

## **Austrian NGO Recommendations concerning GRETA Evaluation**

### **Article 10 Identification**

Even if Austria has successfully carried out quite a number of seminars and trainings for relevant public authorities, a sufficient identification of victims cannot be granted still. The identification of trafficked persons requires an appropriate training in a gender- and culture-sensitive manner of the person or public authority in charge.

Even though a basis approach can be recognized, it cannot be classified as a systematic identification. Especially men and children are affected by this lack.

### **Article 13 Recovery and Reflection Period**

In reaction to the ratification of the Council of Europe Convention for the implementation of RL 2004/81/EG, Austria introduced a reflection period of at least 30 days.<sup>1</sup> This reflection period was only established through a decree.<sup>2</sup>

This internal order of the alien's police states that trafficked persons cannot be forced to leave within a period of 30 days. An analysis of the implementation of RL 2004/81/EG brought to light that Austria has not fulfilled the commitment to provide a reflection period in an adequate matter, since a clear legal regulation granting a reflection period is not given.<sup>3</sup>

The commitment to the implementation of a reflection period also included that presumed trafficked persons be protected from being forced to leave. This protection is not granted, either, through any decree due to the insufficient overall implementation.<sup>4</sup>

A Recovery and Reflection Period for trafficked women should be introduced through a legal regulation. The regulation should provide for a period of 6 months of recovery and reflection, or should at least – in case of an application for special protection – grant protection until a decision about the provision of residence is made.

During the recovery and reflection period no deportation or residence prohibition is allowed to be carried out. With such a Recovery and Reflection Period as drafted above, also including the right to support and counselling through the services of a specific victim protection organization, the purpose of the Council of Europe Convention could actually be accomplished.

We further recommend that until a decision on granting residence or not is made the person should be protected from deportation. We therefore recommend the introduction of an **additional provision to**

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<sup>1</sup> Erläuterungen zur Regierungsvorlage betreffend Übereinkommen des Europarats zur Bekämpfung des Menschenhandels, RV 1565 22. GP 14.

<sup>2</sup> Erlass des Bundesministeriums für Inneres BMI-FW1700/0090-III/4/05.

<sup>3</sup> Academic Network for Legal Studies on Immigration and Asylum in Europe, Directive 2004/81 Victims of Trafficking Synthesis Report (2010) 31, verfügbar unter:  
[http://ec.europa.eu/justice\\_home/doc\\_centre/immigration/studies/docs/odysseus\\_2004\\_81\\_victims\\_trafficking\\_synthesis\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/immigration/studies/docs/odysseus_2004_81_victims_trafficking_synthesis_en.pdf) (27. Juli 2010).

<sup>4</sup> Academic Network for Legal Studies on Immigration and Asylum in Europe, Directive 2004/81 Victims of Trafficking (2010) 33, [http://ec.europa.eu/justice\\_home/doc\\_centre/immigration/studies/docs/odysseus\\_2004\\_81\\_victims\\_trafficking\\_synthesis\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/immigration/studies/docs/odysseus_2004_81_victims_trafficking_synthesis_en.pdf) (27/7/2010).

the Recovery and Reflection Period which is currently regulated in form of a decree. An extension of this period of stabilization has to be possible until residence is granted.

#### **Article 14 Residence**

The new residence law § 69a NAG can be seen as an improvement to the prior legal situation, since authorities are now obligated to grant it to persons with special need of protection. Residence has to either serve criminal proceedings or claims at the civil court.

If no criminal proceedings are started or no claims are made at the civil court, no residence permit is granted.<sup>5</sup>

Through this regulation Austria fulfills the minimum standards.

Still this does not change that the possibility to obtain a residence permit is restricted only for cases in which criminal proceedings or claims at the civil court are being carried out.

The granting of the new residence permit § 69a NAG is still bound to a formal testimony with the police so that the offenders can be prosecuted. Also there is no suspensive effect.

This means in reality that although women apply for residence, they can still be taken into custody prior to deportation. This situation constitutes a serious hindrance of the person's stabilization process.

Also, in order to provide legal security to the victim, we recommend adding to the existent text in as much that the residence permit should also be granted to guaranty protection and security of a victim.

The expertise of a victim protection organization should be consulted for this matter and the residence permit should provide for a suspensive affect.

