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Contents

Executive summary

Definitions

[1]. In Austrian law there is no uniform definition of disability in general or specifically for mental disorders and intellectual disability. These issues are cross-cutting ones – therefore there are numerous definitions.

[2]. The most frequently used terms are *geistige oder psychische Funktionsbeeinträchtigung* [impairment of intellectual or mental functions] used in anti-discrimination law, *geistig behindert* [mentally disabled] in guardianship law and *psychische Krankheit* [mental illness] in custody law.

Anti-discrimination

[3]. Austria has ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) and there is an equality clause in the Federal Constitution. The EU anti-discrimination directives were implemented in 2005.

[4]. Persons with mental disorders and persons with intellectual disabilities are protected from discrimination regarding their access to employment. They are protected from discrimination under federal law and the law of most *Länder* [Provinces] – except Vienna and Lower Austria – regarding access to and supply of goods and services available to the public, including housing.

Specific fundamental rights

[5]. In strict legal terms, people with mental disorders and people with intellectual disabilities enjoy full civil and political rights. Most of these are laid down in the European Convention on Human Rights (ECHR) which was implemented in Austria at federal constitutional rank. There are no explicit exceptions for people with mental health problems.

[6]. The right to life is only relevant for people with mental health problems in asylum procedures, where some decisions involve specific precautions before a person can be deported.

[7]. The UN Convention against Torture (CAT) is in the rank of a simple law in Austria. The right to freedom from torture or cruel, inhuman or degrading treatment or punishment is guaranteed by Article 3 ECHR. There is a specific provision in civil law on treatment which determines that severe medical treatment for people in custody is only lawful with the approval of the custodian and two physicians.

[8]. The right to freedom from exploitation is guaranteed by constitutional and other provisions.

[9]. The right to liberty and security is protected by constitutional law and other legal provisions.

[10]. The right to fair trial is widely protected in Austrian law.

[11]. The right to privacy, including the access to one's own confidential medical records, is protected in many acts.

[12]. The right to marry, to found a family and to respect for family life is protected by Article 8 ECHR and provisions in civil law. Recently, Austria was found to have violated Article 8 ECHR by the European Court of Human Rights (ECtHR).

[13]. In legal terms the right to have children and maintain parental rights is protected. In recent years, the youth welfare services have had to deal with an increasing number of cases. Parents with mental health problems may be more severely affected, but there are no figures available.

[14]. There are no limitations on the right to property.

[15]. The right to vote is fully guaranteed in Austrian law. Nevertheless, easy-to-read information before elections is not made publicly available.

Involuntary placement and involuntary treatment

[16]. In 1990 an act on compulsory admission was enacted in Austria. It puts personal rights and liberty at the centre of procedures and is therefore an improvement on the situation before.

[17]. *Psychische Krankheit* [mental illness] is the term used in the *Unterbringungsgesetz* (UG) [Compulsory Admission Act (CAA)][1] to describe the mental condition of people who can be involuntarily

[1] Austria/BGBl 155/1990 as amended by BGBl I 12/1997 (10.01.1997).

hospitalised. The relevant criterion is whether a person endangers him-/herself or a third person. People who suffer from a *geistige Behinderung* [mental disability] are not covered.

[18]. There are strict rules on the assessment, decision procedures and duration that leave little space for arbitrary decisions.

[19]. The *Patientenanwaltschaft* [Patient Advocacy and Representation] offers free support and legal representation and must be involved in every single case involving involuntary placement.

[20]. There are practical problems for some groups like schizophrenic and bipolar patients who cannot be hospitalised or only for a short period of time. They are frequently released without the necessary support.

Competence, capacity and guardianship

[21]. Since 1984 a newly formulated legal framework has provided for tailored assistance for people with mental disorders and/or intellectual disabilities if they are unable to adequately handle their affairs on their own (*Federal Law on Guardians for Disabled Persons*).[2] Guardianship may only be provided for adults and only subsidiarily. Subsidiarity means that there is no other possibility to protect people with mental disorders or an intellectual disability. Guardianship gives them appropriate support in handling their affairs.

[22]. If there is no other means of support for people with mental disorders or intellectual disabilities to handle their affairs, e.g. family members or representatives of competent institutions or organisations, guardianship can be ordered by the district court as the court of curatorship.

[23]. There are no specific health-related causes determining the legal incapacity of adults. The law only speaks about "mental illness" and "people with intellectual disabilities". The decisive requirement determining mental disorders and/or intellectual disabilities is that the individual is unable adequately to take care of their own affairs.

[24]. The Austrian guardianship system sets out different scopes of guardianship: guardianship for a single issue; guardianship for several matters (which are the most frequent cases of guardianship); and guardianship for all matters.

[2] Austria/BGBl. 136/1983, Section 268(1).

1. Definitions

[25]. In Austrian law, there is no uniform competency at the level of either the Federal States or the nine Provinces concerning disability. Disability issues are a *Querschnittsmaterie* [cross-cutting issue]. Therefore several federal and provincial regulations contain provisions regarding mental disorders and intellectual disability. The most important ones relate to *geistige oder psychische Funktionsbeeinträchtigung* [impairment of intellectual or mental functions] used in anti-discrimination law, *geistig behindert* [mentally disabled] in guardianship law and *psychische Krankheit* [mental illness] in custody law.

[26]. Section 3 of the *Behindertengleichstellungsgesetz* [Persons with a Disability Equality Act (DEA)][3] defines *Behinderung* [disability] as "the effect of a non-temporary disruption of physical, intellectual or psychiatric functions or of sensory functions likely to impede participation in society. A period expected to last more than six months is deemed non-temporary". The explanatory notes do not provide much more information, stating only that disability (apart from physical disabilities) covers any "impairment of…the intellectual capacities or mental condition compared with that typical of a person of the same age".[4] A search on the *Rechtsinformationssystem des Bundes* [Federal Database for Legal Information][5] does not provide any relevant case law clarifying the term "impairment of intellectual or psychiatric functions".

[27]. Section 268 para. 1 of the *Allgemeines Bürgerliches Gesetzbuch* (ABGB) [Civil Code (CC)] reads: "If a person of full age, who suffers from a mental illness or an intellectual disability (person with a disability), is not capable of dealing with all or some of his or her affairs without danger to himself or herself or any other person, s/he must be provided with a guardian ex officio or upon application".

[28]. According to Section 3 para. 1 of the *Unterbringungsgesetz* (UG) [Compulsory Admission Act (CAA)] [6] a person can be hospitalised if he or she suffers from a *psychische Krankheit* [mental illness] and therefore seriously and gravely endangers his or her health or life or those of others. The act does not provide any further definition of the term *psychische Krankheit.* In most cases a *psychische Krankheit* is

[3] Austria/BGBl I 82/2005 as last amended by BGBl I 67/2008 (07.05.2008).
[4] Austria/182 ME XXII. GP, p. 24, available at: http://www.parlament.gv.at/PG/DE/XXII/ME/ME_00182/imfname_025589.pdf (29.09.2009).
[5] http://www.ris.bka.gv.at (29.09.2009).
[6] Austria/BGBl 155/1990 as last amended by BGBl I 12/1997 (10.01.1997).

indicated by behaviour endangering the patient's health (e.g. getting into a bathtub filled with water at 60 degrees Celsius).[7] *Geistige Behinderung* [mental disability] is not covered by this definition.[8]

[29]. There is no other relevant case law further contributing to the definition of the terms specified.

[30]. Accordingly, the definition of (mental) disability in anti-discrimination law meets the requirements of the Convention on the Rights of Persons with Disabilities (CRPD). It includes people with mental and intellectual disabilities and reflects an understanding of disability as a social phenomenon. There are no definitions of the terms used in any other acts. Therefore they should be clarified.

