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„The Useful Foreigner. A Campaign for Asylum
Seekers in Vocational Training and its Impact“

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Introduction

In December 2017 a campaign called *Ausbildung statt Abschiebung* ('Education not Deportation') began in Austria. Its aim was to prevent the deportation of asylum seekers who were in vocational training. They were – according to the national legal framework and politics at the time – threatened by expulsion. The initiative showed some unusual characteristics: it did not – as aid organizations normally do – depict the afflicted migrants as poor and helpless but tried to point out their strengths and potential: abilities, ambitions, the will to integrate and to become members of the “host society” to whom they would prove to be useful. This was bolstered by the fact that in some Austrian regions there was a lack of qualified personnel in skilled crafts and trades.

The campaign was founded on a petition. The collection of signatures for *Education not Deportation* gained more support than similar initiatives at the time and won over allies who normally were not seen as partners for such issues: conservative politicians, company managers and leading representatives of the business community. They were attracted by the strongly “utilitarian” argumentation of the political proposal¹.

This leads to research questions and especially to one of the most important ones:

How does the notion of the “useful refugee” need to be assessed in the light of human rights and the concept of (unalienable) human dignity?

On the other hand: What was the impact of the campaign – on politics, on the law and above all on the opportunities of asylum seekers? Was there an impact at all and if yes, how can it be described? Were there rules that were changed – and did possible changes in jurisdiction trigger changes in real life?

To answer these questions the work will be divided in sections as follows:

Rules and politics at the start of the campaign; the methods, including the petition and the special platforms; a short history of the law considering the international framework (Geneva convention, EU directives etc.); the national framework and possible contradictions to international norms; the political success and the political failures of the campaign; the “time afterwards”, analysing changes in jurisdiction, consequences for the afflicted group and discussing utilitarianism and its “price”; the conclusions –focusing on the questions “what changed” and “what did not change”?

¹ Utilitarians follow a “commitment to maximizing utility”, see: Kymlicka, Will 2002: *Contemporary Political Philosophy. An Introduction*, Oxford, New York: Oxford University Press, p 20.

The assumptions were that the campaign had a certain impact, especially on the image of young asylum seekers in public; that - regarding policies - a fundamental change on the issue of “asylum seekers and apprenticeships” in practice did not materialise, though some jurisdictional decisions seemed to be in favour of it; and that certain political goals remained unaltered and were pursued.

The methods used for the paper include an analysis of legal provisions and of the communicative instruments used in the wake of the campaign. Additionally, people responsible for the campaign, politicians and stakeholders were interviewed, for example with Rudolf Anschober, the spokesman for the campaign and Reinhold Mitterlehner, former Vice- Chancellor for the Conservative Party (the ÖVP, Austrian Peoples’ Party). Experts “in institutions have specific insights and knowledge because of their professional position and expertise; and elite interviews (address) rather high-ranking representatives of organizations or in public life.”² The interviews were semi-structured (prepared questions, but mostly open-ended, applied flexibly, with room for the perspective of the interviewees) and qualitative, aiming to contain a wealth of information and in-depth knowledge. I translated the content of the interviews conducted in German.

For the thesis – especially the “historical” part until the end of 2019 – material was taken from a seminar paper written on the issue.³

1 The Campaign – Means and Aims

1.1 The Conditions at the Start

In retrospect the autumn and the early winter of 2017 proved to be a period of change in Austria – a new centre-right government coalition came to power, asylum practice became stricter (details see below), but public resistance towards it intensified too, and the life of individuals belonging to a certain group seemed to more insecure than ever: that of asylum seekers in vocational training. From 2013 these young men – they were almost exclusively men – were allowed to take up apprenticeships. The permit was restricted to persons between 16 and 25 and these were only “entitled to start an apprenticeship training in professions with a shortage of skilled labour”.⁴ But as the general limitations

² Flick, Uwe 2014: *An Introduction to Qualitative Research*, London: Sage, p 227.

³ Mair, Michael 2020: *A Coalition of the Willing*, University of Vienna/Postgraduate Center, seminar paper.

⁴ Lechner, Ferdinand/Wetzel, Petra: 2016, *Labour market integration of asylum seekers and refugees – Austria*, EU-Commission, Luxembourg: Office of the European Union, 2016, p 6.

for asylum seekers were still more restrictive (in fact they could only take on jobs in agriculture and tourism if no EU-citizens were applying for them) this meant a step forward: access to the labour market was eased at least for a specific number of refugees.

But this did not mean that the policy became more stable or that these migrants were protected from deportation - because in the background a change of course had been prepared: in autumn 2016 the EU (Austria has been a Member State since 1995) and Afghanistan had signed a declaration “with the objective to establish a [...] process for a smooth, dignified and orderly return of Afghan nationals”⁵. On the national level the *Berufsausbildungsgesetz* (the Vocational Training Act, translation by M. M.) had been amended, stipulating that an apprenticeship ended when the asylum procedure of the person had come to a negative conclusion.⁶

In the autumn of 2017, the Austrian Minister of the Interior (a member of the Conservative Party) expressed satisfaction about what the ministry and he himself had achieved. In a press release they were pleased, because “in deporting (failed asylum seekers, note by M. M.) from Austria we are top of the list measured per capita in Europe”. The number of these persons was higher than 8,800.⁷

The then Minister for European and International Affairs, Sebastian Kurz, had announced already in 2016 that Austria was promoting further return deals with other states. Kurz, consistently followed a hard course on immigration issues, took over the Conservative Party (the ÖVP), won the elections in 2017, concluded a coalition with the right-wing Freedom Party and was sworn in as Federal Chancellor at the end of 2017.

The Green Party was voted out of the *Nationalrat* (the national assembly) in 2017 after more than three decades, suffering from serious internal conflicts. But it had not lost all its political strongholds. For instance, in the province of Upper Austria, Rudi Anschober, a long-standing and popular spokesman for the Greens (at the time he was also known in public as Rudi), was still a member of the national government, responsible for the integration department. In 2003, with Anschober leading his party, the first coalition of the ÖVP (the Conservative Party) and the Greens on the level of regional governments had been formed. According to Anschober’s knowledge and to that of his assistants,

⁵ EU/Islamic Republic of Afghanistan 2016: JWF (*Joint Way Forward*) on migrations issues, Kabul.

⁶ Jusline, *Berufsausbildungsgesetz*, Paragraph 14, *Endigung des Lehrverhältnisses* (Vocational Training Act, End of Apprenticeship, translated by MM), <https://jusline.at/gesetz/bag/paragraf/14>, accessed May 28, 2020.

⁷ Austrian Federal Ministry of the Interior: 2017, press release (quote: Wolfgang Sobotka, the then Minister): APA/OTS, October 7, 2017.

Kurz's strict anti-migration policy of was by far not shared by all officials of the Conservatives – especially considering the labour market. At the beginning of 2018 statistics quoted by the AMS (the Austrian labour market service) for asylum-seekers in vocational training for understaffed occupations in Austria was exactly 748, the majority of them working in Upper Austria⁸. They met the needs of the regional economy, Anschober's press secretary, Werner Dedl, explained:

“We had already addressed the issue in 2017. At the time the managing directors of companies had poured out their troubles to us. We had always tried to give support. This was the launching pad of the campaign. No one could understand the measures – they said, ‘we have people on hand, who are in vocational training in these understaffed professions.’ This was the main reason for the broad scope extension of the campaign. But at the time this was not totally clear to us, I understood it only afterwards.”⁹

Yet even if the dimension was not “totally clear”, economic arguments played a key role for the campaign only from the beginning. This and other characteristics can already be found in the first press conference convened by Anschober to announce the start of a nationwide campaign entitled *Ausbildung statt Abschiebung* (Education not Deportation, translated by MM). It demanded a right for asylum-seekers to stay during the period of vocational training – not only for integration, but also for the “economy and society”.¹⁰ To illustrate the fact a young businesswoman called Sylvia Hochstätter was presented who with her husband operated a roofing and plumbing company in a small market town. They had been requested by the Chamber of Commerce and Caritas, the emergency aid organization of the Catholic Church, to train Shaffiqulla, a 23-year-old refugee from Afghanistan:

“We saw a great chance in it [...] there is a lack of skilled workers in our line of business and this trend will continue so I am very worried thinking about the future of our company[...] Now we are dismayed that he is to be sent back to his home country and all the time and money invested into the education of Shaffi has been in vain. Why can't these people who have become perfectly integrated and given some hope to companies not even finish their apprenticeship? Shaffi is a very reliable and conscientious

⁸ Arbeitsmarktservice Österreich 2018: Zugangswege für ausländische Fachkräfte zum österreichischen Arbeitsmarkt. Ein Überblick, Spezialthema zu Arbeitsmarkt, p 5, Vienna.

⁹ Interview with Werner Dedl, at the time of the campaign press spokesman of Regional Councillor Rudi Anschober, Linz, April 14, 2022, transcript (my translation – in the following abbreviated as ‘mt’), p 1.

¹⁰ Anschober, Rudi 2017 (December 1): Press conference information on , Linz: *LandesKorrespondenzMedienInfo*, p 1.

apprentice. He passed the first grade of the vocational school with determination which can be attributed to his incredible ambition and stamina. In case of a positive asylum decision, he would be a very good skilled worker [...] but now he is in fear of death.”¹¹

This short statement said almost everything – it contained nearly all the elements of the campaign, incidentally, not endorsed by a refugee aid worker but by a company owner:

- the utility of young asylum seekers, considering the needs of the economy;
- the will to work and the potential abilities of many of the young men (most of them were male), contradicting their image as helpless creatures;
- laws and rules not promoting integration.

Some official data and scientific studies seemed to confirm these assumptions, for example concerning the “usefulness” of asylum seekers in vocational training:

In November 2017 more than 1000 apprenticeship posts in Upper Austria were vacant, only 450 young people were looking for a training position¹².

Experts in business education had discovered that asylum seekers filling the need could improve their self-confidence. They had evaluated diaries of refugees and detected

“a positive correlation between the wish to pursue an apprenticeship in the job area of the internship and the level of the expected job-related self-efficacy; stability over the extent of these expectations also correlated positively with the perceived satisfaction of the subjects’ basic needs.”

Nevertheless, the risk of deportation was high especially for Afghans, the largest section: 40% of decisions on their asylum applications were negative.¹³

In May 2017 the Federal Ministry of the Interior had informed the media that since the beginning of the year more than 200 persons had been “deported from Austria to Afghanistan.”¹⁴ Anschöber was a member of the regional government of Upper Austria at the time, responsible for the department of integration. Thus, he spoke in an official capacity when he referred to “about 15 cases which have received negative decisions in first instance, among them one deportation after the decision of the last instance.”¹⁵

¹¹ *Ibid.*, p 5-6.

¹² Arbeitsmarktservice Oberösterreich (Public Employment Service of Upper Austria) November 2018: *Der oberösterreichische Arbeitsmarkt* (The Labour Market of Upper Austria), *Medieninfo*, p 3.

¹³ See Austrian Ministry of the Interior, <http://www.bmi.gv.at/301/Statistiken/start.aspx>.

¹⁴ <https://www.derstandard.at/story/2000057810706/exilverein-gegen-abschiebungen> (May 18, 2017)

¹⁵ Anschöber 2017, p 3.

The Federal Ministry of the Interior was controlled by the ÖVP at the time, but even the regional Wirtschaftsbund (the Austrian Economic League), a sub-organisation of the ÖVP, advocated exceptions. Doris Hummer, chairwoman of the Economic League, representative of the ÖVP and President of the Chamber of Commerce of Upper Austria, delivered a public statement at the start of the *Education not Deportation* campaign supporting its main requirement:

“I strongly urge that asylum seekers – even in the case of a negative asylum decision – must be able to finish their vocational training and ideally can remain in the businesses as well-integrated skilled employees.”¹⁶

This early example must be classified as typical for another characteristic of the initiative – to win over allies one would not necessarily expect. The voices of support not only came from refugee care organisations such as Volkshilfe or Caritas, but also from persons and sections of a party which was not famous at all for a strictly human rights-based course in the matter.

1.2 The Petition

The campaign was presented at a press conference. However, on the same day another instrument was introduced which was comparatively new and became more widespread: an online petition. In the period from 2011 to 2018, within seven years, the number of online petitions in Austria amounted to 956, the same number as from 1987 to 2018, over a period of 31 years. There were platforms with much experience on hand. The Anschöber-group used *openPetition* that had been founded in Germany seven years earlier. It described itself as a “donation-financed, civil society platform. We are neutral, transparent, and financially independent of politics and business.”¹⁷ According to their reports they had published about 8,700 new petitions and almost 13 million people had subscribed to their newsletter. To sign the new petition from Austria you only had to leave your name and an e-mail address. The aim was openly declared – to “put pressure on the Austrian Federal government to reach a reasonable and human solution – no deportation during education”.¹⁸

¹⁶ Anschöber 2017, p 6.

¹⁷ openPetition 2020: *Jahres- und Transparenzbericht*, https://www.openpetition.de/wordpress-content/uploads/2022/05/Jut_2020.pdf, accessed on May 23, 2022, p 4.

¹⁸ Anschöber, Member of the Regional Government, 2017: Great Start of Education not Deportation, APAOTS December 2, 2017.

On the first day 1,000 signatures were already registered, supporting demands with a clear reference to the practical needs of the economy. Anschober commented, “The first numbers showed how great the indignation was about the inhuman and counterproductive danger for this beneficial action for integration and by negative asylum decisions and deportations”¹⁹, and he stressed the ‘utilitarian’ aspect of the facts under discussion.

The petition did in fact show a double character. There are two types of petitions in Austria – one being a sort of outlet for protest outside the representative-democratic sphere, the other one based on parliamentary regulations:

“In Austria, parliamentary petitions and citizens’ initiatives enable citizens to submit initiatives to the Austrian Parliament, either by garnering 500 signatures of support (parliamentary citizens’ initiative) or via a member of parliament (petition). These tools thereby broaden the participatory repertoire in Austria’s political system of. Apart from these institutionalized instruments, online petitions such as *openPetition* are enjoying increasing popularity.”²⁰

Statistics confirm that trend. Until 2018 more than 300 parliamentary petitions and parliamentary citizens’ initiatives were submitted – but on the website *openpetition.eu* more than 960 Austrian petitions have been filed since its start in 2010. The maximum per year was 79 for parliamentary petitions and 355 for the online variant²¹, the type which could be deployed very efficiently to gather followers of certain demands:

“Low thresholds for, and high-speed participation and the potential effects of reinforcement on online-platforms turn online-petitions into an instrument for mobilization purposes.”²²

The Greens in Austria were in urgent need of such an instrument. They had, as we remember, lost their representation in the national parliament in the elections of 2017. Werner Dedl, one of the organizers of the *Education not Deportation* campaign, was at the same time spokesman of the regional Green minister Anschober:

¹⁹ Anschober, December 2, 2017.

²⁰ Rosenberger, Sieglinde/ Stadlmair, Jeremias/ Dalpra, Elio/ Seisl, Benedikt 2021: *Participate – Petitions and Parliamentary Citizens’ Initiatives, Linking Citizens and Parliament?* <https://inex.univie.ac.at/research/peticipate/> (accessed May 23, 2022).

²¹ Seisl, Benedikt/ Rosenberger, Sieglinde/Stadlmair, Jeremias 2021: *Nutzung und Themen von Petitionsinstrumenten*, in: Rosenberger/Seisl 2021: *Petitionen in Österreich, Akteurinnen, Prozesse, Funktionen*, Parlamentsdirektion (publisher.): Vienna, p 26-27.

