

# Questionnaire of the Special Rapporteur on the human rights of migrants: Ending immigration detention of children and seeking adequate reception and care for them

## Contribution by the Austrian Ombudsman Board

- (1) Please provide information on any legislation or policy that prohibits or restricts the use of Immigration detention of children and their families in your country. Grateful if you could kindly submit the original text of the legislation or policy, accompanied by an English translation if it is in a language other than English, French or Spanish.

Pursuant to § 76 para 1 of the Aliens' Police Act (*Fremdenpolizeigesetz*), underage minors, i.e. children under the age of 14, must not be held in detention pending forced return. In relation to minors of age (i.e. children from the age of 14 to 18), the Federal Office for Immigration and Asylum has to apply milder measures, unless certain circumstances give reason to believe that the purpose of detention pending forced return may not be achieved by such milder measures. A minor of age should not be held in detention pending forced return longer than for a period of 3 months (§ 80 para 2 Z.1 of the Aliens' Police Act). In general, detention pending forced return should be kept as short as possible for all those concerned (§ 80 para 1 of the Aliens' Police Act).

- (2) Please provide information on existing non-custodial alternatives to immigration detention of children in your country (e.g. community-based reception solutions) and elaborate how these alternatives effectively enhance the protection of the rights of migrant children and their families.

Asylum seekers may only be put in detention pending forced return if it is absolutely necessary to ensure that the person's stay in the country is terminated with the available measures of the asylum proceedings. Detention pending forced return may only be ordered if the asylum seekers' stay poses a threat to the public order or safety, if there is a risk of absconding and if the detention measure can be considered proportionate. To put an end to the stay of other persons (i.e. not asylum seekers but e.g. persons who do have a resident permit) detention pending forced return may only be applied if it is absolutely necessary to secure the proceedings, if there is a risk of absconding, if the detention measure can be considered proportionate or if the conditions of Article 28 (1) and Article 28 (2) of the Dublin Regulation apply (§ 76 para 2 of the Aliens' Police Act).

Even if the above listed reasons exist, the Federal Office for Immigration and Asylum has to apply milder measures, provided it has reason to believe that the purpose of detention pending forced return can be achieved by such milder measures (§ 77 para 1 of the Aliens' Police Act).

Such milder measures include for example a directive to be accommodated in facilities provided by the Federal Office for this specific purpose, to report back to the Police Department of the competent province on a regular basis, or to deposit a fair amount of financial guarantee with the Federal Office (§ 77 para 3 of the Aliens' Police Act).

- (3) Please provide information on any existing good practices or measures taken in your country to protect the human rights of migrant children and their families while their migration status is being resolved, including inter alia their rights to liberty, family life, health and education (e.g. by ensuring effective access to inter alia adequate reception, healthcare, education, legal advice, family reunion).

Asylum seekers receive basic care from the Federal State once they have filed their application and are provided with accommodation, food and medical care pursuant to the Basic Welfare Support Act (*Grundversorgungsgesetz Bund 2005*). They are able to pursue gainful employment after three months, pursuant to the Act Governing the Employment of Foreigners (*Ausländerbeschäftigungsgesetz*).

After admission, they are transferred to the basic care providers of the provinces where they will receive basic support as well as a small allowance in accordance with the Basic Provision Agreement of the nine Austrian provinces (*Grundversorgungsgesetze der neun Bundesländer*). Social support, training to learn German as well as integration courses and help to structure the daily routine are also provided for.

Facilities to fulfil the reception conditions under the Basic Provision Agreement are not places where persons are deprived of their liberty.

Children have the right to go to school within the legal framework of compulsory education. Compulsory education starts on September 1<sup>st</sup> of the year in which the child reached the age of six pursuant to § 2 of the Compulsory Education Act (*Schulpflichtgesetz*) and will last for nine years (§ 3 of the Compulsory Education Act). Children who only stay in Austria for a certain period of time and who fulfil the criteria, have the same right to attend school as any other children that are subject to mandatory schooling (§ 17 of the Compulsory Education Act). A voluntary 10<sup>th</sup> school year is also possible (§ 18 of the Compulsory Education Act).

During the admission proceedings asylum seekers must be provided with a legal adviser free of charge (§ 49 para 1 of the Federal Office for Immigration and Asylum Procedural Act). During the proceedings before the Federal Office, consultative support can be provided. Legal adviser who take on this role, support and advice asylum seekers free of charge and within their possibilities, they assist to arrange the service of an interpreter if need be and they provide repatriation counselling if necessary. There is no legal claim to consultative support (§ 50 of the Federal Office for Immigration and Asylum Procedural Act).

If it is intended that the application is to be resolved negatively the asylum seeker shall be referred to a legal adviser (§ 29 para 4 Asylum Act). If the Federal Office has resolved the application negatively and the asylum seeker wishes to appeal against this decision, he/she is

entitled to the assistance of a legal adviser and to support when filing the appeal (§ 50 of the Federal Office for Immigration and Asylum Procedural Act).

Foreigners, whose asylum application has been dismissed or resolved negatively, and Asylum seekers who do not have the financial means but are ready to return to their home country or – in case they are stateless – to the country of origin, can be granted repatriation support. This support includes at least the necessary costs for their return journey (§ 12 Basic Welfare Support Act 2005). Special centres who offer such repatriation counselling have been established.

- (4) Please indicate any challenges and/or obstacles in the development and/or implementation of non-custodial alternatives to immigration detention of children and their families.
  
- (5) What support could other stakeholders (other than your Government) provide to strengthen the development and/or implementation of non-custodial alternatives to immigration detention of children and their families that enhance the protection of their rights?

The Austrian Ombudsman Board cannot provide such additional support due to its clearly defined constitutional mandate. However, in order to prevent persons from detention pending forced return, NGOs can provide accommodation to those, whose asylum proceedings have been resolved negatively and who are therefore no longer covered by the basic reception conditions. When authorities have to enforce measures to terminate a person's stay in the country, they consider it more difficult to get a hold of that person, if he/she does not have accommodation; as a consequence, persons without accommodation will be more likely held in detention pending forced return.