

# Country Report: Switzerland



2020  
Update



## Acknowledgements & Methodology

The 2020 update of this report was written by Laura Rezzonico, Lucia Della Torre and Adriana Romer, legal unit of the Swiss Refugee Council, and was edited by ECRE.

This report draws on jurisprudence of the Federal Administrative Court, publicly available statistics by the State Secretariat for Migration (SEM), press releases of the SEM and the Federal Council, information and statistics provided by the SEM upon request, newspaper articles, documents from the political process, and the experience of the Swiss Refugee Council from its daily work in different functions, especially the coordination of the different legal advisory offices.

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The information in this report is up-to-date as of 31 December 2020, unless otherwise stated.

## The Asylum Information Database (AIDA)

The Asylum Information Database (AIDA) is coordinated by the European Council on Refugees and Exiles (ECRE). It aims to provide up-to date information on asylum practice in 23 countries. This includes 19 EU Member States (AT, BE, BG, CY, DE, ES, FR, GR, HR, HU, IE, IT, MT, NL, PL, PT, RO, SE, SI) and 4 non-EU countries (Serbia, Switzerland, Turkey, United Kingdom) which is accessible to researchers, advocates, legal practitioners and the general public through the dedicated website [www.asylumineurope.org](http://www.asylumineurope.org). The database also seeks to promote the implementation and transposition of EU asylum legislation reflecting the highest possible standards of protection in line with international refugee and human rights law and based on best practice.



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# Table of Contents

|   |           |
|---|-----------|
| Glossary & List of Abbreviations .....                                      | 6         |
| Statistics .....  | 7         |
| Overview of the legal framework .....                                       | 9         |
| Overview of the main changes since the previous report update.....          | 11        |
| Asylum Procedure .....  | 15        |
| <b>A. General</b> .....   | <b>15</b> |
| 1. Flow chart.....  | 15        |
| 2. Types of procedures .....  | 16        |
| 3. List of authorities that intervene in each stage of the procedure.....   | 16        |
| 4. Number of staff and nature of the first instance authority.....          | 17        |
| 5. Short overview of the asylum procedure .....                             | 17        |
| <b>B. Access to the procedure and registration</b> .....                    | <b>21</b> |
| 1. Access to the territory and push backs.....                              | 21        |
| 2. Registration of the asylum application .....                             | 22        |
| <b>C. Procedures</b> .....  | <b>25</b> |
| 1. Regular procedure .....  | 25        |
| 2. Dublin .....   | 39        |
| 3. Admissibility procedure .....  | 54        |
| 4. Border procedure (border and transit zones) .....                        | 56        |
| <b>D. Guarantees for vulnerable groups</b> .....                            | <b>60</b> |
| 1. Identification .....   | 60        |
| 2. Special procedural guarantees .....                                      | 63        |
| 3. Use of medical reports .....   | 70        |
| 4. Legal representation of unaccompanied children.....                      | 72        |
| <b>E. Subsequent applications</b> .....                                     | <b>73</b> |
| <b>F. The safe country concepts</b> .....                                   | <b>74</b> |
| 1. Safe country of origin.....  | 74        |
| 2. Safe third country .....   | 75        |
| <b>G. Information for asylum seekers and access to NGOs and UNHCR</b> ..... | <b>76</b> |
| 1. Provision of information on the procedure .....                          | 76        |

|  |  |            |
|--|--|------------|
| 2.                                       | Access to NGOs and UNHCR .....   | 76         |
| <b>H.</b>                                | <b>Differential treatment of specific nationalities in the procedure .....</b> | <b>78</b>  |
| <b>Reception Conditions .....</b>        |  | <b>84</b>  |
| <b>A.</b>                                | <b>Access and forms of reception conditions .....</b>                          | <b>85</b>  |
| 1.                                       | Criteria and restrictions to access reception conditions .....                 | 85         |
| 2.                                       | Forms and levels of material reception conditions .....                        | 87         |
| 3.                                       | Reduction or withdrawal of reception conditions .....                          | 89         |
| 4.                                       | Freedom of movement .....  | 91         |
| <b>B.</b>                                | <b>Housing .....</b>   | <b>96</b>  |
| 1.                                       | Types of accommodation .....   | 96         |
| 2.                                       | Conditions in reception facilities .....                                       | 99         |
| <b>C.</b>                                | <b>Employment and education .....</b>  | <b>102</b> |
| 1.                                       | Access to the labour market .....  | 102        |
| 2.                                       | Access to education .....  | 103        |
| <b>D.</b>                                | <b>Health care .....</b>   | <b>104</b> |
| <b>E.</b>                                | <b>Special reception needs of vulnerable groups .....</b>                      | <b>105</b> |
| <b>F.</b>                                | <b>Information for asylum seekers and access to reception centres .....</b>    | <b>108</b> |
| 1.                                       | Provision of information on reception .....                                    | 108        |
| 2.                                       | Access to reception centres by third parties .....                             | 108        |
| <b>G.</b>                                | <b>Differential treatment of specific nationalities in reception .....</b>     | <b>109</b> |
| <b>Detention of Asylum Seekers .....</b> |  | <b>110</b> |
| <b>A.</b>                                | <b>General .....</b>   | <b>110</b> |
| <b>A.</b>                                | <b>Legal framework of detention .....</b>                                      | <b>113</b> |
| 1.                                       | Grounds for detention .....  | 113        |
| 2.                                       | Alternatives to detention .....  | 118        |
| 3.                                       | Detention of vulnerable applicants .....                                       | 118        |
| 4.                                       | Duration of detention .....  | 120        |
| <b>B.</b>                                | <b>Detention conditions .....</b>  | <b>122</b> |
| 1.                                       | Place of detention .....   | 122        |
| 2.                                       | Conditions in detention facilities .....                                       | 125        |
| 3.                                       | Access to detention facilities .....   | 128        |

|   |  |            |
|---|--|------------|
| <b>C.</b>                                       | <b>Procedural safeguards .....</b>   | <b>129</b> |
| 1.  | Judicial review of the detention order .....                               | 129        |
| 2.  | Legal assistance for review of detention .....                             | 131        |
| <b>D.</b>                                       | <b>Differential treatment of specific nationalities in detention .....</b> | <b>132</b> |
| <b>Content of International Protection.....</b> |  | <b>133</b> |
| <b>A.</b>                                       | <b>Status and residence .....</b>  | <b>133</b> |
| 1.  | Residence permit .....   | 133        |
| 2.  | Civil registration .....   | 134        |
| 3.  | Long-term residence .....  | 134        |
| 4.  | Naturalisation .....   | 135        |
| 5.  | Cessation and review of protection status .....                            | 136        |
| 6.  | Withdrawal of protection status.....                                       | 137        |
| <b>B.</b>                                       | <b>Family reunification .....</b>  | <b>139</b> |
| 1.  | Criteria and conditions .....  | 139        |
| 2.  | Status and rights of family members .....                                  | 140        |
| <b>C.</b>                                       | <b>Movement and mobility .....</b>   | <b>141</b> |
| 1.  | Freedom of movement.....   | 141        |
| 2.  | Travel documents .....   | 141        |
| <b>D.</b>                                       | <b>Housing.....</b>  | <b>142</b> |
| <b>E.</b>                                       | <b>Employment and education .....</b>                                      | <b>143</b> |
| 1.  | Access to the labour market .....  | 143        |
| 2.  | Access to education.....   | 143        |
| <b>F.</b>                                       | <b>Social welfare .....</b>  | <b>144</b> |
| <b>G.</b>                                       | <b>Health care.....</b>  | <b>144</b> |

## Glossary & List of Abbreviations

|                            |  |
|----------------------------|--|
| <b>AsyIA</b>               | Asylum Act   Loi sur l'asile (LAsi)   Asylgesetz (AsylG)   Legge sull'asilo (LAsi)   |
| <b>AFIS</b>                | Automated Fingerprint Identification System  |
| <b>AOZ</b>                 | Asyl-Organisation Zurich, running some of the federal asylum centres   |
| <b>AS</b>                  | Official Journal of Swiss law ( <i>Amtliche Sammlung</i> )   |
| <b>Cantons</b>             | Members states composing the Swiss Confederation (26 cantons)  |
| <b>CFA/BAZ</b>             | Federal asylum centre   Centre federal d'asile   Bundesasylzentrum (BAZ)   Centro federale d'asilo   |
| <b>CoE</b>                 | Council of Europe  |
| <b>DRMP</b>                | Dublin Returnees Monitoring Project  |
| <b>Eurodac</b>             | European fingerprint database  |
| <b>FDJP</b>                | Federal Department of Justice and Police   Département fédéral de justice et police (DFJP)   Eidgenössisches Justiz- und Polizeidepartment (EJPD)  |
| <b>FNIA</b>                | Foreign Nationals and Integration Act   Loi fédérale sur les étrangers et l'intégration (LEI)   Ausländer und Integrationsgesetz (AIG)   Legge federale sugli stranieri e la loro integrazione (LStrI)   |
| <b>GRETA</b>               | Council of Europe's Group of Experts on Action against Trafficking in Human Beings   |
| <b>KSM</b>                 | Coordination Unit against the Trafficking and Smuggling of Migrants   Koordinationsstelle gegen Menschenhandel und Menschenschmuggel   |
| <b>NCPT</b>                | National Commission for the Prevention of Torture  |
| <b>NEE/NEM</b>             | Dismissal without entering on the merit (Nichteintretensentscheid NEE   Non entrée en matière NEM   Non entrata nel merito NEM)  |
| <b>ORS</b>                 | ORS Service AG, running some of the federal asylum centres   |
| <b>OSAR</b>                | Swiss Refugee Council   Organisation suisse d'aide aux réfugiés   Schweizerische Flüchtlingshilfe   Organizzazione svizzera d'aiuto ai rifugiati   |
| <b>SCSA</b>                | Swiss Conference for Social Assistance   |
| <b>SEM</b>                 | State Secretariat for Migration   Secrétariat d'état aux migrations   Staatssekretariat für Migration   Segreteria di Stato della migrazione   |
| <b>TAF</b>                 | Federal Administrative Court   Tribunal administratif fédéral   Bundesverwaltungsgericht (BVGer)   Tribunale amministrativo federale   |
| <b>Temporary admission</b> | Admission provisoire   Vorläufige Aufnahme   Ammissione provvisoria<br>Protection granted to persons whose removal cannot be executed because deemed illicit (it would constitute a breach of international law), impossible or unreasonable (humanitarian reasons including medical). It exceeds the scope of subsidiary protection, which does not exist in Swiss law. |
| <b>TF</b>                  | Federal Supreme Court   Tribunal fédéral   Bundesgericht (BGer)   Tribunale federale   |
| <b>TRACKS</b>              | Project on Identification of Trafficked Asylum Seekers' Special Needs  |

## Statistics

### Overview of statistical practice

The State Secretariat for Migration (SEM) publishes detailed statistics on the number of asylum applications and types of decisions on a monthly and a yearly basis. SEM statistics include figures on the application of the Dublin Regulation.<sup>1</sup>

Based on the yearly statistics provided by the SEM, the figures below, especially the asylum and temporary admission rates, are the result of a calculation methodology that differs from that used by the Swiss authorities. The Swiss Refugee Council calculates recognition rates based only on the number of decisions on the merits rendered by the SEM at first instance, without considering the inadmissibility decisions or the “radiations” cases for the total of decisions, insofar as these do not include an examination on the merits of these asylum claims.<sup>2</sup>

### Applications and granting of protection status at first instance: 2020

|              | Applicants in 2020 | Pending at end 2020 | Asylum | Temporary admission | Rejection on the merit | Asylum rate | Temp. adm. rate | Rejection rate |
|--------------|--------------------|---------------------|--------|---------------------|------------------------|-------------|-----------------|----------------|
| <b>Total</b> | 11,041             | 3,852               | 5,409  | 4,630               | 3,626                  | 40%         | 34%             | 26%            |

Breakdown by countries of origin of the total numbers

|             |       |     |       |       |     |                  |     |     |
|-------------|-------|-----|-------|-------|-----|------------------|-----|-----|
| Eritrea     | 1,917 | 262 | 1,546 | 462   | 252 | 68% <sup>3</sup> | 21% | 11% |
| Afghanistan | 1,681 | 723 | 351   | 1,433 | 90  | 19%              | 76% | 5%  |
| Turkey      | 1,201 | 743 | 1,524 | 216   | 373 | 72%              | 10% | 18% |
| Algeria     | 988   | 169 | 4     | 8     | 178 | 2%               | 4%  | 94% |
| Syria       | 904   | 219 | 676   | 854   | 205 | 39%              | 49% | 12% |
| Sri Lanka   | 468   | 169 | 327   | 119   | 577 | 32%              | 12% | 56% |
| Morocco     | 400   | 68  | 3     | 11    | 60  | 4%               | 15% | 81% |
| Iraq        | 314   | 179 | 105   | 275   | 180 | 19%              | 49% | 32% |
| Iran        | 310   | 281 | 213   | 168   | 407 | 27%              | 21% | 52% |
| Somalia     | 288   | 82  | 127   | 193   | 43  | 35%              | 53% | 12% |

<sup>1</sup> SEM, *Statistiques en matière d'asile*, available at: <https://bit.ly/2Mk3jnT>.

<sup>2</sup> This calculation method is also used by Vivre Ensemble, available at: <https://asile.ch/statistiques/>.

<sup>3</sup> This rate is calculated out of a total of applications which includes secondary applications (e.g. birth or family reunification), the asylum rate for primary applications being much lower. For a critical analysis of this rate see the section on Eritrea in

Differential treatment of specific nationalities in the procedure.

Source: SEM, *Statistiques en matière d'asile*, available at: <https://bit.ly/2Mk3jnT>.

### Gender/age breakdown of the total number of applicants: 2020

|                                   | Number        | Percentage  |
|-----------------------------------|---------------|-------------|
| <b>Total number of applicants</b> | <b>11,041</b> | <b>100%</b> |
| Men                               | 7,399         | 67.01%      |
| Women                             | 3,642         | 32.99%      |
| Children (accompanied)            | 5,034         | 45.60%      |
| Unaccompanied children            | 535           | 4.85%       |

Source: SEM, *Statistiques en matière d'asile*, available at: <https://bit.ly/2Mk3jnT>.

### Comparison between first instance and appeal decision rates:

|   | First instance |            | Appeal |            |
|---|----------------|------------|--------|------------|
|   | Number         | Percentage | Number | Percentage |
| <b>Total number of decisions on merits</b>  | <b>13,618</b>  |            |        |            |
| Decisions granting international protection | 5,409          | 40%        | -      | -          |
| Rejection                                   | 3,623          | 26%        | -      | -          |

The available statistics do not allow to do draw a comparison between first instance and appeal decision rates. Statistics at second instance only indicate if the appeal was admitted, partially admitted, rejected, etc., but it is not possible to differentiate between appeals on the merits and appeals against dismissals, nor between appeals on the question of asylum (for persons with a temporary admission) or on removal as well. Available statistics for the period between 1 March 2019 and 31 August 2020 show that appeals were admitted or partially admitted in 11% of cases, while in 10% of cases the file was sent back to the SEM for further instruction and new decision.<sup>4</sup>

<sup>4</sup> Federal Administrative Court, "*Nouveau droit d'asile – bilan*". This calculation was made removing those appeals that were dismissed without entering in the merit and those that were cancelled. The data concern both cases dealt under the old and new procedure.

## Overview of the legal framework

### Main legislative acts relevant to asylum procedures, reception conditions and detention

| Title (EN)                                       | Original Title (FR/DE/IT)   | Abbreviation | Web Link   |
|--|---|--------------|--|
| Asylum Act                                       | Loi sur l'asile (LAsi)<br>Asylgesetz (AsylG)<br>Legge sull'asilo (LAsi)   | AsyIA        | <a href="http://bit.ly/1GpuAId">http://bit.ly/1GpuAId</a> (FR)<br><a href="http://bit.ly/1FjUQe">http://bit.ly/1FjUQe</a> (EN)   |
| Federal Act on Foreign Nationals and Integration | Loi fédérale sur les étrangers et l'intégration (LEI)<br>Ausländer und Integrationsgesetz (AIG)<br>Legge federale sugli stranieri e la loro integrazione (LStrI)  | FNIA         | <a href="http://bit.ly/1Bfa0LT">http://bit.ly/1Bfa0LT</a> (FR)<br><a href="http://bit.ly/1Bfa26s">http://bit.ly/1Bfa26s</a> (EN) |
| Federal Act on Administrative Procedure          | Loi fédérale sur la procédure administrative (PA)<br>Verwaltungsverfahrensgesetz (VwVG)<br>Legge federale sulla procedura amministrativa (PA)                     | APA          | <a href="http://bit.ly/1hNNtx">http://bit.ly/1hNNtx</a> (FR)<br><a href="http://bit.ly/1BQdG52">http://bit.ly/1BQdG52</a> (EN)   |
| Federal Constitution of the Swiss Confederation  | Constitution fédérale de la confédération suisse<br>Bundesverfassung der Schweizerischen Eidgenossenschaft<br>Costituzione federale della Confederazione svizzera | Constitution | <a href="http://bit.ly/1dHqBgj">http://bit.ly/1dHqBgj</a> (FR)<br><a href="http://bit.ly/1HNtIPO">http://bit.ly/1HNtIPO</a> (EN) |

### Main implementing decrees and administrative guidelines and regulations relevant to asylum procedures, reception conditions and detention

| Title (EN)   | Original Title (FR)   | Abbreviation | Web Link   |
|--|---|--------------|--|
| Asylum Ordinance No. 1 on procedural aspects   | Ordonnance 1 sur l'asile relative à la procédure                        | AO1          | <a href="http://bit.ly/1ejpzYG">http://bit.ly/1ejpzYG</a> (FR) |
| Asylum Ordinance No. 2 on Financial Matters  | Ordonnance 2 sur l'asile relative au financement                        | AO2          | <a href="http://bit.ly/1FjVey4">http://bit.ly/1FjVey4</a> (FR) |
| Asylum Ordinance No. 3 on the processing of personal data  | Ordonnance 3 sur l'asile relative au traitement de données personnelles | AO3          | <a href="http://bit.ly/1GJx1ql">http://bit.ly/1GJx1ql</a> (FR) |
| Ordinance on the Enforcement of the Refusal of Admission to and Deportation of Foreign Nationals | Ordonnance sur l'exécution du renvoi et de l'expulsion d'étrangers      | OERE         | <a href="http://bit.ly/1IGDU6">http://bit.ly/1IGDU6</a> (FR)   |

|   |   |                           |  |
|---|---|---------------------------|--|
| Ordinance on Admission, Period of Stay and Employment   | Ordonnance relative à l'admission, au séjour et à l'exercice d'une activité lucrative                             | OASA                      | <a href="http://bit.ly/1GJzYaB">http://bit.ly/1GJzYaB</a> (FR)   |
| Ordinance of the FDJP on the on the management of federal reception centres in the field of asylum and accommodation at airports. | Ordonnance du DFJP relative à l'exploitation des centres de la Confédération et des logements dans les aéroports  |                           | <a href="https://bit.ly/3bIQoUl">https://bit.ly/3bIQoUl</a> (FR) |
| Directive III on the Field of Asylum  | Directive III sur le domaine de l'asile   |                           | <a href="http://bit.ly/1TpuYgF">http://bit.ly/1TpuYgF</a> (FR)   |
| Ordinance on Measures Taken in the Field of Asylum due to Coronavirus (Ordinance COVID-19 asylum)                                 | Ordonnance sur les mesures prises dans le domaine de l'asile en raison du coronavirus (Ordonnance COVID-19 asile) | Ordinance COVID-19 asylum | <a href="https://bit.ly/2UQawwL">https://bit.ly/2UQawwL</a> (FR) |

## Overview of the main changes since the previous report update

The report was last updated in **April 2020**.

### *Asylum procedure*

- ❖ **Towards completion of old procedures:** Asylum applications lodged prior to the reform of 1 March 2019 are still handled under the ancient procedure, but the State Secretariat for Migration (SEM) has examined most of them. A total of 6,340 decisions on old cases were issued in 2020 and 447 old procedures were pending as of 31 December 2020.
- ❖ **New procedure in full regime:** All asylum applications lodged after 1 March 2019 are now handled according to the asylum reform either in the Dublin procedure, the accelerated procedure (which should not exceed 140 days including appeal and removal procedure) or the extended procedure (which should not exceed one year including appeal and removal procedure). Asylum seekers subjected to the extended procedures are attributed to cantons, while accelerated procedures are carried out entirely in federal asylum centres. In 2020, the SEM took 29% of the decisions according to the new procedure within a Dublin procedure, 49% within an accelerated procedure and 22% within an extended procedure. In June 2020, the Federal Administrative Court ruled that, in light of the different applicable appeal deadlines, a wrong assessment of whether a case is “complex” (i.e. thereby being channelled into the extended procedure or not) may constitute a violation of the right to an effective remedy, and clarified the criteria to define a case as “complex”.
- ❖ **Length of the procedure:** The average duration of asylum procedures has significantly decreased with the entry into force of the asylum reform. In 2020, the average duration of the first instance procedures (excluding those conducted under the ancient procedure) was 54 days for Dublin procedures, 64 for accelerated procedures and 221 for extended procedures. By way of comparison, the average duration of the first instance procedure prior to the reform was 466 days in 2018. However, the duration of the first instance procedure in 2020 remains significantly higher than those foreseen in law (namely a maximum of 29 days for accelerated procedures and approx. 80 days in the extended procedure until issuing of the decision).
- ❖ **Measures related to the COVID-19 pandemic:** The pandemic has not triggered any suspension of the asylum procedure and registration remained open at all times throughout 2020. The SEM only suspended personal interviews during two weeks at the end of March until the rooms were equipped with plexiglass and masks were at disposal. The Ordinance on Measures Taken in the Field of Asylum due to Coronavirus (Ordinance COVID-19 Asylum), in force since April 2020, foresees the limitation of the number of persons present in the same room during the interview. The SEM officer and the asylum seeker are in the same room, while the interpreter, the minute keeper and the legal advisor can be situated in another room and participate in the interview through appropriate technical means (mainly audio transmission). The Ordinance, which will be in force at least up until 30 June 2021, has extended the time limit for lodging an appeal from 7 working days to 30 days for decisions taken under the accelerated procedure. This extension does not apply to inadmissibility decisions, including Dublin decisions, for which the appeal still needs to be filed within five working days.
- ❖ **Legal assistance:** The asylum reform in March 2019 introduced a mandatory access to free legal assistance at first instance to all applicants, regardless of the applicable procedure. Each asylum seeker is thus assigned a legal representative who is present during interviews. Legal protection is provided by several organisations mandated by the SEM in the federal asylum centres. In 2020, the Coalition of Independent Jurists for the right of asylum has published an independent evaluation of the first year of implementation of the legal aid scheme, raising some concerns over the quality and independence of legal assistance in federal asylum centres. Supported by statistical data, the Coalition concluded that the mandated legal representatives too frequently revoke their mandate, as almost one third of the appeals admitted by the Court or resulted in a referral to the SEM for further instruction was filed by external representatives or without legal representation. Moreover, applicants

who lodged their asylum claim prior to 1 March 2019 do not fall under the new legal aid scheme and therefore do not systematically have access to legal assistance. Similarly, asylum seekers who lodge their application in detention or prison are not entitled to legal representation in their asylum procedure, as described further below.

- ❖ **Airport procedure suspended in Zurich:** The airport procedure was suspended in Zurich from March 2021 and at least until end of the year. Persons expressing the will to claim asylum were oriented towards the federal asylum centre of Zurich. On the contrary, the airport procedure continued in Geneva, although the number of applications at the airport was very low in 2020 as a result of COVID-19 and travel restrictions.
- ❖ **Dublin transfers reduced:** Dublin transfers were not officially suspended in Switzerland due to the pandemic and related travel restrictions. However, in practice, transfers to most countries were not possible during spring 2020 and partly during the rest of the year. The number of transfers has progressively increased throughout the year, reaching a total of 941 outgoing transfers and 877 incoming transfers in 2020, compared to 1,724 and 1,164 respectively in 2019.

#### *Reception conditions*

- ❖ **Reduction capacity and temporary federal asylum centres:** In order to comply with COVID-19 measures, the SEM has reduced the capacity of the federal asylum centres to 50% and then 60% of their usual capacity in 2020. During 2020, there was a higher number of cases in which the length of stay in federal centres went significantly beyond the foreseen maximum of 140 days. This was due to the fact that during several months, the attributions to the cantons were significantly restricted because cantonal structures were already at their maximum capacity under the new measures related to COVID-19. The SEM had to open a few temporary facilities to cope with this situation.
- ❖ **COVID-19 measures in reception:** Masks were accessible to asylum seekers in federal asylum centres within a few weeks after the outbreak of the pandemic. An obligation to wear them was also introduced outside the dormitories. Information videos and posters were put at disposal of the asylum seekers and the temperature was measured after every exit from the centre. However, distancing rules can hardly be observed in collective centres. Asylum seekers can be set in quarantine and isolated in single rooms when they are tested positive, have symptoms or have had contacts with infected persons. In a few cases, reception centres have been set in quarantine for approximately two weeks without any possibility to exit the centre for the residents. As of January 2021, 230 asylum seekers tested positive to COVID-19 have been registered; none of them has died.
- ❖ **Violence in reception:** During 2020, there were a number of cases in which violence escalated in the federal asylum centres. The media reported excessive use of physical force by security personnel. Several criminal proceedings were initiated against security staff, with allegations of disproportionate or arbitrary violence and abuse of authority. The SEM is currently finalising a violence prevention concept to be applied to all federal asylum centres and is planning to introduce a complaint mechanism within federal centres. On 5 May 2021, the SEM announced that a former federal judge was mandated to carry out an independent investigation on these incidents. Moreover, the SEM has suspended 14 security agents working in the federal asylum centres according to the media.
- ❖ **Re-opening of specialized facility “Les Verrières”:** The new legislation of March 2019 introduced a legal basis for the creation of specific centres for uncooperative asylum seekers. i.e. those who endanger public security and order or who seriously disrupt the normal operation of the federal asylum centres may be accommodated there for two weeks (extendable to one month). During 2020, no such facility was in function since the only centre of this kind was temporarily closed on 1 September 2019. In February 2021, however, the SEM has decided to re-open it.
- ❖ **Identification of vulnerabilities and access to psychiatric care:** The identification of vulnerabilities, including psychological problems and psychiatric diseases, remains a significant challenge. A psychological screening at arrival in the centre could be a useful measure and also a

tool to prevent suicides. According to the National Commission for the Prevention of Torture (NCPT), access to psychiatric care in federal asylum centres is limited in practice to the most acute situations. It recommends an early identification of psychiatric and trauma-related problems and orientation towards the competent services already during the stay in federal asylum centres. The NCPT also reports that a translation service per phone is available to the medical staff, but the latter rarely uses it.