²² Seisl, Rosenberger, Stadlmair 2021: *Institutionelles Design von Petitionen – vorbestimmte Funktionen und gemischte Erwartungen*, in: See above, p 45.

“In 2017 the ‘black-blue’ (the coalition of ÖVP and FPÖ) era of Kurz began. We sat in our conference room and said, ‘there are no Greens anymore, we are the last ones, so to speak’...the situation was very depressing when we started.”²³

Dedl recalls that the initiators at the beginning did not expect more than an overall number of 5,000 signatures. Three weeks later, in an interim balance, they communicated that “more than 15,000 supporters have signed online”²⁴, three times as many as predicted.

What made the initiative so special? Anschöber, although he himself was an active politician and member of a (regional) government had seized an instrument of civil society (an online petition) to use it against another part of the political elite (the federal government). Professional players appreciated this non-parliamentary “uprising”, this sort of “click democracy” (Rosenberger: 2021) as a good way to “disseminate demands quickly. They use the instrument nationwide to give people the possibility to take a stand, to form a common will and to subsequently enunciate this so-called civic will.”²⁵

But even if we understand and accept this explanation for the design of the campaign, we find a second element which at first sight did not seem to promote its success: it simply was its subject. Considering criteria of social policy, online petitions often seem to be positioned very clearly:

“57 per cent of the analysed online petitions seem to have a progressive orientation. Unlike parliamentary petitions, the informal petitions on *openpetition.eu* seem to polarize more strongly – above all in the cultural dimension.”²⁶

The issue of the “no deportation”-petition seemed to harbour a potential for polarization – the concern was to protect asylum-seekers or at least a certain group of them. Why did it nevertheless attract such broad support? In August 2018, about seven months after it was launched, the petition had been signed by more than 600 enterprises, more than 90 municipalities and almost 56,000 individuals, among them well-known personalities like a former chairman of the Conservative Party, a former skiing champion and pop singers.

But why did a request with such a great risk of conflict and division (to stop deportations of a certain group of asylum seekers) not slow down the flow of signatures? Why did the potential of supporters not split up?

²³ Dedl 2022, p 2.

²⁴ LandeskorrespondenzMedienInfo, Information on Press Conference with the Member of the Regional Government, Rudi Anschöber, press release, December 20, 2017, Linz: Amt der oberösterreichischen Landesregierung, p 1.

²⁵ Seisl/Rosenberger/Stadlmair 2021, p 46.

²⁶ Seisl/Rosenberger/Stadlmair 2021, p 30.

The first reason was that no one was excluded. In the national election campaign of 2017 the issue of “asylum and integration” was the most strongly discussed among voters²⁷; in his canvass Kurz, the Conservative Party’s nominee for chancellor, had warned “that still too many people are coming to us, this overloads the welfare system and is detrimental to successful integration.”²⁸ But Reinhold Mitterlehner, a long-time leading manager of the Austrian Business Association and the Chamber of Commerce, and the party leader who had been pushed out of office by Kurz, took part in a press conference about the *Education not Deportation*-campaign alongside Rudi Anschober, its Green spokesman. Mitterlehner knew that within the ÖVP two different currents existed:

“There was the new one which can be described as the Kurz-line, which drew a very clear picture: anyone who has no right to stay, must leave the country. This was implemented on all levels. The other philosophy was very close to a Christian concept of ethical values [...] It’s right that the then official ‘turquoise’ party has intervened via intermediaries to insist that I should drop that – but this did not make me attach no importance to the topic.”²⁹

Turquoise had become the new party colour after Kurz and his staff had taken over. They were famous for their message control but could not exercise it completely given the “No Deportation” campaign and its allies within the party. Sympathizers who were not dependent on the new ÖVP-leadership could not be prevented from signing and speaking up, “Systematic support came from the mayors and business, those people who were not subject to the hierarchy system” (Mitterlehner 2022).

It was no great secret that Anschober, a seasoned Green politician, tried to drive a wedge into the conservative camp:

“It has to be admitted that it was a lever deployed with full intent towards the ÖVP, this has to be confessed. There were different political camps, different interests and the ÖVP is a very multi-layered, very broad party. There is also a humanistic economic wing existing within.”³⁰

The first way to win over potential allies was to identify the target group, the second one was to make special offers to them. Anschober used his organizational and financial

²⁷ SORA/ISA 2017: Wahlanalyse Nationalratswahl 2017 (Analysis of the National Council Elections 2017, tbm), ORF (Austrian Broadcasting Corporation), p 11.

²⁸ Kurz, Sebastian: Stop illegal migration, see <https://www.sebastian-kurz.at/>, June 10, 2017, accessed on June 4, 2020, translated by me.

²⁹ Interview with Reinhold Mitterlehner, April 14, 2022, Linz, transcript (translated by MM), p 1.

³⁰ Interview with Rudi Anschober, April 13, 2022, Vienna, transcript, p 5.

resources as a member of the regional government. But the online petition, usually seen as an instrument for a people's movement, could not be easily dismissed as a Green attempt at resurrection. Anschober in his interview recalls:

“I did not want to run it as a party initiative, in my view this would have been wrong. Therefore, it was important to get proponents from other parties from the beginning [...] We had planned this strategic direction from the start - to win over many allies from other parties. To get them in any other way would have been much more difficult.”³¹

For two groups two doors to special petition-rooms were opened: one was reserved for companies, where owners could sign up, demanding a decision of the federal government to prevent deportations during vocational training. The other one was meant to attract municipalities, who were invited to adopt resolutions requesting “humane and economically reasonable solutions for asylum seekers in apprenticeship.”³²

With these two additional and “made-to-measure” forms of access the campaign was extended from the regional to the national level and was extended in time, too. At the start it was planned to complete it in January 2018, after about six weeks. But in May 2018, after about six months, the count showed 51,000 signatures for the core petition “Education not Deportation”, more than 320 registrations on the platform of companies and 36 municipalities who had had themselves listed on the community platform.³³

More than half of these municipalities were governed by mayors rooted in the ÖVP (the Conservative Party). Until August 2018 the number of supporters from the world of businesses and managers almost doubled including, for example, Georg Kapsch, the then president of the Federation of Austrian Industries, Gerhard Drexel, at the time chief executive officer of one of the biggest trading groups in Central Europe or Josef Stockinger, director general of a big insurance company and a former Conservative member of the regional government .

Hans Peter Haselsteiner, a liberal and a former managing director of one of the biggest European construction companies, also found some common ground with the initiative and its Green spokesman:

³¹ See above, p 6.

³² Anschober, Rudi 2018/2019: Information from press conferences, February 5, 2019/June 11, 2018, Linz: *Land Upper Austria*.

³³ LandesKorrespondenzMedienInfo May 18, 2018: Informations on the Press Conference with Counsellor Rudi Anschober, Linz: Office of the State Government of Upper Austria (ed.).

“In view of such a pressing lack of skilled workers, the deportation of apprentices is the most stupid measure imaginable.”

It was the breach of economic logic by the asylum-policy that industrialists and company leaders like Drexel mainly denounced in their statements conveyed on the company platform:

“Many lines of business in Austria lack workers, skilled crafts and trades too. It contradicts logic and philanthropy to deport young people who would like to work and are well integrated!”³⁴

The movement rested on a third special pillar: celebrities. The campaign organizers had succeeded in convincing sportsmen, TV-stars or even favourites of the gossip columns to deliver testimonials for the campaign and its undoubted political goals –confessions of a type these public figures usually tried to avoid. Hermann Maier for example, an ex-skiing champion and a national hero especially for his Olympic medals, normally posed on his homepage as a sledge builder or as a character in bank advertisements. Maier had been a hard-working bricklayer in the Austrian countryside before achieving fame as a hero on the downhill slopes. Now he could identify with the story line of the young refugees trying to build a life:

“From my own experience and from my time as a mason I know how important it is for young people to find an appropriate education and job. This alone creates the prerequisite for successful integration [...] If the will is there, enthusiasm and passion, a way should be made possible.”³⁵

Maier owed his rise to fame to his individual performance and strength and held the opinion that no one should be prevented from following his example. Another favourite of the people, the cabaret artist and actor Josef Hader, had become a real face of the campaign. He added a chapter to the story board of the brave and useful immigrant:

“The deportation of asylum seekers doing an apprenticeship in a sphere with an acute shortage of workers is questionable on the human scale and makes absolutely no economic sense.”³⁶

³⁴ See *LandeskorrrespondenzMedienInfo*, August 20, 2018, p 1.

³⁵ <http://ausbildung-statt-abschiebung.at>, accessed on June 10, 2020.

³⁶ See above.

1.3 The Images

The utility argumentation was repeated in almost every form of media information on the issue – and there were many. The collection of the governmental media department contains information from about 60 press conferences with Rudi Anschober, as the regional minister in charge of integration, from November 2017 to December 2019. In the media releases asylum-seekers were consequently portrayed not as a burden, but as an opportunity, happy to work and ready to integrate, with only positive characteristics being attributed to them:

“[...] already familiarized, industrious young people” (from a letter of a citizen to the secretary of the interior)³⁷ [...]

“[...] speaks perfect German. He is an open minded, ambitious, and responsible young man, extreme beneficial for our company” (the owner of a painting company about a refugee from Afghanistan)³⁸

“[...] well integrated by an apprenticeship and an apprenticeship commitment” (about two brothers subject to deportation) [...]”³⁹

“[...] a very conscientious and very reliable apprentice [...] in case of a positive asylum decision he would for sure become a good skilled worker and maybe even a technician [...]” (the employer).⁴⁰

“[...] we have three godchildren from Afghanistan, all three of them are in apprenticeships and they are very industrious. They are already supporting themselves. They cost the state nothing and are future taxpayers.” (quotation from the website of the petition, December 4, 2017).

It was an unusual approach to emphasize the potential usefulness of asylum seekers. Some media were benevolent, but it seemed to be the primary goal of their reporters to arouse compassion:

“It is a fact that in many of the countries of origin of the people now present in Traiskirchen (a centre of initial reception in Austria, MM) war, death, persecution,

³⁷ *LandeskorrespondenzMedienInfo*, Linz: Office of the Regional Government of Upper Austria, August 6, 2018, p 5.

³⁸ *Landeskorrespondenz* (see above).

³⁹ *Landeskorrespondenz* (see above), May 7, 2018, p 1.

⁴⁰ *LandesKorrespondenzMedienInfo Land* Upper Austria, see above, January 11, 2018.

destruction, and despair prevail. These people are on the run, it's about surviving. One should consider that, before he/she forms a judgment and turns away.”⁴¹

“Probably in all communities in our district there are citizens who get involved in the care of refugees, people from Pinzgau, who are aware of the situation of vulnerable and help-seeking fellow men and for whom it is a matter of the heart to use their resources to help.”⁴²

Professional social workers were also following this “poor soul”-line, as an analysis of articles in *SIÖ/Sozialarbeit in Österreich* substantiated, the journal of their professional association:

“In political and social discourse migrants are presented as helpless, powerless or as a danger for social peace and our culture. Moreover, the image of migrants is created in social work.”⁴³

It is a pessimistic view of refugees which predominates in social work:

“The overtaxing, overtaxed, guilty, unreasonable, uncomprehending, dangerous, threatening, mentally ill, unsuccessful, lost, disoriented, drug addicted, waiting, inactive migrants are exemplary excerpts of deficient migrant pictures [...] Other negative pictures that essentially concern only refugees and asylum seekers: the criminal, the dependent, the untrue, the unrealistic, the ingenious, the unknowing, the discouraged and the despondent refugee.”⁴⁴

This image of the clients spread by social workers has an impact on the “outside world”, on media, law, social conditions and thus the public and politics – it triggers negative impacts:

⁴¹ *Der Standard*: August 12, 2015, <https://www.derstandard.at/story/2000020639714/das-koennen-wir-besser>, download February 12, 2022.

⁴² *Flüchtlinge in Neukirchen*, April 26, 2016: https://www.meinbezirk.at/pinzgau/c-lokales/fluechtlinge-in-neukirchen-viele-einheimische-engagieren-sich_a1709616, download February 12, 2022.

⁴³ Ebner, Elisabeth Maria 2009: Migrant Pictures of social Workers, in: Österreichischer Integrationsfonds, ÖIF-Dossier 2009, p 9
file:///C:/Users/micha/AppData/Local/Temp/n2_Dossier2_Migrantinnenbilder_von_Sozialarbeiterinnen.pdf, accessed February 12, 2022.

⁴⁴ Ebner 2009, p 17.

“As a consequence of public self-dramatization to secure donations, to secure the right to exist or financial support of public means they regrettably forget over and over again the stigmatizing effect of deficient portrayals of their clients.”⁴⁵

The academic – a specialist in social pedagogy –recommended liberating refugees from their role as puppets of fate. This was very similar to what the *Education not Deportation*-campaign propagated:

“He/she in this discourse seems to be very quickly a ‘poor victim of the conditions’. This could be right in a single case, but systematically it is wrong. The migrant is an active player and follows his interests like all individuals do. By migration there are not only losses, but also benefits.”⁴⁶

This school of thinking suggests that the well-meaning players especially should not promote indirectly discriminating attitudes:

“By changing the perspective of social work in an immigrant’s society to an orientation towards resources and recognition of the strengths of migrants can lead to an improvement in the self- and interpersonal perception of migrants. A broad appreciation and esteem of the capacities and achievements of people with a migration background could lead to a relevant improvement of their living conditions in Austria.”⁴⁷

1.4 The “Utilitarian” Approach

Human Rights campaigns too have been “criticized for resorting to messages and imagery that are too simplistic or lack an adequate context, and, as such, perpetuate stereotypes of poverty, underdevelopment and victimization.”⁴⁸

The *Education not Deportation*-campaigners could not be reprimanded for that. Asylum seekers were described as people who “want to work and are in search of new perspectives”⁴⁹. The shift of images simply fit very well into the design of the campaign. It had become more and more its goal to forge an alliance with the employers and to

⁴⁵ Hamburger, Franz, 2002: *Soziale Arbeit und Öffentlichkeit*, in: Thole, Werner(ed.), *Grundriss Soziale Arbeit. Ein einführendes Handbuch*, Opladen: Leske+Budrich, p 767.

⁴⁶ Hamburger, Franz 2001: *Migration*. In Hans-Uwe Otto & Hans Thiersch (Hrsg.), *Handbuch Sozialarbeit, Sozialpädagogik*, Neuwied: Luchterhand, p 1221.

⁴⁷ Ebner 2009, p 12.

⁴⁸ Heger Boyle, Elizabeth et.al. 2017: *Making Human Rights Campaigns Effective While Limiting Unintended Consequences, Lessons from Recent Research*, University of Minnesota: Working Papers Series, p 35.

⁴⁹ Anschober, Rudi 2018: *Landeskorrespondenz* (see above), June 11, 2018, p 2.

