**Austrian Replies to OHCHR Questionnaire “The rights of the child and family reunification”**

**Based on contributions by Ministry of the Interior, Ministry of Justice, several Federal Regions (Vienna, Carinthia, Vorarlberg, Salzburg)**

1. **a. How are the human rights of children separated from their families upheld in your country?**

The best interests of unaccompanied minors (UAM) in Austria are taken into account in all steps of the procedure – from arrival and application for asylum in Austria to the final decision on residence in the federal territory. The rights to protection, care and participation enshrined in the Convention on the Rights of the Child (CRC) are taken into account through a number of national provisions and procedural guarantees.

UAM are assigned a caregiver in basic care from the first day and they receive 24-hour-assistance, including specific psychological and/or psychosocial care and counselling. Additionally, culture-sensitive measures are taken to prevent violence and/or de-escalate conflicts. UAM under 14 are assigned a so-called ‘remunerated parent’ who supports them in everyday life. UAM are accommodated separately from adults in special care centers of the federal government. Access to public schools is constitutionally guaranteed for all, no distinction is made according to nationality or residence status or the status of the asylum procedure.

In most cases, regional **Child Protective Services** act as legal guardians for UAM and represent their interests in all relevant proceedings. UAM are mostly cared for in special care centres, taking care of the minors' everyday needs and ensuring their well-being and development. Child Protective Services assess whether (re)reunification with family members is in the best interest of the child and assist with locating family members. The federal regions (Bundesländer) provide child and youth welfare services for all areas of life.

*All* children and adolescents in institutional or alternative care have a **constitutionally guaranteed right to special state protection and assistance**, in accordance with Article 2 para. 2 of the Federal Constitutional Law on the Rights of the Child (BVG-Kinderrechte): "Every child who is permanently or temporarily removed from his or her family environment, which is the natural environment for the growth and flourishing of all its members, especially children, is entitled to special protection and assistance from the state".

Family unity is an important principle in Austrian asylum and foreign law. Concerning the right to family life/reunification of families **two intersecting bodies of law concerning separated families and their reunification** exist: 1) The right to family unification within national law (Sections 34 sq. Asylum Act 2005), applicable for recognized refugees or holders of subsidiary protection wanting to reunite with family members outside the EU and 2) the Dublin III Regulation,[[1]](#footnote-1) applicable for families separated within the European Union. The Dublin III Regulation explicitly refers to the best interest of the child as a primary consideration, and sets forth guarantees for the best interest of the child.

There is a legal distinction between persons with international protection status (asylum) and others with subsidiary protection status (temporary protection due to non-refoulement). Persons granted asylum have the right to apply for family reunification without delay. For persons enjoying subsidiary protection, there is a three-year waiting period before they can apply for family reunification.

**b. What are the priorities to strengthen global and national frameworks for the prevention of family separation?**

The general principle of taking into account the best interests of the child, as defined in the CRC, requires that the best interests of the child be a primary consideration in all actions affecting children and youth.

In Austria, several provisions of the CRC – including the primacy of the best interests of the child – are enshrined at constitutional level.[[2]](#footnote-2) The constitutionally guaranteed best interests of the child must therefore be taken into account in all decisions made by authorities and courts and thus included in the balancing of interests. This applies both to legislative measures and to decisions in individual cases. In proceedings before the Federal Office for Immigration and Asylum (Bundesamt für Fremdenwesen und Asyl BFA), the best interests of the child must be given priority.

The BFA's qualitative standards are based on laws and ordinances and are laid down in internal decrees and binding work instructions, which are brought to the attention of all employees and must be observed by them.

In principle, all relevant provisions of EU and international law, such as the legal acts of the Common European Asylum System and the Geneva Refugee Convention, must also be taken into account in national questions of the right to remain for unaccompanied minors. The right to remain during the asylum procedure and the rules for granting or withdrawing asylum or subsidiary protection status as well as the suspensive effect of legal remedies are clearly determined by European law. Whether a residence title going beyond this is granted nationally for reasons worthy of consideration is always based on a case-by-case examination. All relevant provisions of constitutional, European and international law, in particular the CRC and the ECHR, are taken into account.

With regard to the concrete procedure of an examination of the best interests of the child, it should be noted that this is always a case-by-case examination with a large number of different aspects, which is why only an exemplary list is possible. For example, when assessing the credibility of a minor's statement, the minor's age and stage of development are also taken into account, and accordingly a lower standard is applied to the comprehensiveness of the impressions described.