#### *Detention of asylum seekers*

- ❖ **Lack of access to legal representation in detention:** Under the new asylum procedure, all asylum seekers are systematically assigned a legal representative. This is not the case, in practice, for people lodging asylum applications while in detention or in prison. Despite case law of the Federal Administrative Court finding that legal representation must be guaranteed in those cases, the SEM still does not systematically provide for legal representation in the asylum procedure. Access to legal advice and representation concerning the ordering of immigration detention also remains a critical point as national law does not provide for legal representation in detention procedures and access to legal advice is very limited in practice.
- ❖ **Immigration detention in dedicated facilities:** Following an amendment to the Foreign Nationals and Integration Act (FNIA), the Federal Supreme Court ruled in March 2020 that detention for immigration related purposes must take place in facilities specifically dedicated and conceived for this purpose and that detention in a non-specialised facility – even in a separated section – is only admissible for a short time, in exceptional and well-founded cases. In practice, however, the administrative detention of asylum seekers and other foreigners in prisons that are also holding prisoners under the penal code – usually in separated areas – is still a very frequent solution adopted by cantons.
- ❖ **Release due to COVID-19:** During 2020, several detained persons have been released following a decision of cantonal administrative authorities, a judicial review procedure or a request for release. The ground for release was mainly that enforcement of removal was not foreseeable due to the pandemic and related travel limitations. In some cantons, all detained persons were released at the beginning of the pandemic. This was the case in Basel-Stadt and in the French-speaking cantons of Geneva, Vaud and Neuchâtel. Some cantons released Dublin detainees only, while others released only detainees with no criminal record. There were a number of judgements that ruled that detention pending deportation or coercive detention was unlawful in single cases since removal was not enforceable in foreseeable future.
- ❖ **Detention conditions during COVID-19:** During 2020 and due to the COVID-19 pandemic, there were significant restrictions on freedoms and rights of detained persons in the different detention facilities. In the detention facility at Zurich airport, for example, visitors were not allowed during several months, occupation programmes were significantly reduced, the fitness room was closed and newly detained people had to spend the first 10 days of their detention in quarantine.

#### *Content of international protection*

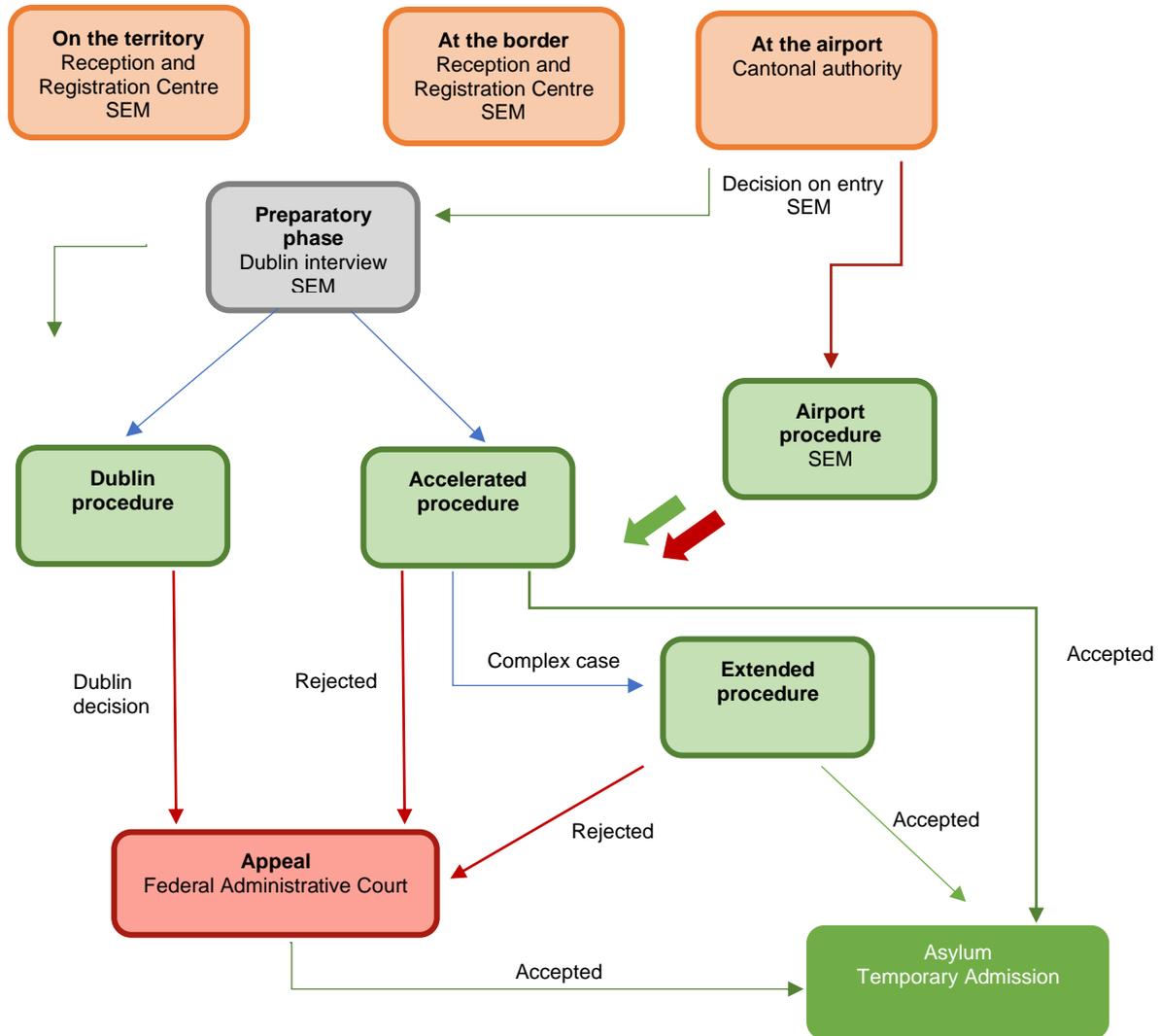
- ❖ **Cessation of temporary admissions for Eritrean nationals:** In 2018, the Swiss Parliament had tasked the SEM with the review of the temporary admission of 3,400 Eritrean nationals. This task was completed in 2020. The SEM has concluded that removal was reasonable and ceased the temporary admission of 83 Eritrean nationals (2.4%).
- ❖ **Obstacles to family reunification:** At the beginning of the COVID-19 pandemic in spring 2020, family reunification was suspended from 18 March 2020 to 8 June 2020. In addition, many embassies around the world suspended their activities, thereby hindering the access to family reunification procedures. Moreover, those who would have received an entry authorisation from SEM still faced difficulties in reaching Switzerland due to travel restrictions. The situation improved during the course of the year.

- ❖ **Travel restrictions for persons with refugee status:** Since 1 April 2020, the Foreign Nationals and Integration Act (FNIA) includes a provision prohibiting recognised refugees to travel not only to their country of origin, but also to its neighbouring countries, when there is a justified suspicion that the ban on travel to the home country will be disregarded. This provision entered in force but was still not implemented as of January 2021. It allows the SEM to issue collective travel bans to certain neighbouring countries for all refugees coming from one specific country.

# Asylum Procedure

## A. General

### 1. Flow chart



## 2. Types of procedures

### Indicators: Types of Procedures

Which types of procedures exist in your country?

- |   |   |  |
|---|---|--|
| ❖ Regular procedure:                    | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No            |
| ▪ Prioritised examination: <sup>5</sup> | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No            |
| ▪ Fast-track processing: <sup>6</sup>   | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> No |
| ❖ Dublin procedure:                     | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No            |
| ❖ Admissibility procedure:              | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No            |
| ❖ Border procedure:                     | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No            |
| ❖ Accelerated procedure: <sup>7</sup>   | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No            |
| ❖ Other:                                | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> No |

Are any of the procedures that are foreseen in the law, not being applied in practice?  Yes  No

In March 2019, the asylum reform came into force in Switzerland. All asylum applications submitted since 1 March 2019 are processed according to the new procedure that significantly reduced the duration of procedures. The majority of the procedures have to be concluded within 140 days (including appeal and removal procedure) while asylum seekers are accommodated in federal asylum centres located in one of the six asylum regions. If the case is a complex one requiring further clarifications and cannot be decided within 8 days after the interview on the grounds for asylum, the SEM must order that the case be assigned to the extended procedure. These procedures shall last a maximum of one year in total (including appeal procedure and enforcement of removal in case of a negative decision). After the assignment to the extended procedure, asylum seekers are attributed to a canton that is responsible for organising accommodation.

In the new procedure, asylum seekers receive free counselling and legal representation right after their asylum application.

In 2020, the SEM was able to process nearly all pending cases that were lodged before 1 March 2019 and to which the new procedure does not apply. It examined a total of 6,340 old procedures, while a total of 447 pending cases under the previous procedure were still pending by the end of 2020.<sup>8</sup>

## 3. List of authorities that intervene in each stage of the procedure

| Stage of the procedure                      | Competent authority (EN)        | Competent authority (FR)          |
|---|---------------------------------|-----------------------------------|
| Decision on / denial of entry               |                                 |                                   |
| ❖ At the border                             | Border police                   | Police des frontières             |
| ❖ At the airport                            | Airport police                  | Police aéroportuaire              |
| ❖ After lodging asylum claim at the airport | State Secretariat for Migration | Secrétariat d'Etat aux migrations |
| Application                                 | State Secretariat for Migration | Secrétariat d'Etat aux migrations |
| Dublin (responsibility assessment)          | State Secretariat for Migration | Secrétariat d'Etat aux migrations |
| Refugee status determination                | State Secretariat for Migration | Secrétariat d'Etat aux migrations |
| Airport procedure                           | State Secretariat for Migration | Secrétariat d'Etat aux migrations |

<sup>5</sup> For applications likely to be well-founded or made by vulnerable applicants.

<sup>6</sup> Accelerating the processing of specific caseloads as part of the regular procedure.

<sup>7</sup> Labelled as "accelerated procedure" in national law.

<sup>8</sup> Information provided by the SEM, 19 March 2021.

|                        |                                 |                                   |
|------------------------|---------------------------------|-----------------------------------|
| Appeal procedure       | Federal Administrative Court    | Tribunal administratif fédéral    |
| Subsequent application | State Secretariat for Migration | Secrétariat d'Etat aux migrations |

#### 4. Number of staff and nature of the first instance authority

| Name in English                                     | Number of staff | Ministry responsible                     | Is there any political interference possible by the responsible Minister with the decision making in individual cases by the determining authority? |
|---|-----------------|--|---|
| State Secretariat for Migration (Asylum Department) | 628             | Federal Department of Justice and Police | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No   |

Source: SEM, 27 April 2021.

The State Secretariat for Migration (SEM) is responsible for examining applications for international protection and competent to take decisions at first instance. It falls under the responsibility of the Federal Department of Justice and Police. The guidelines and circulars of the SEM relating to the asylum procedure are publicly accessible and can be consulted online.<sup>9</sup>

The SEM employs 1,232 officials, who work not only on asylum but also other areas in the field of migration such as immigration or integration. Out of them, 628 officials worked in the Asylum Department as of December 2020. The number of caseworkers examining applications for international protection is not available. Every single asylum decision is double checked by the head of unit (Sektionschef) or his/her deputy. There is also a Quality Management team at the HQ, but they only check a representative selection of decisions in order to improve the processes and contents of decisions.

#### 5. Short overview of the asylum procedure

**Preliminary remarks – Process of restructuring the Swiss asylum system:** Swiss Asylum Law has undergone a series of changes in the last few years and substantial modifications have entered into force in March 2019 after a test phase conducted between 2014 and 2019.<sup>10</sup> The Asylum Act and the Federal Act on Foreign Nationals and Integration as well as different relevant ordinances have been entirely or partially revised.

Fundamentally, the restructuring of the asylum system aims to significantly speed up asylum procedures. To this end, the reform brings together all the main actors of the procedure “under the same roof”. Asylum procedures are carried out in federal centres located in six defined regions in Switzerland. The reform sets up several procedures (accelerated, extended, Dublin) strictly limited in time. The processing times for asylum applications and the time taken to appeal have been significantly shortened. In order to ensure fair procedures according to the rule of law, asylum seekers whose application is examined within the accelerated procedure are entitled to free counselling, as well as free legal representation from the very beginning of the procedure (see [Regular procedure](#)).

Before the entry into force of the new asylum system throughout the country in March 2019, SEM implemented a test phase in the federal asylum centre of **Zurich** (with a centre without processing facilities in Embrach) between 2014 and March 2019. Thereafter, a second test phase was conducted in **Boudry**

<sup>9</sup> SEM, *Guidelines and circulars*, available in French at: <https://bit.ly/2IRH7nn>. A handbook for SEM employees providing useful information on Swiss law and practice is also available online in French and German at: <https://bit.ly/2J0U22t>.

<sup>10</sup> SEM, *Asylum procedures* available at: <https://bit.ly/33NaCcb>.

(with a centre without processing facilities in Chevrolles/Giffers) from April 2018 to February 2019, in order to set up the appropriate processes and test the new accelerated procedure.

**Application for asylum:** A person can apply for asylum in a federal asylum centre with processing facilities, at a Swiss border or during the border control at an international airport in Switzerland.<sup>11</sup> The Swiss asylum procedure is organised as a single procedure.

In most cases, asylum applications are lodged in one of the six asylum centres with processing facilities that are run by the SEM. If this is not the case, the concerned asylum applicants are directed to one of those centres within 72 hours of filing the application for asylum. Even if they apply in one of the federal centres, asylum seekers can be transferred to one of the five other centres located in another region. As a result, they cannot choose in which region their application will be examined. The proceeding is different if an application is filed at the international airports of Zurich and Geneva (see below).

**Preparatory phase:** The preparatory phase ("*phase préparatoire*") starts after the lodging of the application and lasts a maximum of 10 days in the case of a Dublin procedure and a maximum of 21 days for other procedures. The purpose of the preparatory phase is to carry out the preliminary clarifications necessary to complete the procedure, in particular to determine the State competent to examine the asylum application under the Dublin Regulation, conduct the age assessment – if the minority is doubted – collect and record the personal data of the asylum seeker, examine the evidence and establish the medical situation.<sup>12</sup>

During the preparatory phase, a first interview is held mainly to determine whether Switzerland is competent to examine the merits of the asylum application (**Dublin interview**).<sup>13</sup> The interview is conducted in the presence of the applicant's legal representative and is usually translated over the phone by an interpreter. It collects information on the identity, the origin and the living conditions of the applicant and covers the essential information about the journey to Switzerland. The applicant is granted the right to be heard regarding possible reasons against a transfer to a Dublin member state<sup>14</sup> but the grounds for the asylum application are not discussed.

**Cancellation and inadmissibility decision:** On this basis, the SEM decides whether an application should be examined and whether it should be examined in substance. If the application cannot be considered as an asylum claim according to the Asylum Act or if the application is not sufficiently justifiable and/or the asylum seeker withdraws his or her application, the latter is cancelled without a formal decision.<sup>15</sup> Similarly, the application of asylum seekers will be cancelled without a formal decision if they fail to cooperate without valid reason or if they fail to make themselves available to the authorities for more than 20 days – or more than 5 days if the asylum-seeker is accommodated in a federal centre. In such circumstances, the persons concerned cannot lodge a new application within 3 years, unless this restriction would amount to a violation of the Refugee Convention.<sup>16</sup>

In certain cases, the SEM will take an inadmissibility decision (so-called NEM or NEE), which means that it decides to dismiss the application without examining the substance of the case. Such a decision is for example taken if the asylum application is made exclusively for economic and medical reasons. In practice, the most frequent reason for such a decision is the possibility of the applicant to return to a so-called safe third country or if according to the Dublin III Regulation another State is responsible for conducting the asylum and removal procedures.<sup>17</sup>

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<sup>11</sup> Article 19 AsyIA.

<sup>12</sup> Article 26 AsyIA.

<sup>13</sup> Article 26 AsyIA.

<sup>14</sup> Article 36(1) AsyIA.

<sup>15</sup> Article 25a AsyIA.

<sup>16</sup> Article 8-bis AsyIA. This reservation indicates that the prohibition to file an asylum application within 3 years cannot be applied if it would constitute a violation of the Convention, in particular of the right to seek protection.

<sup>17</sup> Article 31a AsyIA.

**Dublin procedure:** If the preliminary investigations indicate that another Member State might be responsible for processing the asylum application according to the Dublin III Regulation, a request for taking charge or taking back is submitted to the relevant State. Under the Asylum Act, a Dublin procedure formally begins with the submission of the request to take charge or take back and lasts until the transfer to the competent Dublin State or the decision of SEM to examine the application on the merits in a national procedure.<sup>18</sup> In case of a Dublin procedure, the SEM has to examine whether grounds exist to make use of the sovereignty clause. If such grounds exist, Switzerland takes over the responsibility for examining the application even if another Member State would be responsible according to the Dublin Regulation. In all the other cases where a decision to dismiss the application without examining the substance of the case has been taken, the SEM examines if the transfer of the applicant to the receiving State is lawful, reasonable and possible.<sup>19</sup>

**Accelerated procedure:** Unless a Dublin procedure is initiated, the accelerated procedure itself starts as soon as the preparatory phase is completed.<sup>20</sup> It lasts a maximum of eight working days,<sup>21</sup> and includes mainly the following stages:<sup>22</sup>

- Preparation of a second interview regarding the grounds of asylum;
- Conduct of the second interview and/or granting the right to be heard;
- Assessment of the complexity of the case and decision to continue the examination of the asylum application under the accelerated procedure or proceed to the extended procedure;
- Preparation of the draft decision;
- If negative, legal representative's opinion on the negative draft decision within 24 hours;
- Notification of the decision;

After the second interview, the SEM carries out a substantive examination of the application. It starts by examining whether the applicant can prove or credibly demonstrate that he or she fulfils the legal criteria of a refugee. As laid down in law, a person able to demonstrate that he or she meets these criteria is granted asylum in Switzerland.<sup>23</sup> If this is the case, a positive asylum decision is issued.

If the SEM considers however that an applicant is not eligible for the refugee status or that there are reasons for his or her exclusion from asylum,<sup>24</sup> it will issue a negative asylum decision. In this case, the SEM has to examine whether the removal of the applicant is lawful, reasonable and possible.<sup>25</sup> If the removal is either unlawful, unreasonable or impossible, the applicant will be admitted temporarily to Switzerland (F permit). A temporary admission constitutes a substitute measure for a removal that cannot be executed. It can be granted either to persons with refugee status that are excluded from asylum or to foreigners (without refugee status). The scope of the temporary admission as foreseen in national law exceeds the scope of the subsidiary protection foreseen by the recast Qualification Directive, as it covers both persons whose removal would constitute a breach of international law, as well as persons who cannot be removed for humanitarian reasons (for example medical reasons).

**Extended procedure:** If it appears from the interview on the grounds for asylum that a decision cannot be taken under an accelerated procedure, the application is processed further in an extended procedure and the asylum seeker is allocated to a canton. The channelling into an extended procedure occurs in particular when a procedure cannot be concluded within eight working days because additional investigative measures are necessary.<sup>26</sup> In addition to a possible additional interview, other investigative

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<sup>18</sup> Article 26b AsyIA.

<sup>19</sup> Article 44 AsyIA; Article 83 FNIA.

<sup>20</sup> Article 26c AsyIA.

<sup>21</sup> Article 37 (2) AsyIA.

<sup>22</sup> Article 20c AO1.

<sup>23</sup> Article 49 AsyIA.

<sup>24</sup> Asylum is not granted if a person with refugee status is unworthy of it due to serious misconduct or if he or she has violated or endangered Switzerland's internal or external security (Article 53 AsyIA). Further, asylum is not granted if the grounds for asylum are only due to the flight from the applicant's native country or country of origin or if they are only due to the applicant's conduct after his or her departure, so-called subjective post-flight grounds (Article 54 AsyIA).

<sup>25</sup> Article 44 AsyIA; Article 83 FNIA.

<sup>26</sup> Article 26d AsyIA.

measures can relate to the identity and origin of the person, the alleged medical problems, the documents submitted or the credibility of the allegations.

The decision to proceed with the extended procedure is an “incidental decision” (“*Zwischenverfügungen*” in German or “*décision incidente*” in French) that cannot be appealed before the final decision is issued so as to avoid lengthy procedures.

**Appeal:** If an applicant has not been granted asylum, the individual can submit an appeal against the decision of the SEM to the Federal Administrative Court.<sup>27</sup> The latter is the first and last court of appeal in asylum matters in Switzerland. An applicant has thus only one possibility to appeal against a negative decision in the asylum procedure (except for extraordinary proceedings such as application for reconsideration or revision and proceedings under international instances). An appeal can be made against inadmissibility and negative in-merit decisions.

With the entry into force of the new Asylum Act in March 2019, time limits for appeals have been significantly shortened and depend on the type of the contested decision and proceedings in which the decision was issued. The time limit is five working days in the case of an inadmissibility decision, a decision in the airport procedure, or if the applicant comes from a so-called safe country of origin (according to the list of the Federal Council) and is evidently not eligible for refugee status and his or her removal is lawful, reasonable and possible. In an accelerated procedure, the time limit for appeal is seven working days but was temporarily extended to 30 days with the Ordinance COVID-19 Asylum (in force at least until 30 June 2021). In an extended procedure, the deadline for appeal is 30 days for in-merit decisions. As for regards incidental decisions (e.g. attribution to a canton), the deadline for appeal is 5 days in the accelerated and 10 days in the extended procedure.<sup>28</sup>

**Removal:** The cantonal authorities are in charge of the execution of the removal of an applicant, regardless of whether the measure concerns a Dublin transfer or a removal to a country of origin.<sup>29</sup>

**Airport procedure:** If the asylum application is lodged at the border in the transit area of an international airport, special rules apply.<sup>30</sup> As a first step, the SEM has to decide whether entry into the territory should be allowed. In case entry is provisionally refused to an applicant, the whole asylum procedure is generally carried out in the transit area of the airport. The SEM must then issue the asylum decision within a maximum of 20 days after the asylum application has been lodged. If that time limit is not met, the SEM allocates the applicant to one of the six federal asylum centres with processing facilities where he will undergo the regular procedure. The time for lodging an appeal against a negative asylum decision within the airport procedure is five working days.<sup>31</sup>

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<sup>27</sup> Article 105 AsyIA.

<sup>28</sup> Article 108 AsyIA.

<sup>29</sup> Article 46 AsyIA; Article 21(2) Test Phases Ordinance.

<sup>30</sup> Articles 22 and 23 AsyIA.

<sup>31</sup> Article 108(4) AsyIA.

## B. Access to the procedure and registration

### 1. Access to the territory and push backs

#### Indicators: Access to the Territory

1. Are there any reports (NGO reports, media, testimonies, etc.) of people refused entry at the border and returned without examination of their protection needs?  Yes  No
2. Is there a border monitoring system in place?  Yes  No
  - ❖ If so, who is responsible for border monitoring?  National authorities  NGOs  Other
  - ❖ If so, how often is border monitoring carried out?  Frequently  Rarely  Never

Despite the much calmer situation in 2019 and the significant decrease in the number of arrivals at the Italo-Swiss borders in general, OSAR was informed in September 2019 of people being pushed back at the border between **Como** and **Chiasso**. In these cases, Italian authorities received minors (but also adults) who have been sent back on the basis of the Italo-Swiss readmission agreement, without proper identification. This is in violation of the UN Convention on the Rights of the Child according to which the best interest of the child should take precedence over any other consideration and should always receive careful assessment.<sup>32</sup>

In 2020, the NGO Asylex reported two cases of pushbacks occurring at the Southern border. In one case, the person having been sent back to Italy had spent four days in Switzerland. He had tried to lodge his application in a federal asylum centre not mandated to register new applications and, after having been temporarily detained by the canton, he had been invited to submit his application in **Chiasso**. Upon arrival in Chiasso, however, he was put on a train to Milan without any possibility to apply for asylum. This removal was not documented so that it was not possible to legally contest it.

Pushbacks at the southern border had been a major problem during the summer of 2016 (see AIDA Report 2016 Update). Throughout 2018 and 2019, fewer persons tried to cross the southern border compared to 2016, as illustrated by the number of removals from Switzerland. In this context, the term removal (“*Übergabe*”/“*Remise aux autorités étrangères*”) refers to the fact that persons were handed over to authorities in neighbouring countries. The vast majority of removals were still recorded at the southern border, while the data is not available for 2020:

| Removals at border from Switzerland: 2016-2020 |        |        |       |       |       |
|--|--------|--------|-------|-------|-------|
| Location                                       | 2016   | 2017   | 2018  | 2019  | 2020  |
| Removals from the southern border              | 25,025 | 16,425 | 7,215 | 4,528 | -     |
| Total number removals                          | 26,267 | 17,526 | 8,187 | 5,575 | 4,796 |

Source: Federal Customs Administration, *Migration Statistics*, 2016-2020.

Access to Swiss territory was the main obstacle to applying for asylum during 2020 following the border closures across Europe. Switzerland closed its borders on 13 March up until 15 June 2020. While certain exceptions were foreseen, for example for cross border workers who could continue to enter Swiss territory, none of them concerned persons claiming international protection at the border. During a press conference in March 2020, Federal Councilor Keller-Sutter emphasised that entry into Swiss territory may be refused even to asylum seekers and this would be legitimate since they would be able to claim asylum in neighboring countries such as Italy, France or Germany. This clearly violates European and international law as Member States are obliged to examine any asylum application presented by a person

<sup>32</sup> Compare chapter “9.6.3 Pushbacks at the border”, in: Swiss Refugee Council OSAR, Reception conditions in Italy – Updated report on the situation of asylum seekers and beneficiaries of protection, in particular Dublin returnees, in Italy, January 2020, available at: <https://bit.ly/2SARryi>.

on their territory, including at the border. Refusing entry without examining whether this would constitute a violation of *non-refoulement* would represent an unlawful pushback.<sup>33</sup>

Due to the closed borders, asylum applications in April have reached record low numbers, with 111 primary applications lodged, most of which were probably of people already present on Swiss territory.<sup>34</sup> The border closure were finally lifted on 15 June 2020 and the number of applications for international protection started to progressively increase again during the rest of the year, albeit at lower levels than in previous years.

