



VOLKSANWALTSCHAFT

Annual Report

to the National Council
and the Federal Council

2010

Austrian Ombudsman Board

Table of Contents

Preface	5
<hr/>	
Key Figures 2010	7
<hr/>	
Data and Facts	7
Communication with the public	12
Events	14
<hr/>	
International Activities	17
<hr/>	
International Ombudsman Institute (I.O.I.)	17
Bilateral contacts and projects	19
International organisations	19
International conferences	22
<hr/>	
Fundamental Rights	23
<hr/>	
Right to freedom	23
Right to proceedings of appropriate duration	24
Principle of equal treatment	29
Right to private and family life	31
General information on anti-discrimination	33
Discrimination based on nationality or ethnicity	35
Discrimination based on illness or disability	39
Discrimination based on gender	40
Discrimination based on sexual orientation	41
Discrimination based on place of residence	43

Preface

Pursuant to Austria's Federal Constitution, the Austrian Ombudsman Board (*Volksanwaltschaft*, AOB) has independently and impartially monitored Federal, state and local public administration since 1977. Once a year, its members submit a report to the National Council and the Federal Council outlining the AOB's work, priorities and main findings during the past year.

This International Version of the AOB's 2010 Annual Report is an abridged version of the original (German) version. Section 1 provides an outline of the activities of the three members of the AOB during the year, along with all key data, e.g. statistics regarding complaints and investigative proceedings. Section 2 provides an overview of international activities, including International Ombudsman Institute (I.O.I) activities and bilateral contacts.

Since 2001, the AOB's Annual Report has put special emphasis on human rights. Accordingly, Section 3 provides examples of human rights related cases which the AOB has had to resolve in 2010 when assessing complaints about maladministration and infringements of administrative law by public authorities.

This international version and the original version of the Annual Report (in German) are available free of charge via download from our website www.volksanw.gv.at.



Peter Kostelka



Gertrude Brinek



Terezija Stoitsits

Vienna, June 2011

Key Figures 2010

Data and Facts

In 2010 a total of 15,265 people contacted the Austrian Ombudsman Board (AOB) regarding their concerns. Notwithstanding the fact that numbers were already high in recent years, this constituted a significant increase: the number of cases in which individuals felt they had concrete concerns about improper treatment by an authority or inadequate information rose to 11,198, an increase of 8% (2009: 10,320).

AOB busier than ever

Performance Record	2010	2009
Complaints regarding administration	11,198	10,320
Investigative proceedings initiated	6,613	6,235
Investigative proceedings not initiated	4,585	4,084
AOB challenges to statutory orders	0	1
Complaints outside AOB's area of responsibility	4,067	4,533
TOTAL number of citizen's concerns handled	15,265	14,853

The AOB initiated investigative proceedings in 6,613 cases; a 6% increase over last year (2009: 6,235), i.e. 59.1% of all complaints about authorities led to investigative proceedings. In 4,585 instances, although the matter did fall within the AOB's remit, it was evident from the outset that there had been no maladministration. Just over 4,000 instances involved matters beyond the AOB's sphere of responsibility. In these instances, the AOB provided additional information, including legal information.

Increase in investigative proceedings

The AOB's area of responsibility covers all public administration, i.e. all authorities, administrative bodies, agencies and departments responsible for implementing Federal law. Thus its realm of responsibility extends well beyond the Federal ministries. It includes for example Austro Control (air traffic management), social security institutions, and the Federal Asylum Office. In 2010 the AOB carried out a total of 4,125 investigative proceedings in matters involving Federal administration.

4,125 investigative proceedings on Federal Administration

Investigated Federal Ministries	2010	2009
Federal Ministry of Labour, Social Affairs and Consumer Protection	1,241	1,160
Federal Ministry of the Interior	781	474
Federal Ministry of Justice	708	756
Federal Ministry for Traffic, Innovation and Technology	353	398
Federal Ministry of Economy, Family and Youth	270	254
Federal Ministry of Finance	257	291
Federal Ministry of Agriculture, Forestry, Environment and Water Management	228	151
Federal Ministry for Education, Arts and Culture	72	68
Federal Ministry of Defence and Sports	68	36
Federal Ministry of Science and Research	60	66
Federal Ministry of Health (excl. health and accidental insurance)	47	51
Federal Ministry of European and International Affairs	22	44
Federal Chancellery	18	26
TOTAL	4,125	3,775

Social Affairs accounted for the lion's share of complaints

Just as in recent years, social affairs (an area handled by Ombudsman Peter Kostelka) accounted for the lion's share of complaints and investigative proceedings. Problems with social benefit entitlement levels, periods of employment applicable to pensions or unemployment benefits affect many people. Social affairs thus accounted for 30% of all investigative proceedings. The entities involved in this area are the Federal Ministry of Labour, Social Affairs and Consumer Protection, social security institutions and the Public Employment Service Austria (AMS).

Investigative proceedings regarding the judiciary

In 2010 there were 708 investigative proceedings concerning the judiciary (handled by Ombudswoman Gertrude Brinek). This area accounted for 17% of all investigative proceedings. The number of complaints in this area fell for the second year in succession. The AOB's remit covers administration of the judiciary

and the court, public prosecutors, the penal system and investigations into delays in proceedings. This year numerous complaints related to court rulings of the independent judiciary.

2010 saw 781 investigative proceedings relating to the area of internal security (handled by Ombudswoman Mag.^o Terezija Stoisits). That represents a 60% increase relative to 2009 (2009: 474). As in earlier years, this was largely attributable to the numerous complaints relating to foreigners' rights and asylum law. Complaints related to matters involving the Federal Ministry of the Interior and agencies subordinate to it: the Asylum Court and the Independent Federal Asylum Senate (UBAS). The parties involved complained in particular about the length of appeal proceedings.

Internal affairs: significant increase

Completed Investigative Proceedings within the Federal Administration	2010	2009
No case of maladministration	4,021	3,664
Maladministration on the part of the authorities	829	641
Investigative proceeding inadmissible (administrative proceeding still ongoing)	1,141	1,076
Complaints outside the mandate of the AOB	1,240	890
Complaints not suitable for handling (per the relevant regulations)	106	114
Complaints retracted	600	490
Qualified case of maladministration / recommendation	12	4
Challenges to statutory orders	0	1
TOTAL	7,949	6,880

6,613 new investigative proceedings were initiated in 2010; 1,336 investigative proceedings in progress from earlier years were processed. A total of 7,949 investigative proceedings were completed in 2010, an increase of 15% relative to 2009. At the same time the number of investigative proceedings which found maladministration also increased, to 829 (17.1% of investigative proceedings found maladministration (2009: 14.9%)). In 4,021 cases, no maladministration was found, and the parties involved were notified accordingly regarding the legal situation. On average, investigative proceedings took 46 days.

17% of investigative proceedings found maladministration

Advice and information

In 1,141 cases, the complaint fell within the AOB's area of authority, but there was no reason to initiate an investigative proceeding. In these cases, the parties involved were supplied with additional information, including legal information. 1,240 cases were beyond the AOB's sphere of authority. In these instances the AOB endeavored to provide information and advice: it contacted the relevant authority and provided a brief outline on how to resolve the situation. In 600 instances, the complaint was withdrawn.

70 ex officio investigative proceedings

Under the Austrian constitution, the AOB can initiate investigative proceedings *ex officio* if it has concrete suspicions regarding maladministration. As in earlier years, the Ombudspersons invoked this right in initiating 70 ex officio investigative proceedings (2009: 72).

Investigative Proceedings of the Regional and Local Government Authorities	2010	2009
Vienna	817	816
Lower Austria	575	537
Styria	345	302
Upper Austria	298	313
Salzburg	166	185
Carinthia	166	157
Burgenland	120	148
TOTAL	2,487	2,458

Regional and local administration

The AOB also monitors regional and local administration in seven of Austria's nine Federal States (Tyrol and Vorarlberg have separate regional Ombudsmen). In 2010 the AOB carried out 2,487 investigative proceedings in matters relating to regional and local administration, i.e. roughly the same number as last year (2009: 2,458).