Section 18 para. 2 Asylum Act 2005 provides for the **obligation to search for family members**, in implementation of the obligations under EU law (including Article 31 para. 5 Qualification Directive). Accordingly, in the case of UAM (from the age of 14), the BFA must conduct a search for family members in the country of origin, in a third country or Member State, as possible. In case of UMF below the age of 14, the BFA has to support them in their search for family members upon request.

**2. a. How can the right to family life be upheld for children in cross-border situations, particularly migrant children who are separated from their families (taking into consideration Article 10 of the Convention on the Rights of the Child)?**

Family members of refugees can submit an application for family reunification at the Austrian diplomatic/consular missions abroad. The application is further processed by the BFA, which performs a probability forecast. If the granting of a protective status is deemed probable, a visa is issued by the diplomatic/consular mission. The family reunification process protects the "continuation of an existing family life" in accordance with Article 8 ECHR – “family life” must therefore already exist at the time of the relevant decision.

**b. How can the best interests of children separated from their families in cross-border situations, in particular migrant children, be more effectively upheld without discrimination?**

Among some recommendations that have been voiced are:

- Legal anchoring of a mandatory comprehensive examination of the best interests of the child in the entire asylum procedure based on Section 138 Civil Code, supplemented by criteria such as ties and socialisation in Austria, length of stay in relation to age, physical and mental health (trauma consequences) as well as access to the health system, chances of survival, education and development opportunities in the country of origin.

- Age-appropriate and native language information on their rights in the asylum procedure, children's rights and aid organisations for asylum seeking minors prior to their first examination.

- Prompt appointment of a qualified and trained legal guardian for unaccompanied

minors seeking asylum.

- From the first day of stay in Austria, best possible accommodation and care in pedagogical institutions appropriate to the age of the children and adolescents instead of in unsuitable large-scale accommodations.

For unaccompanied minors,[[3]](#footnote-3) the residence title "Red-White-Red - Card plus" (Section 41a (10) Settlement and Residence Act) is provided for. The "Red-White-Red - Card plus" takes into account both the issuance of a residence title on the basis of Article 8 ECHR or on the basis of particularly serious grounds and is intended to strengthen protection in the best interests of the child. The minor must be in the not only temporary care of foster parents or of Child Protective Services – on the basis of a court order, a law or an agreement between the natural parents and the Child Protective Services. This residence title can be issued under facilitated conditions and is free of charge. If the family members can subsequently be located and if it is in the best interest of the child, family reunification is to be carried out.

**3. a. What are the main human rights concerns for children living in conflict, children in detention or whose parents are detained, or children allegedly associated with terrorism or terrorist groups, regarding their right to be reunited with their families?**

There are a variety of human rights issues for children living in the above conditions, such as: Their right to life, to freedom, their right to be protected from inhumane treatment, the presumption of innocence, and of course the right to a private/family life.

**b. How can the best interests of children separated from their families in these situations be more effectively upheld without discrimination?**

Arguably the most important step is legal guarantees that establish and protect the above rights as subjective rights with concrete remedies for those affected.

Child Protective services have the task of safeguarding the interests of children who have been separated from their parents. For this purpose, the guardianship court may transfer custody to the competent regional Child Protective Services (Section 209 Civil Code). In case of imminent danger, the child and youth welfare office can take immediate measures for the welfare of the child (Section 211 para. 1 Civil Code).

Detention:

Imposing detention pending deportation to secure repatriation is a measure of last resort; an alternative measure always has priority. Minors under the age of 14 may not be placed in detention pending deportation.

If minors are placed in detention pending deportation, they shall be detained separately from adults. If detention pending deportation has also been imposed on a parent or legal guardian, minor detainees awaiting deportation shall be detained together with the parent or legal guardian unless their best interests require separate detention. If an alternative measure is ordered against a minor, such a measure is also to be preferred to detention for the entire family (parent or legal guardian, adult siblings, etc., for whom the conditions for imposing detention pending deportation are met).

Returns of families and children are only carried out by specially trained bodies of the police who wear civilian clothes when on duty. They are professionally trained for this task and pay special attention to the best interests of the child during the return process. The number of staff and the composition of the return team are based on the assessment of known factors such as, in particular, family size and structure including age and physical and psychological condition. In the case of returns in the course of charters, a medical doctor is also always on board.

4**. What are the main gaps and strategic priorities to strengthen international cooperation on upholding the rights of children in cross-border situations who are separated from their families?**

1. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013. [↑](#footnote-ref-1)
2. Federal Constitutional Law (BVG) on the Rights of Children, Federal Law Gazette I No. 4/2011 (BVG Children's Rights). [↑](#footnote-ref-2)
3. Or in cases where it is no longer possible for the child to remain in the family due to incidents in the family, e.g. neglect or abuse. [↑](#footnote-ref-3)