria and of the province of residence only once they apply for Austrian citizenship (Art. 10a para 1 subpara 2 Citizenship Act).

Integration measures as defined in the framework of the Settlement and Residence Act

Family members applying for family reunification under the Settlement and Residence Act are nonetheless generally required to demonstrate a specific level of German proficiency prior to and after immigration. These integration-related language requirements in Austria are structured according to three levels, at each of which the corresponding skills have to be demonstrated. The **three-level model** of language integration is structured as described in the following.

1. Demonstration of language proficiency at the A1 level of the Common European Framework of Reference for Languages – “German Before Immigration”

Approval of family reunification normally requires demonstration of German proficiency at the A1 level of the Common European Framework of Reference for Languages.⁵⁴ An application for a residence title is normally to be rejected as unfounded if the applicant is unable to demonstrate elementary proficiency in German (Art. 21a para 1 Settlement and Residence Act; Abermann/Czech/Kind/Peyrl, 2016:354).

Family members of individuals holding a Temporary Residence Permit are specifically exempted from this requirement. The underlying reasoning is that a Temporary Residence Permit is issued only for a temporary stay in Austria (Art. 8 para 1 subpara 10 in conjunction with Art. 21a para 1 Settlement and Residence Act).

Demonstration of German proficiency is also not required from other categories of individuals. The family members listed below do not have to demonstrate German proficiency at the A1 level:

- individuals below the age of 14 at the time of application;
- individuals who cannot be reasonably expected to demonstrate language proficiency due to their state of physical or psychological health; evidence of this condition must be provided by third-country nationals in the form of an opinion by a medical officer or an opinion by a physician recognized as trustworthy by an Austrian representation authority;
- family members of individuals holding either a Red-White-Red Card for very highly qualified workers or an EU Blue Card;
- family members of holders of a Permanent Residence – EU title where the sponsor originally held an EU Blue Card (Art. 21a para 4 Settlement and Residence Act).

The authorities can furthermore approve an exemption where warranted in order to maintain the individual’s family life in accordance with Art. 8 ECHR or, in cases involving unaccompanied minors, to safeguard the best interests of the child. When examining such cases, it is

54 Common European Framework of Reference for Languages, available at www.europaischer-referenzrahmen.de (accessed on 5 October 2016).

necessary to consider the individual circumstances (cf. for example Czech, 2012).⁵⁵ Application for such an exemption can only be made prior to the issuing of a first-instance decision. The family members are to be informed of this limitation (Art. 21a para 5 Settlement and Residence Act).

To demonstrate elementary language proficiency prior to immigration, appropriate language diplomas or course transcripts have to be submitted already at the time of application. Such certificates must not be any older than one year when submitted (Art. 21a para 1 and Art. 22 para 2 Settlement and Residence Act). At present the language diplomas and course transcripts issued by the following providers are recognized for this purpose:⁵⁶

- Austrian German Language Diploma (ÖSD);
- Goethe-Institut e.V.;
- Telc GmbH;
- Austrian Integration Fund.

To demonstrate elementary language proficiency it also suffices to complete Module 1 or 2 of the Integration Agreement (Art. 21a para 3 Settlement and Residence Act; see sections 2 and 3 below).

Corresponding evidence has to be submitted already at the time of application. Otherwise the representation authority has the duty to request the family member to present the evidence within an appropriate period. The procedure is to be terminated without further action if this deadline is not met (Art. 22 para 2 Settlement and Residence Act).

The requirement for elementary proficiency in German prior to immigration does indeed lead to challenges, according to a study. It is reported that, from a linguistic perspective, the efficacy of this requirement is highly questionable. Specifically, language courses are observed to contribute only little to the mastery of a language in the long term.

55 See also ECHR, 19 February 1996, *Gül v. Switzerland*, Application No. 23218/94, para 38; 28 November 1996, *Abmut v. the Netherlands*, Application No. 21702/93, para 67.

56 Art. 9b para 2 Regulation on the Implementation of the Settlement and Residence Act; see also Art. 21a para 7 Settlement and Residence Act.

Moreover, the required examinations are reported to put the individuals concerned under considerable pressure, which in turn potentially has a negative impact on the learning process (Kraler et al., 2013:82–83, 103, 105).

2. Demonstration of language proficiency at the A2 level of the Common European Framework of Reference for Languages – “Integration Agreement Module 1”

Once they have been granted a residence title, family members are generally required to complete Module 1 of the Integration Agreement (Art. 8 in conjunction with Art. 14a Settlement and Residence Act). Module 1 of the Integration Agreement is intended to help individuals acquire superior language proficiency, corresponding to the A2 level of the Common European Framework of Reference for Languages.

The following categories of individuals are exempt from this requirement:

- children who are below the age of 12 when the residence title is first granted;
- individuals who are unable to meet this requirement due to their state of physical or psychological health and are able to present an opinion by a medical officer certifying this condition;
- individuals who declare in writing the intention of not staying in Austria for more than 12 months within a 24-month period (Art. 14a para 5 Settlement and Residence Act).

The requirement to complete Module 1 of the Integration Agreement can be met specifically by presenting a certificate issued by one of the providers listed above (Art. 9 Regulation on the Integration Agreement). Other possible evidence of complying with Module 1 is a school-leaving certificate showing general university eligibility or completion of a lower secondary vocational school (Art. 14a para 4 subpara 3 Settlement and Residence Act).⁵⁷

57 For further information please see Art. 64 Universities Act 2002.

Proof of having completed Module 1 of the Integration Agreement normally has to be presented within two years of receiving the residence title. An extension of this period can nonetheless be approved in view of individual circumstances (Art. 14a para 2 Settlement and Residence Act). Failure to complete Module 1 of the Integration Agreement in time can result in the authorities refusing to renew the residence title and imposing an administrative fine of between EUR 50 and EUR 250 (Art. 11 para 2 subpara 6 Settlement and Residence Act; Art. 77 para 1 subpara 3 Settlement and Residence Act; Peyrl/Neugschwendtner/Schmaus, 2015:60). Furthermore, a return decision can be issued against the family member even before the residence title expires (Art. 52 para 4 subpara 5 Aliens Police Act).

A family member failing to complete Module 1 of the Integration Agreement in time who applies for renewal of the residence title can nonetheless be granted a renewal if this serves to maintain the individual's private and family life in accordance with Art. 8 ECHR (Art. 11 para 3 Settlement and Residence Act; see Section 3.1). A return decision is also only permissible if it would not lead to a violation of the right of the individual concerned to a private and family life (Art. 9 para 1 Federal Office for Immigration and Asylum Procedures Act).

3. Demonstration of language proficiency at the B1 level of the Common European Framework of Reference for Languages – “Integration Agreement Module 2”

There is no obligation to complete Module 2 of the Integration Agreement, and only at a much later point in time does this Module play a role in family reunification. Only once the individual intends to apply for a Permanent Residence – EU title or for Austrian citizenship does that person have to complete Module 2 (Art. 45 para 1 subpara 2 Settlement and Residence Act; Art. 10a para 1 Citizenship Act). Module 2 of the Integration Agreement requires language proficiency at the B1 level of the Common European Framework of Reference for Languages (Art. 9 Regulation on the Integration Agreement).

To help achieve the levels described above, two of the examination organizations (Austrian Integration Fund and Austrian German Language Diploma) offer online **learning materials** as well as sample exams. These

materials consist of an examination description, sample sentences and matching exercises and preparation material.⁵⁸ The Goethe Institut also offers similar online learning materials,⁵⁹ which are supplemented by a smartphone app, to train German skills at the A1 language proficiency level.⁶⁰

To prepare candidates for the examination, the Austrian German Language Diploma organization also strongly recommends attending a **counselling session** at the examination centre where the exam will be taken, prior to registering. Counselling is offered at the particular institution holding the examination as well as at the Austrian German Language Diploma offices.⁶¹

The family members themselves normally have to pay the **costs** of courses and examinations taken to demonstrate language proficiency in the context of family reunification. Provision is made, however, for the Federal State to contribute towards the costs of completing Module 1 of the Integration Agreement (Art. 15 Settlement and Residence Act). In addition, language courses in particular can also be made available to subsequently migrating family members within the framework of integration support (Art. 17 para 2 subpara 1 Settlement and Residence Act).

The fees charged for sitting an examination to demonstrate required language proficiency are not set by one central authority in Austria and hence fees vary according to the institution administering the exam.

The course fees are set by the certified language institutes offering the courses. The Austrian Integration Fund provides one or two examiners for every examination that institution offers. The Austrian Integration Fund

58 Österreichisches Sprachdiplom Deutsch, *Modellprüfungen und Übungsmaterialien*, available at www.osd.at/default.aspx?Slid=32&LAid=1 (accessed on 6 October 2016); Austrian Integration Fund, *Mein Sprachportal. Beispieltests als Download*, available at <http://sprachportal.integrationsfonds.at/pruefungen/beispieltests-als-download.html> (accessed on 6 October 2016); Written query response by Katerina Wahl, Austrian Integration Fund, 3 November 2016.

59 Goethe-Institut, *Deutsch online*, available at www.goethe.de/lrn/prj/fer/deindex.htm (accessed on 7 October 2016).

60 *Ibid.*, *Unterwegs Deutsch lernen Deutschtrainer A1-App*, available at www.goethe.de/de/spr/ueb/dt1.html (accessed on 7 October 2016).