Regional trends

Not surprisingly, the most populous states, Vienna, Lower Austria and Styria, top the list in terms of investigative proceedings. There was no uniform discernible trend in the number of complaints. Relative to 2009, numbers increased in Vienna, Lower Austria, Carinthia and Styria, but fell in the other states. Of particular note were the increase in the number of complaints in Styria (+ 14%) and the decrease in Burgenland.

Regional and Local Government Authorities AOB Priorities	2010	2009
Regional planning, housing and development	600	608
Social welfare, youth welfare	501	504
Community affairs	365	393
Citizenship, voter register, traffic police	206	235
Regional finances, regional and local taxes	181	158
Regional and local roads	158	152
Health care system and veterinary sector	132	99
Trade & industry; energy	108	49
State Office of regional affairs, civil service law and civil service compensation law for regional and municipal employees	65	45
Agriculture and forestry, hunting and fishing laws	60	52
Education system, sports and cultural matters	49	92
Nature conservation and environmental protection, waste management	37	36
Transport and traffic on regional and local roads (excl. traffic police)	25	33
Science, research and the arts	0	2
TOTAL	2,487	2,458

As in recent years, in investigative proceedings at the regional and local level, various specific areas predominate. Foremost among them are regional planning and building law, areas in which Ombudswoman Gertrude Brinek and her division handled 600 investigative proceedings in 2010. While 2009 had already seen a dramatic increase in complaints relating to social welfare and youth welfare (an area handled by Ombudsman Peter Kostelka), in 2010 that figure remained high (501 investigative proceedings). Many of the investigative proceedings handled by Ombudswoman Terezija Stoisits related to citizenship issues.

Monitoring priorities in
the Federal States

Communication with the public

Easily reachable

Citizens evidently welcome the fact that the AOB is easily reachable in person, by phone or in writing. 7,600 people made use of the AOB's information service, either in person or by phone, to obtain initial information, lodge a concrete complaint about an authority or to inquire about the status of proceedings. AOB headquarters in Vienna received around 15,000 letters and emails, about concrete problems with authorities or containing requests for a wide variety of information, including legal information. The AOB's correspondence in total amounted to over 25,000 items of written correspondence, an increase of 8% relative to 2009. Correspondence with authorities at the Federal, state and local level amounted to around 11,000 letters and emails.

Communication with the Public

- 7,600 people contacted the AOB information service
- 15,000 people wrote to the AOB
- 25,000 items of written correspondence in total
- 11,000 letters and emails were sent to authorities
- 273 consultation days
- 1,800 persons attended these consultation days

Increase in the number of consultation days

Consultation days remain popular. Held at locations throughout the Federal States, they are an opportunity for the parties involved to discuss their concerns directly with an Ombudsperson. 2010 saw a dramatic increase in the number of consultation days: 273 consultations days, with around 1,800 consultation hours, were held during the year (2009: 189). They were held at the offices of district authorities and state governments, and at penal institutions, police detention centres and federal army barracks. Vienna, as the most populous state, accounted for a large proportion of the consultation days (74). Tyrol and Vorarlberg (in these states, complaints about regional and local administration are not handled by the AOB) accounted for 21 and 10 consultation days respectively.

Consultation days	2010	2009
Burgenland	17	14
Carinthia	26	20
Lower Austria	43	28
Salzburg	19	15
Styria	28	16
Tyrol	21	15
Upper Austria	35	18
Vienna	74	54
Vorarlberg	10	9
TOTAL	273	189

The weekly television programme "Bürgeranwalt" ("Advocate for the People"), shown by the public broadcaster ORF once again proved an important platform for the AOB. As in previous years, the figures were highly satisfactory. It is one of the few TV shows to maintain its high market share (28%): on average the show had 317,000 viewers per week. One of the highlights were the comments by Ombudsman Peter Kostelka, who criticised recent changes in Austria's Social Welfare Act, which are supposedly beneficial but in reality merely place additional financial burdens on caregiving family members. Ombudswoman Gertrude Brinek reached a broad audience when she spoke out in support of the parties involved in a case of a flooded garage, after social housing organisation *Wiener Wohnen* refused to take responsibility for the damage to the cars. Ombudswoman Tereziya Stoisits also achieved high viewing figures when she criticised the fact that adopted children in Austria do not automatically obtain the same citizenship as their adoptive parents, since in many cases there are additional bureaucratic hurdles before they can obtain citizenship.

Successful weekly TV show

The AOB launched its new online portal in July 2010 which can be accessed at www.volksanwaltschaft.gv.at. The website now provides streamlined information about AOB activities and makes it easier for users to turn to the AOB for help. The website provides information on all areas of investigation, e.g. complaints about a specific social authority, questions on building law, or problems with residence per-

New website

mits and visas. Based on the initial experiences over the first few months, users particularly welcome the detailed information about consultation day scheduling. The easy-to-use online form for lodging a complaint electronically is also proving popular. In addition to this, the site features a "case of the week" and highlights from the "Bürgeranwalt" TV show. Information about the AOB is available in English, Spanish, French, Turkish, Croatian and Slovene. The user base is therefore highly international: the site has received hits from over 80 countries. In 2011 further elements will be added to the site, including listings of cases of maladministration found by the AOB.

Series of AOB publications

The AOB is producing a new series of publications, the first volume of which focuses on welfare for the elderly. The challenge of aging is one the AOB encounters increasingly in its day-to-day work. For the elderly, legal matters often become a serious burden, and difficult decisions have to be made about care and caregivers. Increasing numbers of people have to face the issue of legal representation/guardianship, and social and cultural links with the rest of society become increasingly difficult. In November 2009, Ombudswoman Gertrude Brinek organised an experts' roundtable about how to lay the political and legal groundwork for empowered aging. The first volume of the aforementioned series contains the articles and outcomes from this event: experts from relevant academic disciplines and the judiciary conducted a scholarly debate, along with representatives from guardians' associations and charitable organisations active in the field.

Events

Roundtable event on care and care providers

The issue of care is becoming increasingly important in the public debate, as society faces growing challenges in providing future-oriented, supportive, humane care. On 29 November 2010 Ombudsman Peter Kostelka, who handles the area of social affairs, therefore organised a roundtable event entitled "The Future of Care and Care Providers". Participants included Federal Minister of Social Affairs, Labour and Consumer Protection Rudolf Hundstorfer, numerous experts from relevant academic disciplines and organisations active in the field.

At present around 435,000 people, or around 5% of Austria's population, receive Federal or state care allowances. Every year the AOB conducts around 250 investigative proceedings in cases where parties or their family members have complained about concrete care allowance entitlement levels. Since Federal and state care allowance legislation was passed in 1993, AOB has built up an overview of around 5,000 concrete care entitlement assessments. Among these, one in five complaints has been justified.

Facts and figures

At present 280 different offices, including municipalities, pay care allowances. The AOB is calling for Austria-wide "quality assurance in the assessment process", to ensure uniform quality standards. For many years, AOB has also been calling for complementary social advisory services oriented to the specific situations, needs and options of individuals requiring care and their caregiving relatives. Applications for social services or additional funds for therapy and medical aids that can relieve the burden on relatives have to be submitted separately to various different authorities. For many caregivers, this becomes an intolerable burden. At present there is no "one-stop-shop" specialising in individual care needs and covering all branches of social insurance, state-specific claims and support, and needs-based non-cash benefits.

AOB calls for further measures

In her day-to-day work, Ombudswoman Terezija Stoisits is often confronted with problems relating to implementation of the Austrian Citizenship Act, and therefore organised an experts' symposium on citizenship law, held on 30 November 2010. The symposium covered problems with implementation of the Citizenship Act in the individual states, and the socio-political impact of immigration legislation. Participants included representatives from relevant authorities, academic experts and representatives from NGOs.

