FUNDAMENTAL RIGHTS SERIES

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
(CFR-CDF)
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN AUSTRIA IN 2003

January 2004

Reference : CFR-CDF.repAT.2003

The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union. The content of this opinion does not bind the European Commission. The Commission accepts no liability whatsoever with regard to the information contained in this document.

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[*] submitted to the Network by Manfred Nowak and Alexander Lubich.

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

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lituanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. Slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Dean Spielmann (Luxembourg), Pavel Sturma (Rép. Tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par Olivier De Schutter, assisté par Valérie Verbruggen.
Les documents du Réseau peuvent être consultés via :
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The EU Network of Independent Experts on Fundamental Rights is composed of Elvira Baltutyte (Lithuania), Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), Rick Lawson (The Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Dean Spielmann (Luxembourg), Pavel Sturma (Czech Republic), Ineta Ziemele (Latvia). The Network is coordinated by Olivier De Schutter, with the assistance of Valérie Verbruggen.
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PRELIMINARY REMARKS

The most serious and systematic violation of human rights in Austria during 2003 concerns the asylum policy of the current Minister of the Interior, Ernst Strasser. In order to combat a certain increase of asylum requests the Minister, in October 2002, issued a decree which denied access to the Federal care taking programme for asylum seekers from certain countries. Although this policy constitutes a violation of Austria's obligations under the Geneva Refugee Convention as well as a violation of various human rights of the asylum seekers concerned, such as the rights to an adequate minimum standard of living, including adequate food, clothing and housing, the right to social security, the right to health (Articles 9, 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) or the right to equality and non-discrimination (Article 26 of the International Covenant on Civil and Political Rights, Articles 1(3) and 2 of the International Convention on he Elimination of All Forms of Racial Discrimination), and although this inhuman policy of sending asylum seekers in need of protection onto the street was strongly criticized by the opposition parties, civil society, UNHCR, the media and the Austrian Human Rights Advisory Board, which issued fairly strong recommendations to the Minister in January 2003, the Minister continued throughout the year to deny these essential human rights to a considerable number of asylum seekers in need. Only after the Supreme Court, for the second time, decided in August 2003 that the State could not escape its legal obligations to act in conformity with fundamental human rights and that the discriminatory policy of the Minister of the Interior violated the fundamental values of the Federal Care (Asylum Seekers) Act, did the Minister finally revoke this Decree. At the same time, he introduced, however, a bill for an amendment of both the Asylum Act and the Federal Care Act to Parliament. Both amendments, which have been adopted in a slightly revised manner by Parliament in November, constitute a further deterioration of the legal protection of refugees and asylum seekers in Austria and have been strongly criticized by opposition parties, experts, non-governmental organisations and the media.

Closely related to the restrictive asylum policy is the practice of the Austrian aliens' police to return illegal immigrants, including asylum seekers whose asylum requests are simply ignored, to Hungary, Slovakia and the Czech Republic, which are regarded as so-called "safe third countries". One example of this illegal policy is a group of 74 Chechnyan refugees, whose asylum requests were simply ignored by the Austrian authorities, and who on 1 November were forcibly handed over to the Czech authorities after Minister Strasser had declared that they had been "convinced" not to apply for asylum in Austria in view of the non-existing possibility of being taken into Federal care. In a decision of 15 May 2003, the UN Human Rights Committee, in the case of Sholam Weiss, strongly criticized the Austrian authorities for having extradited the applicant to the US in blatant violation of several human rights enshrined in the International Covenant on Civil and Political Rights and in violation of an interim measure ordered by the Committee.

Racial discrimination and xenophobia against certain groups of foreigners, above all against African immigrants, continues to be a major human rights problem and might also have been the reason for the death of Cheibani Wague, a 33-year-old Mauretanian citizen, shortly after his arrest on 16 July 2003 in Vienna. Whereas the respective ambulance team of the City of Vienna involved was immediately suspended from field service pending the investigations, the Minister of Interior did not see any necessity to react in a similar fashion vis-à-vis the police officers involved. He was also criticized by the Human Rights Advisory Board for not granting it access to relevant documents in this case. The investigations by the police and the investigative judge are still pending.

Although the Ludwig Boltzmann Institute of Human Rights had already in 2001 prepared a comprehensive draft for a general anti-discrimination law aimed at implementing the EU

Racial Equality and Employment Equality Directives of 2000, the Austrian Government and Parliament did not take any action in this regard. The Austrian Equal Treatment Act, which was prepared without any participation of civil society in 2003, represents only a minimum solution which can barely be considered a proper implementation of the said EU Directives. It contains no shift of the burden of proof to the discriminator once the victim has established a prima facie discrimination, as required by the EU Directives, NGOs are not entitled to file class actions in cases of discrimination, and the Equal Treatment Commission, whose members will have to work on a voluntary basis, will be a fairly inefficient monitoring body. Furthermore, the Equal Treatment Act does not contain any specific protection for persons with disabilities, as the Government had promised before, or for gays and lesbians who in Austria continue to be subject to widespread discrimination by both governmental authorities and private individuals. During 2003, the European Court of Human Rights decided in three different cases that the Austrian authorities had discriminated against the applicants on the ground of their sexual orientation in the enjoyment of their right to private and family life and respect for one's home, and thereby had violated Article 14 in conjunction with Article 8 of the European Convention on Human Rights.

Another serious problem of human rights related to illegal immigrants and asylum seekers are the deplorable conditions of detention in most of the old police jails, which are today primarily used for detention of aliens pending deportation (*Schubhaft*). The Human Rights Advisory Board and its six Commissions, which regularly inspect all places of detention under the authority of the Minister of Interior, have continued in 2003 to criticize these prison conditions, above all in the two police jails in Vienna, and to recommend the establishment of special *Schubhaft* detention centers, in which human rights of detainees should be restricted only to a degree absolutely necessary for upholding internal security standards and for the protection of other detainees.

Although Austria had ratified international human rights treaties which guarantee the right to strike, above all Article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights, no implementing legislation has ever been adopted. For many years, this has created no practical problem as strikes in Austria have traditionally been measured in seconds rather than hours or days per year. This situation of social peace and tranquility has gradually been changing under the present Government, and the year 2003 has seen more strikes in Austria than in any other year after 1945. As a consequence, the courts are likely to be confronted with a wave of litigation, which will have to be decided without a proper legal framework.

During 2003, the European Court of Human Rights held in a number of judgments that the Austrian courts had violated Article 6 of the European Convention on Human Rights, as the respective proceedings were not conducted within a reasonable time. Particularly serious is the situation of the last instance Administrative Court, which has been suffering for many years from a structural problem of being overloaded with cases and understaffed. For many years, experts and non-governmental organisations have demanded the establishment of regional administrative courts in the nine Federal Provinces as a solution to the structural problems of the Administrative Court, which has also been found by the Strasbourg Court to violate Article 6 of the European Convention for not holding public hearings in many cases.

It is a matter of growing concern that the Austrian authorities, for purely political reasons, often seem to deliberately violate international obligations in the field of human rights. The asylum policy of the Minister of Interior is only the most blatant example. Another example is the open disregard for decisions of the Human Rights Committee, as illustrated by the extradition case of Sholam Weiss. Similarly, EU Directives, such as the two anti-discrimination Directives of 2000 or the Council Directive of January 2003 on minimum standards for the reception of asylum seekers, tend to be ignored or implemented only belatedly and half-heartedly.

Finally, the ongoing undertaking to completley reform the Austrian Constitution of 1929 and to consolidate the scattered constitutional provisions in one single document deserves to to be mentioned in this report. Formed after the European model, an "Austria Convention" (*Österreichkonvent*) was established in which experts and politicians work together in several task groups in order to elaborate a new draft constitution by the end of 2004. One of the task groups is specifically concerned with human rights and is working on a comprehensive catalogue of rights that shall be built in the constitutional text. Pending its final outcome the common national effort clearly deserves the benefit of doubt.

CHAPTER I : DIGNITY

Article 1. Human dignity

No significant developments to be reported

Article 2. Right to life

National legislation, regulation and case law

In a unanimous vote on 13 November 2003 Parliament ratified Protocol no. 13 of the European Convention on Human Rights, concerning the abolition of the death penalty in all circumstances. The provisions will be directly applicable and rank at constitutional level yet will not change the present law, since Parliament has completely abolished the death penalty already back in 1968.

Practice of national authorities

Following the death of Cheibani Wague on 16 July 2003 during a police operation in the Vienna Stadtpark, investigations have been launched by the Public Prosecutor's Office and the independent Human Rights Advisory Board.

The 33-year-old national of Mauretania resisted (reportedly violently) a police check and was arrested in face-down position with police officers pressing him to the ground and ambulance men including an emergency physician standing by without intervening. The case reached high public awareness when an amateur video-tape covering the entire operation was broadcast on television. Whereas the involved ambulance team was immediately suspended from field service pending the investigations, the Ministry of the Interior did not see any necessity to react likewise. Moreover, the Ministry filed a statement of facts to the Prosecutor's Office suspecting the emergency physician of negligent homicide but not the police officers. The so attacked physician declared repeatedly that he was prevented by the police from continuously aiding Cheibani Wague. While the police and ambulance blamed each other for the deadly incident, criticism of the operation itself and the handling of the case by the police in the aftermath have grown. It has been pointed out, for instance, that since the Bureau of Internal Affairs (BIA) within the Ministry of the Interior was charged with conducting the investigations, meaning effectively that the police are investigating themselves, there is little prospect of an impartial examination. Half a year later there is still no indictment and it appears that the BIA protracts the proceedings. The Bureau was heavily criticised by the Human Rights Advisory Board for not granting it access to documents for its own separate investigation. Finally, the competent judge admitted access directly at court, but the Advisory Council still issued a recommendation to grant unconditional and easy access to documents of the Ministry of the Interior and all subordinated agencies. As a consequence of the case the Advisory Board will also examine the internal regulations of the police on arresting and fixing of persons.

Meanwhile, in November 2003, the coroner delivered the final forensic report finding that Cheibani Wague died of a failure of the cardiovascular system due to a congenital weak heart. In addition he had smoked cannabis of good quality that evening which contributed to his bad physical condition. Suffocation was in fact ruled out as being the reason for his death. However, the coroner's report supports eye witnesses, who claim that Cheibani Wague was mistreated by the police, by describing several haematoma on arms and legs and in the region

of his neck. Given those facts, it should be self-evident from the viewpoint of human rights that the issue be clarified in due proceedings before a criminal court.

Article 3. Right to the integrity of the person

National legislation, regulation and case law

The Convention on Human Rights and Biomedicine of the Council of Europe has been open for signature in Oviedo since 4 April 1997 and entered into force on 1 December 1999. However, Austria has not yet signed the Convention, let alone ratified, despite a recommendation to that end by the Bioethics Commission[1] dating from 11 February 2002 which it renewed on 12 February 2003. The Commisssion argues that the uncertainty of some of the Convention Articles is not worse than that of existing constitutional rights and provisons and would pose no serious problem as it is conceived as a framework document that requires specific implementation through domestic laws. Moreover, Article 27 ensures that a higher level of protection in domestic law would be left untouched and merely guarantees a European-wide minimum standard. Accession to the Biomedical Convention would rather increase the level of protection in certain respects such as organ and tissue donations between living persons, which is not expressly regulated in Austrian law, or the prohibition on making the human body a source of profit or the need for establishing a binding informed consent before dealing with bodily substances in all circumstances, which is not regulated comprehensively either. Not signing the Convention also bars Austria from participating in future developments and European consensus laid down in protocols like that on the prohibition of reproductive cloning.[2]

In its recommendation of 12 February 2003 the Bioethics Commission unanimously and strongly objects to reproductive cloning, i.e. cloning to produce children. Following reasons are given to support its stance: the prohibition on a total instrumentalisation of the human being grounded in human dignity, the right to have two biological parents, the irresponsibility of testing human beings in contradiction to basic medical and research ethics, the high risks involved for mother and child, the ethical boundaries to the reproductive autonomy of parents, the undermining of family and intergenerational realations, and the economisation of human beings. Even though reproductive cloning is currently understood as prohibited under Austrian law, the Commission would favour an express prohibition which sends a clear signal in order to raise public awareness without, however, prejudicing an assessment of the so-called therapeutic cloning.

This assessment is still missing in Austria and it will be very difficult to find agreement on how to solve the issue of therapeutic cloning, since even among Commission members the opinions held diverge remarkably. The debate is very young in Austria, for there has not been any specific research activity in the field of embryonic stem cells and no pertaining reasearch proposals have been submitted, but none the less it is conducted ardently. Advocats, who are mainly comprised of the medical profession, argue that therapeutic cloning does not create any new being but only a kind of offshoot – admittedly with the potential to become a full human being – that could be utilised to help millions of ailing people in the future. Opponents, who mainly come from a theologic-ethical or philosophic background, criticise that the distinction between good and bad cloning cannot be determined solely by the intention behind it.

[1] The Bioethics Commission is an advisory body to the Federal Chancellor established by statutory instrument in July 2001 (BGBL II 226/2001), www.bka.gv.at/bioethik

[2] (First) Additional Protocol to the Biomedicine Convention, ETS no. 168, signed in Paris on 12 January 1998

The legal framework for cloning is provided by the Reproductive Medicine Act 1992[3] (*Fortpflanzungsmedizingesetz*), in particular its sections 3 and 9, which everyone agrees prohibit at least implicitly the creation of a genetically identical human being. But the question remains whether this prohibition should not be framed in fundamental rights terms instead and whether the maximum administrative fine of € 36.000 is deterrent enough to prevent any offences. On the other hand it is not clear whether cloning for therapeutical reasons is presently allowed or not. Undoubtedly, according to section 9(1) the law does not permit the use of any left-over fertilised embryonic stem cells which are no longer necessary for effecting pregnancy after in-vitro-fertilisation. But what about the most interesting technique in therapeutic cloning of substituting for the cell nucleus in a human egg cell a somatic cell nucleus? Neither the Reproductive Medicine Act nor the Genetic Engineering Act (*Gentechnikgesetz*) give any useful information on that issue. Recourse to the fundamental right to life does not help either, since the case law of the Constitutional Court does not extend the protection to the unborn life, and the right to human dignity does not have any correspondence in the constitution. Sometimes it has also been argued that from an ethical point of view it could be justified to relax the current law in one point by allowing the utilisation of redundant fertilised embryonic cells instead of destroying them, while clearly ruling out the possibility of therapeutic cloning. Although it is often claimed that the future of stem cell research lies in the employment of adult stem cells, which is ethically far less problematic, the whole field of using embryonic stem cells for medical research requires some legal clarification.

