

# Family Reunification: a barrier or facilitator of integration?

## Country Report Austria

Vienna, June 2013

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## NATIONAL REPORT FAMILY REUNIFICATION AUSTRIA

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### Disclaimer

The views expressed in this study are solely the views of its authors. They should not be taken as expressing an official position of ICMPD as an intergovernmental organisation or the European Commission which has provided funding for this study.

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## 1. Introduction

Austria is a country considerably shaped by migration. In 2011, 18.9 per cent of the population, or 1.6 million persons of a total population of 8.3 million, had a migration background, i.e. had either migrated themselves or had parents who were both born abroad (Statistik Austria 2012a).<sup>1</sup> Of the population of persons with a migrant background, some 1.2 million persons were first-generation migrants. Some 415,200 persons were born in Austria, and, thus, were second generation migrants. In terms of legal status, the number of persons with a foreign citizenship stood at 970,541 at the beginning of 2012, representing 10.7 per cent of the population. Of these, 551,747, or 63.8 per cent of the foreign resident population, were third country nationals (Statistik Austria 2012b). Of the 472,412<sup>2</sup> third country nationals registered in the Alien Information System at the end of 2012, close to 70 per cent had either an EU long-term residence status (41.4 per cent), a long-term residence status as a family member of an EU citizen enjoying free movement rights under the Citizens' Directive (5.8 per cent) or a long-term residence status under national law<sup>3</sup> (20.7 per cent) (Ministry of the Interior 2012a: 4).

Post-war migration has been cyclical in nature, closely related to economic cycles, but also influenced by broader geopolitical events such as the fall of the Iron Curtain, the wars in Yugoslavia or the two most recent rounds of EU enlargement. Net migration reached an all-time peak in the early 1990s, by far exceeding migration levels reached during the guest-worker period. Inflows were also significant in the first half of the new millennium (See Figure 1.1, overleaf).

In terms of countries of origin and socioeconomic characteristics, post-war migration in Austria is still largely shaped by guest worker recruitment, although the share of migrants from traditional countries of recruitment (the successor states of the former Yugoslavia and Turkey) has been declining since it peaked in the 1980s. Ever since, the countries of origin in general have greatly diversified as has the composition of migrants in terms of reasons for migration and their socio-economic profiles.

Although labour recruitment in the 1960s and early 1970s was – by definition – primarily about migrant labour, initial guest-worker migration already had an

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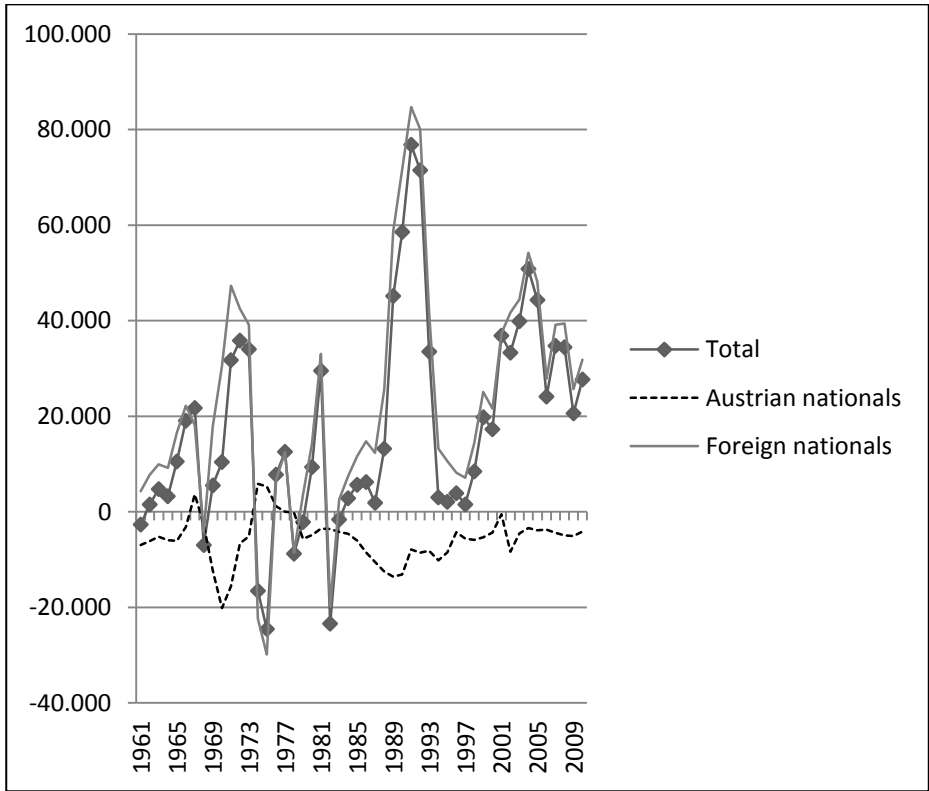
<sup>1</sup> The source of these figures is the 2011 LFS and represents the annual average of persons in private households with a migration background.

<sup>2</sup> The difference between numbers of third country nationals registered in the Aliens Information System and statistics provided by Statistics Austria on the total number of resident third country nationals is due to the fact that third country nationals whose residence is regulated under the Asylum Act (i.e. asylum seekers, beneficiaries of international protection), as well as persons on long-term visas (up to 6 months), are not recorded by the system.

<sup>3</sup> This permanent residence permit called 'residence certificate' was introduced in the 2002 reform on immigration and has since become obsolete with the transposition of the Long Term Residence Directive and a related residence status. It is largely equivalent to long-term residence under Directive 2003/109/EC. Upon 'renewal' (residence cards have to be renewed periodically as the validity of the document is limited) migrants would be issued a long-term residence permit/EU.

important family dimension and a considerable share of migrants moved with or joined other family members. In the absence of clear admission categories, however, they were not recorded as such and often seem to have been admitted as workers rather than family members. While family reunification did occur, reunification with children or whole family migration involving children seemed to have been rare. The recruitment stop in 1974 further increased family-related migration and, in particular, led to a rise in reunification with children (Kraler 2010: 70f).

**Figure 1.1: Net Migration, 1961-2010**



Source: Statistik Austria 2012c

While reunification with children abated in the mid-1980s and decreased to an insignificant level by the late 1990s, family reunification of spouses has been consistently increasing since the 1970s, reaching almost 28 per cent among migrants who immigrated between 2004 and 2008.<sup>4</sup>

<sup>4</sup> Figures are based on the 2008 LFS ad-hoc module on migrants in the labour market. As the LFS only captures those migrants still resident in Austria, the data cannot show the actual historical composition of migration flows towards Austria, but rather shows the current composition by migration



By contrast, family formation – migration for the purpose of marriage – has been relatively insignificant and rarely exceeded 10 per cent of all immigrants at any given period. Above all, this reflects the absence of family formation as a legal entry channel. Instead, most family-related migration involving adults is channelled towards family reunification.<sup>5</sup> In this context, it is not surprising that the share of marriage migrants is highest among EU nationals (more than 18 per cent), as EU migrants – with few exceptions – are the only ones who can legally migrate for the purpose of family formation.<sup>6</sup> In total, more than 53 per cent of the current immigrant population migrated for family-related reasons, making family-related migration the main source of immigration. The share of family-related migrants among migrants born in Turkey is the highest – almost three quarters of the Turkey-born population has immigrated either as a child, for the purpose of family reunification or for the purpose of marriage.<sup>7</sup> Despite restrictions to labour migration, migration for the purpose of employment continued to be an important reason for migration until the early 1990s, when new restrictions drastically reduced the opportunities to do so. This trend was only reversed in the wake of the latest rounds of EU enlargement. About 9 per cent of the foreign-born population immigrated to Austria as refugees or asylum seekers, mostly between the mid-1980s and the late 1990s. After 2000, the relative share of refugees and asylum seekers declined, reflecting both a decline in asylum-related arrivals in absolute terms as well as a new peak in immigration related to reasons other than flight (see figure 1.2, overleaf).

Statistics on admission of non-nationals by reasons of admission have only been available since 1995<sup>8</sup> and are difficult to compare over time due to frequent legislative changes and related changes of admission categories and because the extent to which short-term migrants were included in the statistics varies considerably. Despite these difficulties, it is safe to say that family reasons have consistently figured among the main reasons for admissions ever since data collection started. This is particularly true of what the OECD terms ‘permanent type immigration’ (i.e. immigration entailing a long-term residence perspective), where family reasons are the most important grounds of admission, exceeding 70 per cent of the total share of residence permits issued.

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history. In particular, it is likely that forms of migrations which are typically associated with settlement (for example, migration as a child) are overestimated while labour migration (which may be short-term or, if involving persons without family in Austria, may go along with a high tendency to return migration) is likely to be underestimated.

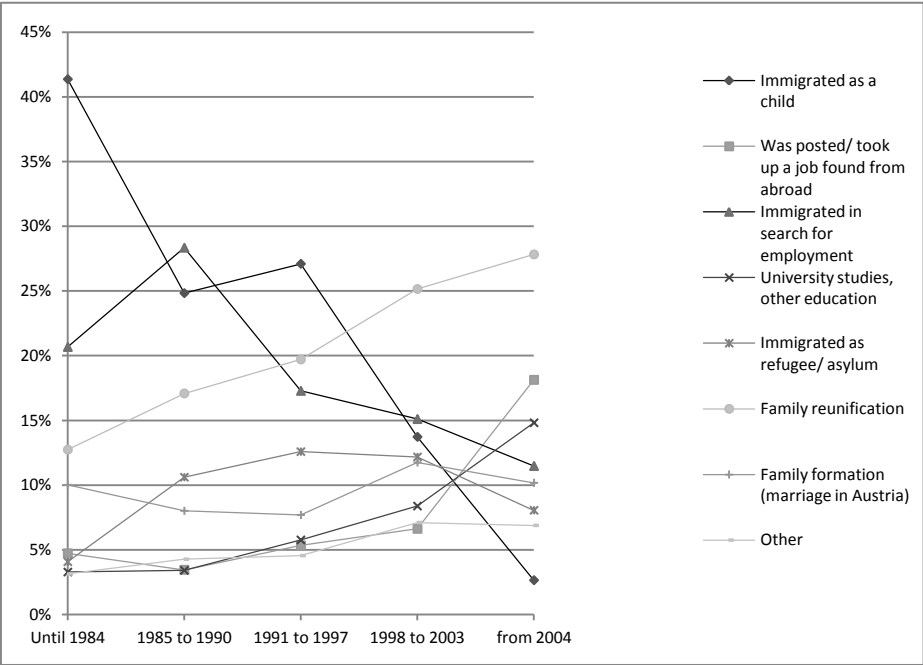
<sup>5</sup> The difference between family reunification and formation, however, is not clear cut. Thus, third-country national spouses need to marry before migrating to Austria, but sociologically they are in a sense still migrating to form a family.

<sup>6</sup> This only applies to the period after Austria’s accession to the European Economic Area (EEA) in 1994, which was followed by accession to the EU a year later.

<sup>7</sup> The source of these figures is the 2008 LFS ad-hoc module on migrants in the labour market, which left the meaning of the question on ‘reasons for migration’ deliberately open. Legally, Turkish marriage migrants would have been admitted either as labour migrants or through family reunification, i.e. upon marriage.

<sup>8</sup> In principle, reasons of admission (excluding asylum, which is recorded separately) have been recorded since 1993, but statistics were published only for reference years 1995ff.

Figure 1.2: Reasons for Migration over Time (in per cent)



Source: 2008 LFS Ad-Hoc Module on Immigrants and Their Descendants (Statistik Austria 2009)

Over the past two decades, family-related migration has also been one of the most contentious issues in debates on migration and integration (second only to asylum), partly reflecting the quantitative significance of family-related migration. In the Austrian context, family-related migration became problematised in the 1990s as an unwanted and ‘uncontrollable’ channel of migration at a time when government policies aimed at limiting immigration. With the initial establishment of an explicit right to family reunification in the early 1990s and its subsequent consolidation, family reunification also became increasingly seen as a migration channel where, as with asylum, abuse was ripe and, therefore, needed to be more strictly controlled. Finally, family-related migration also has become increasingly an issue in terms of integration, partly informed by similar debates in Germany and the Netherlands. Indeed, both the introduction of compulsory post-entry integration measures in 2002, as well as the more recent introduction of pre-entry tests in 2011, mainly targeted family members.

## *Methodology*

This report is part of a comparative research project addressing the topic of family migration. The study included six EU Member States.<sup>9</sup> Family reunification, in general, is an increasingly well-researched area, although most studies focus on legal aspects and an analysis of policymaking on family reunification. There is still only relatively little systematic research available on the actual impact of legal and administrative practices on individuals involved in family reunification. This study seeks to address this gap.<sup>10</sup>

Over the past decade, it has become more difficult to keep track of policy developments. Across Europe, the evolution of policy in this area is characterised by frequent amendments and the introduction of increasingly restrictive criteria as a precondition to family reunification. Against this background, the study will particularly address the integrative or disintegrative effects of this framework on individuals subject to family reunification. The most central questions are: (1) does the obligation to fulfil certain requirements hinder or promote family reunification? (2) do the conditions for family reunification promote or hinder integration? and finally (3) in what sense is family reunification beneficial for integration?

Importantly, family reunification – as a legal right – is conceived as a right of the sponsor, i.e. of migrants or citizens bringing in a family member. In this context, it is important to differentiate between three main categories of sponsors - (1) EU nationals, (2) Austrian nationals<sup>11</sup> and (3) third country nationals (hereafter: TCNs), for whom different legal regimes apply. Family reunification is understood in a broad sense as including family reunification proper involving pre-existing family units separated by migration or migrating jointly as well as family formation, i.e. the formation of new families through marriage. In addition, family retention, i.e. protection from expulsion because of family ties, is also explored.

In order to render the reports comparable, this study focused on four admission requirements: accommodation, income, age and integration. While Member States have reached a certain common understanding of the meaning of integration in the form of the Common Basic Principles on Integration,<sup>12</sup> the concept of integration remains highly contested among policymakers, practitioners and academics. In conceptual terms, it is difficult to pin down what exactly constitutes ‘successful

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<sup>9</sup> These are: Austria, Germany, Ireland, the Netherlands, Portugal and the United Kingdom. The project was implemented from September 2011 until March 2013. The research covers the developments of the past decade in the area of family reunification.

<sup>10</sup> An earlier study on “Civic stratification, gender, and family migration policies in Europe”, coordinated by ICMPD and implemented between 2006 and 2009 did cover some of the same ground, but was less exhaustive in terms of the legal analysis of policies and the assessment of the implementation of family migration policy in administrative practice, see on the project <http://research.icmpd.org/>.

<sup>11</sup> This is a simplification of the legal distinction between EU citizens who have realised their freedom of movement rights (*Freizügigkeitsberechtigte*) and those who have not. Among the former may be citizens who have returned to their country of citizenship from another EU MS and thus fall under freedom of movement legislation.

<sup>12</sup> Council of the European Union (2004): Press Release. 2618<sup>th</sup> Meeting. Justice and Home Affairs Council. Brussels, 19 November 2004. 14615/04 (Presse 321), [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/82745.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/82745.pdf).

integration'. As critics have noted, integration is neither a stable condition nor a linear process. In both academic and wider public debates, integration is often imagined as involving the integration of newcomers into that society, which in turn is typically imagined as a homogenous entity. From a scientific perspective, such an understanding of integration is problematic in two ways. First, differentiation and fragmentation are key characteristics of modern societies. In other words, diversity rather than homogeneity is the essential condition of modernity. Second, and following from the former, integration then becomes a societal and systemic question rather than an individual one, namely how different components of societies are integrated, i.e. 'held together' and relate to each other and how individuals are able to participate in different societal domains. Analytically, the study focused on four key dimensions of integration, namely employment, education, social inclusion and language skills.<sup>13</sup>

The study followed a mixed-methods approach, combining original empirical research with a legal analysis, a document analysis and an extensive review of the existing literature. The desk research included, among others, a review of the existing literature, an analysis of legislation and legislative proposals, case law, parliamentary enquiries and statistics. The empirical research involved expert interviews with different types of stakeholders (government representatives, practitioners, social partners, MP's, etc.) and one NGO expert focus group.

Expert interviews were guided by a topical interview guide; interviews aimed at collecting background information on the policy framework in place, its implementation and experts' perspectives on the interlinkages of family migration and integration. Interviews were conducted with representatives of the Ministry of the Interior, including two experts from the department for residence and citizenship and one expert from the department responsible for integration. In view of the importance of organised interest groups for the policymaking process in Austria, the social partners<sup>14</sup> were also interviewed, including a legal expert on migration affairs at the Chamber of Labour and an expert on migration affairs at the Chamber of Commerce. In addition, one interview was conducted with the parliamentary spokesperson for migration issues of the Social Democratic Party in order to gain a better understanding of views on family reunification at the political level. In order to gain a better insight into the administrative implementation of the family reunification provisions, another interview was conducted with the legal expert of the Viennese authority responsible for processing applications related to family reunification.

The expert focus group was comprised of eight participants, largely consisting of NGO representatives and self-organisations active in the field of family reunification. The discussion was guided by key questions aimed at helping to identify key challenges individuals involved in family reunification are confronted with.

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<sup>13</sup> It should be noted that the precise role of language in integration remains subject to considerable academic controversy.

<sup>14</sup> The social partnership consists of the Chambers of Labour, Commerce and Agriculture, as well as the Austrian Trade Unions Association. Thus, the social partners may best be defined as the largest association of organised economic interests in Austria (see also Hollomey et al. 2011: 8).

Additionally, twenty-one qualitative interviews were conducted with individuals involved in family reunification. Interviews were conducted in Vienna, the country's capital, which is one of nine provinces in Austria and a municipality at the same time. The province receives the largest portion of immigrants in relative and absolute numbers, including family migrants, if compared with other federal provinces in Austria. Since the framework addressing integration and, to a lesser extent, immigration policy, also confers some competences to the federal provinces, the experiences of individuals involved in family reunification reported are likely to differ between different providences and to be linked to specific regional contexts. Several strategies were applied for the recruitment of interviewees. Firstly, NGOs present during the focus group and other organisations were used as mediators. Secondly, respondents were recruited through private networks. Thirdly, the respondents were recruited at facilities and venues which were likely to be frequented by family migrants (e.g. in waiting areas of immigration offices). Many individuals displayed a great deal of interest in the project. However, despite a guarantee of absolute anonymity, many potential respondents declined the interview. In particular, those whose family reunification process was still ongoing feared that giving an interview might negatively impact the outcome of the process. Consequently, most respondents in the sample already had completed the process at the time of the interview. The widespread reluctance to give interviews among individuals can be interpreted as an expression of a high degree of pressure experienced in the course of the reunification process. The focus on the alleged negative aspects of family reunification, specifically, and immigration, more generally, in public debates may have contributed to their reluctance. Finally, in the context of the massive increase of empirical research on migration over the last decade, there is also an increasing 'research fatigue', especially among gatekeepers who could mediate access to respondents, as a result of which researchers have to turn to other sampling strategies. In order to reflect the legal complexity of family reunification, the sample aimed to include different statuses of family sponsors and to obtain a better knowledge of the different stages of reunification.

All interviews conducted were transcribed and thematically coded using a text analysis software (Maxqda). The material was systematically analysed in order to better identify challenges encountered by individuals and strategies adopted to succeed and to assess their views on and current status with regards to integration. Table 1.1 and Table 1.2 give an overview of individuals and experts consulted for the purpose of this project. Due to the geographic limitation of the sample (all interviewees lived in the region of Vienna), the comparatively small size of the sample, and the qualitative methodology applied, the findings are not representative. However, although not providing quantifiable results, the empirical research nevertheless provides robust findings regarding challenges often faced by different categories of individuals involved in family reunification as well as strategies adopted by them in view of such challenges. Interpreted in light of the legal regulations and the analysis of structural issues in integration, the research findings, thus, allow one to draw robust conclusions regarding the three main research questions outlined above.

**Table 1.1: Overview of the Profiles of Individuals Interviewed**

	Nationality of interview partner	Sponsor(s) or family member (FM)	Nationality of partner <sup>15</sup>	Residence status of sponsor	Category of family member(s) and gender (F or M)	Gender of sponsor	Status of family reunification	Family formation or reunification
P1 <sup>16</sup>	Austrian	S	Senegalese	Austrian Citizenship	Husband	Female	Granted	Formation
P2	Senegalese	FM	Austrian	Austrian Citizenship	Husband	Female	Granted	Formation
P3	Austrian	S	Pakistani (rejected asylum seeker)	Austrian Citizenship	Husband	Female	Granted	Reunification
P4	Austrian	S and FM	Turkish	Austrian Citizenship	Husband	Female	Granted	Formation
P5	Democratic Republic of Congo (DRC)	S	DRC	Refugee Status	Wife and four children, fifth child from previous partnership	Male	Granted and Rejected (for child from previous partnership)	Reunification
P6	Iran	FM	Iran	Refugee Status	Wife	Male	Granted	Reunification
P7	Iran	FM	Iran	Refugee Status	Wife and Child born in Austria	Male	Granted	Reunification
P8	Austrian	S	Serbian	Austrian Citizenship	Wife	Male	Granted	Formation
P9	Austrian	S and her husband (not a sponsor)	Serbian	Austrian Citizenship	Adult son	Female	Granted	Reunification
P10	Afghan	FM	Afghan	Subsidiary	Three	The	Pending	Reuni-

<sup>15</sup> If the interview took place with the sponsor, this refers to the nationality of the family member. If the interview took place with the family member, this refers to the nationality of the sponsor.

<sup>16</sup> P = participant (e.g. P1 = participant 1)

	Nationality of interview partner	Sponsor(s) or family member (FM)	Nationality of partner <sup>15</sup>	Residence status of sponsor	Category of family member(s) and gender (F or M)	Gender of sponsor	Status of family reunification	Family formation or reunification
				Protected (appealed against status)	Daughters and two Sons and a Wife	three eldest children arrived unaccompanied	(for father); Granted for rest of family	fication
P11	Austrian	S	Afghan	Austrian Citizenship (previously refugee status)	Wife and Mother of the Sponsor	Male	Granted (Wife) Pending (Mother)	Formation and Reunification
P12	Austrian	S	Croatian	Austrian Citizenship	Husband and child born in Austria	Female	Granted	Reunification
P13	Afghan	S	Afghan	Refugee Status	Wife	Male	Pending	Reunification
P14	Turkish	S and FM	Turkish	Permanent Residence EC – Settlement Permit	Wife and three Children (F, M, M)	Male	Granted	Reunification
P15	Somali	S	None, came here as a minor aged child	Subsidiary Protection	Mother and four Children (Gender not specified during interview)	Male	Pending (the family has already reached Austria, but awaits a formal decision on their asylum application)	Reunification
P16	Turkish	FM	None, came here as a minor aged child	Permanent Residence EC – Settlement Permit	Daughter, four siblings (F,F,F and M) Wife	Male	Granted	Reunification
P17	Ukrainian	S	Nigeria	10 year residence title	Husband (Rejected Asylum Seeker)	Female	Granted	Reunification
P18	Italian	FM	Brazilian	Diplomatic	Husband	Female	Successful	Reuni-

	Nationality of interview partner	Sponsor(s) or family member (FM)	Nationality of partner <sup>15</sup>	Residence status of sponsor	Category of family member(s) and gender (F or M)	Gender of sponsor	Status of family reunification	Family formation or reunification
				Legitimation Card	and child born in Austria (F)		Documentation	Reunification
P19	Austrian with mobility rights	S and FM	UK	Austrian Citizenship	Life-partner (M)	Female	EU Documentation not yet taken place	Reunification
P20	Czech	FM	Italian	Registration certificate	Fiancée (F)	Male	Successful EU Documentation	Reunification
P21	Romanian	FM	Romanian	Registration certificate	Wife and Child (M)	Male	Successful EU Documentation	Reunification

**Table 1.2: Overview of the Profiles of Experts Interviewed and Expert Focus Group Participants**

Gender	Name of organisation	Function/position	Target group(s)	Kind of interview
Tamar Citak	Wiener Interventionsstelle gegen Gewalt in der Familie	Social work, counselling	Victims of domestic violence, including refugees, regular migrants	Focus Group
Ayşe Aktuna	Miteinander Lernen –Birlikte Öğrenelim	Counselling and external communication	Mostly, but not solely immigrants from Turkey	Focus Group
Angela Magenheimer	Ehe ohne Grenzen	Co-founder of association, counselling and external communication	Bi-national couples with Austrian sponsor	Focus Group
Ursula Eltayeb	Programm Start Wien, MA 17	Head of project ‘Start Vienna’ for newcomers at the municipal authority MA 17 (integration and diversity)	Immigrants who newly arrived to Vienna, especially TCN	Focus Group



Gender	Name of organisation	Function/position	Target group(s)	Kind of interview
Katharina Echsel	Peregrina	Counsellor at the centre for education, counselling and therapy for female immigrants	Female immigrants including their families	Focus Group
Jasmina Haracic	Red Cross Tracking Service	Counsellor for refugee and subsidiary-protected families in the reunification process	Refugees and subsidiary protected persons	Focus Group
Judith Hörlsberger	Beratungsstelle für Migrantinnen und Migranten	Legal advisor	TCN	Focus Group
Petruska Kremer	Verein FIBEL	Counsellor for bi-national couples	Bi-national couples	Focus Group
Johannes Peyrl	Arbeiterkammer Wien	Expert in migration law and policy, department for labour market and integration, Chamber of Labour	Employees	Individual Interview (Expert Interview AK)
n./n.	Wirtschaftskammer Österreich	Expert on migration and integration, Chamber of Commerce, department for social policy and health	Employers	Individual Interview (Expert Interview WKO)
Dr. Johannes Pointner	SPÖ Klub	member of the Parliament, Social Democratic Party; parliamentary spokesperson for migration issues		Individual Interview (Expert Interview SPÖ)
n./n.	Rechtsabteilung MA 35	Head of the legal department at the Viennese immigration authority MA 35	Non-nationals	Individual Interview (Expert Interview MA 35)
Mag. Tamara Völker, Mag. Dietmar Hudsky, Mag. Michael Girardi	Bundesministerium für Inneres	Head and deputy of the department for residence and citizenship Head of the department for integration, Ministry of the Interior	Non-nationals and 2nd generation immigrants	Individual Interview (Expert Interview BMI)

## 2. Legislation on family reunification and legal position of admitted family members

Family reunification involving persons from third countries is regulated by the Residence and Settlement Act of 2005 (*Niederlassungs- und Aufenthaltsgesetz 2005, NAG as amended*) and the Asylum Act (*Asylgesetz 2005, AsylG 2005 as amended*). Both acts have been subject to frequent amendments, and as a result have become increasingly complex.

The NAG regulates entry and stay of third country nationals and, hence, applies to cases of family reunification and formation where a third country national is involved either as a sponsor or as a family member. It generally distinguishes between the family reunification of third country national sponsors, EEA (including Austrian) and Swiss nationals who have not realised their EU mobility rights, and EU and Swiss nationals (including Austrian nationals) enjoying mobility rights. Family reunification of refugees and persons with subsidiary protection is regulated under the Asylum Act, which, however, does not foresee a procedure for family formation.

Generally, Austrian law does not distinguish between family reunification and family formation. However, for some immigration categories it is important when the family was formed, notably for refugees and subsidiary protected who reunify under the Asylum Act.

One of the main principles of Austrian family reunification policies is that *the status of the family member depends on the status of the sponsor*. The rights and obligations of the family member, thus, depend on the respective status of the sponsor and whether s/he is entitled to a temporary or permanent stay, or to labour market access. Usually, the status of the sponsor constitutes the maximum set of rights that the family member can obtain. Only in the case of (highly) skilled workers, for whom new immigration schemes were only introduced in 2011, does the status of the family members exceed that of the sponsors in some aspects.

A peculiar feature of Austrian family reunification regulations is the *quota regulation* for family members of the third-country national sponsor. Each year the maximum number of persons from third countries, for whom a new permit can be issued, is defined by way of a federal regulation (*Niederlassungsverordnung*). The quota only applies to family reunification with third country national sponsors under the Residence and Settlement Act, but not under the Asylum Act. In 2012, the quota for family reunification for the whole of Austria was 4,660.<sup>17</sup> If the quota of one year is exhausted before the end of the year, the applications are prioritised for the next year's decisions. The maximum waiting time between the filing of the application and the decision taken is three years.<sup>18</sup>

Generally, the quota regulation applies to all third country nationals who intend to settle in Austria for a longer period of time and who are not family members of

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<sup>17</sup> *Niederlassungsverordnung 2012*, Federal Law Gazette II, Nr. 445/2011.

<sup>18</sup> §12 (4) and (7) Residence and Settlement Act (NAG 2005, last amended in 2012).

Austrian or EU nationals. Family reunification of sponsors who are EU nationals has been exempted since the beginning of the introduction of the quotas in 1993. Reunification sponsored by Austrian nationals was exempted a few years later in 1995. However, in some cases, such as reunification with members of the wider family, quotas still apply (see below). In the course of the last amendment of the NAG in 2011, and against the background of a turn towards ‘managed migration’, e.g. facilitating the immigration of highly skilled workers to Austria, the quota regulation was also weakened for certain categories of third country nationals. In particular, highly skilled labour immigrants and their family members were exempted from the quota system. As an instrument of migration management, the quota system has become all but irrelevant; indeed, in recent years, quotas have hardly been exhausted (a major problem until about 2005). This said, it still has an important impact on individuals affected by it (for more details see Chapter 6).<sup>19</sup>

## 2.1 Family reunification sponsored by third country nationals

### 2.1.1 *Conditions for family reunification under the Residence and Settlement Act*

#### *Scope of family reunification*

Family reunification sponsored by third country nationals is limited to the ‘nuclear family’. In the scope of the NAG, the wording ‘family member’ refers to members of the ‘nuclear family’, including the spouse or registered partner<sup>20</sup> and minor unmarried children (including step children and adopted children). Since a legal amendment in 2009, both spouses have to be at least 21 years old. In case of a polygamous marriage, only one spouse is allowed to immigrate as a family member.<sup>21</sup> Unmarried/unregistered partners, parents or adult children are not admitted as family members under the scope of this law.

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<sup>19</sup> There are also strong principled objections against the quota system. For example, in its 2011 conclusions regarding Austria, the European Committee of Social Rights held that a waiting period of up to 3 years was inconsistent with article 19(6) of the European Social Charter of 1961 (Austria ratified the revised Social Charter of 1996 only in 2011; see Council of Europe 2012: 22f). Similarly, the ECJ (now CJEU) ruling in the case *European Parliament v. Council of the European Union* (Judgement of the Court, Grand Chamber of 27 June 2006 in Case C-540/03) ruled that “the criterion of the Member State’s reception capacity (...) may be one of the factors taken into account when considering an application, but *cannot be interpreted as authorising any quota system or a three-year waiting period imposed without regard to the particular circumstances of specific cases.*” (ibid, para 100, see also Ecker 2008: 329-339).

<sup>20</sup> Registered partnership is an institution for same-sex relationships similar to that of marriage, which was introduced in 2010 by the Registered Partnership Act. Since then, the core family also includes same-sex partners, if the partnership is officially registered (in the country of origin). It is important to note that, conversely, registered partnership is not accessible for heterosexual couples (see Federal Law Gazette I, Nr. 135/2009).

<sup>21</sup> §2 (1) nr. 9 Residence and Settlement Act (NAG 2005, last amended in 2012).

### *Eligibility for family reunification*

According to the definition of the NAG, a ‘sponsor’ is a third country national who legally stays in Austria. Importantly, the Residence and Settlement Act distinguishes between residence titles that imply the prospect of permanent residence and titles for temporary stays.<sup>22</sup> For temporary immigration, the options to consolidate residency are very limited and, in general, not foreseen.<sup>23</sup> While holders of permits allowing for permanent stay are generally entitled to apply for family reunification, only certain categories of persons holding a temporary residence permit may do so. The types of temporary titles eligible for reunification are: students, artists, intra-corporate transferees and researchers. By contrast, pupils, self-employed persons, voluntary workers, or foreign workers on assignment are explicitly exempted. Holders of a temporary residence permit, different from settlement permit holders, are not subject to quotas for family reunification, as the stay per definition cannot lead to permanent residence.

### *General immigration conditions for family members*

Third country nationals who wish to settle permanently in Austria have to fulfil a number of general conditions in order to be admitted to Austria.<sup>24</sup> According to the NAG, a residence title may be issued to a TCN if s/he<sup>25</sup>:

- a. provides valid travel identification;
- b. does not pose a threat to public order or security;
- c. has a legal entitlement to accommodation (according to local standards);
- d. has health insurance;
- e. can provide sufficient means for living on a regular base, i.e. the residence does not invoke any financial burden to a public authority;
- f. the residence does not distort bi-national relations with other states;
- g. has fulfilled the pre-entry language requirement (A1 Common European Reference Framework of Languages) and has fulfilled the Integration Agreement Module 1 (proof of German language skills at the level of A2 of the CERFL) when filing an application for prolongation of residence (see Integration Agreement below).

In the case of family reunification, the responsibility to comply with these conditions rests with the sponsor (income, housing) and the family migrant. In the case of first applications, the burden to supply evidence of sufficient income and housing lies mostly with the sponsor (for alternative strategies see Chapter 6).

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<sup>22</sup> An exception are permits issued to researchers according to §67 Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>23</sup> Holders of temporary residence titles may, under certain circumstances, switch to a permanent residence title (settlement permit, *Niederlassungsbewilligung*) if they satisfy the conditions for that title.

<sup>24</sup> The term ‘residence title’ is used here as a general term including all types of permits issued to third country nationals entitling them to a temporary or permanent stay in the country.