Experts' symposium on citizenship

Since 2006, the number of complaints relating to naturalisation submitted to the AOB has increased dramatically. In 2007 alone the number of complaints doubled. The background to this are the 2005 legislative amendments, which entered into force in March 2006 without transitional provisions. This has had a major impact on how naturalisation has been implemented in practice. In 2004, 41,645 people became naturalised Austrian citizens; by contrast, in 2009, the figure had fallen to around 8,000.

Facts and figures

Key issues Authorities handling naturalisation often have to tackle the question of the prerequisites for ensuring the individual can support himself/herself. These financial aspects are often highly problematic, and the authorities do not have any discretionary scope. In many instances lack of income leads to hardship cases. This applies particularly to people who, through no fault of their own, end up in financial distress and are then unable to obtain citizenship. Ombudswoman Terezija Stoisits has drawn attention to the fact that generally it is not that the authorities implement the legislation incorrectly, but rather that the legislation as such contains problematic provisions. One of the prerequisites for naturalisation is that the person needs to have been in the country for an uninterrupted period of at least 10 years. Thus beneficiaries of a subsidiary protection status may find it very difficult or impossible to obtain citizenship. Moreover, the lengthiness of the proceedings means numerous investigative proceedings arise.

International Activities

International Ombudsman Institute (I.O.I.)

The AOB has managed the General Secretariat of the International Ombudsman Institute (I.O.I) since September 2009. The I.O.I, with Ombudsman Peter Kostelka as its Secretary General, is a permanent, independent, non-partisan international organisation founded in Edmonton, Canada in 1978. It helps drive cooperation among independent ombudsman offices around the world. Its members are national, regional and local ombudsman offices from around 90 countries, and in total it has around 140 institutional members. It is organised into six regional groups (Africa, Asia, Australasia & Pacific, Europe, the Caribbean & Latin America and North America).

Structure and tasks

Following a period of transition after the I.O.I had moved from Edmonton to Vienna, in 2010 the I.O.I General Secretariat became fully operational. It currently employs three people, and functions as a competence centre for effective administration and upholding of the rule of law, and as an information source and service provider for its members worldwide.

General Secretariat now fully up and running

One of the I.O.I's top priorities is to function as an interface and platform for the exchange of information. The new communications platform www.theioi.org provides comprehensive information about I.O.I member organisations via an interactive member database. It also provides updates and information on events in the ombudsman field, and makes a variety of publications available for free download. In addition to its virtual archive, a physical archive containing over 3,000 published items is housed at the I.O.I. General Secretariat.

New communication platform and archive

Training courses for the employees of ombudsman offices are another key area of activities. The first of these, created by the Ombudsman of Ontario, Canada and entitled "Sharpening Your Teeth", was held in November 2010 at the General Secretariat in Vienna. 38 people from 18 different countries from 5 of the 6 I.O.I regional groups took part in this 3-day seminar, which helped them acquire specialist skill sets for carrying out systemic investigative proceedings. The seminar was available to member organisations free of charge,

First I.O.I. training course in Vienna

and it was particularly encouraging that employees from a number of poorly funded ombudsman offices were able to attend thanks to I.O.I. scholarships. The five recipients of financial support were from Burkina Faso, Djibouti, the Gambia, Mali and Zambia. Feedback has been very positive, and a further training course of a similar nature will be held in Vienna in June 2011.

New Executive Committee elected

New Executive Committee members were elected in autumn 2010, at the Annual Board Meeting, held from 16-20 October in Bermuda. The new President, Beverley Wakem, became a New Zealand Ombudswoman in March 2005, and the country's Chief Ombudswoman in April 2008. She has been an I.O.I Board member since 2008. Tom Frawley took office as Northern Ireland Ombudsman in 2000. He has already been the I.O.I's Vice-President from 2006 to 2007 and a Board member since 2004. The new Treasurer Alan Lai has been Ombudsman of Hong Kong since April 2009 and an I.O.I Board member since June 2009. Pursuant to the I.O.I's By-Laws, Secretary General Peter Kostelka is an Executive Committee member automatically.

Outcome of the meeting of the Board of Directors

At the Board meeting, the Board of Directors proposed formal approval for the I.O.I's business year and noted that the past year had been very successful. The I.O.I stepped up its activities during the year, and methods for handling member requests were reorganised. The number of members rose by around 5%, with new members from Europe, Asia and the Caribbean. The positive trend in membership, which reflects worldwide acceptance of the I.O.I's activities, was also beneficial from a financial standpoint. Members were reliable in paying their membership fees, which meant there were sufficient funds for additional projects. At the Board meeting the I.O.I also officially thanked the Republic of Austria for its support for the I.O.I.

Research and training

Also, the Board passed a resolution to provide support for training projects in the I.O.I regional groups (Africa, Asia, Australasia & Pacific, Europe, the Caribbean & Latin America and North America), and to step up scholarly research activities. Following completion of an academic study of Europe's ombudsman offices by Professor Gabriele Kucsko-Stadlmayer, their focus will broaden to include ombudsman offices in all the other I.O.I regions. A research project focussing on the Australasia & Pacific region, to be carried out by the Ludwig Boltzmann Institute of Human Rights (Vienna), is currently in the implementation phase.

Bilateral contacts and projects

At the beginning of the year, Ombudsman Peter Kostelka took part in a noteworthy ombudsman event in Helsinki, where Finland's Ombudsman Board, one of the world's oldest ombudsman offices, was celebrating its 90th anniversary. September saw an event in Hungary, attended by all three AOB members: in the presence of numerous parliamentarians, Dr. Máté Szabó, Hungary's Parliamentary Commissioner for Civil Rights, held discussions about the responsibilities of ombudsman offices in relation to anti-discrimination and environmental matters.

Events abroad

The AOB also hosted a number of international visitors during the year. Bilateral meetings of this kind were an opportunity to discuss collaborative activities, organisational issues, work methods, best practice models and how best to uphold human rights in often difficult situations. Visitors included Asad Ashraf Malik, Ombudsman of Sindh province in Pakistan; Catalan Ombudsman Rafael Ribó, and Azerbaijani Ombudswoman Elmira Suleymanova. European Ombudsman Nikiforos Diamandouros, Indonesia's Deputy Ombudswoman Sunaryati Hartono, and Young-Keun Lee, Vice-Chairman of Korea's Anti-Corruption and Civil Rights Commission, also strengthened their ties with the I.O.I. Also of note were visits from Polish Ombudswoman Irena Lipowicz; Israeli Ombudsman Micha Lindentrauss; a twenty-person delegation from Kazakhstan's Ombudsman Office and justice ministry, as well as Ian Pattison of the British and Irish Ombudsman Association (BIOA).

International visitors

International organisations

In January 2011, the human rights situation in Austria came under scrutiny as part of the UN Human Rights Council's Universal Periodic Review. The objective of the UPR is to determine whether and how a country, in this case Austria, is implementing civic, cultural, social, economic and political rights. The AOB played an active role in preparations for this, both within Austria and at the international level, and was represented by Ombudswoman Terezija Stoisits at the key meeting of the Human Rights Council in January.