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

International case law and concluding observation of international organs

On 25 September 2003, Austria signed the Optional Protocol to the UN Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment (OP-CAT), which deals with allowing regular inspections to places of detention under the jurisdiction of the States Parties carried out by members of an independent national institution and of a Sub-Committee on Prevention.

Detention conditions in Austria remain a reason for concern, especially as regards the custody of asylum seekers.

The conditions of detention pending deportation of illegal immigrants in old police jails, which sometimes certainly come close to inhuman treatment, have been the continuous object of criticism by the Human Rights Advisory Board in 2003 when inspections by its six fact-finding Commissions did not show relevant improvements as compared to its 2002 reports on the many shortcomings in detention facilities. Hunger strikes and incidents of auto-agression resulting from the unsatisfactory general situation in the detention places have therefore become an everyday problem. As the vast majority of detainees are no criminals but merely violated the immigration rules, the Advisory Board once again urged the Ministry of the Interior to transform the unsuitable detention centres, with ordinary prison cells being used for the enforcement of residence bans and deportation orders, into more appropriate open stations where the restrictions of personal liberty are kept to the minimum extent necessary to maintain public security and in-house order.

[3] Federal Law Gazette (BGBL) 275/1992

Article 5. Prohibition of slavery and forced labor

No significant developments to be reported

CHAPTER II : FREEDOMS

Article 6. Right to liberty and security

Practice of national authorities

Due to an increase of criminal activity, notably in Vienna, and the extensive use of detention pending trial by some judges even in petty cases prison capacities are almost exhausted, and more than ever inmates are facing unsatisfactory conditions.

In recent years Austria has been facing a steady increase in criminal offences, which resulted in overcrowded prisons and detention centres with sometimes miserable and unbearable conditions for inmates. This is revealed by a scientific study on the number of prisoners by the Institute of Legal and Criminal Sociology (*Institut für Rechts- und Kriminalsoziologie*) of the University of Vienna, assessing the data of the penal system between 2000 and 2002 upon request by the Ministry of Justice, which features in the Government's Security Report 2002.[4] In the period of scrutiny the total number of prison inmates has risen from 12.728 to 13.948, of which Vienna alone accounts for 716 new adult and 306 new juvenile inmates. Especially the increase of juvenile offenders sent to jail gives rise to great concern, with the situation being worst in Vienna where in three years the rate of new inmates under the age of 21 has risen by 74% above-average. Disaggregated by nationality the study shows that in the Provinces the numbers of new foreign inmates go down, whereas in the capital Vienna two groups of foreigners account for the increased number of jailed criminals: nationals of Eastern European countries (not including accession countries) of all ages are predominantly sentenced and jailed for professional theft and the figures for this group count five times as many new convictions at the end of 2002 as compared to the year 2000, and convictions of younger people of African descent for drug offences have more than doubled during the period of survey. As this year's criminal statistics by the Ministry of the Interior show, these are continuing trends. These negative developments surely cannot be ignored by those responsible in the Ministries of Justice and the Interior and there are already ideas to apply the possibility of early release on probation more generously and to extend the possible period of reprieve from 12 months to 18 months. Also building a new juvenile prison and a second regional criminal court with an attached general prison in Vienna is on the agenda but it is clear that such measures would only mitigate the enforcing of sentences in the crowded prisons.

An example that might illustrate the urgent need to counter the present shortcomings in the Austrian penal system is that of a 14-year-old Romanian boy who was kept on detention on remand for some minor shopliftings in the amount of € 57 on the ground that he was suspected of trying to earn a regular income by selling the goods at a time were Romanian criminals were flooding the country. Due to lack of space he had to share a room with three older juveniles detained for various crimes. On 8 August 2003 the boy was raped by a 17-year-old cell mate in the bathroom while the others were watching, and suffered injuries that had to be treated in hospital. He was instantly released and one month later acquitted of the charge of professional theft that had brought him to jail in the first place. The practice of jailing foreign juveniles for petty crimes was thus at the core of the legitimate criticism of

[4] *Bericht der Bundesregierung über die innere Sicherheit in Österreich (Sicherheitsbericht 2002)*, presented to Parliament on 8 July 2003

organisations like Amnesty International, and it should be demanded of judges to take their responsibility seriously and think twice about the implications before they impose detention on remand on young adolescents.

Article 7. Respect for private and family life

International case law and concluding observation of international organs

The issue of striking a fair balance between the public interest of preventing disorder and crime and the individual right to one's private and family life features time and again in cases brought against Austria before the European Court of Human Rights. In *Jakupovic v. Austria*[5] the European Court found by the closest possible margin that a residence prohibition against a 16-year-old Bosnian national violated Article 8 ECHR.

Jakupovic, born in 1979, is a Bosnian national who arrived in Austria in 1991 together with his younger brother. Both joined their mother who has already been living and working in Upper Austria and remarried some years after her sons' arrival. In 1994 Jakupovic was found to have committed several burglaries but taking account of his youth the Wels Regional Court provisionally discontinued the criminal proceedings and ordered Jakupovic to compensate the victims for the damage caused. In 1995 a prohibition on the possession of arms was issued against the applicant, after he had attacked several persons with an electroshock device. Some months later he was convicted to five months of imprisonment for a series of burglaries, suspended for a probationary period of three years. In September 1995 the Vöcklabruck District Administrative Authority issued a ten years' residence prohibition against the then 16 year old Jakupovic. While his appeal was treated by the authorities, he was again convicted for further burglaries and sentenced to a probationary term of imprisonment of ten weeks. Jakupovic was deported to Bosnia in 1997 after the Administrative Court had finally dismissed his claim.

There was no dispute between the parties that the residence prohibition was an interference with the applicant's private and family life but was in accordance with the law and pursued a legitimate aim, namely the prevention of disorder or crime, within the meaning of Article 8(2). The question, however, remained, whether the interference was "necessary in a democratic society", that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued. The Government in its response argued that Jakupovic was able to speak his mother tongue and therefore could find a job similar to the one he had in Austria. As to the applicant's note that he had an Austrian fiancée and that he had lost contact with his father who was reported missing after the armed conflict in Bosnia and Herzegovina, the Government argued that he had only come to Austria at the age of eleven to stay with his mother. The Court, however, considered that "very weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there". Furthermore, it was held that there were no elements of violence due to which he was convicted to conditional sentences of imprisonment. However, the Court didn't consider the applicant's relationship to his Austrian fiancée and their child to be a relevant aspect because he knew about the unlawfulness of his stay when their relationship started. The Court thus held by 4 votes to 3 that a violation of Article 8 was given. In the joint dissenting opinion it was stated that the last series of burglaries in the face of the issued residence ban was evidence enough for "the applicant's callousness and of the contempt in which he held the laws and institutions of his host country" which were the decisive elements that should have outweighed the applicant's interest in his private and family life.

[5] E.Ct.H.R., *Jakupovic v. Austria*, application no. 36757/97, judgement of 6 February 2003

As to the non-pecuniary damages claimed, the finding of a violation was said to constitute in itself just satisfaction but the applicant was awarded € 7.936,09 to cover the costs of the proceedings.

In the international child abduction case of *Sylvester v. Austria*[6] the European Court of Human Rights found Austria to have violated Article 8 of the Convention when it did not undertake all efforts possible to ensure a quick return of the child to its father in the United States but let precious time pass by without proper action. Eventually the time factor turned out unfavourably for the father's claim, as the Austrian courts considered the well-being of the child paramount and blocked its return.

In October 1995 Mrs Sylvester, a national of Austria and the United States, left the United States where she had married the first applicant the year before and had given birth to their child (the second applicant) for whom they shared common custody under US law. The day after his child's removal to Austria without his consent, Mr Sylvester, relying on the 1980 Hague Convention on Civil Aspects of International Child Abduction, requested the Austrian courts to order his daughter's return. In May 1996, after the Supreme Court had finally dismissed the mother's appeals, in which she argued that the return of the girl would put her at risk of serious psychological harm for her father had used to masturbate in the child's presence, the first (and only) enforcement attempt failed because the child had disappeared from her presumed residence. Meanwhile the mother lodged an appeal against the enforcement order and finally, in October 1996, the Supreme Court set aside its own enforcement order of May 1996 arguing that coercive measures would run counter the child's well being which had to take priority over the Hague Convention's general aim of preventing child abduction and returning the child as soon as possible to her former residence. In the last year the girl had only seen her mother who had become her main person of reference and, furthermore, as for her growing age it had to be examined whether her father's alleged sexual behaviour was true or not and, if so, whether it could harm her. The case was therefore referred back to the Graz District Civil Court.

In the continued proceedings, an expert on child psychology held in March 1997 that it was indispensable for the child's well-being to stay with the mother as her main person of reference – a forceful return would expose her to serious psychological harm. The District Court followed the expert opinion and the Regional Court dismissed the father's appeal mainly relying again on the expert opinion while adding that the child's return to the US together with her mother was no alternative for Mrs Sylvester would face criminal prosecution there and would get separated from the child. Building on the final decision not to enforce the return order the mother was awarded sole custody in December 1997.

The applicants brought the case before the European Court of Human Rights and claimed that the Supreme Court's decision of October 1996 which had caused the review of the enforcement order and had effectively undermined the return order was not justified under Article 8(2) for it served no legitimate aim but ran counter the aims of the Hague Convention.

In its reasoning the Court stressed the positive obligations "inherent in an effective 'respect' for family life" and that they had to be interpreted in the light of the Hague Convention and included "a parent's right to the taking of measures with a view to his or her being reunited with his or her child and an obligation on the national authorities to take such action". Since these obligations were not absolute and the application of coercion in this matter was strictly limited, it was decisive whether the national authorities have taken "all the necessary steps to facilitate execution as can reasonably be demanded in the special circumstances of each case" and whether in cases of non-enforcement of a court order they succeeded in striking "a fair

[6] E.Ct.H.R., *Sylvester v. Austria*, applications nos. 36812/97 and 40104/98, judgement of 24 April 2003

balance between the interests of all persons concerned and the general interest in ensuring respect for the rule of law".

In the case at hand the Court decided that the alienation of the first and second applicant was mainly for the lapse of time and that that lapse of time was caused by Austrian authorities failing to take all necessary measures to facilitate the return: it took more than two months before the file was returned from the Supreme Court to the Graz District Court in May 1996; although the enforcement of the return order was ordered the day after, no measures were taken to guarantee a successful second attempt of enforcement after the first had failed nor were measures taken to at least locate the whereabouts of the child in order to facilitate contact with the first applicant; thirdly, it took the District Court more than five months to obtain an opinion from an expert in child psychology. The Court concluded that in view of the authorities' failure to take all necessary measures without delay Austria had breached the applicants' right to respect for their family life, as guaranteed by Article 8.

The first applicant requested USD 1 million for non-pecuniary damages but was awarded only € 20.000 under this head and again € 20.000 for legal costs and expenses. In his separate opinion Judge Bonello criticised that such a "paltry and uncaring" sum for compensation of anger, anxiety and frustration made neutralizing the Convention much too cheap for states and was afraid that other states may therefore find it "foolish" to strictly apply the Convention.

National legislation, regulation and case law

While the Ministry of the Interior issued the immigration quota which limits the places for new foreigners admitted in Austria, the Constitutional Court found the system as such compatible with fundamental rights but strongly criticised the practice of the authorities.

Every year the Ministry of the Interior fixes the quota of new immigrants admitted in the country, which passed the Council of Ministers on 25 November 2003. For 2004 the overall places were slightly reduced from 8.070 to 8.050 but the subquota for family reunification remains unchanged and high at 5.490 which is expected to further reduce the backlog of undecided applications that currently amounts to 5.500 applications as compared to 11.000 in the year 2000. In Vienna, following a special request, the quota is set at 4.010 after 3.115 in the previous year, which means that almost half of all new immigrants will settle in the capital. Not covered by that quota are the 8.000 temporary grants for seasonal workers and further 7.000 places for farm hands. Since 1 January 2003, after the 2002 amendment to the Aliens Act 1997[7] (*Fremdengesetz*), it is also possible for the authorities to grant the right to settlement for humanitarian reasons. Until October this year 605 such grants have been issued. Before that date the authorities could only issue a temporary residence permit without perspective of a permanent stay in the country.

The quota system for immigrants has been applied in Austria for years but criticised equally long for being incompatible with Article 8 of the European Convention of Human Rights. According to the case law of the European Court of Human Rights the States are under no general obligation to comply with a foreigner's desire for reunification with his family, but in exceptional circumstances Article 8 may afford a right to family reunification. On 8 October 2003 the Constitutional Court[8] in rather unequivocal terms declared unconstitutional sections 18(1)(3) and 22 of the Aliens Act 1997 in their original form for having violated the Convention, because they absolutely ruled out the possibility of reunification after the quota was exhausted. Since the new law provides for such an exception, the Court found that the quota system was as such acceptable. But it held that the present implementation of the quota

[7] Federal Law Gazette (BGBL) I 75/1997 as amended by BGBL I 126/2002
[8] VfGH, G 119/03 and G 120/03, judgement of 8 October 2003

system pursuant to section 22 was deficient in several aspects, including that it was not sufficiently clear on how the free quota places were allocated, that it was unforseeable for applicants and their relatives how long they would have to wait for a decision, that the criteria for the ranking of applicants in the waiting list were not subject to judicial control, and that the procedure altogether did not correspond to the requirements of the rule of law. Amnesty International added in an official statement that it was essential for applicants to be able to apply from abroad and urged that this possibility be expressly regulated. The Ministry of the Interior promised to repair the provision in accordance with the judgement after negotiations to be organised with the Provinces.

Article 8. Protection of personal data

National legislation, regulation and case law

Better protection of the private sphere as against other individuals and compensation also for immaterial damages will be guaranteed by a new law as of 1 January 2004. Victims of private eavesdropping, wire-tapping, outing of their sexual orientation, unwanted snapshots and the like will then be equipped with better tools of redress.

In times where mobile phones with integrated cameras become more and more popular complaints about unwanted snapshots are on the rise. From a legal perspective the question arises how persons concerned can react to such and other interferences in their private sphere. If the photo taken is published, for instance put on the internet, the aggrieved has a right to have the photo removed and also to damages as far as it violates his or her legitimate personal interests and is seriously compromising, which will in particular be assumed in the case of a nude picture. But the protection is less far-reaching if the picture is only taken for the private purposes of the photographer. Here, too, lies a claim for the deletion of the picture but the perpetrator is not liable for immaterial damages as a result of his interference into the private sphere of another. The Civil Law (Amendment) Act 2004[9] generally redresses this lacuna and provides for compensation even of immaterial damages as a consequence of an unlawful interferences into the private sphere. It is very positive that such law reform was passed by Parliament so that the general reluctance of the courts to afford non-pecuniary damages can be overcome.

