

THE REPUBLIC OF AUSTRIA

**NGO PROGRESS REPORT
ON THE FOLLOW-UP OF THE CONCLUDING
OBSERVATIONS**

CCPR/C/AUT/CO/4

asylkoordination Österreich

Integrationshaus

SOS Mitmensch

With the support of :



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Concluding observations selected for the follow-up procedure

Recommendation 11

The Committee is concerned about reports that the State party has repeatedly failed to initiate a prompt investigation and, that only lenient sentences and disciplinary sanctions have been imposed, in cases of death and abuse in police custody. It is particularly concerned about the case of Cheibani Wague, a Mauritanian national, who died on 16 July 2003 in Vienna in the presence of a doctor while being restrained by three paramedics and six police officers, none of whom were suspended during the investigations and most of whom were acquitted; the doctor and one police officer were sentenced to suspended prison terms of seven and four months. It is also concerned about the case of Bakary Jassay, a Gambian national who was abused and severely injured by policemen in Vienna on 7 April 2006 after his deportation had been cancelled, resulting in suspended sentences of eight and six months' imprisonment due to 'mitigating factors', as well as in disciplinary fines, for the responsible officers who continue to serve in the police force. (arts. 6, 7 and 10)

The State party should take immediate and effective steps to ensure that cases of death and abuse of detainees in police custody are promptly investigated by an independent and impartial body outside the Ministry of the Interior and that sentencing practices and disciplinary sanctions for police officers are not overly lenient. It should also reinforce preventive measures, including by introducing mandatory training for police, judges and law enforcement officers on human rights and treatment of detainees and by intensifying its efforts to eliminate deficiencies within the police training system with regard to restraint methods.

Measures taken by the authorities (status quo or improvement):

It is highly appreciated that the number of people being detained awaiting deportation is decreasing and that the number of people being submitted to more lenient measures is increasing. This positive development finds its origin in the jurisdiction of the two High Courts of Austria. In numerous complaint procedures the High Constitutional Court and the High Administrative Court had the possibility to interpret the necessity of detention pending deportation due to security reasons. The jurisdiction clarified and reaffirmed the necessity to proof individually every single case of detention pending deportation and its securing thereof by this measure. This evolving body of jurisprudence lead to a decrease of asylum seekers being detained during the period of their admission's examination and before the initiation of the expulsion order from around 79 % to 60%. Crucial in this regard is the procedure of issuing a detention order while awaiting deportation.

It is very telling for the practice of imposition of custody prior to deportation and its examination by the UVS that a memorandum of the security agency of Lower Austria seemingly encourages the police's executives to inflict detention pending deportation measures, even if they'd be in disaccord to the actual application of law foreseen by the high courts. Since all decisions of the UVS confirming detention are regarded as illegitimate by the Administrative Court, the UVS - according to a memo - feels itself prompted to change its practice of decision-making (see Der Standard: 12.02.2008).

Despite the declining numbers in cases of detention pending deportation of asylum-seekers criticism on the arrest of persons seeking asylum has to be passed and therefore maintains.

Year	Applications for asylum	Detained asylum-seekers	Detention pending deportation	Percentage of asylum-seekers in detainees	Detention pending deportation during admission procedure
2006	13.350	2.700	8.694	31,06	78,85
2007	11.879	1.602	6.600	24,27	71,1
2008	12.841	829	5.398	15,36	59,71

Detention pending deportation of asylum seekers in Austria during 2008, detailed :

executable expulsion order	239	28,83
Initiated expulsion procedure	164	19,78
Expulsion order before asylum application	95	11,46
anzunehmende Ausweisung assumption of expulsion	331	39,93
Detention pending deportation	829	15,36

More lenient measures taken during the last few years:

2006	927
2007	1123
2008	1809

The increasing number of orders issuing more lenient measures is appreciated by us. However, concerns must be raised with regard of the overall framework of such orders and the execution thereof. Asylum seekers falling under these measures are not entitled to receive basic care in the different asylum accommodations. These persons are therefore not permitted to receive the treatment in accordance with the EU Protection Directive, the Austrian federal « Grundversorgungsgesetz » or the respective law within the provinces. Although, asylum seekers in need are granted accommodation and rations but they are not entitled to receive pocket money. Discrimination also arises when it comes to medical treatment. Asylum seekers being submitted to lenient measures only receive emergency treatments and are not entitled to receive a full covering health insurance; which is normally granted to asylum seekers.

In October 2008, police officers at the initial registration office ordered such lenient measures for asylum seekers without securing their accommodation and diet. (see Der Standard, 24.10. 2008)

Concerning the case of Bakary Jassay it is to mention that only a judgement by the Administrative High Court of Austria declared the taken disciplinary measures as too little and consequently annulled the latter (VwGH of 18.09.2008, GZ 2007/09/0320). In a rarely seen clarity the Court found that even a first time occurring malpractice can lead to a dismissal of the person in question « [...] if the malpractice – like in the present case – is of a certain gravity [...] » At present time the supreme commission for disciplinary sanctions (Disziplinaroberkommission) is again to rule on the case.