<sup>25</sup> According to §11 (2) Residence and Settlement Act (NAG 2005, last amended in 2012)

According to the NAG, first applications for immigration have to be filed at the competent Austrian representation authority abroad. However, certain exemptions apply. Thus, persons who are eligible for a visa-free entry, researchers and highly skilled workers looking for a job may submit an application in Austria.<sup>26</sup> However, they have to await the decision in the country of origin if their visa expires before the decision is taken (this will usually be the case). Residence permits for children of regular residents who were born in Austria can also be submitted inland within a period of six months after birth.

#### Exceptional conditions

Even if the applicant does not fulfil all conditions, a residence permit may have to be granted if a refusal would be in breach with Article 8 of the European Charter of Human Rights (right to the protection of private and family life). This is rarely the case with the initial admission of family members to the country and mainly applies to cases of renewals of residence permits. In the course of the examination, the competent authority takes into account, among other criteria, the duration and legality of stay, the actual existence of family life ('toothbrush-checks'), the degree of integration in the host country, and conversely, ties to the country of origin, as well as the family's awareness of the uncertainty of residence when the family was founded. In the course of the examination, eventual alternatives (e.g. family life being exercised in another country) are balanced against the personal interest of the family.<sup>27</sup>

#### Reasons to reject a residence title

A residence title may be rejected at the stage of application if there is evidence of a bogus marriage, partnership or adoption, a forced marriage or partnership or a false statement of parenthood. It can also be rejected if the person has overstayed the visa, has entered the country without permission or has been issued an expulsion order within the last eighteen months.<sup>28</sup>

#### *Income requirement*

Earning a regular and stable income is a general immigration condition for third country nationals who want to settle in Austria. The level of the required income varies according to the immigration category (mainly a differentiation between family migration and high-skilled labour migration is made by the legislator), but must ensure that the immigrant does not make use of social assistance during the period covered by the residence title.<sup>29</sup>

Since the Residence and Settlement Act entered into force in 2006, the income target rates for third country nationals are defined at the assured minimum income

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<sup>26</sup> §21 (2) Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>27</sup> §11 (3) Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>28</sup> §11(1), 30, 30a Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>29</sup> §11 (2), nr. 4 Residence and Settlement Act (NAG 2005, last amended in 2012).

levels for pensioners (compensatory allowance – *Ausgleichszulage*).<sup>30</sup> In 2012, the income requirement for third country nationals amounted to EUR 814.82 for single persons, EUR 1,221.68 average monthly net income for a couple and EUR 125.72 for each minor child.<sup>31</sup> Regular expenses, such as rent, loan payments or alimony, have to be deducted from the net income, which increases the actual earnings required to reach the income target rates. A lump sum of a maximum EUR 260.35 can be deducted from the total income required. The required net income for a couple amounts to 68.8 per cent of the equivalised net median income<sup>32</sup> in 2011 of EUR 1,777 (70.1 per cent of the median income of women and 63.3 per cent of median income of men).<sup>33</sup> However, as already stated, the net income required does not include rent and other regular payments. Thus, for a better comparison, one should also add the average regular housing expenses (rent, service charges [*Betriebskosten*], expenses for heating and electricity)<sup>34</sup> in Austria. These amounted to 656.21<sup>35</sup> in 2012. Deducing the allowance of EUR 260.35 for regular expenses, a couple has to have a disposable net household income of EUR 1,617.54 a month to meet the income requirement. Thus, the income requirement comes very close to the net median income. At first glance, the income requirement thus seems to be set at a reasonable level. Also in a comparative perspective, the income requirements in Austria appear to be moderate (see income requirements in other EU Member States in Strik et al 2013: 12).

Nevertheless, this calculation conceals considerable differences in disposable incomes, as we did not take into account household sizes. Not only do household incomes differ by household size, but the level of income required increases as well. Thus, 50 per cent of families would just about meet the income requirements (with

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<sup>30</sup> These are higher than the level of social aid granted to persons in working age (*bedarfsorientierte Mindestsicherung*).

<sup>31</sup> *Erteilung von Aufenthaltstiteln: Erstantrag*, available at: <https://www.help.gv.at/Portal.Node/hlpd/public/content/12/Seite.120222.html>.

<sup>32</sup> 'Equalised net income' is a measure that allows calculating an indicator of individuals' disposable income based on information on household net incomes. In this process, the net household income is divided by the number of household members. The household members are weighted according to their age, using the modified OECD equivalence scale. See for further details [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Glossary:Equivalised\\_disposable\\_income](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Glossary:Equivalised_disposable_income). 'Median income' means that 50 per cent have an income up to the level of the median income.

<sup>33</sup> For comparative reasons, the project consortium used the household income data gathered by the EU-SILC and accessible via the Eurostat database ([http://epp.eurostat.ec.europa.eu/portal/page/portal/income\\_social\\_inclusion\\_living\\_conditions/data/database](http://epp.eurostat.ec.europa.eu/portal/page/portal/income_social_inclusion_living_conditions/data/database)). According to Eurostat, the monthly median income in absolute numbers amounted to EUR 1,776.583 in the year 2011 (EUR 1,814 for men and EUR 1,735 for women). Note that this refers to the household income, and not individual incomes, and, thus, includes also income, for example, earned by parents if they share a common household.

<sup>34</sup> The NAG does not specify the precise meaning of housing expenses. These may, but must not, include expenses for heating and electricity. In Vienna, expenses for heating and electricity are not taken into account. The average housing expenses in Vienna, therefore, would be EUR 512.3.

<sup>35</sup> This amount is calculated on the basis of the 2009/2010 consumer survey by Statistics Austria (Statistics Austria 2011). From the total average expenses for energy and housing (EUR 691), maintenance costs were deducted, as these would not be regular expenses. The resulting amount (EUR 622) was adjusted by the consumer price index for 2012 (Statistics Austria 2012d).

regular housing costs added) if there is one child; the presence of additional children, however, would mean that the overall income required is above the equalised net median income. In addition, migrants earn considerably less than non-migrants. According to the Microcensus 2011, naturalised migrants in dependent employment have a net median monthly income of 1,548 EUR, with the comparable figure for foreign nationals being 1,490 EUR.<sup>36</sup> In the case of the latter, the simple net income required (without regular housing expenses) already amounts to 82 per cent of their monthly net median income. If regular housing expenses are taken into account, the income required amounts to 108.6 per cent of their monthly net median income. If the income distribution is further differentiated, the ability of different groups to meet income requirements becomes even clearer. Thus, the poorest 25 per cent among foreign nationals have a monthly net income of up to 1,082 EUR<sup>37</sup> - that is far below the income threshold set by the law, let alone if regular expenses are taken into account. But also in terms of the income distribution across the entire population (i.e. including both migrants and non-migrants), significant differences in the ability to meet the income requirements appear. For the poorest 20 per cent of the population<sup>38</sup> the overall income required (including regular housing expenses) amounts to 131.6 per cent of their disposable net income, while for the second poorest 20 per cent, the sum required still amounts to 102.7 per cent. Despite their relatively moderate level, therefore, income requirements are socially highly selective.

#### **Income requirement calculation example**

Mrs. K wants to bring her husband and her minor-aged daughter, who will attend school in Austria. She has to provide EUR 530 in monthly rent and has to pay back a loan at a monthly rate of EUR 120. Mrs. K must have EUR 1,221.68 at her disposal for herself and her spouse, an additional EUR 125.72 for her daughter, 269.65 for the rent (EUR 530 minus the lump sum of EUR 260.35), plus the monthly loan payment of EUR 120. In sum, Mrs. K actually must actually provide a total of EUR 1,737.05 on a monthly base in order to reunify with her husband and daughter. As a fulltime salesperson in retail, she does not earn enough money (EUR 1,400). However, she managed to organise a pre-contract assuring her husband a job and monthly wage of EUR 1,200, provided he obtains a residence title in Austria. The authorities have decided in favour of the reunification because of the positive future prognoses. Had she not succeeded in finding a pre-contract for her husband, things would have turned out differently.

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<sup>36</sup> Own calculations, ICMPD on the basis of the 2011 dataset of the Austrian Microcensus, which, for the first time, contained income data.

<sup>37</sup> Own calculations, ICMPD, on the basis of the 2011 dataset of the Austrian Microcensus.

<sup>38</sup> This draws again on Eurostat data based on the EU-SILC.

Unlike certain other EU Member States, Austria does not prescribe a certain type of employment contract (e.g. fixed vs. temporary). While the proof of employment demanded is relatively moderate, difficulties still may arise in practice, notably for self-employed persons. A 39-page brochure issued by the Ministry of the Interior (2012) details what earnings are taken into account to prove a ‘regular and stable’ income. Savings or care allowances may be taken into account on a case-by-case basis. The criterion of a stable and regular income is, however, generally assessed on the basis of payslips of the past three months. Eventually, authorities may as well take into account future income in terms of a pre-contract for the family member in question. According to the brochure, social benefits that the applicant would be entitled to when the residence is granted are not taken into account in the case of first applications, but only when prolonging the residence.<sup>39</sup> Social benefits are generally defined as benefits emerging from a case-by-case assessment of individual need of such support. By contrast, insurance benefits, such as unemployment benefits (*Arbeitslosengeld*), hardship benefits (*Notstandshilfe*), or payments resulting from invalidity insurance are considered as regular and stable resources.

For persons and their family members who intend to settle in Austria but do not work here, the income requirement is doubled.<sup>40</sup> If the income requirement is not met, the residence permit will be rejected. However, the right to protect private and family life has to be considered in every decision.

### *Legal entitlement to accommodation*

The applicant/sponsor must prove that s/he has a legal entitlement to an accommodation equal to the ‘local accommodation standards’ for a family of comparable size. A legal entitlement means that the entitlement is legally enforceable, i.e. that a tenant or an owner of a dwelling has a legal title to tenancy or ownership, respectively. Family members of sponsors are legally entitled to accommodation on grounds of liability emerging from family law (Schumacher et al. 2012: 47). If the accommodation requirement is not met, the residence permit will be rejected. However, the right to protect private and family life has to be considered in every decision.

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<sup>39</sup> The European Committee of Social Rights criticised the exclusion of social benefits for the calculation of minimum incomes in its 2011 conclusions on Austria. Thus, the Committee holds that “with respect to social assistance (...) migrant workers who have sufficient income to provide for the members of their families should not be denied the right to family reunion because of the origin of such income, where its origin is not unlawful or immoral and where they have a right to the granted benefit (...).” It concludes that the situation in Austria is incompatible with Article 19 §6 of the 1961 Charter because the exclusion of social assistance benefits from the calculation of the worker’s income is likely to hinder family reunion rather than facilitate it. More generally, the Committee recalls that “the level of means required by States to bring in the family or certain family members should not be so restrictive as to prevent any family reunion” (Conclusions XIII-1, Netherlands). (Council of Europe 2012: 22f.).

<sup>40</sup> *Erteilung von Aufenthaltstiteln: Erstantrag*, available at: <https://www.help.gv.at/Portal.Node/hlpd/public/content/12/Seite.120222.html>.



## *Integration*

The integration requirement essentially concerns the obligation to prove German language skills for admission, the renewal of a residence permit and the acquisition of a long-term residence permit for the EU (see post-entry integration requirements section 2.1.2). Integration is also relevant in connection with cases that invoke Article 8 ECHR (right to protect private and family life). The ‘degree of integration’ is one of the criteria examined in the course of related assessments.<sup>41</sup> The exact meaning of ‘integration’ in these cases remains unclear, though, and gives authorities wide discretion.

On July 2011, the obligation to prove German skills at the level of A1 already before entry came into force.<sup>42</sup> Under-age minors (i.e. legally defined as aged less than fourteen years) and sick persons upon certification of a public health official, as well as family members of exceptionally highly skilled migrants are exempted from this requirement. In addition, the authorities can, upon application, waive the requirement of the pre-entry language test in the case of unaccompanied minors and on grounds of the obligation to protect the private and family life of an applicant already legally residing in Austria. In this regard doubts may be raised as obligations emerging from Art 8 ECHR may be applicable even in cases in which the family member has not yet arrived to Austria (for discussion see Schumacher et al. 2012: 61). At the time of filing the application for reunification, the exam certificate shall not be older than one year (for an extensive discussion of the implications of the pre-entry requirement see also Chapter 6).

## *Age limits*

As of 2009, both, the sponsor and the spouse or partner have to be aged 21 when the application is filed.<sup>43</sup>

## *Exemptions from general immigration conditions for Turkish nationals*

Although the standstill-clause as stated in the Association Agreement with Turkey has been applicable since Austria became a member of the European Union, it was not until the *Dereci* case was decided before the CJEU that the obligation to enforce the clause became of practical relevance in Austria. With regard to Turkish family members joining Turkish sponsors, no age limit applies in case of married couples. Turkish family members are, furthermore, exempted from the pre-entry language test and not subject to Module 1 of the Integration Agreement (see on Module 1 of the Integration Agreement below). Only Turkish citizens with the intention of taking up employment benefit from special rules for Turkish citizens – the mere declaration

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<sup>41</sup> §11 (3) Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>42</sup> §21a Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>43</sup> Amendment to the Settlement and Residence Act 2005, Federal Law Gazette 1, Nr. 122/2009, §2 (1), nr. 9.

thereof, however, suffices. Whether the standstill clause applies is evaluated on a case-by-case principle (Beratungszentrum für Migranten und Migrantinnen 2012).

**2.1.2 Rights and obligations after admission**

The already complex system and highly differentiated statuses that developed in the course of the 1990s and early 2000s has become even more complex as a result of multiple amendments to immigration legislation. Since 2005, when the Residence and Settlement Act came into force, it has been amended no less than sixteen times.<sup>44</sup> Considerable legal expertise, therefore, is needed to fully understand the legal situation. This has given rise to increasing concerns about the accessibility and clarity of the legal regulations and their implications on the legal protection of individuals. Thus, while a core principle of general administrative procedural rules is that individuals should be enabled to access their rights and obligations on their own, critics note that this is increasingly less the case, rendering it more difficult to act without legal support.

The table below shows some of the complexity that governs the immigration system for TCN and subsequently for their family members. A document published by the Ministry of the Interior, which lists all existing residence titles since July 2011, shows over ten differently named identity cards solely issued to foreigners who are family members of third country nationals (see figure 2.1, below).<sup>45</sup>

**Table 2.1: Residence Titles Issued to Family Members of TCN Who Are Permanent or Temporary Residents**

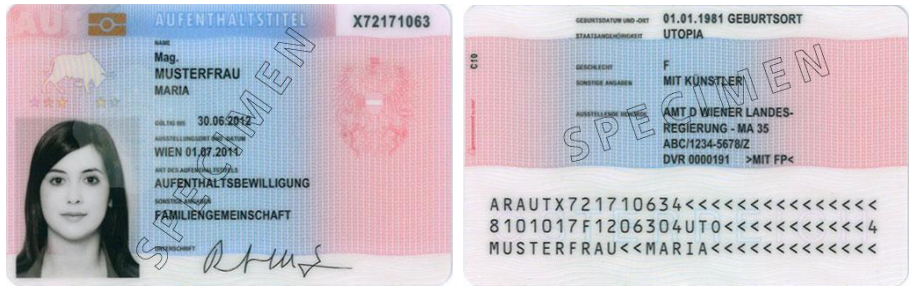
Status sponsor	Status family member ('nuclear family')	General admission conditions PLUS:	Quota	Right to work
PERMANENT RESIDENCE TITLES				
RWR Card	RWR Card Plus		NO	YES unlimited
RWR Card Plus (former RWR Card holders or holders of Residence Permit Researchers)			NO	YES unlimited
RWR Card Plus (all other categories)			YES	YES unlimited

<sup>44</sup> See for the list of amendments: <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004242> (accessed 15 December 2012). This figure also includes a few minor technical changes resulting from changes in other pieces of legislation. Nevertheless, there have been four major reforms of immigration legislation since 2005, although the last amendment mainly concerned procedural changes following from the planned establishment of the Federal Office for Migration and Asylum as of January 2014.

<sup>45</sup> See: Muster Aufenthaltstitel und Dokumentation ab 01 Juli 2011, available at: [http://www.bmi.gv.at/cms/bmi\\_niederlassung/](http://www.bmi.gv.at/cms/bmi_niederlassung/) (accessed 15 Desember 2012).

Blue Card EU	RWR Card Plus	Marriage/ partnership existed at the time of settlement	NO	YES unlimited
Permanent Residence EC			YES	YES unlimited
Permanent Residence EC - Settlement Permit Excluding Employment (§49 (1))	Settlement Permit Excluding Employment	Marriage/ partnership existed at the time of settlement	YES	NO
Permanent Residence EC – Settlement Permit (§49 (2))	Settlement Permit	Marriage/ partnership existed at the time of settlement	YES	YES limited
Settlement Permit			YES	YES limited
Settlement Permit – Family Member			YES	YES limited
Settlement Permit – Self Employed	Settlement Permit – Excluding Employment		YES	NO
<b>TEMPORARY RESIDENCE TITLES</b>				
Residence Permit	Residence Permit		NO	Only family members of certain professional groups

**Illustration 2.1: Sample of a Temporary Residence Permit for Family Members of TCN**



Source: Muster Aufenthaltstitel und Dokumentation ab 01 Juli 2011, available under: [http://www.bmi.gv.at/cms/bmi\\_niederlassung/](http://www.bmi.gv.at/cms/bmi_niederlassung/).

In brief, the legal status of family members of third country nationals can be divided into three main categories:

- 1) Family members of TCN who hold a temporary residence title that is bound to a specific purpose of stay (e.g. artist, researcher);
- 2) Family members of TCN with permanent residence;
- 3) Family members of TCN who are highly skilled or who are long-term residents as per Council Directive 2003/109/EC.<sup>46</sup>

With regard to labour market access of family migrants, their access depends on the respective status of the sponsor and varies within these three categories.

*Ad 1:* Starting with the first category, all family members of third country nationals who hold a residence permit will be issued the Residence Permit – Family Community. There are six different purposes of stay that entitle one to family reunification, such as working as an artist, researcher or student.<sup>47</sup> Family reunification for this category of temporary permits is not subject to quotas. With some exceptions, it is generally not foreseen that a temporary immigration status leads to the right to permanent residence, even after long years of stay. The access of family migrants to the labour market in this category is generally restricted; only family members of researchers and of other professional groups, such as certain categories of health workers, teachers, diplomats etc.,<sup>48</sup> enjoy access to the labour market.

*Ad 2:* The second category regulates family reunification with persons who hold a residence title with a limited validity, which is not bound to a specific purpose of stay and which entails the option to ‘consolidate’ the stay, i.e. to acquire a long term residence status or otherwise enjoy enhanced protection from expulsion. Family members of this category of sponsors are issued a Settlement Permit. This permit is issued for a limited period of time, but is renewable and entails the right to residence consolidation. Whether the family member will enjoy access to the labour market depends on the respective status of the sponsor. Quota regulations apply.

*Ad 3:* This third category addresses family members of (highly) skilled workers and holders of permanent residence titles. All family members of third country nationals who hold a residence title as a (highly) skilled worker (RWR Card, Blue Card EU) or have received the status of a long-term resident after at least five years of stay (Permanent Residence – EC) are issued a RWR Card Plus. Regarding quota, family members of (highly) skilled workers are exempt from the quota for family reunification, while family members of long-term residents are still subject to the quota.<sup>49</sup> The RWR Card Plus entitles them to unlimited access to the labour market and is issued for one year.

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<sup>46</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

<sup>47</sup> See: Muster Aufenthaltstitel und Dokumentation ab 01 Juli 2011, available at: [http://www.bmi.gv.at/cms/bmi\\_niederlassung/](http://www.bmi.gv.at/cms/bmi_niederlassung/) (accessed 15 December 2012).

<sup>48</sup> §62 Residence and Settlement Act (NAG 2005, last amended in 2012), and §1 (2)-(4) Aliens Employment Act (AuslBG 1975, last amended in 2011).

<sup>49</sup> §46(1) nr. 2 Residence and Settlement Act (NAG 2005, last amended in 2012)

### *Exemptions based on Art. 8 ECHR*

In case of an expulsion order issued within the past eighteen months, overstaying or illegal entry, a person may be granted a residence title if required by the scope of Art. 8 ECHR. The evaluation of private and family life takes into account the duration and nature of the stay, the existence of a family life, ties with the country of origin, the criminal record (*Unbescholtenheit*), whether violations against public order in terms of violations of asylum and immigration regulations were committed, whether the family relationship was founded at a time when the insecure residence was clear to the person as well as administrative delays in deciding on the residence title.

### *The Integration Agreement*

The Integration Agreement is a unilateral contract which requires third country nationals who wish to settle more permanently in Austria to prove their German skills within a certain time period after obtaining a residence title. The Integration Agreement was first introduced in 2002 and was amended several times since then.<sup>50</sup>

The Integration Agreement as of today consists of two modules:<sup>51</sup>

- *Module 1* – proof of German skills at the level of A2 of the Common European Framework of Reference for Languages within two years after having received the first residence title (previously five years). Partial reimbursement is foreseen at that stage under certain circumstances.<sup>52</sup>
- *Module 2* – proof of German skills at the level of B1 as a precondition for permanent residence and citizenship. Module 2 is not compulsory and no form of reimbursement exists.<sup>53</sup>

Children until the age of fourteen (at the time when the agreement has to be fulfilled), sick persons upon certification by a public health officer and immigrants who certify their stay will not exceed 24 months are exempted from Module 1. Regarding Module 2, exemptions are solely made for minors before the age of schooling and persons with medical certification.

In order to fulfil the Integration Agreement, the foreign resident either has to successfully pass an exam at a certified institute, successfully complete the certified integration course, hold a Vocational Education and Training School Certificate, successfully take an exam allowing him/her to attend a university or s/he has already completed Module 2 of the Integration Agreement. If the person holds a RWR Card (residence title for highly skilled persons with scarce or key qualifications and their family members), Module 1 is considered automatically completed because of the

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<sup>50</sup> In its 2011 conclusions regarding Austria, the European Committee of Social Rights considers that “the integration requirement is likely to hinder family reunion rather than facilitate it.” (Council of Europe 2012: 24).

<sup>51</sup> §14 Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>52</sup> §14a Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>53</sup> §14b Residence and Settlement Act (NAG 2005, last amended in 2012).

nature of the residence title. The residence title given to family members of holders of a RWR Card or of a RWR Card Plus, however, is a RWR Card Plus. Therefore, family members of skilled migrants are subject to the post-arrival Integration Agreement (see Table 2.1). Module 2 of the Integration Agreement is completed if the person in question holds officially recognised evidence of his/her German skills, if the person is a minor and attends or has completed primary school or is a minor who has successfully completed secondary school (and obtained a positive grade in German) or has attended school for at least five years and successfully completed the ninth grade and holds a positive grade in German or has taken the final exam for his/her apprenticeship (Hudsky & Völker 2011). Thus, only very few exceptions apply in the case of Module 2 of the Integration Agreement, creating considerable obstacles to obtain a long-term residence status.

Under certain conditions, the person may receive reimbursement for course costs up to EUR 750 for Module 1 only (corresponds to 50 per cent of the course costs). However, Module 1 needs to be fulfilled within eighteen months after arrival to qualify for partial reimbursement.<sup>54</sup>

The period of two years to fulfil Module 1 might be extended to twelve additional months (extension is renewable), depending on the personal living circumstances of the immigrant (e.g. because of pregnancy). However, in principle, if the module is not completed in the prescribed time, the residence title is not prolonged and the individual has to pay an administrative fine and risks expulsion<sup>55</sup> if the authorities confirm that the right to private and family life is not violated and the reasons for not completing the integration requirement solely lie with the immigrant.<sup>56</sup> Regarding expulsion, TCN who have lived in Austria for several years and who have grown up here enjoy special protection from expulsion.<sup>57</sup>

If the total amount of administrative fines exceeds EUR 1,000, the residence title may be withdrawn and subsequently an expulsion order issued. An expulsion order automatically implies that de facto the affected person cannot enter Austria for eighteen months after having been expelled. The general practice is that no visa will be issued (Schumacher et al. 2012: 360f.).

### ***2.1.3 Differences between holders of permanent vs. temporary residence permits***

#### *Consolidation of residence*

For third country nationals, the Residence and Settlement Act distinguishes between immigration categories that imply a consolidation of residence and other categories of temporary immigration that generally do not foresee a consolidation (exceptions are researchers, students, etc.; see also above).

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<sup>54</sup> §15 Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>55</sup> §11 (2) nr. 6 Residence and Settlement Act (NAG 2005, last amended in 2012); §62 (1), nr. 2 Alien's Police Act (FPG) Federal Law Gazette I No. 112/2011.

<sup>56</sup> §11 (3) Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>57</sup> §64 Alien's Police Act (FPG) Federal Law Gazette I No. 112/2011.

Generally, all residence titles with the perspective of settlement are issued for a validity of one year when issued for the first time. After one year, the authority checks whether all conditions are still fulfilled. If the assessment is positive, the residence title will usually be prolonged for another year. After two years, the applicant is obliged to prove that s/he has completed Module 1 of the Integration Agreement (A2 CERFL; see above for detailed description). Only with the positive completion of Module 1 can the residence title be prolonged for up to three years. If, however, a person does not manage to learn German within the required period, the residence title is not prolonged and the foreign resident may be expelled (after a negative decision over the grounds of protection according to Art. 8 ECHR). In addition, the person is issued an administrative fine ranging between EUR 50 and 250 (Caritas 2011).

After at least five years of uninterrupted and legal stay,<sup>58</sup> third country nationals can apply for a long-term EU residence permit, that is, a long-term residence permit as per Council Regulation 2003/109/EC. The preconditions to receiving a long-term residence title are to fulfil the general immigration requirements<sup>59</sup> and to have successfully completed Module 2 of the Integration Agreement, i.e. prove to have acquired advanced German skills in speaking, writing and understanding (level B1 of the CERFL; see above for the exemptions).

#### *Access to state social benefits*

Access of third country nationals to certain state benefits, such as to a guaranteed minimum income (welfare income for persons who cannot sustain themselves) or to state subsidised housing, is tied to the status of long-term residency. That being said, in order to get access to such support, TCN have to fulfil all conditions required in order to receive a permanent residence title (general conditions, five years legal and uninterrupted stay, German skills at B1 level).<sup>60</sup>

#### *Independent residence status for family migrants*

Since an amendment in 2011, the residence title of the family member is no longer bound to that of the sponsor within the first years of stay (Bichl et al. 2011: 329). Family members of (highly) skilled workers and of persons with a residence title that allows for residence consolidation have an independent right to stay. If the conditions for family reunification can no longer be fulfilled, the family member has to be issued

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<sup>58</sup> If the person during these 5 years leaves Austria for more than six months in a row or ten months in total (§45 (4) NAG), the required five years period starts to count anew. For persons holding a temporary permit (e.g. students and subsidiary protected), only half of the actual period of stay is taken into account for an aspired consolidation of residence.

<sup>59</sup> As the residence title was obtained on grounds of family reunification, the income requirement refers to the income necessary for the family as a whole.

<sup>60</sup> See also „Ausländische Staatsbürger“, available at: <https://www.help.gv.at/Portal.Node/hlpd/public/content/169/Seite.1693903.html> (accessed 15 December 2012).

an independent residence title. However, the family member has to meet the general immigration conditions (income, health insurance, etc.) by her/himself.<sup>61</sup>

The requirement to comply with general immigration conditions does not apply if the family unit breaks apart as a consequence of the death of the sponsor, divorce (provided the reasons for divorce mainly lie with the sponsor), forced marriage/partnership or domestic violence. In these cases, the family member receives an independent right to stay, even if s/he cannot fulfil the general immigration conditions.<sup>62</sup> The end of family unity has to be reported to the authorities within one month. Previously, if the family migrant missed this deadline, s/he lost the residence title and had to file a new application that was treated like a first application. To avoid hardship cases, this rigid rule was abolished by the last amendment of the NAG in July 2011. Now, when the death of the sponsor or divorce is not reported within one month, the family migrant may 'only' be issued an administrative fine (see above for possible consequences).

### *Grounds for withdrawal of resident permit or expulsion of permanent residents*

The system of residence consolidation has been increasingly tied to the fulfilment of conditions over the past decade. Generally, the longer an individual is regularly residing on Austrian territory, the greater his/her residence security is.<sup>63</sup> Moreover, Art 8 ECHR is to be taken into consideration. Yet, it is important to note that the perspective of residence consolidation largely applies to individuals holding a resident permit that qualifies as a Settlement Permit. Thus, asylum seekers, although often facing long-lasting procedures, are not considered as settled; similarly, subsidiary protected persons are not covered by this provision,<sup>64</sup> nor are holders of temporary residence permits.

The first step to residence consolidation is achieved after five years of regular and uninterrupted stay. Although the income condition may not be (entirely) fulfilled, authorities are not entitled to expulse an individual solely on grounds of representing an 'economic burden' to the state or not fulfilling any of the other general admission requirements. However, the individual must display an effort and offer a realistic perspective to achieve a change in his/her personal situation. This first marker of residence consolidation does not require individuals to hold a permanent residence title as such.<sup>65</sup> The next stage covers a period of eight years of uninterrupted stay and beyond. Individuals may only get expelled on grounds of a conviction by a foreign or national court and on condition that his/her further stay would threaten public order and security. The specific circumstances are evaluated case-by-case. Furthermore,

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<sup>61</sup> §27 (1) Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>62</sup> §27 (2) and (3) Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>63</sup> §64 Alien's Police Act (FPG, last amended in 2012).

<sup>64</sup> Subsidiary protected persons have the possibility to obtain a Red White Red Card Plus after five years of stay in Austria, provided they fulfill the general admission conditions and have completed Module 1 of the Integration Agreement.

<sup>65</sup> Thus, an individual who has been categorised as 'unwilling' to work in a legally binding decision by the National Employment Agency (AMS) may be expelled despite his/her residence exceeding five years of regular and uninterrupted stay.



holders of a permanent residence title, regardless of their duration of stay, may solely be expelled if their presence represents a sufficiently serious threat to public order and security. This is especially the case if the individual was convicted by an Austrian court for more than one year of imprisonment or for the following reasons: human smuggling, helping a third person illegally reside in the country in return for payment, arrangement of or participation in a sham marriage, registered partnership or adoption, offence against the Act on Addictive Drugs, treason or a crime against public peace. Otherwise, an expulsion order may also be issued if the individual was convicted for a crime for the second time (for reasons of purposeful harm against property or human life) if the present conviction of imprisonment is longer than six months. However, the catalogue mentioned above is not exhaustive. Only holders of a permanent resident title, who were already born in Austria or who moved here at a very early age, are fully protected from expulsion (Schumacher et al. 2012: 354f.).<sup>66</sup>

Should a residence ban apply to holders of a permanent residence title, but the implementation would represent a breach of Art 8 ECHR, the authorities may end the validity of the permanent resident title and issue a RWR Card Plus instead (individuals have a right to appeal). As Schumacher et al. (2012: 201) remark, legislation remains fairly unclear about whether the individual may obtain his/her permanent residence title again in a reasonable time or whether the five years of required residence start counting again from scratch.

### ***2.1.4 Family reunification sponsored by third country nationals under the Asylum Act***

Family reunification for persons seeking international protection is regulated under the Asylum Act of 2005. The act was amended ten times since it entered into force on 1 January 2006.<sup>67</sup>

In general, family reunification under the Asylum Act covers the nuclear family of convention refugees or persons holding a subsidiary protection status.<sup>68</sup> The nuclear family includes the parents of minor children, spouses or registered same-sex partners, and unmarried minor children.<sup>69</sup> The applicability of family reunification rights to same-sex partners has been criticised for being a ‘dead provision’, since to qualify as a family the partnership must have been formally registered in the country

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<sup>66</sup> See also §64 (1) nr. 2 Alien’s Police Act (FPG 2005, last amended in 2012). It is important to note that residence consolidation applies with one specific limitation: the consolidation must have taken place before the offence was committed. It is, thus, irrelevant when the expulsion procedure is started, but rather how long the person in question was settled before having perpetrated the offence.

<sup>67</sup> See also <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004240> last accessed 31 January 2013.

<sup>68</sup> In limited ways also asylum seekers.

<sup>69</sup> §2 (1) nr. 22 Asylum Act 2005 (AsylG 2005, last amended 2011). Although the Administrative Court has ruled that adoptive and stepchildren are eligible for reunification (22 December 2005, VwGH 2002/20/0514), first instance decisions in practice seemingly apply a narrower notion of unmarried children, arguing that the court judgement refers to the derogated Asylum Act (AsylG 1997) and is no longer applicable to the Asylum Act 2005.

of origin, which is not usually the case in typical refugee-producing countries (Sußner 2010). Since 2005, it has been required that the marriage or partnership was formed when still residing in the country of origin.<sup>70</sup> Before 2005, it was only required that the family was formed at the latest one year after the sponsor applied for asylum. Legally, family reunification under the Asylum Act is conceived as an extension of international protection to family members. Family members of recognised refugees or beneficiaries of subsidiary protection, thus, are also given the corresponding protection status. The general immigration requirements applicable to family reunification procedures under the Settlement and Residence Act, such as income or integration requirements, do not apply to reunification under the Asylum Act. If the family formed after the beneficiary of international protection left the country of origin, the ordinary procedures under the NAG would have to be applied, which means applicants would have to fulfil all material conditions.

The Asylum Act relates to two main family reunification scenarios: a) applications by family members who are already in Austria,<sup>71</sup> and b) applications by family members who are still in the country of origin.<sup>72</sup> Strictly speaking, however, applications for family reunification can only be filed in Austria, as the Austrian representations abroad only issue an entry visa that allows the family members to apply for family reunification in Austria. Thus, the visa procedure is crucial in terms of access the reunification procedure in a narrow sense.