UN Universal Periodic Review

NGO involvement	<p>In recognition of the fact that NGOs play an important role in this evaluation process, following a 2009 kick-off event the AOB organised four further meetings of representatives from civil society in the run-up to the UPR. The goal was to provide networking opportunities and an additional platform for NGOs' involvement in the UPR.</p>
<p>Commentary on the draft version of the UPR country report for Austria</p>	<p>In August 2010, the AOB provided commentary on the draft version of the UPR national report for Austria. In the commentary, attention was drawn to various key issues for upholding human rights efficiently. In particular, it was pointed out that there is still no national human rights action plan for Austria, nor any clearly delineated responsibilities or implementation plans, and there has been no evaluation of the status quo. It was also noted that there is still much work to be done in raising awareness about democracy, multiculturalism and peaceful conflict-resolution particularly among children and young people. So far, education about human rights is not taught as a standalone, mandatory school subject. The commentary drew attention to repeated cases of asylum seekers, refugees and migrants from non-EU countries suffering racist and xenophobic abuse, inter alia from politicians and in media reports. The commentary also called for more concerted action to combat discrimination, racism and xenophobia. In addition, it asserted that since education is a marker of social status and plays a role in integration, and since language ability heavily influences educational and career success, it will be important to provide support for language acquisition in the pre-school years to ensure equal opportunities.</p>
<p>AOB stakeholder report</p>	<p>As the Austrian NHRI (national human rights institution) accredited with B-status by the International Coordinating Committee of National Human Rights Institutions (ICC), the AOB was invited by the United Nations Office of the High Commissioner for Human Rights (OHCHR) to prepare a stakeholder report. This report was based on AOB activities in the area of fundamental rights, particularly in such fields as anti-discrimination, minorities' rights and prohibition of torture. The OHCHR subsequently prepared a summary of statements from Austria, used by members of the UN Human Rights Council as an information source and basis for debate. Encouragingly, this summary referred extensively to the AOB's statements, e.g. its appendix contained inter alia excerpts from the AOB annual report, in particular the parts about fundamental rights, as illustrations of human rights problems.</p>

The Paris Principles adopted by the UN Human Rights Commission in 1993 are a set of requirements regarding the role and functions of national human rights institutions. The ICC accredits national human rights institutions - many of which are ombudsman institutions - based on their degree of compliance with the Paris Principles. The AOB has for many years held ICC B-status, and over the past year stepped up its involvement with the ICC: in March 2010, Ombuds-woman Terezija Stoisits participated in the 23rd meeting of the ICC in Geneva, and in October 2010, Ombudsman Peter Kostelka attended the ICC Biennial Conference in Edinburgh.

Increased involvement with the ICC

All national human rights institutions accredited by the ICC have to undergo a status check at least every 5 years. The AOB is currently undergoing re-accreditation, a process which should be completed by summer 2011. In January 2011, extensive documentation was made available to the ICC, to provide a clear picture of the AOB's tasks, responsibilities and investigative activities under the Austrian constitution.

ICC re-accreditation

In April, Ombudsman Peter Kostelka was asked by the Council of Europe to participate in talks with parliamentarians from Monaco and ombudspersons from Belgium, France, Denmark, Cyprus, Spain concerning the setting up of an ombudsman institution in Monaco. The talks focussed on the particular conditions facing an ombudsman institution in a monarchy. Monaco is one of the few remaining European countries without an ombudsman office. At a parliamentary hearing in April, Ombudsman Peter Kostelka provided insight into approaches to the appointment process and the role and responsibilities of ombudspersons in general.

Council of Europe project in Monaco

The goal of the EU-funded twinning project "Support for the Strengthening of the Serbian Ombudsman" (2009-2011) is to help Serbia's ombudsman office improve and further professionalise its activities. In September and October 2010, an AOB expert, with the assistance of colleagues from Greece, provided help with setting up a public communication unit and reorganisation of the reporting system.

EU Twinning project with Serbia

Along with experts from ombudsman institutions in the Netherlands, Spain and France, the AOB participated in a workshop in Cairo organised by Egypt's Ministry of Administrative Development and the

Workshop in Egypt

European Commission, entitled "The Role of Complaints Offices in Public Administration". The AOB presented a paper on how to carry out investigative proceedings and gave examples of best practices.

International conferences

Conference of I.O.I.'s
European Region

In early October 2010, all three AOB ombudspersons were present at the conference of the I.O.I.'s European region. The conference, held in Barcelona and attended by around over 100 ombudspersons and experts, focussed in particular on migration and migrants' rights. Ombudsman Peter Kostelka gave a presentation on this topic entitled "Integration or Assimilation", and Ombudswoman Terezija Stoisits issued a statement on children's rights. Catalan Ombudsman Rafael Ribó was elected chairman of the I.O.I.'s European region, and Polish Ombudswoman Irena Lipowicz, Northern Ireland Ombudsman Tom Frawley and Norwegian Ombudsman Arne Fliflet were elected to the European Board of Directors.

Other interna-
tional events

As has been customary for many years, AOB attended the conference of Germany's Petitions Committee and the biennial regional seminar of the European Ombudsman. At the former, held in Schwerin in September 2010, Ombudswoman Gertrude Brinek, representing the AOB, gave a presentation on using citizen-friendly language. At the latter, held in Innsbruck in November 2010, Ombudswoman Ombudswoman Terezija Stoisits gave a presentation entitled "Exchanging Information via the European Ombudspersons' Communication Network".

Fundamental Rights

Right to freedom

Inmate released late

An inmate was released three days late from Klagenfurt prison: instead of being released on Friday, he was not released until the following Monday, as the reversal of verdict had been forwarded too late. Although the Graz Higher Regional Court decision was sent to the offices of the Chief Justice of Klagenfurt Regional Court via fax at 1.14 pm, it did not reach its destination until 10 am on the following Monday.

N. had been sentenced to 20 months in prison. Pursuant to a decision of 17 July 2009, the Graz Higher Regional Court ruled that the criminal proceedings regarding N. should be reopened. 17 July 2009 was a Friday. At Klagenfurt Regional Court the filing office and the offices of the Chief Justice were staffed without interruption until 3.30 pm. In the criminal departments, at least one employee is always present until 3.30 pm, and this was the case on 17 July 2009. After the necessary statement had been obtained from Klagenfurt prison, N. was released on 20 July 2009 at 11.40 am

Held in custody three days too long

The late release would have been avoidable if the Graz Higher Regional Court decision had not been sent to the offices of the Chief Justice of Klagenfurt Regional Court but instead directly to the filing office. The Ministry of Justice stated that it would have been feasible to send the decision on appeal to the relevant department during the afternoon of 17 July 2009. It would then probably have been possible to contact Klagenfurt prison to clarify the question of custody that day. However, the Ministry of Justice pointed out that in retrospect it was impossible to say precisely how much time the interaction between court and the prison would have taken.

Response from the Ministry of Justice

AOB: "Infringement of fundamental rights"

The AOB argued that custody issues ought to be handled as quickly as possible since the fundamental right of freedom is involved, and that if the entities involved in this case had been better organised, N. could have been released three days earlier.

Organisational shortcomings resolved

When the Chief Justice of Klagenfurt Regional Court learned of the case, before the AOB investigative proceedings were initiated, he instructed that fax machines which are not staffed on an ongoing basis should be monitored regularly, and that urgent documents should be forwarded to the relevant department immediately. Faxes are now sent directly to the filing office to ensure swift processing. The department in question now receives a phone call in advance, before the document is sent.

Right to proceedings of appropriate duration

ASYLUM PROCEEDINGS TAKING TOO LONG

During the year there was a huge, nearly tenfold increase in the number of complaints to the Asylum Court (2009: 24; 2010: 212). Moreover, complaints related not just to existing proceedings before the Independent Federal Asylum Senate (94), but also to new proceedings (118).

Efforts to reduce the backlog postponed

The AOB noted that in many instances appeal proceedings were taking several years to resolve. In many cases, until the complaint was submitted to the AOB the authorities had taken no steps at all in proceedings. Not surprisingly, this means the backlog has not been reduced (earlier it had been boldly claimed that this would be achieved by the end of 2010).