“offer” the young asylum seekers as the solution for the biggest problem of the companies: the lack of skilled workers. This was what held the project together, this was the “glue” of the partnership which connected different interest groups:

“I thought it can’t be that we don’t make it, but that great social processes in our society are destroyed, because a part of politics means that there should be no place for it; that we have to harm ourselves so to say, while harming someone else out of partisan calculation (Anschober).”⁵⁰

This clearly was a case of utilitarian and not purely ethical thinking of a Green politician, or it at least shared traits of this type of argumentation. In the scientific world the term “utilitarianism” does “not refer to a single theory but to a cluster of theories”.⁵¹ Its theme revolves around

“the consequence component, to the effect that the rightness or wrongness of acts is tied in some way to [...] the good and bad consequences; the value component, to the effect that the goodness or badness of consequences is to be evaluated by means of some standard of intrinsic goodness; the range component, to the effect that it is the consequences as affecting everyone [...] that are to be considered in determining rightness; and a principle of utility, to the effect that one should seek to maximize [...] what the adopted standard of goodness identifies as intrinsically good.”⁵²

In a nutshell: the aim should be a better state of the world, including advantages for all groups. But what is seen as “good”?

“The most prevalent variant today is the conception of Preference Utilitarianism. An action is accordingly morally good if, with a view to realizing the preferences of all the subjects concerned, it produces a state of the world better than the state of the world which could be brought about by an alternative action.”⁵³

If we use this measure stick – considering the preferences of all the subjects concerned – the goals of the campaign were proposing advantages to all the stakeholders: to grant apprenticeships to asylum seekers promised to open a chance to build a life in their host country; the companies and the society could hope to recruit new workers for understaffed occupations and thus to secure economic success. Following this path, it had to be proven

⁵⁰ Interview with Anschober, p 2.

⁵¹ Frey, R.G. (ed.) 1984: *Utility and Right. Introduction*, Minneapolis: University of Minnesota Press, p 4.

⁵² Frey 1984, p 4.

⁵³ Tiedemann, Paul: 2021, Are There Moral Duties toward Refugees? Considerations in Legal Ethics. in: *Laws* 10: 4. <https://doi.org/10.3390/laws1001000>, p 4.

by numbers that certain actions would produce a better state of the world. In a university study two economists calculated the long-term costs of deportations, comparing two options: the first one was that the apprentices would stay in the country and work in their professions in the future, the second option was that they would be forced to leave and therefore not start to work. For this latter variant the loss in added value, tax payments and consumption would amount to 100.000 euros per person and in Upper Austria would accumulate to a total of 31 million euros, the scientists predicted.⁵⁴

According to medium-sized companies non-action or “alternative action” (deportation of asylum seekers in apprenticeships) was not to bring about an improvement in recruitment. At one of the press conferences of the campaign, a manager of an international consulting and auditing company took part and testified, “that the situation on the labour market limits growth [...] Within Austria there is no business and no longer any place that is spared by the lack of skilled workers.”⁵⁵ The network had interviewed 900 Austrian businesses.

In a study by the *Integrationsfonds*, an official agency of the Republic, respondents were asked about a “better world” by immigration. More than half of them (57%) approved the statement “for migrants qualified for understaffed professions it should be easier to come to Austria”.⁵⁶

The Austrian economy simply could not afford to deport asylum seekers who had qualified for these professions, the argumentation went on. At the time in Upper Austria one third of the more than 360 asylum seekers in apprenticeships was faced with negative asylum decisions, the integration department of the state government reported. The call for protection was unambiguously linked to conditions, “We need to link the best possible integration by work with the interests of the economy and the employees. So, this is a win-win situation for everyone.”⁵⁷ Two sisters for example were particularly praised. They had completed their apprenticeship diploma in a restaurant. Fatima and Sonya had grown up in Afghanistan, a Muslim-dominated country. For the exam the apprentices had

⁵⁴ Schneider F./Dreier E. 2018: Ein Bleiberecht für Asylwerbende in Mangelberufen, Berechnung der volkswirtschaftlichen Kosten durch Abschiebungen in OÖ, Linz: Johannes-Kepler-Universität, p 12. <https://www.jku.at/forschungsinstitut-fuer-bankwesen/abgeschlossene-studie>; accessed June 10, 2020.

⁵⁵ Lehner, Erich 2018: *Landeskorrespondenz*, see above, June 11, 2018, p 5.

⁵⁶ Hajek Peter, 2019: *Integrationsbarometer 2019*, Österreichischer Integrationsfonds (ed.): Vienna, p 18.

⁵⁷ Anschober 2018 in: *LandesKorrespondenzMedienInfo* (LK) June 11, 2018, p 2f.

not only prepared pork chops but also tasted them, saying afterwards “this was no problem. It belongs to our job.”⁵⁸

The two asylum seekers had passed a test of adaptation – to Austrian lifestyle. The member of the regional government in charge of integration happily confirmed that. He stressed that during the course mainly *österreichische Schmankerl* (Austrian delicacies) had been cooked. This may be an anecdote, but it conveys a message on the possible outcome of consequentialism, respectively utilitarianism:

“The dominating understanding of migration is geared to criteria of utility. The danger is that human rights aspects of the phenomenon are superseded and become hazy.”⁵⁹ The conflict is a principal one. Human rights “respond to our fundamental needs and values as human beings”⁶⁰ and thus as individuals, but utilitarianism is not focused on single claimants:

“The utilitarian moral theory refers to the principle that agents are always responsible for all the predictable consequences of their actions. It is less concerned about the consequences for those who have rights or claims by contract or warranty liability or for those who have an interest in not being harmed. Rather, he has in mind the consequences for the state, for society, or for the world in general”.⁶¹

The objections to utilitarianism concentrate on this characteristic – that it focuses almost exclusively on the “maximization of utility” while overlooking “other important categories, for example subjective moral rights”⁶²:

“An example are human rights which in the meantime are enshrined in a large number of documents of international law. The idea that human beings have moral rights as human beings – the right to physical integrity and security, the right to religious freedom and to the freedom of expression, the right to fundamental social goods like education – determines the political culture of our society. But utilitarianism has no place for this category or rights.”⁶³

⁵⁸ LK, August 6, 2018, p 3.

⁵⁹ Lentsch Magdalena Josefa 2014: *Racist Practices as an Instrument Co-constituting the Precariat. The Example of Asylum Seekers as Workers in Austria*, Vienna: Vienna University, p 27.

⁶⁰ Nowak, Manfred 2012: *Human Rights from a Legal Perspective*, in: Nowak/Januszewski/ Hofstätter (eds.), *All Human Rights for All, Vienna Manual on Human Rights*, Vienna/Graz: nww, p 22

⁶¹ Tiedeman 2021, p 2.

⁶² Pauer-Studer, Herlinde 2020: *Einführung in die Ethik*, Vienna: facultas, p 76.

⁶³ Pauer-Studer 2020, p 87

What did we learn so far about the utility concept? Obviously, it cannot be regarded as a wall of protection for human rights, and critics question if it can include them at all. But does this approach exclude rights-based thinking or underlying ethics? It is true that there are doubts, but the assumption that utilitarianism ignores moral aspects and is only and constantly in search of majorities would certainly be too simple. “Very many utilitarians today seek to reconcile their utilitarianism with theories of human moral rights, with theories of natural moral rights of persons of the kinds set out in the UN Declarations”⁶⁴. In ethical terms utilitarianism holds

“that it is the greatest good or the greatest pleasure that has a moral right to exist, that individual persons and animals have no moral right to a specific share in or of the greatest good, their roles being those of being instruments for achieving or vehicles for bringing into being and sustaining the greatest good, they have a moral right to contribute to the common good as vehicles or instruments thereof.”⁶⁵

Wasn’t that the purpose the initiative *Education not Deportation* aimed at – to grant the right to “contribute to the common good” to asylum seekers? To allow them to become an “instrument thereof”, by working and by undergoing a vocational training? To take the path of utilitarianism did not inevitably mean giving up any moral claim.

Another bridge is created by Frey: He recognizes a “value component” in utilitarian theories to be measured by something like “intrinsic goodness”, maintaining that a “number of things are good in themselves”.⁶⁶ As one of those values we could accept stability (in a democratic society, ‘stability’ in a dictatorial system cannot automatically be qualified as ‘good’). In the case of the “not deporting but educating”- argumentation, stability could be held out as a prospect: companies would continue to exist or to expand, refugees would find a job, an income, and a place to be – both could hope to build a future. This would fulfil another component of utilitarianism, “the range component [...] affecting everyone and not just the agent himself”⁶⁷. To keep asylum seekers in apprenticeships within the country could be seen as an advantage for several interest groups. These advantages were not only of an economic, but also of a social and even political nature –documents of the Austrian Ministry of the Interior also emphasize that

⁶⁴ McCloskey, H.J.: *Respect for Human Moral Rights versus Maximizing Good*, in: Frey 1984, p 121.

⁶⁵ McCloskey 1984, p 121

⁶⁶ Frey 1984, p 4.

⁶⁷ See above.

“integration strengthens social peace and increases economic success.”⁶⁸ But even this – still rather utilitarian – view did not indicate the way to a solution.

As Kymlicka demonstrates, the utilitarian method as a decision-procedure can turn out to be a double-edged sword. The problem concerns “its demand, not that each person be given equal weight in our decision-making, but that each source of utility (for example, each kind of preference) be given equal weight.”⁶⁹ The author refers to the example of health care in a mainly white society. When the “utility calculations” are done, the result could be “that utility is maximized by depriving blacks of an equal share of health care (or school facilities etc).”⁷⁰

In the case of asylum-seekers in apprenticeships in Austria, some decision-makers were convinced that it would yield more political benefits to deprive certain human beings of a social right.

This was reflected in the law and especially the legal practice in Austria, and in some policies concerning the issue at stake.

2 The Law - a Short History

2.1 A Mysterious Decree

The document with the greatest impact was not officially published. It was the so-called “Bartenstein-Erlass” (the Bartenstein Decree) from 2004, named after the then minister for the economy and labour and directed as an internal regulation to the Board of the Arbeitsmarkt-Service (Public Employment Service) of Austria. The arrangement concerned the “EU Enlargement Adaptation Act”. The part on asylum seekers was inserted, as long-time researchers like Rudolf Moser, labour market-expert of the Austrian Chamber of Labour in Linz and lay judge at the Federal Administrative Court, recall: “It was only a little part of the big EU-enlargement, it somehow slipped through.”⁷¹

It is true that in this 20-page document the term “asylum seeker” is mentioned for the first time on page 6. The passages stipulate that “during the first three months after submission of the asylum application or after the termination of the asylum procedure [...] there is in

⁶⁸ Matiassek, Hanns 2012: *Sozialer Frieden. Annäherung an einen aktuellen Begriff*, in: SIAK Journal-Zeitschrift für Polizeiwissenschaft und polizeiliche Praxis 2, p 31

⁶⁹ Kymlicka 2002, p 26

⁷⁰ Kymlicka 2002, p 26

⁷¹ Interview with Rudolf Moser: May 30, 2022, Linz, transcript (translated by MM), p 9.

fact a prohibition of employment”⁷², and “that even after the waiting time of three months employment permits have to be issued only according to quotas.”⁷³

These few lines had an effect on real life, especially if you were an asylum seeker in search of work. It defined that “third-country nationals have access only to jobs for a maximum of six months. Asylum seekers can de facto work only in agriculture or tourism and only if no EU-citizen applies for the job.”⁷⁴ Residence permits for educational purposes should only be granted for school or university attendance but not for apprenticeships.

Mr. Bartenstein, at the time minister of the economy and labour, did not deny his political intentions when he –years later – defended his order in parliament with the words, “Austria had to be prevented from becoming a country of ‘asylum shopping’.” The resulting restrictions were criticized repeatedly by human rights experts warning that these could lead to violations of asylum- and other regulations:

“The lack of an effective access to the labour market can in extreme cases end in ‘constructive refoulement’, for example, if persons due to extreme poverty and especially because of a lack of basic care in combination with a lack of access to the labour market return to the persecuting state. It must be commented critically that for asylum seekers without protection status the non-working can be disadvantageous at the deportation check, because it is scored as a lack of interest in integration.”⁷⁵

The next chapter will be dedicated to the international and the national legal frameworks and will examine possible contradictions between them and between the frameworks and actual practice. It will focus on the period from the Bartenstein Decree to 2018/19 when new political solutions and a game-changing jurisdiction appeared on the scene.

2.2 International and National Frameworks

The overview on the legal aspects of the topic –asylum seekers and their access to the Austrian labour market – starts with international asylum law which provides some

⁷² Federal Ministry for the Economy and Labour 2004: *EU-Erweiterungs-Anpassungsgesetz. Durchführungserlass* (EU-Enlargement/Adaptation Law/Executive Order), *Geschäftszahl*: 435.006/6-II/7/04: Vienna 2004, p 6

⁷³ See above, p 7

⁷⁴ Lechner, F./Wetzel, P. 2016, p 2.

⁷⁵ Ammer, Margit 2013: *Zugang zum Arbeitsmarkt für Asylsuchende aus menschenrechtlicher Perspektive*, in: *juridikum* 2013/1, pp 28-36, p 35, Vienna: Verlag Österreich <https://elibrary-verlagosterreich-at.uaccess.univie.ac.at/journal/juridikum/2013/1> (accessed 23 May 2020).

regulations covering in principle the group of asylum seekers. The “mother” of post-war regulations, the so-called Geneva Refugee Convention, defines minimum norms in article 17 (“Wage-Earning Employment”):

“1. The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.”⁷⁶

Austria had signed the Convention in 1951. Yet it had recognized the relevant parts of article 17 only as recommendations and not as binding obligations. The reservation Austria lodged against article 17 was never withdrawn (at least not until spring 2022).⁷⁷

Therefore, it must be recorded that “because of the reservation to art. 17/Geneva Refugee Convention the actual national legal position and the practical implementation are not in contradiction to this norm.”⁷⁸

As Peyrl, a long-time expert for Austrian and European migration law, remarked in 2022 “Austria was keen already 70 years ago to seal its labour market off against refugees”.⁷⁹ Critical observers add that asylum law because of historical and political reasons is not applied any more in the way it had been interpreted in the first decades after the Geneva Convention:

“Just the fact that the refugees had fled from a Communist dictatorship legitimized their asylum application [...] Today the notion of ‘refugee’ has a much narrower interpretation [...] this means that in former times numerous people got asylum in Austria whose application today under the notion of the so-called economic refugee would not only be discredited but rejected.”⁸⁰

And what about asylum seekers who were still subject to pending procedures? To start to work legally they (to be precise: their employers) needed an employment permit. A state that demanded such a permit did not automatically breach European rules. For example, the respective Single Permit Directive is not applicable to asylum seekers.⁸¹

⁷⁶ UNHCR 2010: Convention and Protocol Relating to the Status of Refugees, Geneva: UNHCR Communications and Public Information Service.

⁷⁷ See *Bundesgesetzblatt für die Republik Österreich* 1955: 15. April, p 429 (<https://www.ris.bka.gv.at/>, accessed June 7, 2022).

⁷⁸ Peyrl, Johannes 2018: Zugang zum Arbeitsmarkt für geflüchtete Personen, in: Schratlbauer/Pfeil/Mosler (eds), *Migration, Arbeitsmarkt und Sozialpolitik*, Vienna: Manz, p 109.

⁷⁹ Peyrl, Johannes 2022: *Good things take time? About the long way to legal conformity of labour market-access for asylum seekers*, <https://www.blogasyl.at/>, accessed June 6, 2022.

⁸⁰ Lentsch 2014, p 43.

⁸¹ Peyrl 2018, p 103.