[7] Austria/Oberster Gerichtshof/ 3Ob263/07h (08.05.2008).
[8] Austria/Oberster Gerichtshof / 4 Ob 531/91 (28.05.1991).

2. Anti-discrimination

2.1. Incorporation of United Nations standards

[31]. Austria signed the CRPD and the Optional Protocol on 30.03.2007 and ratified it on 25.09.2008.[9] The ratification was followed by an amendment of the *Bundes-Behindertengesetz* [Federal Disability Act (FDA)].[10] Austria also participated in the one-day consultation of the United Nations High Commissioner for Human Rights (OHCHR) but did not provide any answers.[11] Furthermore, the *Second EU Disability High Level Group Report on the UN Convention (2009*) does not provide any specific remarks on the situation of people with mental disorders either.[12] In order to monitor the implementation of the CRPD a *Monitoringausschuss* [Monitoring Committee] was set up.[13] It consists of seven members[14] with the right to vote (four persons with a disability, one member of an NGO focusing on human rights, one member of an NGO focusing on development, one academic representative) and two representatives of the competent ministries with an advisory function. The Monitoring Committee is independent, can publish opinions and recommendations and must report to the *Bundesbehindertenbeirat* [Federal Disabilities Advisory Board] on a regular basis. The Provinces must appoint independent bodies for the range of their competences.[15] The appointment or creation of such bodies has not yet been publicly announced.

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9 Austria/BGBl III 155/2008 (23.10.2008).
10 Austria/BGBl 283/1990 as last amended by BGBl I 109/2008 (08.08.2008).
11 Office of the High Commissioner for Human Rights (2008) Open-Ended Consultation on Key Legal Measures for the Ratification and Implementation of the Convention on the Rights of Persons with Disabilities, Geneva, available at: http://www2.ohchr.org/english/issues/disability/docs/FinalConsultationreport.doc (06.10.2009).
12 European Commission (2009) *Second disability high level group report on implementation of the UN Convention on the Rights of Persons with Disabilities*, available at: http://ec.europa.eu/social/BlobServlet?docId=2790&langId=en (06.10.2009).
13 Section 13 FDA.
14 Section 13 para. 1 FDA.
15 Section 13 para. 8 FDA.

2.2. The anti-discrimination national framework

[32]. Before the implementation of Directive 78/2000/EC (Employment Equality Directive) there were no efficient anti-discrimination provisions in Austrian law for people with mental disorders or intellectual disabilities.

[33]. At a constitutional level, the general equal treatment clause of Article 7 para. 1 of the *Bundes-Verfassungsgesetz* [Federal Constitution][16] was amended in 1998 and now reads: "… No one shall be discriminated against because of his or her disability. The Republic (Federation, Länder and municipalities) commits itself to ensuring the equal treatment of disabled and non-disabled persons in all spheres of everyday life."

[34]. The *Behinderteneinstellungsgesetz* [Act on the Employment of Persons with a Disability (AED)],[17] enacted in 1969, lays down specific provisions for persons with a disability, especially the duty of employers to employ one *begünstigt Behinderten* [person with a disability eligible for preferential treatment] for every 25 employees and specific provisions for the termination of labour contracts with such people. Employers who refuse to employ a *begünstigt Behinderten*, despite the fact that they are obliged to, must pay an *Ausgleichstaxe* [compensatory fine]. According to Section 9 of the AED the *Ausgleichstaxe* must be fixed each year. In 2009 it was set at €220 by Government decree.[18]

[35]. The implementation of the Employment Equality Directive 2000/78/EC became effective on 01.01.2006. From this date, discrimination on the ground of disability was prohibited in working life as set out in Section 7a-q of the AED and outside the sphere of work in accordance with the DEA. There is no relevant case law yet with regard to persons with mental disorders and persons with mental disability.

[36]. Preferential treatment arrangements – *positive Maßnahmen* (positive action) – are only found in the AED and the DEA. Section 7 of the DEA provides that "specific measures to ensure equal inclusion of persons with disabilities in the life of society shall not be assumed as discrimination according to this act". The "life of society" includes goods and services provided by federal institutions as well as private

[16] Austria/BGBl 1/1930 as amended by BGBl I 47/2009 (22.05.2009).
[17] Austria/BGBl 22/1970 as last amended by BGBl I 67/2008 (07.05.2008).
[18] Austria/BGBl II 411/2008 (24.11.2008).

individuals and companies. Health care, education and housing are therefore included.[19] Social protection is not explicitly mentioned but should also be included if it is provided by the Federal State.

[37]. The corresponding clause in employment law is Section 7c para. 9 of the AED. The concept of disability in both the DEA and the AED covers people with mental disorders. There is no relevant case law yet with regard to the understanding and definition of (mental) disability.

[38]. In provincial law all nine Provinces have implemented the Employment Equality Directive 2000/78/EC.[20] Seven of them have prohibited discrimination on the ground of disability outside employment[21] – including health, social protection, access to goods and services that are available to the public, including housing, and education. Only *Niederösterreich*[22] [Lower Austria] and *Wien*[23] [Vienna] have not included disability. None of these acts have precise definitions of disability. Nevertheless, with regard to the CRPD and the Employment Equality Directive it is obvious that mental disorders are covered by "disability". There is no relevant case law yet. All provincial acts include reasonable accommodation clauses. Basically, they state that any measures in favour of vulnerable groups do not constitute discrimination.

[39]. The relevant equality body is the *Behindertenanwalt* [Ombud for Persons with Disabilities (OPD)]. According to Section 13c para.1 of the FDA, he or she is competent to counsel and support people who

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19 H. Hofer/W. Iser/K. Miller-Fahringer/M. Rubisch (2006) *Behindertengleichstellungsrecht: Kommentar*, Vienna, Graz: nwv verlag, pp. 35-39.

20 Burgenland/ Section 1 para.1 *Antidiskriminierungsgesetz (ADG)* [Anti-discrimination Act (AA)], LGBl 45/2005 (08/10/2005); Carinthia/Section 1 para. 1 *ADG* [AA], LGBl 63/2004 (01.01.2005); Lower Austria/ Section 1f *Gleichbehandlungsgesetz (GlBG)* [Equal Treatment Act (ETA)], LGBl 69/1997 as amended by LGBl 40/2005 (29.04.2005); Upper Austria/ Section 1 *ADG* [AA], LGBl 50/2005 as amended by LGBl 136/2007 (01.01.2008); Salzburg/ Section 1f *GlBG* [ETA], LGBl 31/2006 as amended by LGBl 44/2009 (22.04.2009); Styria/ Section 1f *GlBG* [ETA], LGBl 66/2004 (06.07.2004); Tyrol/ Section 1f *Landes-GlBG* [Provincial ETA], LGBl 1/2005 as amended by LGBl 39/2008; Section 1f *Gemeinde-GlBG* [Communal ETA], LGBl 2/2005 as amended by LGBl 40/2008; Vorarlberg/ Section 1 and Section 3 *ADG* [AA], LGBl 17/2005 as amended by LGBl 49/2008 (13.08.2008); Vienna/ Section 18a *Dienstordnung* [Civil Servants Act], LGBl 56/1994 as amended by LGBl 20/2009 (11.03.2009); Sec 4a *Vertragsbedienstetenordnung* [Act on Contract Employees], LGBl 50/1995 as amended by LGBl. 33/2009 (17.06.2009).