Political responsibility

The AOB is well aware of the difficult circumstances under which the Independent Federal Asylum Senate was operating, and that the situation has not in any way improved for the Asylum Court, which has been in operation since July 2008. When they started operations, both entities took on large numbers of existing cases, and only the Asylum Court was adequately staffed. This is also the reason why the AOB did not find a case of maladministration. Instead, it

suggested that the problems lay in the political realm. Pursuant to court rulings by the highest courts, being overworked does not automatically absolve an authority in cases of slowness in processing. However, obviously the Asylum Court was and is dependent on the funding and personnel resources available to it. The Independent Federal Asylum Senate drew attention to its personnel shortage as long as 10 years ago, but there was no response from the political realm.

Since it was founded in July 2008, the Asylum Court has received around 50,000 proceedings to process, of which around a half were existing proceedings. In total it has been able to process two-thirds of the proceedings. 80% of new proceedings involving a complaint have been processed within the statutory deadlines. However, based on current planning it will be late 2011 or early 2012 before all existing proceedings will have been closed and decisions made regarding new complaints (within the statutory deadlines), i.e. a year later than originally planned. The AOB has therefore advised that comprehensive support be given to the Asylum Court in its work, to prevent a large backlog of proceedings. The President of the Asylum Court has assured the AOB that it is on the right track. However, the Asylum Court has also stated that due to being short staffed, and in light of the heavy workloads on its staff, a speedy solution is not going to be feasible.

Asylum Court claims to be on the right track

ALIENS POLICE AUTHORITY SLOW IN PROCESSING

There have been repeated cases of despairing individuals contacting the AOB because proceedings handled by the Aliens Police Authority seem to go on endlessly.

On several occasions the AOB has reminded the authority that for example investigations regarding possible sham marriages have to be completed within three months. The goal of this is to prevent delays in residence permit proceedings. Among the complaints in 2010, in many instances there were also problems with family member residence permits, as the following cases show.

Authorities must keep to statutory deadlines

Vienna City Administration MA 35 sent a file to the Aliens Police Authority office of the Federal Police Directorate Vienna, because it suspected a sham marriage in proceedings for granting a family

Six months of waiting

member residence permit. Instead of the three months permitted by law, the Federal Police Directorate took six months to determine that there were no grounds for suspicion.

Two months
of inactivity

In another case, the relevant department of the Vienna City Administration also sent a file to the Federal Police Directorate Vienna, because it suspected a sham marriage in connection with an application for a family member residence permit. However, the case worker took two months to initiate an investigation. In this case, appropriate supervisory measures were initiated by the Ministry of the Interior.

Waiting three-
and-a-half years

In October 2006, Mr. N., who was studying in Vienna, applied for an extension to his student residence permit. MA 35 proceeded on the assumption that he was not fulfilling the performance requirements in his studies and forwarded the file to the Aliens Police Authority so that measures could be taken to terminate Mr. N's residence. Quite apart from the fact that this procedure was unlawful, the file remained in the hands of the Aliens Police Authority for three-and-a-half years. MA 35 only followed up three times, at one-year intervals. Encouragingly, the Ministry of the Interior stated that it would inspect all the files handled by the case worker in question, in search of any other instances of delayed proceedings.

Proceedings at a
standstill for 9 months

Ms. N. submitted an application to MA 35 for her daughter - at that time three years old - for an initial residence permit, for which a statement from the Aliens Police Authority was needed. The Aliens Police Authority took no less than nine months to determine that it did not have any objections to issuing the residence permit. In its comments, the Ministry of the Interior stated to the AOB that in this clear-cut case there was absolutely no justification for the proceedings taking so long.

Evaluation will form
the basis for future
improvements

The Ministry of the Interior has welcomed the AOB's criticism and initiated talks with the Vienna Chief of Police. Also, the Aliens Police Authority is currently reviewing its processing procedures. According to the current schedule, the outcome of these reviews will be available in 2011, and will form the basis for future improvements.

REVENUE AUTHORITIES SLOW IN CARRYING ON PROCESSING

In 2010, the AOB received 264 complaints concerning the revenue authorities. In many instances this related to problems with employee assessments, tax assessments for individuals drawing foreign pensions, or mandatory assessments for individuals with two employers. In other instances, enquiries and complaints were frequently about which expenditures could be deemed extraordinary charges that reduce the tax burden.

As is evident from the examples below, many complaints related to the duration of proceedings. In instances where an authority was slow in carrying out processing, the AOB repeatedly had to remind the authority of its obligation to reach decisions within six months. In these instances, it was unacceptable for the authority to argue that it had organisational or technical problems, or that the delay in processing was due to the complexity of the legal situation. If proceedings are delayed for clear reasons, it is the revenue authority's duty to at least notify the individual involved.

Delays in processing

Ms. N. contacted the AOB because it took six years after her partner's death for the inheritance tax to be determined. During the investigative proceedings, it emerged that although the Feldkirch revenue authority had been notified of the death in autumn 2004, an enquiry submitted to the relevant district court regarding the status of the probate proceedings had not been received. It was not until November 2009, i.e. six weeks before the five-year statute of limitations deadline, that the revenue authority requested an inheritance tax assessment from Ms. N. Although the revenue authority was in possession of the necessary information in December 2009, the decision was not issued until six months later.

Six years to determine inheritance tax

After waiting 18 months for her income tax to be determined, and having in vain followed up several times with the relevant revenue authority, Ms. N. contacted the AOB. During the investigative proceedings, the Ministry of Finance initially argued that the complexity of the matter meant it had taken a very long time to process. However, when the AOB inspected the files, it became clear that the problem was much more banal: the case worker at the Klagenfurt revenue

Anger over tax return

authority had simply failed to process the case, and the case had not undergone any internal assessment until the AOB made its official enquiry.

UNACCEPTABLY LONG CHILD SUPPORT PROCEEDINGS

The AOB is repeatedly contacted in connection with family law and child support matters, because the individuals involved feel that pending court proceedings are taking too long. This is a sensitive area of the law, and in the interests of legal clarity, court proceedings and decisions need to be carried out in a timely manner. This is the only way to guarantee to citizens that proceedings will be of an appropriate duration, as defined in Article 6 of the European Convention on Human Rights, and that they can have confidence in the rule of law and a properly functioning judicial system.

Proceedings took
three years

Unfortunately, in its investigative proceedings the AOB has repeatedly encountered very serious delays in proceedings. In one instance, for example, representatives of youth welfare authorities petitioned the Donaustadt District Court for increased monthly child support to be paid by a father to his two daughters (who were minors). Ultimately the proceedings went on for three years. After eight months the proceedings were halted by the Donaustadt District Court, so that it could be determined whether the father was capable of participating in proceedings. Moreover, medical experts took six months to ascertain whether the father was capable of working; and the Donaustadt District Court took around five months to issue instructions to another expert to carry out the necessary assessment. The representatives of youth welfare authorities had to abandon their representation of the two daughters, as they had in the meantime come of age and were left to cope with this sensitive legal matter alone.

Five months to
obtain documents

In March 2009 the Melk District Authority, acting on behalf of three minors in child support proceedings, petitioned the Ybbs District Court for increased child support. The court obtained all the necessary documents, but took five months to question the children's father about the petition for increased child support.

In September 2008, the Salzburg area District Authority, representing two minors, petitioned the Oberndorf District Court for increased child support. Following swift preliminary proceedings, by mid-February 2009 all the information required for a decision had been assembled. However, a court decision was not issued until nine months later. The Ministry of Justice attributed the delay to the fact that the judicial officer handling the case had been sick, and that judicial officers overall were having to handle an above-average workload.

Nine months
for a decision

Principle of equal treatment

ALLOWANCES FOR DISABLED STUDENTS

Pursuant to the Student Support Act, students with disabilities are entitled to additional student allowances. The amounts are based on the type and extent of disability, the goal being to cushion the additional financial burden faced by disabled students during their period of study. The details are set forth in law, and stipulate that those with hearing disabilities receive larger student allowances than those with visual impairment or those in wheelchairs.