61 Written query response by Karoline Janicek, Österreichisches Sprachdiplom Deutsch, 26 October 2016.

charges the language institute EUR 65 for one examiner and EUR 90 for two examiners.⁶²

The fee for examinations at the A2 to B2 levels held directly at the Austrian Integration Fund is EUR 130 per person. Prices can vary when other certified language institutes use the examination schemes of the Austrian Integration Fund.⁶³

An examination fee of EUR 75 is recommended by the Austrian German Language Diploma organization for the A1-level examination. The Austrian German Language Diploma organization recommends charging a rate of EUR 85 for A2-level examinations. A discount is granted by the Austrian German Language Diploma organization especially for school pupils.⁶⁴

Integration measures as defined in the framework of the Asylum Act

While they are exempted from the language requirements described above, the family members of persons granted asylum or subsidiary protection under the Asylum Act have to report to an integration centre operated by the Austrian Integration Fund upon being granted their status (Art. 67 para 1 Asylum Act). This interview serves the purpose of supporting integration and primarily aims at providing guidance. At the same time the person should become aware of his or her individual responsibility within the integration process. Here, persons granted asylum and beneficiaries of subsidiary protection are made aware of the need to take steps towards integration and of the importance of German language proficiency.⁶⁵

It is unclear what consequences could result from the failure of these individuals to comply with the obligation to report to the centre of the

62 Written query response by Katerina Wahl, Austrian Integration Fund, 3 November 2016.

63 Austrian Integration Fund, *Mein Sprachportal. FAQ*, available at <http://sprachportal.integrationsfonds.at/faq.html> (accessed on 7 October 2016).

64 Written query response by Karoline Janicek, Österreichisches Sprachdiplom Deutsch, 26 October 2016.

65 Austrian Integration Fund, *Integration und Migration in Österreich – Novelliertes Asylgesetz seit 1. Juni 2016 in Kraft*, available at www.integrationsfonds.at/monitor/detail/article/novelliertes-asylgesetz-seit-1-juni-2016-in-kraft (accessed on 20 October 2016).

Austrian Integration Fund that is responsible for them for integration support purposes. In certain provinces of Austria this might lead to a limitation of the basic welfare support benefits received. Specifically, in some provinces' legislation regulating basic welfare support provision is made to limit basic welfare support if the recipient breaches the obligation to cooperate with authorities or other obligations related to the "asylum procedure" (*asylrechtliches Verfahren*).⁶⁶ Such a consequence probably has to be excluded from a legal perspective, however, because the obligation to report to the authorities no longer relates to the asylum procedure once protection status has been awarded, as this procedure has already been completed. Therefore, no immediate consequences of the failure to comply with the obligation to report to the authorities are specified. This, accordingly, does not represent a requirement for family reunification. Failure to comply with the obligation to report to the authorities might nonetheless be taken as an indication of the individual's lack of willingness to work and subsequently lead to a reduction of the minimum income received.⁶⁷

3.3 Waiting period and quota requirement

Family reunification under the Asylum Act with beneficiaries of subsidiary protection is subject to a three-year **waiting period** beginning with the granting of subsidiary protection with final effect. Application cannot be made before expiry of this three-year period. There are no legal provisions specifying exemptions from the waiting period (Art. 35 para 2

66 See Art. 8 para 1 subpara 6 Provincial Basic Welfare Support Act Lower Austria; Art. 9 para 1 subpara 8 Provincial Basic Welfare Support Act Salzburg; Art. 7 para 1 subpara 8 Provincial Basic Welfare Support Act Styria.

67 See Art. 7 para 5 Provincial Guaranteed Minimum Resources Act Burgenland; Art. 7a para 1 Provincial Guaranteed Minimum Resources Act Carinthia; Art. 8 para 5 Provincial Guaranteed Minimum Resources Act Salzburg; Art. 7 para 6 Provincial Guaranteed Minimum Resources Act Styria; Art. 16 para 1 and Art. 19 para 1 (d) Provincial Guaranteed Minimum Resources Act Tyrol; Art. 7 para 6 Provincial Guaranteed Minimum Resources Act Lower Austria; Art. 8 para 6 Provincial Guaranteed Minimum Resources Act Vorarlberg; Art. 15 para 1 Provincial Guaranteed Minimum Resources Act Vienna.

Asylum Act; Czech, 2016:17). Apart from this no statutory waiting period is defined for the purposes of family reunification.

Yet some cases of family reunification under the Settlement and Residence Act are subject to a **quota**, so that family reunification can in effect be delayed if the quota has already been used up (see AT EMN NCP, 2015:35–36, 37). The quota requirement applies to family members of persons granted asylum as well as of individuals holding a Red-White-Red Card Plus, Permanent Residence – EU title, a Settlement Permit, a Settlement Permit – Dependant or a Settlement Permit – Gainful Employment Excepted (Art. 12 and 46 Settlement and Residence Act). The quota requirement is recognized as having apparently become less significant in recent years due to the fact that the quotas have hardly ever been used up during this period (Kraler et al., 2013:70–72; cf. Peyrl/Neugschwendtner/Schmaus, 2015:126). However, it is observed that this requirement can have a negative impact particularly on the later integration of children in Austria, because it deprives them of valuable years of schooling in Austria (Kraler et al., 2013:101).

No quota requirement applies, in contrast, to cases of family reunification under the Asylum Act with persons granted asylum and beneficiaries of subsidiary protection.

3.4 Public order and security

Both under the Settlement and Residence Act and under the Asylum Act, an endangerment of public order or security can be an impediment to family reunification. Yet again, the fundamental right to private and family life needs to be considered in such cases (Art. 11 para 2 subpara 1 in conjunction with para 4 subpara 1 Settlement and Residence Act; Art. 35 para 4 subpara 2 Asylum Act).

When identifying a potential endangerment of public interests, anything can be considered as evidence that is suitable for identifying such an endangerment and is judged appropriate in view of the facts of the individual case (see Art. 46 General Administrative Procedures Act). Specifically, excerpts from current police records are requested in practice from the applicant's previous country of residence (Ecker, 2008: 233f; Peyrl/Neugschwendtner/Schmaus, 2015:61; Abermann/Czech/Kind/Peyrl,

2016:156f).⁶⁸ As specified in Art. 11 para 7 Settlement and Residence Act, family members might have to present a health certificate.

When applying for family reunification under the Asylum Act, family members are required to complete a questionnaire for submission to the representation authorities (Art. 35 para 3 Asylum Act). This is usually done as part of an interview with the Austrian representation authority, while using the services of an interpreter if required.⁶⁹ This form also lists questions relating to a potential endangerment of public interests, such as whether the person has ever been in detention (see Annex A to the Regulation on the Implementation of the Asylum Act). The Austrian Federal Ministry of the Interior is responsible for subsequently evaluating whether the person's entry into Austria conflicts with public interests (Art. 35 para 4 subpara 2 Asylum Act). In practice, information is also obtained for this purpose from the Austrian representation authority abroad.⁷⁰

3.5 Challenges and good practices

Challenges arise to family reunification in a variety of areas.

Family members are required to provide evidence of German proficiency at the same time as applying for reunification (Art. 21a para 1 and Art. 22 para 2 Settlement and Residence Act). Only a recognized certificate is accepted as possible evidence, and so third-country nationals might have to take upon themselves considerable travelling distances to reach a recognized examination centre.⁷¹

68 Interview with Doris Stilgenbauer, Office of Provincial Government of Lower Austria, 24 October 2016.

69 Written query response by the Federal Office for Immigration and Asylum, 3 November 2016.

70 Interview with Christian Fellner, Federal Ministry for Europe, Integration and Foreign Affairs, 24 October 2016.

71 Wiener Zeitung, *1500 Kilometer zum Deutschkurs*, 25 February 2011, available at www.wienerzeitung.at/nachrichten/oesterreich/politik/27929_1500-Kilometer-zum-Deutschkurs.html?em_cnt=27929 (accessed on 7 October 2016); Unique, *Perpetuierte Veränderung – Das Fremdenrechtspaket 2011*, available at www.univie.ac.at/unique/uniquecms/?p=694 (accessed on 7 October 2016).

The requirement for a secure means of subsistence has come to be seen as a particularly significant impediment in practice (Ecker, 2008:238; Kraler et al., 2013:80). When considering income requirements, attention is drawn to the fact that especially women are at a disadvantage, with their mean income levels frequently being lower than those of men. Apart from this, a person's marital status and level of education often have considerable influence on the individual's income and accordingly on the ability to meet the requirement for a secure means of subsistence (König/Kraler, 2013:14; Peyrl/Neugschwendtner/Schmaus, 2015:130; Strik/de Hart/Nissen, n.d.:55; Kraler et al., 2013:80).

Providing evidence of adequate funds is facilitated inasmuch as the means of both the sponsor and the person migrating to join the sponsor are taken into account in the decision based on a prospective assessment, including for example any income the subsequently migrating person will receive from anticipated employment in Austria.⁷²

As a requirement for approval of reunification, accommodation to local standards can prove to be a barrier since families often have to lease a larger flat before making use of it. Hence the family incurs higher rental costs even before they are actually reunified (Ecker, 2008:238).

The challenge presented by accommodation to local standards is also ameliorated through the process of deciding based on a prospective assessment.⁷³ Specifically, legal entitlement to accommodation meeting local standards does not have to exist as of the date of application or of the decision but only as of the anticipated date of the family's subsequent migration.