In the three joint cases[10] before the European Court of Justice, following preliminary references by the Constitutional Court and the Supreme Court respectively, that dealt with the difficult question of balancing the individual right to data protection and the public interest of disclosing certain income figures, the Court stopped half way and left it for the national courts to decide on the necessity and appropriateness of the interference into the private sphere.

Contrary to what the Advocate General suggested in his opinion, the European Court of Justice ruled that Directive 95/46/EC was, in principle, applicable in the question posed by a national provision requiring the disclosure of income figures of employees in public enterprises for the purposes of review in a regular report to Parliament by the Court of Auditors (*Rechnungshof*) and had to be construed in conformity with Article 8(2) of the European Convention on Human Rights. The Court came to the conclusion that the provisions of the Data Protection Directive did not preclude national legislation requiring not merely the disclosure of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the Court of Auditors but also of the names of the

[9] Federal Law Gazette (BGBL) I 91/2003 (*Zivilrechts-Änderungsgesetz 2004*)
[10] ECJ, Joint Cases C-465/00 *Rechnungshof v. ORF et al*., C-138/01 and C-139/01 *Neukomm and Lauermann v. ORF*, judgement of 20 May 2003

recipients of that income – provided that it was shown that these provisions were necessary for and appropriate to the objective of proper management of public funds. These questions were for the referring national courts to decide. In case they would deny the compliance of the national provisions with human rights and Community law the ECJ declared the provisions of the Data Protection Directive directly effective, in that they may be relied on by an individual before the national courts.

Back on the national plane, the Constitutional Court decided in a judgement[11] of 19 December 2003 that the Court of Auditors was allowed to fully access all documents of employees of companies controlled by the state including statements of salaries and pension but had to refrain from making public the names of employees in combination with their remuneration, as such interference with the right to data protection would be disproportionate.

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

No significant developments to be reported

Article 10. Freedom of thought, conscience and religion

No significant developments to be reported

Article 11. Freedom of expression and of information

International case law and concluding observation of international organs

The European Court of Human Rights found a breach of Convention Article 10 in the case of *Krone Verlag GmbH & CoKG (no. 2) v. Austria*[12] for imposing on the applicant newspaper too high an amount of coercive indemnity without a pressing social need in a democratic society.

In July 1996 the Neue Kronenzeitung ("Krone") published several articles on a case of parents, Ms and Mr K., who had abused their daughter. In the articles it was alleged that they had homo-bisexual inclinations. Subsequently Ms K. filed a compensation claim under the Media Act (*Mediengesetz*) with the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) against the applicant company. Following the decision of this court the Krone published a notice concerning the institution of the proceedings in September 1996 and paid to the applicants ATS 115.000 (€ 8.357) for breaching the presumption of innocence. Ms K. filed an enforcement request for she claimed that the notice did not have the same "publishing value" (*Veröffentlichkeitswert*) as the original message. In December 1996, however, the Regional Court found that the notice had been published in the due form. However, the Vienna Court of Appeal (*Oberlandesgericht Wien*) quashed the Regional Court's decision for a diminished "publishing value" of the notice and ordered the applicant company to pay a coercive indemnity (*Beugestrafe*) in the amount of ATS 1,304.000 million (€ 94.765), i.e. ATS 4.000 per day – starting with the day when Ms K. had filed her enforcement request and including the months following the favourable first instance decision. The Appeals Court held that the exemption for notices that come close to the due form did not apply. Against this decision the Procurator General's Office (*Generalprokuratur*) lodged a plea of nullity for the preservation of the law (*Nichtigkeitsbeschwerde zur Wahrung des Gesetzes*) with the Supreme

[11] VfGH, KR 1/00, judgement of 19 December 2003
[12] E.Ct.H.R., *Krone Verlag GmbH & CoKG (no. 2) v. Austria*, application no. 40284/98, judgement of 6 November 2003

Court, arguing that after the first instance decision in its favour the Krone was to be considered in good faith when it did not publish another notice. The Supreme Court, however, dismissed the plea of nullity.

The Court held that the award of damage of a particularly high amount such as the coercive indemnity in the present case constituted an interference with Article 10 of the Convention. Although the interference was prescribed by law, namely by Section 20(1) Media Act, and although it followed a legitimate purpose for it aimed to protect the reputation and the rights of others, it was still not necessary in a democratic society to impose coercive indemnity during on-going appeal procedures. Furthermore, the Court repeated the Procurator General's argument of the Krone having acted in good faith and reiterated the vital role of the press for a democratic society and the strict limitations to the restrictions from freely imparting information.

The Court awarded € 20.000 under the title of pecuniary damages for payments made pursuant to friendly settlements in the domestic proceedings and a further amount of € 9.209,31 for costs and expenses.

The Strasbourg case of *Scharsach and News Verlagsgesellschaft v. Austria*[13] is just a new episode in the long judicial struggle between the defamation-friendly Austrian courts that are rather inclined to uphold the personal rights of an individual versus the position of the European Court of Human Rights which, favouring the freedom of the press to impart information, tends to be more on the journalists' side, especially when the opponent is a politician.

In 1995 Austrian journalist Scharsach published a one-page article under the heading „Brown instead of Black and Red?" in the applicant company's weekly magazine *News*. The article dealt with the question whether a coalition with the Austrian Freedom Party under the leadership of Jörg Haider was desirable or not. Scharsach gave nine reasons against, one of them claiming that within the party colleagues there were many "closet Nazis" ("*Kellernazis*"), a term used to describe people who had a clear affinity for National Socialist ideas but did not support them in public. In this context Scharsach also named Mrs Rosenkranz, at the material time member of the Lower Austria Regional Parliament (*Landtag*) and deputy chairperson of the Lower Austria regional branch of the FPÖ, who had never criticised Haider for his statements and was married to the editor of the far right-wing magazine "*fakten"*. She filed a private prosecution for defamation (*üble Nachrede*, section 111 Criminal Code) against the journalist and a compensation claim against *News* under the Media Act. Both were convicted by the St. Pölten Regional Court (a suspended fine of ATS 60.000 for Scharsach and ATS 30.000 as compensation against *News*). In 1997 the Vienna Court of Appeal upheld the first instance decision, arguing that the average reader did not know the original meaning given to the term by the former leader of the FPÖ Peter Steger who used the term for those party colleagues who failed to clearly dissociate themselves from the right-wing extremists within the FPÖ, i.e. to actively take a stand against Nazi ideology; however, the term was not meant to link them with criminal conduct as punishable under the Prohibition Act (*Verbotsgesetz*).

At stake was the question whether the applicants' convictions as interferences with their right to freedom of expression were justified pursuant to paragraph 2 of Article 10. There was no dispute between the parties whether the interference was prescribed by law (section 111 Criminal Code and section 6 of the Media Act) nor whether the interference served a legitimate aim (protection of the reputation of others). It remained to be assessed whether the convictions because of the use of the term "closet Nazi" overstepped the narrow margin of

[13] E.Ct.H.R., *Scharsach and News Verlagsgesellschaft v. Austria*, application no. 39394/98, judgement of 13 November 2003

appreciation afforded to State parties. The Court criticised the national courts for failure to sufficiently take into account the political context of the present case: a journalist was expressing his political opinion on a topic of public interest and gave factual basis for his contested value-judgement (the Court didn't accept the national courts presumption of a statement of fact); Scharsach has given factual basis for his statement by way of referring to her public criticism of the Prohibition Act, her failure to dissociate herself from the activities of her husband's activities and from the extreme right in general. The Court concluded that " the essence of the impugned article was exactly the reproach that FPÖ politicians failed to dissociate themselves clearly from the extreme-right" and that Scharsach had given factual basis why he had named Rosenkranz in the context of those politicians with an ambiguous position towards Nazi-ideology, whom Steger had called "closet Nazis". Furthermore, Rosenkranz was a politician for whom the limits of acceptable criticism are wider than for private individuals. The Court reiterated the essential role of the press in a democratic society and that the right to freedom of expression is applicable also to information and ideas that offend, shock or disturb. By six votes to one, the Court held that there was a violation of Article 10. In his dissenting opinion judge Matscher criticised that Rosenkranz could not be held liable for activities of her husband and that no evidence had been given that she herself supported Nazi ideas; furthermore, he contested that the average reader had understood that the "closet Nazi"-term had been used as a saying and in the meaning that Steger has given to it.

Scharsach was not granted compensation for pecuniary damage for lack of a causal link ("even if the Austrian courts had not convicted him, his preparation for and attendance at the court hearings would have been necessary") but was awarded € 5000 for the non-pecuniary damage suffered through the criminal conviction plus costs. In his dissenting opinion Matscher referred to cases like Oberschlick were no award was made for pecuniary damage.

National legislation, regulation and case law

In the request for a preliminary reference in *Karner v. Troostwijk*[14] by the Supreme Court the Advocate General delivered his opinion and suggested that an absolute prohibition in Austrian law on advertising the fact that goods for sale stem from bankrupt's estate would run counter the fundamental right of freedom of speech and opinion, if the facts of the case could at all be brought under the scope of Community law.

Troostwijk bought goods from bankrupt's estate and offered them by promoting this very fact in his advertisements contrary to an explicit prohibition in section 30 of the Austrian Unfair Competition Act (*Gesetz gegen den Unlauteren Wettbewerb*). The Advocate General was clearly of the opinion that such prohibition constituted a mere selling arrangement and therefore did not come under Community law. However, in case the ECJ did not concur with his views he continued to hold that this indiscriminate prohibition of advertising which does not allow at all saying that the goods for sale are taken from bankrupt's estate was disproportionate to the requirements of fundamental rights such as the freedom of speech and opinion (Article 10 ECHR). Although consumer protection and fair competition were legitimate aims, these aims could also be reached by other means. As measures which are incompatible with the observance of human rights were not acceptable, Community law provisions that can bring a measure outside the scope of Community law such as Article 30 EC (free movement of goods) or Article 49 EC (freedom to provide services) had to be interpreted in the light of fundamental rights and thus could not justify the mentioned Austrian competition restriction.

[14] Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GesmbH*, opinion of 8 April 2003

The freedom of the press is foremost and expressly guaranteed in Article 13(2) of the old bill of rights of 1867 (*Staatsgrundgesetz*) which is part of today's Constitution and must be seen as the cornerstone for the development of pluralistic media. But in this special field the market rules do not regularly bring about the desired goal of a pluralistic media society so that state intervention is needed. Several laws can be mentioned that somehow purport to promote the pluralism of the media: the Anti-Trust Act (*Kartellgesetz*), Press Funding Act (*Presseförderungsgesetz*), Journalism Funding Act (*Publizistikförderungsgesetz*), Media Act (*Mediengesetz*), Private Radio Act (*Privatradiogesetz*), Private Television Act (*Privatfernsehgesetz*). The only legal definition of pluralism of the media was introduced last year and can be found in section 35(2a) of the Anti-Trust Act[15]: "Pluralism of the media shall be understood as pluralism of separate media businesses which are not [legally or economically] linked to each other and through which a coverage taking into account different opinions is ensured." With effect of 1 January 2004 a revised Press Funding Act[16] will come into force that focuses not only on the quantity of daily newspapers and weekly journals but also on their quality. Funding will be newly organised under three headings and transferred from the Federal Chancellery to the Austrian Communications Authority (*KommAustria*), being the supervising media authority. Distribution funding in the amount of about € 200.000 will be available for each newspaper with at least 10.000 subscribers and weekly journal with more than 5.000 subscribers. Dailies can also qualify for the more flexible special press funding which in total amounts to € 7.21 million in 2004 as long as they are not national or regional market leaders. Finally, the state supports with € 1.18 million the education of journalists, press clubs, correspondents abroad, projects aiming at promoting reading at schools and research projects. The budget of all funds will be adjusted every year. However, the opposition called the law a torso equipped with too few means to stop the ongoing media concentration and also missed additional funds for local radio stations and the new media, a point which had to be admitted by the Government.

Article 12. Freedom of assembly and of association

International case law and concluding observation of international organs

The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) took note of the information supplied by the Government that a new Associations Act[17] entered into force as of 1 July 2002 and promised to examine the conformity of this Act with the provisions of the ILO Convention at its next meeting.

On 12 June 2003 the European Court of Justice delivered its judgement in the *Schmidberger* case[18] that was referred to it by the Innsbruck Court of Appeal after a German company had filed a claim for damages arguing that the Austrian authorities had acted against the Community principle of free movement of goods when they allowed a demonstration on the Brenner motorway. The case, which has already been portrayed briefly in last year's report on the occasion of the Advocate General's opinion, involved the difficult question of balancing on the one hand the free movement of goods as against on the other hand the fundamental freedoms of assembly and expression of opinion.

In 1998 the Innsbruck District Administrative Authority allowed a demonstration of the environmentally concerned association „Transitforum Austria" to take place on the Brenner

[15] Federal Law Gazette (BGBL) 600/1988 as amended by BGBL I 62/2002
[16] Act passed on 3 December 2003 by the National Council and endorsed by the second chamber of Parliament on 18 December 2003, not yet officially published.
[17] Federal Law Gazette (BGBL) I 66/2002
[18] ECJ, C-112/00, *Schmidberger v. Austria*, judgement of 12 June 2003

motorway, entailing a ban for all traffic for a period of 30 hours. As a consequence Schmidberger, a German company carrying goods on the road, sued for state liability, claiming that five of their lorries could not use the Brenner motorway on four consecutive days due to the authority's failure to prohibit the registered demonstration. The Court of Appeal eventually suspended the proceedings for a preliminary reference to the European Court of Justice.

The Court admitted the case, as it was concerned with specific questions of Community law and did not constitute a merely hypothetical issue, as was suggested by the Austrian Government. According to its long standing case-law, the Member States were under an obligation to ensure the observance of the fundamental freedoms for the functioning of the internal market, which also included the obligation to act when positive action was needed. It stressed the importance of the free movement of goods and found a prima facie interference by the Austrian authorities in not prohibiting the demonstration.