The situation in the transit zones at the airport also merits particular consideration. Since 2014, admission conditions in the transit for asylum seekers in possession of fake documents are more restrictive. In Geneva, they are admitted after an arrest order not exceeding 24 hours and brought before the Public Prosecutor, who issues an accusation ruling for forgery of a document with a fine,<sup>35</sup> which may constitute in some cases a violation of Article 31 of the Geneva Refugee Convention.<sup>36</sup> In 2020, similar practices at the airport in Geneva were still reported (see [Border procedure \(border and transit zones\)](#)).<sup>37</sup>

## 2. Registration of the asylum application

### Indicators: Registration

1. Are specific time limits laid down in law for making an application?  Yes  No  
❖ If so, what is the time limit for lodging an application?
2. Are specific time limits laid down in law for lodging an application?  Yes  No  
❖ If so, what is the time limit for lodging an application?
3. Are registration and lodging distinct stages in the law or in practice?  Yes  No  
❖ Is the authority with which the application is lodged also the authority responsible for its examination?
4. Is the authority with which the application is lodged also the authority responsible for its examination?  Yes  No
5. Can an application for international protection be lodged at embassies, consulates or other external representations?  Yes  No

According to Swiss law, an asylum application can be lodged at a federal asylum centre with processing facilities, an open border crossing or a border control point at an international airport in Switzerland. An application can be lodged only at the Swiss border or on Swiss territory.<sup>38</sup> The Swiss Parliament abolished the possibility to lodge asylum applications at Swiss representations abroad from 29 September 2012 onwards.<sup>39</sup> Any statement from a person indicating that he or she is seeking protection in Switzerland from persecution elsewhere is considered as an application for asylum.<sup>40</sup>

No specific time limits are laid down in law for asylum seekers to lodge their application, and persons are not excluded from the asylum procedure because they did not apply for asylum immediately or within a certain time limit after entering Switzerland. However, if the application is not lodged soon after the entry, authorities may demand a reasonable justification for the delay.

<sup>33</sup> Swiss Refugee Council, “*Argumentaire de l’OSAR sur la fermeture des frontières et les demandes d’asile à la Frontière*”, 30 March 2021, available in French at: <https://bit.ly/2YhRXD7>.

<sup>34</sup> Statistics available on SEM Website.

<sup>35</sup> Pursuant to Article 251 Criminal Code: Information provided by Elisa-Asile, 21 January 2019.

<sup>36</sup> Information provided by Elisa-Asile, 21 January 2019.

<sup>37</sup> Information provided by Caritas, 28 January 2021.

<sup>38</sup> Article 19 AsylA.

<sup>39</sup> Parliament, *Objets parlementaires, 10.052 Loi sur l’asile: Modification*, available (in French, German and Italian) at: <http://bit.ly/1R3t815>. The possibility exists to request a national humanitarian visa to be allowed to enter in Switzerland and then apply for asylum. However, this legal provision is implemented in a very restrictive way: only 172 humanitarian visas were issued in 2019, see <https://bit.ly/36XVxXi>.

<sup>40</sup> Article 18 AsylA.

In general, foreign nationals without a valid permit of stay in Switzerland need to lodge an asylum application in one of the six federal asylum centres with processing facilities run by the SEM.<sup>41</sup> If a person requests asylum at the border or following detention for illegal entry in the vicinity of the border or within Switzerland, the competent authorities shall normally assign him or her to a federal asylum centre. The competent authority establishes his or her personal data, informs the closest federal asylum centre and issues a transit permit. The person has to present him or herself at that centre during the following working day.<sup>42</sup>

There was no specific obstacle to registering an asylum application due to the COVID-19 pandemic reported in 2020. Registration offices within federal asylum centres remained open at all times during the year. The most significant problem in this regard was the access to the territory due to the closing of the borders on 16 March 2020, which prevented applicants from entering Switzerland and lodging their application (see [Access to the territory and push backs](#)). However, it remains unclear if or how many persons who wanted to apply for asylum at the border were actually rejected in practice. A significant obstacle was also access to the border from the heavily guarded Italian side.

Persons with a valid cantonal residence permit who want to apply for asylum have to file the application in one of the federal asylum centres with processing facilities.<sup>43</sup>

Swiss law provides for exceptions to this rule for children under 14 years of age joining their parents in Switzerland, as well as for persons in prison (administrative detention or execution of a sentence). Children under 14 years do not have to lodge an application in a federal asylum centre. The cantonal authority (of the canton where the parents live) directly issues them an “N permit” (which certifies that an asylum application has been lodged and allows the applicant to remain in Switzerland until the end of the asylum procedure), after having confiscated the travel and identity papers. The cantonal authority then informs the SEM about the asylum application.<sup>44</sup>

If a person is in detention, it is also the cantonal authority (from the canton that has ordered the detention or the execution of a sentence) that accepts the asylum application. The cantonal authority establishes the personal data of the concerned person, takes pictures, confiscates the travel and identity papers and takes the fingerprints if necessary. The cantonal authority then informs the SEM about the asylum application. In case the applicant is released, he or she is issued an N permit by the cantonal authority.<sup>45</sup> In the context of the asylum reform entered in force in March 2019, which provides free legal representation during the asylum procedure, it was not clear whether detained asylum seekers would also have access to legal assistance during the procedure. The SEM assumed that this was not the case, since the persons concerned do not reside in a federal asylum centre. In November 2019, the Federal Administrative Court clarified that the fact that the person concerned had lodged her asylum application while in detention does not dispense the competent authority of its duty to duly investigate the application in accordance with the law in force, in particular to ensure the right to free legal advice and representation.<sup>46</sup> During 2020, the SEM has not provided access to legal assistance and representation to people applying for asylum while in prison or detention, although there have been several judgements ruling that such access must be guaranteed.<sup>47</sup> There are no statistical data available on the number of asylum applications lodged in detention.<sup>48</sup>

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<sup>41</sup> The centres with processing facilities are located in Zurich, Bern, Basel, Boudry, Chiasso and Altstätten. A list of the federal asylum centres with their address and contact data is available at: <https://bit.ly/3kXy79d>.

<sup>42</sup> Articles 19 and 21 AsylA; Article 8(1)-(2) AO1.

<sup>43</sup> Following the changes of law of 28 September 2012, Article 19(2) of the ancient AsylA has been cancelled. According to the latter, a person with a permission to stay had to submit an asylum application to the cantonal authority of the canton having granted the permission to stay: Directive III Field of Asylum, *Das Asylverfahren*, 4-5.

<sup>44</sup> Article 8(4) AO1; Directive III Field of Asylum, *Das Asylverfahren*, para 1.1.1.3.

<sup>45</sup> Article 8(3) AO1; Directive III Field of Asylum, *Das Asylverfahren*, para 1.1.1.4.

<sup>46</sup> Federal Administrative Court, Decision D-5705/2019, 25 November 2019.

<sup>47</sup> Federal Administrative Court, Decisions D-5705/2019 of 25.11.2019, E-1401/2020 of 1.04.2020, D-5480/2020 of 19.11.2020.

<sup>48</sup> Information provided by the SEM, 27 April 2021.

If an application is lodged at a border control point at an international airport, the competent cantonal authority establishes the personal data of the concerned person and takes a picture, as well as the fingerprints in order to check possible matches in the automatic fingerprint identification system (AFIS) or Eurodac. The SEM is immediately informed about the application. The applicant will be channelled through the airport procedure (see section on [Border Procedure](#)),<sup>49</sup> which also provides access to free counselling and legal representation.<sup>50</sup>

As described above, depending on the situation, the respective competent cantonal or federal authority can register an application for asylum. Nevertheless, in all the cases the SEM is responsible for examining the application.

By virtue of the Dublin Association Agreement that came into force on 1 March 2008,<sup>51</sup> Switzerland applies the Dublin Regulation. Therefore, the SEM has to examine whether Switzerland (or another state) is competent for examining an application (see section on [Dublin](#)). It is therefore not possible anymore to refuse entry to asylum applicants or return them directly to neighbouring states without registering them and examining their application (at least) formally.<sup>52</sup>

According to the Asylum Act, asylum seekers are obliged to cooperate in the establishment of the facts during the asylum procedure (duty to cooperate).<sup>53</sup> Asylum applicants who fail to cooperate without valid reason or who fail to make themselves available to the authorities for more than 20 days lose their right to have the asylum procedure continued. This rule also applies to persons who fail to make themselves available to the asylum authorities for more than five days in a federal centre without a valid reason. The applications are cancelled without a formal decision and the persons concerned cannot file a new application within three years – except if this would amount to a violation of the Refugee Convention being reserved.<sup>54</sup> This provision is problematic with regard to access to the asylum procedure, as well as to the right to an effective remedy.<sup>55</sup> So far, the Federal Administrative Court has not clarified whether there is a right to an appeal against the decision to cancel the application in these cases. However, in practice, usually asylum seekers who reappear within a few months are reintegrated in the procedure.

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<sup>49</sup> Article 22ff AsylA.

<sup>50</sup> Article 22(3bis) AsylA.

<sup>51</sup> Accord entre la Confédération suisse et la Communauté européenne relatif aux critères et aux mécanismes permettant de déterminer l'Etat responsable de l'examen d'une demande d'asile introduite dans un Etat membre ou en Suisse (Agreement between the Swiss Confederation and the European Community regarding the criteria and mechanisms to determine the responsible state for examining an asylum application introduced in a member state or in Switzerland), 26 October 2004, No. 0.142.392.68.

<sup>52</sup> Swiss Refugee Council (ed.), *Handbuch zum Asyl- und Wegweisungsverfahren (Manual on the asylum and return procedure)*, 2009, 65ff; Article 21 AsylA.

<sup>53</sup> Article 8(1)-(3) AsylA.

<sup>54</sup> Article 8(3-bis) AsylA.

<sup>55</sup> Seraina Nufer, *Die Abschreibung von Asylgesuchen nach dem neuen Art. 8 Abs. 3bis AsylG*, ASYL 2/14, 3ff.

## C. Procedures

### 1. Regular procedure

#### 1.1. General (scope, time limits)

##### Indicators: Regular Procedure: General

1. Time limit set in law for the determining authority to make a decision on the asylum application at first instance: Depends on type of procedure
2. Are detailed reasons for the rejection at first instance of an asylum application shared with the applicant in writing?  Yes  No
3. Backlog of pending cases at first instance as of 31 December 2020: 3,852

**Preparatory phase:** The preparatory phase (“*phase préparatoire*”) starts with the lodging of the application and lasts a maximum of 10 days in the case of a Dublin procedure and a maximum of 21 days for other procedures. The purpose of the preparatory phase is to carry out the preliminary clarifications necessary to complete the procedure, in particular to determine the State competent to examine the asylum application under the Dublin III Regulation, conduct the age assessment – if the minority is doubted – collect and record the personal data of the asylum seekers, examine the evidences and establish the medical situation.<sup>56</sup> During the preparatory phase, a first interview is held mainly to determine whether Switzerland is competent to examine the merits of the asylum application (see [Personal interview](#)).<sup>57</sup>

**Cancellation and inadmissibility decision:** On this basis, the SEM decides whether an application should be examined and whether it should be examined on the merits. If the application cannot be considered as an asylum claim according to the Asylum Act or if the application is not sufficiently justifiable and the asylum seeker withdraws his or her application, the application is cancelled without a formal decision.<sup>58</sup> Similarly, the application is cancelled without a formal decision if asylum applicants fail to cooperate without valid reason or if they fail to make themselves available to the authorities for more than 20 days or more than 5 days if the asylum seeker is accommodated in a federal centre. The persons concerned are further not allowed to lodge a new application within 3 years, unless this restriction would amount to a violation of the Refugee Convention.<sup>59</sup> However, according to information provided by the organisations providing legal assistance in the federal centres, applicants who return to the centres after their asylum application has been cancelled without a formal decision are, in principle, reintegrated into the ongoing procedure if they reappear within a few months.

In certain cases, the SEM will take an inadmissibility decision (NEM/NEE), which means that it decides to dismiss the application without examining the substance of the case. Such a decision is for example taken if the asylum application is made exclusively for economic and medical reasons. In practice, the most frequent reason for such a decision is the possibility of the applicant to return to a so-called safe third country or if according to the Dublin Regulation another state is responsible for conducting the asylum and removal procedures.<sup>60</sup>

**Dublin procedure:** If the preliminary investigations indicate that another Member State might be responsible for processing the asylum application according to the Dublin III Regulation, a request for taking charge or taking back is submitted to the relevant State. Under the Asylum Act, a Dublin procedure formally begins with the submission of the request to take charge or take back and lasts until the transfer to the competent Dublin State or the decision of SEM to examine the application on the merits in a national

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<sup>56</sup> Article 26 AsyIA.

<sup>57</sup> Article 26 AsyIA.

<sup>58</sup> Article 25a AsyIA.

<sup>59</sup> Article 8-bis AsyIA.

<sup>60</sup> Article 31a AsyIA.

procedure.<sup>61</sup> In case of a Dublin procedure, the SEM has to examine whether grounds exist to make use of the sovereignty clause. If such grounds exist, Switzerland takes over the responsibility for examining the application even if another Member State would be responsible according to the Dublin Regulation. In all the other cases where a decision to dismiss the application without examining the substance of the case has been taken, the SEM examines if the transfer of the applicant to the receiving State is lawful, reasonable and possible (see section [Dublin: General](#)).<sup>62</sup>

**Accelerated procedure:** Unless a Dublin procedure is initiated, the accelerated procedure itself starts as soon as the preparatory phase is completed.<sup>63</sup> It lasts a maximum of eight working days<sup>64</sup> and includes mainly the following stages:<sup>65</sup>

- Preparation of a second interview regarding the grounds of asylum;
- Conduct of the second interview and/or granting the right to be heard;
- Assessment of the complexity of the case and decision to continue the examination of the asylum application under the accelerated procedure or proceed to the extended procedure;
- Preparation of the draft decision;
- If negative, legal representative's opinion on the negative draft decision within 24 hours.
- Notification of the decision

After the interview on the grounds for asylum, the SEM carries out a substantive examination of the application. It starts by examining whether the applicant can prove or credibly demonstrate that he or she fits the legal criteria of a refugee. As laid down in law, a person able to demonstrate that he or she meets these criteria is granted asylum in Switzerland.<sup>66</sup> If this is the case, a positive asylum decision is issued.

If the SEM considers however that an applicant is not eligible for refugee status or that there are reasons for his or her exclusion from asylum,<sup>67</sup> it will issue a negative asylum decision. In this case, the SEM has to examine whether the removal of the applicant is lawful, reasonable and possible.<sup>68</sup> If the removal is either unlawful, unreasonable or impossible, the applicant will be temporarily admitted (F permit) in Switzerland. A temporary admission constitutes a substitute measure for a removal that cannot be executed. It can be granted either to persons with refugee status who are excluded from asylum or to foreigners (without refugee status). The scope of the temporary admission as foreseen in national law exceeds the scope of the subsidiary protection foreseen by the recast Qualification Directive, as it covers both persons whose removal would constitute a breach of international law, as well as persons who cannot be removed for humanitarian reasons (for example medical reasons).

The actual duration of the accelerated procedure exceeds the one foreseen in the law. The average time between asylum application and decisions taken under the accelerated procedure in 2020 was 64 days,<sup>69</sup> while in a normal case this should not be more than 29 days.

According to statistics provided by the SEM in 2020, out of 2,835 decisions on the merits issued within the accelerated procedure, 1,279 (45%) resulted in the granting of asylum and 903 (32%) of a temporary admission, while a total of 653 (23%) rejections were issued with a removal order. This suggests that accelerated procedures do not necessarily result in the issuance of negative decisions, as was initially feared by critical observers before the asylum reform entered in force.

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<sup>61</sup> Article 26b AsyIA

<sup>62</sup> Article 44 AsyIA; Article 83 FNIA.

<sup>63</sup> Article 26c AsyIA

<sup>64</sup> Article 37 (2) AsyIA

<sup>65</sup> Article 20c AO1

<sup>66</sup> Article 49 AsyIA.

<sup>67</sup> Asylum is not granted if a person with refugee status is unworthy of it due to serious misconduct or if he or she has violated or endangered Switzerland's internal or external security (Article 53 AsyIA). Further, asylum is not granted if the grounds for asylum are only due to the flight from the applicant's native country or country of origin or if they are only due to the applicant's conduct after his or her departure, so-called subjective post-flight grounds (Article 54 AsyIA).

<sup>68</sup> Article 44 AsyIA; Article 83 FNIA.

<sup>69</sup> Data provided by the SEM, 19 March 2021.

**Extended procedure:** If it appears from the interview on the grounds for asylum that a decision cannot be taken under an accelerated procedure, the application is channelled into an extended procedure and the asylum seeker is allocated to a canton. The switch to an extended procedure occurs in particular when a procedure cannot be concluded within eight working days because additional investigative measures prove necessary<sup>70</sup> or if the maximum length of stay of 140 days in a federal centre is reached.<sup>71</sup> In addition to a possible additional interview, other investigative measures with regard to the identity and origin of the person, the alleged medical problems, the documents submitted or the credibility of the allegations may be taken.

The decision to proceed with the extended procedure is an “incidental decision” (“*Zwischenverfügung*” in German or “*décision incidente*” in French) and cannot be appealed before the final decision is issued so as to avoid lengthy procedures.

In a landmark decision of June 2020 the Federal Administrative Court ruled that, in light of the different applicable appeal deadlines, a wrong assessment as to whether a case is to be considered as complex or not - and based on which it will therefore be channelled into the extended procedure or not - may constitute a violation of the right to an effective remedy.<sup>72</sup> The Court clarified that a case should be considered as complex and requires to be channelled into an extended procedure if a complementary interview on the grounds for asylum is necessary,<sup>73</sup> if the applicant has submitted a large amount of evidence or if further clarifications need to be mandated in the country of origin.<sup>74</sup> The extended procedure also needs to be ordered when the deadlines cannot be met, for example when the medical situation of the applicant could not be sufficiently assessed, and especially if the asylum seeker is still residing in a federal asylum centre after 140 days.<sup>75</sup>

During the preparation of the reform, the SEM had estimated that approximately 40% of the procedures would be conducted under the extended procedure. This estimate later changed to 28%. At the beginning of the reform, however, very few cases were attributed to the extended procedure, corresponding to approximately 19% of all applications.<sup>76</sup> Data about how many cases were attributed to the extended procedure in 2020 are not available. In 2020, the SEM took 22% of the decisions under the new procedure within an extended procedure, 49% within an accelerated procedure and 29% within a Dublin procedure.<sup>77</sup>

According to statistics provided by the SEM, out of 1,498 decisions on the merits taken at first instance within the extended procedure, 535 (36%) resulted in the granting of asylum and 457 (30%) in a temporary admission, while 506 (34%) were rejected with their removal being ordered.<sup>78</sup>

**Length of procedure:** The Asylum Act sets time limits for making a decision on the asylum application at first instance. In the case of inadmissibility decisions, the decision should be made within 5 working days of the submission of the application, or within 3 working days of the moment when the concerned Dublin state has accepted the transfer request. In an accelerated procedure, the decision should be notified within 8 days following the end of the preparatory phase whereas this period is extended to 2 months under the extended procedure.<sup>79</sup> However, the procedural deadlines set in Swiss law are not binding but rather give a general temporal scope. Within the airport procedure, decisions must be issued

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<sup>70</sup> Article 26d AsyIA

<sup>71</sup> Article 24(4) AsyIA.

<sup>72</sup> Federal Administrative Court, Decision E-6713/2019, 9 June 2020. On this jurisprudence see also: Lucia Della Torre and Seraina Nufer, *Between Efficiency and Fairness: The (new) Swiss Asylum Procedure*, in: Journal of Immigration, Asylum & Nationality Law, Vol. 34 No. 4 2020, p. 317.

<sup>73</sup> Judgements of the Federal Administrative Court E-4534/2019 of 25.9.2019, c. 7.5.1; E-4367/2019, of 9.10.2019 c. 7; E-4329/2019 of 7.11.2019, c. 7; E-5624/2019 of 13.11.2019, c. 5.3.2

<sup>74</sup> Judgements of the FAC E-3447/2019 of 13.11.2019, c. 5.3.2, E-244/2020 of 31.01.2020, c. 3.7, E-5850/2019 of 21.01.2020, c. 8.4; 9, D-6508/2019 of 18.12.2019, c. 5.6.

<sup>75</sup> See for example judgement E-3447/2019 of 13.11.2019 or E-5490/2019 of 5.11.2019.

<sup>76</sup> SEM, « Fiche d'information: chiffres clés relatifs aux procédures d'asile accélérées », available at: <https://bit.ly/2NOKi2x>.

<sup>77</sup> Data provided by the SEM, 19 March 2021.

<sup>78</sup> Data provided by the SEM, 19 March 2021.

<sup>79</sup> Article 37 AsyIA.

within 20 days of the submission of the application. Otherwise, the SEM allocates the applicant to a federal centre or a canton.<sup>80</sup>

Under the former asylum system, the length of the asylum procedure at first instance varied significantly from what was foreseen by law. As a way of example, in 2018 the average duration was 465.7 days<sup>81</sup>. This average has significantly decreased with the entry into force of the asylum reform in 2019.

Following a first assessment of the new procedure covering the period from March to December 2019, SEM indicated that Dublin procedures last on average 35 days, while national procedures last on average 50 days in the accelerated procedure and 100 days in the extended procedure, before a decision is issued.<sup>82</sup> In contrast to the very positive initial assessment made by the SEM, several organisations, including OSAR, highlighted that such acceleration was partly accompanied by a reduction of the decision quality, stressing the need to ensure that the speeding up of procedures does not occur to the detriment of the quality of the examination of asylum applications and the decision-making process.<sup>83</sup> In fact, the number of decisions that were annulled by the Federal Administrative Court was very high during the first 18 months of application of the new procedure, which showed significant problems of instruction by the SEM.

In 2020, the average duration of the procedures (excluding those conducted under the old procedure) from the application to the first instance decision was 54 days for Dublin procedures, 64 for accelerated procedures and 221 for extended procedures. These lengths are significantly higher than those foreseen in the law (namely a maximum of 29 days for accelerated procedures and approx. 80 days in the extended procedure). The average duration of procedures that were concluded in 2020 under the old procedure was very high, at 616 days.<sup>84</sup>

3,852 applications were pending at first instance on 31 December 2020, representing a very significant decrease since 2019, when 8,377 applications were still pending. This has to do with the completion of a high number of old procedures, as 6,340 of them were processed in 2020 and 447 pending by the end of the year.<sup>85</sup> The decrease of the backlog is further due to the decrease of the overall number of applicants in 2020 and the impact of COVID-19, as a result of which the SEM was able to focus on pending cases.

## 1.2. Prioritised examination and fast-track processing

Following the entry into force of the new asylum procedure in 2019, the previous accelerated procedures (i.e. fast-track and 48-hour procedures) are not used anymore.

Under the Asylum Act, asylum applications lodged by unaccompanied minors are examined as a matter of priority.<sup>86</sup> In addition, SEM defines an asylum processing strategy in which it determines an order of priority.<sup>87</sup> In March 2019, SEM communicated its new strategy for processing asylum applications that takes several elements into account, namely (i) the situation in the country of origin, (ii) the credibility of the asylum request and (iii) the asylum seeker's personal behaviour.<sup>88</sup> Applications that can be processed under the Dublin procedure or under an accelerated procedure are given priority treatment,<sup>89</sup> as well as

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<sup>80</sup> Article 23(2) AsyIA.

<sup>81</sup> Information provided by the SEM, 21 January 2019.

<sup>82</sup> SEM, *Procédures d'asile accélérées: premier bilan*, 6 February 2020, available (in French) at: <https://bit.ly/37K00Ly>.

<sup>83</sup> OSAR, *L'accélération ne doit pas préteriter l'équité et la qualité*, 4 February 2020, available (in French) at: <https://bit.ly/2ugVu9t>.

<sup>84</sup> Data provided by the SEM, 19 March 2021.

<sup>85</sup> SEM 2020 Statistics and additional data provided by the SEM, 19 March 2021.

<sup>86</sup> Article 18 (2bis) AsyIA.

<sup>87</sup> Article 37b AsyIA.

<sup>88</sup> SEM, *Demandes d'asile priorité aux procédures Dublin et aux procédures accélérées*, 9 May 2019, available (in French) at: <https://bit.ly/2u0JQ22>.

<sup>89</sup> SEM, *Strategy for processing asylum requests: Fast-tracking of unjustified applications*, 17 July 2019, available at: <https://bit.ly/2uQOaS2>.

those lodged by nationals originating from countries with a low rate of recognition. The list of countries considered as having a low chance of success is available online and was last updated in October 2019.<sup>90</sup>

### 1.3. Personal interview

#### Indicators: Regular Procedure: Personal Interview

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the regular procedure?  Yes  No  
❖ If so, are interpreters available in practice, for interviews?  Yes  No
2. In the regular procedure, is the interview conducted by the authority responsible for taking the decision?  Yes  No
3. Are interviews conducted through video conferencing?  Frequently  Rarely  Never
4. Can the asylum seeker request the interviewer and the interpreter to be of a specific gender?  Yes  No  
❖ If so, is this applied in practice for interviews?  Yes  No

The SEM carries out the whole first instance procedure. It is therefore also responsible for conducting the interviews with the applicants during the asylum procedure in both accelerated and extended procedures.

During the preparatory phase, the applicants undergo a short preliminary interview during which they are accompanied by their legal representative. This interview is mainly held to determine whether Switzerland is competent to examine the merits of the asylum application and is called Dublin interview (see section on [Dublin: Personal interview](#)). The health emergency due to the COVID pandemic has slightly modified the conditions of interview (see below). In 2020, the SEM conducted 736 preliminary interviews.<sup>91</sup> The average duration of such Dublin interviews was 1 hour.<sup>92</sup>

In case the SEM intends to take an inadmissibility decision (see section on [Admissibility Procedure](#)), the applicant is granted the right to be heard, be it orally during the interview or later in writing. The same applies if the person deceives the authorities regarding his or her identity and this deception is confirmed by the results of the identification procedure or other evidence, if the person bases his or her application primarily on forged or falsified evidence, or if he or she seriously and culpably fails to cooperate in some other way.<sup>93</sup> In those cases, there is no second interview.

Unaccompanied minors do not undergo a Dublin interview but they are subject to a first interview for unaccompanied minors, during which they are accompanied by their person of trust who is as well their legal representative. The interview serves to gather information about his person, family and journey in order to prepare the next steps of the procedure, which sometimes include an age assessment (see [Age assessment of unaccompanied children](#)). In 2020, such interviews lasted on average 3,5 hours.<sup>94</sup>

**Interview on the grounds for asylum:** In all the other cases, the accelerated procedure begins and the applicant undergoes a second interview (so-called interview on the grounds for asylum).<sup>95</sup> On this occasion, the applicant has the possibility to describe his or her reasons for fleeing and, if available, to submit evidence. In addition to the person in charge of conducting the interview and the person who draws up the minutes, asylum seekers are accompanied by their legal representative and, if necessary, a

<sup>90</sup> The list of countries with a low recognition rate is available at: <https://bit.ly/2Tm0ZOt>.

<sup>91</sup> Data provided by the SEM, 19 March 2021.

<sup>92</sup> Data provided by the SEM, 27 April 2021.

<sup>93</sup> Article 36 AsyIA.

<sup>94</sup> Data provided by the SEM, 27 April 2021.