72 Administrative High Court, 11 November 2013, 2012/22/0017.

73 Administrative High Court, 9 September 2014, Ro 2014/22/0032.

4. THE FAMILY REUNIFICATION PROCEDURE

Here too, when considering the procedure for family reunification, a distinction has to be made between procedures conducted pursuant to the Settlement and Residence Act and procedures pursuant to the Asylum Act (see Section 1.1).

4.1 Application

Austrian law specifies that the application for family reunification must be made by the family members wishing to subsequently migrate to Austria (Art. 46 Settlement and Residence Act; Art. 35 Asylum Act).

It should be noted that applications made under the Settlement and Residence Act have to be submitted personally to the authorities (see Art. 19 para 1 Settlement and Residence Act). Applications for family reunification under the Asylum Act, in contrast, can also be submitted in writing (Art. 11 para 1 Aliens Police Act).

4.2 Responsible authorities

The authority responsible for the application differs depending on whether the application is made under the Settlement and Residence Act or under the Asylum Act (see Chapter 1).

Applicants for family reunification under the Settlement and Residence Act generally have to apply abroad to the locally competent professional representation authority (Art. 3 para 3 and Art. 21 para 1 Settlement and Residence Act). A professional representation authority is an authority entrusted with consular responsibilities and with professionally representing Austria in another country (Art. 2 para 1 subpara 16 Settlement and Residence Act). Honorary consulates are thus generally not responsible for cases of family reunification under the Settlement and Residence Act (see Art. 5 para 2 Settlement and Residence Act). Which authority is locally competent in another country generally

depends on the family member's place of residence (Art. 5 Settlement and Residence Act).

Under the Asylum Act, applicants for family reunification are required to apply to an Austrian representation authority entrusted with consular responsibilities (Art. 35 Asylum Act). The only Austrian representation authorities that qualify in this context are Austrian diplomatic representation authorities managed by career consuls (Art. 2 para 5 subpara 3 Aliens Police Act). An application for family reunification under the Asylum Act cannot therefore be submitted to an honorary consulate either.

It is not clear whether application under the Asylum Act can be made to any professional Austrian representation authority (as claimed by Feßl/Holzschuster, 2006:509) or only to the representation authority locally responsible in the particular case. In Art. 35 of the Asylum Act, the representation authority to which the application is to be submitted is referred to using a definite and not an indefinite article, i.e. *the* representation authority and not *a* representation authority (*die* and not *eine Vertretungsbehörde*). Thus the application can apparently be submitted only to the locally competent representation authority. In this case as well, the local competence of the representation authority generally depends on the family member's place of residence (Art. 8 para 1 Aliens Police Act). The term "place of residence", on the other hand, is defined in the Austrian Registration Act. According to this definition, a person's place of residence is established at a dwelling in which that person has settled with the intention of having for an indefinite period a point of connection for life relationships, where this intention is verifiable or can be deduced from circumstances (Art. 1 para 6 Registration Act). If the family members live in Afghanistan for example, the application has to be submitted to the embassy in Islamabad. If the Afghan family members live in the Islamic Republic of Iran, on the other hand, the embassy in Tehran is responsible.⁷⁴

74 See Federal Ministry for Europe, Integration and Foreign Affairs, *Austrian representations worldwide*, available at www.bmeia.gv.at/fileadmin/user_upload/maps/Vertretungen/vertretungen.html (accessed on 15 November 2016).

4.3 Establishing identity and family membership

To allow verification of the application for family reunification, the competent authorities are always charged with verifying the identity and the family membership of the individuals concerned.

In Austrian administrative law, in general anything can be considered as evidence that is suitable for establishing the relevant facts of the case and is judged appropriate in view of the facts of that individual case (Art. 46 General Administrative Procedures Act). The specific circumstances of the individual case consequently determine in general how the competent authority will establish applicants' identity and their family membership. Specifically, identity and family membership can be established using interviews or expert opinions (see Art. 48–52 General Administrative Procedures Act). Examples of material presented in practice include school transcripts, photographs and video recordings (such as family photos and wedding videos). Particularly in cases involving asylum, the competent authority in Austria interviews the sponsor.⁷⁵ However, interviews with other witnesses are apparently used only infrequently.⁷⁶

When applying under the Settlement and Residence Act, applicants usually have to submit a valid travel document, a birth certificate or comparable document and a photograph, as well as, where applicable, a marriage certificate, a certificate of divorce, a certificate of partnership, a certificate of dissolution of the registered partnership, certificate of adoption, evidence or a certificate of the family relationship, or a death certificate (Art. 19 para 3 Settlement and Residence Act; Art. 7 para 1 subpara 1–4 Regulation on the Implementation of the Settlement and Residence Act). A copy and the original of each of these documents have to be included with the application (Art. 6 para 1 Regulation on the Implementation of the Settlement and Residence Act). The authority can, however, approve exemption of the family members from this submission requirement where the individuals concerned provide reasons when applying (Art. 19 para 8 Settlement and Residence Act).

75 Written query response by the Federal Office for Immigration and Asylum, 3 November 2016.

76 Interview with Daniel Bernhart, Austrian Red Cross, 19 October 2016; Interview with Christian Fellner, Federal Ministry for Europe, Integration and Foreign Affairs, 24 October 2016.

When applying for family reunification under the Asylum Act, generally at least a travel document and a photograph have to be submitted for the purpose of establishing the applicant's identity and family membership (Art. 11 para 1 Aliens Police Act in conjunction with Art. 19 para 1 Visa Code and Art. 10 para 1 (b) and (d) Visa Code). Besides travel documents and photographs, in particular birth certificates and where applicable marriage certificates and documents specific to the particular country are requested in practice.⁷⁷

If family members are unable to provide proof of a claimed family relationship, on their request the authority has to allow a DNA analysis. Later in the procedure, only the information pertaining to the family relationship is permitted to be processed, with all other data required to be deleted (Art. 29 para 2 Settlement and Residence Act; Art. 12a Aliens Police Act).

4.4 Special considerations for minors

Special provisions apply in part to the reunification of minors with their families.

Austrian civil law defines minors as persons below the age of 18 (Art. 21 para 2 Austrian Civil Code). In cases of family reunification under the Settlement and Residence Act, whether a person is of minority age is explicitly determined on the basis of Austrian civil law (Art. 2 para 4 subpara 1 Settlement and Residence Act; Abermann/Czech/Kind/Peyrl, 2016:54).⁷⁸ Within the framework of the Settlement and Residence Act, therefore, the decisive consideration is whether the person has reached the age of 18.

With family reunification under the Asylum Act, in contrast, it is not certain whether minority age is always to be decided based on Austrian law or whether the law of another country might apply (see for example Putzer, 2011:253–254). On the other hand, family reunification under the Asylum Act represents implementation of the essential provisions of Family Reunification Directive 2003/85/EC. Whether the individual has reached

77 Interview with Daniel Bernhart, Austrian Red Cross, 19 October 2016.

78 See also Administrative High Court, 17 November 2011, 2010/21/0494.

the age of 18 is also the decisive consideration according to that Directive (Art. 2 (f); Art. 4 para 1). Consequently, whether the person has reached the age of 18 is also the decisive consideration if family reunification under the Asylum Act is to be interpreted in conformance with the Directive.⁷⁹

As evidence of family membership in the case of children, in particular birth certificates, certificates of adoption, family photographs or video recordings can be presented.⁸⁰ Performing a DNA analysis is also specified as an auxiliary measure (see Section 4.3). In conventional procedures for the purpose of family reunification, responsibility for assessing the family relationship lies with the governor of the province of residence, while the Federal Office for Immigration and Asylum has this responsibility in procedures under the Asylum Act; in both cases this is done after the representation authority forwards the application to the authority responsible in the particular case (Art. 22 and Art. 23 Settlement and Residence Act; Art. 35 para 3 and para 4 Asylum Act).

Whether a person is of minority age can in general also be established using all suitable means of evidence (Art. 46 General Administrative Procedures Act). This includes birth certificates or school transcripts for example, although the plausibility of such documents also depends heavily on the country of origin.⁸¹ Where doubts about claimed minority age exist, the authorities can additionally request radiological examinations to be performed. Individuals must not be forced to participate in radiological examinations, however, and such examinations must be as minimally invasive as possible. If after medical age assessment reason for doubt remains, the person concerned must be assumed to be of minority age (Art. 13 para 3 Federal Office for Immigration and Asylum Procedures Act; Art. 29 para 4 Settlement and Residence Act; Koppenberg, 2014:42; Lukits/Lukits, 2013).

79 Cf. with different statements of Administrative High Court, 28 January 2016, Ra 2015/21/0230; Feßl/Holzschuster, *Asylgesetz 2005*, p. 390f.

80 Art. 7 para 1 subpara 2 and subpara 4 Regulation on the Implementation of the Settlement and Residence Act; Interview with Daniel Bernhart, Austrian Red Cross, 19 October 2016.

81 Interview with Daniel Bernhart, Austrian Red Cross, 19 October 2016; Interview with Christian Fellner, Federal Ministry for Europe, Integration and Foreign Affairs, 24 October 2016.

Pursuant to Art. 1 of the Federal Constitutional Act on Children Rights,⁸² the child's best interests must be a priority consideration in all actions affecting children that are taken by public and private institutions (see for example to Fuchs, 2011). This principle also applies in the context of reunification of third-country nationals.⁸³ In Art. 138 of the Austrian Civil Code, Austrian legislators have enumerated important aspects for determining the best interests of the child. Examples of these include appropriate care, a diligent education, a secure environment, protection from violence, and esteem (see Art. 138 subpara 1–12 Austrian Civil Code).