But at this point a crucial document comes into play, the so-called EU *Reception Directive* (of the European Parliament and the Council [...] for the reception of applicants for international protection). A directive is a “legislative act that sets out a goal that all EU countries must achieve”⁸² and in article 15 this special one stipulated that

“Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.”⁸³

To grant access to the labour market, Austria set a specific condition – a labour market exam. It prescribed that an asylum seeker could only be considered for a job if no Austrian, no EU-citizen, or no other candidates from non-member countries were available. This clause still did not render the Austrian practice unlawful. The border to illegality was only crossed with another restriction, as experts analysed: the (in)famous decree of 2004 allowed permits for asylum seekers only within quotas of seasonal employment:

“In my opinion the restriction of access to the labour market to employment permits referring to quotas of seasonal employment is not permitted under European law, because the real possibilities to grant an employment permit do not match the term ‘effective access’. The directive is not correctly implanted in this point and the decree is no longer to be applied to this group of persons.”⁸⁴

In fact, data of a study by the Austrian Institute of Economic Research on quota employment from 2006 to 2014 showed

“that only a few asylum seekers succeeded in gaining labour market access within these quotas. In the years from 2006 to 2014 only 2,840 persons received quota permits as harvest helpers, in agriculture or in summer-/winter-tourism.”⁸⁵

This was a share of five percent of approximately 56,000 persons with pending asylum procedures at the end of 2017.⁸⁶ From the perspective of the Reception Directive of the

⁸² European Commission, Directorate General for Communication. *Types of Legislation*, https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en, accessed June 7, 2022.

⁸³ European Parliament/Council 2013: Directive 2013/33/EU, Brussels 2013, in: *Official Journal of the European Union*, L 180/104, 29.6.2013.

⁸⁴ Peyrl 2018, p 107.

⁸⁵ Bock-Schappelwein/Huber 2015: Impacts of an Easement in Labour Market Access for Asylum Seekers in Austria, Austrian Institute of Economic Research (Österreichisches Institut für Wirtschaftsforschung), tbm, Wien: WIFO, p 92.

European Commission “this leaves room for doubts if with the current regulations and with the restrictions attached to them it is possible to achieve effective labour market access.”⁸⁷

The study had been compiled on behalf of the Ministry of Labour and Social Affairs, so the state of Austria had scientific information that it could not fulfil the obligations of EU law. Nevertheless, in autumn 2018 the next government turned the screw even tighter: it decided that vocational training for asylum seekers should no longer be allowed.⁸⁸ In an order to the Professional Employment Service the “Ministry of Labour, Social Affairs, Health and Consumer Protection” enjoined to mediate asylum seekers only “to seasonal jobs in tourism and agriculture”.⁸⁹

This was – as we know – again in contrast to the above-mentioned EU-directive. Franz Leidenmühler, a legal scholar, specialist in European Law and then chairman of the Institute of European Law at the University of Linz, commented on the obligations for EU-states resulting from the EU-Directive of 2013 (to grant access to the labour market for asylum seekers within nine months after their application):

“(this provision, note by MM) has to be fulfilled by the Austrian authorities and tribunals with a primacy to contradicting national law and contradicting decrees, and access to the labour market has to be granted.”⁹⁰

The reality in Austria was summarized in a report by the FRA (the European Union Agency for Fundamental Rights):

“In Austria, since September 2018 applicants have in principle no longer been allowed to take up apprenticeships. Before that date they could access vocational training until the age of 25 in specific, often understaffed, occupations – for example in fields such as technology, gastronomy, or industrial production.”⁹¹

This did not seem to be what the EU Charter of Fundamental Rights, the European Bill of Rights aimed at:

⁸⁶ Austrian Ministry of the Interior, Asylum Statistics 2018, Vienna: BM.I, p 51, https://www.bmi.gv.at/301/Statistiken/files/Jahresstatistiken/Asyl-Jahresstatistik_2018.pdf, accessed June 16, 2022.

⁸⁷ Bock-Schappelwein/Huber 2015: p 95.

⁸⁸ Republic of Austria Österreich, Parliamentary Correspondence: October 9, 2018, *Apprenticeships for Asylum Seekers*.

⁸⁹ Federal Ministry of Work, Social Affairs etc. 2018: Mediation of Asylum Seekers, Vienna: BMASGK-VI/B/7/.

⁹⁰ Leidenmühler, Franz 2018: APA OTS, November 14, 2018.

⁹¹ FRA 2019: Integration of young refugees in the EU. Good practices and challenges, Luxembourg: Publications Office of the European Union, p 103.

That “everyone has the right to engage in work and to pursue a freely chosen or accepted occupation” is enshrined in article 15; that “everyone has the right to education and to have access to vocational and continuing training” in article 14.⁹²

By including “access to vocational and continuing training”, educational rights had been extended via the EU Charter of Fundamental Rights; the term had not been explicitly mentioned e.g., in the European Convention on Human Rights.⁹³

Usually article 13 of the ICESCR (the International Covenant on Economic, Social and Cultural Rights) is ranked as the “most wide-ranging and comprehensive article on the right to education in international human rights law”⁹⁴. It imposes positive obligations on the states⁹⁵, “primary education” has to be available “free to all”, whilst “secondary and higher education” must be only “generally accessible”.⁹⁶

The Charter of Fundamental Rights of the European Union came “into full legal effect” in December 2009 and it is legally binding for Member States like Austria when acting within EU-Law; the ICESCR was ratified by Austria in 1978.⁹⁷

Nevertheless, it was obvious that certain Austrian regulations were not in accordance with EU- and UN-frameworks. But what is more – they did not even comply with national legal requirements like the Foreigners Employment Act.⁹⁸ This stipulates that the employment permit has to be granted if “the foreigner on the basis of generally accepted rules of international law or intergovernmental agreements has to be admitted to an employment.”⁹⁹ This condition – that a basis in international law exists – was fulfilled with a view to the ICESCR: In article 2 the State Parties (like Austria) guarantee that the

⁹² FRA 2022, EU Charter of Fundamental Rights/Freedoms/Right to Education, Freedom to Choose an Occupation, <https://fra.europa.eu/en/eu-charter/article/15-freedom-choose-occupation-and-right-engage-work>, accessed June 8, 2022.

⁹³ See Protocol to the Convention for the Protection of Human Rights and Fundamental Rights 1952: article 2 “right to education”, https://www.echr.coe.int/documents/convention_eng.pdf, accessed June 8, 2022.

⁹⁴ Tesanovic, Tijana 2019: *The Right to Education of Asylum-Seeking Minors*. Case Study Serbia, University of Education Freiburg: Freiburg, p 18.

⁹⁵ Tesanovic, see above.

⁹⁶ United Nations Human Rights/Office of the High Commissioner: International Covenant on Economic, Social and Cultural Rights, adopted 1966, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social->, accessed June 8, 2022.

⁹⁷ United Nations/Human Rights/Treaty Body Database: Ratification Status for Austria, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=10&Lang=EN, accessed June 8, 2022.

⁹⁸ Peyrl 2018, p 106.

⁹⁹ *Rechtsinformationssystem des Bundes, Ausländerbeschäftigungsgesetz Par. 4, tagesaktuelle Fassung*, <https://www.ris.bka.gv.at/NormDokument.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008365&Paragraf=4>, accessed June 9, 2022.

“rights [...] will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.”¹⁰⁰

Restrictions are only admissible when serving legitimate aims and being within reason. However, legal scholars reasoned that the goal to secure work for Austrian citizens and to promote general well-being in a democratic society was not in danger, referring to the labour-market data which were better than the EU-average.¹⁰¹

Under the perspective of human rights law and to meet international requirements, the decree of 2004 had to be quashed and access to the labour market for asylum seekers had to be widened. This was the conclusion drawn by experts in 2013, four years before the start of the *Education not Deportation*-campaign. The above-mentioned demand was not easy to fulfil, especially in the field of law. Austria had given a commitment to the ICESCR but had not accepted individual complaints procedures.¹⁰²

As the approach was broadened, other human rights came into play, beyond the right to work or the right to education as laid down in the ICESCR:

“Human dignity and self-esteem are very much affected. They are protected by the right to respect for private and family life. Effective access to the labour market would allow to contribute to the economy of the reception state, to ease the pressure on the social services budget of the state and to live independently.”¹⁰³

This right to private and family life is enshrined in article 8 of the European Convention on Human Rights¹⁰⁴. Interference by a public authority is not welcome, but there are exceptions and one of them is the interest of “the economic well-being of the country.” In 2018, with the petition already running, the provision was evoked in an expert’s statement for the operators, one of the authors being Manfred Nowak, an internationally renowned human rights expert.¹⁰⁵ They ascertained that every return decision in Austria had to be in compliance with article 8 of the ECHR and therefore reasons had to be given considering

¹⁰⁰ ICESCR, see above.

¹⁰¹ Ammer 2013, p 31, 32.

¹⁰² United Nations/Human Rights/Treaty Body Database: Ratification Status for Austria, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal, accessed June 9, 2022.

¹⁰³ Ammer 2013, p 35.

¹⁰⁴ European Court on Human Rights: European Convention on Human Rights, p 10, https://www.echr.coe.int/Documents/Convention_ENG.pdf, accessed June 9, 2022.

¹⁰⁵ Reyhani, A.N./Nowak, M. 2018: *Beschäftigung von Asylsuchenden in Mangelberufen und die Zuverlässigkeit von Rückkehrentscheidungen*, Vienna: Ludwig-Boltzmann-Institut für Menschenrechte-Förderungsverein.

the “well-being of the country”. In principle the European Court of Human Rights (ECtHR) recognizes an important interest of the state in the termination of residence and a wide margin of appreciation. At the same time the Court in its case law puts into account the degree of integration, which can be manifested in vocational training or participation in social life. In their statement the authors argued that it was relevant if an afflicted person could only contribute to the economic well-being of the reception-country by remaining after an otherwise negative asylum procedure. In this case the authorities would have to underpin why the termination of residence was an urgent need in a democratic society.¹⁰⁶ In the view of these experts an employment could invalidate the assumption of a strong public interest in a deportation.

This interpretation was bluntly rejected by the Austrian Supreme Administrative Court (the Verwaltungsgerichtshof).¹⁰⁷ In the case of an Afghan asylum seeker – an apprentice working in a bakery, an understaffed occupation, with no criminal record; having learnt German well – it declared the return decision of a lower instance to be permissible.¹⁰⁸ The Supreme Administrative Court confirmed its own jurisdiction, according to which “the interests of the national labour market were not ? by article 8/European Convention on Human Rights”.¹⁰⁹ Furthermore “the jurisdiction is opposed to considering the apprenticeship in a shortage profession as a public interest in favour of the foreigner.”¹¹⁰ The “apprenticeship in a shortage profession” was exactly the same criteria that the lower instance, the Federal Administrative Court, had seen as crucial: if fulfilled it would contain “a present and future utility for the Austrian economy” and should therefore be regarded in favour of the asylum seeker.¹¹¹

So how did the Supreme Administrative Court, as the highest instance, justify its final judgment? It referred to the amendment of the Austrian “Vocational Training Act” (see footnote 6), because “hereby it (became) clear, that the legislator does not want an apprenticeship to be maintained beyond the duration of an asylum procedure”.¹¹² And

¹⁰⁶ Reyhani/Nowak 2018, p 9 (translated by MM).

¹⁰⁷ Verwaltungsgerichtshof 2019: Ro 2019/01/0003-3.

¹⁰⁸ This overview of the case is based on a seminar paper by the author (see Mair, 2020, p 7, 8).

¹⁰⁹ Verwaltungsgerichtshof 2019, p 12.

¹¹⁰ See above, p 13.

¹¹¹ Friedrich, Roman 2019: *Keine Berücksichtigung der Lehrausbildung*, in: *migraLex*, Heft 2/2019, p 54-59.

¹¹² See Verwaltungsgerichtshof 2019, p 13.

furthermore, the Court pronounced that the foreigner “had to be aware of his uncertain residential status”.¹¹³ Experts in asylum law were not convinced and criticized that

“no reason was presented why public interests could not be decisive in favour of the foreigner.”¹¹⁴

2.3. The Effectiveness of the Human Rights Frameworks

The attempt to prevent asylum seekers in apprenticeships from being deported by claiming the right to respect for private and family life had failed. The same can be said about other human rights provisions when we sum up the state of affairs in the Republic of Austria in autumn 2018:

- The Geneva Refugee Convention (“right to engage in wage earning employment”): mitigated
- The EU reception directive (“effective access to the labour market”): circumvented
- The EU-Charter (“access to vocational and continuing training”): disregarded
- The ICESCR (“rights [...] will be exercised without discrimination”): not respected
- The Foreigners Employment Act (“the foreigner on the basis of generally accepted rules of international law has to be admitted to employment”): partially not implemented.

What could be the reason for this nearly general disrespect for human rights obligations towards asylum seekers on the labour market? Rosenberger and König point out the political reluctance to really integrate migrants and the long tradition of this stance. They investigated the adoption and transposition of Directive 2003/9/EC¹¹⁵ in Austria. The Directive laid down minimum reception standards for asylum seekers in the European community – the scholars comment:

“In substantial terms, the opposing parties, for example, the federal government and representatives of regional governments, lacked the political will to go beyond minimum reception standards. As the separate welfare scheme, low levels of financial allowances and the hardly accessible labour market suggest, the

¹¹³ Verwaltungsgerichtshof 2019, p 14.

¹¹⁴ Friedrich 2019, p 57

¹¹⁵ Official Journal of the European Union, L 31/18, 6.2.2003: Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

implementation process indicates political adherence to a principle of mere basic subsistence rather than a dignified way of life [...]”¹¹⁶

The field work for the study had been done in 2009/2010. At the time the country was not ruled by a right-wing government but by a coalition of the Social Democrats (who provided the chancellor) and the Conservatives.

2.4. The Effectiveness of Policies

In fact, the issue (are asylum seekers allowed to enter the labour market?) was played for years by political and not by legal rules. In 2012 the then Minister of Social Affairs, a social democrat, eased the restrictions. Young asylum seekers – under 18 years of age – were admitted to vocational training, but only in professions with a shortage of apprentices. This was seen as a step forward by human rights scholars because the ministerial order made possible “training and employment for young asylum seekers during their procedures [...] so that they could be employed in a meaningful manner elsewhere even after a negative ending of the asylum procedure.” In the first year only 14 permits were granted, so that –again by decree –the age limit was adjusted. Now asylum seekers between 16 and 25 years old were “entitled to start an apprenticeship training in professions with a shortage of skilled labour.”¹¹⁷

This liberalization was not on principle. In 2014 the government parties (the Social Democrats and the Conservatives) rejected parliamentary motions of the NEOS (the Liberals) and the Green Party to annul the prohibition to work for asylum seekers and to grant them full access to the labour market. The Social Democrats warned against paying a reduced rate.¹¹⁸ A reform was turned down. This happened in 2014, before the refugee movement triggered by the war in Syria. In Austria it did not need an external game-changer to refuse legally compliant rules. There was a domestic majority following this tradition.

In 2015 the “migration crisis” broke out and provided an additional motive. The same Social Democratic minister who had opened the door to the labour market, now placed a warning sign in front of it: “In view of the high unemployment rate an opening of the labour market for asylum seekers is not acceptable.”¹¹⁹

¹¹⁶ Rosenberger, Siglinde/König, Alexandra 2011: *Welcoming the Unwelcome. Minimum reception standards*, in: Journal of Refugee Studies Vol. 25, No. 4, Oxford University Press, p 552.

¹¹⁷ Lechner/Wetzel 2016, p 2.

¹¹⁸ Republic of Austria/Parliament: Reform für Rot-Weiß-Rot-Karte findet keine Mehrheit, Parlamentskorrespondenz June 12, 2014.