§§ 43 and 44 NAG state the requirements that need to be fulfilled to be granted "residence permit – unlimited" and "residence permit – limited". § 43 allows affected women to apply for "residence permit – unlimited" if they have previously been granted residence on the basis of §69a NAG for three years. Changing after one year is only possible, if the requirements asked for in §69a are still being fulfilled – a trial is still in process – and if the "Agreement on Integration" is being fulfilled as well.

The safety of trafficked women is not guaranteed automatically once offenders are in prison; therefore safety measures need to be provided even after main proceedings are finished, especially if women have given testimony against offenders. Traumatized persons can hardly cope with the difficulties concerning labor market before not even a year has passed.

The experience of Lefö-IBF proves that once women are identified there is a possibility for them to be released from custody prior to deportation, only they might still have residence prohibition. The annulment of this prohibition cannot always be achieved by Lefö-IBF.<sup>6</sup> Even if the woman was identified as trafficked being in custody prior to deportation, proceedings are still long-lasting and complicated.<sup>7</sup> In 2006, for example, it was not possible to annul the residence prohibition for two women who were in custody prior to deportation.<sup>8</sup>

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<sup>5</sup> Siehe § 69a Abs 3 NAG.

<sup>6</sup> Vgl Probst, Frauenhandel - Erlebtes (Un)Recht (2007) 5, verfügbar unter: [http://birgitsauer.org/SoSe%202007/VO%20Eine%20von%20FCnf/Frauenhandel\\_Unver%F6ffentliches\\_Manuskript.pdf](http://birgitsauer.org/SoSe%202007/VO%20Eine%20von%20FCnf/Frauenhandel_Unver%F6ffentliches_Manuskript.pdf) (28. Juli 2010).

<sup>7</sup> LEFÖ-IBF Tätigkeitsbericht 2009 (2010) 27.

<sup>8</sup> LEFÖ-IBF Tätigkeitsbericht 2006 (2007) 23.

#### **Article 12 (4) Access to the labor market**

The Austrian Immigrants Employment Act states that foreigners who own a residence permit – which in theory allows them free access to the labor market – can only get integrated into the labor market if the first employer seeks permission to hire the person. The potential employer therefore has to seek permission for a work permit and has to submit to a so called “substitute employee procedure”. The Austrian Public Employment Service (AMS) decides then, if a work permit can be granted. This is based mainly on the country quota for each sector. If the permit is denied it is possible to appeal.

This regulation applies to all women assisted by Lefö-IBF – therefore all recognized victims – who are allowed to remain in Austria (at least for the time being) and own a residence permit, or are EU-citizens from the “new” EU-states, since it is for all of them – at least until the current date – the first time to work in Austria.

Rarely are employers willing to seek permission, let alone appeal if permission is not granted right away.

Concerning the quotas we would like to add that these mostly apply to jobs, for which no special qualifications are needed. Although the women supported by Lefö-IBF are not all without qualifications, they have difficulties putting them into action especially during the first years due to their lack of German skills or the long-lasting nostrification process. The same conditions apply to any further education programs necessary for the integration into the labor market.

#### **Article 12 (1.b) and (3) Access to Health Services**

Trafficked women who are not EU-citizens are generally not covered by any health insurance until they are granted a residence permit including basic services.

Their medical treatment is dependent on doctors who are willing to provide their services up to a certain degree for free.

EU citizens who can legally remain in the country and seek a registration form<sup>9</sup> are obligated to present a health insurance (besides housing and food) if they intend to stay for more than 3 months. Just as in the case of residence for humanitarian reasons, housing, food and health supply has to be secured through the support of LEFÖ-IBF. This can be considered as problematic since the medical supply LEFÖ-IBF has to rely on does not provide for a free choice of medical practitioner, which would be especially important in the case of traumatized persons.

Through the committed crime trafficked women have already suffered a violation of their personal rights – A dependence on any kind of supply has to be considered as very critical under this aspect, especially concerning their right to physical self-determination in this specific area.

For LEFÖ-IBF the maintenance of this network of doctors, also in cooperation with an organization which provides basic health support for people without health insurance implies a considerable effort. Many times problems arise due to the fact that free services provided by doctors are not the same as paid services when it comes to comprehension and extend of these services.

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<sup>9</sup> Siehe § 53 NAG.

Once a trafficked person is identified a full access to health services should be granted, which does not give room for any stigmatizing restrictions.

This means that affected women should be granted free access to basic services – in the case of EU-citizens social welfare including health insurance – independent of their legal status or registration form.