<sup>95</sup> Article 29 AsyIA.

translator. The applicant may also be accompanied by a person of his or her choice and an interpreter.<sup>96</sup> In 2020, the SEM conducted 3210 interviews on the grounds for asylum within the new accelerated procedure (and 486 additional interviews, see below). Such interview lasted on average 5 hours. The SEM also conducted 1,527 interviews on the grounds for asylum under the old procedure (of which 330 were complementary interviews).<sup>97</sup>

During the first wave of the COVID-19 pandemic there was no suspension of the asylum procedure. The SEM only suspended the interviews during two weeks at the end of March until the rooms were equipped with plexiglass and masks were at disposal. The Ordinance on Measures Taken in the Field of Asylum due to Coronavirus (Ordinance COVID-19 Asylum), entered in force on 2 April 2020 and is valid until at least 30 June 2021 (most probably until 31 December 2021)<sup>98</sup>, foresees the limitation of the number of persons present in the same room during the interview.<sup>99</sup> The SEM officer and the asylum seeker are in the same room, while the interpreter, the minute keeper and the legal advisor can be situated in another room and participate in the interview through appropriate technical means. In practice, the interview setting differs from one region to another and was mostly adapted to single cases. In some cases, the interpreter was in the same room as the asylum seeker and SEM officer, while in other cases, the legal advisor was in the same room while the interpreter was connected via video or audio means. In most cases, only audio transmission was used and not video, which the SEM motivated with data protection issues. As of January 2021, interviews mainly take place in large rooms allowing for all participants to attend them in the same room. If one of the participants belongs to a category of higher risk regarding COVID-19 or if there is no such large room available, the interview takes place in two separate rooms. Since January 2021 there is a mask obligation for all participants in the interviews.

The Ordinance also foresees the possibility, if health reasons related to the coronavirus require it, to exceptionally hold the interview in such a way that the asylum seeker and the officer are in separate rooms and that the interview is conducted using appropriate technical means, however this option seems to have not been used. As of January 2021, the SEM allows to postpone an interview until after vaccination if the situation is deemed too risky for the applicant. Persons at higher risk can also have a FFP2-mask from SEM to use during interview.

The Ordinance also states at Article 6 that in case the legal advisor cannot participate in the interview due circumstances related to the coronavirus, the interview can be conducted and is legally effective. This provision has been strongly criticised by the Swiss Refugee Council and other organisations<sup>100</sup> as well as in a legal note concluding that interviews carried out without the legal representative shall be considered formally invalid.<sup>101</sup> As a consequence, this provision has not been used in practice, except in a few cases at the beginning of the pandemic.

Regarding the content of the interview on the grounds for asylum, the following are the main topics discussed:

- Educational background, training and career paths
- Places of residence in the country of origin and possible stays in other countries
- Family and social environment
- Identity documents
- Itinerary before arrival in Switzerland
- Grounds for claiming asylum
- Pieces of evidence

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<sup>96</sup> Article 29 AsylA.

<sup>97</sup> Data provided by the SEM, 19 March 2021.

<sup>98</sup> In April, the Federal Department of Justice and Police has opened the consultation procedure for an extension of the validity of the Ordinance COVID-19 Asylum until 31 December 2021. See <https://bit.ly/3y4vs5t>.

<sup>99</sup> Article 4 of the Ordinance COVID-19 Asylum.

<sup>100</sup> Statement of the Swiss Refugee Council on 1st April 2020, available at: <https://bit.ly/36W9B3e>. A more detailed and recent statement of 20.11.2020 can be accessed at: <https://bit.ly/2USrAIE>.

<sup>101</sup> Legal note by Prof. Tanquerel, available at: <https://bit.ly/3l00Zhc>

- Health conditions<sup>102</sup>

Under the accelerated procedure, SEM may subsequently decide to carry out a complementary asylum interview and assign the applicant to the extended procedure if additional investigative measures are necessary. In 2020, the SEM conducted 486 such complementary asylum interviews<sup>103</sup> which also lasted on average approximately 5 hours.<sup>104</sup> This decision is only up to the SEM, however the legal representative can suggest its suitability, for example if not all the relevant topics have been discussed or if he/she has more questions to add. Interviews conducted by SEM under the extended procedure satisfy the same conditions and requirements as those carried out under the accelerated procedure. In principle, the applicant is invited to an interview, at which he/she is accompanied by his/her legal representative. The interview takes place in the federal asylum centre where the first stages of the person's asylum procedure were carried out.

According to article 17(2) AsylA in relation to article 6 AO1, if there are concrete indications of gender-related persecution or if the situation in the State of origin allows the inference that such persecution exists, the asylum seeker shall be heard by a person of the same sex. This rule also applies to the other participants of the interview such as the interviewer, the interpreter and the legal representative and represents a right for the asylum seeker. Non-compliance with this provision constitutes a violation of the right to be heard. The applicant is, however, free to renounce this right. In this case, a formal right to be heard must be granted.

In practice, the official in charge of the case may on his or her own initiative decide to conduct an interview with persons of the same sex as the applicant, or the legal representative may so request. However, it may also happen that this obligation is not complied with in practice, which implies the intervention of the legal representative, who should then require the cancellation of the interview and its conduct in an appropriate interview team composition. In case of male applicants victims of gender related persecution, this provision is implemented in a more open and pragmatic way, asking the asylum applicant which team composition he prefers.<sup>105</sup>

## Interpretation

According to Swiss asylum law, the presence of an interpreter during the personal interviews is not an absolute requirement, as an interpreter should be called in "if necessary".<sup>106</sup> Normally, an interpreter nevertheless participates in the interviews. According to the SEM, the interview always takes place with an interpreter, unless the knowledge of an official Swiss language by the applicant is considered sufficient.<sup>107</sup> However, in certain cases, it has been observed that applicants – especially Nigerian applicants – are interviewed in English. This is problematic when the interviewed person, contrary to the assumption of the SEM, does not sufficiently master that language. The SEM issued a code of conduct applicable for its interpreters, specifying their role, the expected impartial and neutral conduct and emotional detachment during translation.<sup>108</sup>

Even if, in general, an interpreter is present during the interviews, some problems have been identified with regard to simultaneous translation. Internal, unpublished surveys on procedural problems conducted by the representatives of charitable organisations attending interviews regarding the grounds for asylum in the old procedure (coordinated by the Swiss Refugee Council) regularly highlight difficulties relating to

<sup>102</sup> Further information about the interview on the grounds for asylum and the quality criteria to be followed by SEM employees in charge of the interviews is available in the handbook of the SEM (chapter C6.2), at: <https://bit.ly/35WrShA>.

<sup>103</sup> Data provided by the SEM, 19 March 2021.

<sup>104</sup> Data provided by the SEM, 27 April 2021.

<sup>105</sup> Handbook SEM, chapter D2, p. 18. Available at: <https://bit.ly/35UBQAg>.

<sup>106</sup> Article 29(1-bis) AsylA.

<sup>107</sup> SEM, *Handbuch Asyl und Rückkehr. Anhörung zu den Asylgründen*, available (in German) at: <http://bit.ly/1Fk7AXb>, 8; Asylum Appeals Commission, Decision EMARK 1999/2 of 27 October 1998, para 5.

<sup>108</sup> SEM, *Role of the interpreter in the asylum procedure*, January 2016, available (in English) at: <https://bit.ly/2IUogEp>; see also SEM, *Requirements for interpreters and translators* (no date), available (in English) at: <https://bit.ly/3l1nfqQ>.

simultaneous translation, such as partially incorrect translations, difficulties of comprehension taking into account the cultural context and the corresponding references. In this respect, the systematic presence, in principle, of an interpreter and a legal representative during the interview should reinforce the right of asylum seekers to be able to express themselves in a language of which they have a sufficient command. If significant communication problems arise between the interpreter and the asylum seeker, the interview must be cancelled. In any case, issues related to translation should be mentioned in the minutes so as to be considered by the Court in case of appeal.

During 2020 and due to the special measures to prevent COVID-19 infections, the interpreter and the legal advisor can be placed in a separate room and connected with audio means (see above).

The representatives of charitable organisations also point out that several interpreters are not impartial, sometimes even have close ties to the regime in the country of origin, or that they lack professionalism (i.e. imprecise, no literal translation but a summary, lacking linguistic competence).<sup>109</sup> Problems have also been identified in relation to the difference in accent or dialect between the interpreter and the applicant, especially in cases where the applicant's mother tongue was Tibetan, Kurdish of Syria or Dari.

While from time to time there may be a temporary shortage of interpreters for a specific language, it appears, particularly in view of the drop in asylum applications in recent years, that the quantitative needs are generally covered.

Video conferencing has only very rarely been used for the interviews. In the test procedure in **Zurich** of 2018, which corresponded to the new accelerated asylum procedure, the SEM tested interpretation via Skype for Business, in order to reduce costs. Due to technical problems and lack of data protection regulation, the SEM renounced, until further notice, to use video conferencing. During 2020 and due to the pandemic, interviews could take place in two different rooms, where the interpreter could in some cases be placed in a separated room and connected with audio and/or video transmission.

## Transcript

Neither audio nor video recording of the personal interview is required under Swiss legislation. The recording of interviews with asylum seekers is a long-standing demand of the charitable organizations, which has so far not been implemented by the federal authorities.<sup>110</sup> In a letter of January 2020, sixty-six experts in asylum law requested the introduction of audio recording of asylum interviews, to which the SEM answered vaguely that it needed to examine a series of aspects before considering such a measure.<sup>111</sup>

However, written minutes are taken of the interview and signed by the persons participating in the interview at the end, after a translation back into the language of the applicant (carried out by the same interpreter who had already translated during the interview).<sup>112</sup> Before signing the minutes, the applicant and legal representative have the possibility to make further comments or corrections to the minutes.

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<sup>109</sup> On the issue of interpretation see in particular: OSAR, *L'interprétariat dans le domaine de l'asile n'est pas une question mineure*, 5 July 2017, available (in French) at: <https://bit.ly/2HQXGI2> and Le Temps des réfugiés, *Asile: les superpouvoirs des interprètes*; 16 May 2019, available (in French) at: <https://bit.ly/2wllt9l>.

<sup>110</sup> Le Temps des réfugiés, *Plusieurs Etats européens procèdent déjà à l'enregistrement audio des auditions d'asile. Pourquoi pas la Suisse?*, 4 October 2019, available (in French) at: <https://bit.ly/3c6jFbG>.

<sup>111</sup> Jasmin Caye, *Auditions : une mauvaise traduction et la vie d'un demandeur d'asile peut basculer*, *Vivre Ensemble* 177, May 2020, available at : <https://bit.ly/35ZEmFf>.

<sup>112</sup> Article 29(3) AsyIA.

## 1.4. Appeal

### Indicators: Regular Procedure: Appeal

1. Does the law provide for an appeal against the first instance decision in the regular procedure?  
 Yes  No  
❖ If yes, is it  Judicial  Administrative  
❖ If yes, is it suspensive  Yes  Some grounds  No
2. Average processing time for the appeal body to make a decision: Not available

Swiss law provides for an appeal mechanism in the regular asylum procedure. The sole competent authority for examining an appeal against inadmissibility and in-merit decisions of the SEM is the Federal Administrative Court (*Tribunal administratif fédéral*, TAF).<sup>113</sup> A further appeal to the Federal Supreme Court is not possible (except if it concerns an extradition request or detention, including in Dublin cases).<sup>114</sup> The Federal Administrative Court can either deliberate on the merits of a case and issue a new, final decision or cancel the decision and send the case back to the SEM for reassessment. Appeals are usually decided upon by three judges, while manifestly founded or unfounded cases are decided upon by one judge (with the approval of a second judge). Leading decisions (or coordination judgements) are taken by five judges.

An appeal to the Federal Administrative Court can be made on two different grounds: the violation of federal law, including the abuse and exceeding of discretionary powers; and incorrect and incomplete determination of the legally relevant circumstances.<sup>115</sup> During 2020, the Federal Administrative Court did not suspend its activities. It was only decided to extend the judicial holidays in April (which automatically extended the deadlines as well), but this provision did not concern asylum appeal procedures.

It is important to note in this respect that the Federal Administrative Court cannot fully verify asylum decisions of the SEM anymore, since the examination for appropriateness has been abolished in the Asylum Act as of 1 February 2014.<sup>116</sup> The Court can examine the SEM's decisions on asylum only regarding the violation of federal law, including the abuse and exceeding as well as undercutting (but not the inappropriate use) of discretionary powers or incorrect and incomplete determination of the legally relevant circumstances.<sup>117</sup> Even if the Court can still verify the appropriateness of the enforcement of removal (as this part of the decision falls under the Foreign Nationals and Integration Act, as opposed to the decision on asylum, which falls under the Asylum Act and is therefore subject to the limitation of the Court's competence), it is questionable whether the legal remedy in asylum law is effective. The limitation of the Court's competence in asylum decisions seems problematic and unjustified in view of the rights to life, liberty and physical integrity that are at stake. Also, it can lead to incongruities between the areas of asylum and foreigners' law.<sup>118</sup> In practice, the limitation of the Court's competence has proven to be extremely problematic especially in Dublin cases when it comes to the question whether Switzerland should apply the sovereignty clause for humanitarian reasons or not (see section on [Dublin: Appeal](#)).

The appeal must meet a certain number of formal criteria (such as written form, official language, mention of the complaining party, signature and date, pieces of evidence if available). The proceedings in front of the court should be conducted in one of the 4 official languages,<sup>119</sup> which are German, French, Italian and Romansh. Writing an appeal can be an obstacle for an asylum seeker who does not speak any of these

<sup>113</sup> Article 105 AsyIA. Most judgments of the Federal Administrative Court are available at: <http://bit.ly/1NgE8vb>.

<sup>114</sup> Article 83(c)-(d) Federal Supreme Court Act.

<sup>115</sup> Article 106 AsyIA.

<sup>116</sup> Article 106(1) AsyIA. Appropriateness of a decision means situations in which the determining authority has a certain margin of appreciation in which it can manoeuvre. Within this margin of appreciation, there can be decisions that are "inappropriate" but not illegal because they still fall within the margin of appreciation and they respect the purpose of the legal provision, but the discretionary power was used in an inappropriate way.

<sup>117</sup> For a more detailed analysis of the discretionary power of the determining authority and the competence of the Federal Administrative Court, see Federal Administrative Court, Decision E-641/2014, 13 March 2015.

<sup>118</sup> For a more thorough analysis of the changed provision in the Asylum Act, see Thomas Segessenmann, *Wegfall der Angemessenheitskontrolle im Asylbereich (Art. 106 Abs. 1 lit. c AsyIG)*, ASYL 2/13, 11ff.

<sup>119</sup> Article 33a APA.

languages. In practice, the Court sometimes translates appeals or treats them even though they are written in English. The court can also set a new time limit to translate the appeal, but there is no legal basis for this procedure; it depends on the goodwill of the responsible judge. As a service to persons who want to write an appeal themselves, the Swiss Refugee Council offers a template for an appeal with explanations in different languages on its website.<sup>120</sup>

In addition, it must be clear that it is an appeal and what the intention of the appeal is. If an appeal does not meet the criteria, but the appeal has been properly filed, the Court should grant an appellant a suitable additional period to complete the appeal.<sup>121</sup>

The time limit for lodging an appeal against negative decisions on the merits is 7 working days if the decision was issued under the accelerated procedure and 30 days under the extended procedure. As a response to the difficulties caused by the pandemic, the deadline has been temporarily extended to 30 days also for decisions taken under the accelerated procedure.<sup>122</sup> No such extension is foreseen for inadmissibility decisions taken without entering on the merit (NEE/NEM), for which the appeal still needs to be filed within five working days. The Court normally has to take decisions on appeals against decisions of the SEM within 20 days in case of accelerated procedure and within 30 days under the extended one.<sup>123</sup> During the first 18 months since the introduction of the new accelerated asylum procedure, the 20-day deadline was met in 72% of cases (442 procedures). It exceeded by a few days in 8% of cases, by 10 to 30 days in 10% of cases, and by more than 30 days in 10% of cases.<sup>124</sup> This constitutes a significant acceleration in comparison with the average duration of an appeal procedure between 2015 and 2017, that was 159 days.<sup>125</sup>

In general, an appeal has automatic suspensive effect in Switzerland.<sup>126</sup> Appeals in Dublin cases are an exception: suspensive effect is not automatic but can be granted upon request (see section on [Dublin: Appeal](#)).

Different obstacles in appeals have been identified. One important obstacle is the fact that the Court may demand an advance payment (presumed costs of the appeal proceedings, usually amounting to 750 Swiss francs (around 680 Euros), under the threat of an inadmissibility decision in case of non-payment. Only for special reasons can the full or part of the advance payment be waived.<sup>127</sup> Appeals filed by legal representatives working for the organisations mandated by the SEM are usually not subject to such advance payment. An advance payment is mostly requested when the appeal is considered as *prima facie* without merit, which may be fatal to destitute applicants in cases of a wrong assessment. Such wrong assessments have been noted by the European Court of Human Rights (ECtHR).<sup>128</sup> In October 2017, the Federal Supreme Court instructed the Federal Administrative Court to cease demanding an advance payment for unaccompanied asylum-seeking children in appeal procedures. According to the Court, the present practice of Federal Administrative Court consisting in requiring an advance payment in such situations constitutes a measure that disproportionately restricts access to justice for unaccompanied asylum-seeking children.<sup>129</sup>

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<sup>120</sup> Swiss Refugee Council, *Instructions for filing and appeal and Appeal template*, available (in several languages) at: <https://bit.ly/39cydHU>.

<sup>121</sup> Article 33a and 52 APA.

<sup>122</sup> Art. 10 of the Ordinance COVID-19 Asylum.

<sup>123</sup> Article 109 AsyIA.

<sup>124</sup> TAF, *Nouveau droit d'asile - Bilan*; 1.03.2019-31.08.2020; statistics available at: <https://bit.ly/3pTfLtm>; press release available at: <https://bit.ly/371qeL7>.

<sup>125</sup> Information provided by the Federal Administrative Court, 22 February 2019.

<sup>126</sup> Article 55(1) APA.

<sup>127</sup> Article 63(4) APA.

<sup>128</sup> For example ECtHR, *MA v Switzerland*, Application No 52589/13, Judgment of 18 November 2014. In this case, the Federal Administrative Court delivered an interim decision in which it declined the applicant's request for legal aid, reasoning that his application lacked any prospects of success. In its preliminary assessment of the case, The Court noted that the applicant was deprived of additional opportunities to prove the authenticity of the second summons and the Iranian conviction before the national authorities because the Federal Administrative Court ignored the applicant's suggestion of having the credibility of the documents further assessed. It did not follow up on the applicant's proposal to submit the copies to the Migration Board for further comments, but instead decided directly on the basis of the applicant's file and his appeal.

<sup>129</sup> Federal Supreme Court, Decision 12T\_2016, 16 October 2017.



|                                  |  |
|----------------------------------|--|
| <b>Boudry (+ airport Geneva)</b> | Protection juridique Caritas Suisse & VSJF |
| <b>Chiasso</b>                   | SOS-Ticino & Caritas Protezione giuridica  |
| <b>Zurich (+ airport Zurich)</b> | Rechtsschutz für Asylsuchende (RBS Bern)   |

Source: Swiss Refugee Council, addresses and contacts available at: <https://bit.ly/3pYFvVt>.

Although mandated by the federal migration authority SEM, independence and confidentiality in the work of legal representation must be guaranteed.<sup>134</sup> The quality of the legal protection is currently the object of an external evaluation mandated by SEM.

Each asylum seeker is assigned a legal representative from the start of the preparatory phase and for the rest of the asylum procedure, unless the asylum seeker expressly declines this. The legal representative assigned should inform the asylum seeker as quickly as possible about the asylum seeker's chances in the asylum procedure. The so-called legal protection in the federal asylum centres, consisting in principle of an advice office and legal representation, mainly carries out the following tasks:<sup>135</sup>

- Informing and advising asylum seekers;
- Informing asylum seekers about their chances of success in the asylum procedure;
- Ensuring the preparation of – and participating in – the interview
- Representing the interests of unaccompanied minor asylum seekers as a person of trust in federal centers and at the airport;
- Drafting an opinion on the negative draft decision in the accelerated procedure;
- Communicating the end of the representation mandate to the asylum seeker when the representative is not willing to lodge an appeal because it would be doomed to failure (so-called 'merits test');<sup>136</sup>
- Ensuring legal representation during the appeal procedure, in particular by preparing and writing an appeal;
- Informing the asylum seeker of the other possibilities for legal advice and representation for lodging an appeal.

In cases where the application is being channeled into the extended procedure, legal representatives must conduct an "exit interview" with the applicant in order to inform him/her of the further course of the asylum procedure and of the possibilities for legal advice and representation in the extended procedure (see below).

The legal representation lasts, under the accelerated and the Dublin procedure, until a legally binding decision is taken, or until an incidental decision on the allocation to the extended procedure is issued by the SEM. It also extends to a possible appeal procedure in front of the Federal Administrative Court. It ends when the assigned legal representative informs the asylum seeker that he or she does not wish to submit an appeal because it would have no prospect of success (so called "merits-test"). This should take place as quickly as possible after notification of the decision to reject asylum in order for the asylum seeker to find another legal representative if wished.<sup>137</sup> The mandated legal representative should give the contact of other legal advice offices, but it is unclear if this always occurs in practice.

In some cases, asylum-seekers awaiting a decision at first instance or for whom an appeal has been lodged have been allocated to a canton without their legal representative being informed. Furthermore,

<sup>134</sup> SEM, *Asile : attribution des mandats pour le conseil et la représentation juridique dans les centres fédéraux*, 17 October 2018, available (in French) at: <https://bit.ly/3936CpN>.

<sup>135</sup> Article 52 OA1 and seq.

<sup>136</sup> Depending on the organisation in charge of legal assistance, several steps may have been taken to provide a framework for this sensitive assessment. For example, the principle of double-checking each negative decision received: a manager or more experienced legal officer will systematically evaluate the decision and discuss it with the legal officer in charge of the case. In addition, internal recommendations or guidelines relating to the practice of the authorities make it possible to guide and give clear information to the lawyers in charge of making this merits test.

<sup>137</sup> Article 102h AsyIA.

due to COVID-19, some applicants have been transferred to other centres within the same asylum region or even in another region without the legal representatives being informed beforehand.

The introduction of legal counsel and representation during the first instance procedure is a major change in the history of Swiss asylum procedures and requires constant efforts on both the authorities and legal protection sides to acknowledge and understand their mutual roles. UNHCR has published a series of recommendations addressed to legal counselors and representatives as well as managers to ensure a legal protection of good quality.<sup>138</sup>

The Coalition of Independent Jurists for the right of asylum, gathering several lawyers and NGOs working on asylum cases, has published an independent evaluation of the first year of implementation of the asylum reform. The report partly focuses on the work of the mandated legal protection, pointing to a series of problematic issues. On one hand, the Coalition raises the question of the independence of such mandated organisations, noting that they are very cautious when it comes to taking position in the public space.<sup>139</sup> The geographical proximity with the SEM in the federal centers is also reflected in the perceptions of asylum seekers, who do not always take the independence of their legal representative for granted.<sup>140</sup> The report also points at insufficient coordination among the various mandated organisations that have missed, according to the Coalition, an opportunity to jointly influence the development of case law in the interests of asylum seekers.<sup>141</sup>

In this evaluation, the Coalition also analysed quantitative data provided by the Federal Administrative Court concerning the rates of appeals and concluded that the legal protection too frequently revokes its mandate. The average rate of appeal submitted by the officially mandated legal representation is 12.5%, however it varies greatly from one region to another, ranging from 4.5% in East Switzerland to 19.3% in West Switzerland.<sup>142</sup> The data show that almost one third of the appeals that were admitted by the Court or resulted in a referral to the SEM for further instruction was not filed by the legal protection of the federal centers but either by external representatives or in the name of the applicant (without official representation). Moreover, in more than half (90 out of 158) of the appeals submitted by an external representative, the Court had considered the appeal as having a chance of success. The Coalition interpreted this data as reflecting a shortcoming of the legal protection regime, given that introducing an appeal when it is not doomed to fail is part of the legal protection mandate financed by SEM in accelerated procedures (Art. 102h(4) AsyIA).<sup>143</sup> Revocation of mandates are particularly problematic given the geographic isolation of some federal centers and the short deadlines for introducing an appeal, which can make it practically impossible to find a legal representation and hence prevent the asylum seeker from accessing an effective remedy. This problem is more or less accentuated depending on the region the asylum seeker was allocated to, as discussed above, which also creates unequal treatment.

No statistical data are available on the number of asylum seekers having renounced the legal representation during their asylum procedure nor on the number of asylum seekers having appointed an external independent lawyer.<sup>144</sup>

### **The extended procedure (allocation to a canton)**

Following the allocation to a canton, asylum seekers may contact a legal advice agency or the legal representative allocated free of charge at relevant steps of the first instance procedure before the

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<sup>138</sup> UNHCR, *Recommandations du HCR relatives au conseil et à la représentation juridique dans la nouvelle procédure d'asile en Suisse*, March 2019, available (in French) at: <https://bit.ly/3nQGyFg>. Available also in German and Italian.

<sup>139</sup> Coalition des juristes indépendant-e-s pour le droit d'asile, *Restructuration du domaine de l'asile: Bilan de la première année de mise en œuvre*, September 2020, available in French at: <https://bit.ly/3mJPg7u> and in German at: <https://bit.ly/34vbKCG>. Page 13, ch. 4.2.8.

<sup>140</sup> *Ibid.*, p. 8, ch. 4.1.6.

<sup>141</sup> *Ibid.*, p. 12, ch. 4.2.6.

<sup>142</sup> *Ibid.*, p. 26.

<sup>143</sup> *Ibid.*, p. 10, ch. 4.2.2.

<sup>144</sup> Information provided by the SEM, 27 April 2021.

decision, in particular if an additional interview is held on the grounds for asylum.<sup>145</sup> In fact, usually there is a change of legal representation after the triage in the extended procedure. However, the legal representative assigned at the federal asylum centre can continue to represent the asylum seeker in exceptional cases if a relation of trust has developed.<sup>146</sup>

Following a public call for tenders, the SEM appointed several organisations active in the cantons to provide legal protection after the asylum seeker's allocation to a canton.<sup>147</sup> An updated list of all organisations providing legal representation for asylum seekers in the different regions of Switzerland is available on the website of the Swiss Refugee Council.<sup>148</sup>

The system of legal representation in the extended procedure implemented by the SEM covers solely the decisive steps of the asylum procedure. It does not include the submission of an appeal to the Federal Administrative Court, a task for which they could be reimbursed afterwards by the Court if the appeal is not considered as doomed to fail. Furthermore, several activities traditionally carried out by the legal advice offices active in the cantons do not fall within the scope of application under the new Asylum Act and the related ordinances, for instance family reunification procedures, contacts and reaching out health professionals or questions relating to accommodation.<sup>149</sup> When asylum seekers are attributed to a canton where another language is spoken, this can represent an obstacle for the legal representative. Complementary interviews will be conducted in the initial federal asylum centre in the language of that centre, and the decision will also be written in that language. A further obstacle for legal representatives in the extended procedure is that the SEM does not allow access to the minutes of the interview on the asylum grounds, except if there is a complementary interview, in which case they only have access 30 minutes before that interview. This time is insufficient to prepare for the interview, especially if it is in a language that the legal representative does not completely master.