Basically it should not be feasible to treat one group of disabled students differently from another group of disabled students. To be lawful, and in particular to be in conformity with the principle of equal treatment, the differing treatment would have to be justified by the facts. The AOB essentially cannot see any facts that might justify the different treatment as it is described above.

Different treatment
not justified

The Ministry of Science and Research, within whose realm of responsibility this matter falls, has presented arguments seeking to justify this unequal treatment, by drawing attention to the findings of a working group in which representatives from organisations for the disabled participated. By contrast with those with visual impairment and those in wheelchairs, those with hearing disabilities do not receive any financial support pursuant to the Federal Care Allowance Act. At the same time, this group has to bear substantial additional costs during their period of study, e.g. the costs of sign language interpreters, and those costs are not reimbursed from other sources. The

Ministry refers to working group findings

higher additional student allowance is intended as a way of partially offsetting those costs. Currently there are no plans for increasing the additional student allowance for those with visual impairment or those in wheelchairs.

AOB has proposed a better approach

The AOB does not believe the legislators intended for there to be different treatment of this kind. It has therefore recommended that the following concrete approach to the legislation be considered: one could ensure equal treatment for blind students, those with serious visual impairment, and students largely confined to wheelchairs, by increasing their additional student allowance to the level currently received by those with hearing impairment.

ASSIGNMENT PAY BASED ON MARITAL STATUS

Pursuant to federal regulations regarding travel remuneration, civil servants who have to perform work at different locations receive assignment pay in addition to their salary. Assignment pay is at its maximum starting from the thirty-first day of the assignment, and the amount paid is based on the civil servant's marital status.

Example case

Mr. N. is a civil servant. His partner, with whom he has a child, also works for the Federal government and receives a child allowance. When carrying out an assignment, he discovered that after the thirty-first day he received 25% of the day and night allowance as assignment pay. If he had a child with a non-civil-servant, he would be able to claim assignment pay of 75% of the day and night allowance, and it would be immaterial whether or not the parents were married, because the civil servant would himself be entitled to the child allowance.

Not justified by the facts

According to Constitutional Court rulings, for it to be deemed that there has been unequal treatment, this must always be justified by the facts. The AOB felt it was wrong that a civil servant's marital status could be deemed justification for paying higher allowances, and it seemed unlikely that differentiating between married and unmarried civil servants would stand up to scrutiny by the Constitutional Court in light of the law on equal treatment.

The Federal Minister within whose realm of responsibility the matter fell was of the opposite view: she argued that the existing law was probably in conformity with the constitution. However, the Constitutional Court sided with the AOB, and in December 2010 rescinded the provision on the grounds that it contravened the principle of equal treatment. The new, amended version of the travel allowance regulations is in line with the AOB's arguments in the above case. However, other provisions still seem unconstitutional, not least in light of the Constitutional Court's recent findings. The AOB has therefore asked the Federal Minister within whose realm of responsibility the matter falls to reassess the legislation.

Provisions rescinded
by the Constitutional
Court

Right to private and family life

VIDEO CAMERA ENCROACHING ON PRIVACY

Throughout Austria, the number of private video cameras used to monitor houses, building frontages etc. is on the rise. In many instances, the background to this is a feeling of security for the individuals involved, and protection of property. At the same time, citizens have quite rightly become more sensitised, particularly if they feel their privacy may be being encroached upon due to actual or suspected video monitoring.

A resident of the Municipality of Gaweinstal in Lower Austria complained to the AOB that his house (located opposite a kindergarten and the offices of the local authorities) was being monitored by a video camera attached to the front of the aforementioned buildings. Mr. N. suspected that this was somehow connected to a registration infringement with which he had been charged. He alleged that the municipality was evidently trying to keep watch on him as he entered or left his house. According to a newspaper article, the mayor had allegedly made the following statement: "It is nothing but a dummy video camera and will be taken down on Monday. This gentleman has been annoying us for years, now we want to annoy him a little."

Example case

In a similar case, the Supreme Court has already ruled that there is no difference between a dummy video camera and a functioning one. The more important issue is whether the individual involved has

Clear Supreme
Court ruling

a subjective impression of being watched by a video camera. If the individual feels as though he/she is being watched when entering or leaving their house, this constitutes a significant encroachment upon privacy. This also applies even if the alleged camera is merely a dummy.

AOB issued warning to municipality

This in fact contradicts not only Austria's Data Protection Act but also the European Convention on Human Rights. In cases of this kind, it is deemed that there is direct encroachment on privacy and the video camera must be deactivated or taken down. In light of jurisprudence, the municipality was urged to refrain from similar actions in future.

PERSONAL DATA FOR STUDENT ALLOWANCES APPLICATION

The father of a student complained to the AOB about an application for a student allowance for his daughter. He was required to supply information about his highest education level attained and his profession. He argued that these questions were unnecessary, and that there were no legal grounds for them.

Data provided on a voluntary basis for statistical purposes?

The Ministry of Science and Research stated the following: the data would be used solely for statistical purposes by the authority providing the students allowances, so that it could determine the efficacy of support for students; the personal data would not be shared with other entities; and answering the questions was "voluntary" and would have no impact on assessment of claims for student allowances. The Ministry did not provide any legal grounds for gathering the data.

Legal grounds required

The AOB stated the following: it was not clear from the form whether supplying the data was "voluntary" and would have no impact on processing of the application for a student allowance; if the data were to be used for other purposes, legal grounds for gathering the data should have been provided; and the forms should have contained wording stating that answering the questions was not mandatory and that they would be used for statistical purposes only. The Federal ministry uses the data for planning and for evaluating

support for students. The student allowance authority has been instructed to structure the forms in such way that they make it clear that supplying the data is voluntary.

The Ministry for Science and Research has duly noted the AOB's arguments, and when the Student Support Act is amended, it intends to submit various proposals to the National Council.

Ministry noted
AOB's arguments

General information on anti-discrimination

The AOB has always been a well-known, independent, cost-free, easily accessible point of contact for victims of discrimination. Every instance of discrimination by an executive body itself, or the executive body's refusal to use every means at its disposal to intervene against such discrimination, is a "case of maladministration" as defined in Article 148a of the Austrian Federal Constitution. The AOB therefore plays a key role in implementing the complex network of national, European and international legal instruments for combating discrimination.

The AOB is a point of
contact for victims of
discrimination

The complaints received by the AOB relate to various different forms of discrimination. In numerical terms, the main focus is on complaints in the area of social affairs, involving discrimination based on nationality or ethnic background, and discrimination based on illness or disability. In many instances, solutions are found during the course of investigative proceedings. In other instances, the AOB issues recommendations or makes proposals regarding necessary changes in the legislation.

Different forms
of discrimination

Thus for example the AOB called for sign language interpreters to be provided cost-free when needed in proceedings involving social security institutions, and this was implemented via the Social Law Amendment Act 2010. Moreover, at the AOB's suggestion, the minimum residence duration clauses for regional family benefits, which were in place in several of the Federal States, have been rescinded. They were discriminatory in particular in instances where a foreigner had not been living in Austria for long.

Success stories

Collaboration
with NGOs

When working with NGOs in the area of anti-discrimination, the AOB has found systematic infringements of human rights, e.g. during an assessment based on a complaint submitted by the anti-racism NGO ZARA. Numerous people had complained about the behaviour of authorities in connection with criminal complaints about advertisements hostile to foreigners and other forms of racist discrimination.

2010 also saw inter alia the completion of extensive investigative proceedings in connection with a complaint submitted by the "Klagsverband" (an umbrella organisation of NGOs working to combat discrimination) and ZARA about various aspects of how the Equal Opportunities Commission was conducting its operations. The outcome of these investigative proceedings was a series of legislative proposals which were incorporated into the evaluation process for the recent amendments to equal opportunities legislation. The AOB also suggested that it would be helpful if the possibility of class actions was introduced in this area.

