Submission for Switzerland's 4th Universal Periodic Review Cycle

ASYLEX

LEGAL ADVISORY

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AsyLex is a non-profit organization based in Switzerland. Our team of volunteers provides free online legal advice to refugees and asylum seekers. AsyLex was founded 5 years ago (2017) and has assisted over 5'000 clients on Swiss asylum law matters up until today. We not only assist our clients with legal submissions on national level, but also take cases of severe human rights violations on an international level before UN Committees such as the CRC, CERD, CAT and CEDAW.

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1. Developments since the previous report

The following report highlights developments concerning migrants since Switzerland's 3rd UPR cycle. Switzerland has yet to fully implement all accepted recommendations in this area, as will be shown below.

1.1. Accelerated Asylum Procedure and Examination of all Potential Human Rights Violations

146.119, partially implemented / 146.117, not implemented yet

In March 2019, Switzerland introduced the accelerated asylum procedure in accordance with recommendation *No. 146.119.* It provides for asylum procedures to be completed directly in national asylum centres within 140 days. However, if a case is too complex to establish the necessary facts in the accelerated procedure, the case will be transferred to the extended procedure. To ensure the rule of law during the accelerated procedure, a legal representative accompanies asylum seekers during their procedure. The legal representative attends the hearings, responds to the draft of any negative decision and, if they deem it necessary, appeal the negative asylum decision.

The legal representative's mandate is remunerated at a lump sum and ends when a positive asylum decision has been issued, after a decision by the Federal Administrative Court (hereinafter **FAC**) in the case of an appeal, or when the legal representative terminates their mandate because they chose not to appeal the negative asylum decision due to a lack of prospects of success.

The Secretariat for Migration (hereinafter **SEM**) often violates its duty to investigate and does not sufficiently refer more complex cases to the extended procedure.[1] This is of particular concern when the case involves children, vulnerable persons such as victims of sexual and gender-based violence (hereinafter **SGBV**), or sick individuals whose health status needs to be more closely examined, or those who come from a so-called "safe third country". In the latter case, the SEM and FAC rely solely on the formal ratification of human rights treaties and legal standards of the third country, without sufficiently and individually assessing the situation or current human rights practices on the ground, which is contrary to the accepted recommendation *No. 146.117*.[2] Thus, the facts of the case often cannot be adequately established under the accelerated procedure, which in turn leads to wrongful inadmissibility decisions or wrongfully rejected asylum claims.

In addition, if the mandate is terminated by the legal representative after a negative decision by the SEM, it is almost impossible for the persons concerned to find a new representative within the very short appeals period of 5 or 7 working days, especially since asylum seekers are usually located in remote asylum centres and therefore cannot easily resort to another legal representation.

1.2. Application of Refugee Convention 1951

146.118 partially implemented

[1] See also: https://bündnis-rechtsarbeit-asyl.ch

[2] For more information see AsyLex's submission to the Special Rapporteur on the Human Rights of Migrants from 25 February 2021, attached as Annex 1.

Switzerland applies the 1951 Refugee Convention in an extremely restrictive manner, therefore, only partially implemented recommendation *No. 146.118*. Especially for people fleeing civil war and widespread violence and who have personally suffered from its consequences, it is difficult to provide sufficient evidence of individual persecution to get refugee status in Switzerland. Thus, if in Switzerland's view the person does not fall into the refugee category, but repatriation to the country of origin would be impossible, inadmissible or unreasonable, the person is granted temporary admission, a so-called F-status. Such an F-status does not grant the person the same rights as the refugee status though. Individuals with temporary admission have difficulty finding employment because many employers are deterred by the temporary nature of the admission. Since most people with temporary permits come from countries such as Afghanistan, Syria, Eritrea, and Somalia, where war has been ongoing for many years, the temporary nature of the status is highly contradictory, which is why they should be issued a refugee status.