The case thus raised the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter. The Court proceeded by examining the possible justifications under Articles 10 and 11 of the Convention, stating generally that fundamental rights could always restrict fundamental principles of Community law such as the free movement of goods. Relevant in the material case were not the interests of the Transitforum Austra organising the demonstration but solely the public policy aims of freedom of expression and assembly taken into account by the authorities in their decisions, which were said to be legitimate. Applying the proportionality test on the ban, the Court further argued that information as to the date of the closure of the Brenner motorway had been announced in advance in a publicity campaign by the media and the motoring organisations in Austria and its neighbouring countries. The demonstration thus did not result in substantial traffic jams or other incidents. No permanent or serious restriction on free movement was created but the demonstration remained an isolated event. Furthermore, security arrangements had been made for the site of the demonstration. As regards the possible imposition of stricter conditions concerning both the site - for example by the side of the Brenner motorway - and the duration - limited to a few hours only, all the alternative solutions would have risked reactions which would have been difficult to control and would have been liable to cause much more serious disruption to intra-Community trade and public order, such as unauthorised demonstrations, (violent) confrontation between supporters and opponents of the group organising the demonstration. For all these reasons the authorities were said not to have overstepped the margin of discretion and the Court concluded that the ban was not incompatible with Community provisions on free movements of goods.

National legislation, regulation and case law

Another assembly on the Brenner route scheduled for 6 May 2003 by the work council of the Autobahngesellschaft Alpenstraßen AG was, however, prohibited by the Innsbruck District Administrative Authority, reasoning inter alia that the free movement of persons and goods guaranteed by the EU Treaties would be undermined by a total blockade of the motorway. The work council announced to bring the issue before the Administrative Court, which will have to decide along the lines of *Schmidberger* whether the district authority was right to rely on Community law. The result of the appeal is expected with much interest.

In Austria, the founding of political parties is regulated in a very liberal way in section 1 of the Political Parties Act 1975 (*Parteiengesetz*)[19] at constitutional level. The law further governs the public funding of political parties but does not provide for the dissolution of political parties or other sanctions for pursuing unconstitutional aims. The Parliamentary materials[20] show that the legislator clearly wanted to ensure that parties were not subject to interference by any administrative authority or could be adversely affected by a simple Act of Parliament, even though their members had to observe the law. The extreme freedom of political parties acting in competition with others was said to be the only real safeguard for democracy and restrictions on their pluralism the first step to an autoritarian system. The members of Parliament were also aware of the possibility of abuse and that dangerous, violent or anarchistic parties could be founded under the law but were convinced that such developments, if they occurred, could not be prevented by means of prohibition. This liberal stance does notably not apply for parties with national socialist ideas that were prohibited under the Prohibition Act 1947[21] (*Verbotsgesetz*), which is also enacted at constitutional level. In the apparently only reported judgement[22] of the Constitutional Court dating from 1983 concerning a "party against foreigners" whose statute was rejected by the Minister of the Interior for its xenophobic and national socialist contents, the judges employed a historic interpretation and quashed the negative decision arguing that the Minister did not have the right to refuse the deposition of a party's statute or to interfere with the founding of the party in any other way; rather the prohibition was directly effective by act of law and the party could not acquire legal personality. In other words, every authority that deals with a political party which might fall under the Prohibition Act (e.g. the ordinary courts in a civil law dispute, the election authorities, etc.) must, as a preliminary question, decide whether this party in fact acquired legal personality or not. In the latter case, the founder of a prohibited party may then submit an individual complaint to the Constitutional Court. Public funding cannot be suspended either, yet only applies to parties represented in Parliament which receive a yearly financial support depending on the votes gained and those other parties managing to achieve more than 1% of the votes in general elections which each get a one-time payment of about € 130.000 per percentage point as a contribution to the campaigning costs.

Article 13. Freedom of the arts and sciences

No significant developments to be reported

Article 14. Right to education

No significant developments to be reported

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

No significant developments to be reported

[19] Federal Law Gazette (BGBL) 404/1975
[20] Parliamentary materials, sten.prot. pp. 14596 and 14601 (150th session NR, XIII GP)
[21] Federal Law Gazette (BGBL) 25/1947 as amended
[22] VfGH, B 195/82, judgement of 1 March 1983

Article 16. Freedom to conduct a business

National legislation, regulation and case law

The EU Code of Conduct on arms exports, adopted by the Council on 8 June 1998, was neither adopted in the form of a legally binding act, nor does it constitute an international agreement to be signed or ratified by Member States. Therefore no specific action was taken. As a result of Austria's obligations under the Neutrality Act 1955 (*Neutralitätsgesetz*) the laws on arms exports have always been fairly strict, though. The Arms Act 1977[23] (*Kriegsmaterialgesetz*) governs the import, export and transit of all arms listed in a special statutory instrument and provides for a general licence system. Exports may, inter alia, not be permitted to areas of armed conflict, unstable areas where conflicts might erupt, and to a recipient country where there is a clear risk that the arms might be used for suppressing human rights (section 3).

A completely new codification of the Commercial Code (*Handelsgesetzbuch*) with its many hundred sections is envisaged by a Ministerial Draft[24] that has formally been sent out for consultation. On the face, the gigantic legal project will substitute the more appropriate term entrepreneur for the old term merchant and is intended to provide more legal certainty and practicability as well as a smoother overall application of the law.

Article 17. Right to property

National legislation, regulation and case law

Intellectual property rights are better protected since a revised Copyright Act came into force this year in implementation of Directive 2001/29/EC.

With effect of 1 July 2003 Parliament enacted an amendment[25] to the Copyright Act (*Urheberrechtsgesetz*) which is supposed to transpose Directive 2001/29/EC. After the period for implementation elapsed on 22 December 2002, time pressure did not allow for any revolutionary new regulations but at least some important clarifications were made. The protection of intellectual property on the internet is now fostered by the additional exclusive right of the copyright holder of making interactively available his protected works. The second main focus was to reform the field of "private copies", which is already regulated very restrictively since 1993 in terms of software but was considered too lax elsewhere, notably by the music industry in the face of the mushrooming private copying of song tracks. The new tightened definition speaks of right to "private use" instead of formerly "own use", thereby confining the right to natural persons only. No commercial use whatsoever is permitted and forwarding to third persons is prohibited, which is accompanied by a set of torts and criminal offences.

A law that cuts back on the expected pensions of active railway employees and was doubtful with regard to its implications on the right to property passed a close scrutiny by the Constitutional Court.

The Constitutional Court upheld a law[26] that regulates the transfer of railway employees' pension rights from an individual contractual basis to a general basis provided by law while simultaneously increasing the pension age and cutting back on the amount of the pensions

[23] Federal Law Gazette (BGBL) 540/1977
[24] Ministerial Draft (81/ME, XXII GP)
[25] Federal Law Gazette (BGBL) I 32/2003
[26] Federal Law Gazette (BGBL) I 86/2001 as amended

(*Bundesbahnpensionsgesetz*). Following applications for review by the Austrian Socialdemocratic Party and the Supreme Court respectively, the Court found an interference with the constitutional right to property but ruled that it was justified. Applying the test of public interest the Court said that the aims pursued by Parliament of harmonising the different pension systems and reducing the financial burden for the state could not be contested. As to the question whether the interference was proportional, the new model was said not to affect the confidence into the continuity of the law of a concerned railroader any more than the previous pension system.

Article 18. Right to asylum

National legislation, regulation and case law

In November 2003 Parliament voted for an amendment to the Asylum Act 1997 (*Asylgesetz*) that is intended to speed up the asylum proceedings and will be applicable as from 1 May 2004.

Within 72 hours at the latest the Asylum Authority shall then decide on the admissibility of an application in Austria. The chosen methods for pursuing that goal have triggered heavy criticism from both opposition parties and non-governmental organisations operating in that field. The law was said to be inspired by suspicion and there was a general fear that the public would get a one-sided negative picture of asylum seekers. Not a new more restrictive law with a fast track procedure was needed but more staff. Even jurists from the Legal Service of the Federal Chancellery have submitted a long list of constitutional concerns in the consultation period. In many instances the possibility to present new evidence and grounds for refuge to support one's case on appeal is ruled out and the law also extends the grounds for imposing detention to cases that do not seem to be covered by Article 5 ECHR (where asylum seekers leave the initial reception centre during the admissibility procedure, or simply file a follow-up application after a final negative decision). It further provides for a number of mandatory measures that can be enforced against the will of the asylum seeker like restriction of personal freedom in the initial reception centres, personal search and confiscation of belongings relevant for the proceedings as well as the taking of fingerprints without consent, which constitute very intrusive interferences with several fundamental rights bearing in mind that asylum proceedings require an application in the first place. Moreover, an appeal to the Independent Federal Asylum Tribunal (*Unabhängiger Bundesasylsenat*) regularly does not carry suspensive effect, meaning that deportation can be effected before a decision on the refugee status becomes final. The appeals tribunal may grant suspensive effect, though, if the appeal does not seem futile and public interest so permit and if it is quick enough to issue its decision within seven (!) days despite being considerably overloaded with cases.

Practice of national authorities

The number of applications for asylum is slowly decreasing after a continuous rise over the last couple of years.

The preliminary figures[27] from the Ministry of the Interior for 2003 show that until 1 December 30.240 persons have applied for asylum, whereas in the same period last year there were some 5.000 more applications. On top of the preliminary statistics were people from the Russian Federation (Chechnya) who account for 6.199 applications, second is India (2.709) followed by Turkey (2.663), Serbia and Montenegro (2.345), Afghanistan (2.267) and Nigeria (1.656). 5.24% of all applications were decided in the positive, while 13.96% of the applications were formally rejected and the bulk of over 80% struck out of list after the

[27] Asylum and Aliens Statistics of the Federal Ministry of the Interior, November 2003

applicants left the country or withdrew their applications. However, the individual country recognition rates which correlate positive and negative decisions differ considerably, for example the rate for the Russian Federation is at 74% (511 positive as against 183 negative decisions), for Turkey at 13% (+56 -376), for Serbia and Montenegro at 13% (+148 -968), for Afghanistan at 65% (+260 -138), for Nigeria 1% (+3 -309) and for Indian asylum seekers there was not a single positive decision while 137 applications were rejected.

For more than a year the Ministry of the Interior has been at the centre of intensive critique by private social caretaking institutions, international organisations like Amnesty International and the UNHCR, the opposition parties and the media for its tightened policy on asylum seekers. Only a last minute compromise on the split of costs for the caretaking of asylum seekers between the Federation and the Provinces prevented the worst case scenario of thousands of applicants being left uncared on the streets over the winter months.

The quarrel started with last year's ministerial decree containing directives concerning the Federal care for asylum seekers that denied access to the Federal caretaking programme for asylum seekers from certain countries the Ministry deemed stable and safe enough, who therefore had little prospect of actually being granted refugee status. This was done so despite ongoing negotiations at EU level for a Directive laying down the minimum standards for the reception of asylum seekers were progressing. The said Directive, finally passed on 27 January 2003 as Council Directive 2003/9/EC, does not at all distinguish between asylum seekers on the ground of their nationality and provides for an effective judicial remedy on all negative decisions concerning available benefits. This notably includes housing, social security and health care but contrary to that European consensus the Federal Care (Asylum Seekers) Act (*Bundesbetreuungsgesetz*)[28] does not establish a legal claim to be admitted to one of the caretaking premises. Alarmed by these developments the Human Rights Advisory Board started an investigation on the compatibility of the ministerial caretaking decree with the law and recommended in its concluding report of January 2003 that all provisions on the caretaking of asylum seekers be immediately "brought in accordance with human rights and the relevant constitutional and legal framework and to ensure, in particular, that asylum seekers are taken care of during the whole length of the proceedings regardless of their nationality and chances of success."[29] In spite of this heavy criticism by this high level Advisory Board the contentious decree remained in force.

When private caretaking institutions, who stepped in as good as it gets for the failure of the Ministry of the Interior to provide adequate housing places, realised that press conferences did not help they decided to take legal action to get their costs reimbursed by the state and supported asylum seekers in their claims for a caretaking place. In two judgements[30] on the matter the Supreme Court clearly held that the state could not escape its legal obligations to act in conformity with fundamental rights arbitrarily by outsourcing its tasks into the field of private law without a legal right of the individual applicant to Federal housing benefits. Organisations acting in place of the state like *Caritas, Red Cross, Diakonie Österreich, and Volkshilfe* thus had a claim to get their expenses paid back by the state. But the Supreme Court decided further that any discrimination among asylum seekers in granting places in accomodation centres could not be based on the Federal Care Act as it violated its underlying fundamental values and thereby gave the individual a legal claim to be admitted into the Federal caretaking. Only upon the second judgement of 27 August 2003 did the Minister of the Interior react and in September he revoked the discriminatory Decree which had been in force since 1 October 2002.

[28] Federal Law Gazette (BGBL) 405/1991 as amended

[29] See htttp://www.menschenrechtsbeirat.at, *Stellungnahme zu den Richtlinien des BMI betreffend Bundesbetreuung, Jänner 2003*

[30] OGH, 1 Ob 272/02k, judgement of 24 February 2003 and 9 Ob 71/03m, judgement of 27 August 2003

But this decision did not change the basic policy on the reception of asylum seekers and did not close the gap between housing capacities and applicants. Instead of organising new places of residence an amendment to the Federal Care Act was quickly introduced to Parliament on 13 October 2003 as an annex to the planned amendment to the Asylum Act 1997 (*Asylgesetz*) that would have excluded in its initial version the NGOs claim for costs and expenses with retroactive effect, a measure coming close to expropriation. In the light of constitutional concerns and severe public pressure the passage on retroactivity was eventually skipped before the enactment of the law, but section 2 of the law being in force since 29 November 2003 now contains many exceptions from the right to caretaking. First of all, asylum seekers may only qualify if they are deemed indigent by the authorities but the law provides that support from third parties (humanitarian organisations are explicitely mentioned) shall be taken into consideration accordingly, which only appears to prolong the vicious circle. Moreover, there are special exemptions: next to technical points such as res iudicata that may apply, asylum seekers are denied the right if they do not contribute to determining their identity or indigence, state motives not recognised by the Geneva Convention, are convicted for criminal offences, or behave improperly towards their fellow residents in an unaccaptable way. [31]

Due to the non-cooperative attitude of the Ministry of the Interior the case-by-case approach did not prove very effective since apparently for one asylum seeker admitted the Ministry pushed for the release of another and sometimes even ignored preliminary injunctions of a court. As a consequence there are reported cases of pregnant women, minors (estimated 700 in Vienna) and ill people left without shelter and social security, who can only partly be received by communities and private organisations. The Vienna office of the UNHCR reported a case of a Chechnyan family with three children readmitted to Austria from Belgium pursuant to the Dublin Convention, which provides a mechanism for determining which country is responsible for examining an application for refugee status; only the wife and the baby child were admitted into Federal caretaking while the husband and the two other children aged 8 and 10 were sent onto the street. Upon intervention by the UNHCR only the children were also admitted. A new creative method was presented by the Minister in late October when he declared in view of the insufficient places of accomodation that he intended to “invite” asylum seekers to return directly at the border; on 1 November 2003 a group of 74 Chechnyans were sent back after they could allegedly be convinced not to apply for asylum. According to their lawyers and journalists of the Vienna weekly “Falter” who made inquiries into that case, these refugees had not at all voluntarily rescinded their asylum requests, but their asylum requests were simply ignored by the Austrian authorities and they were sent back by force and handed over to the Czech authorities. According to figures from different organisations almost every day up to 20 people fomerly accepted and cared of are being expelled from centres run by the state and sent onto the street.