21 Burgenland/ Section 1 para.2 *ADG* [AA], LGBl 45/2005 (08/10/2005); Carinthia/ Section 29 para. 1 *ADG* [AA], LGBl 63/2004 (01.01.2005); Upper Austria/ Section 1f *ADG* [AA], LGBl 50/2005 as amended by LGBl 136/2007 (01.01.2008); Salzburg/ Section 1 and Section 28 *GlBG* [ETA], LGBl 31/2006 as amended by LGBl 44/2009 (22.04.2009); Styria/ Section 1 and 32 *GlBG* [ETA], LGBl 66/2004 (06.07.2004); Tyrol/ Section 2f *ADG* [AA], LGBl 25/2005 as amended by LGBl 41/2008; Vorarlberg/ Section1 para. 3 and Section 3 para 1 *ADG* [AA], LGBl 17/2005 as amended by LGBl 49/2008 (13.08.2008).

22 Lower Austria/ Section 11 *ADG* [AA], LGBl 45/2005 as amended by LGBl 25/2008 (22.02.2008).

23 Vienna/ Section 1f *ADG* [AA], LGBl 35/2004 as amended by LGBl 13/2008 (02.02.2008)

feel discriminated against within the scope of the AED and the DEA. He or she is also competent to support people with mental disorders. A report about the work of the Ombudsman for Persons with Disabilities (Behindertenanwalt) can be found in the Annex to the "Disability Report of the Austrian Federal Government 2008".

3. Specific fundamental rights

[40]. Austria signed the European Convention on Human Rights (ECHR) on 13.12.1957 and it was ratified on 03.09.1958.[24] It was formally accorded the rank of constitutional law in 1964.[25] Protocol No 2 was ratified in 1958[26], Protocol No 4 in 1969[27] and Protocol No 6 in 1985.[28]

3.1. The right to life

[41]. The right to life is protected by Article 2 of the ECHR and Article 1 of Protocol No 6 (abolition of the death penalty).

[42]. Contrary to the jurisdiction of the European Court of Human Rights (ECtHR), there was a long and controversial discussion in Austria about whether Article 2 of the ECHR ("Everyone's right to life shall be protected by law") triggers the State's duty to enact specific laws.[29] It is only recently that this principle has been acknowledged.[30] The *Verfassungsgerichtshof* [Constitutional Court] decided that there is no protection of life before birth.[31]

[43]. The right to life as an issue for people with mental health problems has only been considered in a few cases. The Constitutional Court repealed provisions allowing the execution of decisions against traumatised asylum seekers who had appealed.[32]

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24 Austria/ BGBl 210/1958 as amended by BGBl III 179/2002 (06.08.2002).
25 Austria/ BGBl 59/1964 (06.04.1964).
26 Austria/BGBl 210/1958 as amended by BGBl III 30/1998 (27.02.1998).
27 Austria/BGBl 434/1969 as amended by BGBl III 30/1998 (27.02.1998).
28 Austria/BGBl 138/1985 as amended by BGBl III 30/1998 (27.02.1998).
29 B. Kneihs (1999), „Das Recht auf Leben in Österreich", in: JBl 1999, p. 76.
30 R. Walter/H. Mayer/G. Kucsko-Stadlmayer (2007) *Bundes-Verfassungsrecht*, Vienna: Manz, rec. 1389.
31 Austria/VfSlg. 7400 (not published in RIS).
32 Austria/Verfassungsgerichtshof / G237/03 et al (15.10.2004).

3.2. The right to freedom from torture or cruel, inhuman or degrading treatment or punishment

[44]. The right to freedom from torture or cruel, inhuman or degrading treatment or punishment is guaranteed by Article 3 of the ECHR and the CAT[33] (not in constitutional rank). Section 283 para. 1 of the Civil Code (CC) lays down that medical interventions require the consent of the individual or his/her representative. Section 283 para. 2 of the CC prescribes that medical treatment which results in serious interference of physical integrity or the personality is only lawful if the appointed guardian agrees and two physicians certify that the individual cannot decide on his or her own and that the treatment is necessary for his or her wellbeing.

[45]. The *Oberste Gerichtshof* (OGH) [Supreme Court (SC)] decided[34] that the right to self-determination requires that physicians provide information on the risks of a treatment, taking into account the capacities of the respective patient.[35] The right to proper information on risks and alternatives derives from the individual contract governing medical treatment. Only if this information is understandable can the patient appropriately consent to the treatment. Without the patient's consent the physician is liable for treatment without consent under Section 110 *Strafgesetzbuch* (StGB) [Criminal Code]. [36]

[46]. Generally, the *Verfassungsgerichtshof* (VfGH) [Constitutional Court] considers the physical and mental integrity of Austrian citizens and aliens to be protected by Article 3 of the ECHR. A violation of Article 3 requires an infringement of human dignity;[37] e.g. in a case in which an individual person was slapped in the face.[38]

[47]. A mentally ill Russian citizen claimed that his human dignity would be violated by his deportation to Poland. The Constitutional Court

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33 Austria/BGBl 492/1987 (16.10.1987).
34 Austria/OGH/7 Ob 208/08a (05.11.2008).
35 For details on the necessary consent of the patient see: G. Aigner/A. Kletecka/M. Kletecka-Pulker/M. Memmer (ed.) (2008) *Handbuch Medizinrecht für die Praxis*, Vienna: Manz, pp. I 131ff.
36 Austria/BGBl 60/1974 as amended by BGBl I 98/2009 (18.08.2009).
37 R. Walter/H. Mayer/G. Kucsko-Stadlmayer (2007) *Bundes-Verfassungsrecht*, Vienna: Manz, rec. 1394.
38 Austria/Verfassungsgerichtshof/VFSlg 8296, 10.052 (06.03.2008).

declared the deportation to Poland lawful because of the proper treatment he was expected to receive there.[39]

3.3. The right to freedom from exploitation

[48]. The right to freedom from exploitation is laid down in Article 4 of the ECHR. Article 7 of the *Staatsgrundgesetz 1867* (StGG) [Fundamental Rights of Citizens Act 1867][40] annulled the existence of any *Untertänigkeits- und Hörigkeitsverband* [traditional personal dependency rights under the laws of the Habsburg monarchy].

[49]. There are a number of *Behindertenwerkstätten* [sheltered workshops] where people with all kinds of disabilities are either employed or work for pocket money. In part, these workshops are intended to support integration into the labour market. Their function is also to keep people busy during the day. Provisions can be found in the law of the Provinces – the legal situation in Vienna will be presented as an example.

[50]. The *Wiener Behindertengesetz* [Vienna Disabilities Act (VDA)][41] offers facilities for integration into the labour market (Section 6 and 9), sheltered workshops (Section 18), facilities for vocational therapy (Section 22) and residential homes (Section 24). Participation in such services is often related to the provision of various subsidies (monetary aid, homes for assisted living etc.). Due to the mixed nature of these activities (work, vocational training, activities to keep people occupied during the day), some are paid and therefore include social security protection, while others are not. Under Section 11 of the DEA there are facilities for the integration of people with a disability who are eligible for preferential treatment which can be funded where the persons with a disability are employed according to the relevant collective bargaining agreement.

[51]. Employment and daytime activities are offered for persons with disabilities. Employment is paid and offers social security protection, whereas daytime activities do not provide an income and full social insurance, though they are accompanied by social benefits. There are no clear legal standards for this distinction. Nevertheless, organisations which offer such daytime activities are often profit-making. As yet there has been no public criticism of this imbalance

[39] Austria/VfGH/B2418/07et al.

[40] Austria/Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger für die im Reichsrate vertretenen Königreiche und Länder, RGBl 142/1867 as amended by BGBl 684/1988 (20.12.1988).

[41] Vienna/LGBl 16/1986 as amended by LGBl 30/2007 (29.08.2007).

between fully protected employment and less protected daytime activities. One of the reasons seems to be that gaining income and social insurance might be accompanied by the loss of many social benefits. There has not yet been any decision in an Austrian court about the legal nature of these relationships and the question of whether the unpaid activities undertaken by persons with a disability should be considered forced labour. Nevertheless, there are a number of activities which it has been decided are in line with Article 4 of the ECHR, such as military service and alternative civilian service.[42]

3.4. The right to liberty and security

[52]. The right to liberty and security is laid down in Article 5 of the ECHR and the *Bundesverfassungsgesetz über den Schutz der persönlichen Freiheit* (*PersFrG*) [Federal Constitutional Act on Personal Liberty].[43] Section 2 para. 1/5 of this law allows the withdrawal of personal liberty if a person endangers himself or herself or someone else because of a mental illness.