In addition, people with an F-status must wait three years before they can apply for family reunification, which has a negative impact on their integration. Moreover, people with an F-status receive less social assistance than people with refugee status. Finally, people holding an F-permit are practically prohibited from travelling abroad. Since the last UPR cycle, Switzerland has even decided to impose a travel ban for temporarily admitted people, which violates the right to free movement and family life and is therefore highly concerning.[3]

1.3. Administrative Detention

122.11 neither accepted nor implemented

In Switzerland, various forms of administrative detention exist until foreigners are deported or even before a decision regarding the person's asylum application has been taken. The period of detention can last up to 18 months, which is completely disproportionate. Although less restrictive measures are often available, they are generally not considered by the authorities. In Switzerland, there are forms of administrative detention pending deportation that systematically do not reach the hands of a judge. This type of detention – also called "detention under the Dublin procedure" – is highly problematic, as many detainees do not even know their right to be brought before a court or are simply too afraid to ask the authorities, whose language they do not speak.

Concerning legal representation, it is a regional responsibility to decide whether a detainee will be granted legal assistance. The differences between the individual regions are enormous. Thus, only very few persons in administrative detention have access to free legal representation, which is consequently highly problematic.[4] During the 3rd UPR cycle, Switzerland did not adopt recommendation *No. 122.11,* where it was requested that administrative detainees should have access to legal counselling. Consequently, nothing has been done in this regard since the last cycle.

[3] See also: https://www.unhcr.org/dach/ch-de/71829-unhcr-bedauert-strenges-reiseverbot-fur-vorlaufig-aufgenommene.html, https://www.humanrights.ch/de/ipf/menschenrechte/migration-asyl/reiseverbot-f-bewilligung and https://www.fluechtlingshilfe.ch/themen/asyl-in-der-schweiz/aufenthaltsstatus/die-vorlaeufige-aufnahme.

[4] For more information see AsyLex's submission on migrants' rights to liberty and freedom from arbitrary detention from 20 October 2020, attached as Annex 2.

1.4. Dublin / “safe” third country Returns

146.117 partially implemented

Switzerland has been a part of the EU’s “Dublin System” since 12 December 2008. A person who enters Switzerland from a third country considered “safe” will be issued with an inadmissibility decision and returned to the country in question. Although adopted during the last cycle, Switzerland has not sufficiently implemented recommendation *No. 146.117*. Most returnees find themselves in a desperate situation, with insufficient access to housing, social welfare, protection from violence and medical care. Many NGOs report on the dire situation of asylum seekers in Dublin states and “safe third countries” such as Croatia, Bulgaria, Romania and Greece. In such inadmissibility decisions, Swiss authorities merely rely on theoretical legal obligations in the respective country, but rarely truly assess the individual situation and the individual risks of humanitarian hardship, namely faced by vulnerable asylum applicants regarding compliance with international obligations, in particular the prohibition of (chain-)refoulement. As a result, asylum seekers needed to resort to UN committees which granted interim measures in several cases concerning vulnerable persons.

1.5. Minors

146.104 partially implemented / 147.61 partially implemented

The vulnerability of children is still not sufficiently addressed in the Swiss asylum system. Although Switzerland adopted recommendations *No. 146.104* and *No. 147.61* during the last cycle, they have not yet been sufficiently implemented. Both unaccompanied (hereinafter **UMA**) and accompanied minors are affected here: Due to isolated housing and schooling, children are affected by inadequate access to education and integration opportunities as well as virtually denied contact with the outside world, leading to social exclusion. Asylum-seeking children older than 16 are no longer entitled to any schooling at all. Due to limited access to medical care, especially for mental health problems, asylum-seeking children are often unable to receive adequate medical treatment.

Furthermore, children's asylum applications are hardly examined individually and independently of their families, so that child-specific reasons for fleeing are insufficiently taken into account. In addition, children under the age of 12 are usually denied a hearing, and even when it does take place, SEM staff still lack the necessary training and skills to conduct a child-sensitive hearing.