Ad a): According to the Asylum Act, family members of asylum seekers already in Austria, convention refugees and persons who were granted subsidiary protection can apply for family reunification under slightly different conditions. If decided positively, the family members receive the same status as the sponsor. If the status of the sponsor is not renewed (e.g. in case conditions in the country of origin have change), the right to residence of family members expires too.

There are three basic conditions that have to be fulfilled in order to receive protection status as a family member under the Asylum Act:

- not having a criminal record;
- family life according to article 8 ECHR cannot be exercised in another country;
- no legal proceeding against the sponsor to annul the protection status is underway

In addition, for family members of persons with subsidiary protection, the family procedure can only be invoked if the applicant does not qualify as a convention refugee her/himself. In-country applications by family members of asylum seekers are all treated as one and the same file, even if each application is submitted

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<sup>70</sup> §2 (1) nr. 22 Asylum Act 2005 (AsylG 2005, last amended 2011). However, the European Court of Human Rights has stated in the case of a refugee-sponsored family that aimed to reunify in the UK that a differentiation between pre- and post-flight families was disproportional, particularly in light of the vulnerable position of refugees (Hode and Abdi vs. UK, 6 November 2012, 22341/09). Possibly, this judgement could impact future decisions within Austrian jurisdiction.

<sup>71</sup> §34 Asylum Act 2005 (AsylG 2005, last amended 2011).

<sup>72</sup> §35 Asylum Act 2005 (AsylG 2005, last amended 2011).

separately. All family members will be granted the same status, either convention refugee status or subsidiary protection. This principle also applies to protection from expulsion that may be granted to the sponsor if the main application is rejected.

Ad b): Family members of convention refugees and persons with subsidiary protection who are still in the country of origin can apply for an entry visa at the Austrian representation abroad in order to come to Austria and apply for family reunification inland. Family members of persons with subsidiary protection can only apply for an entry visa and subsequently for reunification one year after the sponsor has received the status. The granting of an entry visa depends on a positive prognosis of the responsible authorities inland: The Federal Asylum Office in Austria must inform the Austrian representation abroad on whether it is likely that the application will be decided positively. Only then the foreign representation will issue an entry visa. This procedure may last more than six months, as the usual time limit for proceedings before foreign representations of maximum six months is suspended in these cases. Moreover, the division of competences between the foreign representations and the domestic asylum authorities contributes to the complexity of such procedures (for in-depth discussion of practical implications, see Chapter 6). A person granted family reunification under the Asylum Act cannot sponsor another family member under the Asylum Act. An exception is made in the case of minor children who may receive a status derived from another family member who has obtained protection under the reunification procedure (Schumacher et al 2012: 266ff.).<sup>73</sup>

### *Consolidation of residence*

Family members' protection status remains in force even if the family unity breaks apart (Schumacher et al. 2012: 268). Convention refugees enjoy a broader range of rights, notably in terms of welfare support and the entitlement to support measures from the Austrian Integration Fund for up to three years after a successful determination procedure. Beneficiaries of subsidiary protection receive less support and can only benefit from the minimum welfare support according to the Basic Welfare Agreement (*Grundversorgungsvereinbarung*) regulating minimum reception conditions for asylum seekers and beneficiaries of subsidiary protection. Moreover, major differences exist regarding the accessibility of permanent residence and citizenship. Convention refugees may apply for citizenship after six years of continuous residence in Austria provided they fulfil the criteria required for naturalisation.<sup>74</sup> Beneficiaries of subsidiary protection and their family members can only access citizenship if they are able to obtain a RWR Card Plus, possible after 5 years of continuous residence as a beneficiary of subsidiary protection. In order to

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<sup>73</sup> §35 Asylum Act 2005 (AsylG 2005, last amended 2011).

<sup>74</sup> It must be noted that naturalisation requires a stable average income throughout the past three years before lodging the application for citizenship, amounting to the minimum income requirement as laid out in the Residence and Settlement Act (see for that Section 2.1.1 in this report). The naturalisation requirements have been extensively criticised for their social selectivity (Schumacher et al 2012: 330, Stern 2012).

qualify for a RWR Card Plus, applicants have to meet the general admission conditions and must have fulfilled Module 1 of the Integration Agreement. Since their residence as a beneficiary of subsidiary protection is not considered as settlement, they have to spend an additional five years of continuous residency as holders of a RWR Card Plus to obtain citizenship. This amounts to a total of ten years to be eligible for naturalisation and the preconditions for citizenship must also be met (ibid.: 281ff.).<sup>75</sup>

## **2.2 Family reunification sponsored by European Union citizens**

Reunification of EU citizens and Swiss citizens who have realised their mobility rights according to Directive 2004/38/EC is regulated by the Residence and Settlement Act. This also includes Austrian citizens who enjoy mobility rights.

The definition of the ‘nuclear family’ of EU and Swiss nationals includes:

- married spouses and registered partners
- children and grandchildren up to the age of 21 and beyond, if supported by the sponsor (including step- and adoptive children)
- parents and grandparents if supported by the family

Moreover, family reunification also includes other family members, including:

- partners in an enduring relationship
- any other relatives of the sponsor if s/he has been responsible for the supporting the person before reunification, if they have shared a common household in the country of origin, or if serious health problems require care by the family<sup>76</sup>

Applications for family reunification can be filed in Austria. For family members who are third country nationals, this right only applies to the ‘nuclear family’ as defined above. Within four months of stay, they then have to file an application for a residence card. Importantly, the right to apply for family reunification with an EU/Swiss sponsor inland also applies to asylum seekers and persons without a right to stay (e.g. rejected asylum seekers). Family reunification for EEA nationals is not subject to quotas.

### ***2.2.1 Conditions for family reunification***

The general immigration conditions do not apply for European Union nationals and their family members. In order to qualify for family reunification, the sponsor has to fulfil certain conditions, such as being employed (including self-employment) and having a health insurance and sufficient income to sustain him/herself and the family

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<sup>75</sup> §10 (1) nr. 1 Nationality Act (Staatsbürgerschaftsgesetz, last amended in 2011). Considering that the duration of the initial status determination procedure may take some time, the effective period of residence required may be even longer.

<sup>76</sup> §52 (1) Residence and Settlement Act (NAG 2005, last amended in 2012).

or obtaining an education, a qualification or a training certification.<sup>77</sup> In addition, the applicants have to supply evidence of the marriage/registered partnership, parenthood and eventual maintenance costs for family members.

*Income requirement*

In contrast to the regulations for third country national or Austrian sponsors, ‘sufficient income’ for families sponsored by EU nationals is calculated on the basis of the levels of social assistance benefits, which is significantly lower than the levels of compensatory allowances (Bichl et al. 2011: 372f.). For family reunification with partners and members of the wider family (other relatives that are supported by the sponsor, have shared a household with the sponsor, or are sick and require care by the sponsor) who are third country nationals, additional conditions apply.<sup>78</sup> The sponsor is obliged to sign a declaration of liability (see below) in order to qualify for family reunification.

**2.2.2 Rights and obligations after admission**

All family members of EU nationals who are part of the core family have the right to stay in Austria for more than three months. Within four months of stay, third country family members have to apply for a Residence Card that is issued for a maximum of five years. The Residence Card entitles them to unrestricted labour market access.

Partners and members of the wider family from third countries may receive a Settlement Permit – Family Member, if the conditions mentioned above are fulfilled. This permit does not include labour market access. They may apply for a Settlement Permit that includes labour market access, if they fulfil the general immigration conditions, a quota place is available and the National Employment Agency (AMS) issues a work permit.

**Illustration 2.2: Sample of a Residence Card for Family Members of EU or Swiss Nationals**



Source: Muster Aufenthaltstitel und Dokumentation ab 01 Juli 2011, available at: [http://www.bmi.gv.at/cms/bmi\\_niederlassung/](http://www.bmi.gv.at/cms/bmi_niederlassung/).

<sup>77</sup> §51 Residence and Settlement Act (NAG 2005, last amended in 2012).  
<sup>78</sup> §54 (1) Residence and Settlement Act (NAG 2005, last amended in 2012).

### *Independent residence right in case of death or divorce*

The residence right of family members who are themselves nationals of another EU or EEA state is not touched in case of death of the sponsor, emigration or divorce.<sup>79</sup> For third country family members, if the sponsor dies, the residence right of the family member continues if they have stayed in Austria for at least one year, have employment and are able to sustain themselves and their family.<sup>80</sup> Children who are third country nationals and who are still at school when the parent dies have the right to stay with their other parent until they complete their education.<sup>81</sup> Additional conditions apply for third country family members in case of divorce. Thus, the marriage or partnership has to have lasted for at least three years, of which one year had to be spent in Austria; the dependant spouse has to receive sole custody if there is a child and the right to access a minor child is only given in Austria. Finally, the residence status will be maintained to avoid special hardship that accrues from the relationship.<sup>82</sup> The end of the family unit has to be reported to the authorities within one month.

After five years of continuous residence, family members who are third country nationals attain the right to permanent residence (Permanent Residence Card EC). Family members who are themselves nationals of an EU Member State or Switzerland may attain the permanent residence card before the end of five years, depending on the status of the sponsor. The family members can also apply for a permanent residence card with the validity of ten years without having to fulfil additional conditions.<sup>83</sup>

### ***2.2.3 Differences between holders of permanent vs. temporary residence permits***

This differentiation is not applicable in the realm of reunification of families sponsored by citizens of the EU and Swiss nationals with mobility rights.

## **2.3 Family reunification sponsored by nationals of Member States without mobility rights**

Family reunification of Austrian or other EU nationals and Swiss citizens who have not realised their mobility rights is regulated in a separate section of the Residence and Settlement Act.<sup>84</sup> Family formation and family reunification involving an Austrian sponsor and a TCN have become subject to systematic suspicion in the

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<sup>79</sup> §52 (2) Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>80</sup> §54 (3) Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>81</sup> §54 (4) Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>82</sup> §54 (5) Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>83</sup> §54a Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>84</sup> Basically these are §§47 and 48 of the Residence and Settlement Act (NAG 2005, last amended in 2012). The mobility rights of Swiss nationals are set out in a special agreement between the EC and Switzerland.

context of concerns about marriages of convenience (Messinger 2012). For Austrian and Swiss nationals and EU nationals without EU mobility rights, section 2.2. applies.<sup>85</sup> Basically, the rights and conditions for family reunification are the same as those of third country nationals. Also, the definition of the ‘nuclear family’ applied to nationals of Austria is the same as for third country nationals. Under specific conditions, other relatives of Austrian nationals *may* obtain a residence title under the framework of family reunification (yet, without labour market access).<sup>86</sup> However, it is required that the family member fulfils the general admission requirements *and* the sponsor signs a declaration of liability (see below). The circle of relatives eligible for reunification who do not form part of the nuclear family definition is restricted to financially dependent relatives of the sponsor, spouse or registered partner in direct ascending line, the life-partner of the sponsor (proof of long-term relationship in home country required) and other relatives who received maintenance support and/or who have shared a household in the home country and/or who depend on the care of the sponsor for medical reasons.<sup>87</sup>

The wider circle includes:

- parents or grandparents of the sponsor or spouse/registered partner
- partners in an enduring relationship
- other relatives who have been supported by the sponsor already in the country of origin, have shared a common household, or whose state of health requires the care of the sponsor

In contrast to family reunification of third country nationals, family members of Austrian nationals are not subject to the quota for family reunification, neither are members of the extended family.

### ***2.3.1 Conditions for family reunification***

The general conditions for family reunification are the same than for third country nationals (see section 2.1.1).

#### *Income Requirement*

See section 2.1.1

For members of the wider family not belonging to the ‘nuclear family’, the sponsor is obliged to sign a declaration of liability.<sup>88</sup> By signing the declaration, the

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<sup>85</sup> §57 Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>86</sup> Labour market access may be granted if the type of residence permit is changed. Again, this requires the fulfilment of additional requirements and preconditions, amongst other, according to the *Ausländerbeschäftigungsgesetz*.

<sup>87</sup> §47 (1), (3) and (4) Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>88</sup> §47 (3) Residence and Settlement Act (NAG 2005, last amended in 2012).

signatory certifies that s/he will cover all maintenance costs,<sup>89</sup> as well as costs which may arise in connection with a termination of stay in Austria. The declaration is valid for a minimum of five years and the signatory cannot opt out during that period, not even if his/her financial situation reaches a critical stage (Schumacher et al. 2012: 56f.). The income requirement is assessed every time the application for the prolongation of residence is filed.

### *Housing*

See section 2.1.1

### *Integration*

See section 2.1.1

### *Age limits*

See section 2.1.1

### *Exemptions from the general immigration conditions for Turkish nationals*

Again, the standstill-clause is also applicable to family members of Austrian nationals who are Turkish nationals and have the intention to work in Austria. In this case, the conditions are even more favourable. The most important differences are subsequently pointed out. Not only are family members exempted from the age limit and obligation to pass the pre-entry test or fulfil the Integration Agreement after arrival, but also a larger circle of family members is eligible for reunification. There is no obligation to fulfil the income requirement, own health insurance or have accommodation according to local standards. Finally, family members are not only entitled to apply inland but also have the right to await the decision in Austria. Again, the intent of work is crucial, though a mere declaration is sufficient and whether the clause applies will be evaluated on a case-by-case principle (Beratungszentrum für Migranten und Migrantinnen 2012).

## **2.3.2 Rights and obligations after admission**

Members of the nuclear family are entitled to settlement and to unrestricted labour market access, while members of the wider family do not get access to the labour market and may only continue to reside in Austria in exceptional cases if the family relationship with the sponsor ceases. The type of residence title may however be altered, if the relative continues to fulfil the general immigration requirements and

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<sup>89</sup> In case of expulsion or deportation of the applicant, the signatory is obliged to cover all related costs that accrue to the public administrations.



obtains a work permit subject to a yearly quota by the National Employment Agency (Schumacher et al. 2012: 136).

After five years of regular and continuous stay, members of the nuclear family may apply for a permanent residence permit, if they fulfil all general immigration conditions, have fulfilled Module 2 of the Integration Agreement and the marriage or registered partnership has endured at least two years.<sup>90</sup> Members of the wider family must, in order to consolidate their status, comply with the general conditions, obtain a quota place and require a work permit.<sup>91</sup>

## 2.4 Chapter conclusion

The right to family reunification involving third country national family members varies considerably depending on the residence status of the sponsor. Whereas family members of EU and Swiss nationals, who have realised their mobility rights, are subject to only modest admission requirements and family reunification is possible also for members of the wider family, family members of Austrian nationals without mobility rights and third country nationals are subject to considerably more stringent admission criteria. While the position of Austrian nationals without mobility rights has arguably been weakened with the 2005 immigration reform, they still are privileged compared to third country national sponsors. In particular, the definition of family members eligible for family reunification is broader than in the case of third country nationals and family members of Austrian nationals are generally exempted from the quota requirements. The most important general admission requirements for third-country national and Austrian sponsors are accommodation, income, pre-entry language testing and, specifically addressing family migrants, a minimum age limit for reunification of spouses. Families reunifying under the Asylum Act are exempt from these conditions, however their family relations have to be convincingly documented. Within the category of third country nationals, pre-entry language requirements are not uniformly applied: family members of highly skilled are considered to have completed the requirement by virtue of their residence title, whereas other categories of family members need to provide evidence of their language proficiency. Yet, family members of highly skilled migrants, like all other categories of family members, are subject to the post-arrival Integration Agreement (see Table 2.1). Module 2 of the Integration Agreement (B1 CERFL) is, with only a few exceptions, a prerequisite for long-term residence.

As this chapter has shown, the right to family reunification is a highly complex and differentiated right. This complexity is to no small degree driven by Europeanisation. Not only is there an in-built differentiation in European family migration law, notably in the form of the distinction between the three basic categories of sponsors – mobile EU citizens, static citizens, and third-country nationals, with family reunification rights differing for the latter). But there are additional differentiations within the margin of manoeuvre left for individual Member States.

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<sup>90</sup> §48 Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>91</sup> §47 Residence and Settlement Act (NAG 2005, last amended in 2012).

### **3. Policy developments and political debate on family reunification and the legal position of admitted family members<sup>92</sup>**

While almost all migration to Austria in the post-WWII period has involved a certain family dimension, Austria lacked an explicit framework for family reunification before the adoption of the Residence Act 1992.<sup>93</sup> The Residence Act contained specific provisions for family reunification, and most importantly, for the first time established family reunification as a right – if a highly conditional one. Since then, family reunification provisions have been subject to numerous reforms, and have become increasingly differentiated and complex, partly reflecting the increasing Europeanization of migration policy and the related differentiation between the legal regimes for citizens without mobility rights, EU citizens and third country nationals.

In the following sections, we provide an overview of the most relevant policy developments throughout the past decade (2001 until 2011). Where it is necessary to give a broader context, references to major policy changes prior to this period will also be made. In a first section, we discuss the changing overall institutional and policy context of family reunification. The subsequent section describes the changing legal status of family members. Third, we review policy changes in relation to the main requirements for family reunification framework, namely the income, housing, and integration conditions as well the age limit for family reunification of spouses.

#### **3.1 The changing institutional and policy context of (family) migration policies**

The early 1990s were a major turning point in migration policymaking. This included a shift of institutional responsibility for migration policymaking from the Ministry of Social Affairs and social partners to the Ministry of the Interior, which was accompanied by a policy change from managing migration through controlling access to the labour market and the welfare state towards managing migration through the control of access to territory (Gächter 2000). At the same time, migration policy became an issue of intense public debate and a key issue on the political agenda of the political parties.

Before the 1990s, the main regulatory tools in place were various restrictions of immigrants' access to employment and welfare, notably non-contributory welfare benefits. For a long time, access to both was largely preserved as the privilege of Austrians, later also extended to EU nationals (Kraler 2011: 44). The shift towards control of access to the territory and the establishment of annual quotas in the immigration reforms of the early 1990s made admission requirements more

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<sup>92</sup> Exceptions for Turkish nationals on grounds of the Association Agreement are discussed in Chapter 2.

<sup>93</sup> Before the entry into force of the Residence Act in 1993, a provision under the Passport Act 1969 (*Passgesetz 1969*) that obliged authorities to take into account the personal circumstances of applicants was the main provision used to admit family members.

important. Even though control of access to the territory became the primary locus of immigration control, key features of the labour market-centred regulatory regime remained in place until the new millennium. Only after the 2005 reform, for instance, did long-term residents from third countries gain equal access to welfare benefits (Perchinig 2010a: 28, Gächter 2000).

The establishment of the State Secretariat for Integration in April 2011 has been one of the most significant recent institutional changes. The establishment of the state secretariat has long been demanded, both by certain political parties and NGOs. While its establishment has been welcomed, its subordination to the Ministry of the Interior remains a contested issue. In symbolical terms, its establishment can be read as an official acknowledgement that Austria is indeed a country of immigration, a fact denied in official discourse until recently. Interestingly, the secretariat has undertaken considerable efforts to represent itself as a player with a distinct agenda that operates independently from the Ministry of the Interior (Gruber & Peintinger 2012).

From an institutional angle, the Ministry of the Interior not only is the main actor in regard to admission policy, but it also has emerged as the main actor in relation to the definition and coordination of integration-related agendas on the national level. For much of the last decade, however, actual integration policy has remained narrowly defined, and has focused largely on compulsory language measures (Hollomey et al. 2011: 8, 24, Kraler 2011). However, from about 2008 onwards, a discursive shift towards a more cross-sectoral und multi-level-oriented understanding of integration can be observed, evidenced, for example, in a report on various domains of integration policy commissioned by the Ministry of the Interior in 2008, and involving both experts from within the Ministry and academic experts on integration (Ministry of the Interior 2008). The National Action Plan on Integration (NAPI) adopted two years later took a similar approach and aimed at promoting a more coherent and multi-levelled integration approach. With regards to its implementation, a systematic in-depth analysis lies beyond the scope of this report. It remains to be seen whether the NAPI framework will succeed in promoting integration in a more systematic manner, also touching on structural issues. Academics have previously criticised Austrian integration policy for its tendency to culturalise and individualise integration-related issues and for avoiding addressing integration at a structural level (Mourão Permoser et al. 2010). The dominance of culturalist problem-framing has served as an important means to legitimise the adoption of policies demanding specific efforts from individual migrants and overall focused on their individual characteristics, rather than social positioning and structural disadvantages that they may face. One of the most prominent examples is the introduction of the pre-entry language requirement, which was represented by members of the government as a means for Muslim women to emancipate themselves from their 'backward' and 'oppressive' cultural context (for further discussion see Section 3.5).

As pointed out earlier, the regulatory framework addressing family reunification has become increasingly complex. To a significant extent, this development is the consequence of the interplay between European and national level policy making (see also Expert Interview AK). Yet, Europeanization should not be seen simply as the result of a top-down process. Austria undertook great efforts to shape the outcome

of the negotiations of the Family Reunification Directive and thus in ‘uploading’ its policy preferences onto the European level (Kraler 2010: 90).<sup>94</sup>

### 3.2 The legal position of family members

When family reunification was first established as a legal admission category on its own by the 1992 Residence Act, family members of third country nationals were mostly framed as dependent, economically inactive individuals (Kraler 2010: 98). As a corollary, they were largely excluded from access to the labour market. As a result of the quota system, families were confronted with considerable periods of separation during much of the 1990s. While the 1997 Aliens Act considerably improved the conditions of migrants, family members of third country national sponsors could still lose their residential status due to divorce or unexpected death of the sponsor within the first five years of stay. Moreover, family members did not have access to the labour market until these five years of residence had elapsed. Only after five years of residence, individuals were entitled to an independent residence title and eligible for limited labour market access.<sup>95</sup> To obtain unrestricted access to the labour market, family members of third country nationals required eight years of regular residence. However, the Aliens Employment Act had already introduced quotas in 1990, which kept a considerable number of immigrants off the formal labour market. The interplay between these two legal frameworks further increased the dependency of family members on sponsors.

Conversely, family members of Austrian nationals and EEA-citizens, in fact, have enjoyed full freedom of establishment since Austria’s EU-accession in 1995. Accordingly, they have been exempted from the quota and other requirements applicable to family members of third country nationals and have been able to access the labour market freely. In response to growing public and political debate over the authenticity of bi-national partnerships, the Aliens Act of 1997, however, did introduce a bundle of sanctions against so-called ‘bogus’ marriages. These measures specifically targeted bi-national couples (Kraler 2010: 75ff.). In the 2005 immigration reform, additional measures were adopted. Thus, civil marriages of Austrian nationals with third country nationals have to be reported to the Aliens Police by civil registrars. The former may initiate inquiries on the couple’s life in case of suspicion (Messinger 2012). In addition, the legal position of Austrian nationals without mobility rights was weakened as compared to EU nationals with mobility rights, notably by making legal residence under the Residence and Settlement Act a

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<sup>94</sup> Austria, the Netherlands and Germany held a leading role throughout the negotiation of the Family Reunification Directive. For instance, Austria successfully limited the scope of the Directive and managed to introduce a clause (subject to standstill clause) allowing it to maintain the quota system (see also Kraler 2010: 90). This said, the judgement of ECJ in Case C-504/03 seems to suggest that a generalised quota system is not covered by the directive (see, above footnote 19).

<sup>95</sup> Employers are required to submit a request for the permit at the Austrian Labour Market Service. A work permit is issued on condition that no labour force subject to priority access (e.g. Turkish nationals under the Association Agreement and EU nationals including Austrian citizens) is available for that specific employment. The so-called *Beschäftigungsbewilligung* is a work permit that is tied to the working place it was initially applied for.

precondition for inland applications, thus ruling out that asylum seekers or rejected asylum seekers would be able to gain family reunification with an Austrian national from within the territory (Schumacher 2007: 82). This policy change aimed to reduce the incentives to enter into a union with an Austrian national. Nevertheless, Austrian nationals without mobility rights were still privileged compared to third-country national sponsors, notably by being exempted from the quota.

Importantly, this measure did not target Austrian nationals per se (this would have been unconstitutional), but Union citizens (including Austrians) without mobility rights. The legitimacy of the differentiation between EU citizens with and without mobility rights (also dubbed ‘reverse discrimination’) was subject to a great deal of controversy. However, the Constitutional Court confirmed that the differentiation was justified and objective – although legal experts criticise this ruling for its lack of substantial argumentation (VfGH 16.12.2009, G 244/09, Schumacher et al. 2012: 141f., Schumacher 2007: 82; see also Chapter 5).

A further measure that considerably affected family reunification of bi-national families was the restriction of access to citizenship in the legal changes of 2006. As Perchinig (2010a: 30ff) argues, naturalisation represented a vital facilitator for family reunification or family formation in the 1990s and the first half of the 2000s, since it allowed circumventing the quota restrictions applicable to family members of third country nationals. The restrictions evidently aimed to reduce the amount of family migration exempted from the quota. In the public debate, the government presented the envisaged amendment as a measure to secure employment in Austria (See also Kraler 2010: 82, and Stern 2012 for a critical review of rules governing access to citizenship).

It was not until the introduction of the Residence and Settlement Act in 2005 that family members of third country nationals gained independence from their sponsors. From then on, death of and divorce from their sponsor did not per se terminate residence in Austria.<sup>96</sup> Moreover, economic dependency was considerably alleviated, as the period of restricted access to the labour market was limited to one year and no further restrictions were imposed on family members thereafter (ibid.: 78f.).

### 3.3 Income requirement

Income requirements have been justified as a legitimate means to enforce immigrants’ economic autonomy and as an instrument to minimise economic burdens for the state and have existed in various forms for a very long term (Hollomey et al. 2011: 10). However, the precise meaning of sufficient means clauses remained ill-defined until fairly recently. Thus, the 1992 Residence Act remained vague about how income

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<sup>96</sup> The sponsored may obtain an independent resident title, if the sponsor carries the main responsibility for the divorce. In most cases however, divorces are concluded on a consensual bases. Legislation also foresees specific protection for victims of domestic violence (though conclusive evidence must be provided). Independent residence titles may, moreover, be issued within the first five years of residence in case the sponsor was judged guilty of committing a crime that leads to the termination of his/her residence.

conditions were to be met. Consequently, implementing agencies in the federal states required varying income levels in practice. An Administrative Court ruling provoked a legal amendment in 1997. The court argued that the minimal threshold required must not exceed the level of social assistance in the respective federal states. Major changes were adopted in 2005 and 2009. In 2005, the income requirement was harmonised across the provinces at the level of the minimum pension. This de facto implied an increase of the level of income required. (Previously, the provincial level of social assistance formed the reference applied, see Hollomey et al. 2011: 10f., see also Chapter 2). Generally the minimum pension represents a gross value, but in the case of family reunification it is referenced as a minimum threshold. Legislation on the income requirement as of 2005 was criticised for leaving wide margins of discretion with regards to implementation. Especially the uncertainty as to whether to include monthly rent expenses and other types of regular payment were viewed as particularly problematic (Schumacher 2007: 75). This controversy was clarified by jurisprudence – the Administrative Court ruled the deduction of monthly expenses from the required income as unlawful, since no legislative specification indicated to do so (3 April 2009, VwGH 2008/22/0711). In reaction to this ruling, the legislator introduced a clause in a legal amendment of 2009 that explicitly stated the income requirement was considered to be met only after deduction of all regular payments. Opinions on this amendment are controversial. Whereas the legislator interprets it as a mere adaption to actual practice (Expert Interview BMI), a legal expert from the Chamber of Labour drew on this example to underline the relative weakness of jurisdiction in comparison to legislative power in Austria (Expert Interview AK).

### 3.4 Integration requirement

Modelled after Dutch integration policies, language requirements were incorporated into legislation on aliens after the change of government in 2000, although incorporated into legislation only in the framework of the immigration reform 2002. The so-called ‘Integration Agreement’ essentially obliged long term immigrants to attend language courses and complete these by a test. In terms of institutional responsibility the Austrian Integration Fund – whose mandate was expanded to include integration support for legal migrants – was charged to organise curriculum development and certify course providers. Its new mandate allowed the Fund also to expand its competences more widely and increase its weight as an institution in integration policy making. Over the last decade, the Fund thus has become an important government think tank and has an increasingly important role in regard to knowledge production on integration.

Debates over post-arrival admission requirements were strongly accentuated by the centre-far right coalition government, established in 2000. The debate departed from an overall assumption over the ‘unwillingness’ of immigrants ‘to integrate’ (*Integrationsunwilligkeit*). The term was coined by the far-right Freedom Party (FPÖ) as a strategic argument to justify restrictive immigration policy and further shift the responsibilities from the Austrian state to immigrated individuals. The former head of the FPÖ parliamentary group, Peter Westenthaler, launched a debate on the necessity to restrict access to residence permits to those who prove sufficiently proficient in

German and acquire basic knowledge of Austrian society and history, in short, who prove 'willing to integrate'. Compulsory language courses were to form the core of this measure. Despite some controversy on details, the FPÖ's coalition partner – the People's Party (ÖVP) generally supported the idea and never seriously opposed the anti-immigration discourse, which shaped the core of debate. Furthermore, the governing parties emphasised the role of language skills as a facilitator to employment. Among the opposition parties at the time – the Green Party and the Social Democratic Party (SPÖ) – the Green Party clearly figured as the dominant actor. Whereas the SPÖ uttered its scepticism on the effectiveness of the tool and underlined its selectivity towards specific migrant groups, the Green Party emphasised the relevance of access to the labour market as a prior means to integration and which should not be impeded by additional barriers, thus following a rights based approach. Moreover, the SPÖ ruled City of Vienna figured among the opponents, as it had by then already introduced voluntary integration programmes and did not share the government's ambition to install compulsory measures. With regards to civil society, several organisations active in this field argued against the envisaged sanction-based approach and stressed the relevance of positive incentives and the necessity of ensuring enforceable rights for successful immigrant integration. Notwithstanding the criticism, the draft was adopted in a slightly amended version in July 2002 (Hollomey et al. 2011: 12f., 19f.).

During its initial existence, the number of individuals affected by the Integration Agreement was rather limited due to numerous legal exemptions. The content and nature of this agreement have significantly evolved throughout the past decade. In the version of 2002 each individual had to attain a German level of A1 within a period of five years, but only 100 hours of course participation were foreseen. In response to expert criticism, 75 hours of a literacy course<sup>97</sup> were included in the agreement (if judged necessary) and the amount of German lessons was raised to 300 hours in 2005. Conversely, the level of proficiency required was raised from A1 to A2 and, since 2005, certified language skills have been a precondition to naturalisation and permanent residence. While course participation was not compulsory, the required language proficiency had to be formally certified by a recognised examination centre. The scope of the agreement, moreover, was extended to spouses of Austrian nationals (Perchinig 2010a: 34, Schumacher 2007: 75). Similar to 2002, the debates accompanying this amendment were dominated by a discourse that pictured immigrants as 'unwilling to integrate'. The instalment of mandatory measures became increasingly represented as necessary to foster Muslim immigrant integration in particular. The compulsory character of the Integration Agreement was justified, for instance, as a tool to empower Muslim women, who were represented as oppressed victims of a patriarchal (Muslim) cultural context in public debate. Regarding this amendment, neither opposition parties nor civil society actors figured prominently in the debates. However, their arguments remained fairly similar to 2002

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<sup>97</sup> A broad range of actors, including language experts, have criticised the amount of course hours as too low to secure alphabetisation (Perchinig 2010b). Since the last amendment of 2011, alphabetisation is not offered anymore, as immigrants are expected to have minimum levels of writing skills at A1 level before entry.

and further underlined the necessity to introduce an incentive-based and voluntary rather than a sanction-based and compulsory model of integration. Also, the relevance of context-sensitive support schemes for the financing of language courses was stressed. Furthermore, experts raised the issue of anti-discriminatory measures as a far more efficient tool of integration than coercive integration programs (Hollomey et al. 2011: 21f.)

The Integration Agreement was further amended in 2011. Whereas the required proficiency level remained unchanged, the conditions now must be met within two years. As a legal expert points out, this change rendered residential security more precarious, since expulsion orders are easier to enforce if a person has only resided inside the country for two years instead of five years (Expert Interview AK). Access to a permanent residence permit and citizenship further requires B1 level language proficiency (compared to A2 in 2005). Although this module of the Integration Agreement is not compulsory, it poses the ultimate precondition to obtain permanent residence or citizenship (Schumacher et al. 2012: 193f.).

Debates on pre-entry language requirements emerged in 2009, when the Minister of the Interior announced that a higher level of language competence (B1) was envisaged in the future to improve societal and labour market integration and also stressed that an A1 German level would be the prerequisite to immigrate to Austria in the near future (Perchinig 2010b: 15). The importance of limited language knowledge already before entry also was stressed in the National Action Plan on Integration (Ministry of the Interior 2010: 15) and, as a representative of the Ministry of the Interior explained, was the outcome of the consultation process that preceded the adoption of the NAPI (Expert Interview BMI).

While not explicitly addressed to family members, pre-entry testing *de facto* mainly concerns family migration, as highly skilled migrants (including their family members) are exempted and not considered to be problematic. According to this document, skilled migrants have visibly less need for integration measures, whereas family migrants are identified as the primary target group (Ministry of the Interior 2010: 15). As research conducted by Hollomey et al. (2011: 23, 26) underlines, highly-skilled migration was not perceived as problematic throughout the period under research,<sup>98</sup> since it was assumed that these migrants were self-sufficient and shared similar cultural backgrounds. A legal amendment introduced A1 language skills as a prerequisite to immigration, entering into force in July 2011. In response to pressures from business representatives, the language requirement does not apply to highly skilled immigrants and their family members. As a representative from the Chamber of Commerce explained in the interview, it was important to exempt highly skilled labour migrants to maintain their flexibility and facilitate their settlement in Austria (and that of their family members). However, the Chamber of Commerce generally views the requirement as a legitimate requirement for migrants who wish to access the labour market. It was perceived as an uncontested reality and metaphorically

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<sup>98</sup> The period does however not entirely cover a specific time-span but rather consists of media analysis around major 'turning points' in which major policy changes with regards to the integration framework were debate. These are: March 2002 until January 2003; January 2005 until May 2006 and October 2009 until December 2010 (Hollomey et al. 2011: 30).



represented as an 'entry ticket' to the labour market. Rather than changing the rules, future questions should preferably address what additional measures are necessary to accompany the preparatory process before immigration (Expert Interview WKO).