### **Access to legal advice and representation under the old procedure**

People who have lodged an application for international protection prior to 1 March 2019 as well as those with a multiple application have no systematic access to legal representation. They can receive free legal support at local legal advisory offices, especially if they have received a negative asylum decision. In those cases, the office will analyse the decision and a legal representative will file an appeal if this is considered as likely to succeed. At least one office is present in each canton (see the list provided by the Swiss Refugee Council),<sup>150</sup> and most of them are in charge of legal assistance under the extended procedure as well.

During the lockdown in spring 2020, many legal advisory offices for asylum seekers had to close their open consultations or restrict access to them. Following the lockdown, they could at least partially re-open to the public. Some offices have reinstated open consultations while others have restricted access and require from the asylum seekers to make an appointment unless they have very urgent matters.

### **Access to legal representation for asylum applications lodged in detention**

If a person is in prison or detention, it is also the cantonal authority (from the canton that has ordered the detention or the execution of a sentence) that accepts the asylum application. The cantonal authority establishes the personal data of the concerned person, takes pictures, confiscates the travel and identity papers and takes the fingerprints if necessary. The cantonal authority then informs the SEM about the asylum application. In case the applicant is released, he or she is issued an N permit by the cantonal authority.<sup>151</sup> In the context of the asylum reform that entered in force in March 2019, which provides free

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<sup>145</sup> Article 102I AsylA.

<sup>146</sup> Article 52f(3) OA1.

<sup>147</sup> SEM, *Loi sur l'asile révisée : le SEM désigne les bureaux de conseil juridique habilités*, 26 February 2019, available (in French) at: <https://bit.ly/2TdD2qO>.

<sup>148</sup> The list is available at: <https://bit.ly/33cXspz>.

<sup>149</sup> OSAR, *Conseil et représentation juridique*, available (in French) at: <https://bit.ly/3nQiG4C>.

<sup>150</sup> The list is available at: <https://bit.ly/33cXspz>.

<sup>151</sup> Article 8(3) AO1; Directive III Field of Asylum, *Das Asylverfahren*, para 1.1.1.4.

legal representation during the asylum procedure, it was not clear whether detained asylum seekers would also have access to legal assistance. The SEM assumed that this was not the case, since the persons concerned do not reside in a federal asylum centre. In November 2019, the Federal Administrative Court clarified that the fact that the person concerned had lodged his or her asylum application while in detention does not dispense the competent authority of its duty to duly investigate the application in accordance with the law in force, in particular to ensure the right to free legal advice and representation.<sup>152</sup> During 2020, the SEM has not provided access to legal assistance and representation to people applying for asylum while in prison or detention, although there have been several judgements ruling that such access must be guaranteed.<sup>153</sup> There are no statistical data available on the number of asylum applications made in detention.<sup>154</sup>

## 2. Dublin

### 2.1. General

#### Dublin statistics: 2020

| Outgoing procedure |          |           | Incoming procedure |          |           |
|--------------------|----------|-----------|--------------------|----------|-----------|
|                    | Requests | Transfers |                    | Requests | Transfers |
| <b>Total</b>       | 4,057    | 941       | <b>Total</b>       | 3,759    | 877       |
| Germany            | 882      | 354       | Greece             | 569      | 416       |
| Italy              | 869      | 176       | Germany            | 799      | 140       |
| France             | 499      | 136       | France             | 1,181    | 126       |

Source: SEM, *Asylum Statistics* 2020.

The Dublin III Regulation is applied directly since 1 January 2014 according to a decision of the Federal Council of 18 December 2013. In 2020, the SEM did not suspend Dublin transfers during COVID-19 and Dublin requests continued to be issued accordingly. However, the number of transfers decreased compared to previous years as a result of travel restrictions or border closures in other Dublin countries. The responsibility for the applicant shifted back to Switzerland when the 6-months deadline to carry out the transfer was not respected.

#### Application of the Dublin criteria

According to the SEM, in 2020 Switzerland issued a total of 4,057 take charge or take back requests to other Member States, compared to 4,848 in 2019, 6,810 in 2018 and 8,370 in 2017. They were based on the following criteria:

| Outgoing Dublin requests by criterion: 2017-2020          |       |       |       |       |
|---|-------|-------|-------|-------|
| Dublin III Regulation criterion                           | 2017  | 2018  | 2019  | 2020  |
| Family provisions: Articles 8-11                          | 76    | 43    | 28    | 18    |
| Documentation and entry: Articles 12-15                   | 2,870 | 1,823 | 1,130 | 1,037 |
| Dependency and humanitarian clause: Articles 16 and 17(2) | 50    | 55    | 16    | 4     |
| "Take back": Article 18(1)(b)                             | 4,202 | 3,703 | 2,781 | 2,166 |
| "Take back": Article 18(1)(c)                             | 53    | 30    | 32    | 43    |
| "Take back": Article 18(1)(d)                             | 1,116 | 1,155 | 861   | 779   |

<sup>152</sup> Federal Administrative Court, Decision D-5705/2019, 25 November 2019.

<sup>153</sup> Federal Administrative Court, Decisions D-5705/2019 of 25.11.2019, E-1401/2020 of 1.04.2020, D-5480/2020 of 19.11.2020.

<sup>154</sup> Information provided by the SEM, 27 April 2021.

|                                |              |              |              |              |
|--------------------------------|--------------|--------------|--------------|--------------|
| "Take back": Article 20(5)     | 3            | 1            | 0            | 10           |
| <b>Total outgoing requests</b> | <b>8,370</b> | <b>6,810</b> | <b>4,848</b> | <b>4,057</b> |

Source: SEM, Information provided on 19 March 2021.

The Federal Administrative Court clarified in 2015 that the presence of a family member or sibling in a pending asylum procedure in Switzerland qualifies as "legally present" for the purposes of Article 8(1) of the Dublin III Regulation.<sup>155</sup> It also confirmed that Article 9 and 10 of the Dublin III Regulation are directly applicable, and that there is a reduced standard of proof to establish the competence of a Member State in the Dublin procedure.<sup>156</sup>

The family criteria in particular are generally applied narrowly. The SEM's practice regarding the effective relationship and regarding the definition of family members in the Dublin III Regulation is strict. A few recent examples can illustrate this:

**Concept of "spouses":** In one case, the SEM was of the opinion that the applicant could not derive anything in his favour from the spouse living in Switzerland, since a stable relationship was required under the notion of spouses under Article 2(g) of the Dublin Regulation. In this context, Article 8 ECHR must be observed. In order to determine the nature of the actual relationship, various factors should be taken into account according to the SEM, in particular common housing, financial interdependence, the bonding of partners and the stability and duration of the relationship. The SEM concluded that the relationship between the spouses did not fall under the scope of Article 8 ECHR.

The Federal Administrative Court disagreed and stated that:

- ❖ Asylum seekers can rely directly on Article 9 of the Dublin Regulation;
- ❖ Article 2(g) of the Regulation, which defines family members, does not impose any further requirements for (formal) spouses; a stable relationship is only required for unmarried couples;
- ❖ Article 9 of the Regulation requires that the family member residing in Switzerland is entitled to stay in Switzerland in his or her capacity as a beneficiary of international protection. In addition to refugee status, international protection includes other protection status, granted due to a serious threat to life and limb resulting from arbitrary violence in the context of armed conflict in the country of origin. This shall also include the Swiss status of 'temporary admission', granted to an asylum seeker because of a precarious security situation in the country of origin.<sup>157</sup>

**Best interests of the child:** According to a doctor's report and information from the reception centre's management, a female applicant was not capable of providing adequate care such as nourishment for her children. The applicant's family (her father and her two siblings, all resident in Switzerland) had taken care of the applicant and especially her children since their arrival in Switzerland. The management of the reception centre stated that the loss of the family support could endanger the welfare of the applicant and her children. Nevertheless, the Federal Administrative Court confirmed the decision of the SEM to transfer the woman and her children to Italy.<sup>158</sup>

A family with three children, whose asylum application was rejected in France and a request of reconsideration was pending before a French court, had already been returned to France by Switzerland in January 2017. They lodged a new application in Switzerland in August 2017. Both children and parents were in a worrying medical condition. According to doctors, the Dublin transfer to France of January 2017 had caused severe psychological damage to the children. Another return would lead to a massive violation of the well-being of the children with damaging consequences. In the case of the two sons, emergency treatment had been initiated which could only lead to success if a long-term, fear-free, stable and child-friendly environment was ensured. Otherwise, a further deterioration of the condition with threatening

<sup>155</sup> Federal Administrative Court, Decision D-5785/2015, 10 March 2016.

<sup>156</sup> Federal Administrative Court, Decision E-6513/2014, 3 December 2015.

<sup>157</sup> Federal Administrative Court, Decision BVGE 2017/VI/1, 10 February 2017.

<sup>158</sup> Federal Administrative Court, Decision F-905/2017, 12 July 2017.

suicidal tendencies was to be expected. The Federal Administrative Court referred to the *Tarakhel*<sup>159</sup> judgment of the European Court of Human Rights and instructed the SEM to declare itself responsible for the material examination of the asylum application of the complainants under the national procedure.<sup>160</sup>

**Siblings:** Five adult siblings left Syria together and entered Switzerland via Greece and Croatia. Switzerland considered itself responsible for three siblings, and initiated a Dublin procedure for one man and one woman, despite their identical starting position. The Federal Administrative Court considers equality in terms of law in the sense of Article 8 of the Federal Constitution as violated.<sup>161</sup>

### The dependent persons and discretionary clauses

In addition to the cases in which Switzerland must apply the sovereignty clause because the transfer to the responsible Dublin State would violate one of its international obligations, Article 29a(3) AO1 provides the possibility to apply the sovereignty clause on humanitarian grounds. According to case-law, the sovereignty clause is not self-executing, which means that applicants can only rely on the clause in connection with another provision of national law.<sup>162</sup> There are no general criteria publicly available in Switzerland on when the humanitarian clause or the sovereignty clause are implemented. The SEM is very reluctant to show in a transparent manner which criteria are decisive for the application of the sovereignty clause. The Federal Administrative Court's competence to examine the SEM's decision regarding humanitarian reasons is very limited, which leads to less jurisprudence and transparency on the issue. However, the Court sent some cases back to the SEM, because it had failed to consider whether or not to apply a discretionary clause (see section on [Dublin: Appeal](#)).

In the case of a woman whose parents were recognised as refugees in Switzerland and who herself was in a very bad state of health, the Federal Administrative Court recognised a mutual dependency between the daughter and her parents to such an extent that non-application of Article 16 of the Dublin Regulation could not be justified; the SEM was ordered to proceed with the material assessment of the applicant's asylum claim under the national procedure.<sup>163</sup>

The sovereignty clause is used only in exceptional cases and is usually based on Article 29a(3) AO1. According to Swiss case-law,<sup>164</sup> the interpretation of humanitarian reasons should be similar to the interpretation of the humanitarian clause of the Dublin Regulation.<sup>165</sup> Therefore, a sharp distinction cannot be made between the grounds mostly accepted by Swiss authorities to use the sovereignty clause and grounds mostly accepted to use the humanitarian clause. In most cases in which Switzerland decides to examine an application even if another state is responsible, the cases concern EU Member States with problematic conditions. Another category are particularly vulnerable persons, for example families (especially single mothers with children) or persons with severe medical problems that run a high risk of not receiving the essential care because of the deficiencies of the reception conditions or of the asylum system in the responsible Member State.<sup>166</sup> However, the threshold for the application of the humanitarian clause is high. A high risk of detention in case of a transfer back to the responsible state has also been stated as a reason (for further information see section on [Dublin: Appeal](#)).

In the case of an Eritrean asylum seeker who had a child with an Eritrean national residing in Switzerland who was granted temporary admission ("F refugee permit") the SEM simply asked the Italian authorities for guarantees regarding the availability of care for the mother and her baby. In the Court's view, the SEM was wrong not to consider the father-child relationship at all and not to consider the proportionality

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<sup>159</sup> European Court of Human Rights, *Tarakhel vs. Switzerland*, No. 29217/12.

<sup>160</sup> Federal Administrative Court, Decision D-5698/2017, 6 March 2018.

<sup>161</sup> Federal Administrative Court, Decision E-2246/2016, 4 October 2017.

<sup>162</sup> Federal Administrative Court, Decision E-5644/2009, 31 August 2010.

<sup>163</sup> Federal Administrative Court, Decision D-3566/2018, 28 June 2018.

<sup>164</sup> Federal Administrative Court, Decision E-7221/2009, 10 May 2011.

<sup>165</sup> Articles 16 and 17(2) Dublin III Regulation.

<sup>166</sup> For example: In Decision D-5221/2016, 31 October 2018 and Decision D-5407/2018, 31 October 2018, the Federal Administrative Court the cases were referred back to the SEM in order to do a proper examination of a possible use of the sovereignty clause. The cases concerned families with a Dublin decision to Bulgaria, where they had been ill-treated and detained by the authorities.

between the removal order and the child's best interests sufficiently. The case was referred to the SEM, which will have to rule on the application of the sovereignty clause in relation to Article 8 ECHR.<sup>167</sup> In a leading case judgment, the Federal Administrative Court stated that asylum seekers in Dublin procedures can evoke Article 8 ECHR if they have family members with a temporary admission in Switzerland. The temporary admission status will then be taken into account as one of the factors when deciding on the balance of interests in the sense of Article 8 (2) ECHR.<sup>168</sup> This is a new development for Dublin constellations, as Swiss practice in other areas generally considers a "stable residence status" in Switzerland as a prerequisite for evoking Article 8 ECHR and thus for examining Article 8 (2) ECHR, a temporary admission usually not being considered stable enough (except in special individual circumstances).

Several complaints regarding victims of human trafficking were decided by the Federal Administrative Court. In the case of a woman from Ethiopia, who was a victim of human trafficking in Kuwait and whose asylum application was rejected by the SEM because of the responsibility of France, the Court stated that the complainant had not presented a concrete and serious risk that would lead to the conclusion that the French authorities would refuse to take her in and consider her application for international protection.<sup>169</sup> Nor did the court see any concrete evidence that the woman could become a victim of re-trafficking in France. The public prosecutor's office did not take on the criminal complaint filed in Switzerland. The court stated that it would be welcome if the SEM received assurances from the French authorities regarding access to the protection system for victims of human trafficking, as this could help to reduce understandable fears of the applicant from being transferred. In another case - also Dublin-France - the Federal Administrative Court upheld the complaint of a woman from Cameroon who was forced into prostitution in France. The Court found that the SEM had underestimated its discretion and, by using the inexact and empty phrase "in consideration of the file and the circumstances you have invoked, there are no grounds justifying the application of the sovereignty clause of Switzerland", it completely disregarded the fact that there were concrete indications that the vulnerability of potential victims of human trafficking in France could not always be adequately taken into account.<sup>170</sup>

In 2020, the SEM applied the sovereignty clause in 546 cases, compared to 859 cases in 2019 and 875 cases in 2018. In 2020, 441 cases concerned applications for which Greece would have been competent according to the Regulation, 43 Italy and 17 Croatia.<sup>171</sup>

These figures show that, like the family criteria, the humanitarian clause and the sovereignty clause are only rarely applied by Switzerland.<sup>172</sup> Despite continuous joint efforts by a large number of Swiss NGOs, united under the "Dublin Appell" coalition, the application of the humanitarian clause or the sovereignty clause to cases of vulnerable asylum seekers remains extremely restrictive.<sup>173</sup>

## 2.2. Procedure

### Indicators: Dublin: Procedure

1. On average, how long does a transfer take after the responsible Member State has accepted responsibility?<sup>174</sup>

|  |          |
|--|----------|
| ❖ Answer to negative Dublin decision   | 22 days  |
| ❖ Negative Dublin decision to transfer | 287 days |

<sup>167</sup> Federal Administrative Court, Decision E-4936/2017, 19 February 2018.

<sup>168</sup> Federal Administrative Court, Decision E-7092/2017, 25 January 2021.

<sup>169</sup> Federal Administrative Court, Decision D-1372/2018, 29 November 2018.

<sup>170</sup> Federal Administrative Court, Decision D-1874/2019, 29 April 2019.

<sup>171</sup> Data provided by SEM on 19 March 2021.

<sup>172</sup> In November 2017, the Swiss Refugee Council and a broad coalition of NGOs submitted to the Federal Council the "Dublin call" (*Appel de Dublin*). This call urges the authorities to handle the asylum applications lodged by vulnerable persons. For further information, see the website of the coalition available (in French) at: <http://bit.ly/2pFSRKW>.

<sup>173</sup> More information available (in German) at: <https://bit.ly/2UhwFQq>.

<sup>174</sup> Data provided by SEM on 19 March 2021.

According to Swiss law, the SEM has to transmit the fingerprints of applicants to the Central Unit of the Eurodac System within the framework of the Application of the Dublin Association Agreements.<sup>175</sup> The Federal Council has the possibility to provide exceptions for children under the age of 14.<sup>176</sup> In practice, all applicants over 14 years of age are systematically fingerprinted and checked in Eurodac after the registration of their application in Switzerland. This applies to all asylum procedures carried out in Switzerland, regardless of where an application is filed. The Dublin procedure is systematically applied in all cases where the data check or other indications suggest that another Dublin Member State is responsible for examining an asylum application.<sup>177</sup>

The Federal Administrative Court ruled that if a person fails to cooperate with fingerprinting, this can be considered as a severe violation of the duty to cooperate according to the Asylum Act. This is also the case if the asylum seeker wilfully destroys the skin of his or her fingertips. However, the SEM must clarify with an expert whether or not the modification of the fingertips was wilful or due to external influences.<sup>178</sup> Article 8(3-bis) of the Asylum Act states that persons who fail to cooperate without valid reason lose their right to have the proceedings continued. Their applications are cancelled without a formal decision being taken and no new application may be filed within three years; the foregoing is subject to compliance with the Refugee Convention of 28 July 1951. So far, such cases have not been reported in practice.

If another Dublin State is presumed responsible for the examination of the asylum application, the applicant concerned is granted the right to be heard.<sup>179</sup> This hearing can take place either orally or in writing<sup>180</sup> and provides the opportunity for the applicant to make a statement and to present reasons against a transfer to the responsible state. In practice, the right to be heard is mostly only granted once and is carried out orally. If a Eurodac hit is found or other evidence is available, the right to be heard is already granted during the first interview conducted by the SEM.

It seems problematic that the applicant is confronted with this question solely at this stage of the procedure, when the responsibility has not yet been fully established. At this point in time, the presumed responsible state has not yet received the request by the Swiss authorities to take charge or take back the applicant. This means that the right to be heard is granted at a moment when consultations between Member States in the Dublin procedure have not even started yet. This deprives the applicant of procedural rights as, according to the Court of Justice of the European Union (CJEU) in *MM*, the authorities are “to inform the applicant that they propose to reject his application and notify him of the arguments on which they intend to base their rejection, so as to enable him to make known his views in that regard.”<sup>181</sup> The right to be heard cannot effectively be exercised as long as the intended outcome of the Dublin procedure is not clear. According to the *MM* standard, the applicant should be able to provide his or her views in the light of an intended concrete decision: “The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely.”<sup>182</sup>

In principle, the applicant is entitled to access to the files relevant for the decision-making.<sup>183</sup> Access can only be refused if this would be contrary to essential public interest, essential private interests or interests of non-completed official investigations.<sup>184</sup> In general, access to the files is not granted automatically, but only upon explicit request. However, in case of an inadmissibility decision (and all Dublin transfer decisions are inadmissibility decisions), copies of the files are annexed to the decision if enforcement of the removal has been ordered.<sup>185</sup> The files should include information about the evidence on which the

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<sup>175</sup> Article 102a-bis AsylA.

<sup>176</sup> Article 99 AsylA.

<sup>177</sup> Article 21(2) AsylA.

<sup>178</sup> Federal Administrative Court, Decision BVGE 2011/27, 30 September 2011.

<sup>179</sup> Article 36(1) AsylA.

<sup>180</sup> Article 29(2) Constitution.

<sup>181</sup> CJEU, Case C-277/11 *MM*, Judgment of 22 November 2012, para 95.

<sup>182</sup> *Ibid*, para 87.

<sup>183</sup> Article 26 APA.

<sup>184</sup> Article 27 APA.

<sup>185</sup> Article 17(5) AsylA.

take back request was made and the reply of the concerned Member State. In case of Dublin transfer decisions, the SEM notifies the decision to the service provider tasked with providing legal representation, who shall inform the legal representative on the same day,<sup>186</sup> who will inform the person concerned.

According to art. 37 AsyIA, the notification of a Dublin decision should occur within three working days after the requested has agreed to take charge or take back the applicant. In 2020, this deadline was not respected mainly due to the pandemic, and notifications took place on average 16 days after the answer of the requested state.<sup>187</sup>

### Individualised guarantees

In a first national leading case judgment regarding the *Tarakhel* judgment,<sup>188</sup> the Swiss Federal Administrative Court specified that the individual guarantees are a substantive precondition for the legality of the Dublin transfer decision according to international law, and not only a transfer modality, as the SEM had repeatedly claimed. Therefore, the guarantees must be provided at the moment of the Dublin transfer decision by the first instance decision, so that the applicants can make a statement regarding those guarantees in their appeal to the Federal Administrative Court. If the guarantees are only given before the actual transfer (as had been the practice up to then), this is too late as at that stage there is no longer a legal remedy.<sup>189</sup> Since the *Tarakhel* judgement, the SEM needs to obtain individual guarantees before issuing Dublin decisions regarding families that shall be transferred to Italy. Right after this judgment, there have been several cases in which the Court sent the matter back to the determining authority because of insufficient guarantees.<sup>190</sup> However, in one case dating back to 2015, the Court stated that the Italian authorities had provided a sufficient guarantee by providing a list of the Protection System for Asylum Seekers and Refugees (SPRAR) projects in **Italy** in which a number of places had been reserved for families returned under Dublin, as well as by accepting that the applicants in the concrete case constituted a family, mentioning the ages of all family members.<sup>191</sup>

Following the amendments in Italian asylum legislation introduced since October 2018 through the so-called Salvini decree, asylum seekers were no longer entitled to live in SPRAR centres.<sup>192</sup> On 8 January 2019, a circular letter was sent from the Italian Dublin Unit to all Member States – replacing the circulars issued since 8 June 2015 – stating that families would no longer be placed in SPRAR centres but in first reception centres and emergency reception centres. The Federal Administrative Court ruled in a reference judgment that such guarantees were not specific enough, as families requiring transfer from Switzerland to Italy no longer had access to the second-line reception centres under the new legislation.<sup>193</sup> Due to the new legislation, in 2019 and 2020 Italian authorities have been required to submit even more specific guarantees concerning reception conditions in each individual case regarding families or seriously ill asylum seekers who will be reliant on seamless medical care from the moment they arrive in Italy.<sup>194</sup> In case of pregnant women, individual guarantees are needed depending on the stage of pregnancy and health situation.<sup>195</sup> In April 2020, Italian authorities provided a new list of accommodation centres that

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<sup>186</sup> Article 12a(2) AsyIA.

<sup>187</sup> Information provided by the SEM, 27 April 2021.

<sup>188</sup> The Court found a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights if the Swiss authorities were to send an Afghan couple and their six children back to Italy under the Dublin Regulation without having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.

<sup>189</sup> Federal Administrative Court, Decision BVGE 2015/4, E-6629/2014, 12 March 2015.

<sup>190</sup> For example, Federal Administrative Court, Decision E-936/2015, 21 April 2015 regarding a Nigerian woman who claimed to have been forced into prostitution in Italy, and who had asked for asylum in Switzerland with her two children; Decision E-3564/2014, 16 March 2015 regarding a single mother with her child.

<sup>191</sup> Federal Administrative Court, Decision D-4394/2015, 27 July 2015.

<sup>192</sup> Italian Law 132/1, 4 December 2018, converting Decree-Law 113/2018 into law.

<sup>193</sup> Federal Administrative Court, Decision E-962/2019, 17 December 2019.

<sup>194</sup> Federal Administrative Court Media release *Stricter criteria for Dublin transfers to Italy*, 17 January 2020, available at: <https://bit.ly/2SY3vbG>.

<sup>195</sup> Federal Administrative Court, Decision F-2939/2020 of 13.07.2020, in which the Court required individual guarantees for a pregnant woman with psychological problems; Decision D-1026/2020 of 4.03.2020, in which the Court stated that the woman was not under the category of vulnerable applicants for whom individual guarantees are needed since she was in an initial stage of pregnancy and was in good health.

were specific for families, but the Court stated that this was not sufficient individual guarantee within the meaning of *Tarakhel* case law.<sup>196</sup>

The *Tarakhel* jurisprudence was originally applied only in the case of families in the Dublin procedure and not for other categories of persons.<sup>197</sup> Until 2019, there had been only two exceptions in which the Court had asked for individual guarantees regarding reception conditions and access to medical treatment for mentally ill persons (not families) and regarding **Hungary** and **Slovenia** (not Italy).<sup>198</sup> In December 2019, taking into account the changes in the Italian legislation introduced by the Salvini Decree (Decree 132/2018), the Court extended the need to obtain individual guarantees from Italian authorities to the cases of applicants with serious health problems: such guarantees include both adequate accommodation and immediate access to medical care.<sup>199</sup> Following that jurisprudence, a number of cases were referred back to the SEM for further instruction with the requirement of obtaining individual guarantees from Italian authorities.<sup>200</sup> One of these cases concerned a pregnant woman considered vulnerable,<sup>201</sup> while another concerned a victim of trafficking.<sup>202</sup> The Court issued a similar decision in a Dublin case regarding Greece (as of 2020 only applying to persons with a Greek visa): in cases of seriously ill applicants, the SEM must obtain individual guarantees from Greek authorities concerning the immediate access to medical care after transfer.<sup>203</sup> The Court has also required from SEM obtaining individual guarantees in a case concerning a Dublin transfer to Spain.<sup>204</sup>

Whereas 36 families and single parents with children were transferred to **Italy** under the Dublin Regulation in 2017,<sup>205</sup> the number was 35 families and single-parent families in 2018 and only three families in 2019.<sup>206</sup> In 2020, no families were transferred to **Italy**, which is probably due in part to the travel restrictions related to the COVID-19 pandemic (in the whole year, only 176 asylum seekers were transferred to Italy altogether, compared to 610 in 2019).<sup>207</sup> The families, as all persons in a Dublin procedure, are not granted the right to be heard regarding the guarantees before the first instance decision.<sup>208</sup> The only moment they can make a statement regarding the guarantees is therefore if they appeal against the transfer decision.

So far it is not transparent how the individual guarantees for families – as well as vulnerable and ill applicants – will actually be implemented after a transfer. In order to document the proceedings in individual cases, in 2016 the Swiss Refugee Council and the Danish Refugee Council started a joint monitoring project (Dublin Returnees Monitoring Project, DRMP)<sup>209</sup> to follow up on what happens to individual families and vulnerable persons after their transfer to Italy. The first report focused on families and single parents and showed that the treatment the monitored families received upon arrival in Italy

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<sup>196</sup> Federal Administrative Court, Decision F-4872/2020 of 5 November 2020, c. 4.4.