In addition, although the new asylum system provides for both a trusted person and a legal representative, in practice it is usually one and the same person. Moreover, Swiss law provides for the separate accommodation of UMA, but children over the age of 12 are often accommodated in regular asylum shelters due to capacity constraints. Furthermore, scientifically controversial and ethically questionable medical age assessments are carried out on children for age determination. Cases have come to light in which children were not informed about the tests and were subjected to forced examinations.

1.6. The Right to Family Life

148.64 neither accepted nor implemented

The right to family life varies greatly depending on the different residence status. The "stronger" statuses (nationality, settlement permit, EU-citizens residence permit) offer a right to family reunification or facilitations, whereas for persons with a "weaker" residence permit (temporary admission, short-term permit), the conditions for family reunification are much stricter. Switzerland did not accept the recommendation *No. 148.64* on ensuring family reunification during the asylum procedure.

The federal law lays down relatively vague conditions for family reunification, which leave the cantons considerable discretion. The effect of Swiss federalism is that the right to family life of foreigners is strongly affected by the canton in which they live in, which they have not necessarily chosen freely. This is in particular the case for asylum seekers, who are distributed among the cantons according to their population.

Family reunification procedures are lengthy. The cantonal and federal authorities, as well as the embassies responsible for checking the veracity of documents in the country of origin, delay their decisions excessively, forcing the people concerned to wait for several months or even more than a year. In the case of Afghanistan, the Swiss embassy in Pakistan is currently taking around a year to check if the documents (e.g., marriage certificates, identity papers) are real. In the process, they contact the Afghan authorities, respectively the Taliban and are thus potentially endangering the applicants. Such long and dangerous procedures are also seen even when the person has a right to family reunification and should generally be avoided.

Some cantons clearly go beyond what they are allowed to do when applying the federal law and do not comply with the requirements of the case law. This is clearly the case with regard to the condition of financial independence, as some cantons require absolute independence at the time of application, even when the case law states that a favourable prognosis should be enough.

Furthermore, the crisis in Afghanistan has shown that family reunification is handled very restrictively. If the necessary documents are not available or cannot be obtained, the authorities hardly accommodate the applicants, which makes family reunification even more difficult.

The three-year waiting period before family reunification of persons with temporary admission can be applied for violates Article 8 of the ECHR. In the ECtHR decision in M.A. v. Denmark, it was clearly stated that such a rigid time limit violates the right to family life.

1.7. Living Conditions in Federal Asylum Centres

146.120 partially implemented

Although the asylum process has been accelerated since March 2019, there has been little, if any, improvement in Federal Asylum Centre capacity and living conditions since the last report. Consequently, recommendation *No. 146.120* has been insufficiently implemented. There are still major problems when it comes to the privacy of and general living conditions for asylum seekers in the large Federal Asylum Centres. Highly concerning hereby is the violence used against asylum seekers by the security guards and the lack of investigation thereof as well as the lack of access to urgently needed psychological care.

In situations where there is an increased need for beds (e.g., Covid-19, Ukraine war), underground shelters are often "activated" as temporary accommodation. Usually this is accomplished by stating that this condition is "temporary" and "only for a short period of time." However, these centres often remain open for long periods. The underground accommodation of asylum seekers often triggers negative experiences and trauma.

1.8. Human Trafficking

146.16 partially implemented

Although Switzerland adopted recommendation *No. 146.61* during the last cycle and implemented the Second National Action Plan Against Human Trafficking[5] from 2017-2020, there is still great need for action, especially with regard to asylum seekers. The authorities, and in particular the police, are not sufficiently trained for this matter and consequently, victims of human trafficking seeking asylum in Switzerland do not receive adequate protection – in contrast, sometimes they are even punished and taken into administrative or criminal detention without any legal or mental health support. In particular, no adequate housing is provided according to the Palermo protocol. Additionally, the Swiss authorities sometimes criminalise victims of human trafficking by opening criminal proceedings against them for illegal entry into Switzerland.