Not only was the pre-entry test represented as facilitating and accelerating integration. The governing parties SPÖ and ÖVP, furthermore, portrayed it as a means of emancipation, most notably the ÖVP-led Ministry of the Interior. Thus, the government did not refrain from further targeting Muslim immigrants and, once more, representing Austrian society as liberal and open in opposition to portraying the Muslim cultural context as backwards, patriarchal and rural. Opposition parties and civil society actors took up different arguments to counter this strand of discourse. NGOs pointed out the unequal treatment of immigrant groups, since the measure applies to some but not to others. Integration measures, they argued, should rather address political and economic participation and confer more rights upon immigrated individuals. The Green Party suggested introducing orientation programmes abroad and voluntary support measures after arrival instead of pre-entry tests. As Hollomey et al. (2011: 22f.) conclude, the responsibility to 'integrate' was not only successively shifted to individuals, but also conferred responsibilities upon potential migrants even before their actual immigration. As a consequence, persons living in peripheral regions or rural areas, as well as illiterate persons, for instance, are clearly disadvantaged in terms of access to Austrian territory. Furthermore, courses for alphabetisation were entirely dropped, as were the subsidies for these courses.

As the political scientist Mourão-Permoser (2012) argues, the early version of the Integration Agreement should not be judged so much in its practical effects (which were limited), but in its exclusionary effects in symbolical terms. Indeed, out of 118,055 migrants who had to sign the Integration Agreement in the first year of its entering into force, some 90 per cent were exempted from actually fulfilling it, mostly because they were judged to be sufficiently proficient without testing (Kraler 2011: 46). Though non-compliance rarely materialised in terms of territorial expulsions, symbolic politics may discourage potential immigrants, fuel xenophobic discourse and pave the way for more restrictive measures in the future. This holds true for the legal amendments of 2005 and 2011, which were nourished by arguments and problem-definitions already rolled out in the early 2000s. They combined the introduction of higher proficiency requirements and simultaneously lesser time to fulfil the first part of the integration requirement, with the introduction of a pre-entry language requirement and a fairly demanding proficiency level (B2) for permanent residence and naturalisation. Consequently, foundations for more socially selective and exclusionary integration conditions have been successively set and residential security has increasingly become tied to the fulfilment of the Integration Agreement.

### 3.5 Housing requirement

The housing requirement was first legally codified in 1992.<sup>99</sup> This provision as such has not significantly evolved throughout the past two decades. Ever since its introduction, it states that accommodation according to local standards it required to obtain a residence title. Similar to the rather unspecified codification of the income requirement in earlier legislation, the housing requirement has remained fairly vague with regards to implementation and leaves room for administrative discretion. Though its introduction was subject to great controversy in the early 1990s, this requirement remains rather uncontested nowadays.<sup>100</sup> When introduced, it was defended as a necessary measure to ensure minimum housing standards and avoid inadequate living conditions. However, the provision was interpreted in a disproportionately restrictive sense by implementing authorities (e.g. requiring three separate rooms for a family of four)<sup>101</sup> – especially with regards to first applications, to a lesser extent also for procedures of prolongations of residence titles. By reason of the lacking specification, parameters remain fluent and variable to date, but in any case shall refer to living standards of the surrounding residential area. Moreover, the size of the family is considered for the evaluation. An important criterion is that families or individuals must be legally entitled to this accommodation – evidence must be furnished via rent contracts or proof of sub-rent, property or non-commercial use of a given accommodation (Schumacher et al. 2012: 48, Jawhari 2000: 69ff.). As earlier studies on administrative practices indicate, the accommodation requirement was indeed deployed as a tool of immigration control. Not only has it become less politicised over time, it also seemingly does not figure among the most ostensible reasons to reject applications anymore, as several expert statements confirmed throughout research (Expert Interview MA 35, Expert Interview BMI, Expert Interview AK).

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<sup>99</sup> In the Residence Act of 1992, the fulfilment of the housing requirement was for the first time defined as a condition to be met by the immigrant. Previously, the employers were required to prove adequate housing for their workers as a prerequisite for an employment permit (which has to be applied for by the employer). Yet, this legal provision was hardly implemented.

<sup>100</sup> However, legal experts present at the Austrian Dissemination workshop for the Family Reunification Workshop held in Vienna on 7 March, 2013, noted great variation in the way immigration authorities implemented the housing requirement, with some district administrations (*Bezirkshauptmannschaften*) in Lower Austria for example known to undertake investigations as to the size and suitability of housing. For some migrants, the housing requirement thus may still be problematic. The problem may thus be rather hidden than absent. As our empirical research focused on Vienna with a more liberal and flexible approach towards housing, we could not capture such cases though.

<sup>101</sup> These decisions came to be known as ‘children’s room decisions’. Accordingly, the authorities required one room for each generation of family members at least. Another example would be the so-called ‘family-planning decisions’, which were negative decision merely based upon prognostication. The authorities claimed that the flat was suitable for current needs but rejected the application on grounds of eventual child-planning in the near future. The Viennese provincial government, responsible for implementing the immigration legislation, subsequently instructed implementing authorities to avoid such reasoning and called for more ‘flexibility’ in administrative decisions (see for example Der Standard, 2 July 1998: 7).

### 3.6 Age requirement

Generally, marriage in Austria can be concluded at the age of eighteen. Exceptionally, marriage is permitted for persons aged not younger than sixteen, if the partner has reached the age of majority (eighteen years) and provided parental or judicial consent is provided (§§1 and 3 Marriage Law, last amended 10 December 2009). A legal amendment in 2009, however, increased the minimum age for spouses from eighteen to twenty-one as a prerequisite for family reunification (for jurisdiction on this matter, see also Chapter 5). This legislation applies to third country nationals and to bi-national couples consisting of Austrian sponsors (with no mobility right) and third country nationals (Hollomey et al. 2011: 11). Exemptions can be made on humanitarian grounds. For instance, the well-being of a child must be considered. The government justified this amendment as an effective instrument to protect young persons from arranged and forced marriages.<sup>102</sup> Among actors from civil society, many have raised serious concerns regarding the government's approach, especially as it may be in violation of Art 8 ECHR. It was argued that the new minimum age requirement was a disproportional measure, since it puts every relationship involving young persons aged less than twenty-one years under the general suspicion of resulting from a forced marriage. Moreover, the measure was criticised for being highly discriminatory since it is solely applied to third-country nationals and family members of Austrian nationals from third countries. If the real concern of the government was to protect young adults, the legislator may well have raised the official age of marriage so that equal treatment was ensured regardless of his/her origin. Furthermore, NGOs pointed out in several comments on the draft legislation that in fact the Ministry did not base its reasoning on any kind of comprehensive evidence.<sup>103</sup>

### 3.7 Chapter conclusion

The evolution of policies in the past decade is characterised by both liberalising and restrictive tendencies. Thus, the right to family reunification as such is now uncontested and more firmly established than it was in the beginning of the 1990s or even a decade ago. In addition, the dependence of family members on sponsors, which has been criticised in particular in view of domestic violence, has been greatly reduced. Thus, access to an independent residence title before the initial five year period of residence was made easier in case of domestic violence or guiltless divorce. Also, restrictions in access of TCN family members to the labour market in the initial period of residence were gradually relaxed in the course of the decade, thus indirectly

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<sup>102</sup> See also explanatory remarks accompanying the draft version of the legal amendment 65/ME XXIV. GP: [http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME\\_00065/imfname\\_160946.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00065/imfname_160946.pdf).

<sup>103</sup> See for example reactions to the draft amendment delivered by several NGOs active in the field of migration: [http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME\\_00065\\_10/fname\\_165125.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00065_10/fname_165125.pdf); [http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME\\_00065\\_28/imfname\\_165191.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00065_28/imfname_165191.pdf); [http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME\\_00065\\_26/imfname\\_165188.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00065_26/imfname_165188.pdf); [http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME\\_00065\\_35/imfname\\_165262.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00065_35/imfname_165262.pdf).

also reducing the financial dependency of family members on sponsors and facilitating the acquisition of an independent employment based residence title. On the other hand, new conditions such as integration requirements have been added and have – as indeed other conditions – become more demanding over the course of the past decade. Thus, the level of language proficiency required after entry is higher and has to be proven earlier, while barriers to long-term residence have been considerably increased. The introduction of pre-entry tests in 2011 also means that initial immigration requires more efforts and resources on the side of the applicant, while for instance illiterate applicants or applicants not literate in the Roman alphabet face even greater challenges. In addition, differences in the scope of family reunification for third-country nationals, Austrian citizens without mobility rights and EU nationals have become more pronounced over the past decade as a result of the tightening of conditions for family members of Austrian and third country nationals. Table 3.1 gives an overview of the most important policy changes concerning family reunification or integration requirements adopted in the past ten years.

**Table 3.1: Policy measures addressing family reunification and integration of family members of TCN and Austrian nationals without mobility right (2001-2011)**

Year	Policy measure
2002	<ul style="list-style-type: none"> <li>• Introduction of the Integration Agreement (A1 level within five years and optional literacy courses)</li> <li>• Introduction of ‘residence certificates’ (issued after 5 years of residence, providing full access to employment)</li> </ul>
2005	<ul style="list-style-type: none"> <li>• Harmonization of income requirement at federal level<sup>104</sup></li> <li>• Amendment of Integration Agreement (A2 level within five years and precondition for naturalization and permanent residence, optional literacy course)</li> <li>• ‘Permanent Residence EC’ replaces ‘residence certificate’</li> <li>• Introduction of independent residence title for family members in case of violence and one-sided divorce</li> <li>• Reduction of waiting time for labour market access from five to one year for family members of TCN</li> </ul>
2009	<ul style="list-style-type: none"> <li>• Amendment of the income requirement stating that requirement is only met after deduction of all regular payments (rent, credit instalments etc.)</li> <li>• Amendment of the minimum age for spouses (from 18 years to 21 years), applicable to sponsor and family</li> </ul>

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<sup>104</sup> The bottom line references now refer to the guaranteed minimum level of monthly allowances for retired persons. The rates are adapted to inflation each year. Previously, the social welfare levels in the respective regional provinces were taken as the minimum level, partly, these were considerably lower than the allowances for retired. For further discussion see Chapter 2.

	member equally
<b>2011</b>	<ul style="list-style-type: none"> <li>• Introduction of the language requirement before entry (A1 level before application)</li> <li>• Amendment of the Integration Agreement (A2 level within two years, B1 as precondition for naturalisation and permanent residence, no literacy course)</li> <li>• Introduction of immediate labour market access for family members of TCN who obtain a Red White Red Card Plus in the realm of a reunification procedure</li> </ul>

Source: Own compilation

A major feature of the political debate on family reunification in the past decade has been its linkage to integration, and in particular, perceived problems regarding integration. While the discussion goes back to the 1990s, concrete policies only followed after a change of government in 2000, notably the introduction of so-called ‘integration’ (i.e. language) conditions in an immigration reform in 2002. While the legislative proposal framed integration conditions as general measures applicable to all current and recent immigrants from third countries, both in practice and in public debates integration conditions very much targeted family members. The focus of integration conditions on family members is even stronger in regard to the pre-entry test introduced in the 2011 immigration reform. The latter was introduced in the framework of a broader reform in the course of which a points based admission system for skilled and highly skilled migrants was introduced. In this context, the distinction between ‘wanted migration’ in the national interest and ‘unwanted migration’ became increasingly important, with family migration being associated with the (unwanted) immigration of low-skilled persons considered as problematic in terms of integration. Other recurrent topics in public debates are marriages of conveniences and concerns about the abuse of family reunification provisions, notably in regard to family reunification with citizens and EU nationals. While focused on bi-national marriages involving third country nationals with a contested residence status (such as asylum seekers or rejected asylum seekers), bi-national couples are now systematically screened for suspect cases.

## **4. Implementation of the right to family reunification: administrative competences and practices**

Chapter 4 complements the analysis of the current legal framework (Chapter 2) and the preceding analysis of the evolution of the policy framework governing family reunifications and provides an analysis of the relevant administrative and judicial structures.

### **4.1 Actors involved and their competences**

As Chapter 3 previously argued, the Ministry of the Interior assumes a great deal of power to define and coordinate the framework addressing immigrant admission as well as the integration-related policy framework. This subsection gives an overview of the most important implementing agencies in this regard.

Administration is split up into agencies processing asylum-related applications and agencies processing demands related to residence and settlement claims (e.g. claims not related to asylum). Moreover, the federal states and communal entities play an important role regarding the implementation of integration policy.

Since the first application (application for entry visa according to the Asylum Act) must generally be lodged and the decision waited for abroad – regardless of whether the application for family reunification is asylum-related or related to residence and settlement – embassies are the agencies dealing with the application in the first place. It must be noted that Austria does not maintain diplomatic representations in every state, so in practice individuals may be obliged to travel far distances to neighbouring countries, since applications must be lodged personally. Only minors aged less than fourteen are entitled to send a legal representative instead. Once the application is filed, an authorised representative may take up communication with the authorities inland (Schumacher et al. 2012: 72).

Though embassies do formally not decide on the application, they are charged with the verification of the applicant's identity as well as the authenticity of his/her documents and checks on whether the required information is sufficiently detailed and correct. Whereas the embassy is held responsible for formal aspects of the application, the decision is taken inland by the responsible administrative unit. If the latter grants reunification (or in the case of reunification under the Asylum Act gives notice of a positive prognosis), the embassy is required to issue an entry visa. Only then may the applicant enter Austria in order to collect the residence title personally, if the application was lodged according to the Residence and Settlement Act, or to apply for family reunification in the realm of asylum,<sup>105</sup> if the application was lodged according to the Asylum Act. Embassies have the discretion to refuse a visa, if evidence is provided that the individual's entry poses a threat to public order and

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<sup>105</sup> The application for asylum inland can be viewed as an act of formality, since the family member has already proved eligible for reunification according to the Asylum Act by virtue of the positive prognoses of the inland authority in the course of the visa procedure.

security. Embassies may take up inquiries on their own initiative in this regard. As Chapter 6 will later discuss, the generous use of margins of appreciation has led to severe difficulties, especially for family members of refugee and subsidiary protected families, throughout the application procedure.

Family members of EU nationals with mobility rights and Swiss nationals are exempted from lodging their application abroad. Reunification is in this case merely documented, thus the relevant procedure may be effectuated inland. Also, applications for residence permits for newborns born in Austria can be filed inland within the first six months after birth. Family members of Austrian nationals (i.e. EU and Swiss nationals without mobility rights) may be lodged inland, provided they have entered the country legally; however, should the visa expire before a decision has been made, the family member has to travel back to his/her country of origin. As Chapter 6 will point out, this basically hinders former asylum seekers from applying inland to reunify with their Austrian family members. Generally, applications may be exceptionally filed on humanitarian grounds inland, however, the burden of proof lies with the individual (Schumacher et al. 2012: 69ff.).

Provided the visa procedure has been successful, first instance decisions in asylum-related matters are processed inland by the Federal Asylum Office, which is directly subordinate to the Ministry of the Interior. Regional branches have been established in five major Austrian cities as well as in the largest asylum reception centre nearby Vienna. Following a legal amendment adopted with the votes of the governing parties ÖVP and SPÖ in July 2012, the first instance will be replaced by a new Federal Office for Migration and Asylum (*Bundesamt für Fremdenwesen und Asyl*).<sup>106</sup> The Office will also hold a mandate to give expulsion orders and grant residence on humanitarian grounds. Previously, these different competences were exercised by a broad range of authorities. This highly decentralised administrative practice was criticised for a lack of transparency (Winkler 2011).<sup>107</sup> The Asylum Court has been responsible for decisions in second instance since 2008. It is mainly based in Vienna, but an additional branch was set up in Linz, Upper Austria. Judges in second instance are independent and irremovable.<sup>108</sup> Appeals against first instance decisions are generally decided on in senates consisting of two judges, or, in case of dissent, a constellation of five (Schumacher et al. 2012: 239f.).

Administrative competences regarding first instance decisions related to the Residence and Settlement Act are federalised. Thus, the issuance of a residence title on grounds of family reunification, its renewal or a change of a given type of residence title, etc. is effectuated by the respective head of provinces. The latter have

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<sup>106</sup> See also *Fremdenbehördenneustrukturierungsgesetz – FNG* BGBl. I Nr.87/2012. With the new Federal Office becoming operational, a possibility to appeal against negative visa decisions is foreseen.

<sup>107</sup> As Winkler notes, alone the competences regarding the administration of deportations are highly diffuse (Winkler 2011, 126f.).

<sup>108</sup> Qualifications/profiles required for a seat as a judge came under severe criticism among civil society actors for being insufficiently demanding in accordance with the challenging job routines of asylum judges. Furthermore, the judges' independence was questioned, as not only the court itself, but also the Ministry of the Interior, may call for a preliminary ruling (Artikel 129e. Para 1 B-VG). See among others the statement of a Viennese NGO specialised in asylum-related matters: <http://www.integrationshaus.at/cgi-bin/file.pl?id=291> (accessed 15 December 2012).

conferred this competence upon regional or city administrations (*Bezirkshauptmannschaften* or *Magistrate*) in all nine federal states. Accordingly, the administrations of the region or city where the alien already resides, has resided recently or wishes to reside are responsible for processing the application for the residence title. The second instance is located in the Ministry of the Interior (ibid.: 68, Winkler 2011: 97).<sup>109</sup> The implementation of reunification claims related to the Residence and Settlements Act is further specified by a regulation of the Ministry of the Interior.<sup>110</sup> In principle, the Ministry of the Interior is responsible for ensuring that local authorities apply the rules in the same way. Indeed, additional handbooks, guidelines, staff training, etc. are in place in order to pursue this goal. Yet, a legal expert in migrant counselling remarked that to some extent (especially regarding the handling of more specific legal aspects), there are noticeably different practices throughout the federal provinces, sometimes even between local authorities in the same federal province.<sup>111</sup>

Although integration is understood as a cross-sectoral matter, the lead actor is definitely the Ministry of the Interior. This was even more affirmed by the establishment of the State Secretariat for Integration in 2011, which is subordinate to the Ministry. The use of consultative mechanisms, involving expertise from various stakeholders, has recently entered the repertoire of governing practice regarding integration. The incorporation of expertise seems to be primarily intended as a tool to generate greater legitimacy for policies and their implementation (Expert Interview BMI). The Integration Committee (*Integrationsbeirat*) coordinates all relevant agencies and actors charged with implementing the National Action Plan on Integration. An Expert Council on Integration (*Expertenrat für Integration*) was established in 2011 to support and advise the implementation of the NAPI (Hollomey et al. 2011: 9).

An important authority in regard to the implementation of integration-related policies is the Austrian Integration Fund (AIF). Founded in 1960 by the Ministry of the Interior and the UN High Commissioner for Refugees, its initial mandate consisted of providing state support to refugees. The Austrian Integration Fund, however, was assigned the role of implementing agency of federal integration policies (e.g. the Integration Agreement) in 2002. It sees itself as being the major state agency providing support to refugees and other legal migrants in terms of social, professional and linguistic integration (Hollomey et al. 2011: 8f.).<sup>112</sup> This assignment did not remain uncontested. Experts had hoped the government would establish an independent and specialised agency and expressed serious doubts, especially regarding the AIF's lack of professional expertise in the area of language teaching and

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<sup>109</sup> The Ministry of the Interior also held a mandate as second instance in asylum-related matters until replaced by an independent instance of appeal following a legal amendment in 1997.

<sup>110</sup> Verordnung der Bundesministerin für Inneres zur Durchführung des Niederlassungs- und Aufenthaltsgesetzes (Niederlassungs- und Aufenthaltsgesetz-Durchführungsverordnung – NAG DV), last amended Federal Law Gazette. II, Nr. 201/2011.

<sup>111</sup> Reply to a request via e-mail by a legal expert in migrant counselling working for a major counselling centre in Vienna on 20 December 2012.

<sup>112</sup> See also [http://www.integrationsfonds.at/wir\\_ueber\\_uns/vision\\_und\\_leitbild/](http://www.integrationsfonds.at/wir_ueber_uns/vision_und_leitbild/).



testing. Later evaluations of the Integration Agreement further noted the quality of the programme developed by the AIF<sup>113</sup> was indeed deficient (Plutzar 2010: 124ff.).

The provision of specific services is becoming increasingly privatised.<sup>113</sup> This holds especially true for the provision of counselling and the implementation of the Integration Agreement, most notably the provision of language courses and examinations. These are subcontracted to private enterprises by the Austrian Integration Fund, pointing towards a growing economy and ‘marketization’ in this area. Courses and testing are offered by a range of actors including institutions for adult education, language schools and NGOs, which must be certified by the AIF. A critical review of the implementation of the Integration Agreement further notes that teachers of German as a foreign language have, thus, involuntarily become implementing agents of the Ministry of the Interior (Plutzar 2010). There is a number of civil society and migrant organisations, especially based in Vienna, which offer counselling in the legal area and matters related to employment. Some are even specialised in specific services for migrant women. Largely, these organisations are funded by the City of Vienna or sustain their services by EU-project funding (Wöger 2011: 6).

According to a study on citizenship testing, information provided regarding the fulfilment of the Integration Agreement varies between the federal states. Individuals reported having received no information at all in Lower Austria, whereas the majority of interviewees in Vienna responded they had been well informed on the language requirement (Perchinig 2010b: 20f., 33f.). Despite the fact that federal provinces are free to implement complementary integration measures, only the City of Vienna offers systematic information, especially targeting newcomers since 2008, reaching about 95 per cent of newly arrived immigrants.<sup>114</sup> It certainly can be viewed as the province that has adopted the most critical stance on the government’s integration policy throughout the past years (Wöger 2011: 5).<sup>115</sup> Despite divergent views on the subject of integration, the information policy and orientation programmes for newcomers adopted by the City of Vienna was frequently referred to as a good practice example among policymakers – including the Ministry of the Interior – and other relevant stakeholders (Expert Interview MA 35, SPÖ, AK, BMI).

## 4.2 Judicial and legal aid system

Regarding the role of embassies throughout the application procedure, several problems related to the legal protection of individuals arise. In case an embassy refuses to issue an entry visa, there is in fact no effective legal remedy against the

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<sup>113</sup> Note discussions on the privatisation of the provision of reception conditions in Austria; see also König/Rosenberger 2010.

<sup>114</sup> The City of Vienna has established a Municipal Department for Integration and Diversity, whereas at the federal level an official diversity policy is largely lacking.

<sup>115</sup> The programme ‘Start Vienna’ (*Start Wien*) provides an overview on the most important rights and obligations of newly arrived immigrants. Generally, the programme is easily accessible for nearly every newly-arrived, since everyone who picks up a residence title is informed about its existence (Expert Interview AK; Expert Interview MA 35).

unlawful administrative practice of Austrian consular authorities abroad. A negative decision may only be challenged before a high court of public law. But due to the high financial burden, the long duration of the procedure and the geographical distance, a negative decision has practically never been challenged. Consequently, applicants are disproportionally exposed to the goodwill and discretion of the employees of the respective embassies. Family members of refugees and subsidiary protected are even more vulnerable during the course of the visa procedure: The issuing of an entry visa relies upon a positive prognosis by the inland authority. However, since the latter does not deliver the required prognoses in form of an official, thus appealable, decision, but solely informal notice is given to the diplomatic representation, negative prognosis decisions cannot be appealed against (Schumacher et al. 2012: 31, 73).

Applications relating to family reunification, like any other procedure connected to immigration, are processed according to the general rules of administrative procedures. The underlying principles thereof are to minimise complexity and allow individuals to understand their rights and obligations on their own, without needing legal counselling. However, administrative procedural guarantees are subject to the principle of subsidiarity. Consequently, they only apply if not specified otherwise. Despite the underlying principle of the rule of law, procedural guarantees have become increasingly curtailed for non-nationals, most notably from third countries (Schumacher et al. 2012: 403, Funk & Stern 2010). Moreover, experts interviewed repeatedly stressed the fact that growing legislative complexity has made the procedure lack transparency, creating additional difficulties for individuals to act without additional support (Expert Interview MA 35, Expert Interview AK).

The application may be decided on in three different ways: a) it may be rejected on grounds of content, b) the application may be accepted, or c) the application may be rejected on grounds of non-compliance with formal requirements. Generally, individuals have a right to appeal against decisions in administrative procedures (for differences with visa procedure see above in this section). Appeals are reviewed by the authority of the second instance; however, the Ministry of the Interior is in charge of appeals against first instance decisions related to resident and settlement. If related to asylum, the Asylum Court is responsible for the review.

A negative second instance decision may be taken before the courts of public law, i.e. the Administrative and the Constitutional Court. The Administrative Court cannot change the content, but can only confirm or revoke a decision. If the decision is revoked, it is remitted to the instance that previously decided the case. The latter is obliged to decide again and take into account the ruling of the high court (Schumacher et al. 2012: 451f.). Since the Asylum Court became operational in 2008, it has both held a mandate as second instance authority and has functioned as a high court for asylum-related administrative matters. Thus, asylum-related cases can only be brought before the Constitutional Court. Yet, the latter is entitled to refuse a case if it judges it not to touch upon the constitution, meaning that 'simple' judicial errors can no longer be rectified (Limberger 2010). The legal expert Joachim Stern notes that the Administrative Court used to be an important means to rectify procedural errors. Its recently established inaccessibility in asylum-related procedures raises severe concerns regarding the protection of essential rights (Stern 2010: 201). Also,

the access to high courts is certainly challenging for individuals, since a legal representation is required. However, the charges may be covered by the state, if a person provides evidence of lacking financial means and the Court judges his/her complaint to be potentially successful. Otherwise, individuals must cover the costs of legal representation. Finally, high court decisions take about two years on average, making judicial reviews a time-consuming and costly matter.

If an application was not rejected on formal grounds, the responsible authority must decide the case within a six-month period. In practice, considerable delays may arise for individuals, since two agencies are involved in the application procedure: one abroad and one inland. The six-month time period seemingly starts only once the application reaches the authority inland. Consequently, delays emerging from dilatory embassies cannot be legally redressed. Clearly, this practice works to the detriment of the applicants, especially of those who are obliged to apply from abroad (Schumacher et al. 2012: 466, Ecker 2008: 243).<sup>116</sup>

Notwithstanding the important gaps in legal protection discussed earlier, appeals against procedural delays are possible in principle. If a decision takes longer than six months, individuals may take the application to the authority in second instance. It is important to note that a second instance decision is final and only may be brought before a high court of public law, even if the first instance was in default and no decision was taken.

If an application is rejected on grounds of content a two-week period for appeal is applicable. The second instance may confirm or revoke the decision. In principle, this decision is final and may only be taken before the high courts of public law.

Generally, a residence title may be prolonged inland. Overall, the same criteria as for the first admission apply. The quota requirement, however, is not applicable, neither is a judicial record from the country of origin required. However, the Integration Agreement must be fulfilled on time. To date, comparatively few expulsions have been enforced on grounds of not having fulfilled the Integration Agreement (Expert Interview MA 35). However, it is difficult to assess the actual effects of the considerable shortage of time available to individuals for fulfilling the language requirement, although the experts interviewed fear higher quotas of failure (Expert Focus Group). Also in a prolongation procedure a negative decision may be appealed in second instance, which is then final and can only be taken to the high courts of public law.

At all times – including the first application and the prolongation of the residence title – decisions require a consideration of Article 8 ECHR. As representatives from the Ministry of the Interior have pointed out in the interview, the longer the stay of an individual and the more conditions are met, the greater is the chance to obtain a prolongation of residence (Expert Interview BMI). As NGO experts and the legal expert from the Chamber of Labour have criticised, there are conversely increasingly more hurdles to take after arrival (e.g. language requirement and yearly renewal of the

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<sup>116</sup> This is especially problematic since embassies may conduct additional inquiries on the identity of applicants. These may contribute to considerable delays in the processing of the application (see also Ecker 2008: 244).

resident permit during the first years of residence). In practice, these legal changes have decreased the applicability of Art 8 considerations, especially since the length of stay is a decisive criterion on which Art 8 ECHR decisions are taken.

### **4.3 Chapter conclusion**

Generally, the responsibility for administering family reunification is divided between competent provincial authorities responsible for immigration on the one hand and asylum authorities, on the other. The responsible authorities in case of applications lodged under the Residence and Settlement Act are the relevant provincial authorities, with the Ministry of the Interior acting as the second instance. First instance decisions regarding asylum related claims for reunification first require a successful visa procedure that relies upon a positive prognosis of Federal Asylum Office. The application for family reunification has then to be lodged in the country and is processed by the Federal Asylum Office. Second instance decisions are taken by the Asylum Court, which also takes up the function of a high court in administrative matters.

With few exceptions, applications must be lodged at the competent consular post abroad. Even if applicants have good prospects to obtain a title on grounds of family reunification or formation, entrance visa may not be issued if the consulate has reason to believe that the individual's entry might pose a threat to public order or security or if the identity of the applicant is not sufficiently verified. Moreover, a visa is not issued in the case of asylum related reunification if the prognosis to obtain protection in the realm of the asylum reunification procedure is deemed unlikely by the Federal Asylum Office. In practice, no effective legal remedy exists to challenge such a decision. While a negative visa decision could theoretically be challenged before a high court of public law, its occurrence is highly unlikely in practice, given that visa applicants need to personally challenge a decision (sponsors cannot challenge a decision in their lieu), the difficulties entailed by geographic distance, the long duration of the procedure (about two years) and the costs involved, notably those resulting from the obligation to take a lawyer.

In the area of integration policy, the Ministry of the Interior is responsible for coordinating integration policy, both horizontally between relevant actors at the national level and vertically with relevant subnational entities (provinces and municipalities), following the adoption of the National Action Plan on Integration (NAPI) in 2010. The area of integration policy most directly related to family reunification as a legal ground for admission is the administration of the so-called Integration Agreement. Here, the Austrian Integration Fund is the main body charged to oversee curriculum development, certification of course providers and subsidies to course participants.

## 5. Case law in Austria (2001 - 2011)<sup>117</sup>

### 5.1 Family members of third country nationals covered by Directive 2003/83/EC (Family Reunification Directive)

The Austrian courts of public law highlight in their constant jurisprudence that Art 8 ECHR does not entail a right to family life for foreigners residing outside their country of origin. Concurrently, under special circumstances, there is an obligation of the state to enable the entry and the settlement of family relatives.<sup>118</sup> Thus, the right to family life of foreign nationals resident in Austria is guaranteed only under specific circumstances. In this regard, the Constitutional Court refers to the ruling of 21 December 2001 *Sen* by the European Court of Human Rights.<sup>119</sup> The Administrative Court ruled that a right to family life exists in reunification cases in which an expulsion would be inadmissible on grounds of Art 8 ECHR.<sup>120</sup> Whether a breach of Art 8 ECHR is at stake is subject to a case-by-case assessment.<sup>121</sup> The alien is entitled to such an evaluation regardless of his/her residential status, even if s/he is irregularly residing in Austria.<sup>122</sup> The mere reference to already established court ruling rationales is considered to be insufficient. An actual evaluation of each individual case must be effectuated.<sup>123</sup> An exceptional legal entitlement to family reunification was further confirmed in the case of the reunion of a father with his three children who were living in Austria.<sup>124</sup> Against this background, the Constitutional Court repealed a provision of the Residence and Settlement Act (NAG) as unconstitutional. This provision had previously hindered individuals from filing individual applications for humanitarian stay.<sup>125</sup>

Unless the medical treatment is accessible in the state of origin, the same rationale applies to cases in which the prevention from family reunification in Austria renders the care of a relative impossible.<sup>126</sup> Similarly, the court implicitly assumed that the necessity of a minor to be taken care of by his Ukrainian grandmother is sufficiently valid grounds to obtain a residence title based on Art 8 ECHR. However, this given case lacked substantiated arguments delivered by the applicant.<sup>127</sup> Such a claim was denied in the case of the reunion of an adult with his father.<sup>128</sup>

Due to the opinion of the Constitutional Court, when a right to family reunification is granted – which in exceptional cases is directly derived from Art 8

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<sup>117</sup> This original chapter was authored by Gerhard Muzak and Christoph Hurich and revised and complemented with a chapter conclusion by the principle authors of the report.

<sup>118</sup> VfSlg 17.734; 18.517; VwGH 24.04.2002, 2002/12/0022; 14.10.2008, 2008/22/0048.

<sup>119</sup> VfSlg 17.013.

<sup>120</sup> VwGH 26.09.2007, 2007/21/00247; 26.01.2010, 2009/22/0022.

<sup>121</sup> VfSlg 17.734.

<sup>122</sup> VwGH 06.07.2010, 2009/22/0355.

<sup>123</sup> VwGH 27.05.2010, 2008/21/0165, 29.09.2011; 2009/21/0080.

<sup>124</sup> VfSlg 17.734.

<sup>125</sup> VfSlg 18.517.

<sup>126</sup> VwGH 28.08.2008, 2008/22/0164; 26.01.2010, 2009/22/0022.

<sup>127</sup> VwGH 31.03.2008, 2007/18/0286.