¹¹⁹ Hundstorfer, R.: press release July 1, 2015, <https://orf.at/v2/stories>, accessed June 5, 2020 (mt.).

The government of Sebastian Kurz (Chancellor, Conservative Party) and Heinz-Christian Strache (Vice-Chancellor, Freedom Party) stayed the course that had brought it to power and had been set out in the government declaration: “control of immigration” as one of the central projects (Kurz) and “no immigration into the Austrian welfare state” (Strache).¹²⁰ Replying to the demands of the *Education not Deportation*-campaign the Kurz-Strache-government announced the decision to deport asylum seekers who were also still engaged in with vocational training. There would be no special regulation. The Minister of the Interior, Herbert Kickl (Freedom Party) proclaimed that the opportunity for young asylum seekers to start an apprenticeship before the end of the asylum procedure would “run out as of today”.¹²¹ A sort of legal justification was produced, an internal working paper of the ministry, warning that “every special regulation for apprentices [...] would be a precedent for further requests for exceptions.”¹²²

This argument was not totally irrelevant as we can conclude from an analysis by Roman Friedrich, a legal scholar. Months later he reflected on a possible new legal solution:

“Labour-market considerations can be an objective reason for differentiation. But it is not evident why considerations of this kind should not have a positive impact on asylum seekers who are about to take the *Matura* (final school examinations), who are studying or are in permanent employment and are available for the labour market at least as well as those on an apprenticeship.”¹²³

Interestingly enough the two leaders of the government coalition did not put the legal arguments (which existed) first but in public again committed themselves to their “hard (political) course”. The courts, the Vice-Chancellor proposed, could examine a “right of residence for humanitarian reasons.”¹²⁴

This was how the game was played: the first move was to prescribe a political target that strictly corresponded to the staging routine; the law came second and at best was intended to find an emergency solution. At that point of time, by the way, a right to remain for

¹²⁰ Parlamentskorrespondenz 2017: Bundesregierung verspricht neuen Stil und Willen zur Veränderung, Republic of Austria /Parliament December 20, 2017.

¹²¹ Volksgruppen/orf.at: *Asylwerber in Lehre werden abgeschoben*, September 12, 2018, <https://volksgruppen.orf.at>, accessed June 15, 2022.

¹²² See above.

¹²³ Friedrich 2019: p 59.

¹²⁴ Volksgruppen/orf.at 2018.

humanitarian reasons had already been evaluated as “unthinkable” in the ministerial paper.¹²⁵

This uncompromising approach was not without opposition within the Conservative Party. The regional party leader and Governor of Upper Austria, Thomas Stelzer, expressed publicly his disappointment “that for asylum seekers in apprenticeships no solution by common sense had been found”¹²⁶. When scrutinizing the wording, again we cannot detect a human rights basis of the criticism. The term “common sense” indicates a more utilitarian direction: until the end of November 2018 about 1,500 apprenticeships were vacant in Upper Austria, the number had increased by more than 40% compared to the year before: “Supply and demand are drifting further and further apart” the managing director of the Public Employment Service summed up.¹²⁷

Impulses to choose a more pragmatic (or should we say “utilitarian”) way had even been stimulated by former staff members of Mr. Bartenstein who had given his name to the decree of restrictions. Johannes Kopf, former labour market expert in the cabinet of the former minister and now a board member of the Public Employment Service did so by raising a question in a magazine on human rights:

“If these people are here and they need to be cared for, why shouldn’t they earn their money themselves?”¹²⁸ Leo Vonmetz, for 13 years Conservative mayor in the community of Hall in Tirol, had touched on the root of the issue – openly criticizing that “authorities override laws by decree” and promising that “the town cannot be put off course by negative experiences [...] the success with the integration of asylum seekers is encouraging us and hopefully all who are ready to take these paths.”¹²⁹ The local politician, one of the municipal greats of the Volkspartei in Tyrol, had understood the core of the rule of law and did not shy away from invoking it.

Unlike his stance, the opposition parties in their reaction to the “no exceptions”-message of the government demonstrated that they had learned their lesson in “utilitarianism”: They mostly objected that asylum seekers would be “condemned to inactivity”. It was very similar to the argumentation of the *Education not Deportation*-campaign.

¹²⁵ Kurier September 12, 2018: <https://kurier.at/>, accessed June 16, 2022.

¹²⁶ <https://www.nachrichten.at/politik/innenpolitik/Asylwerber-in-Lehre-Stelzer-uebt-Kritik-am->, accessed June 16, 2022.

¹²⁷ Straßer, Gerhard 2018: *The Labour Market of Upper Austria in November 2018*. Media Information, Public Employment Service of Upper Austria.

¹²⁸ Brandt, Achim 2014: *Die Rechtsstellung von Asylwerbern im Arbeitsrecht und Sozialrecht*, Innsbruck: Universität, DOI: 10.13140/RG.2.2.13937.28003, p 38.

¹²⁹ Brandt 2014, p 11.

3 Numbers, Names, New Methods

3.1 The Utilitarian Temptation

At the end of 2018, when the campaign was a year old, the petition had been supported by more than 64,000 individuals, almost 1,100 companies, and more than 100 communities. The campaign had seeped deeply into the tissue of the economy and of the Volkspartei. At a press conference Franz Fischler, a former minister of the Federal Government and EU commissioner for the Conservatives, and Stephan Walder, personnel manager of the PORR Company, sided openly with the Green Regional State Minister Anschober. The company was a listed one. It had offered construction apprenticeships to refugees as part of a strategy to secure the replenishment of workers:

“We can report only positive results. Our apprentices have almost no downtimes, they are helpful and like to get their hands on [...] If someone is very committed to his apprenticeship and concludes it with success, he should have the possibility to stay in Austria.”¹³⁰

Numerous businesses from traditional sectors succumbed to the utilitarian temptation – and not only those with a certain affinity towards a “Green” or pale green agenda: car garages and carriers, gravel providers and mechanical engineering companies signed as well as linen weavers, landscape designers or charitable relief organizations.¹³¹

Support was promised by more Conservative politicians: Wilhelm Molterer (ex-Vice-Chancellor of the Federal Government), Erwin Pröll (former Governor of Lower Austria), Othmar Karas (Vice-President of the European Parliament and at the time leader of the VP-delegation).¹³²

In 2018 1,500 asylum seekers had been admitted to apprenticeships nationwide, mostly in understaffed professions¹³³. In Upper Austria 40% of this group were employed in gastronomy and in the hospitality industry. One of the best-known landlords of the country, Helmut Peter from the hotel and restaurant The White Horse Inn on Lake Wolfgang, formerly a member of parliament for the Freedom Party and later a regional

¹³⁰ See *LandeskorrespondenzMedienInfo* December 19, 2018, p 7.

¹³¹ Dedl, Werner 2022: lists of supporters (Land Oberösterreich, office of Councillor Stefan Kaineder: mail from April 15, 2022).

¹³² See above.

¹³³ Mandl, Verena 2020: *Apprenticeship as Asylums Seek. The Admissibility of Removal from the Country*, Universität Innsbruck: Diplomarbeit (final year thesis), p 36.

spokesman of the “Liberales Forum”, denounced in an open letter to the conservative Chancellor Kurz that his Afghan apprentice Rahmat Jafari had received a deportation notice – though the young man was “socially and professionally perfectly integrated.” Peter, having been President of the Austrian Hotelier Association for ten years, called upon Kurz to adjust the legal framework.¹³⁴

The “usual suspects” (should we call them leftist liberals?) had succeeded in winning over new allies. One of the experts interviewed for this paper, a secretary of an association of 13 non-profit organizations, identifies this feature as a special one of the campaign:

“It was special insofar as Rudi Anschöber had understood very quickly that he had to find a connection to people in business. We had had a crisis in the hotel and catering industry already in 2015. He has put a foot into this door because he noticed that there were allies from another corner, not only from the left one, with more liberally-minded people. This was very smart, and it was necessary too. It was an economic ploy to find allies there – because we know that demography will present us with problems. Suddenly everyone is screaming, ‘we lack the workers, we don’t get any applicants anymore.’ These screams we would have had years before if these people had not come.”¹³⁵

That the petition was special in reaching out to new groups is proven by comparing it to other initiatives of the type. Online petitions in Austria are normally signed by people who locate themselves as leftist-Liberal and not as Conservative. Researchers found that supporters share certain political inclinations:

“Maybe the very clear differences according to political orientations in supporting petitions are surprising. A politically leftist self-location, general preferences to be located as left and socio-politically as liberal as well as an identification with left parties (above all the Greens) are very meaningful predictors for supporting petitions. These results are in accordance with the political offer, as these players also launch petitions [...]”¹³⁶

In the case of the *Education not Deportation*-campaign the fence had been overcome. In a survey analysed with a view to party preferences 58% of the ÖVP-voters declared themselves to be against deportations during apprenticeships and 80% of the ÖVP-voters

¹³⁴ ORF.at, February 21, 2018, accessed April 16, 2020.

¹³⁵ Interview with Ruhmannseder, Peter: May 3, 2022, Salzburg, transcript (translated by MM), p 1.

¹²⁷ Stadlmair, Jeremias: Supporters of Petitions. Formally Educated, Politically Interested and Sceptical in Face of Traditional Politics, in Rosenberger/Seisl 2021: p56.

spoke out in favour of access to apprenticeships for asylum seekers.¹³⁷ Obviously the purpose of the initiative was not only welcomed by Green voters.

3.2 Victors and Victims

Until the end of the highest intensity period in December 2019, the number of signatures for the *Education not Deportation*-petition had increased to more than 80,000. It was the most successful project on the field. An appeal to the then Chancellor Sebastian Kurz (Conservative party) and to Vice-Chancellor Werner Kogler (Green party) for a modern right of residence produced about 29,000 signatures up to May 2022¹³⁸; another one, demanding “independent legal advice for asylum seekers” almost 9,900. Both had been started by *menschen. würde.österreich* (humans.dignity.Austria)¹³⁹, an alliance founded by Christian Konrad, once chief executive officer of the Raiffeisen Association and therefore an influential figure in the world of the Conservatives, and by Ferdinand (“Ferry”) Maier, a former General Secretary of the Conservative Party. They had been refugee-coordinators of the federal government and could pride themselves of having gained renowned law professors as the first people to sign. There was no lack of celebrities to follow.

But there were differences between the strategies of the campaigns. Which can be detected in a more careful examination?

In brief:

- the *Menschen. Würde*-initiative focused on the rights of asylum seekers, the *Education not Deportation*-platform on their usefulness.
- *Menschen. Würde* approached almost exclusively the leaders of government, *Education not Deportation* first to the base.
- the legal experts of *Menschen. Würde* demanded the independency of legal advice (important as regards the rule of law, but rather abstract), old hands in political marketing like Anschöber called for deportations to cease (important, concerning certain human beings, rather concrete).

¹³⁷ Social Research Institute SORA, see *LandeskorrespondenzMedieninfo*: 28 January 2029, p 1.

¹³⁸ See “*mein#aufstehn*”/Allianz *Menschen. Würde*. Austria 2022: *Modernes Bleiberecht*, <https://mein.aufstehn.at/petitions/modernes-bleiberecht-miteinander-zahlt-sich-aus> (accessed June 21, 2022).

¹³⁹ See <https://www.mwoe.at/uber-uns/>, accessed June 21, 2022.

The people who had to be saved by *Education not Deportation* had a face, a name – and a job. They were not presented as a mass but as individuals, not as a phenomenon but as persons. In the videos on the *Education not Deportation*-platform:

“Hamid, Shafar or Ali were training for future jobs as waiters, roof painters or process engineers. They were always shown at their workplace, were always dressed in working clothes, and always speaking German. When they carried something that looked like a submachine gun it was in fact a paint sprayer.”¹⁴⁰

In 2015 Austria had been second in Europe with asylum applications in relation to the population.¹⁴¹ In the autumn of the same year the Freedom Party (FPÖ) doubled its share of voters in the elections in Upper Austria and superseded the Greens as coalition partner of the Conservatives; two years later the *Liste Sebastian Kurz – die neue Volkspartei* became the strongest party in the national elections with its anti-immigration course:

“I think that in 2015 the centre was shifted, if you look at the electoral success of Turquoise-Blue or in 2015 in Upper Austria. The campaign was the turnaround – not to frame the refugee issue only negatively. You could frame it positively too. This was purposeful.”¹⁴²

What was the method, what did the trick? The young men in the videos and the press conferences were foreigners, but they could take care of themselves, and they were useful, even urgently needed. To liberate the asylum seekers from the role of victims had been the first image twist, but it was not the last one. In a second turn of the screw the local employers were presented as the true victims:

“Especially in the area of shortage occupations, companies are desperately looking for workers [...] here vocational training for asylum seekers is a huge opportunity which must not be taken away from us.”¹⁴³

Not the refugees but the people of the host region complained about a possible loss. This was quite a new perspective. Organizations active in the field had achieved an objective, they had tried for years to liberate migrants from exactly that image:

“This victimization is something we fight permanently in our work because refugees are not poor people, who can’t speak for themselves. They are strong human beings, who

¹⁴⁰ Mair 2020, p 17.

¹⁴¹ Österreichischer Integrationsfonds 2015: Jahresbericht 2015, Wien: ÖIF, p 23.

¹⁴² Dedl 2022, p 5.

¹⁴³ *OpenPetition Ausbildung-statt-Abschiebung* 2017: changes in the petition, new rationale, <https://www.openpetition.eu/at/petition/online>, accessed April 19, 2020.

have managed to survive the flight and are able to hold their ground. They are not victims.”¹⁴⁴

This role had been taken on by local businesspeople. Thus, another motif to sign the petition had been delivered. You did not do it to attack the (Conservative) party you voted for – you simply did it because of your concerns.

3.3 Populism (for the right cause)

We can assume that the operators of the petition were counting on the positive impact of that exchange of images. The online petition offered a huge advantage. The communication staff could notice on the spot which argument, which person or which spin produced new approval, and which one did not, as exemplified by Josef Hader, the face of the campaign:

“We tried it with him in a newspaper, then we changed to the website of the online petition. This worked very well. The best side of the petition is that you can see every minute which measure works and what it does. That was extremely exciting. Whenever another measure was used, it had an impact – it could be a bad one too.”¹⁴⁵

The operators could watch in real-time what the response to their messages was – and they could react immediately. They were looking “at the crowd’s mouth” and could follow the people’s voice in no time. It was populism but for the right thing if you wish.

The second advantage was that the online petition created its own additional messengers:

“As soon as you have 20,000-30,000 signers, they are in a certain way multipliers. You can address them over and over again. These were the elements which helped the most. Those who had already signed, carried it further. And the petition was good for the media, if only because of the interim results. The petition also produced news.”¹⁴⁶

The instrument offered speed and contact and proved to be rather effective: you could adapt your answers in a short time and did not have to wait days for comments on an article in a printed newspaper; you had your own “delivery boys/girls” and audience on hand and you maintained an influx of material to the classical media. In short: you enjoyed control and speed.

¹⁴⁴ Interview with Herbert Langthaler, public relations *asylkoordination Österreich*, a network of refugee NGOs, April 12, 2022, Vienna: transcript, tbm, p 3.

¹⁴⁵ Dedl 2022, p 1.

¹⁴⁶ Dedl 2022, p 3.