2. Recommendations for Actions for the State under Review

2.1. Accelerated Asylum Procedure and Examination of all Potential Human Rights Violations

Switzerland is urged to extend the time limits for appeals in both the accelerated and Dublin procedures and to comply with the principle of investigation by the SEM in the first instance asylum procedure and by the FAC in the appeal procedure. Particularly in the case of vulnerable asylum seekers and those who come from so-called “safe third countries” the situation must be analysed individually.

2.2. Application of Refugee Convention 1951

Switzerland is encouraged to grant provisionally admitted persons the same rights as persons who have been granted refugee status. This by taking appropriate measures to integrate persons with an F-permit more efficiently into the labour market, paying provisionally admitted persons the same amount of social assistance, granting freedom of travel and abolishing the 3-year waiting period for family reunification of provisionally admitted persons. Finally, Switzerland is urged to rename the term "temporary admission" to "subsidiary protection status", following the example of its neighbouring countries.

2.3. Administrative Detention

Switzerland must ensure that administrative detention is used only as a last resort and that the principle of proportionality is upheld. It must not be imposed on vulnerable persons

[5] See also https://www.eda.admin.ch/dam/eda/de/documents/aussenpolitik/menschenrechte-menschliche-sicherheit/nat-aktionsplan-2017-2020_de.pdf.

(minors, pregnant women, single mothers, victims of trafficking or SGBV) or families. If it is nevertheless imposed, it must be in special facilities and under a system that is clearly different from that of criminal detention (e.g., with access to work, education and health care), and any detention, including that based on administrative law, must be systematically reviewed by a court. Finally, free legal aid must be granted and access to mental health support must be guaranteed.

2.4. Dublin Returns

Switzerland must refrain from returning vulnerable asylum-seekers, particularly women travelling alone, unaccompanied minors, families with children, severely ill persons, LGBTQIA+ people or victims of torture or human trafficking to Dublin/"safe" third countries where they may be subjected to inhumane living conditions. Lastly, Switzerland must take all necessary measures to ensure a proper analysis of the risk of human rights violations a returnee could be exposed to before deciding to return them to a Dublin/"safe" third country, especially when they risk being returned to their country of origin ("chain-refoulement").

2.5. Minors

Switzerland is urged to ensure that the asylum procedure is tailored to the particular vulnerability of children and adapted to their needs as well as to ensure the adequate social and psychological support in both federal and cantonal centres. Moreover, ensuring the same right to education and training as provided to Swiss children is crucial for children under the age of 18. Additionally, Switzerland is urged to not consider medical age determination on children as a crucial component in determining the age of the child. In case of doubt, it should be assumed that the person is a minor. Finally, Switzerland must ensure that all forms of non-criminal detention of or coercive measures on children are prohibited.

2.6. The Right to Family Life

Switzerland is urged to speed up the family reunification procedures, for example by avoiding the verification of the authenticity of documents by the embassies if it is not absolutely necessary, or if it is necessary, to drastically shorten the processing time. Additionally, the three-year waiting period for provisionally admitted persons should be abandoned.

2.7. Living Conditions in Federal Asylum Centres

Switzerland is urged to ensure uniform standards of care, cleanliness and especially security in asylum centres. Immediate action must be taken to improve the situation regarding the use of violence of security personnel against asylum seekers and the access to psychological assistance in the centres. In addition, Switzerland is recommended to adopt an emergency capacity plan for both Federal Asylum Centres and cantonal facilities to avoid housing people in underground shelters. Finally, Switzerland is urged to allow asylum seekers the option of private accommodation.

2.8. Human Trafficking

Switzerland must ensure adequate victim protection and assistance, which includes in particular a gender-sensitive interview, access to health care and psychological support as well as adequate housing in accordance with the Palermo protocol[6]. Furthermore, victims of human trafficking must not be criminalised and must have access to free legal aid.

[6] See also: https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons.