

**Improving Guardianship for Separated Children in Europe:
Regional survey on current legislation and practices**

1. Please provide the latest available statistics on UAMs/ SCs, (indicating the period) and where possible breakdowns by sex, age and legal status (refugee, asylum-seeker, IDP, rejected asylum-seekers, subsidiary protection).

Asylum applications SCs

	Age dispute	Under 14	under 18	Total number
2004	298	43	871	1212
2005	81	81	709	881
2006 (until the end of November)	69	48	322	439

SC Countries of origin 2006

Afghanistan	40
Russ. Federation	46
Serbia	21
Algeria	22
India	20
Nigeria	32

Regarding sex and legal status of UAMs/ SCs there are no overall-statistics for Austria, though for Vienna (where app. 25% of all UAMs/ SCs stay) exists detailed statistical data regarding this issue.

Sex

Of the 116 UAMs/ SCs present in Vienna and looked after in the basic provision 20 are female. This corresponds to a percentage of 17 %. Asylkoordination österreich however estimates that the number of girls in Vienna is not representative for the situation in the whole country and that countrywide the percentage is only around 10 %. This discrepancy is due to the fact that some federal states (e.g.Styria) offer accommodation only for male UAMs/ SCs.

Legal Status

In Vienna additionally exists data regarding the legal status of 115 UAMs/ SCs in basic provision. Accordingly at the moment 56 asylum procedures are pending at first instance. 50 UAMs/ SCs are waiting for a decision at second instance (Unabhängiger Bundesasylsenat). In at least 5 cases the asylum procedure has been concluded with a negative decision at second instance. Out of those, three have been appealed against at the Supreme Court (Verwaltungsgerichtshof), whereas two have become legally binding.

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The data selected by the commune of Vienna (MAG ELF: department for representation in alien law) indicate that the time between first application and interview with the Federal Asylum Senate is on average eight months. Then it takes again on average two months until the decision at first instance is issued. To obtain a decision at second instance (Independent Federal Asylum Review Board) takes even much more time. In 2006 only 4 out of the 140 UAMs/ SCs applicants have obtained a decision at second instance, which they had to wait for on average two years.

At the time of application the major part of the UAMs/ SCs is between 16 and 18 years old. If the procedure goes through two instances, only in very few cases a legally binding decision can be obtained while the person is still minor.

2. Are guardians provided to all UAMs/SCs?

Not for all UAMs/ SCs a guardian is provided.

a) Problem admission procedure

In the admission procedure a guardian is only appointed for those under 14 years of age (unmündige Minderjährige). In those cases the first reception centre (EAST) informs the youth welfare office, which provides accommodation within youth welfare and informs the district court. All other UAMs/ SCs during this first period are supported by a legal advisor of the first reception centre.

Normally the admission procedure is closed after a few weeks. But there are also exceptional cases, where UAMs/ SCs remained in the admission procedure for more than one year without getting a guardian.

b) After admission to the asylum procedure

After admission to the asylum procedure not in all cases a guardian is appointed. However a decision by the Supreme Court of Justice (Oberster Gerichtshof) as of november 2005 (OGH 7 Ob 209/05v) has led to an increase in the number of guardians appointed.

This decision clarifies that in the case of minors normally a natural person or the youth welfare institution has to be entrusted with guardianship in order to guarantee that the minor has a representative in the area of care and guardianship, education and financial administration. Before this court decision nearly all youth welfare institutions refused to take over guardianship for UAMs/ SCs.

Despite this court decision there are still major regional differences regarding guardianship. The youth welfare institutions in Upper and Lower Austria already since some years report all UAMs/ SCs assigned to them within basic provision to the court and so initiated the procedure to clarify guardianship.

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As a result of the decision of the Supreme Court, in Vienna now the youth welfare institutions immediately inform the court about the residence UAMs/ SCs.

In Salzburg a differentiated procedure has been chosen. First the municipal youth office checks whether it can be assumed that an ordinary residence (“gewöhnlicher Aufenthalt”) according to art. 1 of the Haager Minderjährigenschutzabkommen (BGBl. Nr. 446/1975) exists. If such a residence exists or if it is probable that it will occur, within six months the youth office requests the court to assign guardianship to them.

In Styria the youth welfare institution persistently refuses, even after the decision by the Supreme Court, to take over the mandatory protective function regarding UAMs/ SCs.

3. Who or what institution/s appoints guardians?

Guardians are appointed by the district court, court of appeal is the regional court.

The youth welfare institutions are obliged to inform the district court about the UAMs'/ SCs' residence, which then opens the guardian-procedure.

Also the concerned UAMs/ SCs himself can submit an application for appointment of a guardian, which has to be decided by the court. Also other persons can propose a guardian procedure at the court by making an informal request.