Both requirements are not fulfilled by more formalized types of petitions, embedded in the parliamentary framework. As was explained above (see section “The Petition”) it needs a member of parliament to submit it. This was a precondition that the Greens, having lost their parliamentary seats, could not fulfil in 2017. Scholars concede that for example a platform like openpetition.eu offers more speed and the possibility to be in contact with supporters, but point out that it involves

“a decisive disadvantage because online petitions do not provide direct access to political decision-makers. In consequence requests of online petitions are not dealt with in decision-making political bodies.”¹⁴⁷

Nevertheless, this disadvantage dissolves as the same author states having studied the fate of such petitions. They simply get lost or tangled up in the thicket of parliament, in committees or sub-committees:

“This direct wire to political actors or the direct connection to political bodies does not automatically entail more political influence on political decisions than would be possible by online petitions.”¹⁴⁸

Moreover, there is no obligation of parliament to implement the concerns of a formal petition.

So online petitions are not based on specific legal issues, and they do not formally guarantee access to parliamentary procedures. But nevertheless, they offer advantages:

User-friendly handling, implementation of online forums on other platforms and the flexibility to adapt the respective request.¹⁴⁹ The next chapter will show that they can even force discussion and a decision in Parliament as well as in the informal circles of power broking.

4 The Time After

4.1 The Political Compromise

After the national elections in Austria in September 2019 the cards on the game table of politics were reshuffled. In the spring, Sebastian Kurz, the Chancellor and party leader of

¹⁴⁷ Dalpra, Elio 2021: Petitionsrecht in Österreich – nur einen Klick entfernt? In: Rosenberger/Seisl 2021, p 68.

¹⁴⁸ Dalpra 2021, p 69.

¹⁴⁹ Dalpra 2021, p 68.

the Conservatives, had terminated the coalition with the Freedom Party. The right wingers had made a fool of themselves in a scandal known as “Ibizagate” evolving around their chairman, Vice-Chancellor Heinz Christian Strache. He had practically built his political career on demanding restrictions against foreigners and asylum seekers. Kurz had – speaking out against “illegal migration” – not only secured the number one position of the ÖVP but also increased its voter share. With the leader of the People’s Party looking for a new coalition partner the Greens could not be ignored. They had returned to Parliament with their best result in history at elections to the national assembly.

Refugee-friendly representatives of the party warned that for example, “in the sphere of human rights there were almost no intersections”¹⁵⁰. But already during the election campaign Kurz had indicated a path towards a compromise which nevertheless allowed his party to pursue its course. He had proposed that “an asylum-decision in previous cases should be issued or executed only after the end of the apprenticeship.”¹⁵¹ The solution was not justified by human rights arguments. It was called “pragmatic” by the ÖVP-Leader, obviously hinting at the head of the negotiation team of the Greens on the migration/integration issue, Rudi Anschober.

For possible future partners the ÖVP had a political duty to pay on the success of the campaign. But from the beginning this was explained with tactical reasons, and not with respect for human rights and with concerns for justice or non-discrimination. Immediately after the elections – and so in a new constellation – just in the first talks, lobby organizations had the impression that there was no chance for a “reasonable and legally flawless” solution of the “asylum seekers in apprenticeships”-question. The required changes in asylum law were rejected by the ÖVP.¹⁵² In December 2019 a new regulation was adopted in parliament, tailor-made for the Anschober-platform. It determined that the obligation to leave the country after a negative asylum decision should be fulfilled only after the end of the apprenticeship. This was to include persons with proceedings before supreme courts and “candidates” who had begun their vocational training because of a decision of the Federal Administrative Court.¹⁵³

¹⁵⁰ See Reimon, Michel, a former member of the European Parliament: Reuters October 1, 2019.

¹⁵¹ *Kleine Zeitung*, August 21, 2019.

¹⁵² Langthaler, Herbert 2019: *Lehrlinge und kein Ende*, in: *asyl aktuell* 3/2019, p 5.

¹⁵³ Parlamentskorrespondenz December 11, 2019: asylum seekers in apprenticeships, four party-agreement, in: APAOTS

The agreement was based on an amendment to the Aliens Police Act of Austria, whereby the asylum law remained untouched. Nevertheless Anschöber, the campaign spokesman, celebrated the agreement:

“With the decision of the National Council the initiative *Education not Deportation* has reached its first goal with the stop of deportations for apprentices. The ones afflicted are the great majority of the apprentices [...]. All of them profit from the new legal regulation [...]. They can now finish their vocational training without fear and insecurity, and during this period they are no longer threatened by deportation.”¹⁵⁴

It was a political compromise. Compromises are not forbidden and even necessary under the conditions of a democracy. But what if they don't comply with the law?

This was exactly what legal scholars suspected. Roman Friedrich for example, called it “inelegant, because unlawful” to “stop deportations of asylum seekers in apprenticeships until the end of the apprenticeships”. Referring to the Austrian Alien Police Law there was “no discretion allowed to authorities considering the question if a return decision by deportation has to be implemented.”¹⁵⁵

Even networks of refugee aid organizations were wondering about the compromise formula, calling it “Kafkaesque” because of its requirements:

“[...] it is enough to submit to the BFA (the Federal Office of Asylum) a copy of the original apprenticeship contract plus an informal statement signed by the apprentice and the trainer on the resumed continued apprenticeship.”¹⁵⁶

This was true – the Office assured the affected in an information sheet that “the authorized trainer or the asylum seeker himself could inform the BFA about the apprenticeship.”¹⁵⁷

This seemed to open a wide door to the labour market, and even one without a doorman. But critics like the *Asylkoordination* warned that the true intention was “to deport the apprentices after the termination of their apprenticeship.”¹⁵⁸ Serious aid organizations like the Diakonie Österreich missed a solid legal and especially human rights basis for this sort of access:

¹⁵⁴ Anschöber, Rudi, member of the regional government, 11 December 2019: press conference, *LandesKorrespondenzMedienInfo*.

¹⁵⁵ Friedrich 2019, p 59.

¹⁵⁶ Langthaler 2019, p 9.

¹⁵⁷ Bundesamt für Fremdenwesen und Asyl: *Merkblatt Asylwerber-Lehrlinge und deren Lehrberechtigte*, Vienna: Bundesministerium für Inneres, p 1, <https://www.bfa.gv.at/401/start.aspx>, download June 24, 2022.

¹⁵⁸ Langthaler, 2019, p 5.

“It’s about people who are well integrated and who have achieved very much –for example in doing an apprenticeship in an occupation where there are shortages. To allow them to stay is no longer a question of the right to asylum , but a question of respect for their human right to a private and a family life.”¹⁵⁹

In autumn 2019 almost 800 asylum seekers in Austria enjoyed an ongoing apprenticeship, according to the Wirtschaftsbund (the Austrian Economic League) of the ÖVP. The spokesman on security of the ÖVP-faction in parliament promised that the agreement would increase the reliability of long-term planning for companies¹⁶⁰. In an additional information he emphasized that the deadline for departure would start no later than four years after starting the apprenticeship – in other words that the asylum seeker/trainee had to leave after the end of the deadline. The “solution” was by far not a general one, it was limited to a certain group. On precisely the day it was adopted and in the same session of the National Assembly the ÖVP affirmed its announcement that in future asylum seekers would not be granted access to apprenticeships anymore. Karl Nehammer, at the time Secretary-General of the ÖVP, said “it’s good that today it is no longer possible for asylum seekers to start an apprenticeship in Austria.”¹⁶¹

Stephanie Krisper, a member of parliament for the NEOS and former academic associate at the Boltzmann-Institute of Human Rights, regretted that asylum seekers in apprenticeships were considered only as “tolerated illegals” and that their residence was not legalized. The Greens had failed with their wish to make “it possible for affected asylum seekers to continue working in Austria after finishing their apprenticeships”.¹⁶²

In the Austrian government programme 2020-2024 of the ÖVP/Green Party-coalition it was determined that in future Austria would differentiate clearly between “migration and asylum”.¹⁶³ This did not sound exciting but meant that in practice a labour market-migration by asylum would be impossible. Then a very general commitment to the rule of law in asylum procedures followed, including “the minimum standards of the Geneva Convention, the European Convention on Human Rights and EU-Law”. But the identity of the Kurz-VP was shaped very much by its anti-migration signals. The Greens, the new

¹⁵⁹ Moser, Maria Katharina, Director of Diakonie Österreich: *Lösung für Lehrlinge muss jetzt gefunden werden*, APAOTS, August 29, 2018.

¹⁶⁰ Mahrer, Karl: *Die neue Volkspartei*, December 12, 2019.

¹⁶¹ Parlamentskorrespondenz: December 11, 2019.

¹⁶² Parlamentskorrespondenz, see above.

¹⁶³ Republic of Austria 2020, *In Responsibility for Austria*, Governmental Programme 2020-2024, Vienna: Bundeskanzleramt 2020, p 136.

coalition partner and the human rights-faction of the government, had almost no opportunity to enforce a new course:

“If in talks between the Chancellor and the Vice-Chancellor no agreement can be reached, the party promoting the initiative is authorized to submit the proposed legislation in the National Assembly.”¹⁶⁴ This was called a coalition-free space and meant that majorities could be sought beyond the government alliance, for example, with the migration-sceptical Freedom Party. Thus, the Conservatives had free hand to continue their restrictive immigration policy. A principal reform of labour market-access for asylum seekers was not defined as a goal of the new “Black-Green” government. The parliamentary agreement of December 2019 had been nothing more than an act of mercy, explained by *realpolitik*.

There were two elements keeping the process alive. One was the result of the campaign-movement: at the end of 2019, at the time of the political compromise, the petition had been signed by more than “80,000 supporters, 135 municipal council resolutions of communities and more than 2,000 companies”¹⁶⁵.

The second element was jurisdiction by the Constitutional Court.

Was there a connection or at least an indirect one? What was the effect on those (directly) affected? This will be discussed in the next sections.

4.2 The New Jurisdiction and the “Hidden Wall”

At the beginning of 2020 the public knew about at least five cases in which the Federal Administrative Court had set aside limits for the access of asylum seekers to the labour market.¹⁶⁶ Rudolf Moser, layman at the court and a labour market-expert, has no doubt that the campaign had had an effect – particularly as it had become a “keep your hands off our skilled workers”-movement. Negative decisions of the authorities (in the first instance the AMS, the Public Employment Service) had been contested:

“More complaints were lodged in the wake of the Anschober-campaign. This was the significant influence, I think, which led to more appeals by companies. And this is the

¹⁶⁴ Republic of Austria, Governmental Programme 2020-2024, p 143.

¹⁶⁵ Anschober, Rudi: *Petition in Signing. Ausbildung statt Abschiebung*, in: Open Petition, Texte und Nachrichten, December 11, 2012.

¹⁶⁶ <https://www.derstandard.at/story/2000114131116/asylwerberfirmen-erkaempfen-jobs-fuer>, accessed July, 2, 2022.

necessary condition: if no application reaches the supreme courts, they don't become active.”¹⁶⁷

Expert Peter Ruhmannseder was personally caring for an Afghan refugee named Ali as a godfather:

“Something has happened for sure; Ali is also an example. Things can change during a campaign; you maybe get the money for a lawyer [...]. They (the asylum seekers, MM) wouldn't have known about it, if parts of the civil society hadn't been behind it and paid the lawyers so that there was a chance before the courts.”¹⁶⁸

Legal examination by the Constitutional Court was triggered by the complaint of a metal roofer. The employer had applied for a work permit for an asylum seeker from Pakistan which the local AMS had refused to grant. In 2021, the rulings of the Constitutional Court rendered invalid a legal and factual practice which had lasted for 17 years. This was achieved by two decisions within a year. First, the Bartenstein “decree” was annulled.¹⁶⁹ As we remember, the order from 2004 – named after the then Minister of the Economy and Labour – only allowed seasonal work for asylum seekers. In fact, they were only eligible for quota jobs in agriculture and tourism.

The Court disarmed this regime with the help of a very formal argument. The ministerial instruction had been declared as a decree (*Erlass*) and so only as “an internal administrative rule” and not as a “regulation” (*Verordnung*), “a general and abstract [...] legal norm. A regulation has the same effects as a law.”¹⁷⁰ There is a main difference between these two types of governmental directives, and it concerns the public: a decree does not need to be published; a regulation must be. This was exactly where the Constitutional Court put the finger on:

“For the quality of a regulation, not the formal group of addressees is decisive, but the content of the administrative act. The imperative character of the decrees directed to the board of the AMS results from the fact that [...] these decrees [...] are invoked regarding the concerned parties and are binding for their judicial sphere¹⁷¹.”

¹⁶⁷ See Moser 2022, p 5.

¹⁶⁸ Ruhmannseder 2022, p 5.

¹⁶⁹ Verfassungsgerichtshof (Constitutional Court of Austria), V95/2021 ua, 23.6.2021, https://www.ris.bka.gv.at/VfghEntscheidung.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20, accessed July 3, 2022.

¹⁷⁰ See <https://www.oesterreich.gv.at/lexicon/E/Seite.991082.html>, responsible: Bundesministerium für Digitalisierung und Wirtschaftsstandort, accessed July 4, 2022.

¹⁷¹ See Verfassungsgerichtshof V95/2021.

The relevant decrees would have had to be published, the Court decided, and as this had not happened, they had to be repealed as unlawful. The judges added that as a result of the Bartenstein- and a following decree “a work permit for an apprenticeship [...] would be excluded [...] even in professions with a shortage of employees despite the fulfilment of all other requirements, and also if the situation on the apprenticeship market would allow it and there were no important reasons considering the situation and development of the labour market opposing it.”¹⁷² The restriction to grant work permits only “within the framework of quotas” was terminated as well.¹⁷³

The Constitutional Court breached the “hidden wall” Austrian governments had erected and continued to keep asylum seekers away from the labour market. The judges had confirmed in their finding that there was a “wall”: they maintained that in fact even access to apprenticeships was barred for this group. That the wall was hidden and could be detected only at second glance is simply proven by the non-publication of the most important order. A policy of severity was disguised as a purely administrative action. Ironically enough the Bartenstein-Decree was issued as an implementing order to the Austrian “EU Enlargement Adaptation Act”. In fact, it served to undermine EU-policy in this sphere .

The Constitutional Court revealed a second mechanism which “contradicted the rule of law”¹⁷⁴. It provided that a regional advisory board had to approve work permits for asylum seekers, so that without its consent the “local manager of the AMS no longer has any possibility to issue a work permit even if the job market would allow it and there is an urgent need of workers.”¹⁷⁵ This arrangement had been used in 2018 by the then labour and social affairs minister (who came from the Freedom Party) to put an end to the apprenticeships for asylum seekers.¹⁷⁶

The repeal of the relevant provision enters into force at the end of June 2023. At the time of writing there was no information about a new legal solution.

How did the legal and the political experts evaluate the impact of the intervention of the Constitutional Court?

¹⁷² See above, *Rechtssatz*, last updated 23. Februar, 2022.

¹⁷³ Verfassungsgerichtshof V95/2021, 23.6.2021, Spruch, I.

¹⁷⁴ Verfassungsgerichtshof G232/2021, *In der Sache*, 2.3.5., See: RIS, accessed 5. Juli 2022.

¹⁷⁵ Verfassungsgerichtshof G232/2021, *In der Sache*, 2.3.2., RIS, s.o.

¹⁷⁶ Republic of Austria, Parliament: *Parlamentskorrespondenz*, October 9, 2018.