As mentioned above, certain requirements do not have to be met if family reunification is necessary to safeguard the right to private and family life (see especially Art. 11 para 3 Settlement and Residence Act and Art. 35 para 4 subpara 3 Asylum Act). When reviewing these requirements, the best interests of the children concerned also have to be considered.⁸⁴

The Settlement and Residence Act also explicitly mentions the best interests of the child, albeit only in relation to unaccompanied minors. Specifically, certain deficiencies in an application by an unaccompanied minor can be tolerated for the sake of the child's best interests (Art. 19 para 8 Settlement and Residence Act). The requirement to demonstrate proficiency in German can also be waived to the benefit of unaccompanied minors (Art. 21a para 5 Settlement and Residence Act). The eased requirements mentioned above are also provided for safeguarding individuals' private and family life and thus potentially also benefit accompanied minors, as noted.

82 Federal Constitutional Act on the Rights of Children, FLG I No. 4/2011, available at (accessed on 25 October 2016).

83 Interview with Gerald Dreveny, Caroline Jennewein, Carina Royer, Federal Ministry of the Interior and Doris Stilgenbauer, Office of Provincial Government of Lower Austria, 24 October 2016.

84 Constitutional Court, 9 June 2016, E2617/2015; Administrative High Court, 7 May 2014, 2013/22/0352; ECHR, 23 June 2008, *Maslov v. Austria*, Application No. 1638/03, para 82; ECHR, 3 October 2014, *Jeunesse v. the Netherlands*, Application No. 12738/10, para 109, 118; ECHR, 10 July 2014, *Mugenzi v. France*, Application No. 52701/09, para 45.

Facilitated family reunification of parents with unaccompanied minors, as specified in Art. 35 para 2a Asylum Act, also serves in general to promote the best interests of the child.⁸⁵

4.5 Duration of the procedure

A key issue affecting individuals involved in cases of family reunification is the duration of the procedure. Specifically, family reunification is legally not possible as a rule until the application for family reunification is approved by the competent authorities.

The General Administrative Procedures Act requires authorities to issue an official decision in response to applications submitted by parties without undue delay and no later than six months from receipt (Art. 73 General Administrative Procedures Act). As of 1 January 2014, the General Administrative Procedures Act generally applies to official procedures by administrative authorities (Art. I para 2 Act Introducing the Acts on Administrative Procedures).⁸⁶ The six-month time limit for issuing decisions therefore also applies to procedures by Austrian representation authorities (Loos, 2016). Consequently, procedures for family reunification under both the Asylum Act and the Settlement and Residence Act are subject to the six-month decision period as well. Similarly, the administrative courts are under obligation to hand down decisions on complaints without undue delay and within six months (Art. 34 para 1 Proceedings of Administrative Courts Act).

Yet, in practice, the duration of procedures depends largely on the workload and the staff resources of the authorities responsible in the particular case. Another key factor is cooperation by the parties involved, considering that procedures can progress more swiftly when correct and complete applications are submitted. The procedure is usually held up if documents are not available or the authorities have to request amendments.⁸⁷

85 Interview with Gerald Dreveny, Federal Ministry of the Interior, 24 October 2016.

86 See Art. 5 subpara 2 and subpara 10 Proceedings of Administrative Courts Act, FLG I No. 33/2013, available at [\(accessed on 7 November 2016\)](#).

87 Interview with Carina Royer, Federal Ministry of the Interior, 24 October 2016.

To shorten the duration of procedures, the authorities are careful to ensure that family members provide more than one contact address so that their availability can be guaranteed during the procedure.⁸⁸ Appeal proceedings can result in the procedure taking longer.

4.6 Challenges and good practices

In relation to the family reunification procedure as well, challenges and good practices can be identified.

In procedures both under the Settlement and Residence Act and under the Asylum Act, the **duration of the procedure** can be prolonged in particular where several authorities – in Austria and in other countries – are involved.

Procedures lasting for prolonged periods can become an issue particularly if the individuals concerned are minors. Pursuant to general public administration law, the relevant facts of a case are those existing when the authorities decide the case.⁸⁹ Consequently, if procedures are protracted, persons who are minors when the application is made could well reach majority age by the time the application is decided, so that family reunification is no longer possible. Those concerned can experience this as unduly harsh, especially where they are not responsible for the prolongation of the procedure. An exception has been specified only under the Asylum Act for cases of family reunification involving minor children and persons granted asylum or beneficiaries of subsidiary protection: the decisive fact here is minority age at the time when the application is submitted (Art. 35 para 5 Asylum Act).⁹⁰

A major challenge, especially in cases of family reunification with persons granted asylum and with beneficiaries of subsidiary protection, is the potential **lack of documents** proving family membership.⁹¹ A further

88 Interview with Doris Stilgenbauer, Office of the Provincial Government of Lower Austria, 24 October 2016.

89 See for instance Administrative High Court, 4 September 2003, 2003/17/0124; 28 January 2016, Ra 2015/21/0230.

90 See Administrative High Court, 28 January 2016, Ra 2015/21/0230.

91 Written query response by the Federal Office for Immigration and Asylum, 3 November 2016.

challenge is the recognition of documents, since official structures are practically non-existent in many countries from which third-country nationals flee and doubt is cast on the correctness of documents issued by those countries (cf. König/Kraler, 2013:13). There are reports in this regard of Austrian authorities ascribing hardly any plausibility to documents from countries such as Somalia or Afghanistan (cf. Kraler et al., 2013:75; EU Red Cross / European Council on Refugees and Exiles, n.d.:17; Weiss, 2011:2).

Under certain circumstances it is also difficult to **demonstrate a family relationship with non-biological children**, i.e. stepchildren and adopted children. In some countries, adoption is not a formal procedure and the family members are subsequently unable in some cases to present any documents (EU Red Cross / European Council on Refugees and Exiles, n.d.:23; Ecker, 2008:195). Another difficulty lies in the lack of recognition of marriages contracted solely based on tradition (i.e. marriages not recognized by the state), an example of which are marriages contracted only in accordance with Muslim ritual (Kraler et al., 2013:76).⁹²

With DNA testing, there is a risk that the children in question might be revealed not to be the biological children of both parents, potentially putting a tremendous strain on the family (see Kraler et al., 2013:77).

The requirement that a registered partnership has to have already existed in the country of origin (Art. 35 para 5 Asylum Act) can prove especially challenging to meet, especially for the same-sex partners of persons granted asylum or beneficiaries of subsidiary protection. The reason for this is that same-sex partnerships, if not impossible, are at least subject to strong social disapproval in many of the countries from which persons granted international protection originate (cf. Kraler et al., 2013:76).

One barrier seen in practice is that it is difficult in some areas to appear personally before the **representation authority**. Individuals applying for family reunification are required as a rule to appear personally at the representation authority (embassy or consulate; Art. 19 para 1 Settlement and Residence Act; Art. 11 para 1 Aliens Police Act). This

92 See also Der Standard, *Keine Zusammenführung der Familie: Vier Kinder warten auf ihre Mutter*, 5 May 2015, available at <http://derstandard.at/2000015277189/Keine-FamilienzusammenfuehrungVier-Kinder-warten-auf-ihre-Mutter> (accessed on 9 November 2016).

means that family members frequently have to travel great distances since the authorities representing Austria are often far away (Ecker, 2008:200; Strik/de Hart/Nissen, n.d.:34). This is particularly the case when there is no Austrian representation authority in the particular country (cf. Kraler et al., 2013:75, 77). For example, there is currently no Austrian representation authority in Afghanistan, Somalia or Sudan, so that in countries such as these family members actually have to travel to another country.⁹³ The expense associated with travel also poses a challenge for applicants. This problem could be alleviated by allowing applications to be submitted at the embassy of another EU Member State.⁹⁴

To receive access to a representation authority in another country, individuals are required to present an official document as identification. For those not having any official document to prove their identity, this requirement can represent a barrier (EU Red Cross / European Council on Refugees and Exiles, n.d.:18).

Other challenges arising in the family reunification procedure include the need to raise funding for travel to Austria (cf. Kraler et al., 2013:78) and the difficulties in communication ensuing where documents are issued exclusively in German by authorities.⁹⁵

Performing **DNA testing** is generally considered by the Federal Office for Immigration and Asylum as good practice for establishing blood relationships.⁹⁶ Another obvious good practice is to refund the expense of a DNA analysis.⁹⁷ Costs are to be refunded on request by a party to a procedure under the Asylum Act where the claimed family relationship is confirmed by the DNA analysis (Art. 13 para 4 Federal Office for Immigration and Asylum Procedures Act). However, it needs to be noted in this regard that in procedures under the Settlement and Residence Act the family members are always required to pay this expense themselves (Art. 29 para 2 Settlement and Residence Act).

93 See Federal Ministry for Europe, Integration and Foreign Affairs, *Austrian representations worldwide*, available at www.bmeia.gv.at/fileadmin/user_upload/maps/Vertretungen/vertretungen.html (accessed on 15 November 2016).

94 Interview with Daniel Bernhart, Austrian Red Cross, 19 October 2016.

95 Ibid.

96 Written query response of the Federal Office for Immigration and Asylum, 3 November 2016.

97 Interview with Daniel Bernhart, Austrian Red Cross, 19 October 2016.

The Federal Office for Immigration and Asylum also regards as good practice the **interviewing of sponsors and family members** by that authority and by the representation authority as part of the preliminary investigation. In the view of the Federal Office for Immigration and Asylum, its exchange of information with the representation authorities has also proven helpful in practice.⁹⁸

The **dissemination of information** via communities and through the “welcome desks” introduced in Austria is mentioned as a good practice for improving the information level of the individuals concerned (Huddleston, 2015:6; EU Red Cross / European Council on Refugees and Exiles, n.d.:14).⁹⁹

Another example of a good practice for overcoming challenges, is the **networking meetings** between representatives of the Federal Ministry of the Interior, the Federal Office for Immigration and Asylum, the Federal Ministry for Europe, Integration and Foreign Affairs, the United Nations High Commissioner for Refugees, and the Red Cross.¹⁰⁰

98 Written query response of the Federal Office for Immigration and Asylum, 3 November 2016.

99 European Union Agency for Fundamental Rights, *Thematic focus: Family tracing and family reunification*, available at http://fra.europa.eu/en/theme/asylum-migration-borders/overviews/focus-family?_cldee=a2tyYXR6bWFubkBpb20uaW50&recipientid=contact-5bd5eea4ed2de411825d00155d040a10-221a368430a54f2d9786bda692f295ea&urlid=0 (accessed on 11 October 2016).

100 Interview with Christian Fellner, Federal Ministry for Europe, Integration and Foreign Affairs, 24 October 2016.

5. RIGHTS OF FAMILY MEMBERS ARRIVING IN AUSTRIA UNDER FAMILY REUNIFICATION

The following chapter describes the rights of family members who enter Austria within the framework of family reunification. Issues discussed include in particular access to education, to gainful employment and to an independent residence title as well as the right to renewal of the residence permit originally issued.

The rights enjoyed by family members subsequently migrating to Austria significantly depend on the type of residence permit issued. Various residence permits can be issued to third-country nationals entering through family reunification. With family reunification under the Settlement and Residence Act, one of these permits can be issued: Red-White-Red Card Plus, Settlement Permit, Settlement Permit – Gainful Employment Excepted or Temporary Residence Permit – Family Cohabitation. When family reunification takes place under the Asylum Act, in contrast, family members can be granted asylum status or subsidiary protection. Which residence permit is issued to family members depends to a decisive degree on the status of the sponsor (Art. 46, Art. 50 and Art. 69 Settlement and Residence Act; Art. 35 Asylum Act; AT EMN NCP, 2015:36; Buschek-Chauvel/Chahrokh, 2015:20).

5.1 Access to education

Generally speaking, family members joining a sponsor with third-country citizenship in Austria enjoy the same right to education as the sponsor. The type of residence permit issued is usually of no significance for access to education.¹⁰¹

Family members can be granted integration support or integration assistance. This includes language courses and education and training courses (Art. 17 Settlement and Residence Act; Art. 68 Asylum Act). These

101 See for instance Art. 63 Universities Act 2002; Art. 17 and Art. 20 Compulsory Schooling Act; Art. 1 Vocational Training Act.

measures are not specified by law for individuals holding a Temporary Residence Permit – Family Cohabitation that is derived from the sponsor’s residence status, as this permit is intended only for a temporary stay in Austria.¹⁰²

Beneficiaries of subsidiary protection are not explicitly mentioned in law as beneficiaries of integration assistance, since only persons granted asylum are mentioned in the relevant provision (Art. 68 para 1 Asylum Act). Whether beneficiaries of subsidiary protection should also fall under this provision is questionable. After all, integration assistance can now also be accorded to asylum seekers to whom *international protection* (which also includes subsidiary protection)¹⁰³ is most likely to be granted. Legislators can hardly have intended to privilege asylum seekers most likely to receive subsidiary protection over individuals who have already received that status. Furthermore, both persons granted asylum and beneficiaries of subsidiary protection are required, following recognition of their status, to contact the Austrian Integration Fund for the purpose of integration support. This is a further indication that integration assistance can now also be accorded to beneficiaries of subsidiary protection.

Family members receiving a Red-White-Red Card Plus or a Settlement Permit can also receive from the Federal State a partial reimbursement of the cost of a German integration course if this is successfully completed within 18 months (see Art. 15 Settlement and Residence Act). A voucher for this purpose (blue federal voucher) is handed out to such individuals when they sign the Integration Agreement. The maximum cost contribution is a EUR 750 subsidy for German integration courses consisting of 300 instruction units each lasting 45 minutes. Where fewer instruction units are required, for instance because the person has previously acquired knowledge, the cost contribution is also reduced (Art. 10 Regulation on the Integration Agreement).¹⁰⁴ The certificate showing successful completion

102 Art. 17 para 1 in conjunction with Art. 2 para 3 Settlement and Residence Act; Art. 8 para 1 subpara 10 Settlement and Residence Act.

103 Cf. Federal Act Amending the Asylum Act 2005, the Aliens Police Act 2005 and the Federal Office for Immigration and Asylum Procedures Act, Government Proposal, Explanatory Notes, p. 2, available at www.parlament.gv.at/PAKT/VHG/XXV/II/II_00996/fname_498908.pdf (accessed on 13 October 2016).

104 Austrian Integration Fund, *Sprachportal. FAQ*, available at <http://sprachportal.integrationsfonds.at/faq.html> (accessed on 7 October 2016).

of the German integration course also serves as proof of having completed Module 1 of the Integration Agreement (Art. 14a para 4 subpara 1 Settlement and Residence Act; see Section 3.2).

5.2 Access to gainful employment

The right to pursue gainful employment, either as a self-employed or dependently employed person, depends to a decisive extent on the residence permit granted.

Individuals holding a Red-White-Red Card Plus, persons granted asylum and beneficiaries of subsidiary protection are permitted to pursue gainful employment on a self-employed basis and require no work permit to be dependently employed (see Art. 8 para 1 subpara 2 Settlement and Residence Act; Art. 1 para 2 (a) Act Governing the Employment of Foreigners; Art. 7 para 2 Federal Basic Welfare Support Act; Art. 26 Qualification Directive).

Persons holding a Temporary Residence Permit – Family Cohabitation are allowed to pursue dependent employment normally only after being granted a work permit (Art. 8 para 1 subpara 10 Settlement and Residence Act; Art. 3 para 1 and Art. 17 Act Governing the Employment of Foreign Nationals; Peyrl/Neugschwendtner/Schmaus, 2015:157; Abermann/Czech/Kind/Peyrl, 2016:806; Buschek-Chauvel/Chahrokh, 2015:26; AT EMN NCP, 2015:43). Family members of researchers and artists, on the other hand, do not require a work permit (Art. 1 para 2 (i) Act Governing the Employment of Foreign Nationals). Pursuant to Art. 32 Settlement and Residence Act, a condition for taking up gainful self-employment is a residence title “with a corresponding scope of purpose”. No legal provision is made for self-employed activity with a Temporary Residence Permit – Family Cohabitation (Art. 8 para 1 subpara 10 and Art. 69 Settlement and Residence Act). Individuals holding a Temporary Residence Permit – Family Cohabitation are consequently not entitled to pursue gainful employment on a self-employed basis.

A Settlement Permit, in contrast, entitles a person only to be gainfully self-employed, whereas that person is not permitted to be dependently employed (Art. 8 para 1 subpara 4 Settlement and Residence Act; Peyrl/

Neugschwendtner/Schmaus, 2015:153; Abermann/Czech/Kind/Peyrl, 2016:115).

The Settlement Permit – Gainful Employment Excepted does not allow the holder to pursue either type of employment, i.e. either as a self-employed or dependently employed worker (Art. 8 para 1 subpara 5 Settlement and Residence Act).

As a rule, a family member has at least the same right to access the labour market as the sponsor. The exception here is family members of third-country nationals holding a certain type of Settlement Permit, who are issued a Settlement Permit – Gainful Employment Excepted (Art. 46 para 5 Settlement and Residence Act). This disadvantage is counterbalanced by the fact that this form of family reunification with a sponsor holding a Settlement Permit is exempted from any quota (cf. Art. 46 para 4 Settlement and Residence Act). A derived Temporary Residence Permit – Family Cohabitation can also entail more restricted access to employment under certain circumstances. While a Temporary Residence Permit for artists includes permission to pursue self-employed activity, such employment is not permitted for example in the case of individuals holding a Temporary Residence Permit – Family Cohabitation.

5.3 Right to an independent residence permit

It is conceivable that family membership existing at the time of family reunification may no longer apply at a later point in time, for instance after a married couple is divorced or when minor children reach the age of majority. The key consideration in such cases is whether the family member reunified with the sponsor possesses an independent residence permit or whether that person's right of residence depends on the sponsor's.

The family member's independent right of residence is included in a Red-White-Red Card Plus, a Settlement Permit or a Settlement Permit – Gainful Employment Excepted. In contrast, family members holding a Temporary Residence Permit – Family Cohabitation enjoy only a derived right of residence (Art. 27 Settlement and Residence Act). The period of validity of a Temporary Residence Permit – Family Cohabitation depends on the validity of the Temporary Residence Permit held by the sponsor (Art. 69 para 1 Settlement and Residence Act).