What added to the problematic situation of refugees in Austria is the split competence of Federation and Provinces regarding accomodation, food and subsistence, medical care, etc. Only on 1 December 2003, when outside temperatures were already inhumanely low, could the Minister reach an agreement with the governors of the Provinces which establishes a common pool financed on a sixty-forty basis. Currently there are 8.900 persons in the caretaking regime of the Federation with calculated annual costs of up to € 8.000 per person and the solution reached was said to be good for up to 19.000 persons. Opposition parties and NGOs, in principle, welcomed the agreement that will enter into force on 1 May 2004, the very day on which both the new members accede to the European Union and the Council Regulation 343/2003/EC (Dublin II) takes effect. The combination of those events will mean a considerable relief because Austria will then at its sensitive Eastern border be surrounded by safe EU-members where refugees have to apply first if they arrive on the land route. In a resolution of 14 December 2003 the Human Rights Advisory Board also welcomed this new

[31] Federal Law Gazette (BGBL) I 101/2003

agreement between the Federal Government and the Provinces. At the same time it expressed concerns about the fact that this agreement will only enter into force on 1 May 2004 and, once more, urged the Minister of the Interior to provide shelter to all asylum seekers in need. Also in December, the Ludwig Boltzmann Institute of Human Rights published a study on economic, social and cultural rights of asylum seekers in which it concluded that the restrictive policy vis-à-vis asylum seekers constitutes a serious violation of various human rights (right to shelter, food, clothing, health care, social security, equality) in international human rights treaties to which Austria is a State party.

Shortly before Christmas the Minister of the Interior agreed in negotiations with private caretaking organisations to accept 60% of the costs incurred by those organisations also for the transitional period until 1 May 2004 and promised not to release any more asylum seekers over the holidays, ensuring that the costs for care of 620 persons are covered.

Reasons for concern

The treatment of asylum seekers by the Minister of the Interior, Ernst Strasser, without doubt constitutes Austria's most serious and systematic violation of human rights in 2003. Indeed, the magic date that appears to have significantly informed the Austrian asylum policy is the 1 May 2004 so that both time and cost factor have played a vital role. The principal agreement on the question of cost sharing between the Federation and the Provinces, which Minister Strasser called "a humanitarian milestone", is certainly a good and solid basis for the future but one wonders why the responsible politicians let the situation escalate into a humanitarian disaster all the way before. Anyway, the answer is not complimentary: did it follow from deliberate considerations it would point to cynical politics, was it accidental then it would rather mean poor politics. Apart from the formal consultation period before a new draft law is introduced to Parliament, the Ministry of the Interior appears to be very reluctant to have an open exchange with experts and relevant organisations. Even the January 2003 recommendations of the Human Rights Advisory Board, which consists of high level civil servants from the Ministry of the Interior, the Ministry of Justice and the Federal Chancellery as well as of well-known human rights experts and NGO representatives, have been ignored by the Minister throughout the year. It is therefore strongly recommended to improve the consultation process between ministerial officials and the relevant non-governmental organisations in that field and to involve experts and essential actors from civil society at the earliest possible stage of the drafting of new laws and regulations in order to reach a broader public consensus in delicate matters.

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

International case law and concluding observation of international organs

Hardly ever has the UN Human Rights Committee critisised Austria so harshly as in the case of *Sholam Weiss*[32], who had been extradited to the United States in blatant violation of several rights enshrined in the UN International Covenant on Civil and Political Rights. The case, which already featured in last year's rerport, is worth to be followed up on its latest developments.

To reiterate the facts, Sholam Weiss, citizen of the United States and Israel, was found guilty by US Courts of fraud, racketeering and money laundering. He was sentenced to 845 years of imprisonment with - in the event of good behaviour - a possibility to be released after 711 years and pecuniary penalties of USD 248 million. He was convicted and sentenced *in absentia* for he had escaped when jury deliberations had just begun. Weiss was arrested in

[32] UN Human Rights Committee, CCPR/C/77/D/1086/2002, jurisprudence of 15 May 2003

Austria in October 2000 pursuant to an international arrest warrant and was soon transferred to extradition detention. This decision was appealed by his counsel, but the Vienna Court of Appeal dismissed the appeal on the basis of the "fugitive disentitlement" doctrine that allows to reject an appeal on the sole ground that the appellant is a fugitive. The U.S. requested Weiss' extradition in December 2000.

In August 2001 Weiss filed an application with the European Court of Human Rights, alleging that his extradition would violate Articles 3, 5, 6 and 13 ECHR and Article 2 of Prot. No. 7 in that he would have to serve a mandatory life sentence, that his detention with a view to extradition was unlawful, and on the basis that his conviction and sentence were pronounced *in absentia* and no appeal was available to him.

In September 2001 the Vienna Court of Appeal, being the first and last instance concerning the admissibility of an extradition request, refused the U.S. request for Weiss' extradition for his extradition would be contrary to Article 2 of Prot. No. 7 (right to have one's sentence or conviction reviewed by a higher tribunal). However, this decision was finally set aside and remitted by the Supreme Court in April 2002 after the Procurator General lodged a plea of nullity for the consistency of the law. The Supreme Court allowed the plea and held that the previous decision had been a nullity because the Court of Appeal had no jurisdiction to consider the right to appeal but only the specific aspects listed in the extradition statute. One month later the Court of Appeal declared the extradition admissible because Weiss had enjoyed a fair trial and would not be exposed to inhuman or degrading treatment. The Minister of Justice finally confirmed this decision without any further deliberation, although he would have been allowed to also consider Weiss' right to appeal.

Still in May 2002 the European Court of Human Rights indicated interim measures, staying the author's extradition, but Weiss then withdrew his application with the European Court and petitioned the Administrative Court instead, challenging the Minister's decision and seeking a stay of his extradition which was finally granted; the case was referred back to the Ministry of Justice and the Vienna Court of Appeal. The latter declared the Administrative Court incompetent to bar implementation of the extradition and on 9 June 2002 the author was returned to the U.S – despite the Administrative Court's order to stay the execution. Therefore, the Administrative Court decided *ex post facto* in June 2002 that Weiss' surrender had had no sufficient legal basis.

At the time of extradition Austria had not made any submissions to the Human Rights Committee that in late May 2002 had requested not to extradite Weiss until the Committee had received and addressed Austria's submissions on whether there was a risk of irreparable harm to Weiss. Furthermore, two proceedings were pending before the Constitutional Court: one regarding the constitutionality of various provisions of the extradition law, especially concerning the treatment of judgements *in absentia*, and one "negative competence challenge" (*Antrag auf Entscheidung eines negativen Kompetenzkonflikts*) because neither the courts nor the Ministry of Justice had decided upon his right to appeal. In December 2002 the Constitutional Court decided in Weiss' favour, holding that the Court of Appeal were obliged to examine all admissibility issues concerning the author's human rights, including the right to appeal, and that the Ministry's decision thereafter was a formal decision to extradite and should consider all other possible issues of human dignity. Moreover, the Constitutional Court found it contrary to the rules of law and unconstitutional that the complainant had no possibility to challenge the Court of Appeal's decision that extradition was admissible.

As to the State Party's argument that domestic remedies have not been exhausted the Committee found that – given that the extradition had taken place notwithstanding the Committee's request for interim measures in order to prevent irreparable harm to the victim – "a remedy which is said to subsist after the event which the interim measures sought to prevent occurred is by definition ineffective, as the irreparable harm cannot be reversed by a

subsequent finding in the author's favour". Concerning the Austrian reservation to Article 5/2(a) the Committee denied that the European Court of Human Rights had examined the case on the merits when striking it off the list after the author's withdrawal of the application.

On the merits the Committee considered first whether the pronouncement of his conviction *in absentia* in the U.S. amounted to a violation of Article 14/5 (right to appeal criminal convictions) but held that Weiss and his legal representative had been present throughout the trial, as arguments and evidence were advanced, and thus had had notice that judgement would be passed.

The Committee also denied a violation of the Covenant by the operation of the "fugitive disentitlement" doctrine, since Weiss had been extradited on fewer grounds than all the charges for which he was initially sentenced and would be re-sentenced in the U.S. and therefore be granted full appeal.

Next, the question whether the sentence of 845 years of imprisonment without possibility of earlier release violated Articles 7 and 10 (no inhuman punishment or detention) was said to be only hypothetical due to the pending proceedings about re-sentencing Weiss.

However, the Committee found that the proceedings in the State party's courts violated Article 14/1 (equality before courts) in conjunction with Article 2/3 (right to an effective remedy): By way of extradition in breach of the stay issued by the Administrative Court and by finding the author's inability to appeal the Court of Appeal's adverse decision in circumstances where the Procurator General was able to do so, Austria breached its obligations under the Covenant to guarantee effective remedies and equality before the courts.

Furthermore, Austria violated its obligations under the Optional Protocol by extraditing Weiss before the Committee could address the author's allegation of irreparable harm to his Covenant rights. When the Committee sought Austria's assessment of whether Weiss might be exposed to irreparable harm and Austria did not respond but extradited Weiss, Austria undermined the position of the Committee under the OP.

Consequently, the Human Rights Committee demanded of Austria to ensure that Weiss would suffer no violations of his rights under the Covenant as a consequence of his unlawful extradition. Furthermore, Austria had to ensure that no similar violations could occur in the future and that appropriate steps were taken to ensure that the Committee's request for interim measures of protection would be respected in the future.

The case of the Bosnian national Jakupovic whose expulsion from Austria was declared unlawful by the European Court of Human Rights is dealt under the right to private and family life in Article 7 above.

National legislation, regulation and case law

Deportation orders may be enforced against foreigners by officers of the immigration police after a non-refoulement examination according to sections 56, 57 and 60 Aliens Act 1997 (*Fremdengesetz*) if they did not comply with the order voluntarily or where there are good reasons for assuming that they would not comply voluntarily, if they pose a threat to public security or illegally returned to Austria again. If deportation is not possible for refoulement reasons or cannot be effected for practical reasons, the order is temporarily suspended for a period not exceeding one year. Afterwards there will be a new assessment of the situation. Following the death of a Nigerian asylum seeker due to the application of physical constraint (stripping and using of adhesive tape) on his deportation the Minister of the Interior issued

new guidelines[33] for the forcible deportation of persons. The authorities now use chartered flights for all persons that they assume might turn to violent means in order to resist their deportation. The police are also instructed not to jeopardise the health of the deportees and to stop the operation if necessary. Last year the Ministry of the Interior outsourced the giving of advice to asylum seekers on the voluntary return to their country of origin to the German private company European Homecare who try to convince refugees from countries with a low recognition rate by offering a free flight home, some pocket money and Federal care for the meantime. The same company has also become responsible for managing the Federal care and accomodation centres in Traiskirchen, Thalham, Bad Kreuzen and Reichenau on 1 July 2003 after winning a tender with the cheapest offer against a consortium of Austrian humanitarian organisations traditionally involved in providing shelter, security and advice to asylum seekers (Caritas, Diakonie, Volkshilfe and Red Cross).

Practice of national authorities

In this respect, the case of the 74 Chechnyan asylum seekers of 1 Novemeber 2003 – treated more extensively under Article 18 above – may also stand as an example for showing that Austria risks violating the prohibition of mass expulsion and the principle of non-refoulement by wrongly labelling the neighbouring countries as "safe third countries" in all circumstances.

Reasons for concern

The case of Sholam Weiss is a strong indicator for the growing readiness of Austrian authorities to ignore decisions or recommendations by renowned international bodies (UN Human Rights Committee, UN High Commission for Refugees) if it seems to be in the national interests to do so. It is therefore demanded from the responsible Ministers of the Administration to take concerns and objections to policies expressed by international organs more seriously.

CHAPTER III : EQUALITY

Article 20. Equality before the law

International case law and concluding observation of international organs

In its Individual Observation concerning ILO Convention no. 87 on the Freedom of Association and Protection of the Right to Organise 1948, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) issued concerns about the right of workers' organizations to elect their representatives in full freedom. The CEACR has been commenting for a number of years on the need to amend section 53(1) of the Industrial Relations Act (*Arbeitsverfassungsgesetz*) in order to enable foreign workers to be eligible for election to work councils.

The Committee shared the view of the Human Rights Committee adopted on 4 April 2002[34] that there was no objective and reasonable ground for justifying exclusion from a close and natural incident of employment, namely the right to stand for election to the relevant work council, on the basisof citizenship alone and that, as a remedy, the Government should modify theapplicable law. Furthermore, since the European Commission had initiated proceedings against Austria before the European Court of Justice for failure to fulfil an obligation with regard to the eligibility of foreign employees in work council elections, the Committee

[33] Guidelines for "problematic deportations" of 1 June 1999, 19.250/42-GD/99
[34] CCPR/C74/D/965/2000*, Karakurt v. Austria*, 4 April 2002

noticed the views of the Government that any discussion of legislative measures should wait for the conclusion of proceedings before the European Court of Justice which is expected to clarify the legal situation on this issue in the course of a year, so that this decision could be complied with when opening eligibility to foreign employees in work council elections. Recalling that the Committee had been commenting upon this discrepancy with the provisions of the Convention since 1993, it trusted that Austria would take all necessary measures in the very near future to amend its legislation so as to ensure that foreign workers may be eligible for election to work councils and expressed the firm hope that the Government would be in a position to indicate in its next report the measures taken in this regard.