[53]. There are specific acts to guarantee the right to liberty and security that are of importance for people with mental illnesses. One is the *Unterbringungsgesetz* (UG) [Compulsory Admission Act (CAA)] which is described in Chapter 4. The *Heimaufenthaltsgesetz (HeimAufG)* [Residential Homes Act][44] includes provisions ensuring the personal liberty of people who require assistance because of their age, a disability or illness (Section 1 para. 1). Section 2 para. 2 lays down that this act regulates the conditions and remedies for the deprivation of personal liberty in residential homes where – inter alia – at least three people with mental illnesses or mental disability can regularly be cared for (Section 2 para. 1). Examples of measures that restrict personal liberty and must therefore be in line with this law are: measures preventing a person from getting out of bed by means of nets, belts, sheets or such obstructions as tables, chairs or bedside tables; any measures to prevent someone from getting up from a wheelchair; measures to prevent someone from leaving a room by locking the door, isolation rooms, trick locks or alarm systems that ring a bell when the door is opened.[45] There are a number of provisions in public health law for restricting and depriving an individual of the right to liberty which may be relevant for persons with mental illnesses, e.g. Section 7 para. 2 of the *Epidemiegesetz*

[42] Austria/VfGH/VFSlg. 17.341; VfGH 15.10.2005, B 360/05.
[43] Austria/ BGBl 684/1988 as amended by BGBl I 2/2008 (04.01.2008).
[44] Austria/BGBl I 11/2004 (27.02.2004).
[45] R. Klaushofer (2004) ‚Heimaufenthaltsgesetz (HeimAufG): Ein erster Überblick', in: ZfV 2004, p. 590.

[Act on Epidemics][46] and Section 5 para. 2 of the *Geschlechtskrankheitengesetz* [Act on Venereal Diseases].[47]

[54]. There is no relevant case law available.

3.5. The right to fair trial

[55]. The right to fair trial is protected by two constitutional provisions: Article 83 para. 2 of the Constitution[48] ("No-one may be deprived of his or her lawful judge") and Article 6 of the ECHR. There is no question that people with mental disorders and intellectual disabilities can take part in proceedings according to their capacity to take legal action. If they are not capable of taking full or partial responsibility for their affairs, either close relatives according to Section 284b CC or legally appointed guardians (Section 268ff CC) can act in their name (for details see Chapter 5).

[56]. Like everyone else, they can apply for legal aid in criminal and civil law cases.

[57]. Recently, access to justice for persons with disabilities has been discussed and Section 73a of the *Zivilprozessordnung* (ZPO) [Civil Procedure Code][49] was amended. Now it is clear that people with a hearing impairment have the right to sign language interpreting, the costs of which are to be covered by the State. For people with mental disorders and intellectual disabilities no similar provision exists.

[58]. Only very few judgments are relevant with regard to the procedural rights of persons with disabilities. In one of them the Constitutional Court was asked to decide a case in which an individual with a guardian personally employed a lawyer without the guardian's consent. In another case,[50] the Constitutional Court decided that procedural rights had been violated and left the decision on the merits of the case to the civil court. Nevertheless, this judgment is not very specific with regard to the focus of this study.

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46 Austria/BGBl 186/1950 as amended by BGBl I 76/2008 (04.06.2008).
47 Austria/StGBl 231/1945 as amended by BGBl I 98/2001 (07.08.2001).
48 The case law on this provision is very casuistic. A good overview and the relevant legal literature can be found in: R. Walter/H. Mayer/G. Kucsko-Stadlmayer (2007) *Bundes-Verfassungsrecht*, Vienna: Manz, rec. 1514ff.
49 Austria/RGBl 113/1895 as amended by BGBl I 75/2009 (03.08.2009).
50 Austria/VfGH/B1296/93.

3.6. The right to privacy, including the access to one's own confidential medical records

[59]. The right to privacy is protected by Article 8 of the ECHR, the right to access to one's own confidential medical records additionally by Section 26of the *Datenschutzgesetz* [Data Protection Act] [51] and Section 54 para. 1 of the *Ärztegesetz* [Physicians Act]. [52]

[60]. Professional confidentiality in the psychological and medical sphere is ensured by Section 54 of the Physicians Act, Section 14 of the *Psychologengesetz* [Psychologists Act][53] and Section 15 of the *Psychotherapiegesetz* [Psychotherapy Act].[54] Section 54 paras. 2ff of the Physicians Act provide a number of exceptions to the principle of confidentiality. Para. 4 contains a specific exception if an adult who cannot exercise his or her rights is misused, tortured, neglected or sexually abused. The other acts do not include such limitations and the different scope of confidentiality is a practical problem for the cooperation of the different professions. Section 10 para. 1 *Krankenanstalten- und Kuranstaltengesetz* [Medical Institutions Act][55] states that files on patients must be kept by hospitals. Para. 4 stipulates that these files must not include confidential information covered by medical, psychological or psychotherapeutic confidentiality. Under Section 121 of the Criminal Code it is an offence to breach professional confidentiality.

[61]. Organs of deceased persons may be taken for transplantation as long as the person or his/her representative has not filed an objection according to Section 62aff of the Medical Institutions Act.

[62]. There are no limitations of the rights mentioned above for persons with mental disorders and/or intellectual disabilities.

[63]. There are no judgments on privacy and access to one's own medical records with regard to persons with mental disorders and intellectual disabilities.

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51 Austria/BGBl I 165/1999 as amended by BGBl I 2/2008 (04.01.2008).
52 Austria/BGBl I 169/1998 as amended by BGBl I 62/2009 (15.07.2009).
53 Austria/BGBl 360/1990 as amended by BGBl I 98/2001 (07.08.2001).
54 Austria/BGBl 361/1990 as amended by BGBl I 98/2001 (07.08.2001).
55 Austria/BGBl 1/1957 as amended by BGBl I 49/2008 (19.03.2008).

3.7. The right to marry, to found a family and to respect for family life

[64]. The right to marry, to found a family and to respect for family life is protected by Articles 8 and 12 of the ECHR. Article 8 especially protects physical and mental integrity against violations and – compared to Article 3 of the ECHR – it is applicable in less severe cases.[56]

[65]. According to Section 1 of the *Ehegesetz* (EheG) [Marriage Act][57] the legal age for marriage is 18. People who are not legally capable of contracting cannot marry (Section 2) but need the consent of their legal representatives (Section 3 para. 1). If a person who is not legally capable of contracting does marry, the marriage can be annulled (Section 22 para. 1). Under Section 51 a spouse can divorce if the other one is mentally ill to such an extent that the spiritual life of the partners is destroyed and an improvement cannot be expected.

[66]. The right to marry and found a family does not seem to have been discussed by the Supreme Court.

[67]. Article 8 of the ECHR also protects the individual's home. In a very recent case the ECtHR found that Austrian courts had violated the applicants' right to a home when a woman who lacked legal capacity was disposed of her home without being able to participate effectively in the proceedings.[58]

3.8. The right to have children and maintain parental rights

[68]. In Austrian law there is nothing to prohibit people with mental disorders and/or intellectual disabilities from having children. However, if parents are not capable of taking care of their children, custody can be transferred to relatives, the youth welfare services or foster parents.