Family members of persons granted asylum can obtain both a Red-White-Red Card Plus as well as asylum status themselves (Art. 46 para 1 subpara 2 (c) Settlement and Residence Act; Art. 34–35 Asylum Act). Family members of beneficiaries of subsidiary protection, in contrast, can be granted asylum status or subsidiary protection (Art. 34 para 3 Asylum Act).

As mentioned above, the Red-White-Red Card Plus is an independent residence title (Art. 27 para 1 Settlement and Residence Act). With family reunification under the Asylum Act, the principle of the most favourable treatment (*Günstigkeitsprinzip*) applies. This means that all relevant family members are generally to be granted asylum status or subsidiary protection status where only one family member has been granted such status (Art. 34 Asylum Act; Putzer, 2011:252). If family membership no longer exists at a later date, the principle of most favourable treatment would likewise appear no longer to apply.¹⁰⁵ In this case the family members can no longer benefit from the protection status accorded to the sponsor.

A fee of EUR 80 is due with applications for a Red-White-Red Card Plus (the fee is EUR 50 for minors; Art. 14 Tariff Item 6 para 3 (a) Fee Act). A fee of EUR 100 is generally due with applications for an entry visa (Art. 14 Tariff Item 8 para 1 (a) Fee Act). Another fee of EUR 20 is due when the Red-White-Red Card Plus is issued (the fee is EUR 50 for minors; Art. 14 Tariff Item 8 para 5 Fee Act). A fee is also specified in the Fee Act for collecting identification material, the amount of which is EUR 20 (Art. 14 Tariff Item 8 para 5b Fee Act).

Applications for asylum status and for subsidiary protection, in contrast, are not subject to any fees (Art. 70 Asylum Act).

Family members granted international protection can apply for the Permanent Residence – EU residence title after five years, provided that they meet the general requirements for obtaining a residence permit and have completed Module 2 of the Integration Agreement (see Art. 45 para 12 Settlement and Residence Act).

105 See Art. 2 para 1 subpara 22, Art. 3 para 4 in conjunction with Art. 7 para 1 subpara 2, Art. 8 para 4 and Art. 34 Asylum Act.

5.4 Right to renewal of a residence permit

Apart from being allowed to be reunified with their families in Austria, a key concern of family members is whether they are permitted to remain in Austria once the residence permit granted for family reunification expires.

When applying for renewal, family members must usually continue to satisfy the general requirements for obtaining a residence title (see Art. 24 para 3 Settlement and Residence Act). Where applicants for renewal do not meet these general requirements, the right to private and family life must also be considered (Art. 11 para 3 Settlement and Residence Act; see Section 3.1). Where the conditions for family reunification no longer exist, applicants for renewal need not satisfy the general requirements for obtaining a residence title where particularly exceptional circumstances exist (Art. 27 Settlement and Residence Act).

Family members who have subsequently migrated for family reunification may additionally have to complete Module 1 of the Integration Agreement. This requirement does not apply to family members holding a Temporary Residence Permit, persons granted asylum and beneficiaries of subsidiary protection. Exemptions have also been specified on grounds of age and state of health (see Section 3.2). Module 1 of the Integration Agreement normally has to be completed within two years. An extension of this period can nonetheless be granted in view of individual circumstances (Art. 14a Settlement and Residence Act).

Individuals failing to complete Module 1 of the Integration Agreement within this period must normally not be granted any further regular residence title (Art. 11 para 2 subpara 6 Settlement and Residence Act). A further residence title can nonetheless be granted if this serves to maintain the individual's right to private and family life in accordance with Art. 8 ECHR (Art. 11 para 3 Settlement and Residence Act; see Section 3.1).

5.5 Permanent residence and citizenship

Family members reunited with sponsors can generally be granted the **Permanent Residence – EU residence** title after five years, provided that they meet the general requirements for obtaining a residence title and have completed Module 2 of the Integration Agreement (see Section 3.2). It is not permitted, however, to change directly from a Temporary Residence Permit – Family Cohabitation to a Permanent Residence – EU residence title (Art. 45 Settlement and Residence Act). The Permanent Residence – EU residence title entitles holders to settlement in Austria for an indefinite period (Art. 8 para 1 subpara 7 Settlement and Residence Act).

The period between applying for asylum and the granting of international protection is partially counted towards the five-year eligibility period (Art. 45 para 12 Settlement and Residence Act; AT EMN NCP, 2015:56). Half of a residence period based on a Temporary Residence Permit – Family Cohabitation can also count towards fulfilment of the five-year period (Art. 45 para 2 Settlement and Residence Act).

Citizenship is usually granted to foreigners only after 10 years of regular residence (Art. 10 para 1 subpara 1 Citizenship Act; see AT EMN NCP, 2015:41–42). Persons granted asylum, in contrast, can obtain Austrian citizenship after just six years, and this also applies to family members entering under family reunification (Art. 11a para 4 subpara 1 Citizenship Act; AT EMN NCP, 2015:56). Incidentally, the granting of citizenship to foreigners can also be expanded to include the spouses or registered partners of the recipients where those individuals have also resided in Austria for at least six years (Art. 16 and Art. 60 Citizenship Act). Minor children who regularly reside in Austria as of the date when citizenship is applied for can also be simultaneously granted citizenship (Art. 17 Citizenship Act).

6. SELECTED COURT RULINGS RELATING TO FAMILY REUNIFICATION

The purpose of the following section is firstly to describe how rulings handed down in cases of family reunification by the Court of Justice of the European Union and the European Court of Human Rights have impacted the legal situation in Austria. Secondly, selected decisions handed down by Austrian courts in recent years will also be discussed.

6.1 Rulings by the courts at European level

The rulings by the two courts at European level have had a particular impact on the rulings of courts in Austria.

In the decisions *Parliament vs. Council* and *O., S. and L.*, the Court of Justice of the European Union established that the Family Reunification Directive has imposed on the Member States precise positive obligations with corresponding, clearly defined, individual rights. It requires them, in the cases determined by that Directive, to authorize the family reunification of certain members of the sponsor's family, without being left a margin of appreciation.¹⁰⁶ The Provincial Administrative Court of Vienna, to name one example, has deduced from these rulings the **direct applicability** of Art. 4 para 1 of the Family Reunification Directive.¹⁰⁷ This means that family members concerned can substantiate their case based directly on the relevant provision of the Family Reunification Directive, if Austrian legislators have not duly implemented that provision.¹⁰⁸

106 Court of Justice of the European Union, 27 June 2006, *European Parliament v Council of the European Union*, C 540/03, para 60; 6 December 2012, *O., S. and L. v. Maahanmuuttovirasto*, Joined Cases C356/11 and C357/11, para 70.

107 Provincial Administrative Court Vienna, 25 June 2015, VGW-151/068/4111/2015; 3 May 2016, VGW-151/068/10941/2014.

108 See for instance Court of Justice of the European Union, 19 November 1991, *Andrea Francovich and Danila Bonifazi and Others v Italian Republic*, Joined Cases C-6/90 and C-9/90, para 11.

As explained above, the fundamental right to **private and family life** plays a very important role in family reunification (see Section 1.3). The rulings handed down by the two courts at European level are also highly significant in this regard.

An example is the ruling by the Court of Justice of the European Union in case C-578/08 (*Chakroun*),¹⁰⁹ to which the Administrative High Court has referred on several occasions. The Administrative High Court described the effect of this ruling as follows:

*The ruling expresses, firstly, that falling below a specified minimum income must not in any case result in family reunification being denied without the situation of the applicant in the individual case being specifically assessed [...]. The Court of Justice of the European Union has also clearly signified, however, that when considering Art. 8 ECHR the fact of a marriage of long duration carries special weight with it.*¹¹⁰

From the decision handed down by the European Court of Human Rights in the case of *Tuquabo-Tekle*,¹¹¹ the Administrative High Court concluded in particular that a right to family reunification can be derived from Art. 8 ECHR under certain circumstances even if the child concerned is a minor of age 14 or over.¹¹²

The judgement by the European Court of Human Rights in the case of *Hode and Abdi* has also been cited several times in Austrian court rulings. In this judgement, the European Court of Human Rights considers it to be an inadmissible case of **discrimination** in regard to private and family life when, in the context of family reunification, refugees who married prior to fleeing are treated differently from those who married afterwards. Similarly, the European Court of Human Rights ruled in this case that, with regard to family reunification, the unequal treatment of refugees

109 Court of Justice of the European Union, 4 March 2010, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, C578/08.

110 See for instance Administrative High Court, 21 December 2010, 2009/21/0002; 22 March 2011, 2007/18/0689; 4 April 2011, 2008/21/0300; 26 January 2012, 2010/21/0346; 19 November 2014, 2013/22/0009.

111 ECHR, 1 December 2005, *Tuquabo-Tekle And Others v. the Netherlands*, Application No. 60665/00.

112 Administrative High Court, 10 December 2008, 2008/22/0103.

compared with other individuals entitled to residence is a violation of the prohibition on discrimination (see also Kessler/Zipfel, 2014:35–37).¹¹³ While this judgement has been cited several times in Austrian court rulings, as far as can be discerned it has never resulted in a ruling in favour of the claimants.¹¹⁴

With reference to the weighing of interests required by Art. 8 ECHR, the Federal Administrative Court has frequently referred to the decision of the Court of Justice of the European Union in case C558/14 (*Khachab*).¹¹⁵ The Federal Administrative Court cites the statement of the Court of Justice of the European Union that Art. 7 para 1 (c) of the Family Reunification Directive is to be interpreted

... as allowing the competent authorities of a Member State to refuse an application for family reunification on the basis of a prospective assessment of the likelihood of the sponsor retaining, or failing to retain, the necessary stable and regular resources which are sufficient to maintain himself and the members of his family, without recourse to the social assistance system of that Member State, in the year following the date of submission of that application, that assessment being based on the pattern of the sponsor's income in the six months preceding that date.