<sup>128</sup> VwGH 24.04.2002, 2002/12/0022.

ECHR – an exemption from the quota system is required.<sup>129</sup> The Administrative Court interprets the term family relative (§46 NAG) differently to the comparatively narrow legal definition as laid down in §2 (1) nr. 9 NAG. Rather, the court interprets this term in conformity with Art 8 ECHR which is part of the Austrian constitution. Accordingly, a residence title has to be granted when Art 8 ECHR applies – even if the sponsor does not yet reside in Austria.<sup>130</sup> Moreover, the Administrative Court points out the relevance of humanitarian residence titles (§73 NAG) as an instrument to enforce the right to family reunification.<sup>131</sup>

Regarding the definition of the circle of eligible family members, the Administrative Court emphasises the restriction to the so-called ‘nuclear family’. The ‘biological age’ is viewed as relevant for the status as minor.<sup>132</sup> Thus, the applicant must be minor-aged from the day the application is filed onwards to the moment of decision.<sup>133</sup> Furthermore, the Administrative Court points out that relatives in ascending line are not entitled to family reunification in the sense of Art 4 (1) Directive 2003/86/EC.<sup>134</sup> With reference to the explanatory remarks,<sup>135</sup> the Constitutional Court ruled that by reason of the specific nature of this residence title, foreigners with restricted access to employment are not entitled to apply for family reunification.<sup>136</sup>

Concerning the principle of applying from abroad, as established in Art 5 (3) Directive 2003/86/EC, the Administrative Court emphasises the impossibility of deducing any right to apply in Austria from this directive.<sup>137</sup> In another decision, the court further clarified that the obligation to fulfil the quota requirement and file the application for reunification abroad does not represent a disproportional breach of Art 8 ECHR.<sup>138</sup> However, in an earlier ruling, the very same court pointed out the legitimacy of inland applications on the grounds of Art 5 (3) nr. 2 Directive 2003/86/EC. Yet, the Austrian legislator did not make any use of this legal possibility.<sup>139</sup> Following a legal amendment in 2009,<sup>140</sup> the Administrative Court further stated that inland applications have to be accepted if a right to stay directly

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<sup>129</sup> VfSlg 17.013.

<sup>130</sup> VwGH 17.11.2011, 2010/21/0494.

<sup>131</sup> VwGH 27.06.2006, 2006/18/0153; 05.09.2006, 2006/18/0243; 26.01.2010, 2009/22/0022. In most of those cases, family relations have already been established in Austria, but the family members’ residence is irregular.

<sup>132</sup> VwGH 17.11.2011, 2010/21/0494.

<sup>133</sup> VwGH 22.03.2011, 2008/22/0882; 20.10.2011, 2009/21/0206; 20.10.2011, 2010/21/0435.

<sup>134</sup> VwGH 28. 06. 2006, 2002/21/0028.

<sup>135</sup> RV 1172 Blg NR 21. GP to §§ 9, 14 FrG 1997 in the version of the amendment 2002.

<sup>136</sup> VwGH 13.10.2005, 2005/18/0179.

<sup>137</sup> VwGH 22.09.2009, 2008/22/0791.

<sup>138</sup> VwGH 24.04.2007, 2006/21/0057.

<sup>139</sup> VwGH 27.06.2006, 2006/18/0158.

<sup>140</sup> Federal Law Gazette I, Nr. 2009/29.

emerges from Art 8 ECHR.<sup>141</sup> The lawful entry and residence of the sponsor is seen as a legal precondition to apply for reunification inland.<sup>142</sup>

The recent introduction of a minimum age of twenty-one years for spouses and registered partners who apply for family reunification<sup>143</sup> was ruled to be in accordance with Art 8 ECHR by the Constitutional Court. This restriction was judged a legitimate means to avoid forced marriages, especially of young-aged TCN, as laid down in Family Reunification Directive 2003/86/EC. Even the fact that the minimum age limit was suddenly raised from eighteen years to twenty-one was declared to be unobjectionable.<sup>144</sup> The Administrative Court followed that position.<sup>145</sup>

In a ruling the Administrative Court refers to the residence rights granted by Directive 2004/38/EC. The court states that, in principle, the right for a permanent residence (Art 16 ff) requires a minimum of five years of regular stay.<sup>146</sup> In the view of the Administrative Court, a possibility to appeal against decisions addressing family reunification under the directive is required; however, no obligation to charge a tribunal (as opposed to an administrative entity acting as the second instance) can be derived from Art 18 of Directive 2003/86/EC.<sup>147</sup>

### ***5.1.1 Family members of refugees covered under Directive 2003/86/EC***

With regards to family reunification, the Administrative Court ruled that equal treatment of refugees, European Union nationals and Austrian nationals is not required.<sup>148</sup> Moreover, referring to asylum-related matters, the Constitutional Court pointed out that Art 8 ECHR does not confer upon individuals any right of entry into a specific state. Therefore, the court denied asylum seekers a right to family reunification, especially given their uncertain status while awaiting a decision.<sup>149</sup>

From a legislative point of view, the understanding of family and the procedural preconditions have evolved and increasingly gained in complexity. Until 2005, the precondition for the so called ‘asylum extension’ (*Asylerstreckung*)<sup>150</sup> was the impossibility to exercise family life in any other state.<sup>151</sup> The court further decided that changes regarding the family status do not provide sufficient grounds to

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<sup>141</sup> VwGH 17.12.2009, 2009/22/0270; §21 (3) Residence and Settlement Act (NAG 2005, last amended in 2012)..

<sup>142</sup> §21 (2) nr. 1 Residence and Settlement Act (NAG 2005, last amended in 2012); VwGH 09.09.2010, 2008/22/0734.

<sup>143</sup> §2 (1) nr. 9 Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>144</sup> VfGH 17.06.2011, B711/10.

<sup>145</sup> VwGH 13.09.2011, 2011/22/0215.

<sup>146</sup> VwGH 02.07.2010, 2007/09/0194.

<sup>147</sup> VwGH 22.09.2009, 2008/22/0791.

<sup>148</sup> VwGH 28.06.2006, 2002/21/0028.

<sup>149</sup> VfSlg 18.613.

<sup>150</sup> ‘Asylum extension’ (*Asylerstreckung*) was a term established in the Asylum Act of 1997 to refer to the legal possibility to ‘extend’ the asylum status to other family members. To obtain international protection under that scope required an application for ‘asylum extension’.

<sup>151</sup> VwGH 23.01.2003, 2001/01/0429.

withdraw the status of extended asylum.<sup>152</sup> In case of decease, the application was ruled to remain active for the family members, but in reality the chances for partners or spouses to obtain a status were limited.<sup>153</sup>

A restriction regarding the extension of the asylum status to other family members was assumed by an Administrative Court ruling. It stated that the asylum status could not be extended to a family member, if the sponsor him/herself was granted asylum in the realm of family reunification with some other relative. No concerns addressing the violation of Art 8 ECHR were expressed.<sup>154</sup>

The term family member in previous legislation covered the ‘nuclear family’, namely parents and children under the age of eighteen, but also included adopted children and step children.<sup>155</sup> Adult children were not included. Nevertheless, the Administrative Court required Art 8 ECHR to be considered in relevant cases.<sup>156</sup> Principally, the asylum extension application required the sponsor to hold a status as an asylum seeker when the application is lodged (§10 (2) AsylG 1997). This specific requirement is further applicable to minor-aged asylum seekers.<sup>157</sup> Contrary to the current legal situation, the existence of family life in the country of origin was not a prerequisite to family reunification. Marriage could even be concluded up to a year after arrival to Austria.<sup>158</sup>

In some decisions concerning the family procedure according to the Asylum Act currently in force (*AsylG 2005*), the Administrative Court introduced the term ‘uniformity’ (*Gleichförmigkeit*) of a procedure. Accordingly, the procedures should be carried out together and the same type (asylum or subsidiary protection) of protection (asylum or subsidiary protection) has to be granted to all family members.<sup>159</sup> Until 31 December 2009, there was the possibility to apply for reunification at Austrian embassies. Before granting permission to enter Austria, the Asylum Authority had to contact the Ministry of the Interior. With reference to the explanatory remarks,<sup>160</sup> the Administrative Court stated that this measure should prevent the entry of aliens who pose a threat to public security.<sup>161</sup>

Referring to current legislation,<sup>162</sup> the Administrative Court interpreted the definition of minor persons and ruled that – contrary to the treatment of minors as laid out in the Residence and Settlement Act – it is sufficient for the applicant to be minor aged while applying for reunification but it is not a prerequisite throughout the entire procedure.<sup>163</sup> According to a judgement of the Administrative Court, the family

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<sup>152</sup> VwGH 23.01.2003, 2001/01/0429.

<sup>153</sup> VwGH 24.08.2007, 2006/19/0101.

<sup>154</sup> VwGH 22.12.2005, 2002/20/0514.

<sup>155</sup> VwGH 25.04.2007, 2007/20/0366.

<sup>156</sup> VwGH 17.04.2007, 2006/19/0915.

<sup>157</sup> VwGH 23.01.2003, 2001/01/0429; 26.11.2003, 2001/20/0445.

<sup>158</sup> VwGH 12.12.2002, 2000/20/0078.

<sup>159</sup> VwGH 30.05.2007, 2006/19/1405; 25.11.2009, 2007/01/1153; 21.10.2010, 2007/01/0164.

<sup>160</sup> RV 952 Blg NR 22. GP.

<sup>161</sup> Application for family members of refugees can no longer be lodged at embassies. Applications for reunification under the Asylum Act must now be filed after entry inland. For this purpose, a visa can be requested at the embassy on grounds of a special procedure. VwGH 19.06.2008, 2007/21/0423.

<sup>162</sup> §1 (6) Asylum Act 2005 (AsylG 2005, last amended in 2012).

<sup>163</sup> VwGH 28.10.2009, 2007/01/0532; 07.04.2011, 2010/22/0188.



reunification of refugees may not be rejected on the sole grounds of representing a potential financial burden to the state.<sup>164</sup>

### **5.1.2 Family Members of third country nationals covered by Directive 2003/109/EC (Long Term Residence Directive)**

The Administrative Court interprets Art 16 Directive 2003/109/EC concerning the legal status of third country nationals who are long-term residents in the following way: a long-term resident falls under the scope of this directive if s/he enjoys his or her mobility right in another Member State than where s/he initially settled. Family members may join a long-term resident but are required to fulfil the admission criteria as laid out in the Member State where the sponsor initially settled.<sup>165</sup>

## **5.2 Family members of EU nationals including Austrian nationals**

With reference to the former legal situation as laid out in the Aliens Act 1997 (derogated 2005), the Administrative Court emphasised the equal treatment of relatives of Austrian nationals and European Union nationals as per Regulation 1612/68 and Directive 68/360/EC. This decision especially addressed the relevance of an extended family definition including spouses, children aged under twenty-one and adult children receiving alimony. The decision moreover, has highlighted an *ex lege* right to reside for relatives of Austrian citizens and Union citizens.<sup>166</sup>

Although the Aliens Act 1997 was replaced by the Residence and Settlement Act on 1 January 2006, the legal situation has remained fairly stable in this specific aspect. However, the Administrative Court emphasises the inclusion of relatives in direct ascending line as well as adoptive children of Austrian citizens.<sup>167</sup> Furthermore, the court considers the type of employment a sponsor has as irrelevant for the right of his or her family members to reside in Austria.<sup>168</sup>

The only decision of the Court of Justice of the European Union (CJEU)<sup>169</sup> on the practice of family reunification in Austria relates to the distinction between European Union citizens who have enjoyed or have not made use of their mobility right.<sup>170</sup> In the case *Dereci* C-256/11 of 15 November 2011, the CJEU underlined the inapplicability of Directive 2003/86/EC to European Union citizens. The CJEU further noted that European Union citizens, who made no use of their mobility right, do not fall within the scope of Directive 2004/38/EC. However, the court reasoned that European Union citizenship confers a bundle of core rights upon individuals. Otherwise, European Union citizenship would be deprived of its practical relevance.

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<sup>164</sup> VwGH 29.09.2011, 2009/21/0080.

<sup>165</sup> VwGH 22.09.2009, 2008/22/0791.

<sup>166</sup> VwGH 19.11.2003, 2001/21/0120.

<sup>167</sup> VwGH 12.08.2010, 2008/10/0139; VwGH 27.01.2009, 2008/22/0190.

<sup>168</sup> VwGH 19.01.2001, 2000/19/0131.

<sup>169</sup> Previously known as European Court of Justice (ECJ), the Court was renamed into CJEU after the Lisbon Treaty entered into force.

<sup>170</sup> §57 Residence and Settlement Act (NAG 2005, last amended in 2012).

As an example, the CJEU mentioned that European Union citizens, in fact, could be forced to leave the EU territory, if their EU citizenship did not entail a right of residence within the EU territory. However, the national courts have to decide case by case whether a residence right is derivable for family members of EU citizens too. Finally, the court pointed out that the fundamental right to respect for private and family life according to Art 7 EU Charter of Fundamental Rights should be interpreted in the same way as Art 8 ECHR.

Furthermore, the decision discussed the residential rights of Turkish nationals according to the Association Agreement between the EU and Turkey. The agreement clearly relaxed previous legislation regarding the preconditions for the exercise of settlement rights of Turkish nationals who intend to take up work in the EU. The CJEU interprets Article 41(1) of the Additional Protocol to the treaty as follows: the enactment of more restrictive legislation in comparison to the framework in place when the Protocol entered into force in the Member State concerned runs against the objectives of the Association Agreement. Therefore, the court considered that, for instance, the obligation of Turkish nationals to apply for reunification from abroad<sup>171</sup> constitutes an illegal 'new restriction' in the sense of Article 41(1) of the Additional Protocol. The Administrative Court follows this position and has ruled accordingly that general admission criteria, especially the income requirement as laid out in §11 (5) Residence and Settlement Act, represent an unjustified restriction.<sup>172</sup>

Moreover, several decisions of the Austrian high courts regarding the current migration legislation discuss the legal distinction between sponsors who have or have not realised their mobility rights according to §57 Residence and Settlement Act. With reference to the jurisdiction of the CJEU (25.07.2008 *Metock* C-127/08), a cross-border regard or a fact related to European Union law are considered as relevant.<sup>173</sup> Such a situation was assumed even in the case of illegal marginal employment by an Austrian wife of a Nigerian citizen in the Czech Republic.<sup>174</sup> However, the court did not consider cross-border employment to be sufficiently relevant in the case of an Indian citizen married to an Austrian national, who had stayed for several weeks in Greece to participate in a 'turtle project'.<sup>175</sup>

The Constitutional Court considered that the distinction, whether the right for freedom of movement was realised or not, is based on objective merits. Thus, unequal treatment among foreigners would be objectively justified according to the principle of equality as laid out in Article 7 of the Austrian Constitution.<sup>176</sup> It lies in the discretion of the national legislator to differentiate between facts with and without connection to the EU law.<sup>177</sup> The Administrative Court followed that position in this regard.<sup>178</sup>

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<sup>171</sup> §21 Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>172</sup> VwGH 19.01.2012, 2011/22/0313.

<sup>173</sup> VwGH 02.04.2009, 2007/18/0131; VfSlg 18.269.

<sup>174</sup> VwGH 29.09.2011, 2009/21/0386.

<sup>175</sup> VwGH 25.09.2009, 2009/18/0278.

<sup>176</sup> The scope of this principle was extended to the legal situation of aliens by the Constitutional Act Against Racial Discrimination.

<sup>177</sup> VfSlg 18.269, 18.968.

<sup>178</sup> VwGH 22.03.2011, 2008/21/0001.

The distinction concerning the freedom of movement was relativized by recent jurisprudence of the Administrative Court. It argued that this distinction cannot lead to substantial European Union citizen rights being refused. This would be the case if the sponsor was forced to leave the European Union territory.<sup>179</sup> This judgement was issued as a result of the already mentioned CJEU *Dereci* decision of 15 November 2011 C-256/11, which was effectuated following an application of the Austrian Administrative Court.

Similarly to the former legislation in force, the Administrative Court points out that in the case of having realised a mobility right, a right of residence directly emerges from European Union law. Thus, these rights are merely declaratory.<sup>180</sup>

In 2006, the Administrative Court decided that the Asylum Law and the Residence and Settlement Act need to be applied separately. As a consequence, asylum seekers cannot apply for a residence status according to the Residence and Settlement Act.<sup>181</sup> However, by reason of the CJEU decisions *Metock* (25.07.2008 C-127/08) and *Sahin* (19.12.2008 C-551/08), the Austrian high courts' jurisprudential approach has changed: The Constitutional Court affirmed the primacy of Art 9 (1) and (10) of Directive 2004/38/EC over the relevant provision set out in the Residence and Settlement Act<sup>182</sup> which generally excludes foreigners with asylum-related residential entitlements from applying for a residence title.<sup>183</sup>

Both the Constitutional and the Administrative Court argued more recently that it is irrelevant how the third country national reached the Austrian territory. Nor do they consider it to be relevant when the family was founded.<sup>184</sup> It is also considered to be irrelevant whether the alien entered the Member State before or after s/he started a family with an EU citizen.<sup>185</sup> Against this background, the Administrative Court understands the word sequence, or 'accompanying or following a European Union citizen,' as laid out in the Alien's Police Act<sup>186</sup> in the same way as Directive 2004/38/EC (Art 7 (1) lit d). Namely, under reference to the CJEU preliminary ruling of 19 December 2008 C-551/07 *Sahin*, the provision is interpreted in the following way: even relatives, who travelled to a Member State alone and later started a family with an EU citizen, fall within the scope of this provision.<sup>187</sup> A right of residence also exists if the relative has stayed in Austria even before family relations were established.<sup>188</sup> Hence, the right to family reunification does not depend on when or where the marriage was concluded.<sup>189</sup>

Regarding relatives of European Union citizens who did not enjoy their mobility right, the Administrative Court stated that it is not necessary to connect to the

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<sup>179</sup> VwGH 15.12.2011, 2008/18/0189.

<sup>180</sup> VwGH 24.11.2009, 2007/21/0011; 11.03.2010; 2007/09/0096.

<sup>181</sup> VwGH 22.06.2006, 2006/21/0108.

<sup>182</sup> §1 (2) nr. 1 Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>183</sup> VwGH 22.01.2009, 2008/21/0671; 24.02.2009, 2009/22/0032.

<sup>184</sup> VfGH 16.12.2009, G 244/09; VwGH 11.03.2010, 2007/09/0096; 24.11.2011, 2011/23/0302.

<sup>185</sup> VwGH 22.03.2011, 2008/21/0001; ECJ 25.07.2008 *Metock* C-127/08.

<sup>186</sup> §2 (4) nr. 11 Alien's Police Act (FPG 2005, last amended in 2012).

<sup>187</sup> VwGH 17.03.2009, 2009/21/0027; 14.12.2010, 2008/22/0175, 20.12.2011, 2011/23/0468.

<sup>188</sup> VwGH 27.01.2010, 2009/21/0379, 12.04.2011, 2007/18/0241.

<sup>189</sup> VwGH 10.11.2009, 2008/22/0733, 24.11.2011, 2011/23/0302.

provisions concerning European Union citizens enjoying freedom of movement.<sup>190</sup> Nevertheless, their legal status should be harmonised as far as it is useful and appropriate. This aim was realised by exemptions from the quota system and also partly from the necessity to apply from abroad.<sup>191</sup> In another case, the Administrative Court emphasised the high importance of the personal interests of European Union citizens which have to be taken into account according to Art 8 (2) ECHR.<sup>192</sup>

With regards to spouses of European Union citizens who have not enjoyed their mobility right, it was decided that in case of divorce the spouse loses the status of family member as defined in the Residence and Settlement Act, thus the right to residence in Austria as a family member ceases. Moreover, the court denied the necessity of an assessment of interests according to Art 8 ECHR.<sup>193</sup> Amicable relationships that are lived in a way similar to family life are also not included in the notion of family members, as the court did not subsume those cases under the term of ‘other relatives’ (not belonging to the nuclear family) within the meaning of §47 (3) nr. 3 Residence and Settlement Act. However, the Administrative Court argued that a factual life partner would in fact fall under the scope of ‘other relatives’. The Court explicitly states this in regard to the Alien’s Police Act<sup>194</sup> as well as to the Asylum Act of 1997.<sup>195</sup>

### 5.3 Chapter conclusions

Judicial activity of Austria’s Public Law Courts has been an important driver of family reunification policies, with jurisprudence both necessitating legal amendments of existing legislation and responding to the constantly evolving legal framework addressing family reunification. The Austrian courts of public law may be generally characterized as responsive to jurisprudence of the ECtHR and CJEU. By referring cases to the CJEU, such as in *Sabin* (C-551/01 of 19 December 2007) and *Dereci* (C-256/11 of 15 November 2011) the courts also impact on jurisprudence at the European level. Jurisprudence on the basis of Article 8 ECHR has been especially important in shaping rules on family reunification in the past decade, notably in regard of obliging authorities to systematically assess Article 8 in all family reunification and return decisions.

Generally, the legislator has considerable room for manoeuvre in translating jurisprudence into relevant legislation and/or administrative practice. Two examples illustrate this point: In 2009, the Administrative Court ruled that legislation did not further specify that monthly expenses should be added up to the required income, thus the practice to add up regular payments to the minimum threshold was ruled to be unlawful (VwGH 2008/22/0711, 3 April 2009). While the ruling could be read as a recommendation to refrain from adding regular expenses to the required income, a

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<sup>190</sup> §§ 47 and 52 Residence and Settlement Act (NAG 2005, last amended in 2012).

<sup>191</sup> VwGH 30.01.2007; 2006/18/0414.

<sup>192</sup> VwGH 25.09.2009, 2009/18/0278.

<sup>193</sup> VwGH 10.11.2010, 2008/22/0123.

<sup>194</sup> VwGH 03.04.2009, 2008/22/0864.

<sup>195</sup> VwGH 30.08.2011, 2009/21/0197; 26.04.2010, 2006/01/0354; 21.04.2011, 2011/01/0131.

subsequent legal amendment explicitly stated that the required income should be understood as a net sum, i.e. as the sum *after* the deduction of all regular payments.<sup>196</sup> Conversely, the far-reaching implications of the CJEU ruling in *Dereci* in principle would suggest an adaptation of the legal framework in the light of the ruling. The Ministry of the Interior, however, opted for only adapting the administrative practice by instructing implementing authorities accordingly. It argued that no sufficiently general rules can be followed from the ruling in *Dereci* which would allow reflecting the judgement in legislation and that ultimately, the implications of the ruling need to be assessed case by case.

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<sup>196</sup> Some legal experts argue that the CJEU ruling in *Chakroun* (C-578/08, a Dutch case) suggests that the Austrian practice is not covered by the Family Reunification Directive.

## 6. The impact of family reunification requirements on the ability to achieve family reunification

This section will address the question as to whether the obligation to comply with specific conditions promotes or hinders family reunification. The differentiation between different residential statuses and reunification rights implies a socially selective dynamic, reflected in more or less demanding requirements. Reflecting the importance of these differentiated sets of rights we will discuss the impact of the legal framework on access to family reunification by different categories of sponsors. The chapter is based on available quantitative indicators on family reunification, expert interviews, interviews conducted with individuals and a focus group with NGO experts. It is important to note that the sample of interviews with individuals does not allow general statements, but can only highlight and illustrate some of the challenges that individuals face. The experts' insights thus add valuable input to this account.

### 6.1 Quantitative analysis

Given limitations of data collection on residence permits in Austria, no in-depth analysis of quantitative trends by different categories of beneficiaries is possible. Therefore only a summary overview of statistical trends regarding all categories of sponsors will be provided, with some additional information in respect to family reunification with third country nationals subject to quota requirements.

It is important to note that the time series data presented below contain several breaks that reflect legal changes in admission categories. Thus, developments over time are difficult to compare. In addition, Austrian authorities do not systematically compile information on applications,<sup>197</sup> as a result of which no analysis as to rejection rates can be undertaken. Importantly, break-downs by citizenship and gender for individual admission categories is only available to a limited extent, thus again precluding an in-depth analysis by countries of citizenship and gender. Finally, data on residence permits issued on grounds of family reunification does not include family reunification under the Asylum Act. Conversely, in asylum statistics, family reunification is not recorded separately and simply figures as a positive decision.

Table 6.1, overleaf, provides a general overview of the number of titles issued to family members covering a period from 1995 to 2011.

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<sup>197</sup> Application related data are only published in the framework of the annual reports on the Settlement Ordinance (*Niederlassungsverordnung*), notably regarding applications that had or are likely to be rejected because of exhaustion of the quota and regarding rejection rates.

Table 6.1: Residence Titles Granted 1995 - 2011											
Year	Residence Title	Settlement Permit (quota)/ RWR-Card <sup>1</sup>	Settlement Permit (quota-free)/ RWR-Card <sup>2</sup>	Total NB	Quota-free First Application Family Member ( <i>AT Familienangehöriger</i> ) <sup>3</sup>	Total Settlement Permit + Quota-free First Application Family Member	Temporary Residence Permit (introduced 1999) <sup>4</sup>	Temporary Residence Permit (abolished 1998) <sup>5</sup>	EU Documentation (EU/EEA /CH) <sup>6</sup>	Re-sidence Card (TCN family members of EU/EEA / CH) <sup>7</sup>	Total
<b>2011</b>	Family member	3,565	5,699	9,264	4,949	14,213	721		12,384	1,209	28,527
	Total	4,405	11,107	15,512	4,949	20,461	7,517		45,798	1,209	74,985
	Share in %	80.93%	51.31%	59.72%	100.00%	69.46%	9.59%		27.04%	100.00%	38.04%
<b>2010</b>	Family member	3,643	3,829	7,472	4,935	12,407	646		9,849	1,074	23,976
	Total	4,410	4,936	9,346	4,935	14,281	6,238		36,438	1,074	58,031
	Share in %	82.61%	77.57%	79.95%	100.00%	86.88%	10.36%		27.03%	100.00%	41.32%
<b>2009</b>	Family member	3,643	3,829	7,472	5,001	12,473	545		10,192	1,330	24,540
	Total	4,410	4,936	9,346	4,936	14,282	5,532		35,825	1,330	56,969
	Share in %	82.61%	77.57%	79.95%	101.32%	87.33%	9.85%		28.45%	100.00%	43.08%
<b>2008</b>	Family member	4,338	3,992	8,330	5,933	14,263	634		10,367	615	25,879
	Total	5,359	4,069	9,428	5,933	15,361	5,879		38,617	615	60,472
	Share in %	80.95%	98.11%	88.35%	100.00%	92.85%	10.78%		26.85%	100.00%	42.80%
<b>2007</b>	Family member	4,402	4,004	8,406	6,517	14,923	621		9,722	705	25,971
	Total	5,255	4,116	9,371	6,517	15,888	5,699		33,194	705	55,486
	Share in %	83.77%	97.28%	89.70%	100.00%	93.93%	10.90%		29.29%	100.00%	46.81%
<b>2006</b>	Family member	3,395	3,549	6,944	8,595	15,539	661		3,758	1,337	21,295
	Total	4,069	3,689	7,758	8,595	16,353	6,613		14,508	1,337	38,811

Table 6.1: Residence Titles Granted 1995 - 2011											
Year	Residence Title	Settlement Permit (quota)/ RWR-Card <sup>1</sup>	Settlement Permit (quota-free)/ RWR-Card <sup>2</sup>	Total NB	Quota-free First Application Family Member ( <i>AT Familienangehöriger</i> ) <sup>3</sup>	Total Settlement Permit + Quota-free First Application Family Member	Temporary Residence Permit (introduced 1999) <sup>4</sup>	Temporary Residence Permit (abolished 1998) <sup>5</sup>	EU Documentation (EU/EEA /CH) <sup>6</sup>	Re-sidence Card (TCN family members of EU/EEA / CH) <sup>7</sup>	Total
	Share in %	83.44%	96.20%	89.51%	100.00%	95.02%	10.00%		25.90%	100.00%	54.87%
<b>2005</b>	Family member	5,254	24,590	29,844			382				30,226
	Total	6,258	25,908	32,166			21,200				53,366
	Share in %	83.96%	94.91%	92.78%			1.80%				56.64%
<b>2004</b>	Family member	4,325	24,534	28,859			355				29,214
	Total	5,138	26,697	31,835			32,209				64,044
	Share in %	84.18%	91.90%	90.65%			1.10%				45.62%
<b>2003</b>	Family member	6,928	23,880	30,808			357				31,165
	Total	8,027	26,537	34,564			35,405				69,969
	Share in %	86.31%	89.99%	89.13%			1.01%				44.54%
<b>2002</b>	Family member	4,777	18,481	23,258			286				23,544
	Total	6,596	20,570	27,166			38,801				65,967
	Share in %	72.42%	89.84%	85.61%			0.74%				35.69%
<b>2001</b>	Family member	5,089	14,014	19,103			405				19,508
	Total	7,776	15,699	23,475			33,735				57,210
	Share in %	65.44%	89.27%	81.38%			1.20%				34.10%
<b>2000</b>	Family member	3,681	9,645	13,326			326				13,652
	Total	5,275	10,938	16,213			19,610				35,823



Table 6.1: Residence Titles Granted 1995 - 2011											
Year	Residence Title	Settlement Permit (quota)/ RWR-Card <sup>1</sup>	Settlement Permit (quota-free)/ RWR-Card <sup>2</sup>	Total NB	Quota-free First Application Family Member ( <i>AT Familienangehöriger</i> ) <sup>3</sup>	Total Settlement Permit + Quota-free First Application Family Member	Temporary Residence Permit (introduced 1999) <sup>4</sup>	Temporary Residence Permit (abolished 1998) <sup>5</sup>	EU Documentation (EU/EEA /CH) <sup>6</sup>	Re-sidence Card (TCN family members of EU/EEA / CH) <sup>7</sup>	Total
	Share in %	69.78%	88.18%	82.19%			1.66%				38.11%
<b>1999</b>	Family member	3,684 <sup>8</sup>	11,801 <sup>9</sup>	15,485			191 <sup>10</sup>				15,677
	Total	5,278	13,383	18,661			15,288 <sup>10</sup>				33,949
	Share in %	69.80%	88.18%	82.98%			1.25%				46.18%
<b>1998</b>	Family member		13,222 <sup>11</sup>				603 <sup>12</sup>	5,403			18,883
	Total		13,222 <sup>11</sup>				15,516 <sup>12</sup>	6,755			35,850
	Share in %		100%				3.89%	79.99%			52.67%
<b>1997</b>	Family member		13,824 <sup>13</sup>					8,434			22,689
	Total		13,824 <sup>13</sup>					13,545			27,930
	Share in %		100%					62.27%			81.24%
<b>1996</b>	Family member		15,465 <sup>14</sup>					8,444			24,186
	Total		15,465 <sup>14</sup>					13,682			29,567
	Share in %		100%					61.72%			81.72%
<b>1995</b>	Family member		12,686 <sup>14</sup>					8,649			22,162
	Total		12,686 <sup>14</sup>					14,492			28,420
	Share in %		100%					59.68%			77.98%

Source: BMI and own calculations ICPMD

## Notes:

<sup>1</sup> Permanent-type family related immigration to Austria with a settlement permit (Niederlassungsbewilligung) or Red-White-Red Card plus falling, both falling under quota requirements

<sup>2</sup> Family members of holders of a Red-White, humanitarian residence titles issued for humanitarian reasons, until 2005 family members of Austrian nationals and EU/EEA and Swiss citizens; children born in Austria are included for early years, but otherwise have been taken out.

<sup>3</sup> Permit created by the Residence and Settlement Act 2005 for family members of Austrian nationals

<sup>4</sup> *Aufenthaltsbewilligung*. This is a short term permits for family members of pupils, students, rotational employees, since 2006 also includes family members of researchers (RWR card plus since July 2011), special management positions, and special cases of dependent employment (e.g. artists, ministers of religion, journalists). Before 2006 this permit seems to have also included seasonal workers, who are now issued national working visas (visas C+D). Seasonal workers never there entitled to family reunion.

<sup>5</sup> *Aufenthaltsurlaubnis*. This title was replaced by the Settlement Permit as of 1999 and was the standard permit for third country nationals and their family members since 1993.

<sup>6</sup> Documentation for family members of EU citizens with mobility rights who are themselves EU citizens (*Anmeldebescheinigung*). This form of documentation was introduced by the Residence and Settlement Act 2005.

<sup>7</sup> The residence card is issued to family members of EU citizens originating from third countries. Note: Only for the three most recent years were figures for residence cards available. For the remainder, the number of permanent residence cards issued was taken (holders normally must have a right to permanent residence in the meaning of the Citizens Directive). There may be an inconsistency in public available statistics.

<sup>8</sup> The number of family members of key personnel, which form a smaller part of this category, have been estimated for the years 1999 based on the average share of family members in the total nr. of permits issued to key personnel and their family members between 2000 and 2002.

<sup>9</sup> Estimate. Based on the share of family members among quota-free settlement permits in 2000.

<sup>10</sup> Includes on residence permits issued until 1<sup>st</sup> of December.

<sup>11</sup> Quota-free residence titles according to the response to parliamentary question 106/AB XXI.GP. It is assumed that it only covers family members (i.e. family members of Austrian citizens, children born in Austria).

<sup>12</sup> Valid short term residence permits (Aufenthaltsbewilligungen) as of 26.12.1998. As 1998 was the first year in which this title was issued, the number of valid titles approximates the number of issued titles.

<sup>13</sup> Estimate (= average of the years 1995, 1996 and 1998).

<sup>14</sup> Quota-free residence titles according to the response to parliamentary question 2208/AB XX.GP. It is assumed that it only covers family members (i.e. family members of Austrian citizens, children born in Austria).