International
criticism

The background to these proposals is that there have been various international reports highlighting a need for improvement in combatting discrimination in Austria. For example, the 4th Report of the European Commission against Racism and Intolerance (ECRI) was critical of the lack of resources available to the equal opportunities executive bodies, and of the Equal Opportunities Commission's slowness in handling proceedings. It also criticised the fragmentary legislation, institutions and proceedings in the area of equal opportunities law. The ECRI has recommended that the equal opportunities legislation be overhauled, and that civil society and NGOs play a part in this.

Unresolved issues

Although various AOB proposals were incorporated into the most recent amendments to equal opportunities legislation, a number of issues remain unresolved. Regrettably, although there were plans to broaden the scope of protection against discrimination beyond the world of work, so as to include discrimination on grounds of sexual orientation, age, worldview or religion, this did not in fact happen. The AOB has for a long time been calling for equal protection for all against discrimination, e.g. most recently at Austria's 1st Universal Period Review (UPR) of human rights in Geneva on 26 January 2011. Evidently the AOB must continue calling for measures of this kind.

Discrimination based on nationality or ethnicity

CITIZENSHIP OFTEN DECISIVE FACTOR FOR FAMILY BENEFITS

In 2010, many complaints concerning family benefits were once again from families with non-Austrian citizenship. Of the nearly 100 complaints regarding family allowances, over half were from foreign citizens.

Foreign students, for example, who start a family in Austria, are entitled to family allowances, and the Higher Administrative Court concurs with the AOB's legal opinions regarding these issues. Moreover, asylum seekers are entitled to family allowances if their asylum proceedings were pending as of 31 December 2005 and they have been living in Austria for more than five years, and the Higher Administrative Court concurs with the AOB concerning these issues too. Furthermore, around a third of the approximately 50 complaints concerning child care benefits had an international dimension.

Potential for discrimination

Often legal questions arise that relate exclusively to individuals of non-Austrian citizenship, either from elsewhere in the EU or from other countries. Families of non-Austrian citizenship living in Austria frequently face specific problems. Family allowances and child care benefits are not due until the newly born child has received a residence permit, and this may take quite some time. A number of families have missed application deadlines for child care benefits, due to having misunderstood advice from health insurers or because that advice was unclear and as a result has forfeited claims.

Claims often unclear

Cooperation with the office of the competent Families State Secretary has been very fruitful, and the AOB's suggestions and advice have been taken into account. In many instances, after the AOB became involved it proved possible to find suitable solutions.

Government cooperative

ASYLUM SEEKERS CAN BE ENTITLED TO FAMILY ALLOWANCES

A number of families contacted the AOB because they have been living in Austria as asylum seekers for many years but are not receiving any family allowances. The legal situation regarding family allowances for asylum seekers is complex, as it has changed several times over the past few years, which makes matters difficult for the individuals involved as well as the authorities.

Complex legal situation

Since 1 January 2006, families with non-Austrian citizenship are only entitled to family allowances if they reside in Austria lawfully. However, the Higher Administrative Court has ruled that this new legal situation does not apply to asylum seekers whose asylum proceedings were already pending as of 31 December 2005. For these individuals, the old legal situation, whereby foreign families *inter alia* are entitled to family allowances if they have been present in Austria for an uninterrupted period of at least 60 calendar months, continues to apply.

Authorities' arguments

The asylum proceedings of the families involved were still pending as of 31 December 2005. However, they did not receive any family allowances. The relevant authorities argued that asylum seekers were unable to have permanent residence in Austria; instead, they merely had temporary residence until completion of asylum proceedings. The AOB took the opposite view: "permanent residence" implies actual physical presence and does not relate to whether the presence is lawful. Hence in the AOB's opinion asylum seekers who have been living in Austria for more than 60 calendar months fulfill the legal prerequisites for permanent residence despite the fact that their right of residence is only temporary, and should therefore receive family allowances.

Court concurred with AOB

The Higher Administrative Court concurred with the AOB. It is irrelevant that asylum seekers do not have a residence permit entitling them to permanent residence: asylum seekers whose asylum proceedings were pending on 31 December 2005 and have been living here more than five years are entitled to receive family allowances and child care benefits.

INCOME-BASED CHILD CARE BENEFITS

The N. family, who are currently living in another EU country, wish to move back to Austria because they are expecting a baby, and intend to apply for income-based child care benefits here. However, the prerequisite for this is that the earning parent needs to have had "gainful employment subject to social insurance contributions in Austria" six months in the period up to the child's birth. Since the N. family does not fulfill this prerequisite and doubts whether the prerequisite is in accordance with EU law, it contacted the AOB.

Doubts as to whether this provision is in accordance with EU law were raised when the draft law was tabled. The Legal and Constitutional Service of the Federal Chancellery stated that the provision "clearly contradicts EU law in that it invokes gainful employment 'within Austria'". The Ministry of Labour, Social Affairs and Consumer Protection and the Association of Social Security Institutions made similar criticisms. Slight changes were then made to the wording, but the provision nonetheless continued to contradict EU law.

Draft legislation contradicts EU law

In her statement to the AOB, the Families State Secretary pointed out that in actual concrete cases, periods of gainful employment in another EU country are in fact taken into account along with periods of gainful employment in Austria, and that this therefore fulfills the EU's equal treatment regulations. Thus for example if a person first works for two months in France, and then for four months in Austria in the period up to the child's birth, this is deemed to fulfill the statutory prerequisite, and the person is entitled to income-based child care benefits in Austria.

How the issue is handled in practise

To date, there have been no court rulings regarding whether Community-law equal treatment provisions are being adequately implemented. Nonetheless, per the current status of the academic debate and court rulings, it does seem that they are. Article 6 of EU Regulation 883/2004 sets forth a totalling rule and stipulates that insurance periods and gainful employment periods in another country should be taken into account along with periods in Austria. However, this probably does not mean that only the periods of gainful employment abroad are to be taken into account when assessing a claim for income-based child care benefits (per the current status of legal scholarship and court rulings at any rate).

Information for applicants needs to be improved...

In all cases, it is important to ensure that the individuals involved are provided with sufficient information to enable them to assert their rights. The information sheet attached to the application form unfortunately does not contain any such information, and all one can find on the website of the relevant department is a vague allusion to the aforementioned practice.

...and wording of legislation must be amended

The AOB feels that wording which clearly contradicts EU law should be eliminated, and has therefore proposed that the wording of the legislation should be amended so as to include an explicit reference to periods of gainful employment in EU or EEA countries.

POLICE DISCRIMINATION WHEN CHECKING DRIVING LICENCE

Mr. N. is an Austrian citizen of Nigerian background. At Linz central railway station, he was asked to show his driving licence as part of a police check. The driving licence showed his birthplace as a city in Nigeria. The policewoman thereupon asked Mr. N. what his citizenship was. The grounds she cited for doing so were that Mr. N. did not look "typically Austrian". This approach gave Mr. N. the impression that only those with skin of a particular colour are viewed as and accepted as Austrians. He construed the policewoman's remarks as a racist insult.

Remarks deemed inappropriate by Ministry of the Interior

In its statement to the AOB, the Ministry of the Interior made it very clear that this remark was inappropriate, and that remarks of this kind undermine confidence in the police. According to the Ministry, the policewoman's superior has firmly instructed her to in future refrain from remarks which could be construed as discriminatory or racist.

Awareness-raising and further training

The AOB then gathered information about awareness campaigns and further training measures. The Ministry of the Interior pointed out that "Human Rights, Ethics & Policing" is one of the topics in basic training and further training courses, and that seminars entitled "A World Of Difference" held in conjunction with the Anti-Defamation League are designed to raise consciousness among all law enforcement officers. In addition, a project called "Police. Power. Individuals. Rights" aims to further raise levels of professionalism among police officers, and the new project "Strategic Complaint Management" is geared to increasing the accountability of immediate and indirect

superiors in instances where a law enforcement officer has been found to have acted improperly.