[69]. Article 8 of the ECHR also protects the right of people whose children are in public custody, such as foster children. According to Section 148 of the CC, parents of children in foster care have the right to be in

[56] See C. Grabenwarter (2008) *Europäischen Menschenrechtskonvention*, Munich/Vienna: Beck/Manz, § 22 rec. 7.
[57] Austria/RGBl 807/1938 as amended by BGBl I 75/2009 (03.08.2009).
[58] ECtHR/Case Zehentner vs Austria/Application no. 20082/02 (16.07.2009).

contact with their children and to be informed about and asked when decisions relevant to their children must be taken. Youth welfare services, foster parents and parents therefore need to be in contact with each other. Custodians can be involved if the parents are in custody. The general rules on the custody of children and the rights of their parents are laid down in Section 176ff of the CC, Section 14 ff of the *Jugendwohlfahrtsgesetz* [Youth Welfare Services Act][59] and the respective acts of the Provinces.

[70]. The rights of parents with intellectual disabilities are subject to judicial review. There is no question that parents whose children are in public custody have the right to stay in contact with their children.[60] The withdrawal of an individual's right to care for their children must always be the *ultima ratio* – but such judgments nevertheless primarily stress the wellbeing of the child.[61]

[71]. The Austrian youth welfare system is under heavy pressure. The case numbers are rising while the human resources remain static.[62] It can be argued that people who need specific support are more disadvantaged by this situation than others.

3.9. The right to property

[72]. Article 5 of the StGG declares property inviolable. It is amended by Article 1 of Protocol No 1 of the ECHR. The Constitutional Court considers both to contain the same rights.[63] There are no provisions that limit this right in connection with physical or mental disability.

[73]. Nevertheless, the right to dispose of their property may be limited for people with mental disorders and/or intellectual disabilities.

[74]. In a very recent case[64] (already mentioned in footnote 59) the ECtHR found that the strict time limit for appealing against a judicial sale must be balanced with the guaranteed protection of people who are under guardianship. The adequate protection of their property outweighs general rules of private law like the validity of *res*

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59 Austria/BGBl 161/1989 as amended by BGB. I 41/2007. There is a draft on a new act from 2008. See: http://www.parlinkom.gv.at/PG/DE/XXIII/ME/ME_00231/pmh.shtml (02.10.2009)

60 Austria/OGH/5 Ob 243/02z (03.12.2002).

61 Austria/OGH/4 Ob 531/91 (28.05.1991).

62 See amongst others: http://www.ots.at/presseaussendung/OTS_19971028_OTS0106 (02.10.2009)

63 R. Walter/H. Mayer/G. Kucsko-Stadlmayer (2007) *Bundes-Verfassungsrecht*, Vienna: Manz, rec. 1477.

64 ECJ/ Case Zehentner vs Austria/Application no. 20082/02 (16.07.2009).

judicatae. Therefore the ECtHR found a violation of Article 1 of Protocol No 1 of the ECHR.

3.10. The right to vote

[75]. Article 26 para. 1 of the Constitution specifies the active right to vote for the members of the *Nationalrat* [Parliament] and states: "The Parliament is elected by the nation in accordance with the principles of proportional representation on the basis of equal, direct, secret and personal vote for men and women who have completed their sixteenth year of life by the day of the election at the latest…" Para. 4 provides that all Austrian citizens who are at least 18 years old can be elected to Parliament (passive right to vote). According to para. 5 a person can only be deprived of his or her right to vote and to be elected in case of a criminal conviction which is further specified in Section 22 of the *Nationalratswahlordnung* (NRWO) [Elections to the Parliament Act].[65]

[76]. According to Article 60 para. 1 of the Constitution anyone who is entitled to vote in Parliamentary elections is also entitled to elect the Federal President. The president must be at least 35 years of age – moreover he or she must fulfil the same preconditions as an MP.

[77]. According to Article 95 para. 2 of the Constitution the *Landtage* [parliaments of the Provinces] are voted on rules that must not be more restrictive than those to the Parliament.

[78]. Therefore people with mental disorders and intellectual disabilities are allowed to vote and to be elected like all other citizens.

[79]. Easy-to-read information for people with intellectual disabilities is not published by the state.

[65] Austria/BGBl 471/1992 as amended by BGBl II 147/2008 (29.12.2008).

4. Involuntary placement and involuntary treatment

[80]. The final report, *Compulsory admission and involuntary treatment of mentally ill patients – legislation and practice in the EU Member States*[66], covers Austria. It mentions two improvements to the CAA: the right to personal liberty is at the centre of all legal procedures and the courts must be informed of any compulsory admission or involuntary treatment and must make a decision within a short period of time.

[81]. Nevertheless, there are still some shortcomings. The CAA only applies to a small group of psychiatric patients. There are no quality standards for psychiatric wards regarding living conditions, treatments, care and hospital expenditure. Moreover there is no clause that gives patients the right to state-of-the-art treatment. Finally, the report stresses that there are practical problems leading to "revolving-door-psychiatry" for specifically vulnerable groups such as drug addicts, schizophrenic and bipolar patients. This problem appears especially for schizophrenic and bipolar patients whose relatives are not capable of and/or willing to act as their guardians.

[82]. These problems still exist today. Nevertheless, doubts remain about whether it is necessary to include the right of patients to state-of-the-art treatment in the CAA because these rights are generally acknowledged in Section 49 Physicians Act.

[83]. The United Nations Committee Against Torture considered the Third Periodic Report of Austria at its 679th and 680th meeting on 16-17.11.2005 and 24.11.2005.[67] The report was submitted after a three-year delay. It mainly contains findings and recommendations regarding asylum, detention and racism. Para. 13 also recommends that appropriate measures should be taken to ensure that police officers are generally not present during medical examinations and that confidentiality of medical information should be guaranteed. The European Committee for the Prevention of Torture and Inhuman or

[66] H.J. Salize/H. Dressing/M. Peitz (2002) *Compulsory admission and involuntary treatment of mentally ill patients – legislation and practice in EU Member States.* Mannheim: Central Institute of Mental Health, available at: http://ec.europa.eu/health/ph_projects/2000/promotion/fp_promotion_2000_frep_08_en.pdf (02.10.2009).

[67] UN/CAT (2003) *Consideration of the reports submitted by States Parties under Article 19 of the Convention – Third periodic reports of States parties due in 2000*, available at: http://www2.ohchr.org/english/bodies/cat/cats35.htm (02.10.2009).

Degrading Treatment or Punishment (CPT) published a Report to the Austrian Government on its visit to Austria between 14 and 23 April 2004.[68] There are no specific findings on involuntary placement and involuntary treatment. Nevertheless, the report recommends that prisons should take steps to ensure that all medical examinations of prisoners are conducted outside the aural and visual range of non-medical prison staff.[69]

4.1. Legal framework

[84]. Involuntary placement is regulated by the CAA. The main intention of the act is to ensure the personality rights and human dignity of people with mental illnesses. Admission may be voluntary (Section 4) or compulsory (Section 8). The district court has to appoint one or several *Patientenanwälte* [Patients' Advocates] for all patients at any hospital (Section 13). There is a detailed procedure to decide whether the compulsory admission of an individual is lawful (Section 17ff). The access to one's medical records (Section 39) and confidentiality of the police and medical records (Section 39a) are separately regulated.

[85]. The CAA does not have any procedures on the treatment of persons who are involuntarily placed. Such provisions exist in Section 49 of the Physicians Act. The CAA stipulates no specific rules for the nature of aftercare following involuntary treatment. There are special regulations for children and young adults. If a person who is in public custody asks to be voluntarily placed the custodian must consent (Section 5 para. 1, CAA). There are no specific rules for medical treatment of persons under involuntary placement.

[86]. No amendments of the CAA are currently under discussion.