The table above gives an overview of the number of residence titles issued to family members with and without quota application. The column ‘Settlement Permit (quota)/ RWR-Card’ concerns residence titles issued to family members of third country nationals with a long term immigration perspectives. Numbers have remained relatively stable in view of the yearly applied quota (See also table 6.2, below). The second column ‘Settlement Permit (quota-free)/RWR-Card’ includes residence titles issued to family members of EEA citizens (including Austrian nationals) with mobility rights until 2005. Before the entering into force of the Residence and Settlement Act, no differentiation was made between family members sponsored by EEA nationals with or without mobility rights; as of 2006 the new residence category ‘Quota-free First Application Family Member’ contains only family members of EU/EEA citizens without mobility rights. Family members in this category are exempted from the quota system, yet the general immigration criteria apply. The columns ‘Short-term Residence Permit’ and ‘Temporary Residence Permit’ subsume the number of temporary residence titles issued to family members. The column ‘EU Documentation (EU/EEA/CH)’ refers to EU documentations for the purpose of family reunification issued since the Residence and Settlement Act entered into force in 2006. These refer only to family members who are themselves EU/EEA or Swiss citizens. Third-country nationals are issued a residence card (if they are members of the nuclear family), and a settlement permit if they belong to the wider family.

Despite the limitations of available data, some conclusions can be drawn. First, family reunification has consistently been the main admission channel to Austria as far as residence permit with a long term perspective are concerned (termed ‘permanent type residence permits’ by the OECD). Secondly, in terms of family reunification of third country nationals and excluding EU/EEA or Swiss citizens family members of Austrian citizens have been the most important category of family members, although their numbers have greatly decreased since 2006. Third, and related to the former, the immigration reform 2005, in combination with the amendment of the Nationality Act in 2006 seems to have had the impact of bringing numbers of family reunification concerning family members of Austrian nationals down, – although the decrease is to some extent also due to changes in data collection regarding EU/EEA and Swiss citizens. Conversely, the noticeable increase in residence permits for both quota and quota free residence permits in 2005 and the increase of quota free residence permits in 2011 seems to reflect a higher number of applications just before the entry into force of the 2005 and the 2011 legal amendments, respectively, mirroring similar trends observed close to restrictive reforms in other countries (See on the impact of the 2011 amendment WIFO 2012: 85). It is difficult to assess the long term impact of restrictive changes on the overall level of family reunification, partly because of the difficulty to compare data over time.

**Table 6.2: Quota and actual number of residence permits issued for family reunification by province (2002-2012)**

		2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Austria	quota	5490	5490	5490	5460	4480	4540	4755	4905	4905	4905	4660
	permits issued	5439	5090	4213	5167	3576	4081	4273	3608	3340	3486	3572
	ratio	99.07%	92.71%	76.74%	94.63%	79.82%	89.89%	89.86%	73.56%	68.09%	71.07%	76.65%
Burgenland	quota	160	160	80	80	60	40	40	50	50	50	40
	permits issued	118	70	66	57	25	34	40	26	32	35	25
	ratio	73.75%	43.75%	82.50%	71.25%	41.67%	85.00%	100.00%	52.00%	64.00%	70.00%	62.50%
Carinthia	quota	30	30	30	90	70	70	70	70	70	70	70
	permits issued	30	29	30	90	65	70	70	70	70	70	64
	ratio	100.00%	96.67%	100.00%	100.00%	92.86%	100.00%	100.00%	100.00%	100.00%	100.00%	91.43%
Lower Austria	quota	1060	1060	810	750	570	445	400	380	300	300	300
	permits issued	1060	861	612	537	250	290	234	189	122	155	128
	ratio	100.00%	81.23%	75.56%	71.60%	43.86%	65.17%	58.50%	49.74%	40.67%	51.67%	42.67%
Upper Austria	quota	1050	1050	500	500	740	470	540	650	650	640	630
	permits issued	1050	958	495	499	378	420	513	520	565	560	445
	ratio	100.00%	91.24%	99.00%	99.80%	51.08%	89.36%	95.00%	80.00%	86.92%	87.50%	70.63%
Salzburg	quota	210	210	210	300	230	220	220	220	300	310	300

Table 6.2: Quota and actual number of residence permits issued for family reunification by province (2002-2012)												
		2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
	permits issued	210	208	210	299	152	186	191	197	260	271	255
	ratio	100.00%	99.05%	100.00%	99.67%	66.09%	84.55%	86.82%	89.55%	86.67%	87.42%	85.00%
Styria	quota	450	450	460	460	400	400	400	450	500	500	480
	permits issued	441	434	416	425	283	359	340	343	346	293	259
	ratio	98.00%	96.44%	90.43%	92.39%	70.75%	89.75%	85.00%	76.22%	69.20%	58.60%	53.96%
Tyrol	quota	280	280	350	400	385	350	350	350	300	300	280
	permits issued	280	280	341	380	304	268	188	154	118	150	158
	ratio	100.00%	100.00%	97.43%	95.00%	78.96%	76.57%	53.71%	44.00%	39.33%	50.00%	56.43%
Vorarlberg	quota	200	200	200	200	195	195	195	195	170	170	160
	permits issued	200	200	200	200	177	193	185	136	114	110	106
	ratio	100.00%	100.00%	100.00%	100.00%	90.77%	98.97%	94.87%	69.74%	67.06%	64.71%	66.25%
Vienna	quota	2050	2050	2850	2680	2100	2350	2540	2540	2565	2565	2400
	permits issued	2050	205	1845	2680	1942	2261	2512	1973	1713	1842	2132
	ratio	100.00%	10.00%	64.74%	100.00%	92.48%	96.21%	98.90%	77.68%	66.78%	71.81%	88.83%

Note: statistics only include residence permits issued for the sole purpose of family reunification and subject to a quota. Family members of long term residents of other EU Member States (also subject to quota), family members of highly skilled migrants ('key personnel') and private persons without intention for employment are not distinguishable and form part of the specific quota for these sub-categories.

Source: Ministry of the Interior, Immigration Statistics, Various years and own calculations ICMPD

### ***6.1.1 Quantitative data on the application of the quota on family reunification***

The availability of data is somewhat better in regard to family reunification with third country nationals subject to quotas. Not only is it possible to compare the quota with the number of permits actually issued, data is collected annually on the number of applications and permits issues, which allows calculating approval rates. In addition, also data on the number of permits likely not to be accommodated in the annual quota for a given province is collected. While the data collection is run every year, it is only done for the first half of a given year, which implies certain limitations.

Table 6.2 (see above) clearly suggests that the quota system in general has indeed lost much of its impact over the past decade and thus has, in the second half of this decade ceased to function as a ‘bottleneck’ for family reunification, even though the quota for family reunification has been successively lowered.

In the beginning of the decade (and throughout much of the 1990s), however, the quota indeed presented a major hurdle to prospective immigrants. Indeed, in 2002 the quota for family reunification was exhausted in seven provinces, including the largest province, Vienna, which usually accounts for about 50 per cent of all family reunification permits issued. By contrast, the quota was exhausted not in a single province in 2012.

The data, however, also points to significant variations across provinces. Generally, individual provincial quotas are jointly set by the respective province and the Ministry of the Interior, and therefore to a significant degree reflect the policy preferences of individual provinces. This may perhaps be less true for the first half of the decade and the 1990s. One noticeable example for the impact of provincial policy preferences is that of Carinthia, the political stronghold of the late Jörg Haider’s Freedom Party in its various incarnations. Here the quota was exhausted in eight out of the 11 years covered by table 6.2 and in the remaining three years was very close to being exhausted.

There are some indications, however, that quota exhaustion might not be a good measure for the impact of the quota. Thus, data collected the Ministry of the Interior on an annual basis mid-year suggest that due to knock-on effects of the exhaustion of quotas in previous years (and for other, unknown reasons), there were still a considerable number of applications that were likely not be dealt with in a given year. While numbers had been greatly reduced by 2012, there were still 35 individuals in 2012, and 135 in 2011, whose applications were likely not to be accommodated in these two years (see table 6.3, overleaf). Compared to the several thousands of such cases in the early 2000s, however, the overall trend of the declining importance of the quota system is corroborated by these figures. It would however be erroneous to conclude that the quota has no impact at all at the individual level. In addition, according to experts present at the national dissemination seminar organised in the framework of this study, there are also informal practices of advising applicants who are at risk of being turned down because of the exhaustion of the quota to apply for a quota slot in a following year. In other words, the impact of the quota may to some extent be hidden from public view.

<b>Table 6.3: Open applications likely not to be accommodated within the quota for a given year, by province (2003-2012)</b>										
	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
<b>Burgenland</b>	18	13	4	11	5	7	3	3	0	2
<b>Carinthia</b>	470	229	131	125	72	82	65	40	64	33
<b>Lower Austria</b>	0	0	0	0	0	0	0	0	0	0
<b>Upper Austria</b>	16	0	24	416	743	665	192	3	0	0
<b>Salzburg</b>	263	195	25	63	80	96	92	11	0	0
<b>Tyrol</b>	658	297	98	135	38	7	40	25	42	0
<b>Vorarlberg</b>	266	230	159	122	44	0	0	0	0	0
<b>Vienna</b>	3,436	1,068	292	910	537	65	0	0	0	0
<b>Austria</b>	5,531	2,239	875	2,024	1,776	1,146	605	147	135	35

Source: WIFO 2012: 77

As table 6.4 (below), a large share of family members who were likely not be accommodated within the quota for a given year were children, particularly in the beginning of the last decade. While the share of children has been considerably reduced over the years, as has the absolute figure of applications likely not to be accommodated, the resulting delays of family reunification with children must be a reason for concern, in various respects.<sup>198</sup>

<b>Table 6.4: Open applications likely not to be accommodated within the quota for a given year by type of family member (2001-2012)</b>				
	spouses	minor children	total	share children
<b>2001</b>	5,579	6,047	11,626	52.0%
<b>2002</b>	4,610	3,956	8,566	46.2%
<b>2003</b>	2,813	2,718	5,531	49.1%
<b>2004</b>	1,246	993	2,239	44.4%
<b>2005</b>	591	284	875	32.5%
<b>2006</b>	1,277	747	2,024	36.9%
<b>2007</b>	1,152	624	1,776	35.1%
<b>2008</b>	767	379	1,146	33.1%

<sup>198</sup> For example, the OECD (2008) notes in respect to France that PISA results show that every year spent in the country of origin has a negative impact on children's performance later on. Thus, children arriving at the age of 10 are the equivalent of 2 years behind at age 15.

<b>Table 6.4: Open applications likely not to be accommodated within the quota for a given year by type of family member (2001-2012)</b>				
<b>2009</b>	419	186	605	30.7%
<b>2010</b>	121	26	147	17.7%
<b>2011</b>	99	36	135	26.7%
<b>2012</b>	29	6	35	17.1%

Source: WIFO 2012: 75

### **6.1.2 Success rates in family reunification**

There is no systematic comprehensive information available on success rates of applications for family reunification, let alone by citizenship. Limited data, however, is available in respect to family members of third country national sponsors subject to quota requirements (see table 6.5, below).

<b>Table 6.5 Share of positive decisions (residence permits issued) in applications, first half of each year (2005-2012)</b>								
Year	2005	2006	2007	2008	2009	2010	2011	2012
Success rate (in per cent)	77	41.8	70.6	95.8	96.6	118.4	73	70.7

Note: success rates for 2010 are distorted because of administrative adjustments (ex post registration of permits, see WIFO 2011). Administrative adjustments may also explain the high rates in 2008 and 2009.

Source: WIFO, 2005-2012

It is difficult to draw broader conclusions from the data. Despite data limitations and a certain uncertainty regarding their reliability it seems safe to conclude that entry into force of the Residence and Settlement Act and the restrictive changes that it instituted had a discernible effect on the success rates of applicants, even if these picked up again after the changes.

## **6.2 Qualitative Analysis: Third country nationals**

### **6.2.1 Family reunification of third country nationals via the Asylum Act**

As Chapter V of the Family Reunification Directive states, the reunification of refugee families shall be rendered possible under facilitated conditions. Yet, the reunification process turns out to be rather challenging in practice – this was stressed



by the participants of the NGO Focus Group and also became apparent throughout the interviews with individuals. Though families are not obliged to fulfil the general admission requirements, the procurement of relevant documents may cause considerable delays and be associated with high financial burdens as well as stressful travels to embassies. For instance, there are only five diplomatic representations at which one can lodge applications in Sub-Saharan Africa. Also, authorities may not recognise documents from certain states – such as currently from Somalia or Afghanistan.<sup>199</sup> This poses barriers to reunification via the Asylum Law, as an expert from the Red Cross Tracking Service stressed in the Expert Focus Group discussion. Concerns were also raised among expert discussants about whether the right to the protect family and private life is sufficiently enforced for this particularly vulnerable group.

### **(1) Family members eligible for reunification**

The most common motive among interview partners to reunify with their families was to offer their family members a life in safety and dignity and to regain stability. The living environment in the home countries was mostly described as devastated by war as well as negatively impacted by collapsing economies and state structures, repressive political regimes and persecution.

With regards to family reunification according to the Asylum Act, the definition of the circle of family members entitled to reunify with third country nationals is the narrowest among all family definitions to be found in Austrian legislation related to family reunification.<sup>200</sup> Individuals viewed the definition as too narrow and problematic. This was, for instance, repeatedly stressed with regards to the exclusion of siblings (also not possible under the Residence and Settlement Act) from the family definition and the limitation to family relations of spouses predating the flight to Austria (Interviews 5, 6, 7, 11, 13 and 15). In some cases, interviewees had arrived to Austria as unaccompanied minors and were obliged to leave their parents and siblings behind: ‘I said that I would like to bring my minor-aged siblings here and they told me: “Austria has this law: Your mother, your father, your children and your wife are your family; your brother is not your family.”’ (Interview 11) The interviewee, a refugee from Afghanistan, further reported his deception over that restriction. His brother later joined him clandestinely and was granted asylum. However, three minor-aged siblings are still living in Iran with his mother. He frequently stressed the lack of residential, legal and social security as well as the dangers and discrimination Afghan refugees living in Iran are facing. Although he

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<sup>199</sup> Practitioners argued that individuals from certain countries of origin regularly report to have problems with the credibility of their documents (most notably Somalia and Afghanistan). This was also confirmed by two interviewees from Afghanistan (Interview 11 and 13). In case of doubt, the authorities rather rely on the personal credibility rather than on the documents of the individual in question. There is, however, no codified approach, such as a list of countries or the like (reply to an e-mail request answered by a staff member of the Red Cross Tracking Service, 19 December 2012).

<sup>200</sup> Basically, reunification is limited to spouses, registered partners, minor-aged children and parents of minor-aged children. Moreover, family relationships of spouses must predate the entry of refugees to Austria.

perceives chances to succeed as fairly limited, he also displayed a great deal of determination to bring his family to Austria so they can enjoy basic rights and humane treatment and receive an education. Another interviewee reported that his brother too attempted to join, but was intercepted in Turkey and refouled to Iran. Although his brother never abandoned his wish to settle in Austria, the interviewee underlined the arduous legal framework and is fairly pessimistic that his brother will ever reach Europe (Interview 13).

In line with that, members of the focus group also brought up the fact that same-sex families can hardly reunify via the Asylum Law, since the law requires that the partnership must have been formally established a year or more before lodging the application in Austria. However, homosexual partnerships are frequently not officially recognised. In some states they can even be grounds for persecution. Thus, legal provisions in this regard may be viewed as 'dormant' or highly ineffective at least. Despite constraints regarding the family definition, alternative strategies, nonetheless, exist to reunify with family members not belonging to this legally restricted family circle. Reunification is, for instance, possible via the Residence and Settlement Act. It was reported to be an important strategy to reunify with spouses if the marriage was concluded traditionally and failed to be recognised by the asylum authorities or if the marriage was concluded after the sponsor's arrival to Austria (Interviews 11, 13). It also represents an alternative to bring parents who otherwise would not be eligible and, through them, eventually even minor-aged siblings (Interview 11). Despite the fact that refugees and subsidiary protected persons may reunify via the Residence and Settlement Act, it represents an economically costly alternative and also causes additional delays, since general admission criteria and immigration quota for third country nationals apply. This was repeatedly confirmed by interviewees and equally by participants of the expert focus group. Other family members have more or less successfully attempted to reunify with their families clandestinely, whereas the application for a student visa was also considered a viable alternative (Interview 6, 13).

## **(2) Proof of family relationships**

As already stated, evidence of family relationships is necessary to undertake reunification under the Asylum Act. On a general basis, the more documentation that is available, the higher the chances of being recognised as a legitimate family member. The previous section stressed the limitations of the notion of family members eligible for reunification. Such limitations may also arise because authorities do not accept traditional marriages as evidence of family relationships as the following example illustrates. One interviewee had a traditional marriage in Afghanistan. He then fled the country and applied for asylum in Austria in 2002. He was only granted a convention refugee status in 2011. The Austrian asylum authorities never officially recognised his wife, although he had mentioned his marriage several times throughout the asylum procedure. As a consequence, the couple had to conclude a civil marriage in Pakistan for his wife to be eligible to apply for reunification via the Residence and Settlement Act. The civil marriage was only possible after he had

obtained a formal convention refugee status in Austria, which had taken nine years (Interview 13).

In another case the interviewee wanted to bring his son, a child from a former partnership, together with his other children from his current marriage to Austria. Yet, family ties were doubted in the first but affirmed in the latter case. Authorities stated they would let the child join his father, half-siblings and stepmother, provided a DNA-test would confirm the biological relationship between him and his father. But the child's mother did not consent to the testing, a decision the interviewee was determined to respect. Since his son was born and raised in the same household, it was simply incomprehensible in his view why all other children would be granted reunification, except for him. Moreover, he raised concerns about the social consequences if a DNA-test was carried out it turned out the child is not his son:

'Q: You were surprised because you had declared all your children from the very beginning of your asylum procedure?

A: Yes! And why would they, because I declared them all the same day, why would they say yes to three of them and no to the fourth one? [...] and for the latter, they require me to do a DNA-test? [...] For example, if I consented and it turned out that he is not my son, this would provoke a catastrophe in our family. [...] That is why I am so reluctant, because this child was born and raised in my place!' (Interview 5)

DNA-testing was also required in the case of the reunification of a Somali family with an unaccompanied subsidiary protected minor in Austria. As laid out in Chapter 4, embassies may refuse to issue an entry visa if the identity of a person is assumed to be insufficiently documented. In that specific case, the asylum authority in Austria had already given the green light and flights were arranged, but the Austrian embassy in Ethiopia announced it would only issue the visa to the minor's mother and his minor-aged siblings on the condition of a positive DNA-test. The intervention of the Red Cross, a lawyer and a private person were needed to sort out the disagreement over the entry of the family. Legal experts consider the legal protection of individuals who are refused an entry visa by the embassy to be very low (Expert Interview AK, Ecker 2008). Interventions could resolve the dissent between the embassy and the asylum authority. The travel to Austria was delayed for three additional months. Fortunately, the pre-paid flights could be postponed to a later date of departure (Interview 15). This case delivers convincing evidence of the problems that may arise from dual-track procedures and the wide margin for discretion attributed to embassies.

Not all individuals are able to lodge an application in their country of residence, but have to travel to neighbouring states, which, again, is a costly matter and causes additional delays. Some individuals reported these trips to embassies to be troublesome and dangerous. This was the case for the wife of an Afghani interviewee, who had to cross the border between Afghanistan and Pakistan several times to reach the embassy in Islamabad, an area considered to be particularly unsafe (Interview 13). The mother and siblings of the Somali minor-aged subsidiary protected person was obliged to travel from Somalia to Ethiopia to lodge the application for her and the children. There was no possibility to register as a refugee and she consequently applied for a regular visa. However, the reunification procedure exceeded the length of the visa. She was repeatedly fined for overstaying and had to put herself in debt to

cover the costs (Interview 15). Also the children of a refugee couple from DRC had to travel from Kinshasa to Kenya. This posed some organisational challenges, since the children were all minor aged and could not travel unaccompanied. The interviewee reported he had conferred the transfer of his children from DRC to Kenya to IOM (Interview 5). In general, travel expenses to Austria were mentioned to be economically burdensome and most refugee families had to rely on additional support. For instance, the interviewee from DRC reported he took out a loan and was helped by the Red Cross to cover the costs of his children's transfer. The Red Cross tracking service and a private person helped a Somali minor-aged subsidiary protected person, as he otherwise could not have afforded the flights for his family members.

Support has generally played an important role for families who reunified under the Asylum Act. Mostly, the support of legal counsellors, lawyers and NGOs was stressed as an important tool to counteract difficulties or accelerate the process. Also, it may even be difficult to find family members without the help of private networks or/and NGOs. For instance, one interviewed Afghani asylum seeker got separated from his family in Greece and they could only be tracked after several months with the help of a network of various NGOs and international organisations (Interviews 5, 15 and 10). Also, some interviewees reported that they were supported by private persons in Austria throughout the procedure – emotionally, with procedural knowledge and financially. Last but not least, the exchange among refugees was referred to by some as a vital source of information – during the flight and after arrival.

It must be noted that asylum applications<sup>201</sup> lodged in Austria may take years to be decided on. Thus, the period of separation of refugees and subsidiary protected persons from their families is considerably longer than for third country nationals who hold no flight-related protection status, where the maximum waiting period may be up to three years in case quota restrictions apply. One interview partner arrived to Austria in 2002, obtained asylum status only in 2011 and is still struggling to bring his wife here (Interview 13). Another interviewee had applied for asylum in 2005, had obtained international protection in 2010, but his children could not join him before spring 2012 (Interview 5). An unaccompanied minor reached Austria in September 2009 and could only bring his family in May 2012 (including the additional year subsidiary protected persons have to wait once they obtain a status). Without exception, interview partners have portrayed the separation as a period of high anxiety and stress, an experience that remains inexplicable to outsiders:

‘We did not know, whether he would obtain an asylum status or not, whether he was alive or not, how he lives, whether he would ever come back or not. We did not know either, how my application would be decided on. If we had known: Ok, I stay in Iran for two years and then I can join my husband. But I did not know what would happen in the future. It is a big problem not to know whether it will work out or not.’ (Interview 6)

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<sup>201</sup> First the application is examined regarding its eligibility for international protection, if not, the applicant may still obtain subsidiary protection or the application may be rejected altogether.

Specific concerns may be raised about the well-being of unaccompanied minors as the following interview sequence with a minor aged subsidiary protected person illustrates: 'I was on my own for two and a half years and I so much longed to see my mother. And every day, it was just stress, stress' (Interview 15).

### **6.2.2 Family reunification of third country nationals via Residence and Settlement Act**

#### *Qualitative analysis*

Other than in the previous subsection, the reunification process of third country nationals via the Residence and Settlement Act entails the obligation to fulfil general admission criteria. The following subsection will discuss whether the conditions promote or hinder the process of family reunification. The most central dimensions looked into are: evidence of family life, income, accommodation according to local standards, insurance, language requirement before entry and the minimum age. The fulfilment of the Integration Agreement is discussed at length in Chapter 7 and does consequently not form part of this section.

As the interview analysis reveals, the reasons for reunification mentioned in the interviews cannot be reduced to a single decisive factor, but are rather best characterised as a combination of multi-faceted considerations, which also depend on specific the phase of life of the persons interviewed.

#### **(1) Evidence of family life/identification**

The application procedure requires the provision of a broad range of documents (e.g. birth and citizenship certificate, extract of judicial record, school certificates). Some respondents mentioned that the list of required documents seemed extendable, depending on the proceeding authorities. Sometimes, authorities seemed to be unable to cope with situations in which documents simply cannot be provided because the administration in the country of residence does not provide any comparable documentation. For instance, one interviewee reported his wife had severe problems with her papers because she was born as an Afghani refugee in Iran and her papers indicated contradictory information regarding her citizenship (Interview 11). Also the documents need to be translated and, depending on the country of origin, sometimes even required a certification by the respective Ministry of Foreign Affairs. The Ministry of the Interior considers document security to be low in several third countries. This is, however, generally not the case for documents from European third countries but very much so for other states such as India, Pakistan, Somalia, Senegal and Afghanistan. The Ministry of the Interior depicted additional inquiries on the applicant's identities as a necessary precautionary measure, especially '[...] since it is widely known that in some African countries, one can just buy any document'. It is, thus, problematic that family members with certain origins are put under general suspicion of document fraud by Austrian authorities. In one interview the sponsor reported that the embassy had sent someone to his wife's hometown to check on the authenticity of her marriage. She was asked about her husband's reasons for leaving

the country, which the interviewee depicted to be specifically problematic, since he did not share his reasons in order not to endanger his family (Interview 13). Generally, there were several statements that reported severe distortions of privacy, as individuals had to reveal so much private information. The legal expert from the proceeding authority of the federal province of Vienna confirmed that geographical distances are a source of considerable difficulties for applicants. He raised the example of people residing in rural areas that first have to travel to the capital of their country of origin in order to obtain diplomatically certified documents and then eventually are even obliged travel to the capital of the neighbouring country in order to lodge the application at the Austrian embassy (Expert Interview MA 35). Once applications were lodged, family members made use of the possibility to delegate authority to the sponsors in order to ease communication with the Austrian authorities. In discussions addressing the procurement of documents, interviewees also frequently turned to the financial dimension. By and large, the procurement of documents, translations, etc. was perceived as cost-intensive. Financial burdens were also high, as individuals were not correctly informed right away (e.g. about the necessity to have a diplomatic certification, the types of documents required or legal changes) and several journeys were necessary to complete the application.

## **(2) Income requirement**

The government's position on the income requirement was consistent throughout the interview. The representatives of the Ministry of the Interior expressed that the basic precondition to obtain a residence title in Austria is to have enough income. This precondition was portrayed as a necessary tool to prevent people from 'immigrating into the welfare system', a view also shared by the representative of the coalition partner SPÖ. The framework in place was considered to draw on one of the lowest objective bottom lines possible (Expert Interview BMI), although there was a large consent among experts interviewed, including the Ministry of the Interior, that people struggle most with the income requirement. As stated by the representative from the implementing authority from the City of Vienna, especially the most recent amendment in which the sum required was defined as the amount after deduction of rent and other regular payments came as a negative surprise to individuals.

Participants of the focus group were particularly critical of the fact that despite structural inequalities, the same standards apply to all, whereas individual needs and living-circumstances are not taken into account. Women, disabled persons and students were mentioned to figure among the group most disadvantaged by the income criterion (see Chapter 7 for gendered income gap). It is interesting to note that the representative from the Viennese implementing agency was very aware of this selectivity and criticised the government for its lack of political will to become active in this regard (Expert Interview MA 35). Focus group participants criticised that the current framework did not foresee derogations, although legally possible. When asked about the social selectivity emerging from the obligation to fulfil the income criterion (e.g. gender gap) in the interview, the Ministry of the Interior clearly expressed that these issues were not to be resolved by immigration laws, a perspective equally shared by the representative of the SPÖ. The fact that Article 8 ECHR

considerations were to be taken into account at all times was referred to as a reason, why the income threshold cannot be considered an absolute requirement. Also, the ministry's representatives pointed out that there are possibilities to resolve disadvantages emerging from the income gap. For example, if a sponsored person holds a pre-contract certifying his/her employment after arrival to Austria, the future income is equally taken into account. Experts from the focus group and the representative from the Viennese authority, however, stated that many persons are simply not part of relevant networks amenable to provide such a contract. Moreover, in practice, some are merely issued as a favour to the sponsors and family members may have difficulties to actually find employment after their arrival. The expert from the Chamber of Labour expressed that the current threshold should be at least referred to as a sum comprising all expenses and not, as currently practiced, as the remaining income after deduction of all current payments. He was, nonetheless, sceptical of entirely dropping the income criterion, as long as third country nationals are not guaranteed immediate access to social aid, which they currently are excluded from during the first five years of residence.

By and large, interviewees reported they had no problems with fulfilling the income requirement. Two interviewees were still awaiting a decision, but felt fairly relaxed about it. As previously noted though, the sample is too small to make any generalising statements regarding the income criterion. As Chapter 7 also illustrates, once discussion evolved, there were numerous references to alternations in career or educational plans precisely because of the obligation to fulfil the income requirement. When asked about the integrative effect of the requirement, respondents largely thought it not to be of the state's concern how much money they need to survive: 'Why should I bring my family members, if I cannot feed them? It really makes no sense in my view that they are telling me: "You must earn that amount of money, so you can bring your family to Austria."' (Interview 14)

### **(3) Accommodation according to local standards**

The housing requirement did not represent a prominent topic throughout discussions with experts and ministerial representatives. In practice, accommodation causes only little difficulties for individuals, as the representative from the Viennese implementing authority confirmed. Interviews with individuals pointed out that fulfilling this requirement was regarded as a minor challenge, although some thought it was hard to find a flat in the first place, especially when one has little knowledge of the housing market and is not at ease with the language. Some interviewees reported the proceeding authority had told them they must provide a minimum of eleven square meters for each person in the household. Although there are no severe difficulties indicated on grounds of the material collected, it must be pointed out that the sample only contains interviewees located in the region of Vienna. Thus, there is no account of eventual difficulties emerging from more competitive and expensive housing markets in other federal provinces.

### **(4) Insurance**

Also the required health insurance was not subject to a deep debate among experts, policymakers and ministerial representatives. As the representative from the Viennese implementing authority confirmed, in practice, this requirement causes no significant difficulties. In addition, individuals interviewed generally did not refer to any particular challenges in this regard. One self-employed interviewee, however, reported this requirement was economically burdensome, as her revenues were low during that time and she had to pay for a private insurance for her husband for several months in advance, although he arrived to Austria only several months later (Interview 17).

### **(5) Language requirement**

In the view of the representatives of the Ministry of the Interior, the language requirement is one of the few possibilities to legally enact integration in the realm of immigration legislation. They referred to the newly introduced pre-entry testing as the logical consequence of the Integration Agreement, which, rather than being a barrier, provides a 'chance' for immigrants, since it promotes the learning of the language at an early stage, thus enabling more social participation. The representative of the SPÖ coalition partner asserted that family reunification represents a 'life decision' that should be taken seriously by individuals. Against this background, the introduction of language testing before actual immigration was represented as justified. However, the representative from the Viennese implementing authority reported that pre-language tests cause problems for individuals. Though the official thought German to be of uncontested importance with regards to integration, he argued that introducing stricter laws was 'simply the wrong way' and could not compensate for the government's failure to develop a coherent integration policy over the past decades. With regards to the pre-entry requirement, the social partners shared different views. The Chamber of Labour did not support its introduction, as it considered this measure as to pose a systematic barrier to immigration. Rather, the representative explained that the chamber lobbies for an adequate reception framework that issues demands after arrival. He did not see this realised in the current legal framework. By contrast, the Chamber of Commerce argued for the requirement to be a facilitator for integrating the labour market. Moreover, the spokesperson thought it to be a justified effort that could be expected from potential immigrants, since the labour market is accessible to most in exchange. At the same time, the Chamber of Commerce has negotiated exemptions for highly skilled workers and their families (see Chapter 3). Contrary to the previous argument in defence of pre-entry testing, in this case the language requirement was conversely dismissed as a barrier to labour market access.

On a general basis, the focus group agreed that from a linguistic perspective, the efficiency of such a requirement is highly questionable. The participants further regretted that the practice of language testing has seemingly already become a common sense and non-negotiable fact at all political levels, even at the EU-level. As with the income requirement, the focus group criticised language testing before entering immigration for its lacking consideration of very unequal starting conditions (e.g. illiteracy or geographic distance to teaching or testing centres). Only a few exceptions are made and solely on grounds of individual medical assessments.



Moreover, illiterates are factually excluded from family migration, as A1 language proficiency requires alphabetisation as a precondition. The official from the Viennese implementing authority remarked that these exclusionary mechanisms also raise concerns in light of the obligation to protect the right to private and family life.

In the sample, comparatively few family members were confronted with the pre-entry language testing. Both sponsors had stressed that the embassies were not at all informed about the requirement. In one case, the family member was the mother of the sponsor, an elderly woman with health problems. The sponsor was told the file was handed back to the embassy, since evidence of the pre-entry test was missing. Even though he made it clear that his mother had been misinformed by the embassy, the authority inland insisted on an exam certificate or a medical certificate. In view of the age and poor health condition of the family member it was opted for medical certification, which was expensive, complicated to organise and caused further delays in the process. Also in the other case, the applicant did not receive the necessary information at the embassy. The sponsor was only told the test was missing once the application had reached Austria. The interviewee remembered that he did not obtain any information on where his wife could attend courses in her region. Based on their own inquiries, the couple came to the conclusion that there were no certified courses taught in Afghanistan, and so decided the sponsored family member would take some private classes and then take the examination at some officially recognised institution.

## **(6) Age limit**

As the representatives of the Ministry of the Interior underlined, the minimum age limit is a measure that solely addresses family migration, whereas the other criteria previously discussed apply to all types of long-term immigration that fall under the scope of the Residence and Settlement Act. As the ministry representatives argue, it was deployed to prevent forced marriage, following the assumption that younger spouses have more difficulties to escape the predicament of forced marriage. It was viewed a legitimate proceeding, since Article 8 ECHR does not state that family reunification must take place under any circumstance and leaves some discretion to legislators to specify conditions precluding reunification. The representative of the Chamber of Labour found the provision in place disproportional, since it generally prevents an entire group of individuals from reunification and takes no account whatsoever of the individual case. Although the goal to eradicate forced marriage was agreed to be important by the legal expert of the Chamber of Labour, he sees no need for any additional regulation since the Residence and Settlement Act already clearly states that individuals shall not obtain a residence title on grounds of forced marriage. The focus group participants were also very critical of this measure, since, factually, there is no possibility to have a family life for spouses aged under twenty-one years. The only viable option is to lodge an application on humanitarian grounds, for example if a child emerged from the relationship. Eventually, this possibility may force couples into early parenthood for lack of alternatives. The sample did not contain any cases of third country nationals reunifying with TCN sponsors who were subject to difficulties regarding the minimum age requirement.