The AOB welcomes these programmes and will continue working hard to ensure law enforcement officers adopt a better, less coarse approach to the issues of racism and discrimination.

AOB continues to work hard in this area

Discrimination based on illness or disability

ELIMINATING BARRIERS FOR THE DISABLED

Every year, numerous disabled people contact the AOB after having been confronted by barriers in public places, e.g. in hospitals, nurseries, homes for the elderly, on public transport, at the offices of public authorities, or at courts where the facilities or access for the disabled are inadequate. The lack of access to the media and the ORF's limited amount of programming for those with hearing disabilities or visual impairment have also come under fire.

Thanks to the Social Law Amendment Act 2010, some action has been taken to answer the AOB's call to eliminate various existing barriers which were preventing access to the law. Now, sign language interpreters are provided cost-free on demand for all proceedings involving social security institutions.

Some minor successes

Like the UN Universal Declaration on Human Rights, the UN Declaration on the Rights of Disabled Persons is primarily directed at the state, which must uphold the rights the declaration sets forth. The latter declaration puts particular emphasis on infrastructure, and many of the barriers faced by the disabled in their everyday lives are physical barriers. Overcoming them requires comprehensive efforts on the part of the state and society and the willingness to shoulder the resulting financial burden. It is not just a question of somehow integrating people with physical or mental disabilities. Instead, it is all about ensuring from the outset that they can participate in activities at all levels and to the full extent. One of the prerequisites for this is to ensure that barriers are quickly eliminated.

Serious setbacks

Completion dates for solutions postponed by legislators

Pursuant to the Disability Equality Act, which entered into force in 2006, existing barriers in Federal buildings must be eliminated in a step-by-step manner by the end of 2015. The AOB has criticised the fact that to save money this ten-year transition period has now been extended by a further four years, to the end of 2019. This puts Austria in contravention of its international obligations pursuant to the UN Declaration on the Rights of Disabled Persons, which has only been in force for a rather short time.

Discrimination based on gender

PUBLIC TRANSPORT PASSES - DISCRIMINATION AGAINST MEN

The AOB has received numerous complaints from male users of trains and buses, because passes offering special rates for pensioners are available to women over the age of 60, but to men only from the age of 65 up. In 2009, the AOB came to the conclusion that these differing age limits constituted gender discrimination, and has called for this situation to be rectified. The Equal Opportunities Commission concurred.

Constitutional Court concurred

A December 2010 ruling by the Constitutional Court also concurs with the AOB: the differing age limits for men and women constitute discrimination and must be rescinded immediately. Tying reductions in public transport fares to the differing statutory pension ages in fact does nothing to offset the existing disadvantages affecting women (i.e. lower pension payments and disadvantages with regard to social security due to child-rearing).

Infringement of the guarantee of equal treatment

A lower age limit for women for eligibility for public transport fare reductions cannot be deemed a social benefit for offsetting specific disadvantages affecting women. It infringes the guarantee of equal treatment under EU law and Austrian law. The Constitutional Court has therefore rescinded the relevant statutory provisions effective as of 31 December 2011.

Swift solution needed

Independently of this one-year transition period, it should be duly noted that the EU equal treatment regulations are directly enforceable, and infringements thereof should therefore be rectified imme-

diately. It is incumbent on the relevant departments and public transport associations to quickly come up with a socially just and non-discriminatory solution.

Discrimination based on sexual orientation

HOMOSEXUAL MEN NOT PERMITTED TO DONATE BLOOD

Two men contacted the AOB after feeling discriminated against due to the fact that homosexual men are not permitted to donate blood or plasma. On a Red Cross questionnaire, in answer to the question "Are you a man and have you had sex with another man?" they responded truthfully in the affirmative, and were therefore not allowed to donate blood.

With a view to reducing the risk of transmission of diseases, European and Austrian legal principles set forth which individuals are not permitted to donate blood. Pursuant to the applicable EU directive and Austria's Blood Safety Act, it is only individuals whose sexual behaviours involve a high risk of infection who are explicitly prohibited from donating blood. The legal bases do not stipulate mandatory exclusion of homosexual men.

Legal principles

In practice, the following arguments are used to justify the fact that homosexual men are automatically excluded from blood donation: there is a significantly higher risk of HIV infection among homosexual men; despite the latest test methods the residual risk after blood donation cannot be ruled out; and since condoms do not provide 100% protection, even homosexual men who practice safe sex are excluded from blood donation.

Residual risk too great?

Quite rightly, this approach has been contested. In a statement to the AOB, the Minister of Health expressed misgivings about it. He has presented a draft amendment to the Blood Donor Ordinance aimed at adding an amendment explicitly prohibiting discriminatory wording in questionnaires. Whether this draft amendment actually enters into force will depend on the outcome of a European study. In some countries, there is a blanket prohibition on homosexual men donating blood, while in some European countries blanket prohibitions of this kind have recently been rescinded. The European Com-

EU regulation in preparatory phase

mission has therefore arranged for a study to be conducted that will provide a sound basis for a uniform Europe-wide regulation. The results of the study are expected in June 2011.

AOB's position Discrimination based on sexual orientation is banned under Austrian constitutional law and EU law. It is potentially highly discriminatory to insinuate that homosexual men generally have profligate lifestyles and present a positive threat via potentially infectious blood. The Council of Europe recently stated that a blood recipient's right to protect his/her health takes priority over the donor's wish to donate. Studies have shown that the danger of becoming sick with HIV/AIDS and of passing on the virus is greater among homosexual men than among heterosexuals. However, other studies have shown that a significant proportion of HIV-infected people were infected via heterosexual contact rather than homosexual.

Research results needed Hence a blanket exclusion of homosexual men from blood donation would only be justifiable if there were clear, scientifically-based health protection arguments. At present there is no clear answer to this based on the data available. The AOB therefore hopes that the results of the European research will become available soon. Only then will we be able to issue well-founded recommendations, which must then be swiftly implemented in Austria.

Discrimination based on place of residence

FEES FOR NON-RESIDENTS HIGHER THAN FOR RESIDENTS

Municipalities are not permitted to charge non-residents more than residents. A 10% surcharge to use a day centre in a home for the elderly, or differing entry fees for a swimming lake, infringe EU non-discrimination and equality principles. These prohibitions are also applicable to the aforementioned cases. Statutory prohibitions as defined in the Austrian Civil Code are involved, which means agreements which conflict with those prohibitions are (partially) void.

It was brought to the AOB's attention that the home for the elderly in Schwertberg (Upper Austria) had been built by the local municipality. Subsequently a day centre, operated by the non-profit care organisation Volkshilfe Perg, was built adjoining it. The municipality was charging day centre users day rates for use of services. To use the day centre, individuals not resident in Schwertberg were subject to a 10% surcharge on top of the income-based rates. Since the municipality of Schwertberg was unable to proffer any pertinent grounds for this, the AOB demanded that the fees be made uniform.

Example from
Upper Austria

The Municipality of Gaishorn (Styria) was charging Gaishorn residents € 15 for a season ticket for the swimming lake, while charging non-residents € 17. Initially the municipality justified this by arguing that it had to spend substantial amounts to operate the swimming lake, and that since it was funded from local taxes, locals were charged less for a season ticket. After becoming aware that charging differing prices contravened the principle of equal treatment, the mayor without further ado provided his assurance that in future the municipality would desist from charging residents and non-residents differing amounts for season tickets.

Season tickets for
swimming lake

EDITOR

Austrian Ombudsman Board (Volksanwaltschaft)

1015 Wien, Singerstrasse 17

Tel.: +43 (0)1 512 93 88

E-Mail: ioi@volksanw.gv.at

Website: <http://www.volksanw.gv.at>

The unabridged version of the Annual Report of the Austrian Ombudsman Board to the National Council and the Federal Council is only available in German and can be found on the AOB website.