Since the delivery of the judgement by the High Administrative Court almost a year has passed. As far as known at present time the supreme commission for disciplinary sanctions has not yet found a decision on the matter. In other words, this means that the four police officers in question are currently still on their duty as police officers.

Facing these developments it is of concern that not only by issuing a low disciplinary measure, ranging between 3, 4 and 5 monthly salary payments, at first place but the continues lack of a further finding by the supreme commission for disciplinary sanctions is to be appreciated in a critical way. In other words, it could lead to and serve the impression by the police officers in question that even gross violations of their duties only lead to low disciplinary measures. A consistent action against the perpetrators surely would entail an unprecedented signalling. It would ensure and enforce that torture, tantalisation and inhumane treatment is not to be tolerated within the police corps. However, at present time the impression could arise that such clear signalling is not desired. This could ultimately lead to a very different and unwanted signalling to the police corps, as such inaction would not only lead to an unwanted impression within the police corps as such but as well in its surroundings. Furthermore it is to state that the time limit of six month, granted to the supreme commission for disciplinary sanctions for a new finding, has passed.

It is the opinion of the authors that the present case proves a structural deficit within the disciplinary sanction system. Moreover, doubts arise whether the political will to demonstrate clearly its departure from the above mentioned practice is given presently in Austria.

Recommendation 12

The Committee notes with concern that under Section 79 (6) of the Aliens Police Act (2005), detainees awaiting deportation who are on hunger strike can be kept in detention which reportedly may result in situations where their life or health is endangered, in the absence of adequate medical supervision. It is particularly concerned about the cases of Yankuba Ceesay, an 18 year-old asylum seeker from Gambia awaiting deportation, who died in October 2005 in a 'safety cell' after 11 days of hunger strike, and Geoffrey A., a Nigerian detainee awaiting deportation, who was released in August 2006 after 41 days of hunger strike, without anyone having been notified about his release, and who collapsed on his way home. (arts. 6 and 10)

The State party should ensure adequate medical supervision and treatment of detainees awaiting deportation who are on hunger strike. It should also conduct an independent and impartial investigation of the case of Geoffrey A. and inform the Committee about the outcome of the investigations in that case and in the case of Yankuba Ceesay.

Measures taken by the authorities (status quo or improvement):

At this point nothing is known as to measures taken with respect to the above mentioned

recommendation.

Recommendation 16

The Committee notes with concern that Section 59 (1) of the Criminal Proceedings Reform Act (2004), which will enter into force on 1 January 2008, authorizes the police to supervise contacts between an arrested or detained person and counsel and exclude the presence of counsel during interrogations, "insofar as it is considered necessary to avoid that the investigation or the gathering of evidence are adversely affected by the presence of counsel." (art. 9)

The State party should ensure that any restrictions under Section 59 (1) of the Criminal Proceedings Reform Act on the contact between an arrested or detained person and counsel are not left to the sole discretion of the police, and that the rights to talk to counsel in private and to have counsel present during interrogations are never totally denied to persons deprived of their liberty.

Measures taken by the authorities (status quo or improvement):

Currently there is no legislative initiative in order to further or determine the legal consultation or representation of people finding them self in detention pending deportation. In 2008, the Human Rights Advisory Board suggested free legal support and council to the Minister of Interior, who had examined the issue in a sub commission during 2008. If this model is to be implemented safeguards must be established in order to secure the independence of these councils. This could be achieved by inserting a respective clause into the working contracts of these representatives, to ensure their independence. As such the Ministry of Interior or any aligned organ does not seem to be the appropriate organ to nominate such councils or to form part in any manner whatsoever in a presumed nomination procedure as the independence of the nominated persons would be highly questionable.

Unrestricted communication

The right to inform the next of a kin of an effected detention pending deportation is not automatically imposed and sometimes not realised.

One incident, happening at Traiskirchen, brought to our minds concerns a Chechen asylum seeker who tried to figure out the whereabouts of her husband for ten days. Her husband was detained pending deportation after a security check performed by the police in Vienna. He had no possibility to inform his wife or other persons close to him.

A similar situation concerns a Sudanese teenager who was held in detention pending deportation for eight days before he could inform somebody of his detention.

An other case concerns a case of an Afghan family of three kids who were taken into detention pending deportation although their mother was in the hospital at the crucial time.