### **6.3 Qualitative Analysis: Family reunification of EU-nationals without mobility rights via Residence and Settlement Act**

As most remarks regarding the admission criteria equally touch upon families with Austrian national sponsors, the following subchapters will merely give an overview of differing accounts and limit itself to the evaluation of the interviews conducted with individuals. This is equally valid for the motivations and reasons for family reunification, which are similarly manifold. As previously mentioned, the fulfilment of the Integration Agreement is discussed at length in Chapter 7.

#### **(1) Evidence of family life/identification**

By and large, most individuals reported they had no problems to gather the relevant documents to file the application, except they found it time-consuming to collect everything and expensive to have everything translated and certified (where necessary). Several individuals had to also renew parts of their documents, as they were not considered valid anymore (e.g. judicial record). But there were also some reports of more serious difficulties, for instance, in the case of an adult son, who had lodged an application to reunify with his parents. As a precondition, the couple must furnish evidence of having provided financial support in the past. However, they had taken the habit of solely sending money via informal channels, since the couple considered official money transfers to be unsafe in the region where their son resided. It turned out that their practice caused some difficulties to justify their entitlement for reunification, as they had no evidence of the remittances transferred to their son (Interview 9). In the end, they managed to resolve the problem. Like in the interviews with third country national sponsored families, there was also a report about special investigations in the country of origin of the family member. As the interviewee remembers, a lengthy report had been written about whether the sponsored family member adhered to a fundamentalist organisation. Also the interviewee reported she was subject to an interview with the police before they even got married. The objective of this inquiry seemingly was to identify whether their marriage was 'bogus' (Interview 3).

#### **(2) Income requirement**

Other than in the range of interviews with third country national sponsored families, there were more individuals reporting problems with fulfilling the income requirement among Austrian nationals (please note again the lacking representative character of the sample). In some cases, this could be resolved by a pre-contract for the family member. In one case, the sponsor had to take up a second job and procured a pre-contract for her husband; in the interview she remembered this to be a great deal of stress to organise. One interviewee further reported she could only provide for the required income because her mother had put a flat at her disposal. As previously mentioned, individuals must also declare their regular payments (e.g. credit rates). In this regard, the couple, which had reunified with their adult son, faced some difficulties because the administration had incorrectly processed the information regarding their credit rate. Based on wrong facts, the application was first rejected for

lack of income, which had to be rectified at a later stage. Only one interviewee reported there were no difficulties at all. In this case, both partners chose to be self-employed in their common enterprise, which had turned out to develop well. Retrospectively, the interviewee claimed that she could never have reunified had she stayed employed in her former job.

### **(3) Accommodation according to local standards**

Like in the sample of families sponsored by third country nationals, interviewees reported authorities had required the families to have an accommodation of eleven square meters per person. When asked about strategies deployed to fulfil the accommodation requirement, several interviewees replied they had obtained support from their parents, either because they were offered to share the flat (temporarily or long-term) or because a flat was put at their disposal. The couple that finally had reunified with their adult son was concerned about space in the future, as the son too has a family that planned to commute between Serbia and Austria, as they could not qualify for any long-term residence title. Fewer had managed with no support at all. It can be concluded that overall, the accommodation requirement could be solved, but required the support of close relatives, at least in several cases.

### **(4) Insurance**

Interviews displayed a fairly ambiguous administrative practice regarding insurance, as in some cases interviewees were told to insure their family members privately, although it was clear they could be insured with their sponsors immediately after arrival. Conversely in other cases, sponsors could hand in the insurance confirmation after the family members had arrived.

### **(5) Language requirement**

The pre-language requirement applied in only one case. Although the family member had already resided as a student in Austria and accordingly had a level of German required for university studies, he still took the language test because the family wanted to make sure that no problems would occur. As the interviewee stressed, information regarding this requirement seemed unclear to her so they rather preferred to be on the safe side.

### **(6) Age limit**

In one case, the age limit had represented the greatest barrier to family reunification. The couple had been married already and decided to apply for reunification only when the family member could no longer prolong his student residence title. The sponsor remembers they were literally thrown out by the official without any discussion for failing to comply with the age limit. The couple finally decided to seek some independent NGO counselling. Since the sponsor was pregnant by that time, the upcoming parenthood had opened a window of opportunity to apply for reunification on humanitarian grounds. She stressed that in her view forced marriage should be prevented, but thought this provision to be an ineffective and unfair

measure. Rather, she suggested that state infrastructures should be improved in order to prevent and facilitate exit from forced marriage (e.g. better legal protection in case of divorce, more women's shelters). There was also anecdotal evidence in several other interviews of families in which at least one family member has to commute in a three months rotation between Austria and his/her country of residence because of the age limit.<sup>202</sup>

#### **6.4 Qualitative Analysis: Family reunification of EU nationals with mobility rights**

Turning to the documentation of family reunification of families of EU nationals who enjoy mobility rights, interviewees largely reported to have no difficulties regarding the documentation procedure. In cases in which jobs were already arranged before moving, considerable support was provided by employers, which either took care of the procedure in total or at least offered advice through specialised relocation officers. In some cases, interviewees reported employers had even subsidised the participation in language courses or offered interim accommodation until the family found a suitable place to live. By contrast, one couple had not registered yet when the interview was conducted, but felt poorly informed about what to do. The slow transfer of welfare entitlements from the UK to Austria was viewed to be potentially problematic, as neither one was employed at that time and they were expecting a child soon. They considered their situation to be fairly alleviated because they could rely on the support of the parents regarding accommodation and they still had some savings left. Their encounter with the National Employment Agency in order to arrange the transfer was described as problematic and negative because the official initially told them that the UK partner was not eligible for unemployment benefits. Since the Austrian partner had thoroughly collected information beforehand, they could rectify the situation, but the interviewees stressed that they had to insist on their entitlements before the official worked seriously on their cause. Although general admission requirements do not apply, moving was still considered an expensive enterprise by the respondents and necessitated a great deal of planning.

#### **6.5 Assessment of the procedure by individuals interviewed**

When asked to assess the procedure retrospectively, waiting time and separation from the family was frequently raised as problematic. Without exception, interviewees stated that they had experienced a lot of stress during that time and some also faced severe health problems, which they related to the stress from the procedure (e.g. chronic stomach diseases, depression and miscarriage).

Various reasons for delay can be identified. For instance, there are numerous hints at document transfers from embassies to proceeding authorities inland being

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<sup>202</sup> This was referred to in the context of couples with a partner from a country which is exempted from the visa requirement and would be nearly impossible in practice for persons with nationalities where no such agreement was concluded.

met with considerable delays and vice-versa. There also was wide agreement on the poor information policy of the embassies and inland authorities, which is why several interviewees had incomplete applications (e.g. because embassies were not aware of legal changes)<sup>203</sup> or were not informed about alternatives, as experts who were active in counselling reported in the focus group. Also, there were families whose applications were put on hold for several months because authorities were waiting on some ruling by the CJEU. In the sample, several individuals were affected by legal changes while their procedures were still pending. The problem of constant legal changes and lacking transitory provisions was also identified as a problem for implementing agencies by the Viennese inland authority (Expert Interview MA 35). Correctly applying the laws is becoming increasingly challenging and, moreover, individuals become subject to new requirements (e.g. have to apply anew from abroad) literally ‘overnight’ (ibid.). The representative of the Chamber of Labour further added to this subject that the legal security ‘equals zero’ in this regard (Expert Interview AK). It was also argued to be an important source of distrust of state institutions by experts and individuals alike. The procedure was judged to be an expensive enterprise by most, be it the expenses made for travel, language courses, document procurement and translation or the fee for the residence title (EUR 120 per person, which amounted to an annual payment of EUR 500 within the first three years for a family in which a third country sponsor had brought his wife and three children).

Generally interviewees thought the first application to be more challenging than prolonging the residence title, although the lack of residence security was frequently subject to criticism. Several interviews hinted at rising tensions and anxiety among individuals before prolongation. Also, there were remarks made about constant legal changes for each renewal, which makes it difficult for families to plan ahead. Apart from the regular procedure, there were also reports about spontaneous on site police controls to check on the ‘authenticity’ of the marriage. These were referred to as a ‘pulverizing’ experience and reckless intrusion in the families’ private lives. The impression of interviewees was that eventually, more traditional arrangements may be attested more credibly than alternative ones. Nevertheless, in one interview the couple had eventually decided to preserve their self-determination and chose to move into separate flats after several years of common life (and being monitored by the police).

There was a widely shared impression that rules were bendable and interpreted differently by officials. Moreover, individuals frequently remarked that authorities inland operate in a way which is not service-oriented, only selectively providing their

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<sup>203</sup> There seem to be differences depending on the respective embassy. Interviewees reported that in Turkey, applications are systematically checked, whereas in Pakistan, they are apparently not. The representative of the Chamber of Commerce mentioned the differing quality of service and information provided by embassies in a more general way (Expert Interview WKO). Contrary to the individuals’ experiences, the Ministry of the Interior thought the embassies to be generally well informed and ask questions, if any doubt occurs. At the same time, the representatives also argued that evidently ‘every measure newly introduced entails a certain degree of insecurity and certain problems in implementation.’ (Expert Interview BMI)

clients with information and not taking individuals' needs seriously. One interviewee remembered her encounter with the Viennese authority processing her husband's application to be particularly disagreeable: 'We entered the office, and she looked at me: "You are not twenty-one, this is not going to work out!" We could not even take a seat, she just had a glimpse at me and we were out again, which I found impolite, because at least we could have talked.' This view was also expressed in many other reports about long waiting hours, time pressure during the short appointments, unfriendly, humiliating (such as yelling, insulting and in one case even threatening clients) and discriminatory treatment. Also experts in the focus group further reported that several of their clients had been confronted with racist remarks. It was striking that unlike the authority processing applications for family reunification, the authority responsible for integration and diversity matters (e.g. handling the vouchers and offering introductory programmes to family migrants) was viewed positively by interviewees, as they had been consulted and encountered a service-oriented personnel.

Support plays an important role throughout the application procedure, though individuals relied on very different sources. Help with fulfilling requirements was mostly delivered by the close social environment and took up very different forms, be it friends or parents who procured the necessary documents or parental aid with accommodation or business partners who provided a pre-contract in order to fulfil the income requirement. For refugee families, financial support was of great importance to cover the costs of the reunification process. Though many had taken out loans to cover the costs, this does not always reveal a viable strategy (e.g. for minor children sponsors). Moreover, many references were made to very different sources of information and counselling, which were stressed to be particularly necessary when difficulties occurred during the procedure. Also here, contributions are very diverse, ranging from information being circulated among private networks (e.g. in the community or advice from experienced friends), to self-organised groups and counselling by NGOs. With only very few exceptions, most interviewees reported they had not relied on the assistance of a lawyer for financial reasons.<sup>204</sup>

## 6.6 Chapter conclusion

The general admission requirements largely reflect the government's focus on economic self-sustenance and language proficiency, which are often addressed in integration-related agendas. Difficulties to access the family reunification procedure are multiple. When asked to assess the procedure retrospectively, waiting time and separation from the family was frequently mentioned as one of the most problematic aspects, even more so for families of refugees and subsidiary protected persons. Also, there was a widely shared impression of administrative discretion and humiliating treatment by authorities in the country as well as in some embassies. As the interviews with individuals indicate, the frequent legal amendments cause serious

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<sup>204</sup> One interviewee reported a lawyer offered his services on a pay-as-you-wish basis, as he thought the case was interesting.

difficulties for families who intend to reunify as well as for renewals of residence titles. Seemingly, transitory provisions are insufficient and have put individuals in most disagreeable circumstances (e.g. forced rejected asylum seekers to leave the country in order to apply for reunification via the Residence and Settlement Act from their country of origin). Executive powers reach far into the most private sphere of individuals, as the striking reports of individuals over police examinations aiming to detect fake marriages demonstrate. Support has played an important role for many interviewed families throughout the procedure, though the sources and forms of support are heterogenic, comprising resources ranging from material support, legal advice or emotional backup.

## 7. Impact of family reunification on integration

This section aims to discuss the impact of requirements applicable to the process of family reunification on integration. The discussion will largely focus on four dimensions defined as central to integration by the European Commission, namely: employment, education, social inclusion and language skills. Each of these areas will be assessed separately and eventual differences emerging among the various residence statuses will be discussed. Finally, the chapter will close the discussion by addressing how family reunification and integration relate to each other. Conceptually speaking, it is, however, difficult to make out what is actually meant by ‘successful integration’ across these domains. It must be noted that the concept of integration is hotly and controversially debated among academics, policymakers, immigrant and refugee communities, actors from civil society and other stakeholders. Against this background, some conceptual remarks shall complement the introduction of this chapter and offer a central point of reference for how to look at the comparatively challenging subject of integration in the realm of family migration.

Integration, Latcheva and Punzenberger (2011: 4ff.) argue, is neither a stable condition, nor to be perceived as a linear process. Rather, integration dynamics are strongly influenced by a mix of individual and structural factors such as biographical events, different life phases, different contexts of socialisation, overall economic development and opportunity structures. Thus, depending on the given living environment, the subjective perception of inclusion or exclusion may vary, as these are strongly influenced by the resources available to individuals and the way a receiving context is structured, comprising support available, the legal context and anti-discriminatory measures at a specific time (*ibid.*). In addition to that, Ager and Strang (2008: 173ff.) criticise that integration is all too often merely thought of as individual achievements within areas such as employment, health, education and housing. However, the authors suggest, it is worthwhile to look deeper into what delivers the actual foundation for achievements in these areas. Most notably, they emphasise the access to rights and citizenship as fundamental for integration. A stronger orientation towards foundations and structures, moreover, allows one to take a stance on integration as a question, which, rather than looking at ‘immigrants’, points out to structures allowing for equal participation in a society as whole.

A last remark shall address the notion of social inclusion. The sociologist Martin Kronauer (2010: 20f.) argues that if social inclusion is viewed as an end in itself, it becomes impossible to reflect on the conditions a society is based on, or rather, to question what individuals actually ought to integrate into. He further claims that, more than ever, exclusion refers to a process that is located ‘inside’ society and that strongly relies on unequal social relations. Rather than dealing with inclusion and exclusion as two opposing poles, he suggests that inclusion and exclusion are neither a condition, nor absolute, but rather procedural, partial and simultaneous. As he notes (Kronauer 1999: 67f.), dynamics of social exclusion today are only to a limited extent provoked by an exclusion of individuals from access to formal rights. Rather, the most basic social rights are increasingly stripped of their inclusive substance.



The following subchapters aim to relate to the above-mentioned conceptual reflections, where possible, in order to develop a more coherent notion of existing challenges. Since the number of interviews is by no means a representative sample, the results are, where available, complemented with expert statements and relevant studies.

The results from the interview analysis amply demonstrates the importance of structural factors as a foundation for social inclusion. Although the legal framework addressing family reunification undoubtedly plays an important role, it does not solely account for the structurally induced challenges individuals are facing. In fact, the results of this study display that the lack of a comprehensive social policy framework, most notably anchored in the area of gender, welfare and anti-discrimination, combined with a lack of residential security, considerably limit opportunities for equal participation. It must be noted that despite these constraining circumstances, the families interviewed display a great deal of agency too. Before undertaking a quantitative and qualitative analysis of the impact of legal rules regarding family reunification on integration we briefly describe the government definition of integration in the next section, below.

### **7.1 Government definition of integration**

Although Austria has been a country of immigration ever since World War II, there has been no explicit integration policy approach and, accordingly, no specific government definition of integration until recently. Partly, this is due to the fact that although the recruitment of guest workers was abandoned in the early 1970s, immigrants who settled in Austria were still perceived as ‘guest workers’ with no intent of staying long-term. In line with that, the government did not see it as a necessity to develop a consistent integration policy framework. Debates on integration, if there were any, were rather framed as a matter of marginalised social classes throughout the 1970s and 1980s and the topic was not specifically linked with societal changes provoked by permanent immigration (Latcheva & Punzenberger 2011: 4). Nonetheless, some federal provinces developed integration policies in selected areas quite early, the most prominent example being the province of Vienna. It established a fund specifically aiming to support immigrants for settlement (e.g. mother-tongue legal counselling for the major immigrant communities). Though a study on immigrants permanently residing in Austria was commissioned by the government in 1984, the subject was effectively dealt with in parliament no earlier than in the 1990s (Gruber 2011: 139). Emerging debates were largely restrictively framed by the idea that the integration of immigrants who already resided in Austria was a precondition to new arrivals of immigrants. Indeed, immigration became considerably restricted in the legislative reforms of the early 1990s. By contrast, integration policies were promoted only much later. A legal reform of the Nationality Act introduced the necessity to prove achievement of a fairly unspecified ‘personal and professional integration’ as a prerequisite to Austrian citizenship. From then on, access to citizenship became increasingly linked to migration and integration, namely, through framing Austrian citizenship as the reward and final cornerstone for

successful integration.<sup>205</sup> The burden of proving ‘worthy’ of residing in Austria became increasingly conferred upon immigrants (Kraler 2011: 44ff.).

The formulation of an explicit definition of integration and a related policy framework came up as a core issue after the renewal of the coalition government between the Social Democrats (SPÖ) and the People’s Party (ÖVP) in 2007. As already pointed out in Chapter 3, the Coalition Agreement stated the necessity to elaborate a National Action Plan for Integration in joint action with all relevant ministries, provinces, municipalities and stakeholders from civil society (Bundeskanzleramt Österreich 2008: 107). An expert paper commissioned by the Ministry of the Interior sorted out the most relevant issues to be followed up in the years to come (Ministry of the Interior 2008). Following a series of round table discussions at which different stakeholders participated, a national action plan on integration (NAPI) that largely echoes the expert paper previously issued was formulated. Seven policy areas – comprising language and education; work and profession; rule of law and values; health and social; intercultural dialogue; sports and leisure; accommodation, housing and regional matters of integration – were identified as relevant to integration (Ministry of the Interior 2010). The National Action Plan for Integration was adopted by the Council of Ministers in January 2010.

The NAPI policy document defines integration as a two-way process, involving individual efforts of immigrants, on the one hand, and state structures that should enable social cohesion and successful integration, on the other hand. By reason of the cross-sectoral nature of this policy area, it is stressed that different policy levels and actors shall make a joint effort, guided by the principle of subsidiarity. However, the policy document promotes integration under the angle of a rather specific problem-definition. The focus of attention seems to largely lie upon the efforts that should be provided by immigrating individuals, whereas the receiving society is mostly represented in terms of economic interests, accentuated by a claimed legitimacy to choose immigrants responding to the economic needs of the national economy.<sup>206</sup> The low qualification profile of immigrants and their lacking language skills and the high unemployment rates among immigrants are viewed to be the major source of unsuccessful integration. Simultaneously, the document also acknowledges that immigrants have contributed to economic growth in Austria (Ministry of the Interior 2010: 11, 19).

The document states: ‘The most important bases for successful integration in Austria are the learning of German language, economic self-sufficiency, a clear commitment to Austria, its norms and values and the willingness of migrants to integrate.’ (ibid.: 8). Integration, the document further states, comprises the ‘participation in economic, social, political and cultural processes and corresponding duties’ (Ministry of the Interior 2010: 3). Accordingly, one of the core pillars for successful integration from the government’s perspective is language skills. This was

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<sup>205</sup> This approach has persisted to date – the Austrian citizenship is still viewed as the final reward for successful integration in the National Integration Plan on Integration (NAPI 2010: 9).

<sup>206</sup> One can even find formulations echoing the tenor that dominated the debate in the early 1990s, namely that due to economic structural developments, integration is the prerequisite to new immigration (*Integration vor Neuzug*) (Ministry of the Interior 2010: 20).

also highlighted in political debates over the adoption of the policy document (Hollomey et al. 2011: 22). This focus is not new, since the language requirement was already part of the prerequisites to obtain Austrian nationality in 1998. Neither is the economic self-sufficiency that is identified as the second core pillar new, since income has always played a role for residential rights ever since World War II.

As reported by an interviewed representative of the SPÖ, the adoption of the Plan by the Council of Ministers and the involvement of a broad range of stakeholders aim to enhance the liability of the NAPI with regards to implementation (Expert Interview SPÖ). However, it was precisely the lack of liability, as well as the unclear responsibilities and competences, which were at the centre of criticism expressed by actors of civil society, some municipalities and provinces (mostly the City of Vienna) and the Green Party when the policy document was officially adopted in 2010. Moreover, it was criticised for formulating the role of citizenship as the final step of integration, whereas facilitated access to citizenship is widely viewed as an important means to promote integration by legal experts and NGOs. Critics also stressed that many areas identified lacked concrete measures that could be adopted and there are no clear directions on funding (Wiener Zeitung 20.01.2010). The SPÖ representative interviewed raised the subject of conflicts over resource allocation as one of the main challenges throughout the implementation phase (Expert Interview SPÖ).

## 7.2 Quantitative analysis of the integration activities

Statistical overviews on integration programs are generally not available to the public. However, members of the parliament make use of parliamentary enquiries to obtain information from the respective ministries. Related to the implementation of integration programmes, the most recent reply to such a request refers to data from the years 2003-2010. The table below gives a basic overview.

**Table 7.1: Statistical Overview on the Integration Agreement (2003-2010)**

Federal Province	2003	2004	2005	2006	2007	2008	2010	2010
Burgenland	4	19	18	43	76	77	86	126
Carinthia	10	15	18	75	151	198	141	235
Lower Austria	40	313	304	275	368	522	692	804
Upper Austria	40	275	272	179	198	297	405	514

<b>Federal Province</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2010</b>	<b>2010</b>
<b>Salzburg</b>	7	108	118	85	171	222	201	308
<b>Styria</b>	49	190	233	542	590	764	684	874
<b>Tyrol</b>	54	192	213	374	309	351	321	412
<b>Vorarlberg</b>	30	235	211	58	142	370	454	426
<b>Vienna</b>	130	321	296	4,164	3,480	1,854	2,235	3,142
<b>Total Required Agreements</b>	9,114	5,540	3,758	22,958	16,690	15,147	5,219	12,695
<b>Total Exemptions</b>	/	/	46,383	220	181	183	109	264
<b>Total Fulfilled Agreements</b>	364	1668	1683	5795	5485	4655	5219	6841

Source: Reply of the Ministry of the Interior of 7 April 2011 (7564/AB XXIV.GP) to a parliamentary enquiry of the SPÖ and Reply of the Ministry of the Interior of 14 March 2008 to a parliamentary enquiry of the Green Party (3352/AB XXIII. GP).

According to a reply to a parliamentary enquiry dating back to January 2008 (3352/AB XXIII. GP), the Ministry of the Interior does not systematically collect more detailed data other than the yearly number of persons who signed the Integration Agreement and the number of persons who fulfilled the requirements. Consequently, this section cannot offer information on the number of applications, failed tests, course expenses or on the nationality, gender, age and economic background of the persons subject to the Integration Agreement. However, from the limited statistics available, it is evident that there is a considerable and persistent gap between the number of individuals subject to the obligations resulting from the Integration Agreement and the number of individuals who have completed the agreement. So far, severe sanctions seem to have been limited. With the terms of the Integration Agreement significantly tightened in the last immigration reform of 2011, this gap between obligation and compliance is likely to have much more drastic consequences for individuals, who, for what reason ever, fail to comply with the Integration Agreement.

## 7.3 Qualitative analysis

### 7.3.1 *Impact of family reunification on employment*

Though most family members that reunify under the Residence and Settlement Act ought to be entitled to work in Austria at least at some point, there are a few remaining categories of immigrants that are still systematically kept from access to the labour market. Although legal barriers still represent a constraint of relevance to some family members, there are a number of difficulties related to the area of employment despite the entitlement to formal rights. This subsection will highlight the most important challenges and tentatively discuss whether specific groups of sponsors or family migrants are differently affected.

Employment was stressed to play a key role in the lives of all individuals interviewed. In fact, with only a few exceptions, in the vast majority of families interviewed at least the sponsor was employed, and in most cases the partner was also working. Most exceptions were families in which young children aged less than three years formed part of the household. Within the sample, childcare was highly gendered and with no exception the female partners were in charge. The ambition to take up employment or remain involved in jobs was expressed as a priority by all interviewees, regardless of their current status. The interview sample gives some hint at differing employment situations depending on the statuses and frameworks applicable to the families. The most important observations are shared in the following subsections.

#### *Family migration projects affect career/ qualification projects or reverse?*

The results of the interviews with individuals affected by family reunification suggests that, the regulatory framework addressing family reunification does affect individual job careers. There is tentative evidence that the obligation to fulfil requirements or not having to comply with this requirement actually affects job-related decisions in different ways. Based on the small interview sample, the material suggests that strategic career planning is a far greater concern for families of EU nationals with mobility rights. Conversely, the obligation to fulfil requirements seemingly leads to a greater preoccupation with ‘earning the money’, which is why career plans have been dropped in the course of the family migration process.

For EU-nationals interviewed, to whom the criteria do not apply, mostly professional considerations were mentioned as the primary argument for moving to Austria in the discussion.<sup>207</sup> For instance, one interviewee from Romania stressed that the choice to gain some international experience for improving her and her husband’s professional profile was decisive for moving to Austria (Interview 21). One

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<sup>207</sup> In one interview the proximity to the family network due to pregnancy was mentioned as the main reason to move back to Austria for an Austrian national together with her UK partner (Interview 19). Professional reasons were not the only motive mentioned. For example, one Romanian national additionally depicted the political situation as not being supportive of educated, middle-class citizens in her home country (Interview 21).

interviewee kept commuting between Italy and Austria for a year before a convenient job opportunity arose so he could join his wife (Interview 18). Two other interview partners reported to be fairly relaxed about their job perspectives. In one case, a Czech national had followed her fiancée who had responded to an attractive job offer; in the other one, professional activity was not a priority to both partners, as they were expecting a baby soon and one partner was concentrating on his acquirement of German skills (Interview 19, 20).

Conversely, the necessity to fulfil the general admission requirements turned out to negatively affect job and career decisions among families from third countries and bi-national families with Austrian sponsors without mobility rights. The income requirement was named on numerous occasions as being the central reason why job-related decisions were taken differently than initially planned. For instance, several young adults had to quit their studies and looked for employment so they could bring their families or maintain their family life (Interview 4, 11, 12). In other interviews, self-employment in terms of setting up small businesses was chosen as a strategy to involve family members in the generation of the household income. The business set-up did not necessarily correspond with previous education or professional experience, though interviewees reported they had gradually grown into the business. Since asylum seekers are factually almost fully excluded from gainful employment, and applications may frequently not be decided on before years, self-employment in a 'family-business' represents a viable strategy to take up work in Austria. The necessary investments to set up the business (license, rent deposit, etc.) were, however, reported to be economically burdensome (Interview 3, 16, 17).

The income requirement does not apply to families of refugees and subsidiary protected persons who have reunified under the Asylum Act. Yet, interviews underline that gainful employment plays an essential role for refugee families. One interview specifically points out the economic burdens emerging from the process of family reunification in itself and the necessity to maintain a family income now that the children live in the household of the sponsor (Interview 5). Moreover, the fact that continuous employment is required to access citizenship was repeatedly viewed to be a discriminatory and a problematic practice among refugee interviewees. For instance, one interview revealed the case of an experienced plumber, who, rather than leave work in order to prepare for the necessary examination that would enable him to set up a business on his own, chose to continue working until he obtains Austrian citizenship (Interview 6, 7, 11). Another interview clearly depicted problems arising from long-term unemployment. Whereas the family migrant was on maternity leave by that time, the sponsor has been searching for a job as a computer engineer in vain for more than six years. The young woman uttered great dissatisfaction with her life, fearing her family had 'no future' in Austria (Interview 6).

### *Deskilling/ skill-stagnation as part of the family migration project*

As the previous discussion on the NAPI and the expert statements of the Ministry of the Interior and the Chamber of Commerce strongly indicate, efforts to attract highly skilled migrants and their families is a topic of great concern. Moreover, the governments views employment as key to integration. In 2008, the government

officially acknowledged deskilling as a widespread problem and announced that it would react accordingly (Bakondy 2010: 388f.). Statistically speaking, argues a study that analyses data from the 2001 census, deskilling represents an even greater problem in Austrian society than unemployment among non-nationals. Immigrants from countries of the Former Republic of Yugoslavia and Turkey are most affected, regardless of their gender. But this phenomenon is also widely spread among immigrants from neighbouring EU countries and Romania (Gächter & Stadler 2007: 2, 9). Another study reports on the basis of a multivariate analysis of representative statistical material dating from 2008 that the probability to be employed in a job below actual qualification is four times higher for first generation migrants than for individuals without a migration background (Stadler & Wiedenhofer-Galik 2011: 397). Participants of the expert focus group discussions and the interviewee from the Chamber of Labour criticised the lack of policy measures responding to that problem, although the phenomenon is well-documented.

Deskilling prevails for at least three reasons – one being the lack of adequate screening of professional backgrounds and work experiences when immigrants arrive to Austria (Expert Interview AK). Researchers have already stressed this problem for several years; however, politicians are only slowly and selectively responding to that. A study conducted by experts on labour migration argues that, in fact, '[w]e do not know, what qualifications are immigrating on a daily basis' (Gächter & Stadler 2007: 1, own translation). According to the authors, this holds especially true for family and forced migration, in which qualifications are widely ignored by state institutions. Moreover, professional backgrounds that were acquired abroad are frequently deemed less worthy than equal education or experience pursued inland (*ibid.*).

As the interviews point out, most family migrants, and frequently sponsors with migration background, were subject to the dynamics of deskilling. There are, however, differences, depending on the different sponsor statuses the family reunification process is based upon. Most notably, EU citizens with mobility rights seem to be less affected. Still, one interviewee reported she had accepted a job not corresponding to her qualifications for maintaining her family life: 'For coming here, I was the one making the compromise. Because for my husband it was easier to find, but for me it was what I had found quickly just for us to be together in the same place' (Interview 21). At a later point she described her current job situation as a humiliating experience.

The National Employment Agency (AMS) seems to be of little help in preventing deskilling, although a representative from the Chamber of Commerce underlined that more attention will be paid to the qualifications, experiences and individual needs of immigrant clients in the near future (Expert Interview WKO). Individuals interviewed depicted their appointments as hardly long enough to pose all relevant questions (Interview 2, 8, 19). No single interview referred to any sort of in-depth screening of professional potentials. Generally, the AMS was viewed in a controversial light by interviewees. Although it was acknowledged to be an important institution and source of information, some reported they were repelled by its bad reputation and paternalistic treatment and did not register at all or unregistered as soon as possible (Interview 11, 13, 19). Others remembered that the AMS was neither helpful in supporting their career project or in their family members' quest for

jobs, nor was it referred to as being specifically efficient in providing information. Some reported that the 'detection' of lacking German skills throughout appointments seemingly cumulated either in the prescription of additional German courses or job offers in low-paid segments (e.g. cleaning). Also, the welcome programme organised by the City of Vienna seems to offer little inviting job perspectives for the newly arrived. One interview partner reported he was told in the realm of a lecture that the national labour economy was currently lacking butchers and pallet truckers. Although he had wished to breed cattle in the first place, his lack of confidence and resignation became apparent in the interview when he claimed that since he came here uneducated, he felt obliged to accept any offer (Interview 2, 4, 5, 6, 8, 9, 11, 19). Personal networks seem to play a role to compensate for the lack of information. In several cases, even job opportunities could be provided for family members or sponsors (Interview 4, 5, 6, 7, 8, 9, 11, 13, 21). A study carried out on educational and professional pathways of young persons with migration background stresses that personal networks were also a very important resource for receiving an apprenticeship. However, the sample mostly consisted of young persons who were immigrants of the second generation (Ataç et al. 2009: 74).

Another factor that was mentioned to lead to deskilling in the context of family migration is the obligation to fulfil the income requirement. Economic pressures emerging from immigration processes in connection with a highly segmented labour market, fairly typical of the Austrian economy, further contribute to the process of deskilling. As the expert from the Chamber of Labour emphasised, once someone has entered the low-skilled job segment, it gets increasingly harder to get back to one's initial profession (Expert Interview AK). The limited horizontal and vertical job mobility due to the fear of not being able to fulfil the income criterion anymore was also a topic in several interviews (Interview 1, 4, 9). Yet, several interviewees invested a great deal of effort to overcome these constraints or have planned to do so in the near future. In one bi-national family the sponsor was taking part in a vocational training measure, whereas his wife was working full-time. Although the National Employment Agency funded the training and his wife earned a minimum salary, the interviewee reported severe financial difficulties. He had a rather pessimistic view on the renewal of his wife's residence permit too. Despite these rather challenging circumstances, the couple has consciously opted for this strategy to secure better job opportunities and a greater family income in the future. His wife is considering eventually taking up some vocational training too once he has successfully completed his education (Interview 8). In another interview, the individual asserted that some educational training sponsored by his employer was envisaged in the near future. However, in order to pursue this project, the interviewee's wife must first find a job apt to support the whole family (Interview 11). The possibility to integrate some further educational training turned out to be less promising in the case of a third country national who, although having almost fully accomplished twelve years of school in his home country, was still required to complete a secondary school degree in Austria in order to attend vocational school (Interview 1).