[87]. The basic principle for the treatment of individuals is that there must be informed consent (Section 110, para. 1, Criminal Code). Therefore any medical treatment generally needs the lawful consent of the patient. There are only two exceptions: imminent danger where someone cannot consent, in accordance with Section 2, para. 2 of the Criminal Code, or if there is a legal basis for involuntary treatment. In

[68] CPT (2005) *Report to the Austrian Government on the visit to Austria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 23 April 2004*. Strasbourg, available at: http://www.cpt.coe.int/documents/aut/2005-13-inf-eng.pdf (02.10.2009).

[69] CPT (2005) *Report to the Austrian Government on the visit to Austria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 23 April 2004*. Strasbourg, p. 70, available at: http://www.cpt.coe.int/documents/aut/2005-13-inf-eng.pdf (02.10.2009).

the context of this study such legal exceptions are contained in Section 283 of the Criminal Code for persons who have a custodian.

4.2. Criteria and definitions

[88]. According to Section 3, para. 1 of the CAA a person can be subjected to compulsory admission if he or she suffers from a *psychische Krankheit* [mental illness] and therefore seriously and gravely endangers his or her health or life or those of others. The act does not provide any further definition of the term "mental illness". In most cases the mental illness is indicated by behaviour endangering the patient's health (e.g. getting into a bathtub filled with water at 60 degrees Celsius).[70] According to the Supreme Court, *geistige Behinderung* [mental disability] is not covered by this definition.[71]

[89]. According to Section 3 of the CAA a person can only be subjected to involuntary placement if there are no sufficient extramural facilities. The opinion of the patient is taken into consideration insofar as he/she can opt to be placed voluntarily (Section 4, CAA). The risk level of danger to the health or safety of the patient and the public is not specifically mentioned (see Section 3, CAA). There are no specific danger thresholds. So involuntary placement may only be considered if the less intrusive alternatives – namely treatment in extramural facilities – are not available. This must be evaluated before deciding on involuntary placement or treatment.

4.3. Assessment, decision procedures and duration

[90]. According to Section 8 of the CAA, only a physician in the public health service or a police physician may decide or may order that an involuntary placement takes place. At the hospital, two physicians have to decide if the conditions for involuntary placement are fulfilled (Section 10, para. 1, CAA). There are no rules on whether these physicians need to have a certain specialisation. According to Section 19, para. 3 of the CAA, the court can ask for the opinion of another *Facharzt* [medical specialist]. The district court (Section 12, CAA) decides on the basis of this one expert opinion. The termination of the involuntary placement can be decided by the hospital or the responsible district court (Section 31, CAA).

[70] Austria/Oberster Gerichtshof/ 3 Ob 263/07h (08.05.2008).
[71] Austria/Oberster Gerichtshof/ 4 Ob 542/91 (24.09.1991).

[91]. A patient may retract their wish to be voluntarily placed at any time (Section 4, para. 3, CAA). If the responsible physician decides that an involuntary placement is necessary, the procedure according to Section 9 of the CAA applies.

[92]. The maximum period of time between the psychiatric assessment and the beginning of the compulsory placement is not mentioned in law. If a person is involuntarily placed, the head of the hospital must inform the district court without undue delay (Section 17, CAA). The district court must see the patient within four days (Section 19, para. 1, CAA). If the court finds the involuntary placement is justified, it must hold a hearing within 14 days. If it finds the involuntary placement is not justified, it must annul the placement and immediately release the patient if the hospital does not appeal (Section 20, paras. 1f, CAA). The court must decide on the appeal within three days (Section 20, para. 2, CAA).

[93]. According to Section 26, para. 2 of the CAA, the duration of an initial placement amounts to a maximum period of three months after the court order, which should be taken within approximately three weeks (this may vary by two to three days if the person is initially placed on a public holiday or on a Saturday or Sunday). After three months, the approval may be renewed several times. Each period must not exceed six months (Section 30, para. 1, CAA). After a placement of one year, the placement may only be approved by the opinions of two physicians who should not have been involved in the original procedure. In this case, the period of extension must not exceed one year in each individual case (Section 30, para. 2, CAA).

[94]. Section 35, para. 1 of the CAA stipulates that the fundamentals and approved methods of medication must be complied with. According to Section 36, para. 1 of the CAA, "specific treatment including surgery" may only be conducted after written consent has been obtained. The CAA does not define the term "Treatment". The courts have decided that there must be a case-by-case decision on methods and that, for example electro-convulsive therapy requires written consent.[72]

[95]. The stipulations of the Residential Homes Act do not apply to psychiatric units and hospitals. The reviews and appeals concerning the legality of involuntary treatment do not explicitly refer to international law or the *Council of Europe's Committee of Ministers Recommendations*.

[72] Austria/Oberster Gerichtshof/ 6 Ob 2117/96h (14.08.1996).

[96]. According to Section 13, para. 1 of the CAA, the district courts must appoint a representative of the *Patientenanwaltschaft* [Patient Advocacy and Representation] for free legal support.

5. Competence, capacity and guardianship

[97]. Article 12 (2) of the CRPD "recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life". The term "legal capacity" is open to two different interpretations, as it has two meanings in German: It means that a person can act as a legal entity and has *Rechtsfähigkeit* [i.e., be a subject of the legal order], but also to have *Geschäftsfähigkeit* [i.e. the ability to act legitimately in handling his or her own affairs. In the *Comparative study on the legal systems of the protection of adults lacking legal capacity* (2008) Austria is not mentioned. The *Second Disability High Level Group Report* (2009) evaluates the implementation of the CRPD in a very optimistic manner. This is also related to the implementation of Article 12, "legal capacity". It is rather premature to state that all the necessary conditions for the implementation of Article 12 have already been put in place in Austria. The principles formulated in the Council of Europe Recommendation R(99)4 of the Committee of Ministers to Member States on principles concerning the legal protection of incapable adults, as well as the WHO Resource Book on Mental Health, Human Rights and Legislation (2005) have basically been adopted by Austrian legislation.

[98]. The main goal of Article 12 of the CRPD seems to be that all people, including those with severe mental disorders or intellectual disabilities, may legally take care of their own affairs without any legal representative. This interpretation is, however, not in line with Austria's current guardianship regulations. According to Austrian guardianship law,[73] guardians of people with mental disorders or intellectual disabilities act as legal representatives within the scope of their powers.

[99]. The fact that the decisions of a guardian must be harmonised with the will of the person under guardianship leaves ample room for further developments more in line with Article 12 of the CRPD.

[100]. In 1916 the Austro-Hungarian Empire put regulations into force to protect certain groups (among them people with mental health

[73] Federal Law on Guardians for Disabled Persons (Sachwalterrecht) Austria BGBl. 136/1983 as amended by BGBl. I 92/2006 (23.06.2006).

problems) from economic disadvantages, but also to protect the concerned person against extravagance *(Verschwendungssucht)* and/or alcoholic disease *(Entmündigungsordnung)*.[74] Their status of legal capacity either equalled that of children under the age of seven years or that of adolescents aged between 14 and 18. This means that they were either totally unable to conclude legal transactions or could only do so in a very restricted manner.

[101]. This system was increasingly criticised due to the fact that the different situations of people with disabilities were not taken into account.

[102]. Therefore, since 1984 a newly formulated legal framework has been in place. It provides for tailor-made assistance for people with mental disorders and/or intellectual disabilities if they are not able to adequately handle their affairs on their own (*Federal Law on Guardians for Disabled Persons – Bundesgesetz über die Sachwalterschaft für behinderte Personen*).[75] Guardianship may only be provided for adults and only by principle of subsidiary. Subsidiary means that there is no other possibility to protect persons with mental disorders or with an intellectual disability against any disadvantages. Guardianship gives them appropriate support in handling their matters.