Article 21. Non-discrimination

International case law and concluding observation of international organs

The discrimination of homosexual people that featured in Austrian criminal law until the landmark decision of the Constitutional Court to repeal section 209 of the Criminal Code still endures in some aspects. In *L.&V. v Austria*[35] the European Court of Human Rights held that since fomer convictions were not lifted Austria was still in violation of the Convention, and in *S.L. vs. Austria*[36] the Court followed the applicant, who alleged in a more abstract way that the incriminating provision had hampered him from living his life according to his sexual orientation and had put a stigma on homosexuals in general.

Two Austrian nationals, born in 1967 and 1968 respectively, were convicted for consensual homosexual relations with adolescents between 14 and 18 years of age. They were sentenced to eight months suspended on probation for a period of three years and six months suspended on probation for three years respectively.

The Court held that the change in law in 2002 did not affect their position as victims and that consequently their complaints were admissible. Furthermore, the Constitutional Court's argumentation was based on other grounds ("absurd results") than those put forward by the applicants, namely their right to respect for their private lives and the violation of Article 14 in conjunction with Article 8 of the Convention. Above all, the convictions still stood. There were no particularly weighty reasons to justify the differential treatment of homosexual acts since recent research proved that sexual orientation was established at the beginning of puberty and a European consensus was in favour of equal ages of consent. Thus, "to the extent that section 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority those negative attitudes could not of themselves be considered by the Court to amount to sufficient justification for differential treatment any more than similar negative attitudes towards those of a different race, origin or colour."

Both applicants were awarded € 5.000 as compensation for non-pecuniary damages, due to the criminal proceedings that laid their most intimate aspects of life open to the public. As to the costs, they were awarded € 10.633,53 and € 6.500 respectively but the Court rejected their claim for future costs linked to removing the consequences of the violation of the Convention found because the Court considered them "speculative".

S.L., born in 1981, alleged that the maintenance of section 209 of the Austrian Criminal Code violated his right to respect for his private life and was discriminatory. Section 209 had also hampered homosexual adolescents in their development by attaching social stigma to their

[35] E.Ct.H.R., *L.&V. v Austria,* application no. 39392/98, judgement of 9 January 2003
[36] E.Ct.H.R., *S.L. vs. Austria*, application no. 45330/98, judgement of 9 january 2003

relations with adult men and to their sexual orientation in general. Whereas the Constitutional Court dismissed a similar complaint in 1989 for factual differences between on the one hand homosexual and on the other hand heterosexual and lesbian relationships, the Constitutional Court found section 209 unconstitutional in 2002 for it punished consensual homosexual acts only during the 14-to-18-years-of-age bracket and possibly made the same relationship legal at the beginning when both where under 19 years of age, then unlawful when one became older than 19 and then legal again when both reached the 19 years of age requirement. Some months later the Austrian Parliament, after the repeal of section 209, introduced a new section 207b to the Criminal Code, which indiscriminately punishes homosexual and heterosexual relationships with under 16-year-olds if they lack sufficient maturity to understand the meaning of the act and the offender takes advantage of the immaturity or if the offender takes advantage of a under-16-year-old who finds himself in a predicament. The amendments entered into force in August 2002.

Despite these changes in Austrian legislation and case-law the Court found that the amendments did not change the applicant's status as a victim of section 209 because he was prevented from entering into relations corresponding to his disposition until he reached the age of 18. The application was therefore admissible. Turning to the assesment of the material facts the Court held that there was no objective and reasonable justification for the different ages of consent, even more as European consensus favoured equal ages of consent for sexual relations. Furthermore, the Court referred to the Convention as a "living instrument". Thus, its application had to consider the results of modern science that had shown that sexual orientation was already established at the beginning of puberty. The Court unanimously held that there was a violation of Article 14 in conjunction with Article 8 and considered it unnecessary to rule on the question of a violation of Article 8 alone. The applicant was awarded satisfaction for non-pecuniary damages.

In spite of the recent repeal of section 209 of the Criminal Code and introduction of a non-discriminatory follow up provision by section 207b, discrimination on the grounds of sexual orientation is still not overcome in many other areas. *Karner vs Austria*[37], a case that came before the European Court of Human Rights, shows this problem with regard to a civil law claim to succede to the tenancy after the death of the homosexual partner.

Austrian national Karner claimed that the Supreme Court's decision not to recognise him as a "life companion" within the meaning of section 14(3) of the Rent Act (*Mietrechtsgesetz*) and therefore not to recognise his right to succeed to the tenancy after the death of his homosexual partner amounted to discrimination on the ground of his sexual orientation in breach of Article 14, taken together with Article 8 of the Convention. Karner himself died in 2000.

While the Government requested to strike the case out of list, the Court applied Article 37 last sentence of the Convention, saying that although there was no longer a victim of a violation of a Convention right after Mr Karner died without an heir, a judgement may still serve a general interest to elucidate, safeguard and develop the rules instituted by the Convention. In the dissenting opinion, however, judge Grabenwarter claimed the inconsistency of establishing a general interest in the case of *Karner*, whereas the *Erdogan v. Turkey*-case from April of this year was struck out of list.

Since the non-discrimination principle cannot be relied on independently but complements the other substantive provisions of the Convention, the Court first stated that, in any event, the right to respect for one's home in Article 8 was affected. It did not find it necessary to consider whether the case also fell under the notions of private life or family life. As to the alleged violation of Article 14, taken together with Article 8, the Court held that the Government had not brought forward any sufficiently weighty reasons for the differential

[37] E.Ct.H.R., *Karner v. Austria*, application no. 40016/98, judgement of 24 July 2003

treatment of homosexual companions, even though it accepted the historic legislator's aim to protect the traditional family unit. As regards the necessity of justification for differential treatment, the Court also referred to the *S.L. v. Austria*-case from the beginning of this year.

In the absence of an injured party the Court did not grant any damages but merely ordered that the Austrian Government pay € 5.000 for costs and expenses to the applicant's estate.

National legislation, regulation and case law

Fairly belatedly Austria is about to adapt its law in relation to the two anti-discrimination directives, the Racial Equality Directive 2000/43/EC and the Employment Equality Directive 2000/78/EC.

On 13 November the draft legislation for an Equal Treatment Act and an Act on the establishment of an Equal Treatment Commission and an Office of the Ombudsperson for Equal Treatment was referred to the Equal Treatment Committee of Parliament. It was hoped to finish Parliamentary proceedings before the end of 2003 but is still sticking at Committee level. Apart from procedural impediments, it was broadly regretted by commentators that the Government did not take on the chance to elaborate a general anti-discrimination law (a ready-made comprehensive draft was prepared by the Ludwig Boltzmann Institute of Human Rights in 2001) and largely refused to involve non-governmental organisations in the preparation of the law, which could have positively contributed to the effort. It is particularly disturbing that discrimination on the grounds of a person's sex, religion, philosophy, age, sexual orientation, are only outlawed in the area of employment. As regards dicrimination on the grounds of disability the Government pledged to soon prepare the long awaited Equal Opportunities (Disabled People) Act, which was allegedly left out for drafting reasons. Overall the draft thus amounts only to a minimum solution. The wording of the Equal Treatment Act does in most parts closely follow that of the underlying Directives which ought to ensure its smooth application without major difficulties of interpretation. Unfortunately, this cannot be said of the important issue of burden of proof. Whereas the EC Directives intend to fully shift the onus to the discriminator once a prima facie discrimination could be established, the Austrian Equal Treatment Act requires that an action for compensation be rejected when the defendant's version appears to be more plausible. Justification for objective differentiation is admissible, so it is for example possible to prohibit the wearing of scarves in work places where there is a danger to get injured from machines. The minimum amount of damages for sexual harassment is now set at € 720, which is remarkable given that the courts hitherto did not award more than the equivalent of two monthly salaries. The maximum amount was abandoned, notably because the European Court of Justice does not permit such ceiling in the field of discrimination.[38] While the Federal Government have finally - albeit belatedly and partly insufficiently - come to terms with the matter, the nine Provinces are still lagging behind Community requirements in relation to their civil servants. Further critique regards the composition of the new Equal Treatment Commission, which will draw its staff from several Ministries and the Social Partners but not from independent civil society organisations or pressure groups. So the law does not forsee any co-determination of NGOs and does not establish them privileged actors with an own right to file an action in cases of discrimination. Moreover, the work in the Commission is unpaid, meaning that its members can only work part-time for the cause of equal treatment next to their regular jobs, a fact that could erode the efficiency and credibility of the institution.

In the case of *Köbler v. Austria*[39], the European Court of Justice ruled that the doctrine of state liability was also applicable in instances where decisions and judgements of the

[38] In addition, sexual harassment will also be made an offence punishable with up to six months' imprisonment if the Criminal Code Amendment Act 2003 receives Parliamentary approval.
[39] ECJ, C-224/01, *Köbler v. Austria*, judgement of 30 September 2003

highest courts in the Member States obviously infringed Community law including the Community standard of anti-discrimination rules. The judgement can be seen as pushing European integration in the field of state liability, where only Austria and Sweden maintain regulations exempting their highest national courts.

The facts of the case had a university professor teaching in Innsbruck who had requested extra remuneration for long employment taking into account his former years as professors in other EU countries but was denied the remuneration by the Administrative Court. He considered himself indirectly discriminated by a provision of Austrian law that granted such remuneration only to professors with 15 reported years served in Austrian universities and filed a claim for state liability arguing the incompatibility of that law with Community law which finally brought him to the European level.

The European Court of Justice held that infringements of Community Law leading to state liability can also be attributable to the highest national courts. Next to other arguments the Court also referred to the competence of the European Court of Human Rights pursuant to Article 41 ECHR to order a State which has infringed a fundamental right to provide reparation of the damage resulting from that conduct for the injured party. Under the case-law of that court "such reparation may also be granted when the infringement stems from a decision of a national court adjudicating at last instance".

Practice of national authorities

Accompanying the transposition of the anti-discrimination directives into domestic law the Ludwig Boltzmann Institute of Human Rights will offer information and training courses for lawyers, judges and public prosecutors in order to facilitate the application of the new provisions. The initiative is financed by the European Commission and the Ministry of Justice.

Next to several communities in Lower Austria and Vorarlberg, where projects are running at the moment under the EQUAL programme of the European Union, the Provincial Government of Tirol have engaged in developing guiding principles for the integration of migrants. The 2-year process will be fully operational in 2004 and is intended to involve a wide range of different actors from politics, non-governmental organisations and all administrative levels. At the end of the day it is hoped that there will be model guidelines on how to address the issue of integration of migrants which could urge the communities to follow suit. What is more, the process is likely to raise the awareness for migrants and their situation and the need for integration.

In an attempt to end racist access policies non-governmental organisations executed a common field operation testing bars and restaurants in the cities of Vienna and Graz[40]. The results showed that only about 40% of the innkeepers admitted people of Arab and African descent in spite of a clear legal provision that makes it an offence to deny entry to public places for discriminatory reasons.[41] It was mainly argued that black people were potentially aggressive, that regular visitors did not like the company of foreigners or that a membership card was needed which apparently did not exist. In the light of this the Green Party in Styria has launched a campaign on its website where it pillories all innkeepers that employ discriminatory access policies. Additionally the Green Party brought a motion in Parliament on 25 September 2003 proposing to change section 87 of the Trade and Industry Regulation Act so that an innkeeper would lose his licence if found guilty of the administrative offence of discrimination for a second time.

[40] ZARA Racism Report 2002 pp. 19-23, http://www.zara.or.at/download/rass_rep_2002_e.pdf
[41] Art IX(1)(3) EGVG (Einführungsgesetz zu den Verwaltungsverfahrensgesetzen), Federal Law Gazette (BGBL) 50/1991 as amended

A wave of homosexual protest went down on Monika Lindner, the CEO of Austria's public broadcasting corporation ORF, in late November 2003 confronting her with severe charges of discriminating behaviour. In a public statement she defended her decision not to broadcast an episode of the dating show "Dismissed" featuring gay people at 5 p.m. by describing its contents as obscene and inadequate for that time of the day. The gay and lesbian organisation *Homosexuellen Initiative (HOSI)* and Günter Tolar, a homosexual member of the supervising Audience Council qualified the statement as unacceptable insult and outrageous discrimination against homosexual people and demanded an official apology.

Reasons for concern

In particular the *Karner*-judgement might entail a far-reaching impact for all areas of the law, as it implies that any differentiation between homosexual and heterosexual partnerships is infringing human rights. In Austrian law one can find similar provisions concerning the leave for caretaking and the extension of social insurance to one's partner. More generally, the bad treatment of gay and lesbian persons, be it by the state or private individuals, shows that there is still much room for improvement and Austria as well as Austrians should better try to catch up with the more advanced European standard. Having opted for a minimum solution for transposing the Racial Equality Directive and the Employment Equality Directive, the Government can only hope for a mere pass for its performance after the evaluation by the European Commission. It also made obvious that the Government considers combatting discrimination a compulsory exercise that is only delivered on under pressure.

Article 22. Cultural, religious and linguistic diversity

No significant developments to be reported

Article 23. Equality between men and women

No significant developments to be reported

Article 24. The rights of the child

National legislation, regulation and case law

The Constitutional Court annulled[42] provisions of the Civil Code granting the right to contest the legitimacy of a child only to the husband and the public prosecutor who had to act "in the public interest or in the interests of the child". Referring to Article 8 of the European Convention on Human Rights, the senior judges were of the opinion that, since the status of the child is concerned, it was imperative that the child hold a right to action of its own and set a period for the legislature till 30 June 2004 to adjust the law accordingly. This will certainly strengthen the rights of the child.

Practice of national authorities

Contrary to Article 18 of the UN Convention on the Rights of the Child there is a structural lack of child care taking places for children of working parents and the quality of places offered does not match the real requirements: too few places for children aged 1-3 years, restrictive opening hours in kindergartens which leave children uncared in the afternoon, long periods of holiday closing, and lack of all-day schools. Another field of concern is the

[42] VfGH, G 78/00, judgement of 11 August 2003

treatment of unaccompanied minor immigrants and refugees. In many cases the special care needed cannot be provided by the authorities for lack of resources and minors are often left alone without clear perspectives, education, language courses and psychological care.[43] In view of these shortfalls it is deplorable that the CRC is not directly applicable in domestic law.

Article 25. The rights of the elderly

No significant developments to be reported

Article 26. Integration of persons with disabilities

National legislation, regulation and case law

In the course of a general extension of scholarships and study allowances Parliament empowered the Minister of Education, Science and Culture to prolong for students with disabilities hampering their study progress the period of allowance up to 50% over the regular study time.[44] Some € 3 million were spent on removing physical barriers in public places. On the other hand the special year for persons with disabilities could not prevent cut backs of some social benefits either (e.g. free radio and television independent of income, higher family allowance for disabled children) and also the allowance covering the extra needs of the disabled was not adapted to inflation.