The interviews and several studies highlight a third aspect that further contributes to deskilling and also potentially hinders individuals from acquiring further qualifications: language. This tendency was previously emphasised in the individual



encounters with the National Employment Agency. As Gächter and Stadler (2007: 16) argue, there is a high probability of encountering discrimination in the realm of job applications because of language. For instance, a study on the qualifications and recruitment of Viennese with immigration backgrounds provides evidence of German skills being a relevant knockout criterion in the view of employers. Employers have argued rejections as a choice of a purely economic nature. Interviewees displayed little consciousness over the discriminatory dimension that such practices entail. Though not necessarily deployed as a conscious strategy, language serves as a means of differentiation and creates a hierarchy between ‘us’ and ‘them’. According to the authors, the employers’ attitudes hint at an overall tendency of ‘objectifying’ discrimination. There is no need any more to argue ‘The Turk is arrogant, thus he deters my clients’, but exclusion is already exercised by merely thinking ‘This Turk does not speak German, so he cannot sell’ (Littig & Segert 2008: 48, 27f., own translation).

Clearly, the impression of not knowing the language sufficiently well was identified by many interview partners as a factor that narrows job opportunities – regardless of their residential status (Interview 2, 4, 8, 21). A refugee interviewed reported that his ‘lacking’ knowledge of German language was the primary reason why he could not exercise his former profession (Interview 5). In some interviews, the reluctance to enter a vocational training/educational programme was also linked with a perceived insufficient command of German. This concern was even uttered by an interviewee who had attained a proficiency level of B2. Fearing that she would have difficulties in following some classes of graphic design, she opted for working as a waitress instead (Interview 6). Further discussion on language will follow in a later subsection.

Finally, a factor contributing to deskilling must be mentioned. It is induced by the asylum framework and solely valid for subsidiary protected and refugee families. Asylum seekers are, with only a few exceptions, factually excluded from the labour market during the application procedure. Since procedures regularly take several years, the lack of possibilities to exercise a profession or economic activity severely contributes to the dynamics of deskilling. Once the person has obtained international or subsidiary protection, the years of professional inactivity are hard to overcome (Rosenberger 2010, Gächter & Stadler 2007: 17).

### *Compatibility of employment/vocational training and child raising*

Several studies conducted on employment and family life stress that the ‘male breadwinner model’ dominates family life arrangements in Austria. According to a representative survey conducted by the National Statistic Agency, hardly any men (only one in ten) interrupt their professional activity or reduce their amount of working time for reasons related to parenthood. By contrast, only 12 per cent of all women interviewed reported not having reduced their workload for the same purpose. About one third of the women reported to be on maternity leave and one third did not work at all during the first three years of parenthood. Another 20 per cent were working part-time, whereas their male partners were employed full-time during that time. This unequal partition of productive and reproductive work

seriously affects the income gap between men and women. Whereas male income is proportionally rising according to age, the income of women aged 30-39 stagnates. On average, this gap prevails until retirement – women do not economically recover from the financial disadvantages associated with maternity until retirement. The study identified a great lack of public facilities for childcare, especially for children aged younger than three years (Statistik Austria 2011: 15ff., 58ff.). A study recently conducted on migrant women of the first and second generation stresses that the gender-bias regarding the partition of reproductive and productive work holds even more true for migrant households in Austria. Statistically speaking, the intersection of class, gender, educational background, family situation, migration background and years of residence in Austria influences the probability of gendered unemployment. A migration background, so the study argues, makes individuals more vulnerable to structural inequalities. Once all the above-mentioned factors are taken into account, women with a migration background are more likely to be affected by unemployment compared to male immigrants and women without a migration background (Hollomey et al. 2012).

Interviews conducted for the purpose of this study allow for a rather differentiated picture of this dilemma. In most families in which at least one child aged under three years formed part of the household, women were in charge of the child-rearing. However, some families deployed alternative strategies. In one case, the couple was expecting a child and had not yet conclusively negotiated who was to take parental leave in the future. They did not exclude that the male partner would stay at home (Interview 19). In one interview, the couple reported they had left their children with their parents in the home country (Interview 9). In another case, a woman had searched for a nursery so she could fully integrate into the labour market. She remembered the situation to be stressful and discriminatory and hard to handle as a working mother:

‘I felt a certain envy (of women with no children) and felt discriminated somehow, because I have the kid. There was no flexibility [...]. My husband was basically taking care of everything, because he had an Austrian boss with family who understood these kind of problems’ (Interview 21).

Otherwise, women reported to be mostly in charge of the child. The interviews equally demonstrated the difficulties women had to pursue education or work and simultaneously take care of a young child. For instance, there were reports about dropouts from German classes and other interviewees gave up, or at least had postponed, their educational aspirations or career plans for staying at home. Although all interviewees plan to take up work again or start some educational training, references to potential barriers arising from the lack of public infrastructure and flexible working hours were made in several interviews (Interview 5, 6, 11, 12, 14, 16, 21).

#### *Limitations to labour market access: experiences of discrimination and exploitation*

Nearly all interviewed families could access the labour market in theory, although one interview reported the financial distress caused by legal constraints in this regard. The couple had reunified with their adult son, who was not entitled to work in Austria.

The situation had provoked many difficulties, since the family income depended on some additional funding and they had to provide for their son, young grandchildren and daughter-in-law. The family had even found a potential employer. Currently, the son is attempting to change his residential status and has applied for a Red-White-Red Card in order to obtain access to work (Interview 9).

Many interview partners reported that despite having formal access to the labour market, they had experienced discriminatory encounters in their working environment or during their search for work or vocational training. In some interviews, there were also explicit references made to experiences of exploitation, such as not being paid on time or not as much as initially agreed upon or being officially registered for fewer hours than initially settled (Interview 1, 4, 8, 9, 21). One refugee interviewee reported that her husband has remained caught up in a cycle of poorly or unpaid internships for years:

'The company likes that and says: Ok, there are plenty of people willing to do internships, why should we pay then? We can just use the persons for free, during three months, like my husband, and then we take someone else for three months and so on – unpaid. And the companies like that.'  
(Interview 6)

There are a number of qualitative and quantitative surveys that report the discrimination experienced by individuals with an immigration background or discrimination exercised by employers on the grounds of country of origin, language, skin colour or the wearing of a headscarf among Muslim women (Hollomey et al. 2012, Ataç et al. 2009, Littig & Segert 2008: 48f., Gächter & Stadler 2007: 14f.).

### ***7.3.2 Impact of family reunification requirements on access to education***

Not all experts interviewed had conclusive statements on the role of education. However, those who spoke of education at some point referred to it as a constitutive pillar for integration, especially for the younger generations (Expert Interview AK, WKO, SPÖ). In this context, the interviewed representative from the Chamber of Commerce criticised the state for maintaining the admission quota for some groups of third country nationals. The quota was dismissed as a profoundly counterproductive policy measure, especially for children, because they 'lose' important years of schooling in Austria (See also OECD 2008).

Since vocational and adult training were discussed in the section related to employment, this subsection will rather focus on education for children and young adults. The interviews with individuals highlight that education is generally highly valued among the families. The great importance attributed to education is largely linked to the fact that it is viewed by most as a means to secure independence and social mobility in the future, thus as an important strategy to acquire social capital:

'[...] nowadays if you are educated, if you have a good education, you have possibilities to live here.  
[...] as their eldest brother, I will bring them all here and show them the right way, so they don't stay illiterate, unlike many people from Afghanistan' (Interview 11).

Generally, several references to 'smart' and 'talented' family members were made, mostly to stress they deserved a good education in order to realise their potential.

Although access to education in itself did not represent a problem for families with children of a school age, several hurdles may be identified if looked into more detail. Generally, the Austrian educational system can be characterised as socially selective. In other words, it is rather the social background of the parents (education and income) than the school system, which is decisive for the educational pathways of young persons in Austria (Bacher 2005: 13f.). According to a report on the situation of families, Austria ranks among the countries in which the social status of families and the educational careers of their children strongly correlate (BMUKK 2012: 102). The educational system potentially works even more at the disadvantage of young persons with a migration background, although it is important to take into account that this discrimination rather results from the primary effects of the families' socio-economic background (Lachmayr et al. 2011, Bacher 2005). As a qualitative study on educational pathways of young persons with migration background shows, the great majority of young persons interviewed definitely had visions about their educational future and considered good education to be essential for obtaining good jobs. They also reported their parents to be supportive of their ambitions. Still, the students turned out to be poorly informed about how to attain these goals. Moreover, nearly all pupils interviewed had scaled down their educational aspirations throughout the three years of active fieldwork (Ataç et al. 2009).

Another study on the relevance of qualifications for the recruitment of individuals with an immigration background delivers some hints at potential barriers for young immigrants of the first generation. From the employer's perspective, 'normal' educational and professional careers are strongly connected to a coherent biography and biographical timeline. Individuals that do not 'fit' into this scheme are either excluded from recruitment or required to produce enormous additional efforts to enter the labour market (Littig & Segert 2008: 47). Children of a schooling age are generally placed in a grade according to their age. Although there is no systematic supportive evidence from the interviews, there is, however, reason to believe that children who migrated in the first generation are sometimes assigned to lower classes than they have initially completed in their home country (Interview 4, 10, 15). As a brochure from the Ministry for Education indicates, children who have newly arrived to Austria are not graded in the first two years of their school attendance and may enrol in additional classes for German; they are given an extraordinary status during these two years. However, the prerequisite for remedial courses is the participation of at least eight students subject to such an extraordinary status (BMUKK 2011: 9ff.). It is, therefore, hard to say whether in practice such courses are not rather an exception to the rule. The City of Vienna, moreover, offers courses for alphabetisation for pupils who were not taught the Latin alphabet or who did not attend school altogether. Despite the inherently socially selective school system, the attendance of school was mentioned to play an important role for children in order to build friendships and contacts.

### ***7.3.3 Impact of family reunification requirements on language skills***

As pointed out earlier, the government highlights language as a central feature for integration. In fact, integration, to a large extent, has become equalled with language

skills. This impression was widely conveyed in the interview conducted with representatives from the Ministry of the Interior: ‘Knowledge of the German language is central to promote integration in Austria and its acquisition should start as early as possible. [...] [I]t should not be viewed as a barrier, [...] but rather as a chance [...], enabling equal participation in Austria.’ (Expert Interview BMI) Thereby, the government signals a specific ‘awareness’ of a ‘problem’. It implies a fairly deficit-oriented framing of language acquisition, whereas little thought is given on societal barriers that hinder individuals from equal participation. The introduction of measures such as the Integration Agreement demonstrates to the electorate that the state is becoming active on solving the ‘problem’. Again, not all immigrants are portrayed as having difficulties to integrate, e.g. to know the language. As laid out in Chapter 3, highly skilled workers are, for instance, exempted from the language requirement. From a linguistic perspective, the introduction of policy measures such as the Integration Agreement suggests easy solutions where complex societal factors play a role. As Verena Plutzar (2010: 127) suggests, the learning of a language is a social practice intricately linked with social power relations. She criticises that marginalisation is all too often explained as resulting from lacking language proficiency (deficit-thinking), whereas linguistic experts increasingly share the view that the performance of the language of a host society should rather be viewed as the effect of social inclusion or marginalisation.

Largely, the language requirement is implemented via two relevant instruments: language courses and examinations. Linguistic experts, however, point out the fact that courses alone contribute fairly little to a sustainable command of the language. Rather, the actual learning of the language takes place in ‘real life’, which makes social contacts a crucial thing to have. Language courses provide support but cannot replace the importance of applying the language in daily life (Plutzar 2010: 128f.). The expert focus group underlined that the testing puts individuals under high pressure, which is highly counterproductive for the learning process. One of the most problematic aspects discussed was the fact that acquisition of a specific level of language proficiency is tied to residential rights. They equally stated that the educational system fails to adequately reflect on multilingualism and the fact that not everyone acquires a second language as easily. In this regard, much of the criticism was directed at the budgetary cuts for alphabetisation courses since the introduction of the language test before entry. The lack of appreciation of the first language seemingly provokes frustration among individuals and lowers the motivation to learn German. The reduction of pressure was viewed as the primary priority. Also, the courses available should reflect multilingualism and be more flexible and adapted to individual needs. One example raised by expert interview partners was that the course content could be adapted to individual professional backgrounds (Expert Interview AK, WKÖ).

The interview material collected for the purpose of this project is rather supportive of the expert criticism mentioned above. Regardless of the residential status and almost without exception, language is viewed to be a key feature for enabling social interaction, gaining independence, following education and widening job opportunities. Still, for some, the ‘lack’ of language proficiency was not necessarily viewed as an incommensurable barrier, as the following example underlines:

Q: Do you need any kind of support now?

A: My parents do not need any support, if my mother needs anything, she asks my siblings or me. She gets support from us.

Q: Does your mother speak German as proficiently as you?

A: No. But since she runs her own business, she does not really need the language.

Q: In what sense are you supporting your mother?

A: When she needs to go to the hospital, I am going with her. Or when she needs to fill in something, we fill in the documents or we translate letters for her.' (Interview 16)

This sequence points out the fact that individuals do not necessarily perceive not knowing the language as a weakness. Rather, perceived 'deficiencies' are a question of context and largely connected with the reception context. For instance, other interviewees reported they could mostly rely on English in their social and working environment: 'I gave it a try but then I found it wouldn't be easy and that I would have to invest a lot of time which I don't have. Because I work a lot and now I have a family also. And then on the other side you can survive in Vienna with English or Italian' (Interview 18). However, some limitations were pointed out, especially regarding the interaction with Austrian authorities, which was identified to be impossible without German-speaking help (Interview 16, 18, 19, 21). Secondly, the sequence quoted above also hints at the fact that language is needed for very different purposes and the required level of proficiency cannot be generalised. As another interview extract clarifies, even after having attained a comparatively high level of proficiency (B2) there was still no guarantee for the interviewee to enrol for further education (Interview 7). Seemingly, barriers that impede participation may originate also in society rather than just in the language 'deficiencies' of individuals. The discussion on language and deskilling further supports this argument.

With regards to interviews conducted with families of EU citizens, the importance of the language was generally acknowledged, but assessed differently depending on personal context. The material indicates that the acquisition of the language does not necessarily represent a priority immediately after arrival. Some statements hint at the fact that it was more important to 'arrange everything' first (e.g. find a kindergarten for the child, find suitable accommodation, find a convenient job) and then 'take some serious classes' (Interview 21).

Interviews with refugees and subsidiary protected persons revealed that some interviewees had been in the country awaiting a decision of their asylum claim for years without any possibility to learn the language. Indeed, except for minor-aged asylum seekers, learning the language remains subject to individual or private initiatives: 'Back then in 2005 we had no possibilities to join some institution and learn the language for free. [...] So the language I know is the language from the streets, I just started speaking like this. Some priest taught me a few words, until I got relocated again and that's it.' (Interview 5) Conversely, sponsored family migrants of refugee families can enrol for German classes fairly soon after arrival, since their asylum procedure is of comparatively short duration. Interviewed family members had a very positive attitude towards learning the language and also mentioned the fact that they were fully funded as being particularly helpful.

Experiences about fulfilling the language requirement conveyed in interviews with bi-national families or families of third-country nationals strongly differ from the previous accounts. The importance of language skills is stressed by most, although

some interviewees also outlined they or their family members could manage their lives largely without knowing the language. Only in one case did the language criterion not represent an issue at all since the family migrant had converted his student visa into a family one and already had a good command of German. One family interviewed reported that they were put under severe pressure by authorities and had received letters stating that his family members had to learn the language or would get deported (Interview 14). Even though one family member had already passed the required examination, the fear of not knowing the language sufficiently prevailed, as another interview points out:

'My sister is always anxious, because of German language. She has attended the course but didn't learn a thing. She is scared that the administrative staff might ask her something [when she applies for a prolongation of her residence permit]. She doesn't want the magistrate to know, that she cannot speak German.' (Interview 16)

There were also several reports about classes being very expensive, although the family members interviewed had used the vouchers distributed by the City of Vienna (Interview 1, 2, 4, 9 and 14). Some had partially fulfilled the requirement but reported that their workload was not compatible with continuing to seriously study the language. They felt they had to quit work or reduce the amount of hours spent at work, but reported not to be able to currently afford this because of the income requirement. Also, some interviewees referred to the course content as insufficiently interactive or not helpful at all for 'real life' situations. Some expressed they had the impression not to have learned enough, although they already had fulfilled the Integration Agreement (Interview 4, 8, 9, 14, 16) The following example illustrates this dilemma:

A: The German classes are of no use. You sit in there, ten to fifteen people, and you understand nothing.

Q: How long were you taking classes?

A: One and a half years.

Q: Did you learn something?

A: No, almost nothing.' (Interview 14)

Although references made to the course in itself were far more positive in a study conducted on citizenship testing than in the sample of interviewees collected for this report, the interview analysis equally stresses that interviewees who had passed the test thought that A2 level was insufficient to ensure social participation, especially to adequately participate in the labour market (Perchinig 2010b: 35).

## **7.4 Impact of family reunification requirements on social inclusion**

### *The art of 'arriving here' despite unwelcoming social climate*

Experts and many individuals interviewed for this study equally referred to Austrian society as being overtly unwelcoming. Indeed, the unwelcoming mindset of Austrian nationals is confirmed in a quantitative study that surveyed attitudes of nationals towards immigration and migration policy. About 42 per cent of the respondents supported the claim that immigration should be principally restricted, 7 per cent even

favoured a zero-immigration model. As the study further indicates, there is a growing portion of respondents who overtly consent to xenophobic statements proposed in the opinion poll (Friesl et al. 2009: 258). As participants in the expert focus group emphasised, the unwelcoming reception context in Austria reduces opportunities for immigrants to equally participate in many regards. The legal expert from the Chamber of Labour criticised that despite existing frameworks addressing discrimination, in the end, these rights merely exist on paper as they lack adequate implementation. For instance, interviewees raised the problem of the openly xenophobic Austrian media. Especially former asylum seekers felt negatively affected by the criminalising and stigmatising reports on refugees. Quite a few interviewees also brought up the topic of negative encounters they had personally experienced – and these reach far beyond the area of employment, as the following passage underlines:

‘First of all, I don’t want anyone ever to call us “foreigners”. I hate that word; I hear it everywhere. Many authorities call us foreigners or they say: “You foreigners are all the same.” Often, I had arguments with officials because of this word. [...] Even when I am right, they say: “No, you are wrong, because you are a foreigner.” Can you believe this? I mean, that really is discriminating, isn’t it?’ (Interview 14)

Interviewees who experienced overt discrimination, however, also frequently mentioned ‘talk back’. Accounts of negative encounters were frequently contrasted with positive individual contacts, which are seemingly highly esteemed by individuals and sometimes also with personal victories in which persons had revised their prejudice.

Although most interviewees portray their perception of the social climate as ‘unwelcoming’ and exclusionary, family reunification largely seems to be thought of in terms of a long-term project. Only two interviewees considered leaving the country as a realistic option because they felt they could not realise their goals and potentials in Austria (Interview 4, 6). Notwithstanding the intent of staying, some had not (yet) developed any explicit vision of their mid- and long-term future. As several interviews point out, possibly the pressure to fulfil the requirements and lacking residential security hinders people to seriously get involved in long-term projects. Again, families of EU citizens interviewed felt more flexible about their future and did not exclude to relocate somewhere else on the long run. The latter group also hinted at another difference in this regard: they had the possibility to prioritise different aspects, depending on their specific circumstances. To be in control over time and set personal goals in a self-determined way was highly valued by all interviewees, regardless of their residential status. When asked about support, most interviewees explicitly rejected the idea of receiving financial aid and rather emphasised their desire to handle things on their own. However, financial support was viewed to be beneficial if there is no other solution at hand. Many individuals responded that they lacked the necessary information to realise their goals in society, for example, in terms of job opportunities, further education or validation of professional experience and education. In line with that, experts stressed throughout the group discussion that it is of utmost importance to give individuals the necessary time and support to properly accommodate to the new situation they encounter in the country of immigration. The process of migration creates a biographical rupture



that people need time to adapt to. Information plays a big role in this regard, and in the view of the social partners, there is a largely ignored potential to provide more information before the actual process of immigration (e.g. instead of pre-language testing as the representative of the Chamber of Labour suggested).

*Have rights, exercise rights, miss rights: framework and implementation*

Residential security for third-country nationals is a major issue of concern for both experts and individuals interviewed for this study. This is especially so, since access to long-term residence and citizenship is becoming successively narrowed by the introduction of fairly demanding language requirements and financial criteria. Participants of the expert focus group and the representative of the Chamber of Labour fear that many will have difficulties to successfully pass the language examination. The high financial threshold, too, was subject to criticism by experts for being socially selective. The difficulty to access citizenship, and, to a lesser extent, long-term residence, was also a topic raised by many individuals, with the exception of EU nationals. Most individuals from third-countries interviewed stated that they aimed for naturalisation, though some feared not being able to afford it. By contrast, naturalisation seemed to be of no importance for EU nationals interviewed. In particular, the refugees interviewed were very concerned about potential or experienced difficulties to obtain Austrian nationality. The reasons given were mostly financial and there was also much criticism of the fact that their residence as asylum seekers does not add up to the minimum stay required to obtain the nationality. The lack of possibilities to obtain dual citizenship for children of unmarried bi-national couples was further raised as a problem. Despite the fact that some third country nationals had acquired the Austrian citizenship, the feeling of being treated like second-rate citizens rather than fully participating members of society seemingly prevailed:

‘They always say that families should be together, but they do not render that possible. They punish people instead. We are from Serbia; we cannot be from anywhere else, because we were born there. But we have been working here for more than twenty years [...]. For instance, she (refers to his wife) has received the citizenship, but it helps strictly nothing. Again, you are a foreigner and a Serbian.’ (Interview 9)

Residential security, moreover, touches upon another existential dimension, namely the question of the enforceability of state power. By no means does an upright family life represent a guarantee to reside in Austria. This is depicted in the account of a Ukrainian refugee, whose husband’s asylum claim got rejected. After they were married, they further pursued their life together in Austria. When the new migration and asylum legislation entered into force in 2006, he was obliged to leave the country and to apply for reunification from Nigeria. Since he refused to return on a voluntary base, he was forcibly deported, literally ‘overnight’, despite considerable health problems. He was granted entrance to Austria only after a year, since he had entered the country on an irregular basis (Interview 17). Another couple was threatened by similar circumstances, but they had made their cause public in the news. This had seemingly prompted more vigilance from the authorities’ side, since no deportation

order was ever issued in this case. In the end, the family member managed to circumvent the obligation to apply for reunification from abroad on grounds of a humanitarian clause that allows for lodging the application inland in exceptional cases. The latter case, moreover, illustrates the drastic consequences emerging from lacking transitional provisions or amnesties for backlogs. Authorities had pressured the sponsored to lodge an application from abroad, although he had applied inland even before the new law entered into force (Interview 3).

Other interviewees did not refer to citizenship but rather claimed they were missing voting rights and the possibility to run for office. Generally, when thinking about rights, most interviewees also referred to the access of health services, though it was not a subject raised by all. With a few exceptions, access to health insurance and services did not seem to represent a problem for the families. One couple reported that on their arrival from UK to Austria they had experienced serious troubles with obtaining a health insurance. Apparently, they had not been provided with sufficient information and found out only by chance that they were not covered by their health insurance anymore. This was viewed as an extremely stressful situation, especially since the couple was expecting a child soon (Interview 19). An interviewed family was entirely exempted from welfare (e.g. health insurance, services of the National Employment Agency) because of their terms of employment. Since both were working at an international organisation, they had arranged their insurances privately, which was viewed as a 'fair' trade-off in exchange for the tax-exemptions that applied to diplomats (Interview 18).

As previously mentioned, the role of citizenship access and the general admission criterion related to income seemingly influence the perspective on access to welfare and unemployment support. Recently, a social support scheme in terms of a needs-based minimum benefit system replaced the previously federalised social assistance. EU and EEA citizens are generally entitled to these benefits if their residence is related to employment or if they have resided in Austria for more than five years. By contrast, third country nationals are entitled to the benefit system after a minimum of five years of regular residence. Refugees may access these benefits once they obtain a formal protection status (subsidiary protected may only access a distinct, significantly less generous welfare scheme). The provision of welfare to asylum seekers is tied to a system of forcible geographical dispersal. However, this raises serious concerns over the protection of family and private life, also in the realm of family reunification procedures. One interview provided testimony of this highly disintegrative practice. A minor-aged Somali obtained subsidiary protection but appealed against the decision. His family could join him after two and a half years and their applications are still pending. However, the minor-aged child and his family members live separately in two different federal provinces due to forcible dispersal. If the family did not comply with this measure, the members would lose their entitlement to welfare support (Interview 15).

An important issue is social exclusion, despite attribution of formal rights. The most recent report on poverty in Austria stresses that migrant households (including households of naturalised immigrants) are particularly prone to be threatened by poverty: about 27 per cent of all households at risk of poverty are households with a migration background. As the report further argues, the most influential factor

related to poverty is (un-)employment. Unemployed persons are highly likely to be at risk of poverty. Moreover, the proportion of 'working poor' has increased in the past years: about 41 per cent of the persons at risk of poverty are employed. The rise of atypical employment has considerably contributed to the precarious working conditions, which are increasingly disconnected from entitlements to social benefits (ÖGPP 2008: 119f., 129). The study also claims a strong connection between income and education: the higher the education, the greater the probability of being employed and the higher the income. There is also an income gap between non-nationals and Austrian citizens: about half of all non-citizens, but 'merely' a fourth of all Austrian nationals were part of the lowest income group. The proportion of non-citizens among the highest income group amounts to only 9 per cent, whereas Austrian nationals represent a portion 27 per cent in this category (ÖGPP 2008: 130).

The previous discussion indicates that formal rights alone do not suffice to promote equal participation. As long as the income gap, the comparatively higher unemployment rate, the comparatively higher barriers regarding job recruitment and the higher probability to be at risk of poverty continue to persist for persons with an immigration background living in Austria, the problem of social inequality surely is far from being resolved. Similarly, this applies to the examples given in earlier sections when taking in to account the problematic related to the gender divide regarding income and the partition of productive and reproductive work or the multiple forms of discrimination individuals have encountered. In order to ensure that equal participation does not remain mere rhetoric, the state needs to take its responsibilities towards society at large more seriously. Importantly, social exclusion impacts on the ability to access family reunification, most directly through the income criteria. If the ability of individuals to live with their family members is taken as one measure of inclusion, the inability or difficulty of meeting the income condition risks breeding even more exclusion, thus double-disadvantaging already disadvantaged groups.

## **7.5 Chapter conclusion**

With regards to the integrative effects of family reunification, the Ministry of the Interior portrayed the current challenge from a government's perspective as a juxtaposition of chosen migration, which the state seeks to actively promote, and the legal entitlement to family migration, which the state has to accept. The question of whether reunification has beneficial effects on integration was judged not to be answerable in a general way. Reunification was viewed to enhance, as well as prevent, family members from participation in society. By and large, the ministry's representatives depicted the ability to integrate as a question of individual opportunities and needs as well as strategies accordingly applied. By contrast, experts of the focus group, as well as the representative of the Chamber of Labour, stressed the importance of a right to family life. However, the participants of the focus group highlighted that a differentiated approach should be applied. In their view, discussions on the integrative effects of reunification should not be separated from the right to live a life with self-determination. Referring to their counselling experience, experts stated that reunification frequently positively contributes to

integration, but it may also slow down the process in some cases. One core problematic identified in this regard is that the framework at hand produces asymmetries, which render individuals dependent on each other and pose constraints to leading a self-determined life. This is especially so because choosing on one's own behalf may seriously affect the residential rights of the family member (e.g. change of work, divorce, etc.). Moreover, the legal dependency was viewed to potentially produce negative impacts on individuals because it may cover up domestic violence (e.g. for fear of losing the residence status in case of divorce). The lack of residential security of family members may be used in an abusive sense in case of conflict. The experts were also in agreement over the negative effects of the framework on the well-being of children, especially in cases of tensions within the family.

Without doubt, family reunification is central to individuals for a variety of reasons. In some interviews, the waiting period was depicted as being void of sense or paralysing. Family members were referred to as 'best friends' or a source of happiness and stability. This holds especially true for refugee sponsors interviewed. In sum, the importance of the emotional support of the family was a recurring topic among most interviewees, regardless of their status. Besides emotional aspects, care and material reasons were also referred to in discussions. Individuals were largely aware of the legal dependency established between the family member's residence status and that of the sponsor. The interviews hinted at the sponsors' strong feelings of responsibility towards family members, whereas family migrants reported that they felt dependent on the sponsor. The following sequence highlights this dilemma:

'And because of all these requirements, there simply are barriers always present in your mind. And I really can observe, in the weeks before we prolong his residence title, we get increasingly tensed and for instance quarrel more. It really has some psychological impact, also in terms of: How do I organize my relationship? Due to this extreme dependency, which is not solely economic [...], but also simply caused by the fact that his residence title is tied to mine. [...] I take up responsibilities differently than I was used to in other relationships.' (Interview 1)

By and large, family was often referred to also in a broader sense. Accordingly, the ability to live a transnational family life represented an important aspect in many interviews. In this regard, especially refugee families suffered from the separation from their families, since they first need to access citizenship or cannot travel to their home countries otherwise. Finally, discussions about care for elderly parents living abroad or the organisation of childcare in Austria with and without parental aid underline the lack of legal arrangements taking into account the complexity and variety of family arrangements.

## 8. Conclusion

Austria's family migration policy in the past decade shows both liberalising and restrictive tendencies. However, as the study sought to show, the legal framework governing family reunification and its effects on integration needs to be seen against the background of the broader opportunity structures for economic, social and political participation in society.

The framework addressing family migration has increasingly gained in complexity. It was subject to multiple amendments throughout the past decade, largely leaving this a subject accessible and comprehensible to a hand full of experts. Whereas the legal position of third country nationals has certainly become improved in some regards, it has increasingly become difficult to access these rights, even more so in the realm of family migration. By and large, family migration is framed as problematic and unwanted, though legal provisions have come to guarantee rights to family migrants. As a result, the migration and integration framework creates hierarchies among immigrant groups and induces a socially selective policy framework. With regards to integration, clearly some groups of immigrants are subject to more politicisation than others. In public and political discourse, a range of measures were represented as tools addressing family migrants, whereas (highly) skilled migrants are not framed as a problem, thus not needing integration. Though formally defined as a two-way process, the integration agenda first and foremost places the burden on individuals. Integration is largely described in terms of strong language skills and economic self-sustenance.

As research findings from Austria suggest, integration measures largely building on conditions that rely on a sanction-based approach seem unable to adequately seize practical questions and life-worlds of family migrants. In many cases, they prove to exacerbate, rather than resolve, underlying tensions. The obligation to fulfil a certain income requirement and simultaneously acquire a specific level of language proficiency may result in ambiguous effects, as the obligation to fulfil the economic requirement may impede the progress in language acquisition and vice-versa. Interviews with EU reunification cases of EU nationals hints at the importance of self-determination (e.g. to be in control over one's time and determine one's own priorities) and be given time 'to arrive and arrange things'. The research findings also suggest that one-size-fits-all solutions, such as making admission or upgrading of one's legal status dependent on standardised tests, risks ignoring individual needs, life phases and potential, as well as being blind towards structural inequalities the framework relies upon and sustains.

## 9. Annex

### 9.1 List of abbreviations

Abs	Paragraph (Absatz)
Art	Article (Artikel)
AsylG 1997	Asylum Act 1997(Asylgesetz 1997)
AsylG 2005	Asylum Act 2005(Asylgesetz 2005)
BGBI	Federal Law Gazette (Bundesgesetzblatt)
BlgNR	Notes to the records of the Austrian Parliament (Beilagen zu den stenographischen Protokollen des Nationalrats)
BMI	Federal Ministry of Interior (Bundesminister(ium) für Inneres)
B-VG	Austrian Constitution (Bundes-Verfassungsgesetz)
CJEU	Court of Justice of the European Union (before the Lisbon Treaty known as European Court of Justice, ECJ)
EG	European Community (Europäische Gemeinschaft)
ECtHR	European Court for Human Rights (Europäischer Gerichtshof für Menschenrechte)
ECHR	European Convention of Human Rights (Europäische Menschenrechtskonvention)
EU	European Union (Europäische Union)
ff	Following (fortfolgende)
FrG 1997	Alien Act 1997 (Fremdengesetz 1997)
GP	Legislative Period (Gesetzgebungsperiode)
idF	In the version of (in der Fassung)
NAG	Residence and Settlement (Niederlassungs- und Aufenthaltsgesetz)
Nov	Amendment (Novelle)
RL	Directive (Richtlinie)
RV	Legislative Proposal by the Austrian Federal Government (Regierungsvorlage)
VfGH	Constitutional Court (Verfassungsgerichtshof)

VfSlg	Collection of decisions of the Austrian Constitutional Court (Sammlung der Entscheidungen des Verfassungsgerichtshofes)
VwGH	Administrative Court (Verwaltungsgerichtshof)
VO	Regulation (Verordnung)
Z	Numeral (Ziffer)

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### 9.3 Legal Sources

#### EU

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This report presents the findings of the Austrian case study of a comparative research project on the interlinkages between family reunification policy and integration which was conducted in six EU Member States (Austria, Germany Ireland, the Netherlands, Portugal and the United Kingdom). The study examined the way in which family reunification policies have developed over the past decade and the positions governments have adopted regarding four main requirements: income, pre-entry test, age and housing. Furthermore, the study analysed the application of these requirements in practice and how their application is perceived by the family members. Based on statistics and interviews, the authors draw conclusions on the impact of the applicable requirements on migrants and their family members in the Member States included in this study. Considering the recognition at the EU level that family reunification is regarded as beneficial to the integration of migrants, this study seeks to clarify whether or not national policies serve to promote or hinder family reunification and contribute to the integration of migrants and their family members.

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