#### **Article 15 (4) Compensation and legal redress**

In Austria victims of crime have the option to receive compensation from the state applying to federal law from July 9<sup>th</sup> 1972 on the granting of support to victims of crime (VOG)<sup>10</sup>.

Basis requirement to be able to apply to this act is that people have been injured or suffered damage to their health as a result of premeditated illegal acts are entitled to government assistance, victims are Austrian citizens or, those who are not Austrian citizens, fulfill certain requirements concerning their stay in Austria.

A person has a right to receive support if he or she became victim of a serious crime – which is a premeditated illegal act with a sentence to imprisonment of 6 months leads to physical or health damage.<sup>11</sup>

Since 30<sup>th</sup> June 2005 third country nationals are entitled to such assistance if they were staying legally in Austria at the time of the offence.

Persons with a citizenship of a Member State of the EU as well as EEA are entitled to compensation in cases the illegal act took place in Austria, in specific cases also abroad. It is required to confirm if legal grounds in the country of origin provide for compensation or not. Only if this is not the case, compensation is granted in Austria.

Experience proves that regulations vary from country to country – in Bulgaria for example the legally binding sentence has to be expected until a petition can be filed.

In particular the Victims of Crime Act provides for loss of income or alimony, medical rehabilitation measures such as psychotherapy, orthopaedic care such as physiotherapy, and professional rehabilitation such as financing of vocational training and social rehabilitation.

Trafficked women who did not own a legal status in Austria at the time the crime was committed are excluded from compensation. This means, that the state of the victim is not the focus of the law, but rather the residence status. New EU-citizens, who became victim of a crime after May 5<sup>th</sup> 2004 generally have the right to receive compensation on basis of the Victims of Crime Act, but are practically referred to their country of origin to first file a claim there. In case a therapy has to be started as soon as possible and cannot wait until legal entitlements are arranged, it has to be pre-financed.

In order to receive compensation through VOG it has to be possible to presume „with plausibility“ that a criminal act was carried out with intent. A sentence is therefore no requirement for the granting of

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<sup>10</sup> BGBl. Nr. 288/1972 idF BGBl. I Nr. 40/2009.

<sup>11</sup> §1(1) Z1 VOG.

compensation. It can rather be noted that the Federal Office for Social Issues (Bundessozialamt) “puts applicants off” until a sentence can be presented.<sup>12</sup>

The Victim of Crime Act should not be bound to the legal status of a victim, but rather to the site of crime. In the case of EU-citizens compensation through the Victim of Crime Act should be granted for the time being. The authorities should try to claim restitution from the victim’s country of origin afterwards.

The victim should not be burdened with having to run through additional official channels.

The German equivalent to the Austrian Victims of Crime Act states the same legal requirements. In an official circular from 2001 by the Federal Ministry for Labor and Social Order it is pointed out, though, that in cases of human trafficking the legal residence at the time of application is to be considered as relevant and not the one at the time of the criminal act.

If this internal order should be taken as an example for an implementation in Austria it should be considered to also include other acts of crime which are relevant for human trafficking. This means that besides § 104a StGB (Human Trafficking), § 217 StGB (cross-border trafficking for purposes of prostitution), § 216 StGB (procurement) as well as § 116 FPG (exploitation of a foreigner) should be included.

### **Article 26 Non-punishment provision**

Article 26 of the Council of Europe Convention states that parties shall „provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.“

This so called „non-punishment clause“ is supposed to grant that trafficked persons cannot be punished for actions they were forced to do. In Austria it is possible that a residence prohibition is pronounced or a woman is punished because of having used a falsified passport even though she was forced to do so. Additionally fines due to illegal abidance or illegal immigration have to be paid.

Therefore we demand that women who are identified as trafficked cannot be criminalized and we demand legal administrative or criminal complaints to be annulled. In Austria the non-punishment clause is only implemented in reference to the basic principle of criminal law based on the requirement of personal guilt (“Grundsatz des Schuldstrafrechts”)<sup>13</sup>. This implementation can only be seen as insufficient due to the actual criminalization of victims.

The recommendations have been developed in cooperation with the Austrian Boltzmann Institute for Human Rights.

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<sup>12</sup> Volksanwaltschaft, 33. Bericht der VA, 2009, S. 110.

<sup>13</sup> Erläuterungen zur Regierungsvorlage betreffend Übereinkommen des Europarats zur Bekämpfung des Menschenhandels, RV 1565 22. GP 20. Strafbar ist demnach nur jemand, die oder der schuldhaft handelt (§ 4 StGB).