<sup>197</sup> Confirmed by the Federal Administrative Court, leading case Decision D-2177/2015, 11 December 2017: Sri Lankan applicant with medical problems. However, in the individual case the Court ordered that the sovereignty clause must be applied due to the length of the procedure.

<sup>198</sup> Federal Administrative Court, Decision D-2677/2015, 25 August 2015 regarding **Slovenia** and a mentally ill person who needs special trauma treatment. *Tarakhel* was not directly mentioned in the decision, but the Court states the need for guarantees. Regarding Hungary and a traumatised man: Federal Administrative Court, Decision D-6089/2014, 10 November 2014.

<sup>199</sup> Federal Administrative Court, Reference Decision E-962/2019 of 17 December 2019, c. 7.4.3.

<sup>200</sup> Federal Administrative Court, Decisions D-4067/2019 of 14 January 2020, D-1869/2019 of 22 January 2020, D-552/2020 of 5 February 2020, E-6810/2016 of 11 March 2020, F-2751/2019 of 17 March 2020, D-5952/2020 of 4 December 2020.

<sup>201</sup> Federal Administrative Court, Decision F-2393/2020 of 13 July 2020. However, pregnant women do not automatically fall under vulnerable applicants according to the Court, see Decisions Decisions E-406/2015 of 2 April 2015, D-4978/2016 of 6 September 2016 and E-1026/2020 of 4 March 2020. In one case, the Court also stated that the unborn child cannot rely on the Convention on the Rights of the Child, Decision E-406/2015 of 2 April 2015.

<sup>202</sup> Federal Administrative Court, Decision E-543/2020 of 16 March 2020.

<sup>203</sup> Federal Administrative Court, Decision F-1850/2020 of 6 March 2020, c. 4.2.

<sup>204</sup> Federal Administrative Court, Decision E-3259/2019 of 8 October 2019, c. 6.7.

<sup>205</sup> Information provided by the SEM, 18 January 2018.

<sup>206</sup> Information provided by the SEM, 12 February 2020.

<sup>207</sup> Information provided by the SEM, 19 March 2021; Statistics available on SEM's Website.

<sup>208</sup> Information provided by the SEM, 9 September 2015.

<sup>209</sup> Further information to be found on the website of the Swiss Refugee Council: <https://bit.ly/3a3gf9x>.

varied greatly.<sup>210</sup> In some cases, the transferred families could only be accommodated after a certain period of time and after the intervention of third parties. There seemed to be arbitrary or at least unpredictable practice as to which kind of assistance the returned families would get from the Italian authorities. Furthermore, the quality of the accommodation provided varied considerably. The cases show that the relevant regional authorities and/or responsible persons of the reception facility were not always informed in advance of the medical condition and special needs of the applicants. Therefore, it cannot be guaranteed that families returned to Italy will be accommodated in line with the preconditions set out in *Tarakhel*.

The DRMP demonstrated that reception conditions in Italy deteriorated further in 2018. In the third quarter of 2018, two cases of families transferred under the Dublin Regulation from other Member States were already placed in the first reception centre of **Mineo**, which has a reputation for its worrying living conditions.

The DRMP will continue to document the situation of Dublin returnees in Italy without participation of the Danish Refugee Council at least until the end of 2021, focusing on the effects of the legislative changes for persons returned to Italy under the Dublin Regulation.

On 11 February 2020, the Federal Administrative Court has made a reference judgement on the question of systemic deficiencies in **Bulgaria**.<sup>211</sup> Although the Court itself explained in a very detailed manner the problems in the Bulgarian asylum system, it concluded that there are no systemic flaws in the asylum procedure and reception conditions in Bulgaria which would justify a complete suspension of transfers to that country. A case-by-case examination will be required to determine whether or not the transfer to that country of a particular asylum seeker should be suspended. The court also mentioned the possibility to request individual guarantees from the Bulgarian authorities.

According to the SEM, in 2020 it took on average 22 days to issue a Dublin decision after the receipt of a positive answer from the requested Member State.<sup>212</sup> According to the same source, on average another 287 days passed between the Dublin transfer decision and the actual transfer. Surprisingly, this average has not increased in 2020 due to COVID-19 (it was 335 days in 2019). One reason for this long delay could be the prolongation of the transfer deadline in case of a suspension of the execution because of an appeal. The transfer could then be further delayed if the Federal Administrative Court sent the case back to the SEM for additional clarifications and a new decision, which in turn can be appealed again.

According to the Foreign Nationals and Integration Act, an applicant may already be detained during the preparation of the decision on residence status under certain circumstances. Applicants within a Dublin procedure may be detained if there are specific indications that the person intends to evade removal. The Federal Administrative Court as well as the Federal Supreme Court have defined some important basic rules for detention in Dublin cases (see section on [Grounds for Detention: Dublin Procedure](#)). The use of detention differs between cantons. In 2020, a total of 700 persons were placed in detention for the purpose of the Dublin III Regulation.<sup>213</sup> 430 Dublin transfers took place from detention.<sup>214</sup>

As the Dublin III Regulation is directly applied in Switzerland, voluntary transfers should in principle be possible,<sup>215</sup> however they always take place under control of the authorities. In 2020, 86 voluntary transfers took place. By way of comparison, for both test centres of **Zurich** and **Boudry**, this figure

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<sup>210</sup> Danish Refugee Council and Swiss Refugee Council, *Is mutual trust enough? The situation of persons with special reception needs upon return to Italy*, 9 February 2017, available at: <http://bit.ly/2l2Wd7m>; the second report from the Danish Refugee Council and the Swiss Refugee Council, *Mutual trust is still not enough. The situation of persons with special reception needs transferred to Italy under the Dublin III Regulation*, was published on 12 December 2018, available at: <https://bit.ly/2QMvonZ>.

<sup>211</sup> Federal Administrative Court, Decision F-7195/2018, 11 February 2020.

<sup>212</sup> Information provided by the SEM, 19 March 2021.

<sup>213</sup> Information provided by the SEM, 19 March 2021.

<sup>214</sup> Information provided by the SEM, 21 April 2021 and 11 May 2021.

<sup>215</sup> Article 29 Dublin III Regulation.

reached 65 in 2018.<sup>216</sup> Since the leading decision of the Federal Administrative Court of 2 February 2010, the transfer can no longer be enforced immediately after the notification of the decision, even if appeals against Dublin transfer decisions have no suspensive effect. A time limit of five days must be granted, allowing the applicant concerned to leave Switzerland or to make an appeal and to ask for suspensive effect.<sup>217</sup> This case law has since been codified in the Asylum Act.<sup>218</sup> As a result, there are at least ten working days between the date of the opening of the Dublin decision and the enforcement of the removal. In a decision to strike out the application from the list of cases, the ECtHR considered the access to an effective remedy in Dublin cases in Switzerland sufficient.<sup>219</sup> This decision was problematic because the ECtHR based it on a wrong interpretation of Swiss law: it cited the provision in the Asylum Act that relates to non-Dublin-cases, in which the asylum seeker can stay on Swiss territory until the end of the proceedings. On the contrary, in Dublin cases this is precisely not the case, as there is no automatic suspensive effect.

### Enforcement of transfers during the COVID-19 pandemic

Dublin transfers were not officially suspended in Switzerland due to the pandemic and related travel restrictions, however in practice transfers to most countries were not possible during spring 2020 and partly during the rest of the year. Only 4 transfers took place in April, exclusively to Germany, and 3 in May (2 to Germany, 1 to Belgium). In May, the number of transfers enforced was 43 (24 to France, 15 to Germany, 2 to Italy, 2 to Belgium), and it increased in the following months.

In 254 cases, the 6 months deadline to carry out the Dublin transfer expired and the responsibility for carrying out the transfer shifted back to Switzerland. In 1,354 cases, the deadline for enforcing the transfer was extended (to up to 18 months) according to Article 29 of the Dublin III Regulation. This can happen in case the applicant has absconded, if they have been incarcerated for penal reasons, or if an appeal was lodged and the suspensive effect was granted.<sup>220</sup> In some cases, it has been reported that the SEM extended the deadline with the argument that the applicant had absconded although they had only be absent from the centre for one or a few days.

The ratio of outgoing Dublin transfers was particularly low due to travel restrictions related to the pandemic. It was 23% in 2020 (941 transfers out of 4,057 requests, of which 2,567 accepted). For comparison, it was 36% in 2019 and 25.8% in 2018.<sup>221</sup> Less than one fourth of requests made by Switzerland resulted in actual transfers.

### 2.3. Personal interview

#### Indicators: Dublin: Personal Interview

Same as regular procedure

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the Dublin procedure?  Yes  No  
 ❖ If so, are interpreters available in practice, for interviews?  Yes  No
2. Are interviews conducted through video conferencing?  Frequently  Rarely  Never

The SEM carries out the whole first instance procedure and is also responsible for conducting the interviews with the applicants during the asylum procedure, including the Dublin procedure.

<sup>216</sup> Information provided by the SEM, 22 February 2019. In 2020, the SEM informed us that there had not been any voluntary transfer, which was probably incorrect and rather related to a lack of data.

<sup>217</sup> Federal Administrative Court, Decision E-5841/2009, 2 February 2010.

<sup>218</sup> Article 107a AsyIA.

<sup>219</sup> ECtHR, *M.G. and E.T. v. Switzerland*, Application No 26456/14, Decision of 17 November 2016.

<sup>220</sup> Data provided by the SEM, 19 March 2021 and 11 May 2021.

<sup>221</sup> SEM, *Asylum Statistics 2018; Asylum Statistics 2019*.

During the preparatory phase, the applicant undergoes a short preliminary interview (see section on [Personal interview](#)) focusing mainly on the identity and the journey to Switzerland. The SEM is allowed to ask summarily on the reasons for seeking asylum but it rarely does it during the Dublin interview.<sup>222</sup> The interview is conducted in the presence of the applicant's legal representative and is usually translated over the phone by an interpreter if necessary.<sup>223</sup> The interview is recorded in writing in the form of a summary indicating the duration of the interview and is retranslated before being signed by the applicant and his/her legal representative. In 2020, the SEM conducted 736 Dublin interviews which lasted 1 hour on average.<sup>224</sup>

The health emergency due to the COVID pandemic has slightly modified the conditions of interview (see section on [Regular Procedure: Personal Interview](#)).

If the SEM intends to take a Dublin transfer decision (inadmissibility decision), the applicant is granted the right to be heard at the end of the personal interview,<sup>225</sup> and he or she does not get a second interview regarding the grounds for asylum. The omission of the second interview in cases of Dublin and other inadmissibility decisions constitutes the fundamental difference between the personal interview within the Dublin procedure and the personal interviews within the regular asylum procedure (accelerated and expanded) where the application is examined in substance (see section on [Regular Procedure: Personal Interview](#)).

## 2.4. Appeal

### Indicators: Dublin: Appeal

Same as regular procedure

1. Does the law provide for an appeal against the decision in the Dublin procedure?

❖ If yes, is it

❖ If yes, is it suspensive

Yes

Judicial

Yes

No

Administrative

No

In case of a Dublin transfer decision (inadmissibility decision), an appeal can be submitted – as in all the other cases – to the Federal Administrative Court. The time limit to lodge an appeal against a Dublin transfer decision is five working days.<sup>226</sup> No extension of such deadline is foreseen by the Ordinance COVID-19 Asylum.

Contrary to other asylum appeals, appeals against Dublin transfer decisions (inadmissibility decisions) do not have automatic suspensive effect. However, as mentioned in [Dublin: Procedure](#), transfers cannot be enforced immediately after the notification of the decision. A delay of five working days must be granted.<sup>227</sup> This allows the concerned applicant to make an appeal and to request that the execution of the appealed decision be suspended. The Court has to decide on the suspensive effect within another five working days.<sup>228</sup>

In the appeal procedure (applies also to the Dublin procedure), the Federal Administrative Court has the possibility to order a hearing if the facts are not clear enough.<sup>229</sup> In practice, it does not make use of this possibility.

To a certain extent, the Court takes into account the reception conditions and the procedural guarantees in the responsible Member States. This is reflected in different leading case decisions as well as other

<sup>222</sup> Article 26(3) AsyIA.

<sup>223</sup> Article 19(2) AO1.

<sup>224</sup> Data provided by the SEM, 19 March 2021 and 27 April 2021.

<sup>225</sup> Article 36 AsyIA.

<sup>226</sup> Article 108(3) AsyIA.

<sup>227</sup> Article 107a(2) AsyIA; Federal Administrative Court, Decision E-5841/2009, 2 February 2010.

<sup>228</sup> Article 107a AsyIA.

<sup>229</sup> Article 14 APA.

decisions of the Court, notably concerning Dublin Member States such as **Greece, Hungary, Italy, Croatia or Bulgaria** (see [Dublin: Suspension of Transfers](#)).

However, the Court can only examine errors of law, not whether or not the decision of the determining authority was “appropriate” (see section on [Regular Procedure: Appeal](#)). This limitation is very relevant in the Dublin procedure. Many Dublin cases do not fall under the compulsory criteria of the Dublin III Regulation or under Articles 3 or 8 ECHR. Therefore, especially in cases regarding family ties that fall outside those strict definitions, the interpretation of humanitarian reasons for which Switzerland can apply the sovereignty clause becomes crucial.

The Court stated that it is a question of “appropriateness” where the SEM has a margin of appreciation, whether there are humanitarian reasons for applying the sovereignty clause. As long as SEM decides within this margin, the Court cannot examine whether the decision was appropriate. For example, in one case an Afghan mother and her minor son travelled to Switzerland via Bulgaria. The older son/brother lives in Switzerland based on a temporary admission. Because the brother with protection status in Switzerland was already an adult, the SEM decided to send the mother and younger brother back to Bulgaria, despite the fact that the applicants claimed that the younger brother needed the support of his older brother. The Court confirmed this decision: it admitted that the criteria according to which the SEM had examined the humanitarian reasons were strict, however, they were objective and clear. Therefore, the Court could not examine the decision by the SEM.<sup>230</sup> However, the SEM has to examine and motivate the use of the sovereignty clause.

Nevertheless, the Federal Administrative Court confirmed in a leading case decision of 21 December 2017 that the asylum seeker can rely on the correct application of the Dublin responsibility criteria, as an individual right, in line with the CJEU jurisprudence in *Ghezelbash and Mengesteab*.<sup>231</sup>

## 2.5. Legal assistance

### Indicators: Dublin: Legal Assistance

Same as regular procedure

1. Do asylum seekers have access to free legal assistance at first instance in practice?<sup>232</sup>
  - Yes  With difficulty  No
  - ❖ Does free legal assistance cover:
    - Representation in interview
    - Legal advice
2. Do asylum seekers have access to free legal assistance on appeal against a Dublin decision in practice?
  - Yes  With difficulty  No
  - ❖ Does free legal assistance cover
    - Representation in courts
    - Legal advice

Free legal assistance is ensured at first instance since the entry into force of the new asylum procedure in March 2019.<sup>233</sup> Therefore, in the Dublin procedure just as in the regular procedure, state-funded free legal assistance is guaranteed to all applicants.

With the introduction of the new asylum procedure, access to legal assistance should have theoretically been facilitated for persons who ask for asylum in detention or prison. However, despite case law from the Federal Administrative Court saying that legal representation must be guaranteed in those cases, the SEM still does not systematically provide representation. For further information, see the general chapter on [Legal assistance](#) in the regular procedure.

<sup>230</sup> Federal Administrative Court, Decision D-3794/2014, 17 April 2015.

<sup>231</sup> Federal Administrative Court, Decision E-1998/2016, 21 December 2017.

<sup>232</sup> With the new Swiss asylum procedure starting 1 March 2019, the free legal assistance will be provided at first instance for every asylum seeker.

<sup>233</sup> Article 102f AsylA.

The relatively short time limit of five working days for lodging an appeal against a Dublin transfer decision constitutes a real obstacle to appealing, especially under the circumstances relating to the COVID-19 pandemic. This is even more problematic in cases where the mandated legal assistance decides not to appeal as it considers that lodging an appeal would be doomed to fail. In those cases, applicants could theoretically approach a non-state-funded entity for legal advice to ask for support. However, this is very difficult due to the remote locations of federal centres, given that most independent legal advisory offices are situated in urban areas. Access to such offices was also restricted this year for reasons related to COVID-19, which constituted a further obstacle to appealing.

## 2.6. Suspension of transfers

### Indicators: Dublin: Suspension of Transfers

1. Are Dublin transfers systematically suspended as a matter of policy or jurisprudence to one or more countries?  Yes  No
- ❖ If yes, to which country or countries?

In general, if transfers to other Dublin Member States are suspended, it is because of the application of the sovereignty or the humanitarian clause. The asylum application of the person concerned is then materially examined in Switzerland.

**Greece:** In November 2017, the SEM announced a reinstatement of Dublin procedures for cases in which the person was in possession of a Greek visa. This does not apply to vulnerable persons.<sup>234</sup> This means that in most of the cases Switzerland still relinquishes transfers to Greece and applies the sovereignty clause.

On the other hand, if the person already has a protection status in Greece (and therefore does not fall under the Dublin Regulation, but under the safe third country clause), the Swiss authorities are generally of the opinion that the person can be transferred there. For this purpose, a bilateral readmission agreement is used. This has also been the case with vulnerable persons.<sup>235</sup> For example, the Federal Administrative Court even confirmed the transfer of a psychologically fragile mother with four daughters (one of which was suicidal) who fled Greece because of the violent husband/father.<sup>236</sup> Only in a few cases, the Court asked the SEM to further clarify the situation of the individual applicant after return to Greece, in order to examine whether the transfer decision should be upheld.<sup>237</sup> The recent changes in Greek legislation, which have further worsened the conditions for beneficiaries of international protection in Greece, have not led to a major change of practice of the Court, that remains extremely restrictive.<sup>238</sup> However, the assessment of the medical situation of applicants has become particularly important due to difficulties in accessing health care in Greece, so that the Court has cancelled some decisions, requiring from SEM to provide a further medical instruction.<sup>239</sup>

According to SEM statistics, no transfer took place to Greece under Dublin and 21 persons were transferred under the readmission agreement in 2020, compared to 3 persons transferred under Dublin and 21 under the readmission agreement in 2019.<sup>240</sup> The agreement applies to persons having received international protection in Greece. The SEM applied the sovereignty clause in 441 cases.<sup>241</sup>

<sup>234</sup> Federal Administrative Court, Decision F-1850/2020 of 6.05.2020, c. 4.2.

<sup>235</sup> Despite worrying documentations of the situation after the return of persons with status in Greece, e.g. Refugee Support Aegean and Pro Asyl, *Case study: Returned recognized refugees face a dead-end in Greece*, 4 January 2019, available at: <https://bit.ly/2QrdIKw>.

<sup>236</sup> Federal Administrative Court, Decision D-206/2016, 10 February 2016.

<sup>237</sup> Federal Administrative Court, Decisions E-6347/2014, 20 November 2014 and E-1192/2014, 17 March 2014.

<sup>238</sup> Federal Administrative Court, Decision D-559/2020 of 13.02.2020, considered by the Court a "reference decision" according to which removal of beneficiaries of protection to Greece is generally lawful.

<sup>239</sup> Federal Administrative Court, Decisions D-705/2020 of 22.02.2020, D-2041/2020 of 28.04.2020, D-2676/2019 of 19.08.2020.

<sup>240</sup> SEM, *Asylum Statistics 2020; Asylum Statistics 2019*.

<sup>241</sup> Data provided by the SEM, 19 March 2021.

**Hungary:** In May 2017 the Federal Administrative Court issued a reference judgment in which it summarised the latest developments in the Hungarian asylum system and the effects on Dublin returnees.<sup>242</sup> The Court highlighted the responsibility of the SEM to gather all elements necessary for the assessment and that it was not the responsibility of the appeal authority to carry out complex supplementary investigations. Otherwise, the Federal Administrative Court would overstep its jurisdiction with a decision on the merits of the matter and deprive the party concerned of the legal right of appeal. Therefore, the Court annulled the contested decision and referred it back to the SEM for a full determination of the facts and a new decision, which resulted in the initiation of the national procedure in all cases known to OSAR.

According to SEM statistics, there was no transfer to Hungary under Dublin in 2020, similarly to 2019 and 2018. On the other hand, in 2020 there were 4 transfers under the bilateral readmission agreement between Switzerland and Hungary.<sup>243</sup> The agreement applies to persons having received international protection in Hungary.

**Italy:**<sup>244</sup> Overall in many cases the Swiss practice regarding Italy is still strict and the judges still state that there are no systemic deficiencies. The sovereignty clause is only applied in cases of very vulnerable persons, or in case of a combination of different special circumstances. Following the change of government in Italy in 2018 and the legislative changes introduced by Salvini, the reception conditions for asylum seekers have significantly worsened. The Federal Administrative Court first did not see a ground for a change of its constant jurisprudence,<sup>245</sup> but there were an increasing number of judgements in the second half of 2019 which sent the case back to the SEM in order to clarify the situation. The Federal Administrative Court saw at least concerns regarding adequate reception conditions and access to health care in Italy. Regarding families and seriously ill persons, the Federal Administrative Court ruled in a reference judgment that the guarantees provided by the Italian authorities in January 2019 were not specific enough, as families requiring transfer from Switzerland to Italy no longer had access to the second-line reception centres under the new legislation.<sup>246</sup> Since that reference judgement, Italian authorities have been required to provide even more specific guarantees concerning reception conditions in each individual case. Furthermore, they are now obliged to obtain individual assurances guaranteeing the requisite medical care and accommodation for seriously ill asylum seekers who will be reliant on seamless medical care from the moment they arrive in Italy (see section on Individual guarantees above).

In January 2020, the Swiss Refugee Council has published a report on the reception conditions in Italy, focusing on the situation of Dublin returnees in Italy. It showed that the legislative changes had led many obstacles in accessing adequate accommodation and health care.<sup>247</sup> Throughout 2020, the Federal Administrative Court has cancelled a significant number of Dublin decisions because the SEM had not sufficiently clarified the health situation of the applicant or the question of access to health care and adequate accommodation in Italy, or it had not obtained sufficient individual guarantees.<sup>248</sup> A list of accommodation for families issued by Italian authorities in April 2020 was also considered by the Court as providing insufficient individual guarantees.<sup>249</sup> Since the entry into force of a new decree on 22 October 2020 (Decree 132/2020, transformed into law in December 2020), asylum seekers can in theory be accommodated in SPRAR centres (now called SAI) again if there are enough places at disposal. The impact of these changes on Swiss case law is still unclear.

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<sup>242</sup> Federal Administrative Court, Decision D-7853/2015, 31 May 2017.

<sup>243</sup> SEM, *Asylum Statistics 2020; Asylum Statistics 2019*.

<sup>244</sup> Regarding reception conditions in Italy for Dublin Returnees and persons with international protection status please see: Swiss Refugee Council OSAR, *Reception conditions in Italy – Updated report on the situation of asylum seekers and beneficiaries of protection, in particular Dublin returnees, in Italy*, January 2020, available at: <https://bit.ly/2SARryi>.

<sup>245</sup> Federal Administrative Court, Decision E-6313/2018, 29 November 2018.

<sup>246</sup> Federal Administrative Court, Decision E-962/2019, 17 December 2019.

<sup>247</sup> Swiss Refugee Council, "Reception conditions in Italy: Updated report on the situation of asylum seekers and beneficiaries of protection, in particular Dublin returnees, in Italy". January 2020. Accessible (in English) at: <https://bit.ly/2Mwz4cY>.

<sup>248</sup> See for example: Federal Administrative Court, Decision F-2751/2019, 17 March 2020; Decision D-4067/2019, 14 January 2021; D-1869/2019, 22 January 2020, D-552/2020 of 5 February 2020, E-6810/2016 of 11 March 2020; D-5952/2020 of 4 December 2020.

<sup>249</sup> Federal Administrative Court, Decision F-4872/2020, 5 November 2020, c. 4.4.

The Swiss Refugee Council will continue to document transfers to Italy in 2021 within the framework of the Dublin Returnee Monitoring Project (DRMP).<sup>250</sup> Individual cases can be reported or referred to it.

**Bulgaria:** Dublin decisions are generally issued in cases concerning Bulgaria, even in the case of families and vulnerable persons.<sup>251</sup> In a decision from September 2017,<sup>252</sup> the Court implied doubts about the procedure leading up to the rejection of the applicant's claim in Bulgaria. After an earlier asylum application was rejected by Germany, the applicant was deported by Germany to his country of origin Morocco in 2013 and tortured there for three and a half months. Subsequently he applied for asylum in Bulgaria, where he received another negative decision. Before his removal to Morocco, he moved on to Switzerland, where he applied for asylum. Neither the SEM nor the Court had access to the negative decision from the Bulgarian authorities, when assessing his asylum application under the Dublin procedure. The Court stated:

"It is therefore not possible to ascertain whether and to what extent the Bulgarian authorities have examined the complainant's allegations of torture, which are an important indication of a concrete and serious danger of renewed torture, and to what extent they have reached this conclusion. The contrary assertion of the lower instance must be qualified as a mere guesswork prior to this situation. The Federal Administrative Court considers the complainant's allegations that he has been tortured in his home country to be credible in the current file situation and regards it as an important indication that he is likely to face the concrete and serious danger of renewed torture on his return to Morocco. It cannot therefore be ruled out that, in the case of a transfer of the complainant to Bulgaria, Switzerland may be in danger of breaching the principle of non-refoulement, which is why it is advisable that Switzerland starts the national asylum procedure. A transfer to Bulgaria is not permitted."<sup>253</sup>

In 2018, the Court stated it cannot ignore the number of observer reports denouncing the persistence of serious problems in Bulgaria and that requests from nationals of certain nationalities are "almost systematically" considered unfounded (e.g. nationals of Algeria, Bangladesh, Pakistan, Sri Lanka, Turkey and Ukraine with a 0% acceptance rate). Afghan nationals are subject to a similar approach with an acceptance rate of 1.5% and there are doubts as to whether the claimant has been heard on his or her asylum grounds and travel itinerary.<sup>254</sup> In another judgement the Federal Administrative Court stated that although there were no structural deficiencies, the reception conditions in Bulgaria (and in particular the livelihood, access to the health system, excessive use of force, detention and refusal) were poor and that the transfer of vulnerable asylum seekers could be problematic (and therefore a reason for applying the sovereignty clause).<sup>255</sup> In 2020, the outcome of the judgements regarding Bulgaria were mixed, but no transfer was carried out (compared to one transfer in 2019).<sup>256</sup>

On 11 February 2020 the Court issued a reference judgement on the question of systemic deficiencies in Bulgaria.<sup>257</sup> Although the Court itself explained in a very detailed manner the problems in the Bulgarian asylum system, it concluded that there were no systemic flaws in the asylum procedure and reception conditions in Bulgaria which would justify a complete suspension of transfers to that country. A case-by-case examination will be required to determine whether or not the transfer to that country of a particular asylum seeker should be suspended. The court also mentioned the possibility to request individual guarantees from the Bulgarian authorities. In April 2020, the Court ruled, in a case concerning a family,

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<sup>250</sup> Further information to be found on the website of the Swiss Refugee Council, available at: <https://bit.ly/323tHWy>.