“By the findings [...] the access to the labour market for asylum seekers is finally regulated in accordance with the law [...] A 17-year struggle to repeal an unlawful decree was also dismissed [...].”¹⁷⁷ [...] one of the most competent jurists in the field summarized. But at the same time, it could not go unmentioned that the Bartenstein-decree had been eliminated only for formal reasons¹⁷⁸ as Reinhold Mitterlehner, an expert and former minister, emphasizes:

“In fact, the legal framework should be reorganized if I have such a fuzzy decree-situation, not covered by the law.”¹⁷⁹

Concerns were raised especially on the labour market exam which is – as we have learned – in conformity with EU-law and was not put into question by the Constitutional Court. As a condition for the acceptance of an asylum seeker it defines that an employment vacancy cannot be filled by other candidates. The campaign spokesperson comments:

“In fact, this is not justified [...]. In reality, if we are serious about it, we can’t reduce integration to the question if somewhere a vacancy or an understaffed profession is declared. It’s about something else: either we manage to get short procedures or that the situation the refugee comes from, is taken more seriously. It doesn’t matter whether I am prosecuted for religious reasons, or I have fled because of economic motives. This is nothing you can simply ignore; you must take it seriously too.”¹⁸⁰

Not only Anschöber, a politician, but also law experts warned that exactly because of the continuing labour market tests, no extreme quantity of new work permits could be expected.¹⁸¹ In the next section the data available on the topic will be examined.

4.3 The Affected Group: the Lack of Consistency and its Consequences

Shortly after the findings of the Constitutional Court, the Ministry of Labour ordered the Board of the AMS not to apply the repealed decrees any longer.¹⁸² From now on, work permits had to be granted to asylum seekers without restrictions to certain professional activities. But the new minister, Martin Kocher, who had come into office some months

¹⁷⁷ Peyrl 2022.

¹⁷⁸ Langthaler 2022, p 5.

¹⁷⁹ Mitterlehner 2022, p 3.

¹⁸⁰ Anschöber 2022, expert interview, p 4.

¹⁸¹ Peyrl 2022, BLOG ASYL.

¹⁸² Bundesministerium für Arbeit, 14 July 2021: *Zulassung von Asylbewerberinnen/Asylbewerbern zu einer Beschäftigung*, Vienna: index number: 2021-0.502.591.

before, insisted on maintaining the labour market exam and on the priority for available nationals or foreigners when filling an open position.¹⁸³

Nevertheless, when asked about the chances of asylum seekers to find an apprenticeship in Austria in spring 2022, the experts were optimistic:

“The chances are rather good. Word got round to the furthest corners of the AMS that there are permits. Fortunately, many asylum seekers are coached and at the NGOs you find insiders who know about it.” (Moser 2022)¹⁸⁴

“Since the campaign radical changes have taken place [...]. The repeal of the Bartenstein-decree implied that, considering labour market-access, Austria now has one of the most liberal laws in Europe [...]. If someone speaks German reasonably well, finds an employer who applies for a work permit, and it is a profession with an apprentice shortage – then there is a chance to aspire to this profession.” (Langthaler 2022)¹⁸⁵

“Ali (the Afghan protégé of the expert, MM) was subject to this rule and he was able to take up an apprenticeship because it was a shortage profession. I was rather sure that the opinion was to do nothing to those who had started an apprenticeship. Only when he had finished his apprenticeship, did he get an invitation to the Administrative Court.”¹⁸⁶

Statistics of the AMS (the Public Employment Service of Austria) confirm these observations. The quantity of work permits for asylum seekers was rising as the monthly balances demonstrate:

In July 2021, the month after the Bartenstein-decree was revoked, the number was 52 (nationwide); ten months later, in May 2022, more than twice as many permits were issued (107). All in all, almost 900 applications were approved throughout the period. Experts estimate that about a quarter of them were related to apprenticeships.

These statistics refer to the ‘post Bartenstein decree’-time (starting in June 2021). There are no exact details (at least not published) about the more than 1000 young asylum-seekers who had tried to complete their vocational training in the time before with the help of the so-called “Anschober-ticket”. It was based on the political compromise of 2019 (see section 4.1.). It granted that in case of a return decision, the deadline to leave the country

¹⁸³ See above, p 2.

¹⁸⁴ Moser 2022, p 4.

¹⁸⁵ Langthaler 2022, p 1.

¹⁸⁶ Ruhmannseder 2022, p 4.

could be postponed, limited to a maximum of four years after the start of the apprenticeship.¹⁸⁷ But some experts are afraid that this type of temporary protection is not effective anymore:

“In the meantime, the ‘act of mercy’ has become dead law. It will expire this year at the latest. Most of these asylum seekers had begun their apprenticeships already in 2016/17.”¹⁸⁸

Peter Ruhmannseder, secretary of a network of 13 non-profit, socially committed organizations in Salzburg, assumes that a certain group of these immigrants is not even on the record anymore:

“There are between 100 and 300 of them, in this dimension, only in Salzburg. About 50 have already been deported after the termination of their apprenticeship and they are returning now to Austria [...]. They have fled because they were afraid of being deported. But rather than be taken back to Afghanistan they went to Germany or Italy. There the authorities say, ‘the reception state was Austria’ and the person is deported back.”¹⁸⁹

For a part of this group removal orders had been executed and they had been sent back to Austria. Others simply disappeared, at least in the bureaucratic sense of the notion.

The phenomenon is called deportation gap by researchers. In Austria in 2013 the difference between removal orders (14,600) and effective deportations plus voluntary returns (5,400) was 63%. The political reasons can be:

“(1) humanitarian and legal constraints to deport third-country citizens (e.g. a lack of readmission certificates); (2) political constraints caused by protest activities against the effective removal of failed asylum seekers.”¹⁹⁰

The deportation gap measures the canyon spreading between ideology and reality and once more sheds light on the importance of the “staging factor”. With a certain dash of sarcasm, one could argue that Austria is not even able to implement its own malignancy – and that this could turn out to be a sort of loophole for “candidates”. But Rosenberger

¹⁸⁷ Bundesamt für Fremdenwesen und Asyl, Merkblatt Asylwerber-Lehrlinge und deren Lehrberechtigte, p 2.

¹⁸⁸ Moser 2022, interview, p 4.

¹⁸⁹ Ruhmannseder 2022, p 5.

¹⁹⁰ Rosenberger, Sieglinde/Küffner, Carla 2016: After the Deportation Gap: Non-Removed Persons and their Pathway to Social Rights, in: Hsu, R./Reinprecht, C.(eds.), Migration and Integration, New Models for Mobility and Consistence, Göttingen: Vienna University Press, p 5.

points out that one consequence can almost never be avoided: “non-removed persons remain deportable, and thus face residential insecurity.”¹⁹¹

Experts and practitioners have prepared proposals about how greater consistency and stability could be achieved – and the receiving society and the immigrants could even share advantages:

“What I wish is to conceive this group as unemployed people [...] as a potential in our country which is not made use of. If they are asylum seekers, it’s their legal status [...] But we could see these people also as potential workers who want to work here.”

(Ruhmannseder 2022)¹⁹²

“What does not work yet is that the AMS accesses these people and places them with the companies”. (Moser 2022)¹⁹³

“(We could) take over the German ‘3+2 model’, which says that refugees who have begun a vocational training can terminate it and pursue follow-up employment even if the asylum application is rejected.” (Langthaler 2019)¹⁹⁴

“A complete reorganization of the rules for asylum seeker (so that they can) terminate their apprenticeship after a negative asylum decision [...].No possibility is provided to stay in Austria.” (Peyrl)¹⁹⁵

The asylum and labour market experts highlight the positive effect on manpower supply if the potential of the immigrants would be used. This is underpinned by the academic study of the WIFO on the possible impact of more liberal rules for asylum seekers. It recommended to open the doors wide, with determination, and consistently:

“Especially access to apprenticeships which is currently restricted to professions with a shortage of employees should be extended to all vocational jobs.” From an economic point of view this would have “direct occupational effects and would prevent follow-up costs of delayed or deficient asylum care directed towards labour market-integration.”¹⁹⁶

¹⁹¹ Rosenberger 2016, p 6.

¹⁹² Ruhmannseder 2022, p 5.

¹⁹³ Moser 2022, p 5.

¹⁹⁴ Langthaler 2019, p 5.

¹⁹⁵ Peyrl 2022: Blog Asyl.

¹⁹⁶ Bock-Schappelwein/Huber (WIFO) 2015, p 98.

4.4 The Values that Count: Utilitarianism and Human Rights

In the quote above scholars plead for equality. They are economic researchers and from this point of view they consider it reasonable to grant it: Even if the quota solution for asylum seekers on the labour market would be lifted, the impact would be “rather low. As a relevant effect remains an increase in the employment rate of about 0.1 to 0.2 percentage points.”¹⁹⁷ But even in the public statements of aid organizations economic logic was called as a main witness. As the Austrian government had closed the door in 2018 to apprenticeships for asylum seekers, the president of the Caritas organization criticized: “I think that is a wrong decision in human and in economic terms.”¹⁹⁸

The *Education not Deportation*-campaign was profoundly shaped by its utilitarian streak (see 1.4.). During the canvassing of 2019 and shortly before the last session of the National Assembly, the spokesman of the petition, Rudi Anschober, called on the parliamentary parties and their chairs in an open letter, “to allow a reasonable solution to be found so that in the next months not the worst of all possibilities for the persons affected and the companies will come true.”¹⁹⁹ Even in dramatic moments the fate of local businesses was not forgotten and received the same attention as the possible victims of deportations. This corresponded to a widespread attitude of the broader public. In the eyes of many citizens the utility of a refugee, for example as a worker or future worker, is seen as a condition for his/her acceptance. This is indicated by the data from an integration survey carried out in 2021 in Austria:

“From the perspective of a majority of the respondents, very important for integration in Austria are knowledge and recognition of the laws, being in employment, awareness of values and rules and having a good command of the German language.”²⁰⁰

The survey shows broad “approval for vocational training for migrants in professions with a shortage of employees”²⁰¹, this is supported by 76%. But in fact, lifting restrictions for ‘useful’ immigrants does not mean justice for all and could even establish new demarcations: it would come down to distinguishing between working, German-speaking and law-abiding foreigners, and others. This is sharply criticized by anti-racism-specialists:

¹⁹⁷ Bock-Schappelwein/Huber (WIFO) 2015, p 96.

¹⁹⁸ APA-OTS 27 August 2018.

¹⁹⁹ *Petition Education not Deportation*, open letter, September 3, 2019.

²⁰⁰ Österreichischer Integrationsfonds/A Fund of the Republic of Austria (ed.): *Integrationsbarometer* (Integration Barometer) 2/2021, Vienna, p 18.

²⁰¹ See above, p 22.

“By the clear distinction between good and bad foreigners, xenophobic lines of arguing seem to gain a presumed legitimation, because you can circumvent a general condemnation of foreignness. This would amount to open racism from which a large section of the majority population would dissociate themselves.”²⁰²

What the author says is, if we introduce two categories (“good” and “bad” foreigners, the bad foreigners being those without a job) we cannot be accused of general racism, but we allow a specific sort of it – the rejection of not-useful migrants. Even if one does not share this interpretation, it cannot be denied that it invokes a founding principle of human rights: they do not depend on abilities, qualifications, or economic needs – they are based on the “inherent dignity and on the equal and inalienable rights of all members of the human family.”²⁰³

Fundamental human rights are “those required to develop and maintain personhood [...]. Personhood is the ability of a subject to develop his or her own (authentic) will based on his or her own considerations and reflections.”²⁰⁴ No kind of utility –and be it sought-after on the market – can ever establish the same value as personhood as such or as Kant put it (I cannot resist quoting the original):

*“Im Reiche der Zwecke hat alles entweder einen Preis oder eine Würde. Was einen Preis hat, an dessen Stelle kann auch etwas anderes, als Aequivalent, gesetzt werden; was dagegen über allen Preis erhaben ist, mithin kein Aequivalent verstattet, das hat eine Würde”*²⁰⁵. Meaning:” In contrast to market price and other values that are dependent on our personal attachments, Kant calls dignity ‘an unconditional and incomparable worth’ that ‘admits no equivalent’.”²⁰⁶

This obviously was not the basis of the *Education not Deportation*-campaign. It did not defend asylum seekers – or not primarily – because they were persecuted or discriminated in their home country, it wanted to save them from deportation because they could cover a roof or roast (and taste) a pork chop. It spoke out for these immigrants and their access to vocational training because society could make use of them (the persons and the

²⁰² Lentsch 2014, p 48.

²⁰³ United Nations Human Rights 2022: *Universal Declaration of Human Rights, Preamble*, <https://www.ohchr.org/en/human-rights/universal-declaration/translations/english>.

²⁰⁴ Tiedemann, Paul. 2021: *Are There Moral Duties toward Refugees? Considerations in Legal Ethics*, in: *Laws* 10: 4. <https://doi.org/10.3390/>, p 10.

²⁰⁵ Kant, Immanuel 1785: *Grundlegung zur Metaphysik der Sitten*, Riga: Hartknoch, p 77.

²⁰⁶ Hill, T. 2014: Kantian perspectives on the rational basis of human dignity. In: M. Düwell, J. Braarvig, R. Brownsword, & D. Mieth (Eds.), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (pp. 215-221, Summary). Cambridge: Cambridge University Press, accessed July 12, 2022.

professions). In contrast, in human rights for example education, is regarded as a self-evident right of a person:

“The right of self-development and to education as a condition and element thereof relate to the nature and value of human self-development. The right is made manifest by bringing out the nature of self-development as a product of a persons’ exercise of their autonomy, and other valuable capacities and potentialities. The right to access to knowledge and truth is involved in the rights to self-development and to respect a person, but it is also a right in its own right.”²⁰⁷

If only the consequences for the state, the region, the economy are accepted as a “yardstick”, little space is left for rights, as critics like Frey warn:

“The view that acts are right or wrong by virtue of their (actual) consequences is incompatible with any view of moral rules that allows them even partially to determine the rightness of acts.”²⁰⁸

To set “maximizing utility” as a goal itself means to see it only as “a non-moral ideal, akin in some ways to an aesthetic ideal”²⁰⁹. Therefore – as Frey states – it is unsuitable as a basis for rights: “To ground rights on the shifting sands of utility is to place them in jeopardy, since, under the right conditions, they would be set aside or violated.”²¹⁰

Ethicists underline the human rights in particular would not find a stronghold in utilitarianism:

“In the category of moral rights this functional reasoning is problematic because it easily tips over into an instrumentalist justification. It misjudges the core of moral rights: to respect the claims of human beings for their own sake.”²¹¹

The *Education not Deportation*-campaign was appreciated by experts in the field. But this did not leave them ignorant for its shortcomings on certain principles:

“Sure, it was a balancing act. You cannot work only with useful and with likeable people. You must always consider that the disagreeable, the non-useful persons have rights too. It is very important to maintain this ‘rights’-frame.” (Langthaler 2022)

²⁰⁷ McCloskey 1984, p 128

²⁰⁸ Frey, R.G. 1984: *Act-Utilitarianism, Consequentialism, and Moral Rights*, in: Frey (ed.): *Utility and Rights*, Minneapolis: University of Minnesota Press, p 65.

²⁰⁹ Kymlicka 2002, p 36.

²¹⁰ Frey 1984, p 66.

²¹¹ Pauer-Studer 2020, p 88.