In the view of the Federal Administrative Court, this interpretation “makes it clear in any case that, within the framework of public interests in the context of family reunification, major significance may apparently be attributed to aspects of a country's economic prosperity.” This conclusion can hardly be drawn from the cited ruling by the Court of Justice of the European Union, however, as it is mainly concerned with interpreting the provision of the Directive referred to and not with the significance of a country's economic interests in relation to the weighing of interests referred to in Art. 8 ECHR.

113 ECHR, 6 November 2012, *Hode and Abdi v. the United Kingdom*, 22341/09.

114 See for instance Federal Administrative Court, 2 May 2016, W205 2009923-2; 6 February 2015, W152 1435193-1; Administrative High Court, 2 September 2014, Ra 2014/18/0062; 26 November 2014, Ra 2014/19/0117.

115 Court of Justice of the European Union, 21 April 2016, *Mimoun Khachab v. Subdelegación de Gobierno en Álava*, C558/14; see for instance Federal Administrative Court, 24 June 2016, W205 2114877-1; 24 June 2016, W205 2114872-1; 4 August 2016, W205 21216381.

Austrian courts have also referred to the preliminary ruling by the Court of Justice of the European Union in case C-338/13 (*Noorzia*), handed down at the request of the Austrian Administrative High Court. According to this ruling, the provision of the Austrian Settlement and Residence Act which specifies that spouses and registered partners must be at least **21 years of age** at the time of application in order to be considered family members entitled to family reunification does in fact conform to EU law.¹¹⁶

6.2 Court rulings at national level

Recent rulings in court cases at national level have also resulted in certain modifications related to family reunification.¹¹⁷

Specifically, the Austrian Administrative High Court ruled on 17 November 2011 that in certain cases family members are entitled to family reunification under Art. 8 ECHR even if such persons are not family members as legally defined in Art. 2 para 1 subpara 9 Settlement and Residence Act (see Section 2.2).¹¹⁸

In recent rulings the Constitutional Court has confirmed that the right to family life as specified in Art. 8 ECHR also has to be taken into account in family reunification procedures under the Asylum Act.¹¹⁹

In a decision handed down on 28 January 2016, the Administrative High Court ruled that the date of the decision and not of the application determines whether the parents of minor persons entitled to international

116 Court of Justice of the European Union, 17 July 2014, *Marjan Noorzia v. Bundesministerin für Inneres*, C-338/13; Administrative High Court, 9 September 2014, 2014/22/0001; Provincial Administrative Court Vienna, 11 April 2016, VGW-151/023/1243/2016.

117 Interview with Daniel Bernhart, Austrian Red Cross, 19 October 2016; Interview with Gerald Dreveny, Caroline Jennewein, Carina Royer, Federal Ministry of the Interior and Doris Stilgenbauer, Office of Provincial Government of Lower Austria, 24 October 2016; Interview with Christian Fellner, Federal Ministry for Europe, Integration and Foreign Affairs, 24 October 2016.

118 Administrative High Court, 17 November 2011, 2010/21/0494; cf. Administrative High Court, 13 November 2012, 2011/22/0074.

119 Constitutional Court, 6 June 2014, B 369/2013; 23 November 2015, E1510/2015, etc.

protection are to be considered family members of the minor (see Section 4.6).¹²⁰

The Administrative High Court ruled on 1 March 2016 that family members residing in other countries are not entitled to submit a written application for asylum. Instead, the court ruled, family members can apply to be granted a visa for the purpose of family reunification. A complaint can be lodged with the Federal Administrative Court if the application for a visa is denied. The Federal Administrative Court can in particular verify whether the estimate made by the Federal Office for Immigration and Asylum on the likelihood of international protection being granted is correct.¹²¹

120 Administrative High Court, 28 January 2016, Ra 2015/21/0230.

121 Administrative High Court, 1 March 2016, Ro 2015/18/0002.

7. STATISTICS

Also when considering statistical data on family reunification, a distinction has to be made between procedures conducted pursuant to the Settlement and Residence Act and procedures pursuant to the Asylum Act (see Section 1.1). Whereas statistics are available on regular family reunification under the Settlement and Residence Act, the extent to which family reunification takes place in asylum cases is not known based on statistics. Instead, estimates based on observations are available. The Federal Ministry of the Interior expects that, as part of family reunification, about 7,000 individuals will join persons granted asylum in Austria in 2016.¹²²

At about one third, family reunification under the Settlement and Residence Act accounted for a significant share of the immigration of third-country nationals to Austria in the last five years. A downward trend can nonetheless be identified from the data collected by Eurostat. Whereas the share of first-time residence titles granted to third-country nationals for the purpose of family reunification represented 39 per cent of all residence titles issued by Austria in 2011, the share had dropped to only 30 per cent or 15,529 residence titles by 2015 (see Figure 1).¹²³

When nationality, gender and age are considered, it should be stressed that less than half (43%) of all residence titles issued in Austria for family reunification in 2015 were for the purpose of family reunification with third-country nationals (6,692 residence titles).

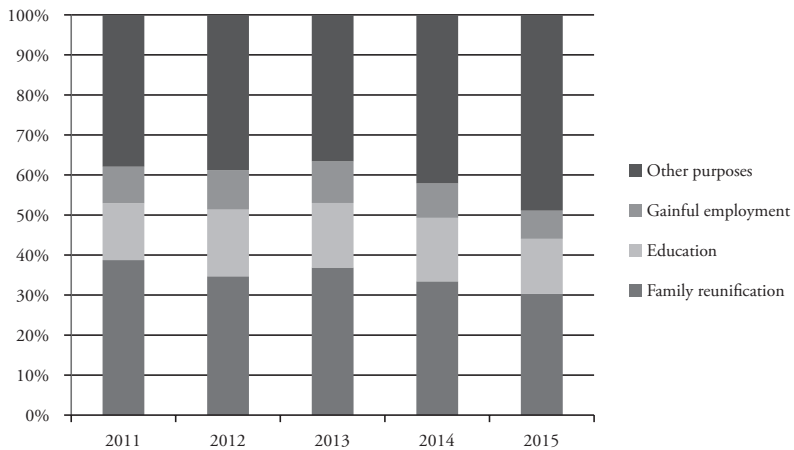
The majority (56%) of the residence titles granted for family reunification in 2015 were issued to female family members. About one quarter (29%) of the residence titles granted for family reunification in

122 Die Presse, *Familiennachzug: Österreich erwartet 7000 Angehörige*, 9 June 2016, available at http://diepresse.com/home/politik/innenpolitik/5007319/Familiennachzug_Osterreich-erwartet-7000-Angehorige (accessed on 25 November 2016).

123 It should be noted that beginning mid-2013 the immigration of Croatian citizens for family reasons ceased, since the EU accession of Croatia meant Croatian citizens no longer needed a residence permit. This factor, however, is negligible and has no influence on the declining trend.

2015 were issued to individuals under the age of 20. Minors under the age of 15 accounted for a 24 per cent share.¹²⁴

Figure 1: First-time residence titles granted in Austria by purpose (2011–2015)



Source: Eurostat [migr_resfirst], exported on 7 November 2016.

124 Eurostat [migr_resfirst], extracted on 7 November 2016.

8. SUMMARY AND CONCLUSIONS

At least with regard to regular immigration under the Settlement and Residence Act, family reunification accounted for about one third of the immigration of third-country nationals to Austria in the last five years, which is a significant share. Family reunification is accordingly an important policy issue in Austria; currently this applies in particular to family reunification with persons granted asylum and with beneficiaries of subsidiary protection.

Important specifications for Austrian legislation relating to family reunification derive in particular from the Family Reunification Directive and from the fundamental right to private and family life. Accordingly, the case-law rulings by the two courts of justice at European level are highly significant for cases of family reunification. The rulings by the Austrian Administrative High Court and the Austrian Constitutional Court also play a major role in practice.

The legal situation in Austria requires a distinction to be made between family reunification procedures conducted pursuant to the Settlement and Residence Act and procedures pursuant to the Asylum Act. The Asylum Act specifies provisions applying only to family reunification with persons granted asylum and with beneficiaries of subsidiary protection. Family reunification under the Settlement and Residence Act, on the other hand, is possible for individuals holding a residence title based on the Settlement and Residence Act as well as for persons granted asylum.

Austrian law makes no provision for family reunification as defined in this study for individuals holding residence titles for exceptional (humanitarian) reasons, or for asylum seekers. However, after one year as a holder of a “Residence Permit” or a “Residence Permit Plus” under the Asylum Act, a switch to the Settlement and Residence Act and thus family reunification is possible.

Generally speaking, spouses, registered partners and unmarried minor-age children are entitled to migrate to Austria for family reunification. The parents of minor children additionally fall within the scope of family reunification under the Asylum Act. Pursuant to the Asylum Act, any marriage or registered partnership must, however, already have existed in the country of origin or prior to entry into Austria.

The decisive requirements needing to be met for family reunification are accommodation to local standards, adequate health insurance coverage and a secure means of subsistence. Exemptions from these requirements exist in particular for family members of persons granted asylum where family reunification is applied for within three months of recognition of refugee status. The parents of unaccompanied minors granted international protection are also exempted from the requirements. Provision has also been made for other exemptions based on the right to family life as specified in Art. 8 ECHR.