If a guardian shall be appointed, because nobody is entitled to legal representation regarding guardianship and no suitable person like a close relative or a person appointed by the court can be found, the court has to appoint the youth welfare institution of the respective federal state (§ 213 ABGB).

Therefore normally the youth welfare institution shall be appointed guardian for the UAMs/ SCs.

In Vienna it takes app. two months until the guardianship is settled. Some judges invite the UAMs/ SCs for an interview, others do without.

Also foster parents can be entrusted with guardianship by the court. Practically this happens only in very few single cases (less than 5% of the guardian procedures for UAMs/ SCs).

On whom or which institution/s do guardians depend/are affiliated with?

Unlike in other European countries (e.g. Germany, Belgium, ...), guardianships by associations are not provided for by Austrian law. In some few cases private persons are appointed guardian by the court. These persons can be relatives or foster parents. Sometimes fellow contrymen of the UAMs/ SCs are appointed, which in the past has repeatedly

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happened with UAMs/ SCs from China. Anyway the existence of a special close relation is necessary.

In practice guardianship is nearly always assigned to the respective federal state as youth welfare institution and is then exercised by an officer of the youth welfare institution (Organ des Jugendamtes).

4. Who or what institution/s are guardians responsible to?

The guardian is responsible to the district court, which can also impose sanctions or withdraw the guardianship.

The youth welfare institution, too is eventually responsible to the court but normally there are no such inspections. An exception was in the past the district court Linz Land, which two months after appointment to guardianship used to ask a situation report regarding the development since the appointment.

5. Are guardians appointed both to minors seeking asylum and foreign minors who do not apply for asylum? Are there differences in procedures?

Regarding the legal basic conditions there are no differences in the guardianship procedures between unaccompanied minors applying for asylum and other unaccompanied minor foreigners. The determining factor is the expected duration of residence. With many UAMs, who do not apply for asylum, orientation is on the organisation of the return. As a consequence the institutions involved do not apply for a decision in the guardian matter at the district court.

6. Are the guardianship provision procedures different between nationals and non-nationals?

No.

7. In addition to guardians, are legal representatives provided for UAMs/SCs? If not, do UAMs/SCs have access to professional legal counselling?

Asylum procedure

During the admission procedure, when normally the guardian question is not yet decided, for every UAMs/ SCs a legal counsellor is appointed. After admission to the procedure and assignment to one of the federal states - also before the court decision regarding custody - the locally competent youth office is appointed to legally represent the UAMs/ SCs in the asylum procedure. This competence results from the Asylum Law. In most federal states the youth welfare institution sources out the legal representation to a NGO.

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Alien police procedure

In the alien police procedure UAMs/ SCs already at the age of 16 are fully capable of acting, which means that these minors in the procedure are not any more supported by the youth welfare institution.

As a consequence UAMs/ SCs do not have a legal representative in procedures regarding a ban of further residence and remand pending deportation - at least as long as no guardian is appointed. It is to be clarified whether this regulation contravene the Austrian constitution.

8. Does the appointment of a guardian have legal implications on the residence/stay of the minor in the country? If yes, please explain how?

Guardianship does not have direct effects on the status of residence. On the other hand the suggestion to grant a title of residence for humanitarian reasons (after a negative decision in the asylum procedure) may be more successful if it comes from a committed guardian rather than from the asylum seeker him/herself.

9. What are the methods used to identify guardians?

The district court is obliged to appoint a suitable guardian in a court procedure.

10. What are the required competencies to become a guardian?

Normally the court after having examined the preconditions of §§ 145 and 213 ABGB entrusts the relative federal state as youth welfare institution with the guardianship. The federal state is obliged to provide suitable and trained staff for that purpose. Normally a legal welfare officer (Rechtsfürsorger) takes over the legal and financial matters. To secure adequate care and education social workers are to be provided.

If private persons are appointed guardian by the court, the following factors are of particular interest: family relationship, tight personal relationship, integrity, life experience.

11. What are the expected duties or roles of the guardian?

The scope of care and education is legally defined in § 146 ABGB. Besides education, administration of means and representation, guardianship also comprises care for the minor. This means the protection of physical well-being and health, but also the direct supervision, the education and especially the development of physical, intellectual, mental and ethical values, the encouragement of dispositions, abilities, preferences and development possibilities of the child as well as its scholastic and professional education. Although in this list accommodation is not explicitly mentioned, this obligation results from several regulations and from the continuous legal practice by Austrian courts, which together with external accommodation of a minor also assign guardianship.

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Duties regularly to be performed by the guardian him/herself:

- Best Interests of the Child (BID)
- Monitoring/reporting on the situation of the child

Duties that are often delegated to third parties:

- Accommodation
- Care arrangements
- Education
- Integration support
- Health services
- Family tracing, family reunification, Dublin II Regulation transfers
- Refugee Status Determination (RSD) procedures
- Access to legal counselling/legal representation
- Identification of durable solutions/return/repatriation/integration

In practice the youth welfare institution fails to perform or only inefficiently performs its obligations as a guardian.

12. Would you describe the guardianship system as:

a) Professionalized

In those cases, where the youth welfare institution is appointed

b) Benevolent or voluntary

No

c) Remunerated but reliant on individuals who are not professionals

No

13. If guardians are remunerated for their duties, what is the remuneration?

Due to the fact that in Austria no system of guardianships for associations exists, there isn't any remuneration provided.

14. Are guardians monitored?

If yes:

- By whom?

By the district court

- Frequency?

Normally there is no automatical monitoring, but minors are entitled to a complaint at a legal authority (§ 217 ABGB). In case of non-observance of the obligations assumed a criminal liability of the youth welfare institution (see § 92 Abs 2 STGB (neglect of minors) or § 199 StGB (neglect of care, education and supervision) may be discussed.

- Methods of monitoring?

Procedure

15. How many minors does a guardian care for:

- Standard in law (where applicable)?

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- Standard in practice?

16. What training is provided to guardians?

- Before taking up guardianship?
- During guardianship?

Guardians, that are not provided by the authority, do at no time receive any special basic or advanced training.

17. Is the guardian involved during the WHOLE asylum procedure of the minor?

No. During the admission procedure and in the beginning of the asylum procedure normally he doesn't yet have a guardian. Later on the task of guardianship is often sourced out to a third party.

18. Does the guardian have an obligation of confidentiality regarding the minor's asylum case? If yes, what are the limitations/guidelines?

The law does not explicitly define an obligation of confidentiality. Social workers are obliged to confidentiality due to their professional ethics (professional association of graduated social workers - Berufsverband der Diplomsozialarbeiter). Legal welfare officers are not obliged to confidentiality. If they get to know about criminally relevant facts, they are even obliged to report them to the authority, which decides whether to make report or not.

19. In the event that the minor is detained, is he or she entitled to have a guardian?

Regarding guardianship the conditions are basically the same as for not detained UAMs/ SCs. It is no contradiction to appoint a guardian for a UAMs/ SCs in detention or in remand pending deportation. But it is problematic that in practice often the locally competent youth welfare institution is not informed about the residence of UAMs/ SCs in detention. As UAMs/ SCs are often taken in remand pending deportation shortly after having entered the country, in those cases the guardianship is not regulated. Due to the lack of legal support for the UAMs/ SCs it is hardly possible to file an application for a guardian decision at the district court. Furthermore in many cases the aliens' police corrects age-indications (mostly estimation of age by the public health officer). The concerned person is then treated as an adult. In some cases it was possible to proof that these statements were wrong.

20. Are there any children denied guardianship on the basis of legal status, age, accommodation/ geographical location, nationality or any other factor (please specify)?

Denial due to short duration residence or lack of residence title (definition of the term "gewöhnlicher Aufenthalt" is essential).

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The problem is mostly, that the competent court is not informed about the UAMs'/ SCs' residence (admission procedure, illegality, remand pending deportation).

21. How is the guardian involved in the identification and implementation of a durable solution for the minor?

Asylkoordination österreich estimates that in less than 10% of the asylum applications filed by UAMs/ SCs a legally binding decision is obtained while they are still minors. This is the reason, why the guardians are rarely encouraged to commit themselves to a durable solution (repatriation, integration).

22. In your view, does the guardianship system in your country work well? Please describe 3 advantages and 3 disadvantages of the current system.

Advantages

- The law is valid for all minors irrespective nationality and title of residence.
- Guardianship is regulated by law in a comprehensive and distinct way.

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Disadvantages

- The youth welfare institution in practice does not or does only insufficiently fulfil the legal obligation to guardianship (necessary financial and personnel means are not sufficiently provided)
- Especially for UAMs/ SCs in remand pending deportation it is often impossible to file applications for guardianship.
- Major regional differences in the proceeding of the youth welfare institution (federal structure). While Lower Austria tries to fulfil it's obligation as extensive as possible, the federal state Styria still refuses to even file applications for guardianship.

23.Please list any country studies or reports on guardianship.

Beatrix Ferenci, Ludwig Boltzmann Institut für Menschenrechte, legal expertise: Materielle rechtliche Grundlagen der Zuständigkeit für die Unterbringung von Unbegleiteten Minderjährigen Flüchtlingen, Jänner 2001.

Thomas Hacker, Gerichtliche Obsorgeregelung für unbegleitet minderjährige Fremde, published by: Der österreichische Amtsvormund 34. Jahrgang Folge 167, 2002

24.Please list the main stakeholders for asylum-seekers, refugees and IDP child care and asylum procedures at the:

- Local Level
- Central Government
- NGOs involved