Practice of national authorities

According to Article 23 of the UN Convention on the Rights of the Child mentally and physically disabled children have the right to thorough social integration as far as possible, which obliges the state to ensure the active participation of children with disabilities in all areas of life. However, in Austria, the communities can exclude disabled children from kindergarten places if the additional costs for the mandatory special nursery teacher cannot be met.

Reasons for concern

The year 2003, being the European year of persons with disabilities, has seen much public talk but little concrete measures. Striking a balance, associations advocating disabled persons' rights acknowledged that public awareness and sensitivity for the difficulties of persons with disabilities has risen through various events and discussions but deplored particularly that the long-promised Equal Opportunities (Disabled People) Act guaranteeing equal treatment and equal chances in all areas of life was still in its prenatal phase. It is to be hoped that the confidence for next year is not disappointed and that the talks will bear fruit.

CHAPTER IV : SOLIDARITY

Article 27. Worker's right to information and consultation within the undertaking

No significant developments to be reported

[43] See Report on the occasion of the 10th anniversary of the *Kinder und Jugendanwaltschaft Salzburg* (Salzburg Children and Youth Advocates).
[44] Federal Law Gazette (BGBL) I 75/2003

Article 28. Right of collective bargaining and action

National legislation, regulation and case law

Austria generally acknowledged the right to strike by ratifying the Inernational Covenant on Economic, Social and Cultural Rights in 1978[45] which obliges the state to ensure that no sanctions for workers taking collective actions are imposed. This was then seen as merely restating the existing law which did not require any further legislative action, although Austria did not recognise Article 6(4) of the European Social Charter. Furthermore, there is no explicit provision in the Austrian domestic legal order that could be invoked in that respect. Due to the special tradition of social partnership built on the principle of consensus it happened that the boundaries of the right to strike were never truly tested in practice before the courts. In the light of the recent wave of strikes Austrians are only yet beginning to deal with the tricky questions of detail.

Practice of national authorities

Re-discovering the right to strike, trade unions prompted a variety of comments, discussions and (threatened) countermeasures which made obvious that the present law does not give guidance on most aspects of interest.

Strikes in Austria have always been measured in seconds rather than hours or days but the year 2003 has seen a remarkable shift to European normality in this respect. Over the year railroaders, employees of the Vienna Lines Public Transportation, teachers, the flight personell of the Austrian Airlines, employees of the Austrian Postal Service, only to give the most important examples have all stopped working to achieve their goals. Making actual use of the fundamental right to strike is not only a new societal phenomenon breaking with an old tradition but equally raises legal questions as to the precise scope of the right. At the centre of debate are the possibility of compensation for strike-related damages and the distinction between classic industrial action regarding wages and working conditions and a strike which is essentially an anti-government manifestation. Although experts more or less agree that politically motivated strikes organised to protest against unpopular policies of the Government like pension reform are unlawful, the crucial question remains as to what exactly amounts to a political strike and how to deal with partly classic, partly political strikes. Given that there is no relevant case law on the right to strike, as labour conflicts were frequently settled on the negotiation table, a new wave of litigation is likely to engage the courts. In a preliminary injunction the Salzburg Regional Court ordered five members of the work council of the Postal Service to stop disturbing the operation of the company after lorries were used to block the entrance to the business premises. In another case holders of annual tickets sued the Vienna Lines Public Transportation for damages in contract before the Vienna Commercial District Court because they could not use the services during a strike. Moreover, various companies affected by strike pledged to examine lawsuits against trade unions in order to recover losses incurred or to indemnify themselves for damages they paid to customers and contract partners. Emotions also ran high among officials of the civil servants' union when the Finance Minister doubted the right of state employees to down work. It is expected with much interest how the Supreme Court will eventually solve the many issues on the table.

Reasons for concern

In the light of a missing legal framework for the right to strike and to take collective actions it would be highly desireable if an Act of Parliament implementing the international obligations (*Streikgesetz*) was passed so as to regulate and clarify the many unsolved issues that otherwise would be left for the courts to decide on a case-by-case basis.

[45] Federal Law Gazette (BGBL) 590/1978

Article 29. Right of access to placement services

National legislation, regulation and case law

Notwithstanding the tense situation on the labour market the Government reduced the means for the national placement service by 7% due to budgetary constraints. At the same time the social partners agreed to tighten the conditions on when an offered job ought to be reasonably accepted, a proposal which the Government is likely to follow.

In the light of the tense situation of the labour market with a yearly average of more than 240.000 (7%) unemployed in 2003, the decision to cut back the means of the national placement service AMS for active counter actions to € 645 million after € 691 million the year before constitutes a serious interference with the right of access to placement services. Next year the AMS will have to regroup its budget and intends to co-finance the allowances for unemployed attending training courses (about € 100 million) with funds from the unemployment insurance. However, this will only shift the financial problem from one side to another. Considering that the state is only obliged by law to cover losses of the unemployment insurance of up to € 356 million it might be necessary for the AMS to take up loans in the future. Due to the legal priority of combatting foremost the unemployment of youths and the elderly the mass of the people without a job cannot be supported adequately. Instead of real qualification the courses often have a single purpose: to palliate the unemployment statistics. Ironically the increased effort to promote jobs for young people aged 15 to 25 years does not reflect in official figures. According to the AMS in October 2003 a total number of 39.137 young people were reported unemployed, which effectively means a rise by 6.3% compared to last year. As an instant measure the Ministry of Labour and Economics announced to furnish the AMS with an extra sum of € 25 million from reserves of the insolvency fund and urged the Provinces to make contributions in order to achieve the Government goal of establishing 5000 new jobs for the youth in 2004. The special advisor to the Government for employing the youth suggested to build inter-entrepreneurial cooperations where the apprenticeship is jointly coordinated by several businesses. On the other hand the criteria for a "reasonable job" will soon be tightened following a basic agreement of the social partners presented to the Government this year. The right not to accept an offered job which is different from the one last practised shall be reduced from one year to the first 100 days of unemployment. As regards commutation to and from work, the time shall not exceed two hours in case of a full time job. Special protection in terms of remuneration is hence afforded if he or she is placed in a job of a different profession, whereas presently it must in any case not fall below the respective applicable collective agreement, which is rather low. In the first 120 days of unemployment the remuneration will be deemed acceptable as long as it lies above 80% of the average earnings in the last year, afterwards the floor is drawn at 75%. If the unemployed refuses to take up a new job that meets all three criteria, s/he will have to accept cut backs of the unemployment benefit.

Article 30. Protection in the event of unjustified dismissal

No significant developments to be reported

Article 31. Fair and just working conditions

No significant developments to be reported

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

No significant developments to be reported

Article 33. Family and professional life

International case law and concluding observation of international organs

In 2003, the ILO Committee of Experts on the Application of Conventions and Recommendations noted with interest that the Government decided on 28 May 2002 to introduce to Parliament the proposal of ratification of the Maternity Protection Convention (no. 183) and the pertaining Recommendations (no. 191). Both instruments have not been ratified as yet.

Article 34. Social security and social assistance

National legislation, regulation and case law

Whereas Parliament enacted a pension reform that is intended to make the system fit for future developments, the harmonisation of the various pension systems for the sake of better comparability and more justice was delayed.

With effect of 2004 a reform of the pension system was finally agreed in Parliament after a heated debate throughout the year which at its peak in June even triggered strikes. Compared with the initial Government proposal the measures to ensure the sustainability of the pension system were partly softened in their effect but the cornerstones remained untouched. Beginning with July 2004 until 2017 the possibility of early retirement will gradually be abolished. During this period the age of early retirement will be raised from 61.5 years to 65 years for men and from 56.5 years to 60 years for women. For the calculation of the pension the 15 best years with the highest earnings are presently taken as a basis, while hence the period will be extended every year by one year until the calculation period is 40 years at the final stage in 2028. Moreover, the stable value factor is reduced from 2 to 1.78 meaning in fact that the pension will further drop. Existing pensions are not affected, except for the group of retired civil servants who will have to pay a 1% higher contribution to the pension insurance. Less pension paid later, this is clearly the essence of the undertaking, which experts considered far overdue in view of the demographic developments. However, they criticised that the accumulated losses caused by the different measures were eventually confined to a maximum of 10% due to strong pressure from the opposition and the street arguing that this might still necessitate further adaptations in the future. Another core aim, the harmonising of the different pension systems for farmers, railroaders, civil servants, the self-employed, and the majority of employees covered by the General Social Security Act (*ASVG*), was postponed for the time being. The Government only issued a legally not binding declaration and called for a common pension age of 65 for all men and women, a maximum pension of 80% of the active salary, and the establishment of an individual pension account where all contributions are entered and which can be accessed any time.

Practice of national authorities

As for the social rights of asylum seekers a comprehensive study was carried out by the Ludwig Boltzmann Institute of Human Rights and finished in December 2003. The social aspects of asylum seekers applying in Austria are dealt with in detail in the chapter on asylum

Article 35. Health care

Practice of national authorities

The health care aspects of asylum seekers applying in Austria are dealth with in detail in the chapter on asylum.

Article 36. Access to services of general economic interest

No significant developments to be reported

Article 37. Environmental protection

No significant developments to be reported

Article 38. Consumer protection

National legislation, regulation and case law

Before the European Court of Justice Austria lost proceedings[46] instigated by the European Commission against provisions of the Foodstuffs Act (*Lebensmittelgesetz*) prohibiting the labelling of food with any reference to its alleged health-promoting effects. Austria defended its position by relying on consumer protection and argued that such information would mislead buyers of the product. The Commission responded that the rigorous Austrian Foodstuffs Act even prohibited health-related information which is proven true and thereby ran counter Community law (food labelling directive, free movement of goods), which won the argument before the Court.

CHAPTER V : CITIZEN'S RIGHTS

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

No significant developments to be reported

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

National legislation, regulation and case law

The Vienna branches of the People's Party and the Freedom Party lodged a claim before the Constitutional Court to test the new Vienna Election Regulation enacted last year by the ruling Social Democrats opening the right to vote and to stand as a candidate on the municipal level also to non-EU foreigners. The constitutional difficulties arise because the City of Vienna is at the same time a community and one of the Federal Provinces. The key question, whether district representatives enjoy mandatory regulatory powers which the Austrian Constitution clearly reserves to Austrian nationals, was also on the minds of the drafters of the law when they excluded some offices for foreigners. However, this exlusion might be at odds

[46] ECJ, C 221/00, *Commisssion v. Austria*, judgemet of 23 January 2003

with the principle of proportional representation. In addition, it is argued that the franchise is the most eminent citizen's right and cannot be divided into a "minor" and a "major" right to vote.

Article 41. Right to good administration

No significant developments to be reported

Article 42. Right of access to documents

No significant developments to be reported

Article 43. Ombudsman

No significant developments to be reported

Article 44. Right to petition

No significant developments to be reported

Article 45. Freedom of movement and of residence

No significant developments to be reported

Article 46. Diplomatic and consular protection

No significant developments to be reported

CHAPTER VI : JUSTICE

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

International case law and concluding observation of international organs

Unreasonable length of proceedings:

The case of *Achleitner v Austria*[47] before the European Court of Human Rights reveals a flagrant breach of Convention Article 6(1), as administrative proceedings have lasted for 27 years and counting. But still such grave violations of procedural rights remain fairly exceptional in Austria.

Mr and Mrs Achleitner run a fishing farm the ownership of which was transferred on them in 1976 by the first applicant's parents. In the vicinity of the applicants'estate the Braunau River Engineering Directorate (*Flussbauleitung*) carried out regulation works on a small river between 1956 and 1969, the permission under the Water Act 1959 (*Wasserrechtsgesetz*) being

[47] E.Ct.H.R., *Achleitner v. Austria*, no 53911/00, judgement of 23 October 2003

granted ex post by the District Authority in 1975. At the same time the applicants request for compensation was dismissed although after the regulation works the capacity of the well was no longer 800 litres per second but 100 and therefore did no longer supply the fishing farm with enough water. In 1999 when the applicants lodged their complaint with the Court claiming an unreasonable length of proceedings, the domestic proceedings were still pending – and still they were when the European Court of Human Rights delivered its judgement.

Without discussing any further whether the relevant proceedings started in 1969 (when the regulation works were finished and the applicants predecessors requested the District Authority to order the municipalities to re-establish the former state of the river bed) or in 1976 (when the applicants became parties), the Court stated that even in the latter case the proceedings have been pending for at least 27 years and 9 months. Although the case required expert data concerning the level of ground water in the region the Court did not consider the case to be particularly complex and therefore held that there was a violation of Article 6(1).

The Court awarded compensation of € 35.000 for non-pecuniary damages plus € 5.000 for costs and expenses.

In *Hennig v. Austria*[48] the European Court of Human Rights gave a ruling on when in criminal matters someone is deemed to be charged by the authorities within the meaning of Article 6 of the Convention and concluded that the relevant period starts as soon as the suspect is informed about the allegations which may well be some time before a formal indictment.

Austrian national Hennig is an auditor and tax consultant who in his professional capacity assisted the WEB/IMMAG group, against which the Salzburg Tax Office lodged investigations into a large scale fraud in December 1989. The same month Hennig requested the Oberwart Tax Office to correct his income tax declarations for the years 1985 to 1987, which he later claimed in trial as a "self-denunciation" resulting in exempting him from punishment. This was not accepted by the Salzburg Regional Court for lack of details and for the fact that at that time the authorities had already known about the offence. Indeed, investigations were running and the applicant was informed by the Salzburg Tax Office two weeks after his request for corrections that he was suspected of tax evasion in the three cases he had asked to correct before. The investigations of the Tax Authorities lasted until January 1995 and led to a bill of indictment by the Public Prosecutor's Office and ended in the applicant's conviction of tax evasion in 1995. Hennig filed a plea of nullity which was finally dismissed by the Supreme Court in 1997.

As to the beginning of the period that has to be taken into account for measuring the "reasonable" length of proceedings, the Court held that in criminal matters the reasonable time period begins to run as soon as a person is "charged" with an offence, which may also occur on a date prior to the date when the case is treated before the trial court. In the present case, the beginning of the relevant period was found to be the day when the applicant was informed by the Salzburg Tax Office to be suspected of tax evasion by the end of December 1989. Furthermore, the Court held that the case was neither particularly complex (one dissenting opinion in favour of a particular complexity of the case) nor had the applicant caused significant delays of the proceedings. The Court found a violation of Article 6(1) for a total length of 7 years and 9 months of criminal proceedings.