Under recent provisions of law, family members of beneficiaries of subsidiary protection are subject to a three-year waiting period beginning with the granting of subsidiary protection.

Family reunification under the Settlement and Residence Act is subject to a quota in certain cases. Yet, with the number of applications dropping in recent years, the quotas are now hardly ever used up, so that the quota requirement plays less of a role in practice.

In addition, individuals applying under the Settlement and Residence Act generally have to provide evidence of elementary proficiency in German in order for family reunification to be approved. Various exceptions also exist in this case.

The family members concerned are required to submit their applications for family reunification to a competent Austrian representation authority in another country. That authority subsequently forwards the applications to the competent authorities in Austria. Once the competent authorities in Austria have reviewed the application and reached a positive decision, the representation authority can grant an entry visa for Austria. In Austria, family members can subsequently obtain the residence permit for the particular case.

The rights of family members who have entered Austria depend to a decisive extent on the type of residence permit obtained. This in turn depends on the residence permit held by the sponsor in the particular case.

Due to the complexity of the related procedures, both special challenges and good practices can be observed for family reunification. Specifically, impediments can arise through the need to demonstrate elementary proficiency in German. Such impediments are in many cases to be attributed to the distance applicants have to travel to institutions administering examinations and courses. Travelling to an Austrian

representation authority can also pose a challenge for family members of third-country nationals. A particular impediment in practice is the requirement to provide evidence of a secure means of subsistence. At the same time, good practices can also be recognized. Examples of such practices include the coordination meetings held among the most important institutions for the purpose of exchanging information and views. Another good practice to be mentioned, specifically in regard to fostering integration, is the availability of financial aid. This is administered in the form of federal vouchers that provide a contribution towards the cost of German integration courses. Refunding the expense of DNA testing where the result substantiates the applicant's claim in an asylum procedure is clearly also considered a good practice.

In view of the large number of asylum applications, especially in 2015, it is expected that family reunification will continue to play a major role particularly in asylum cases.

ANNEX

A.1 List of translations and abbreviations

English term	English abbreviation	German term	German abbreviation
Act Governing the Employment of Foreign Nationals	–	Ausländerbeschäftigungsgesetz	AuslBG
Act Amending the Aliens Law	–	Fremdenrechtsänderungsgesetz	FrÄG
Aliens Law Package 2005	–	Fremdenrechtspaket 2005	–
Aliens Police Act	–	Fremdenpolizeigesetz	FPG
aliens/ foreigners	–	Fremde	–
Asylum Act	–	Asylgesetz	AsylG
asylum seeker	–	AsylwerberIn	–
Austrian Integration Fund	–	Österreichischer Integrationsfonds	ÖIF
basic welfare support	–	Grundversorgung	–
Basic Welfare Support Agreement	–	Grundversorgungsvereinbarung	–
beneficiaries of subsidiary protection	–	subsidiär Schutzberechtigte	–
best interests of the child	–	Kindeswohl	–
Charter of Fundamental Rights of the European Union	CFR	Grundrechtecharta der Europäischen Union	GRC
Civil Service Health and Accident Insurance Act	–	Beamten-Kranken- und Unfallversicherungsgesetz	B-KUVG
complaint	–	Beschwerde	–
Compulsory Schooling Act	–	Schulpflichtgesetz	–
Court of Justice of the European Union	CJEU	Gerichtshof der Europäischen Union	EuGH
district administrative authority	–	Bezirksverwaltungsbehörde	BVB
EU Blue Card	–	Blaue Karte EU	–
European Convention on Human Rights	ECHR	Europäische Menschenrechtskonvention	EMRK
European Court of Human Rights	ECtHR	Europäischer Gerichtshof für Menschenrechte	EGMR
EU Member State	–	EU-Mitgliedstaat	–
European Migration Network	EMN	Europäisches Migrationsnetzwerk	EMN
European Union	EU	Europäische Union	EU
European Economic Area	EEA	Europäischer Wirtschaftsraum	EWR
family members	–	Familienangehörige	–
family reunification	–	Familienzusammenführung	–

English term	English abbreviation	German term	German abbreviation
Family Reunification Directive	–	Familienzusammenführungsrichtlinie	–
Farmers' Social Insurance Act	–	Bauern-Sozialversicherungsgesetz	BSVG
Federal Administrative Court	–	Bundesverwaltungsgericht	BVwG
Federal Basic Welfare Support Act	–	Grundversorgungsgesetz – Bund	GVG-B
Federal Chancellery	–	Bundeskanzleramt	BKA
federal constitutional act	–	Bundesverfassungsgesetz	BVG
Federal Constitutional Act on Children Rights	–	Bundesverfassungsgesetz über die Rechte von Kindern	BVG Kinderrechte
Federal Law Gazette	FLG	Bundesgesetzblatt	BGBl.
Federal Ministry for Europe, Integration and Foreign Affairs	–	Bundesministerium für Europa, Integration und Äußeres	BMEIA
Federal Ministry of the Interior	–	Bundesministerium für Inneres	BMI
Federal Office for Immigration and Asylum	–	Bundesamt für Fremdenwesen und Asyl	BFA
Federal Office for Immigration and Asylum Procedures Act	–	BFA-Verfahrensgesetz	BFA-VG
final	–	rechtskräftig	–
General Civil Code	–	Allgemeines Bürgerliches Gesetzbuch	ABGB
General Social Insurance Act	–	Allgemeines Sozialversicherungsgesetz	ASVG
General Administrative Procedures Act	–	Allgemeines Verwaltungsverfahrensgesetz	AVG
Geneva Refugee Convention	–	Genfer Flüchtlingskonvention	GFK
governor of the province	–	Landeshauptmann/ Landeshauptfrau	LH
in conjunction with	–	in Verbindung mit	iVm
Integration Agreement	–	Integrationsvereinbarung	–
International Organization for Migration	IOM	Internationale Organisation für Migration	IOM
Judiciary Law Collection	JLC	Justizgesetzsammlung	JGS
Member State	MS	Mitgliedstaat	–
minors	–	Minderjährige	–
National Contact Point	NCP	Nationaler Kontaktpunkt	NKP
no date	n.d.	ohne Jahr	o.J.
Permanent Residence – EU	–	Daueraufenthalt – EU	–
persons granted asylum	–	Asylberechtigte	–
posted workers	–	Betriebsentsandte	–
province	–	Bundesland	–
provincial governor	–	Landeshauptmann/-frau	LH
Provincial Law Gazette	PLG	Landesgesetzblatt	LGBl.

English term	English abbreviation	German term	German abbreviation
public peace and/or order	–	öffentliche Sicherheit und/oder Ordnung	–
Red-White-Red Card (Plus)	RWR Card	Rot-Weiß-Rot – Karte (plus)	RWR – Karte
registered same-sex partners	–	eingetragene PartnerInnen	–
Registration Act	–	Meldegesetz	–
Regulation on the Integration Agreement	–	Integrationsvereinbarungs-Verordnung	IV-V
representation authority	–	Vertretungsbehörde	–
residence permit	–	Aufenthaltsberechtigung	–
Residence Permit	–	Aufenthaltsberechtigung (Art. 54 para 1 subpara 2 AsylG)	–
Residence Permit Plus	–	Aufenthaltsberechtigung plus (Art. 54 para 1 subpara 1 AsylG)	–
residence title	–	Aufenthaltsstitel	–
residence title for exceptional circumstances	–	Aufenthaltsstitel aus berücksichtigungswürdigen Gründen	–
return decision	–	Rückkehrenscheidung	–
Settlement Permit	–	Niederlassungsbewilligung	–
Settlement and Residence Act	–	Niederlassungs- und Aufenthaltsgesetz	NAG
Settlement Permit – Dependant	–	Niederlassungsbewilligung – Angehöriger	–
Settlement Permit – Gainful Employment Excepted	–	Niederlassungsbewilligung – ausgenommen Erwerbstätigkeit	–
Social Insurance Act for Trade and Industry	–	Gewerbliches Sozialversicherungsgesetz	GSVG
sponsor	–	Bezugsperson/ zusammenführende Person	–
temporary residence permit	–	Aufenthaltsbewilligung	–
third-country nationals	–	Drittstaatsangehörige	–
United Nations High Commissioner for Refugees	UNHCR	Flüchtlingshochkommissariat der Vereinten Nationen	UNHCR
unaccompanied minors	UAM	unbegleitete Minderjährige	–
waiting period	–	Wartefrist	–

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- Interview with Carina Royer, Federal Ministry of the Interior, Department III/4, Residence and Citizenship Affairs, 24 October 2016.
- Interview with Gerald Dreveny, Federal Ministry of the Interior, Department III/5, Asylum and Alien Matters, 24 October 2016.
- Interview with Caroline Jennewein, Federal Ministry of the Interior, Department III/5, Asylum and Alien Matters, 24 October 2016.
- Interview with Doris Stilgenbauer, Office of Provincial Government of Lower Austria, Department for Police Matters and for Event Matters, 24 October 2016.
- Written query response by Karoline Janicek, Österreichisches Sprachdiplom Deutsch, 26 October 2016.
- Written query response by Katerina Wahl, Austrian Integration Fund, 3 November 2016.
- Written query response by the Federal Office for Immigration and Asylum, 3 November 2016.