A main area of concern deals with the insufficient information provided to the persons held in detention pending deportation regarding their legal options and possibilities. A majority of the persons held in detention pending deportation do not know the reasons why they are being held and furthermore, they do not know what next steps are to be expected. This information deficit bears in itself the danger that people surrender to the system possibly

creating and creating a degrading situation for them. Having to face a very complex and overwhelming administrative procedure it is impossible for themselves to safeguard their rights especially when it comes to the limitation of freedom of movement and detention.

Only people awaiting deportation who can afford to pay a lawyer are able to take the proper legal steps against the detention decree itself or other decrees issued during the asylum seeking process. In addition it must be held that substantial legal aid must be regarded as essential and that it must be provided in an accurate manner as most of the people held in detention pending deportation are unable to afford legal aid.

An alarming case in this regard is the current case of a Mohammed A., a handicapped Austrian citizen who was held in detention pending deportation due to the regulations in the aliens act for eight days. The Austrian was due to his handicap, resulting in a limitation of his intelligent and appreciates situations in its entirety, he was unable to organise himself legal aid or to understand his current situation. The concerned media reports (Der Standard 03 April 2009) Mohammed A. gave his name and address correctly to the alien police officers, showed them his keys to his home and asked the officers to call his mother and father. In addition to the facts it is as well of crucial importance that it took the officers in charge a total of eight days to research the facts of the case correctly and to understand the situation of Mohammed A. in its entirety.

Free support is granted by an NGO called « Verein Menschenrechte Oesterreich » in the provinces of Vienna, Lower Austria, Upper Austria and Tyrol. However, this support is conditioned that the person in question had already been supported by another NGO or the family had been able to organise support by another NGO which then submitted the request to them. Moreover, this NGO does not support any legal advice to the asylum seekers. It does, however, conduct interviews with the asylum seekers about a possibility of repatriation; these interviews are sponsored by the Ministry of Interior. This practice is as well very worrying as it represents one facet of the current trend within Ministry of Interior and its funding policy in connection to asylum projects and issues.

In this respect a trend can be made out which indicates a decrease in funding of legal advice to asylum seekers and an increase in funding of projects that deal with the promotion of repatriation. We have serious concerns with regards thereto that « Verein Menschenrechte Oesterreich » conducts these interviews without sufficiently presenting the asylum seeker his / her possibilities and the present condition of his case. In addition to that, we believe that insufficient information is given about what the real risks are of the concerned asylum seeker when he / she choose to go back to his home country.

Furthermore we believe that it is necessary to release the persons from detention pending deportation, when they decided to return home voluntarily. This measure must be taken in order to ensure that the decision to return is made without any form of coercion and therefore entirely on based on the free will of the affected person. In addition to this, the above suggested approach is as well the only means to ensure that the decision is not made during a situation of distress, which would easily be the case if it were to be made during detention pending deportation.

Moreover the compulsory legal advice, as provided in the asylum law, is only provided at the end of the proceedings, very shortly before the deportation decree is issued. The obligatory legal consultation provided for by the legislation on asylum usually is given at a very late time of the asylum procedure (shortly before the issuing of the notification). During legal consultation the focus lies on questions on the legislation on asylum, the counsellors are not in charge of questions/rights in connection with detention itself, they are not authorized, even when desired by the person seeking asylum, to appeal against any decision taken in the field of the right on asylum and also taken by the special police force in charge of foreigners; equally

counsellors are not allowed to make an appeal against a remand in custody. Counsellors can only act as legal representatives to refugees who are minors and unaccompanied (UMF) and who in general should not be taken in custody prior to deportation.

The advisory board on human rights concluded in his report of 2008 that the asylum seekers in Austria were insufficiently informed about their rights and legal possibilities ahead of them. One reason for this being, that there was no offer of free legal aid. A further reason is to be found in the fact that the information about a possible appeal is only provided in German on the deportation order. This being crucial as the majority of the affected persons does not understand or speak German. This situation would as well explain the low number of detention appeals. During the year 2007 6969 detention pending deportation orders were issued but only 630 of them were appealed.

It's important to note that against ministerial orders also minors are taken into detention pending deportation (in 2006: 185 minors at the age of 14 to 18 have been arrested in custody prior to deportation; see DiePresse.com: 05.02.2008).

1. A report published by the Human Rights Advisory Board in 2008 points out the particularly problematic cases of two minors being detained in the PAZ Eisenstadt because the underlying legal procedures can not be regarded as in conformity with art 8 EMRK as well as with the high courts' judicature. Another serious case mentioned was the arrest of a 16-year-old Chechen who had been held in solitary confinement for six days after he had got hurt by cutting himself.
2. Another, more recent case of mistaken measures of arrest happened only some weeks ago: The Vienna police had held a young disabled Sudanese in detention as he had failed to produce identification. The newspapers mentioned that the police neither checked the register of Austrian citizens for the young man's identity nor did they inform his parents but claimed he was a foreigner who did not have the Austrian citizenship. Due to the intervention of the MA17 the young man had finally been released after eight days of arrest (see DiePresse.com: 03.04.2009).
3. A family of five, they fled from Afghanistan and came over Greece to Austria. Because of psychological problems the mother had to stay in hospital, the father including its three small children came into detention pending deportation. If children are involved with deportation, generally they are not sent to arrest but taken to other facilities for accommodation. In this case this was not possible, since a direct deportation was intended, such a spokesman of the Ministry of the Interior. The case is particularly problematic because of the almost not working asylum system in Greece. (see oe24: 10.04.2009).