[103]. If there are no other options for supporting persons with mental disorders or intellectual disabilities in handling their affairs, e.g. family members or representatives of competent institutions or organisations, guardianship can be ordered by the district court as court of curatorship.

[104]. Legislation does not provide definitions of the terms "competence" and/or "capacity".[76] The actual mental state of the individual concerned is evaluated by means of expert opinions. The experts do not have to be medical professionals, as the health-related causes for a mental disorder or an intellectual disability are not the decisive factors, but the description of the actual need for help and support.[77]

[105]. There are no specific health-related causes determining the legal incapacity of adults. The law only speaks about "mental illness" and "people with intellectual disabilities". The foremost decisive requirement determining mental disorders and/or intellectual

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74 Austria/RGBl. 207/1916 as amended by RGBl. 226/1916 (26.07.1916).
75 Austria/BGBl. 136/1983, Section 268(1).
76 Sections 268/280 CC.
77 Austria/Oberster Gerichtshof/ 1 Ob 574/88; Austria/Oberster Gerichtshof 2 Ob 146/00k; Austria/Oberster Gerichtshof 3 Ob 183/05s.

disabilities is not being able to adequately take care of one's own affairs.

[106]. The Austrian guardianship system foresees different scopes of guardianship:

- guardianship for a single issue;
- guardianship for several matters (which are the most frequent cases of guardianship);
- guardianship for all matters.[78]

[107]. Legal acts within the scope of guardianship can only be concluded with the consent of the guardian. Guardians must give their consent for the marriage of a person with a mental disorder or intellectual disability.

[108]. The system of protection for adults lacking legal capacity includes guardianship and power of representation by next of kin.

[109]. The latter legal instrument was established in 2006 (*Sachwalterrechts-Änderungsgesetz 2006 – SWRÄG 2006 – Amendment to the Guardianship Law 2006*)[79] and provides for informal possibilities for parents, children or spouses to deal with simple legal acts of daily life, e.g. paying the rent, simple bank transactions, consent for simple medical decisions.

[110]. The same amendment of 2006 introduced another possibility of support for adults lacking legal capacity as an alternative to guardianship – the so-called *Vorsorgevollmacht* [Precaution Assignment]. Everyone has the possibility to give authority to a person of confidence in the event of their no longer being able to handle their own affairs, e.g. due to a mental disorder. This authorisation must be given in writing, indicating the scope of affairs the assignee is to deal with. The written authorisation must be lodged in a special public register.

[111]. The basic features of the Austrian legal protective system regarding guardianship are:

- Subsidiarity;
- Adequacy;
- Exactly defined scope of tasks for guardianship;

[78] Section 268 (3) CC.
[79] Austria/BGBl. I 92/2006 (23.06.2006).

- Continuing education of the guardian;
- Cancellation by necessity.

[112]. Conditions which must be met must be separated into two parts:

- Personal conditions:
  - An individual with a mental disorder or intellectual disability;
  - An individual is unable to adequately take care of his/her own affairs;
  - Neither family members nor persons in support can provide support;
  - The person has "affairs" which must be dealt with.
- Formal conditions:
  - The first step is to initiate court proceedings either by the individual themselves, *ex officio* or by demonstration of facts to the district court;
  - *Erstanhörung* [i.e. personal hearing of the individual in possible need of a guardian before a judge];
  - Initiation of court proceedings;
  - Nomination of a temporary guardian for the court proceedings;
  - Nomination of an official expert to diagnose the person in possible need of a guardian;
  - Oral proceedings with debate of the conclusions of the official expert;
  - Interrogation of everyone who can give information about the individual in possible need of a guardian to determine all his or her needs;
  - After the court has issued its order on whether there should be a guardian or not the judge must nominate the person who will be the guardian, preferably a family member; if this is not possible, the judge must nominate associations of guardianship or their employees or – if even this is not possible – lawyers or notaries or any other suitable person;
  - The judge must determine the scope of power for the guardian (a single issue, several matters or all matters) as well as the scope of personal care for the person with a mental disorder or intellectual disability and the possible extent of decisions concerning medical treatment which must be based on informed consent.

[113]. The time limits range from guardianship for a single affair (after which the guardianship may be suspended) to lifelong guardianship. The time span varies according to the main reason for guardianship and depends on the kind of affairs which must be administered by the guardian. In most cases guardianship is determined to last lifelong.

[114]. Guardianship for a single issue is quite rare, due to the relatively extensive efforts required for the court proceedings. The proceedings

to appoint a guardian take about three to six months on average and the associated expenses vary from €1,000 to € 2,000. Currently, there are slightly more than 50,000 guardianships in Austria. More than two thirds of all guardianship proceedings result in empowering the guardian for *all* matters. This seems to be more economical for the judges. When guardianship just covers a number of matters, the description of the duties of the guardian must be changed or adapted by a formal court proceeding whenever there are any changes in the personal circumstances of the person under guardianship.

[115]. The placing of an adult lacking legal capacity under a protective regime may be requested by

- the individual themselves;
- *ex officio*;
- by demonstration of facts to the judge of the district court. The demonstration of facts may be given to the judge orally or in writing. The demonstration of facts can be introduced by anyone who is interested in determining the need for guardianship. Usually these demonstrations of facts are taken to court by family members, authorities or employees of associations providing support.

[116]. The national authorities with jurisdiction with regard to adults lacking legal capacity due to a mental disorder or intellectual disability are:

- The district court, which is competent to declare the legal incapacity of an adult;
- The district court, which together with the guardian is competent to take measures to protect the individual with a mental disorder or intellectual disability;
- The district court, which together with the guardian is competent to take measures to protect the property of the individual with a mental disorder or intellectual disability;
- The district court, which is competent to ensure and monitor the implementation and follow-up of all these measures.

[117]. A decision on legal incapacity/incompetence can be challenged by

- the person for whom a guardian is appointed;
- the temporary guardian for the court proceeding;
- the guardian him- or herself;

- the precaution assignee ("*Vorsorgebevollmächtigter*");[80]
- the next of kin.

[118]. The appeal will be handled by the regional court; this decision can be challenged before the higher regional court. If fundamental rights questions are concerned the case can be appealed before the Supreme Court.

[119]. The following persons or bodies can be appointed to implement the measures placing an adult under a system of protection. The judge of the district court must nominate the person who will be the guardian, preferably:

- Members of the family; if this is not possible, the judge must nominate:
- Associations of guardianship or their employees or – if this is not possible –
- Lawyers or notaries; or
- any other adequate person.

[120]. The person under guardianship can do anything on his or her own as long as it does not fall within the scope of guardianship.

[121]. In addition, it is essential that each decision of the guardian is in accordance with the personal will of the individual under guardianship. If there is a difference in opinion, the judge in the district court must decide the best solution for the wellbeing of the person under guardianship. The judge's decision can be challenged before the regional court.

[122]. The appeals procedures against the decision on the appointment of a person or body entrusted with the implementation of the system of protection is as follows:

- Protection in general: regular appeal procedures as described above (cf. para. 117);
- Limitation of freedom due to the individual endangering him- or herself or other persons. The Act on Residence in Homes *(Heimaufenthaltsgesetz)*[81] stipulates that measures of limitation of freedom must be decreed by the appropriate personnel in residential homes for people with mental disorders or intellectual disabilities. *Bewohnervertreter* [residents' representatives] (belonging to the associations of guardianship) must approve of the limitation of freedom; otherwise the affair is transferred to the district court. The decision of the district court can be challenged by way of the regular appeal measures.

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[80] Cf. para. 110.
[81] Austria/ BGBl. I Nr. 11/2004 as amended by BGBl. I 94/2006 (23.06.2006).

[123]. Decisions on legal incapacity are not reviewed periodically but only if there is an immediate indication of change / worsening / improvement in the existing mental illness or intellectual disability. The main reasons for this approach are that it would be quite challenging for the next of kin permanently to have to renew the decision that their relative has an intellectual disability, because mental disability usually exists for a whole lifetime; financial reasons play a role as well.