The applicant was granted satisfaction in the amount of € 4.000 for the non-pecuniary damage suffered but the Court could not establish a causal link between the length of the proceedings and the alleged pecuniary damage. He also received € 3.000 to cover costs and expenses.

[48] E.Ct.HR, *Hennig v. Austria*, no. 41444/98, judgement of 2 October 2003

Land consolidation proceedings, although inherently complex, were criticised for their unreasonably long delay and the lack of a public hearing before the Administrative Court by the European Court of Human Rights in *Kolb et al. v. Austria*[49]. The Court particularly did not accept the argument of workload and thus found a violation of Article 6(1) of the Convention.

In 1974 the applicant farmers were granted the provisional transfer of compensatory parcels (*Grundabfindung*) by the Agriculture Authority (*Landesregierung als Agrarbehörde erster Instanz*). At that time the land belonged to the applicants as building land. In 1980, however, the municipal council amended the area zoning plan (*Flächenwidmungsplan*) designating the applicants' land to agricultural land. In 1988 the consolidation scheme (*Zusammenlegungsplan*) was issued by the Agricultural Authority confirming the situation created by the provisional transfer. The applicants appealed and hearings were held in camera before the Provincial Land Reform Board (*Landesagrarsenat).*In 1990 all four applicants filed a request for transfer of jurisdiction to the Supreme Land Reform Board (*Oberster Agrarsenat*), which the latter dismissed on 27 February 1991. Their complaints with the Administrative Court were dismissed in 1996 (first applicant) and 1998 (the other three).

At the outset the Court stated that a 'dispute' within the meaning of Article 6(1) did not arise before 1988 when the applicants lodged their appeals against the consolidation scheme. The reasonableness of the length of the proceedings had to be considered from this starting point. As for the criteria to be taken into account in order to assess the reasonableness of length of the proceedings, the Court referred to its case-law, naming the complexity of the case and both the applicant's and the relevant authorities' conduct. In this case, it denied failure of the applicants but declared land consolidation proceedings as inherently complex. Furthermore, the Court criticised the delay before the Administrative Court and did not accept increasing workload and measures already been taken against as an excuse. There was thus a violation of Article 6(1) due to unreasonable length of proceedings. In the case of the first applicant who had also alleged the lack of a public hearing the Court also held a violation of Article 6(1) for it could not find any exceptional circumstances that would have allowed the Administrative Court to dispense with a hearing.

All applicants were also awarded compensation for non-pecuniary damage.

Another example for too lengthy proceedings and an ensuing breach of the Convention is provided by *Malek v. Austria*.[50]

In September 1993 Malek, an Austrian national and practicing lawyer, was informed by the Investigating Commissioner of the Disciplinary Council of the Lower Austrian Bar Chamber (*Disziplinarrat der Niederösterreichischen Rechtsanwaltskammer*) that disciplinary proceedings against him were opened. He was alleged of misbehaviour towards intervening police officers during a traffic control by threatening them with job-related troubles in case they charged him with traffic offences. After several hearings, a first instance decision and one of the second instance, which referred the case back, the Disciplinary Council held in November 1998 that Malek had infringed the profession's honour and reputation. He was sentenced to ATS 10.000. In 1999 the Appeals Board (*Oberste Berufungs- und Disziplinarkommission*) dismissed the applicant's appeal who then lodged a complaint with the Constitutional Court in which he 'complained, *inter alia*, about the length of the proceedings and claimed that the disciplinary authorities had failed to take the excessive length of the proceedings into account as a mitigating circumstance'. The Constitutional Court finally dismissed the complaint in February 2000.

[49] E.Ct.H.R. , *Kolb et al. v. Austria*, no. , judgement of 17 April 2003
[50] E.Ct.H.R., *Malek v. Austria*, application no. 60553/00, judgement of 12 June 2003

As regards the admissibility of the complaint with the ECHR which was contested by the Austrian Government the Court held it admissible since 'proceedings in which the right to continue to exercise a profession is at stake give rise to a dispute over civil rights'.

As to the merits the Court held that the 'reasonable length' in the sense of Article 6(1) had to be considered in the light of all circumstances of the case, such as the complexity of the case and the applicant's and the relevant authorities' behaviour respectively. This case was not very complex and part of the delay in the proceedings was attributable to the applicant who missed several hearings and challenged the chairman of the Disciplinary Council for bias. The Court, however, rejected the Government's explanation that the Disciplinary Council was no full-time panel and instead reiterated that it was for the Contracting Parties to organise their legal system in a way that they can fulfil their international obligations.

The court unanimously found a violation of Article 6(1) and awarded € 1.500 for non-pecuniary damages.

In *Petschar v. Austria*[51], which also concerned a complaint before the European Court of Human Rights against Austria for overlong proceedings of nine years in domestic courts, a friendly settlement in the amount of € 11.000 was reached between the parties.

In *Royer v. Austria*[52] the European Court of Human Rights awarded € 15.000 for an overall duration of criminal proceedings of almost seventeen years.

The proceedings started on 4 April 1984, when the Wels Regional Court served an arrest warrant on the applicant, and ended on 8 March 2001, when the written version of the judgment was served on the applicant's counsel. Therefore the overall duration of the proceedings was almost seventeen years, during which time the case was examined twice, once by three levels of jurisdiction and subsequently by the Wels Regional Court. Royer was convicted of negligent bankruptcy (*fahrlässige Krida*) and sentenced to one year's imprisonment suspended on probation.

Although the Court conceded that the case was of some complexity, the proceedings were not concluded within the reasonable time requirement of Article 6(1). Particularly in the second round of proceedings, the case had been pending before the investigative judge for a period of four years.

Royer was not awarded compensation for the alleged pecuniary damage but € 15.000 for the non-pecuniary damage.

Another case submitted to the European Court of Human Rights on that issue was *Widmann v. Austria*[53], where the Court held that absent any factual complexity more than three years of administrative proceedings before the Administrative Court were untolerable from the viewpoint of Article 6(1) of the Convention.

Widmann, an Austrian farmer, owns an alp for which he is entitled to obtain timber from the Austrian Federal Forestry Administration to the extent necessary for the maintenance of the alp's cabins. This entitlement was laid down in a regulatory deed (*Regulierungsurkunde*) of 1868.

In two rounds of proceedings Widmann's request to grant him the necessary quantity of timber for his alp went the way up and down from the Office of the Salzburg Regional

[51] E.Ct.H.R., *Petschar v. Austria*, application no. 36519/97, judgement (friendly settlement) of 17 April 2003
[52] E.Ct.H.R., *Royer v. Austria*, application no. 42484/98, judgement of 12 June 2003
[53] E.Ct.H.R., *Widmann v. Austria*, application no. 42032/98, judgement of 19 June 2003

Government as agricultural authority of first instance to the Administrative Court and back to the first instance and finally led to a decision by the Administrative Court, granting a variable annual quantity of timber depending on the need to maintain the alp's cabin's. Thus, the whole proceedings lasted over eight years and four and a half months.

Since no significant delays were caused by the applicant and since the Court did not consider the case to be particularly complex, it held that there was a violation of Article 6(1). In particular, it found it incompatible with the reasonable time requirement of Article 6(1) that there had been "a substantial period of inactivity of more than three years and three months before the Administrative Court, i.e. between 27 June 1990, when the applicant lodged his appeal and 12 October 1993, when the Administrative Court gave its decision".

The Court subsequently found a breach of the Convention and granted € 6.000 under the head of non-pecuniary damages and € 1.000 for the costs incurred.

Public oral hearing:

As regards the requirement of an oral hearing in the determination of a civil right, Austrian courts are sometimes at odds with the case law of the European Court of Human Rights and tend to dispense of it more easily, which is illustrated by the case of *Bakker v. Austria*[54]

Bakker, a Dutch national, is a physiotherapist who completed his professional training in Belgium in 1986. From 1987 to 1993 he was employed by an Austrian association in that field. In 1995 his diploma was fully recognised by the Austrian authorities after he had accomplished two additional exams. The applicant then filed a request with the Vorarlberg Regional Governor for the authorisation to work as a self-employed physiotherapist. This request was denied due to lack of sufficient years of authorised professional practice. This decision was affirmed by the Ministry for Health and Consumer Protection in 1996. Bakker then lodged a complaint with the Administrative Court. He requested an oral hearing and asked the court to seek a preliminary ruling from the European Court of Justice under Article 177 of the EC Treaty. Moreover, he filed another request with the Regional Governor in order to be granted the right to work as a self-employed physiotherapist which was rejected again by the Regional Governor and then by the Ministry applying the res iudicata principle. In 1997 Bakker filed a complaint with the Constitutional Court, requested an oral hearing and asked the Court to seek for a preliminary ruling. The Constitutional Court, however, refused to deal with the applicant's complaint for lack of prospects of success. Shortly thereafter, Bakker filed another complaint with the Administrative Court which in a joint decision dismissed both pending complaints without holding an oral hearing, stating that no further clarification of the facts could be expected.

There was no doubt that the case fell under Article 6 of the Convention, as proceedings on the admission to exercise a profession involve the determination of a civil right, and that both the Administrative Court and the Constitutional Court were to be considered as 'tribunals'. As regards the compliance with Article 6 the Court stated that 'there is nothing to show that the subject matter of the dispute was of such a nature, for instance a highly technical issue, that it was better dealt with in written proceedings', and therefore found a violation of the Convention.

In respect of the claim for pecuniary damage the Court argued that there was no causal link between the absence of an oral hearing and the alleged loss of earnings. As to the non-pecuniary damage suffered the Court held that the mere finding of a violation constituted sufficient reparation. The incurred costs were covered by € 4.500 on an equitable basis.

[54] E.Ct.H.R., *Bakker v. Austria*, no. 43454/98, judgement of 10 April 2003

Practice of national authorities

Following a groundbreaking decision of the Administrative Court made public in January 2003[55] which outlawed the common practice of the police not to inform suspects of their right to counsel and to refuse the presence of counsel during police interrogations, the Ministries of the Interior and Justice issued a joint decree[56] on 6 February 2003 so as to instruct the security authorities correspondingly. Richard Soyer, founder and speaker of the Association of Austrian Defence Lawyers (*Vereinigung Österreichischer StrafverteidigerInnen, VÖS*), generally welcomed the decision, but noted that it did not remove the lack of legal aid for counsel action before the police, which makes this right unaffordable for many people, and still left too much room for the police to rely on exceptions to the presence of counsel if circumstances of the case so require or if the questioning is presumed not to exceed one hour. He further pointed to the similarly unsatisfactory situation after the transfer from police to court where the suspect usually cannot consult either with counsel before being interrogated by the investigative judge, which could effectively lead to the absurd result that a suspect enjoys more rights before the police than before the judge.

This year the *VÖS* organised their 1st Austrian Defence Lawyers' Meeting, which took place on 22 March in Vienna. As a result of that event the independent lawyers' organisation demanded various improvements in the pre-trial proceedings (*Vorverfahren*) and in the actual court proceedings (*Hauptverfahren*). The following key points of desireable reform have been identified: the right to unsupervised consultation with counsel in every police or court interrogation; the right to counsel during any admission of evidence; providing mandatory counselling beginning with arrest; reducing the period between arrest by the police and transfer to court from 48 hours to a maximum of 12 hours (this proposal to strip criminal proceedings from an old relic of 1862 is also maintained by Amnesty International[57]); shortened proceedings with reduced sanctions in case of a full confession; the right of counsel to question witnesses for the defence in trial first; full compensation for defence costs when the accused is aquitted; the opportunity to influence the decision of the court on the appointment of expert witnesses. Moreover, a complete reform of the grand jury was recommended: first, the defence should be given the possibility to reject persons from standing as jurors; second, the providing of legal guidance for the jury by the judge on the basis of the distributed questionnaire should take place in the presence of both counsel and public prosecutor; third, for establishing the guilt of a defendant in the first place the requirement of qualified majority voting should be introduced; fourth, the jury should be required to give good reasoning for their verdict and an appeal confined to the question of guilt be allowed. The Association of Austrian Defence Lawyers further announced to soon establish a documentation centre with the aim of reporting blatant cases of violation of defence rights.

Reasons for concern

The considerable number of cases in which Austria was found by the European Court of Human Rights to be in violation of the Convention for overlong proceedings before Austrian courts and authorities is certainly pitiful for each individual concerned and it can be assumed that only a fraction of such cases actually reaches the Strasbourg Court. Clearly, justice delayed is justice denied. However, given the total number of judgements and administrative decisions delivered through the course of a year, it must be admitted that proceedings lasting for several years or even decades without good justification remain exceptional in Austria. Moreover, the cases spread rather evenly over all areas of public administration and the

[55] VwGH, 2000/01/0325, judgement of 17 September 2002
[56] Decree 20.317/417-II/1/03
[57] Statement by Amnesty International Austria of 2001 on a draft law amending the Code on Criminal Procedure. The draft law is currently dealt with in the competent Parliamentary Committee.

judiciary. Regarding the ordinary courts, out of 730.000 reported civil proceedings in 2002 just 0.5% at the district courts and 11.7% at the regional courts have been pending longer than two years. Such statistics, admittedly, do not comfort the individual parties confronted with slow and inactive authorities. Recently, the Supreme Court demanded more strictness in disciplinary proceedings against a judge whose professional behaviour was described by the Court as "denial of justice based on a wide choice of delayig tactics" after the Graz Court of Appeal wanted to get the issue off the table with a mere warning.[58] Generally, the backlog of cases is not specifically worrisome, probably with one exception: the Administrative Court has been suffering from a structural problem for years resulting in an almost unmanageable workload, that could neither be solved by establishing independent administrative boards (*Unabhänge Verwaltungssenate*) in 1988, which are mainly competent as appeal boards for administrative offences and for complaints about police malpractice, nor through the creation of other independent special tribunals in certain administrative areas like asylum matters. Real relief, it is thought, can only be achieved by a law reform making the independent administrative boards fully-fledged regional administrative courts with the possibility to appeal to the Administrative Court solely on a point of law. This is a repeatedly voiced idea that has now also been advocated in the debates of the Austria Convention commisioned with elaborating a new draft constitution.

Article 48. Presumption of innocence and right of defence

No significant developments to be reported

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

No significant developments to be reported

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

No significant developments to be reported

[58] Reported in the daily newspaper „*Die Presse*", 3 March 2003