Recommendation 17

The Committee is concerned about the high number of asylum seekers, including traumatized persons, who have been detained pending deportation under the Aliens Police Act, which entered into force in January 2006. That Act provides that asylum seekers may be detained at an early stage of their asylum procedure if it may be assumed that their application will be rejected under the EU Dublin II Regulation. It is particularly concerned that asylum seekers awaiting deportation are frequently detained for up to several months in police detention facilities which are not designed for a long-term stay, and where the majority of detainees are reportedly confined to locked cells for 23 hours a day, separated from their families, and without access to qualified legal aid or adequate medical care. (arts. 10 and 13)

The State party should review its detention policy with regard to asylum seekers, in particular traumatized persons, give priority to alternative forms of accommodation for asylum seekers, and take immediate and effective measures to ensure that all asylum seekers who are detained pending deportation are held in centres specifically designed for that purpose, preferably in open stations, offering material conditions and a regime appropriate to their legal status, occupational activities, the right to receive visits, and full access to free and qualified legal counselling and adequate medical services.

Measures taken by the authorities (status quo or improvement):

As appreciated above the number of people being held under detention pending deportation is decreasing. This development is not exclusively connected to the jurisprudence of the Administrative High Court of Austria but must be seen as an important actor within this development. The Administrative High Court has found that only individual and precise behaviour by the person in question may allow detaining him / her pending deportation if there is enough certainty that the person in question will elude him / herself from the proceedings. It is not sufficient to refer to experience of the certain bodies in question (e.g. with regard to that persons from certain countries are more likely to withdraw themselves from the proceedings than others). In addition, general information as such does as well not suffice to detain a person pending deportation unless the information is individualized.

Regrettably it must be found, that, the jurisprudence of the independent High Courts, has only found its way hesitantly down to the relevant bodies. At present time decision are still made consisting out of blogs of texts which still lack an individual character. It is as well to question critically that the dedicated Ministry of Interior does not seem to be able to decide on the necessary changes unless new judgements are delivered by the two High Courts. However, even then the to be made changes are only imposed slowly and in an inert manner.

Concerning the conditions of the detention centres in Vienna it must be said that the latter vary greatly in a negative way in comparison to standard detention centres in Austria as such. There are almost no possibilities to exercise and persons held in detention pending deportation must spend most of their days in closed confinement.

There are no special centres detainees / asylum-seekers who are in custody are cared for, but detention pending deportation may be carried out in open wards. There are 310 places out of 796 dedicated to execute deletion pending deportation being carried out in open wards. This is a percentage of 39% of the total places being dedicated to detention pending deportation carried out in open ward. (Feb.2008) (parl AB 3349 vom 17.3.08) In 2007, out of 6600 detainees pending deportation around 2800 were detained in open ward. This equals a percentage of 42%. (parl AB 3349 vom 17.3.08)

Detention in open ward is usually granted only after the person has already spent a certain time in detention pending deportation. Moreover, the behaviour of those asylum seekers who are granted open ward detention are the ones with a favourable behaviour. However, the cell at these centres (PAZ) is only opened a few hours per day. Although some measures have been taken concerning the detention in open ward it must be still critically acclaimed that most of the persons detained spend 22 hours per day in a closed cell.

Detention of traumatized asylum seekers

The practice of detaining traumatized asylum seekers continues and they are not an explicit exception from the people who can be detained pending deportation. The risk of a worsening of the mental condition of the affected person is taken by the government. In this

respect a suicide of an asylum seeker had to be mentioned which took place in 2008 at PAZ.

Visiting Right

Usually people awaiting deportation are only granted to be visited half an hours per week. However, this period is still shortened frequently by interfering administrative procedure.

Concluding a current legislative initiative by the Ministry of Interior must be examined. This addition to the current aliens act allows for a detention pending deportation in certain cases without the necessity of a proportionality evaluation in the individual cases. This is the situation unless special circumstances resting in the person of the asylum seeker himself / herself do not allow for a detention pending deportation. The correct legal elaborations to this act only raise the issue of age and illness as such special circumstances. A concrete and individual case by case analysis of the individual persons is not anymore necessary when it comes to the cases stated in the new law. Should this alteration to the aliens act be decided upon a new increase in numbers of persons being detained pending deportation must be expected.