<sup>251</sup> For example, in the case of a man who claimed to have been detained and mistreated in Bulgaria, with diabetes and psychological problems: Federal Administrative Court, Decision E-521/2016, 13 June 2016.

<sup>252</sup> Federal Administrative Court, Decision E-305/2017, 5 September 2017.

<sup>253</sup> *Ibid*, para E.2.

<sup>254</sup> Federal Administrative Court, Decision E-3356/2018, 6 May 2018.

<sup>255</sup> Federal Administrative Court, Decision D-6725/2015, 4 June 2018.

<sup>256</sup> SEM, *Asylum Statistics 2020; Asylum Statistics 2019*.

<sup>257</sup> Federal Administrative Court, Decision F-7195/2018, 11 February 2020.

that the SEM had not sufficiently examined the reception conditions in Bulgaria and would need to require individual guarantees of adequate accommodation for the family.<sup>258</sup>

**Malta:** According to its own manual,<sup>259</sup> the SEM does not transfer vulnerable asylum seekers to Malta if they are facing detention. No transfers took place to Malta under the Dublin Regulation in 2020, while two persons were transferred in 2019.<sup>260</sup>

**Croatia:** In a reference judgment of July 2019, the Federal Administrative Court commented on the problem of push-backs of asylum seekers to the Croatian-Bosnian border and stated that the SEM is obliged to examine the existence of systemic deficiencies and to take the general situation in Croatia as well as the individual claims of the applicant into account.<sup>261</sup> Following this, the outcome of the judgements were mixed, some have been sent back to the SEM for further clarifications regarding health care for single men, some others regarding families with health issues were rejected. The Court generally considers the argument of push-backs relevant in cases of 'take charge' where the Dublin returnee would still need to file an asylum application.<sup>262</sup> In cases of 'take back', where persons have already applied for asylum in Croatia, it is generally assumed that they will not be in danger of being object of push-backs.<sup>263</sup> Four persons have been transferred to Croatia under Dublin in 2020, while 14 transfers had taken place in 2019.<sup>264</sup>

## 2.7. The situation of Dublin returnees

Dublin transfers to Switzerland are mainly enforced by air to the airports of Zurich, Geneva and Basel, but they can also take place by land from neighbouring countries.

Dublin returnees are received by the police at the airport or the border post. If the person has been transferred according to a 'take back' request, meaning that they have already applied for asylum in Switzerland in the past, they will have to report to the migration authorities of the canton to which they had been attributed (if such attribution had already taken place), regardless of the state of the procedure. The procedure will then be resumed, if there has not yet been a negative decision on the merits. If the person is transferred according to a 'take charge' request, meaning that they do not have applied for asylum in Switzerland before, they have to report to the federal asylum centre which the police indicates to them. The police give the person a public transport ticket to facilitate the journey to the cantonal migration office or the federal asylum centre. If the person has health problems that require the organisation of a transfer, either the canton or the federal asylum centre will organise the transfer from the airport or border post.<sup>265</sup>

No obstacles for applicants transferred back to Switzerland under Dublin have been observed.

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<sup>258</sup> Federal Administrative Court, Decision D-5126/2018, 15 April 2020.

<sup>259</sup> Manuel Asile et retour, C3 Procédure Dublin, available (in French) at: <https://bit.ly/37ApcEc>.

<sup>260</sup> SEM, *Asylum Statistics 2019*.

<sup>261</sup> Federal Administrative Court, Decision E-3078/2019, 12 July 2019. The Court cancelled the SEM's decision of transfer a second time for the same asylum applicant with the judgement E-4211/2019 of 9.12.2019. In another case ((F-661/2020 of 7.02.2020), the Court argued in a very similar way that SEM had not sufficiently taken into account the already well-documented push-back problems and systemic deficiencies of the asylum procedures in Croatia. The case was also transferred back to the SEM for further instruction.

<sup>262</sup> Federal Administrative Court, Decision F-661/2020 of 7.02.2020, in which the Court argued similarly to the reference judgement that SEM had not sufficiently taken into account the already well-documented push-back problems and systemic deficiencies of the asylum procedures in Croatia. See also E-5830/2019 of 30 December 2019, E-4211/2019 of 9 December 2019, F-48/2021 of 8 January 2021.

<sup>263</sup> Federal Administrative Court, Decisions F-4204/2020 of 2 September 2020, E-5910/2020 of 10 December 2020, D-540/2020 of 3 March 2020.

<sup>264</sup> SEM, *Asylum Statistics 2020*; *Asylum Statistics 2019*.

<sup>265</sup> Information on the procedure for Dublin returnees has been provided by the SEM on 27 April 2021.

### 3. Admissibility procedure

#### 3.1. General (scope, criteria, time limits)

In Switzerland, all asylum seekers have to undergo the admissibility procedure. This procedure should take place in the first 3 weeks after the application for asylum has been filed, and is called the “preparatory phase”.<sup>266</sup> Within this time, the SEM records the asylum seekers’ personal details and normally takes their fingerprints and photographs. It may collect additional biometric data, prepare reports on a person’s age, verify evidence and travel and identity documents and make enquiries specific to origin and identity. At this time, the asylum seekers will normally be interviewed by the SEM about their identity and their itinerary, and summarily about the reasons for leaving their country. On the basis of the gathered information, the SEM reaches the decision on admissibility, which aims to determine whether the decision should be examined on the merits or deemed inadmissible.

The reasons for rejecting an asylum application as inadmissible are similar, but not identical to the ones mentioned in Article 33 of the recast Asylum Procedures Directive, and can be found in Article 31a(1)-(3) AsyLA.

An application is inadmissible where the asylum seeker:

- (a) Can return to a [Safe Third Country](#) in which he or she has previously resided;
- (b) Can be transferred to the responsible country [under the Dublin Association Agreement];
- (c) Can return to a third country in which he or she has previously resided;
- (d) Can travel to a third country for which he or she has a visa and where he or she may seek protection;
- (e) Can travel to a third country where he or she has family or persons with whom he or she has close links; or
- (f) Has applied solely for economic or medical reasons. In this case, normally a second interview will take place before the SEM takes the decision to dismiss the application.<sup>267</sup>

The grounds relating to countries not listed as “safe third countries” in the Swiss list (see [Safe Third Country](#)) do not apply if there are indications that there is no effective protection against *refoulement* in the individual case.<sup>268</sup>

Decisions to dismiss an application must normally be made within three working days of the application being filed or after the Dublin state concerned has agreed to the transfer request.<sup>269</sup> In practice, these time limits are rarely respected.

The SEM delivered the following inadmissibility decisions from 2017 to 2020:

| Inadmissibility decisions: 2017-2020  |              |              |              |              |
|---|--------------|--------------|--------------|--------------|
| Ground for inadmissibility  | 2017         | 2018         | 2019         | 2020         |
| Safe third country: Article 31a(1)(a)   | 184          | 255          | 303          | 248          |
| Responsibility of another Dublin State: Article 31a(1)(b)                             | 5,838        | 4,185        | 2,720        | 2,103        |
| Country where the applicant has previously resided: Article 31a(1)(c)                 | 10           | 2            | 3            | 4            |
| Country where the applicant has family or persons with close links: Article 31a(1)(e) | 1            | 2            | 8            | 7            |
| Application made exclusively for economic or medical reasons: Article 31a(3)          | 120          | 258          | 221          | 156          |
| Subsequent application: Article 111c(1)   | 28           | 21           | 27           | 6            |
| <b>Total</b>  | <b>6,211</b> | <b>4,723</b> | <b>3,282</b> | <b>2,622</b> |

Source: SEM, 18 January 2018; 21 January 2019; 12 February 2020; 19 March 2021.

<sup>266</sup> Article 26 AsyLA.

<sup>267</sup> Article 36(2) AsyLA.

<sup>268</sup> Article 31a(2) AsyLA.

<sup>269</sup> Article 37 AsyLA.

### 3.2. Personal interview

#### Indicators: Admissibility Procedure: Personal Interview

Same as regular procedure

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the admissibility procedure?  
 Yes  No
  - ❖ If so, are questions limited to identity, nationality, travel route?  Yes  No
  - ❖ If so, are interpreters available in practice, for interviews?  Yes  No
2. Are interviews conducted through video conferencing?  Frequently  Rarely  Never

Every asylum seeker will be granted a first personal interview (which is in fact called Dublin Interview – see [Personal interview](#)) with questions about his or her identity and the itinerary. No personal interview is conducted with accompanied children under 12 years of age.<sup>270</sup> This practice might change in 2021 due to a decision of the Committee on the Rights of the Child stating that even children of young age must be heard in asylum procedures<sup>271</sup> (see section on minors in [Adequate support during the interview and credibility assessment](#)). In the case of unaccompanied minors, there is no so-called Dublin Interview but a “first interview for unaccompanied minors”.

If the SEM decides to dismiss an application according to Article 31a(1) AsyIA, there will be no second interview, but the asylum seeker is granted the right to be heard. This allows the person concerned to provide a statement in response to the intention of the SEM to dismiss the application.

The first short interview is the same as in the regular procedure (see section on [Regular Procedure: Personal Interview](#)). The right to be heard regarding the inadmissibility decision is usually granted at the end of the first interview or subsequently in writing.

### 3.3. Appeal

#### Indicators: Admissibility Procedure: Appeal

Same as regular procedure

1. Does the law provide for an appeal against an inadmissibility decision?  
 Yes  No
  - ❖ If yes, is it  Judicial  Administrative
  - ❖ If yes, is it suspensive  Yes  Some grounds  No

An appeal against a decision to dismiss an application must be filed before the Federal Administrative Court within 5 working days (while the deadline is of 7 working days in the accelerated procedure and 30 days in the extended procedure).<sup>272</sup> The Ordinance COVID-19 Asylum has not extended this deadline (while it has extended that of 7 days in the accelerated procedure).

The relatively short time limit of five working days for lodging an appeal against a Dublin transfer decision constitutes an obstacle to lodging an appeal in cases where the free legal assistance renounces to appeal as the chances of success are considered very low. In those cases, applicants could theoretically approach a non-state-funded office for legal advice to ask for support. However, significant obstacles arise in practice, especially when asylum seekers are accommodated in federal centres situated in remote locations which are far away from independent legal advisory offices that are usually situated in urban areas.

<sup>270</sup> Information provided by the SEM, 12 January 2018.

<sup>271</sup> Committee for the Rights of the Child, *V.A. v. Switzerland*, 28 September 2020, available at: <https://tinyurl.com/y3fkb62v>.

<sup>272</sup> Article 108 AsyIA.

In general, an appeal has automatic suspensive effect in Switzerland.<sup>273</sup> Appeals against inadmissibility decisions also have automatic suspensive effect, except for Dublin decisions (see section on [Dublin: Appeal](#)).

In principle, the Court should decide upon appeals against inadmissibility decisions within five working days,<sup>274</sup> which is not observed in practice. Although this would be possible in principle, there are no personal hearings taking place in front of the court. OSAR is not aware that such a personal hearing took place in 2020.

The other modalities of the appeal are the same as in the regular procedure.

### 3.4. Legal assistance

#### Indicators: Admissibility Procedure: Legal Assistance

Same as regular procedure

1. Do asylum seekers have access to free legal assistance at first instance in practice?
  - Yes  With difficulty  No
  - ❖ Does free legal assistance cover:
    - Representation in interview
    - Legal advice
  
2. Do asylum seekers have access to free legal assistance on appeal against an inadmissibility decision in practice?
  - Yes  With difficulty  No
  - ❖ Does free legal assistance cover
    - Representation in courts
    - Legal advice

The same rules as regards legal assistance under the regular procedure apply. See chapter on [Legal assistance](#) above.

## 4. Border procedure (border and transit zones)

### 4.1. General (scope, time limits)

#### Indicators: Border Procedure: General

1. Do border authorities receive written instructions on the referral of asylum seekers to the competent authorities?  Yes  No
2. Where is the border procedure mostly carried out?  Air border  Land border  Sea border
3. Can an application made at the border be examined in substance during a border procedure?  Yes  No
4. Is there a maximum time limit for a first instance decision laid down in the law?  Yes  No
  - ❖ If yes, what is the maximum time limit? 20 days<sup>275</sup>
5. Is the asylum seeker considered to have entered the national territory during the border procedure?  Yes  No

Switzerland has no land border with third countries other than Schengen and Dublin Member States. There is therefore no special procedure at land borders; persons who request asylum at the border or following their detention for illegal entry in the vicinity of the border shall normally be assigned by the competent authorities to a federal asylum centre, where they enter the same procedure as any other asylum seeker.<sup>276</sup> However, since the summer of 2016 this has not always been guaranteed in practice

<sup>273</sup> Article 55(1) APA.

<sup>274</sup> Article 109 AsylA.

<sup>275</sup> Article 23 AsylA.

<sup>276</sup> Article 21(1) AsylA.

at the southern Swiss border with Italy, and this was particularly the case during the lockdown due to the COVID-19 pandemic (see [Access to the Territory](#)).

There is a special procedure for people who ask for asylum at the airport. Persons who lodge their asylum application at the airport often do so after having been arrested by the airport police because found in possession of fake travel documents. In Geneva, in some cases it happens that they are prosecuted for illegal entry and brought to the police post in the city, where they spend one night before reaching the airport again to start the asylum procedure. It should be further noted that, during the airport procedure, applicants are not considered as having entered the national territory.

If a person arrives at the international airports of **Zurich** or **Geneva** and claims asylum, the airport police records the personal details, takes his or her fingerprints and photographs and immediately informs the SEM of the asylum application.<sup>277</sup> The asylum seeker receives a flyer with information on the airport procedure. The SEM decides whether or not to authorise entry into Swiss territory within two working days. If it temporarily denies entry, asylum seekers are allocated a place of stay in the transit zone of the airport where they can be held for a maximum of 60 days, which constitutes de facto detention (see [Detention of Asylum Seekers](#)).<sup>278</sup> Their asylum application will be examined within an airport procedure and a decision must be issued within 20 days. If a person requests asylum at another airport in Switzerland, the person will be transferred to a federal asylum centre and will enter the regular procedure.<sup>279</sup>

In Zurich, the problem has been reported that the airport police confiscate mobile phones and analyses data that are also used in the procedure sometimes.

If entry is temporarily denied in a first stage, a summary interview is organised to ask asylum seekers about their itinerary and the reasons for leaving their country. In **Geneva**, the SEM is responsible for this interview (SEM has three staff members dedicated to the airport procedure), while in **Zurich**, it is the airport police which conducts this interview. A legal representative is present during the interview (see below). After this first interview, the SEM can decide to either authorise entry, introduce a Dublin procedure involving the Dublin Unit, or continue the airport procedure with an interview on the grounds for asylum.

The SEM examines if Switzerland is responsible to carry out the procedure according to the Dublin Regulation. The SEM shall authorise entry into the territory if Switzerland is responsible according to the Dublin III Regulation, and if the asylum seeker appears to be at risk under any of the grounds stated in the refugee definition at Article 3(1) AsyIA or under threat of inhumane treatment in the country from which he or she has directly arrived; or if the asylum seeker establishes that the country from which he or she has directly arrived would force him or her to return to a country in which he or she appears to be at risk, in violation of the *non-refoulement* principle. If it cannot immediately be verified if the mentioned conditions are fulfilled, the entry into the territory is temporarily denied.<sup>280</sup>

The airport procedure can result in a decision granting access to the territory (in which case the applicant is channelled into the regular procedure), a negative in-merit decision or an inadmissibility decision (e.g. Dublin or safe third country).<sup>281</sup> In a few cases, it happens that an applicant receives a positive asylum decision within the airport procedure. The decision has to be taken within 20 days after the application was made. If the procedure takes more time, the SEM has to authorise entry, in which case the applicant is usually attributed to the extended procedure and allocated to a canton, but he can also be allocated to a federal asylum centre for an accelerated procedure.<sup>282</sup> If the procedure ends with a removal decision, the applicant can be held in the transit zone for a maximum of 60 days (since the application). If the

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<sup>277</sup> Article 22 AsyIA and Article 12 AO1.

<sup>278</sup> Article 22(5) AsyIA.

<sup>279</sup> SEM, Manuel Asile et Retour, chapter C2, page 4. Available at: <https://bit.ly/36mHNG1>.

<sup>280</sup> Article 22(1-bis), (1-ter) and (2) AsyIA.

<sup>281</sup> Article 23(1) AsyIA. See also SEM, Manuel Asile et Retour, chapter C2, pages 6-7.

<sup>282</sup> Article 23(2) AsyIA.

removal has not been enforced after 60 days, the person concerned can be transferred to an immigration detention centre. This occurs almost systematically in Zurich, where rejected applicants are transferred to the Zurich airport detention centre (situated not inside but next to the airport), while in Geneva, they are led to the competent cantonal authorities who decide whether to detain them or provide them with emergency aid.<sup>283</sup>

In 2020, the number of asylum applications lodged at the airport has significantly decreased due to the COVID-19 pandemic. In **Zurich**, the airport procedure was suspended in March 2020 for the whole year and the few applications made at the airport were directly handled in an ordinary accelerated procedure in a federal asylum centre.<sup>284</sup> In **Geneva**, the airport procedure continued to be carried out despite the low number of people concerned.

According to data provided by the SEM, in the whole year 66 requests of entry were lodged (70% less than in 2019), out of which 43 at the airport of **Geneva** (compared to 93 in 2019) and 23 in **Zurich** (compared to 126 in 2019). 24 of these persons were arriving in family compositions. The main countries of origin were Turkey, Cameroon and Congo DRC in Geneva; Iran, Congo RDC, Cuba and Turkey in Zurich.<sup>285</sup> The SEM issued 69 authorisations to enter Switzerland, while 8 applications were handled at the airport without entry being authorised: 3 were rejected, 4 were dismissed (because the person could travel to a third country for which they had a visa or a right of residence), and one application was withdrawn.<sup>286</sup>

## 4.2. Personal interview

### Indicators: Border Procedure: Personal Interview

Same as regular procedure

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the border procedure?
 

|  |   |  |
|--|---|--|
|  | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No            |
| ❖ If so, are questions limited to nationality, identity, travel route? | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> No |
| ❖ If so, are interpreters available in practice, for interviews?       | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No            |
  
2. Are interviews conducted through video conferencing?
 

|                                     |                                 |   |
|-------------------------------------|---------------------------------|---|
| <input type="checkbox"/> Frequently | <input type="checkbox"/> Rarely | <input checked="" type="checkbox"/> Never |
|-------------------------------------|---------------------------------|---|

In the airport procedure, a first interview will take place in every case. In **Zurich**, the airport police conduct the interview, while in **Geneva** it is the SEM. A legal representative is present. After having carried out the first interview, the SEM carries out an analysis of the file, after which it can decide to authorise entry, introduce a Dublin procedure implicating the Dublin unit, or continuing the airport procedure with the organisation of an interview on the grounds for asylum.

In **Geneva**, where the SEM is already responsible to carry out the first interview, if an interview on the grounds for asylum is planned, it takes place immediately after the first summary interview, on the same day. In Zurich, this does not occur since it is the airport police that conducts the first interview. The quality of interviews carried out by the airport police is lower since officers do not have adequate training nor enough experience on conducting asylum interviews. These interviews usually require more intervention from the legal representation than the ones conducted by the SEM.

In **Geneva**, interviews take place in the SEM offices situated in the detention centre in the transit area. In **Zurich**, they take place outside the transit zone, in police or SEM offices situated on Swiss soil that they can only reach being escorted by the airport police. Both in Geneva and Zurich, interviews always take place with translation, mostly on the phone for summary interviews and always in presence for interviews

<sup>283</sup> SEM, Manuel Asile et Retour, chapter C2, p. 9.

<sup>284</sup> Information provided by the SEM, 21 March 2021.

<sup>285</sup> SEM, Asylum Statistics 2020.

<sup>286</sup> Data provided by SEM for this report. The higher number of authorisations than requests might be due to cases that were registered in 2019 (before the pandemic, which caused a steady decrease in applications).

on the grounds for asylum, as in the ordinary procedure. To adapt to the measures for preventing COVID-19 infections, in Geneva a room has been arranged to host five persons participating in the interview. Such arrangement would not allow interviewing applicants who are particularly at risk regarding the virus. In Zurich, no airport procedure has taken place since the lockdown in March 2020 up until March 2021.

### 4.3. Appeal

#### Indicators: Border Procedure: Appeal

Same as regular procedure

1. Does the law provide for an appeal against the decision in the border procedure?
- |                            |  |   |
|----------------------------|--|---|
| ❖ If yes, is it            | <input checked="" type="checkbox"/> Yes      | <input type="checkbox"/> No                                       |
| ❖ If yes, is it suspensive | <input checked="" type="checkbox"/> Judicial | <input type="checkbox"/> Administrative                           |
|                            | <input checked="" type="checkbox"/> Yes      | <input type="checkbox"/> Some grounds <input type="checkbox"/> No |

The decision to deny entry in Switzerland and be placed in the transit zone can be appealed so far the SEM has not yet notified the negative or dismissal decision.<sup>287</sup> In 2020, a few appeals in Geneva have been successful since the Federal Administrative Court has considered that the asylum seekers had not been granted the right to be heard regarding that decision as required by the law, as they could only express their opinion in a form.<sup>288</sup> In Zurich, applicants are granted the right to be heard in writing through their legal representative.

The applicant or his/her legal representative can also appeal against a decision taken within the airport procedure, be it a decision on the merit or a decision to dismiss an application. Such appeal must be introduced within 5 working days.<sup>289</sup> The Federal Administrative Court is the competent appeal authority, similarly to the regular procedure. As in the regular procedure, appeals have automatic suspensive effect,<sup>290</sup> except for Dublin decisions, in which case the person has to ask for suspensive effect (for further information, see sections on [Regular Procedure: Appeal](#) and [Dublin: Appeal](#)).<sup>291</sup>

If the Federal Administrative Court accepts an asylum seeker's appeal against a decision to deny entry, a negative or dismissal decision, the SEM has to authorise entry and directly allocate the person concerned either to a federal asylum centre or to a canton.<sup>292</sup>

### 4.4. Legal assistance

#### Indicators: Border Procedure: Legal Assistance

Same as regular procedure

1. Do asylum seekers have access to free legal assistance at first instance in practice?
- |                                     |   |  |                             |
|-------------------------------------|---|--|-----------------------------|
| ❖ Does free legal assistance cover: | <input checked="" type="checkbox"/> Yes                         | <input type="checkbox"/> With difficulty | <input type="checkbox"/> No |
|                                     | <input checked="" type="checkbox"/> Representation in interview |  |                             |
|                                     | <input checked="" type="checkbox"/> Legal advice                |  |                             |
2. Do asylum seekers have access to free legal assistance on appeal against a negative decision in practice?
- |                                    |  |   |                             |
|------------------------------------|--|---|-----------------------------|
| ❖ Does free legal assistance cover | <input checked="" type="checkbox"/> Yes                      | <input checked="" type="checkbox"/> With difficulty | <input type="checkbox"/> No |
|                                    | <input checked="" type="checkbox"/> Representation in courts |   |                             |
|                                    | <input checked="" type="checkbox"/> Legal advice             |   |                             |

Similar to ordinary asylum procedures, the airport procedure foresees that applicants are assigned a legal representative since the beginning of the procedure for free, unless the asylum applicant explicitly renounces it.

<sup>287</sup> Article 108(3) and (4) AsyIA.

<sup>288</sup> The two decisions are not published in the database of the Federal Administrative Court.

<sup>289</sup> Article 108(3) AsyIA and Article 23(1) AsyIA.

<sup>290</sup> Article 55(1) APA.

<sup>291</sup> Article 107a AsyIA.

<sup>292</sup> Article 23 AsyIA; SEM, Manuel Asile et Retour, chapter C2, page 8.

Upon registration of the asylum application, the SEM (in **Geneva**) or airport police (in **Zurich**) informs the legal representation, which will contact the applicant within two days to conduct a first counselling interview.<sup>293</sup> The legal representative will also attend the interviews carried out in the context of the airport procedure and meet the applicants in advance to prepare them for the interview. There is no main difference considering legal assistance in the regular procedure and the airport procedure (see section on [Regular Procedure: Legal Assistance](#)). According to a legal representative working in Geneva, the fact that sometimes the two interviews (summary and on the grounds for asylum) are conducted on the same day makes it difficult to prepare their clients. The fast pace of the airport procedure also poses some challenges to the provider of legal representation at the organisational level.

Caritas Switzerland is responsible for the legal representation at **Geneva** airport and the organisation RBS Bern at **Zurich** airport. Differently from the situation in federal asylum centres, there is no fix or regular presence of these organisations at the airport but they punctually go to the airport for interviews or meetings with the asylum seekers. The organisations providing legal assistance have their own offices: in **Geneva**, the office is situated in the detention centre, while in **Zurich**, it is situated far away from the detention centre in the transit area, which is inconvenient for the legal representation. As a consequence, meetings with the applicants are organised in a room within the detention centre in the transit area. Differently from the ordinary procedure, the legal representative will also assure the task of the legal counsellors. According to Caritas, asylum applicants in Geneva have access to their legal representation through the phone. The legal representatives are also able to talk to their clients on the phone when needed and the private company running the centre, ORS, facilitates the contact. In Zurich, applicants also have a mobile phone at disposal to call the legal representation, and a computer is also at their disposal.

## D. Guarantees for vulnerable groups

### 1. Identification

#### Indicators: Identification

1. Is there a specific identification mechanism in place to systematically identify vulnerable asylum seekers?  Yes  For certain categories  No
  - ❖ If for certain categories, specify which:
2. Does the law provide for an identification mechanism for unaccompanied children?  Yes  No

The law does not specifically provide for the screening of vulnerabilities and there is no standard procedure in practice to assess and identify them. Furthermore, since 1 March 2019, all but very complex asylum claims should be assessed and decided within 140 days. The fast-paced new procedure puts the administrative authorities and the legal representatives under increased pressure, which, coupled with the lack of standard identification tools, may result in overlooking potential vulnerabilities. A report published by UNHCR in 2020 details the protection gaps existing in the Swiss asylum system in this regard, and advances concrete suggestions to overcome them.<sup>294</sup> According to UNHCR, there remain wide margins for improvement in the screening and identification of vulnerable applicants. A general document, detailing the State Secretary for Migration's guidelines for the identification and protection of particularly vulnerable asylum seekers is due for publication in 2021. These guidelines were not publicly available at the time of writing of this report. Similar concerns were also raised by the National Commission

<sup>293</sup> Article 7(2) AO 1 and Article 102h AsylA.