[124]. The need for guardianship should be reviewed regularly, which should mean once a year. The guardian must present a report to the judge at the district court which contains the financial accounts and also information about whether the guardianship should be continued or if any change is necessary. In addition, a review must take place if there is an immediate indication of change / worsening / improvement of the existing mental illness or intellectual disability.

Annexes – case law

In different Sections of the Guidelines, experts have been asked to refer to case law. Please present the case law reference in the format below

Case title	Bath in hot water
Decision date	08.05.2008
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	3Ob263/07h, Oberster Gerichtshof (Supreme Court)
Key facts of the case (max. 500 chars)	A patient was transferred to another medical department of a hospital after burning himself in boiling hot water. The court had to decide – inter alia – whether the patient suffered from a *psychische Krankheit* [mental illness]. Nevertheless, the main focus of the decision is on the legal capacity of the *Patientenanwaltschaft* [Patient Advocacy and Representation] to appeal against judgments.

Main reasoning/argumentation (max. 500 chars)	Taking a bath in a bathtub filled with water at a temperature of 60 degrees Celsius indicates a *psychische Krankheit* (mental illness).
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Definition of *psychische Krankheit* (mental illness).
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The measures taken by the hospital were declared lawful.

Proposal of key words for data base	Definition of *psychische Krankheit* (mental illness).

Please attach the text of the original decisions in electronic format (including scanned versions as pdf).

Case title	Specific precautions for traumatised asylum seekers
Decision date	08.05.2008
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	G237/03 et al, Verfassungsgerichtshof [Constitutional Court]

Key facts of the case (max. 500 chars)	A number of Provinces asked the Constitutional Court for constitutional review of many provisions of the Asylum Act and the *Bundesbetreuungsgesetz* [Federal Act on Assistance for Asylum Seekers]. One of the provisions under review was Section 32 para. 1 Asylum Act 1997 (BGBl I 1997/76 as amended by BGBl I 101/2003) which prohibited the presentation of new facts after the decision by the *Bundesasylamt* [Federal Asylum Office].
Main reasoning/argumentation (max. 500 chars)	Article 2 ECHR prohibits provisions that endanger the life of traumatised asylum seekers by prohibiting them from presenting new evidence in the later stages of appeal.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Traumatised asylum seekers need specific precautions to ensure that they can present all the available evidence in their favour. Therefore the periods stipulated for presenting them to the authorities must not be too short.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Parts of the amendment of Asylum Act, BGBl I 101/2003 were repealed.
Proposal of key words for data base	Asylum, assistance for asylum seekers

Please attach the text of the original decisions in electronic format (including scanned versions as pdf).

Case title	Conditions for deportation of a mentally ill asylum seeker
Decision date	06.03.2008
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	B2418/07 et al; Verfassungsgerichtshof [Constitutional Court]
Key facts of the case (max. 500 chars)	A Russian asylum seeker claimed that his pending deportation to Poland violated Article 3 ECHR. The authorities decided that he should be deported to Poland because he would face adequate medical treatment there and would not suffer any inhuman treatment according to Art 3 ECHR.

Main reasoning/argumentation (max. 500 chars)	The Constitutional Court followed the argumentation of the authorities that the arguments of public interest in this specific case outweighed those of the right to respect for private and family life and found no indications for possible violations of Article 3 ECHR. Therefore the case was transferred to the *Verwaltungsgerichtshof* [High Administrative Court] to consider any other violations of law at a lower level than the constitutional.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Mental illness must be considered in cases of deportation.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Mental illness must be considered separately in cases of deportation. The risk of denial of medical treatment would constitute a violation of Article 3 ECHR.

Proposal of key words for data base	Deportation

Please attach the text of the original decisions in electronic format (including scanned versions as pdf).

Case title	Mental disability not covered by compulsory admission
Decision date	24.09.1991
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	4 Ob 542/91, Oberster Gerichtshof [Supreme Court]

Key facts of the case (max. 500 chars)	A youth aged 16 was considered to suffer from *erethische Idiotie* [idiocy] and epilepsy. He was transferred from a home to a hospital because the staff did not know how to deal with him. The hospital claimed they were not responsible for *geistige Behinderung* [mental disability] because the *Unterbringungsgesetz* [Compulsory Admission Act] only covers *psychische Krankheit* [mental illness]. The youth was therefore released from the hospital and the judgment explicitly stressed the responsibility of the custodian, the courts and the youth welfare services to take care of the young man.
Main reasoning/argumentation (max. 500 chars)	The concepts of *geistige Behinderung* [mental disability] and *psychische Krankheit* [mental illness] were confronted. The hospital claimed that idiocy and epilepsy constitute a *geistige Behinderung* [mental disability] – there were neither further explanations nor discussions in the course of the proceedings.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	*Geistige Behinderung* [mental disability] and *psychische Krankheit* [mental illness] according to the *Unterbringungsgesetz (UG)* [Compulsory Admission Act (CAA)]
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Individuals can only be admitted on a compulsory basis if they suffer from a *psychische Krankheit* [mental illness]
Proposal of key words for data base	*Geistige Behinderung* [mental disability], *psychische Krankheit* [mental illness], *Unterbringungsgesetz (UG)* [Compulsory Admission Act (CAA)]

Please attach the text of the original decisions in electronic format (including scanned versions as pdf).

Case title	Parental rights for a mother with intellectual disability
Decision date	28.05.1991
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	4 Ob 531/91, OGH [Supreme Court]
Key facts of the case (max. 500 chars)	A doctor and nurse caring for a young mother were convinced that she would be incapable of taking care of her child due to her intellectual disability. The youth welfare services put the baby under their care and transferred it to foster parents. The mother wanted to take care of the baby just like the father with whom she lived. They therefore notified the youth welfare services who took the child into custody. The Supreme Court decided that more facts need to be collected by the lower courts and referred the case back to the *Bezirksgericht* [district court].

Main reasoning/argumentation (max. 500 chars)	The court argued that the withdrawal of parental rights requires watertight facts that the mother and the father cannot take care of the child. The wellbeing of the child is the priority in such a case – followed by the rights of the unmarried mother and the unmarried father.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Rights of the mother with a disability vs wellbeing of the child
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The case was referred to the *Bezirksgericht* [district court] to complete the evidence.

Proposal of key words for data base	Rights of the child, protection of the right of a mother with disability to family life

Please attach the text of the original decisions in electronic format (including scanned versions as pdf).

Case title	Zehentner vs Austria
Decision date	16.07.2009
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Decision on Application no. 20082/02, ECtHR

Key facts of the case (max. 500 chars)	In 1998 Ms Zehentner, a Viennese resident, was ordered by a district court to pay approximately €7,400. The judgment was enforced by judicial sale of her apartment for €59,000. She was evicted from her home in February 2000. In March 2000 she had a nervous breakdown. The court decided she had been suffering from paranoid psychosis since 1994 and she was appointed a guardian. The courts found that the payment orders were not enforceable because she had not been capable of participating in the case. Nevertheless, the appeals against the enforcement orders were dismissed because the reversal of the enforcement was no longer possible since the creditors had already been paid.
Main reasoning/argumentation (max. 500 chars)	The protection of persons lacking legal capacity of their right to home and property outweighs the protection of bona fide purchasers.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The protection of persons lacking legal capacity outweighs the protection of bona fide purchasers.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The applicant was awarded €30,000 in respect of non-pecuniary damages and €200 for costs and expenses.
Proposal of key words for data base	Legal capacity, right to home, right to property, Article 8, Article 1 Prot. No. 1

Please attach the text of the original decisions in electronic format (including scanned versions as pdf).