“From the point of view of human rights, it was not okay. A human being should be recognized despite their origins, sex etc. But this support, to see what arguments we have, this was a move which is necessary every now and again. Human rights are held in high regard, but we know that human dignity is violable [...].” (Ruhmannseder 2022)

In the case of Ali, the young Afghan the expert was taking care of, the impact of the “useful foreigners”- campaign was very concrete:

“You had won time [...]. Ali would have been re-deported to Afghanistan. This was very likely; he wouldn’t have had a reason for asylum. I don’t know if he would still be alive. His parents had been killed and it would have been a matter of time until the Taliban would have captured him. He belongs to a minority, the Hazara, who had been attacked again and again.” (Ruhmannseder 2022)

What we find here is the conflict in a nutshell: the expert concedes that in fact the campaign leaned on “good and useful” (learning/working) foreigners and not on the framework of universal human rights – but at the same time he had to acknowledge that this approach produced a result and maybe even saved a life.

For refugees from Afghanistan, there was a certain risk to be forced to leave Austria: according to the asylum statistics of the Austrian Ministry of the Interior, in 2018 40% of the decisions on asylum applications of Afghan citizens were negative.²¹² When returning to their home country they were exposed to enormous security risks which are identified in an expert statement to a German court:

“Their status as ‘returnees without success’ entails risks. This status is attributed to them by the Afghan society, and it is associated with elements of suspicion. This does not only provoke the danger of persecution but increases the risk of social and economic exclusion that threatens their existence. They can only escape from these dangers and this vulnerability by accepting new dangers, either by fleeing again or by affiliation with criminal or rebellious organizations.”²¹³

In the negotiations on a new government with the Volkspartei, Anschöber had accepted a deal. It granted a delay of deportations of asylum seekers in apprenticeships but did not guarantee a new national legal framework based on human rights. How did the campaign spokesman defend the solution?

²¹² Republik Österreich/Bundesministerium für Inneres: Asylstatistik 2018, p 10, <https://www.bmi.gv.at/301/Statistiken/start.aspx> (Download August 8, 2022)

²¹³ Stahlmann, Friedrike 2018: *Gutachten Afghanistan*, Wiesbaden: Verwaltungsgericht, AZ: 7 K 1757/16.WI.A, p 299-300 (translated by MM)

“I knew that was more than half the battle. You could save relatively many people because it was not defined how much time the vocational training really took. We could win some years, for every single one of them.” (Anschober 2022, expert interview)

Did the end (to prevent expulsions) justify the means (the utilitarian reasoning)?

Firstly, we must consider that a relevant part of the afflicted group could not be protected from a return decision: for example, in Upper Austria, 78% of the asylum seekers in apprenticeships were Afghans, and almost half of them did not enjoy a right to asylum in Austria, at least according to the rulings of the national authorities. Secondly, the approach to rely on article 8 of the European Convention on Human Rights (the right to respect for private and family life) had failed (see section 2.2.). The campaign supported a target group which was simply deprived of certain rights, or at least could not claim them successfully. In many of the cases there seemed to be no choice at all between a “legal” (and morally justified) path marked “human rights” and another one signposted “utilitarian” – one of the junctions, the juristic route, was barred.

Finally, if we nevertheless suppose that the whole initiative would have exclusively allowed human rights to occupy centre stage – what could have been the result? To achieve a breakthrough, a condition should have been fulfilled – a certain amount of altruism in the host society. Moral philosophers warn, however, never to trust in this kind of motive:

“There is no reason why people should be ready to let themselves offset in the interest of optimal states of world affairs.”²¹⁴

The organizers of the *Education not Deportation*-campaign could not be accused of following illusions or believing in the effectiveness of altruism.

5 CONCLUSIONS

One of the main research questions – how the notion of the “useful refugee” has to be assessed in the light of the human rights – has been answered clearly in the section above. The campaign organizers adhered to their script (young foreigners, fulfilling the demands of the host society, but threatened by irrationality) and human rights played a secondary role, if one at all. After a visit to Austria in 2018, the OHCHR admonished that “some legal provisions and practices are not fully aligned with international human rights law

²¹⁴ Tiedemann 2021, p 4.

and standards and need to be brought in compliance.”²¹⁵ In his role as regional councillor in charge of integration Anschöber knew the report: he had used it to accuse the federal government of “undermining the secured human rights of migrants by a permanent tightening of laws.”²¹⁶ Having full knowledge of these human rights findings – was it justified to limit the efforts of the campaign to refugees valuable for the economy?

“This for sure is the risk. But on the other hand: what is the alternative? The alternative would have been simply to accept it, until there is a fundamental change. Everyone who knew the Kurz-ÖVP was aware that it was about opening the door by a crack.

Afterwards we could as a society experience what the background of an escape is and how we can help each other.” (Anschöber 2022, expert interview)

As shown above, the campaign managers had strong reasons for following the utilitarian path since the legal approach was blocked. From a critical point of view, it has to be noted that the second step announced by the politician – more intense dialogue on the refugee issue – was never taken, at least not with a vehemence perceptible by a broader audience.

The other research questions aim at the impact of the campaign. The first step – to reframe the image of asylum seekers from “victims” to potential “workers” – did not fail to take effect:

“Such a campaign makes sense for raising awareness. Considering the subject itself I would say that the campaign has provided one or the other different approach, above all to see the young people in another light than usual. There are many gifted, positive people among them.” (Mitterlehner, 2022)

Here it is again – the utilitarian argumentation. It cannot be ignored that an initiative based on the concept of the “useful foreigner” scored much better than comparable efforts of the civil society.

One of the main reasons was that the campaign *Education not Deportation* managed to close an alliance with new partners like company owners, managers, and Conservative politicians. This example showed that it was possible to join forces. Moreover, it demonstrated that in the host society other attitudes on migration existed than complete rejection. These positions – and be they utilitarian – had become visible and been given a voice.

²¹⁵ Office of the United Nations High Commissioner for Human Rights 2018: Report of Mission to Austria focusing on the human rights of migrants, particularly in the context of return, 15-18 October 2018, p 16.

²¹⁶ Anschöber 2019: Report of the High Commissioner of the UN for Human Rights gives poor marks to Austria, APAOTS, May 9, 2019.

The campaign did at least have a short term-impact on party politics., This is demonstrated simply by the fact that after more than a year without negotiations the Conservatives (the ÖVP) and their Chancellor proposed a solution²¹⁷. The ÖVP was in search of a coalition partner, but we can assume that without the force of the anti-deportation petition the issue would not have formed part of the agenda. Experts like the former politician and ÖVP-leader Reinhold Mitterlehner doubt the long-term effect:

“In the coalition negotiations the issue no longer had the importance that Rudi Anschober had represented almost aggressively....if there is an allegation to raise, it’s maybe that they let the issue slip away afterwards.” (Mitterlehner 2022)

There are also strong indications that the initiative had an impact on the law. This impact at least was indirect. The campaign and the substantial involvement of companies seem to have encouraged employers to lodge complaints. In one of the communications about the petition a lawyer offered support for businesses.²¹⁸ One of these applications ended with the Constitutional Court abrogating key provisions for asylum seekers on the labour market.

Did these findings change the opportunities and the practical life of asylum seekers in apprenticeships? The experts interviewed agree to that, referring to the work permits issued afterwards.

At the same time, they deny unanimously that a fundamental reform has been introduced. Certain restrictions on the rights of asylum seekers have not been lifted (for example the labour market exam); solutions promising more stability have not been applied – for instance the “German 3+2 model”, which was favoured by the campaign and by aid-networks. The German regulation guarantees that an employer can engage a refugee for two more years after the termination of vocational training.²¹⁹

In Austria specialists in asylum law demanded a complete re-structuring of the regulations after the “act of mercy” of 2019. At the time of writing (spring 2022) “an opportunity to remain after vocational training was not provided”.²²⁰

One of the experts interviewed – who in general appreciates the results of the campaign – describes the unresolved contradictions:

²¹⁷ See *Kurier*, August 21, 2019, and *Parlamentskorrespondenz*, December 3, 2019.

²¹⁸ Anschober 14 August 2019, petition in signing: partial success.

²¹⁹ IHK (Chamber of Industry and Commerce) Munich, <https://www.ihk-muenchen.de/ihk/documents/Flüchtlinge/BIHK-Flyer-3-2-Regelung.pdf> Accessed July 13, 2022.

²²⁰ Peyrl 2022.i

“I see the worries of the companies concerning the labour market and on the other hand I understand the worries of those who say, ‘I am in a precarious employment, what will happen to me if once more those arrive who do the job for even less money?’ The compulsion to say ‘let’s ensure that all of us are doing better and let’s not bully the underlings’ – this compulsion has not risen.” (Ruhmannseder 2022)

A potential power like that – does it not unfold because its immediate utility cannot be proven? The answer of the politician speaking for a campaign in the “useful foreigner”-style is very utilitarian:

“Sometimes it is easier to simplify, even if it is dangerous – to take certain symbolic examples and then to focus with their help on the big questions. I think this is very important, because otherwise we only move within our own territory. But we need a majority in this country to change something in the interest of those affected.”

(Anschober 2022, expert interview).

If we put these vindications on the test bench of our assumptions, we can diagnose:

The first assumption – that the campaign had a certain impact, especially on the image of young asylum seekers – was verified. There is proof for that in the surveys. Nevertheless, the second assumption – that a fundamental change in the sphere of asylum seekers and apprenticeships in practice did not materialise and certain political goals remained unaltered – was confirmed too.

To sum up: this short study has revealed some of the results and some of the risks associated with populist campaigns advocating the “good cause”. At least short terms success is possible, while a long-term policy change is not guaranteed. But *Education not Deportation* showed that it is possible to win support for issues which are often denoted as loser topics.

6 Sources

6.1 List of experts (in alphabetical order)

Anschöber, Rudolf: at the time of the campaign member of the regional government of Upper Austria for the Green Party, in charge of integration; main spokesman of the initiative *Education not Deportation*; he had formed the first coalition with the Conservatives on national government level in Austria

Dedl, Werner: at the time of the campaign press speaker in the government office of Anschöber

Langthaler, Herbert: responsible for public relations in *Asylkoordination*, a lobby organisation for NGOs caring for asylum seekers, author of a chronology of the “asylum seekers in apprenticeships” issue

Mitterlehner, Reinhold: former federal minister and Vice-Chancellor for the Conservative party (predecessor of Sebastian Kurz as party leader), former general secretary for the Austrian Economic League and deputy general secretary in the Chamber of Commerce

Moser, Rudolf: expert for labour market policy in the Chamber of Labour of Upper Austria, lay judge at the Federal Administrative Court of Austria

Ruhmannseder, Peter: secretary of the association *arbeit+/soziale Unternehmen*, a network of 13 non-profit socially committed agencies in Salzburg

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7 APPENDIX

Abstract in English:

The paper analyses the results and the risks of a campaign named “Education not Deportation” in Austria. It aimed to support asylum seekers in vocational training who were - in accordance with the legal framework and policies of the time - in danger to be removed from the country. The initiative, reaching its period of highest intensity between 2017 and 2019, was characterized by some features which were unusual:

- Its main instrument, an online petition, was relatively new at the time. Though petitions often are used as a sort of outlet for protest outside the parliamentary sphere, the speaker was a professional politician of the Green Party and member of a regional government.
- The asylum seekers were not portrayed as poor and helpless, a picture often drawn by social workers or aid initiatives – on the contrary, they were shown as active and ambitious, willing to work and thus being a potential for the labour market. The true victims – the arguing went – were not the immigrants but the company owners who by deportations would lose very useful employees.
- By relying on the concept of the “useful foreigner” it was possible to build new alliances with groups who normally could not be won over for initiatives of the sort: businesspeople, handy men, company owners, conservative politicians. By collecting more than 80.000 signatures, the campaign was by far the most successful on the field.

In the end, a political compromise was achieved granting a postponement of the exit (or the deportation) until the end of the apprenticeship. The campaign encouraged employers to lodge complaints and the Constitutional Court annulled certain provisions limiting the access of asylum seekers to the labour market. But a complete reorganization of the rules – as demanded by experts - was not implemented.

It is obvious that the campaign was deeply shaped by its utilitarian streak and was not founded on the concept of human rights (that do not distinguish between useful and not-so-useful human beings). In the study experts call to considerate that “useless” persons have rights too and the human rights frame should not be forgotten. But the second step promised by the campaign speaker – a more intense debate on the rights of asylum seekers – was never

taken. Eventually this Austrian initiative based on ‘populism for the right cause’ was effective at least in the short term but did not trigger fundamental reforms.

Abstract in German:

Die Arbeit analysiert die Resultate und Risiken einer Kampagne mit dem Titel „Ausbildung statt Abschiebung“ in Österreich. Sie sollte Asylwerber in Berufsausbildung unterstützen, die wegen des rechtlichen Rahmens und der politischen Vorgaben in dieser Zeit in Gefahr waren, aus dem Land entfernt zu werden. Am aktivsten war die Initiative zwischen 2017 und 2019; sie war durch einige Besonderheiten charakterisiert:

- Ihr Haupt-Instrument, eine Petition, war zu dieser Zeit vergleichsweise neu. Obwohl Petitionen meist für Proteste außerhalb der parlamentarischen Sphäre eingesetzt werden, war der Sprecher ein professioneller Politiker der Grünen und Mitglied einer Landesregierung.
- Die Asylwerber*innen wurden nicht als arm und hilflos dargestellt, ein Bild, wie es oft Sozialarbeiter*innen oder Hilfsorganisationen entwerfen – im Gegenteil, sie wurden als aktiv und ehrgeizig präsentiert, arbeitswillig und damit ein Potential für den Arbeitsmarkt bildend. Die wahren Opfer, so wurde argumentiert, waren nicht die Zuwander*innen, sondern die Firmenbesitzer, die durch Abschiebungen wertvolle Beschäftigte verlieren würden.
- Indem sich die Kampagne auf das Konzept vom „nützlichen Ausländer“ stützte, konnte sie Bündnisse mit Gruppen schließen, die sonst für Initiativen dieser Art kaum zu gewinnen waren: Geschäftsleute, Handwerker, Firmeneigner, konservative Politiker*innen. Mit 80.000 Unterschriften war die Kampagne die bei weitem erfolgreichste auf ihrem Gebiet.

Am Ende wurde ein politischer Kompromiss geschlossen, nämlich das Verlassen des Landes oder die Abschiebung bis zum Ende der Lehre hinauszuzögern. Die Kampagne ermutigte Arbeitgeber, Beschwerden einzureichen und der Verfassungsgerichtshof annullierte einzelne Bestimmungen, die den Zugang von Asylwerbern zum Arbeitsmarkt begrenzten. Eine komplette Neuordnung des Regelwerks, wie sie Experten verlangten, blieb jedoch aus.

Es ist offensichtlich, dass die Kampagne zutiefst von ihrem utilitaristischen „Zug“ geprägt wurde und dass sie nicht auf einem Konzept von Menschenrechten beruhte

(Menschenrechte unterscheiden nicht zwischen nützlichen und nicht ganz-so-nützlichen Menschen). In der Studie erinnern Experten daran, dass auch „nutzlose“ Personen Rechte haben und dass der Menschenrechts-Ansatz nicht vergessen werden sollte. Doch der zweite Schritt, den der Kampagnen-Sprecher versprochen hatte – eine intensivere Debatte über die Rechte von Asylwerbern – wurde niemals gesetzt. Letztlich war diese auf einem ‚Populismus für die richtige Sache‘ beruhende österreichische Initiative zwar kurzfristig erfolgreich, löste aber keine grundlegende Reform aus.