<sup>294</sup> A. Stettler, Neustrukturierung des Asylbereichs – Asylsuchende mit besonderen Bedürfnissen im neuen schweizerischen Asylverfahren. Problemaufriss und erste Empfehlungen, August 2020, available at: <https://bit.ly/35YrIG4>

for the Prevention of Torture (NCPT), which published its latest report on federal reception centres in January 2021.<sup>295</sup>

Some international instruments signed by Switzerland specifically provide for the screening of some groups of asylum seekers. We will focus on the implementation of these provisions in the Swiss practice.

### 1.1. Screening of vulnerability: Victims of human trafficking

The obligation to identify victims of human trafficking has been introduced in the Swiss legislation,<sup>296</sup> to respond to European requirements.<sup>297</sup> Since the beginning of 2014, the SEM has intended to improve the protection of victims of human trafficking. Despite the fact that trafficking in human beings encompasses different forms of exploitation, most of the efforts until today have been focussed on the trafficking for the purpose of sexual exploitation. In its second report on Switzerland, the Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) has strongly encouraged Swiss authorities to step up efforts to detect and prevent trafficking for the purpose of labour exploitation and trafficking in children.<sup>298</sup>

A 2016 decision of the Federal Administrative Court sees the identification of victims of trafficking as the state's obligation and highlights the importance of identification within the asylum procedure.<sup>299</sup> The decision states that if, during the screening or the asylum interview, there appear to be indications that the person is a victim of trafficking then: (a) the necessary further investigations must be carried out *ex officio*; (b) protective measures must be taken in favour of the victim; and (c) expulsion must be waived if the imminent risk of recruitment to prostitution or of retaliation is made credible. However, the same decision does not explicitly state that a failure to fulfil this obligation represents a violation of Article 10 of the Council of Europe Convention.

Despite this, it remains very difficult to identify victims of human trafficking in the context of the asylum procedure, as the conditions of the asylum interviews and the limited time are not favourable to build the necessary trust between the applicant and the authorities.

In its 2019 report on Switzerland, GRETA found that the SEM does not conduct formal identification of victims of trafficking and limits itself to detecting possible victims based on their allegations, referring them to the criminal investigation authorities, to specialized counselling centers established in the framework of the Federal Law on Assistance to Victims of Crimes (LAVI) and to other specialised organisations.<sup>300</sup> Furthermore, GRETA highlighted cases in which victims of trafficking were not identified in the asylum process and received a negative decision regarding their asylum application. They remained in Switzerland as irregular migrants and subsequently came to the attention of outreach work organisations after having experienced further exploitation in Switzerland. GRETA expressed concern as regards the lack of early identification mechanism, because it reduces the possibilities for victims of trafficking to benefit from timely support in the asylum process, both with regard to procedures and reception conditions.<sup>301</sup>

A working group coordinated by the Coordination Unit against the Trafficking and Smuggling of Migrants (*Koordinationsstelle gegen Menschenhandel und Menschen schmuggel*, KSMM), supports the implementation of action no. 19 of the National Action Plan against trafficking (NAP).<sup>302</sup> The so-called

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<sup>295</sup> NCPT, Report on federal asylum centres 2019-2020, January 2021, available at: <https://bit.ly/3jEAb72>, p. 13-16.

<sup>296</sup> Art. 35 and 36 of the Ordinance on Admission, Period of Stay and Employment

<sup>297</sup> Art. 10 Council of Europe Convention on action against Trafficking in Human beings, Warsaw, 16 May 2005

<sup>298</sup> GRETA, Report, available at: <https://bit.ly/2Q0rxIX>, § 85 and 95-96.

<sup>299</sup> Federal Administrative Court, Decision D-6806/2013, 18 July 2016

<sup>300</sup> According to statistics provided by the SEM, 84 presumed victims of trafficking were detected among asylum seekers in 2014, 32 in 2015, 73 in 2016, and 100 in 2017. In the Dublin procedure, 19 presumed victims were detected in 2014, 17 in 2015, 34 in 2016 and 41 in 2017.

<sup>301</sup> GRETA, Report, October 2019, available at: <https://bit.ly/2InYsww>, §128-130.

<sup>302</sup> Swiss Coordination Unit against the Trafficking in Person and Smuggling of Migrants (KSMM), National Action Plan to Fight Human Trafficking 2017-2020, available at: <https://bit.ly/2ImwVeP>.

Working Group on Asylum and Human Trafficking was established already under the 2012-2014 NAP, and it is working under the lead of the SEM. It is made up of SEM officials and representatives of the main NGOs active in the asylum field, including the Swiss Refugee Council. Its task is to optimise identification processes regarding human trafficking victims, provide victim assistance during the asylum (including Dublin) procedure, outline these processes in an open publication (e.g. handbook, brochure, etc.), and determine what further action is needed. Publication of the results was due by the end of 2020 but as of May 2021, the report has yet to be released.

The current SEM internal guidelines on how to proceed in cases of asylum-seeking victims of trafficking (which are not publicly available) are expected to be revised in the course of the implementation of action no. 19 of the NAP. According to the current guidelines, if the interviewer of the SEM suspects a possible victim, they inform a person within the SEM who is responsible for the topic of human trafficking. This way, on the one hand, the Federal Criminal Police can be informed, and on the other hand, the hearing will be conducted by a person of the same sex as the applicant.<sup>303</sup> The grant of a 'reflection and recovery' period for victims of trafficking, as foreseen by the Convention against Trafficking,<sup>304</sup> was in the past not applied to those who were undergoing an asylum procedure. According to the federal authorities, the 30-day recovery and reflection time was nevertheless taken into account in the asylum procedure, insofar as the procedural deadlines to respond to an asylum application, and where appropriate to order the removal of a person, are more than 30 days.<sup>305</sup> However, this practice has recently changed: when the SEM considers the applicant a victim of trafficking, it also grants such period of 'reflection and recovery' to asylum seekers. The problem is that such period is often conceived as a simple waiting period and no specific measures are taken for the victim.

According to information provided by the SEM, trafficking in persons is the topic of one basic training (1 hour) and one specialisation training (3 hours) offered to caseworkers.<sup>306</sup> The content of the training or the number of caseworkers having followed such course are not known.

## 1.2. Age assessment of unaccompanied children

The UN Convention on the Rights of the Child (CRC) is in force in Switzerland since 1997. The Committee on the Rights of the Child has issued multiple statements on age assessment and the way it should be implemented by State parties,<sup>307</sup> but the Swiss practice seems to fall short of the international standards at different levels.<sup>308</sup>

For instance, even though, in principle, minority should always be presumed, in practice not all applicants claiming to be under the age of 18 are treated as children and granted the child-specific protections throughout the assessment process, including the right to not be accommodated with adults (See section on [Special reception needs of vulnerable groups](#)). Furthermore, although the person is not explicitly forced to consent the age assessment process, if he or she refuses to participate, the SEM may claim that the asylum seeker has not complied with the duty to cooperate and could therefore be qualified as an adult, or even lose his or her right to have the proceeding continued.<sup>309</sup> Also, there is no effective remedy to challenge the decision on age assessment. The asylum seekers only have the chance to challenge it when they lodge an appeal against the asylum decision itself. Finally, Swiss authorities mainly rely on

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<sup>303</sup> For more information, please refer to the Alternative Report on the Implementation of the Council of Europe Convention on Action against trafficking in human beings in Switzerland, June 2018, available at: <https://bit.ly/2RhRG00>.

<sup>304</sup> Council of Europe, Council of Europe Convention on Action against Trafficking in Human Beings, available at: <https://tinyurl.com/hlrl6ut>, art. 13

<sup>305</sup> GRETA, Report, October 2019, available at: <https://bit.ly/2InYsww>, §185-186

<sup>306</sup> Information provided by the SEM, 27 April 2021.

<sup>307</sup> CRC, General Comment No.4 (2017), available at: <https://bit.ly/2VV7Klg>, §II.4; SCEP, Statement of Good Practice (2009), available at: <https://bit.ly/2TB3M6b>, §D5.1; CRC, General Comment No. 12 (2009), available at: <https://bit.ly/3aCJ0sm>, §22; CRC, General Comment No. 6 (2005), available at: <https://bit.ly/2VWg9Lx>, §21 and section V.b.

<sup>308</sup> The Swiss Refugee council has developed guidelines with the aim of supporting legal representatives dealing with age assessment, available at: <https://bit.ly/2TyfKxk>.

<sup>309</sup> Article 8 AsylA.

forensic examinations to assess the asylum seeker's age. In 2020, 305 age assessments were conducted (out of a total of 535 applications made by unaccompanied minors); in 172 cases (56%), the SEM concluded that the asylum seeker was not a minor.<sup>310</sup> By way of comparison, in 2019 only 168 age assessments were conducted (out of a total of 441 applications made by unaccompanied minors), which points to an increasing use of such measure by the SEM.

The Federal Administrative Court had already ruled in the past that age assessments could be ordered when the proof of the identity (e.g. date of birth) of the asylum seeker was not sufficient,<sup>311</sup> and the previous legislation already foresaw the use of scientific methods to assess the age. The law now provides for a combination of methods to be used.<sup>312</sup>

In August 2018, the Federal Administrative Court reviewed the practice of age determination and stated that: (a) the X-ray of the wrist bones is to be done beforehand because, if such analysis shows a significant probability of a minor age, one dispenses examinations of the teeth and the clavicle, which imply a greater exposure to radiation; (b) if the X-ray of the wrist does not come to a conclusive result, then the X-ray of the collarbone and teeth must be carried out; (c) physical examination is carried out only in specific circumstances i.e. if there is specific medical history or discrepancies in the age determination that cannot be explained otherwise.<sup>313</sup>

Therefore, according to the Federal Administrative Court, there is strong evidence of full age when both the hand and the sternum-clavicular joint X-rays provide a minimum age which is above 18, or when the age ranges provided by the two analyses overlap and they are both above 18. On the contrary, evidence of full age is weak if, despite a possible medical explanation, the age ranges provided by the two exams do not overlap (still placing the probable age above 18). Finally, evidence is very weak if the minimum age is below 18, the two analyses do not overlap and there is no possible explanation for the discrepancy. With this decision, the Federal Administrative Court implicitly confirmed that all the four examinations mentioned above can be carried out, that the approach used is exclusively medical, and that no other methods such as interviews with psychologists or cultural mediators should be applied. In addition, there is no mention of the presence of a paediatrician during the screening process. Furthermore, it was reported that many doctors in charge of age assessment still do genital examinations, unless the applicant refuses such examination. These practices are quite detached from the best practices showcased in other European countries and recommended in multiple international and regional reports, and deserves close monitoring.<sup>314</sup>

## 2. Special procedural guarantees

### Indicators: Special Procedural Guarantees

1. Are there special procedural arrangements/guarantees for vulnerable people?

- ❖ If for certain categories, specify which:  Yes  For certain categories  No  
Unaccompanied children; gender-based claimants; victims of trafficking

<sup>310</sup> Data provided by the SEM, 19 March 2021.

<sup>311</sup> Federal Administrative Court, Decision E-1552/2013, 2 April 2013, available at: <https://bit.ly/2v4MKDN>, para 4.2.

<sup>312</sup> Article 7 AO1 provides for a combination of methods, which include skeletal age (e.g. X-ray of the hand, possibly CT scan of the sternum-clavicular joint) as well as dental age and physiognomy (e.g. sexual maturity and physical constitution).

<sup>313</sup> Federal Administrative Court, Decision E-891/2017, 8 August 2018.

<sup>314</sup> The Federal Administrative Court does sometimes step in to correct the SEM's practice, when the latter is too strict or detached from international guidelines. See for instance: Federal Administrative Court, Decisions D-4824/2019, 27 September 2019, available at: <https://bit.ly/39MzWuN>; E-7333/2018, 4 March 2019, available at: <https://bit.ly/2lt79FT>; E-4959/2018, 4 February 2019 (Dublin case), available at: <https://bit.ly/2xoq963>; D-1589/2019, 15 May 2019, available at: <https://bit.ly/39DKouH>; E-2999/2018, 14 February 2018, available at: <https://bit.ly/3390Hx9>.

There is no specific unit to carry out the procedures for vulnerable persons, but there are experts for specific topics within the SEM (“thematic specialists”) who can be asked for advice or support in difficult cases (for example regarding unaccompanied minors, gender-specific violence or victims of trafficking). These collaborators also treat asylum applications themselves and they are responsible for the development of practice trends and decision-making on their topic. In 2017, one out of three collaborators per unit was specialised on unaccompanied minors, while no data was provided by the SEM for 2020.<sup>315</sup>

In addition, according to the SEM, all caseworkers in 2017 were trained in interviewing children and adolescents by internal and external trainers, but no information was available for 2020.<sup>316</sup>

## 2.1 Adequate support during the interview and credibility assessment

### People with serious illnesses or mental disorders, and survivors of torture, rape or other forms of serious violence, including female genital mutilation (FGM)

The UN Human Rights Committee stated in its recommendations on the fourth periodic report of Switzerland,<sup>317</sup> that it regretted that expert evaluations drawn up pursuant to the Istanbul Protocol were not fully recognised and taken into account by the Swiss authorities in implementing the principle of *non-refoulement*.<sup>318</sup> According to the same recommendations, Switzerland should ensure that all personnel concerned receive systematic and practical training on the Istanbul Protocol and apply it. According to the information available to the Swiss Refugee Council, such training sessions started to be implemented in August 2020, for all the officers working in the new Federal Reception Centres.

Despite this, national NGOs report of numerous cases in which the SEM has failed to carry out further investigations and, in particular, to have expert reports drawn up in accordance with the standards of the Istanbul Protocol if asylum seekers assert - in the hearings or via medical reports - that they are victims of torture or inhuman/degrading treatment.<sup>319</sup> Even when asylum seekers nevertheless succeed in producing such reports in individual cases, the Swiss authorities often fail to take them into account adequately, especially when it comes to the (physical/psychological) consequences of the ill-treatment endured. This in turn can have a very meaningful impact on the asylum claim, as it makes it very hard for the asylum seekers to make their claims credible.<sup>320</sup>

In its most recent report, the National Commission for the prevention of Torture considered that, in all the asylum and migration centres that it visited, there was no standard protocol in practice to facilitate access to assistance and support for victims of torture.<sup>321</sup> A round table with representatives of the SEM and of national NGOs dealing with the topic took place in September 2019, but it is unclear which further steps the Government will take to better implement the provisions of the Protocol (see also section on

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<sup>315</sup> Information provided by the SEM, 3 August 2017. In April 2021, the SEM was not able to provide data for 2020.

<sup>316</sup> *Ibid.*

<sup>317</sup> UN Human Rights Committee, Concluding observations on the fourth periodic report of Switzerland, 22 August 2017, available at: <https://bit.ly/2Q0ZdQb>.

<sup>318</sup> The UN General Assembly adopted the Manual on Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, known as the Istanbul Protocol, almost 20 years ago, available at: <https://bit.ly/39CyI0P>. The Istanbul Protocol contains internationally recognised standards and procedures on how to recognise and document symptoms of torture, so that the documentation may be used as evidence in Court. Although non-binding as such, it does have a *quasi-binding* legal nature, because every State signatory to the Convention against Torture and other cruel, inhuman or degrading treatment or punishment must adhere to the standards set out there, if it wants to fulfil the obligation to carefully and effectively examine evidence of torture. As a result, the Istanbul Protocol has established itself internationally as the instrument for documenting torture and inhumane treatment.

<sup>319</sup> An NGO ‘working group’ is dedicated to the implementation of the Istanbul Protocol into the Swiss practice, information available at: <https://bit.ly/2TNahBH>.

<sup>320</sup> See for instance: Federal Administrative Court, Decision D-4802/2020, 30 December 2020, para 4.1 – 4.3 available at: <https://bit.ly/3aTOvVk>

<sup>321</sup> National Commission for the prevention of torture, NCPT, Report on federal asylum centres 2017-2018, available at: <https://bit.ly/331LIKQ>, §84.

## Use of medical reports).

In September 2018 the UN Committee against Torture ruled that the expulsion of a torture survivor from Switzerland to Italy under the Dublin Regulation would violate the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. In particular, the Committee reproached the Swiss authorities for not undertaking an individual assessment of the personal and real risk that the complainant would face in Italy as an asylum seeker and victim of torture, and for simply relying on the assumption that he was not particularly vulnerable and would thus be able to obtain adequate medical treatment in Italy.<sup>322</sup>

## LGBTQI\*

The SEM held a course on LGBTI asylum claims at the beginning of 2017 to inform the interviewers on the specificities of an LGBTI case (late disclosure, credibility, etc.). It does not appear that other courses were carried out subsequently. Despite the information and guidelines provided in the SEM Handbook (see section on [Victims of gender-based violence](#)),<sup>323</sup> the conduct of the hearings continues to pose many problems. For instance, the asylum seeker is not always granted the right to be interviewed by people of a gender of his/her choice. Also, late disclosure is often weighted against the applicant, despite abundant evidence that trauma or fear can prevent LGBTQI\* asylum seekers to disclose their past experiences in a timely manner.<sup>324</sup> Together with NGOs active on the field, the Swiss Refugee council has developed guidelines with the aim of supporting legal representatives dealing with LGBTQI cases.<sup>325</sup>

## Victims of gender-based violence

According to the Asylum Act, motives for seeking asylum specific to women must be taken into account.<sup>326</sup> Furthermore, when spouses, registered partners or a family apply for asylum, each person seeking asylum has the right, as far as he or she is capable of discernment, to have their own reasons for asylum examined.<sup>327</sup>

If there are indications or if the situation in the country of origin is indicating gender-specific violence and persecution, the asylum seeker will be interviewed by a person of same gender according to the law.<sup>328</sup> The SEM Handbook specifies that men who are victims of gender-specific violence and persecution should also be able to choose the gender of the interviewing official, but that in this case the provision will be applied with some “pragmatism”.<sup>329</sup> The rule also applies to the interpreter and the person taking notes. Despite this rather clear legal framework, the SEM does not always comply with these obligations.<sup>330</sup>

When it comes to the assessment of credibility, settled case law accepts that a traumatized woman may try to protect herself from difficult memories by frequently using “stereotypes” or in some cases by

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<sup>322</sup> UN Committee against Torture, CAT/C/64/D/742/2016, 3 September 2018, available at: <https://bit.ly/2Gy8FXA>, §8.6.

<sup>323</sup> SEM Handbook on asylum and return, available at: <https://bit.ly/2wCi2SZ>, D2.

<sup>324</sup> Federal Administrative Court, Decision E-4306/2018, 21 September 2018, available at: <https://bit.ly/2VXp3IP>; E-4422/2017, 2 April 2019, available at: <https://bit.ly/3cLvrsk>; E-3422/2018, 27 June 2018, <https://bit.ly/2xoO19F>; E-1490/2015, 13 March 2018, available at: <https://bit.ly/2xoO19F>. On these challenges, please also refer to A. Keiser, *Requérant.e.x.s d'asile LGBTIQ+ : Les enjeux principaux des demandes d'asile pour motifs d'OSIEGCS*, ASYL 4/2020, p. 16 ss.

<sup>325</sup> OSAR Guidelines are available at: <https://bit.ly/2VZhqlc>. Also, OSAR developed a detailed report on the decision-making and jurisprudence related to LGBTQI\* asylum seekers.

<sup>326</sup> Article 3, para 2 AsylA.

<sup>327</sup> Article 5 AO1.

<sup>328</sup> Article 6 AO1.

<sup>329</sup> SEM Handbook on asylum and return, available at: <https://bit.ly/2TRQv7Y>, D2, p. 18.

<sup>330</sup> Federal Administrative Court, Decision D-7431/2018, 22 January 2019, available at: <https://bit.ly/3aCQSDo>; E-1805/2017, 26 September 2019, available at: <https://bit.ly/38uay1G>; D-2849/2017, 18 October 2019, available at: <https://bit.ly/2PXGyom>. In all these judgments, the FAC sent the case back to the SEM for a new assessment.

changing the subject of phrases.<sup>331</sup> Yet, the SEM is often very strict in assessing credibility, especially of late and somewhat inconsistent narratives, even when they come from highly traumatized women.<sup>332</sup> The same holds true for late declarations, which are often dismissed as non-credible. This is unfortunate, as the SEM Handbook clearly states that the claimant's credibility must not be dismissed on the sole ground of the belated allegations<sup>333</sup>

### **Victims/possible victims of human trafficking**

The guarantees that are in place for victims of gender-based violence (see section C above) can also be applied to potential victims of human trafficking (PVOT) or victims of human trafficking (VOT). Nevertheless, no specific provision is in place to ensure that.

In a judgement on the credibility assessment of victims of trafficking in the asylum procedure and the positive obligations of the authorities to identify victims of trafficking, the Federal Administrative Court noted that untrue statements in earlier proceedings constitute a typical testimony of victims of human trafficking, and therefore should not automatically lead to the assumption that the subsequent human trafficking allegations were unreliable.<sup>334</sup>

### **Minors/unaccompanied minors**

Regarding the personal interview of children, especially unaccompanied children, Swiss law provides for the interviewer to take into account the special nature of being a child.<sup>335</sup> Also according to case law specific guarantees should be in place.<sup>336</sup> Namely, the atmosphere should be welcoming and benevolent, the adults in the room must have an open and empathetic attitude, each of the participants should introduce themselves to the child and the aims and objectives of the interview should be clarified in a child friendly manner. The Court also provided some details on how the interview should take place: the pace should be slower than the one followed in an interview with an adult, breaks should be granted every 30 minutes, 'open' questions should be preferred, at least at the beginning, conversation topic should be changes only after announcing it to the minor, the listeners' attitude should remain neutral.

The practice does not always live up to these standards. In one decision, the Federal Administrative Court took specific issue with the way the SEM conducted the interview, and quashed the SEM decision as in the opinion of the Court the SEM did not take sufficient account of the child's particular vulnerability during the hearing. Thus, the hearing was conducted in the same way as that of an adult asylum seeker: introductory questions to create a trusting atmosphere were completely absent, the pace of questioning and the type of questions posed were not appropriate, the role and function of the officers present not clearly explained. The Court found that the child's right to be heard had been breached, and that the administrative authorities should re-assess the case.<sup>337</sup>

In other cases, the administrative authorities fail to consider that the minor's age could have an impact on the internal consistency of his/her accounts, and apply the same credibility standards in place for adults.

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<sup>331</sup> Commission suisse de recours en matière d'asile (CRA), 16/1996, available at: <https://bit.ly/2TNPj5K>.

<sup>332</sup> Federal Administrative Court, Decisions E- 5954/2016, 12 June 2018, E-3953/2016, 22 August 2019, available at: <https://bit.ly/2xqOaJT>; D-6998/2017, 8 July 2019, available at: <https://bit.ly/2lxFBIt>; E-6865/2017, 17 April 2019, available at: <https://bit.ly/2v62HJY>. In all these cases the SEM decisions were quashed by the Federal Administrative Court. In other cases, though, while the sexual violence was uncontested, the claimant was not able to prove that it was in connection with the flight, and the FAC dismissed the claim. For a recent example, see E-5299/2019, 5 March 2020, available at: <https://tinyurl.com/y5xupmeo>.

<sup>333</sup> SEM Handbook on asylum and return, available at: <https://bit.ly/2TRQv7Y>, D2, p. 21. See, for instance Federal Administrative Court, E-2245/2017, 26 November 2019.

<sup>334</sup> Federal Administrative Court, Decision D-6806/2013, 18 July 2016, available at: <https://bit.ly/38ACZuL>.  
<sup>335</sup> Article 7(5) AO1.

<sup>336</sup> Federal Administrative Court, Decision E-1928/2014, 24 July 2014, available at: <https://bit.ly/2PXidze>.

<sup>337</sup> Federal Administrative Court, Decision E-7447/2015, 5 November 2018, available at: <https://bit.ly/337u2Z0>. See also: Federal Administrative Court, Decision D-6508/2019, 18 December 2019, and D-6229/2017, 7 February 2020.

This is also in contrast with international guidelines on child-friendly justice and on the child's right to be heard.<sup>338</sup>

In September 2020 the Committee for the Rights of the Child found that, by removing two minor children with their mother to Italy according to the Dublin III Regulation without properly hearing them, Switzerland had violated Art. 3 and 12 of the CRC.<sup>339</sup> The CRC decision addresses a common problem in Swiss practice whereby very young minors, especially if accompanied by their families, are only seldom heard, because it is assumed that their interests coincide with the ones of their parent. Such practice is against the CRC, and it remains to be seen whether this recent decision by the Committee will change the practice.

## 1.1. Decision-making process

### **People with serious illnesses or mental disorders, and survivors of torture, rape or other forms of serious violence, including female genital mutilation (FGM)**

The practice is not always correct when it comes to victims of FGM (or at risk thereof): sometimes the SEM refuses asylum on the basis that FGM is a one-off act that cannot be repeated on the same girl or woman and that asylum law cannot make up for wrongful acts committed in the past. This is in sharp contrast with the UNHCR guidance on FGM.<sup>340</sup> The Federal Administrative Court generally takes a more careful approach. In one judgement,<sup>341</sup> for instance, the Federal Administrative Court accepted that FGM is a form of persecution specific to women. In examining the risk of future harm, the judges did not consider the risk of re-infibulation, but rather the general risk that the applicant will be subjected to other forms of persecution as a single, displaced woman with children. Moreover, the trauma caused by FGM was mentioned as a cause of the applicant's fragility and subsequent vulnerability. A recent case concerns a young Somali national, who suffered from FGM in her country of origin and, once in Switzerland, underwent a de-infibulation procedure. According to the Federal judges, the applicant would certainly be at risk of further FGM in case of return to Somalia, but this was because of her own doing (namely, because she submitted to a de-infibulation procedure). Thus, the applicant only received protected status (F-permit refugee) and not asylum.<sup>342</sup>

### **LGBTQI\***

When it comes to decision-making, the SEM and Federal Administrative Court do not consider criminalization of "non-compliant" sexual identity/gender orientation in the country of origin as sufficient ground for an asylum request.<sup>343</sup> Furthermore, both bodies attach a lot of weight to the "discretion requirement", often claiming that the asylum seeker could avoid persecution by concealing their sexual orientation upon return to the country of origin. This is though in contrast with CJEU jurisprudence.<sup>344</sup>

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<sup>338</sup> Federal Administrative Court, Decisions D-6508/2019, 18 December 2019, available at: <https://bit.ly/38zH8z9>; E-573/2016, 12 December 2018, available at: <https://bit.ly/2TE2Yxn>; E-6636/2017, 21 June 2018, available at: <https://bit.ly/2TBnnTK>; D-1520/2017, 5 April 2017, available at: <https://bit.ly/38ytuwk>.

<sup>339</sup> Committee for the Rights of the Child, V.A. v. Switzerland, 28 September 2020.

<sup>340</sup> UNHCR, *Guidance Note on Refugee Claims relating to Female Genital Mutilation*, May 2009 <https://bit.ly/2TOHpcd>.

<sup>341</sup> Federal Administrative Court, Decision E-6456/2015, 29 June 2018.

<sup>342</sup> Federal Administrative Court, Decision E- 3512/2019, 27 July 2020.

<sup>343</sup> Federal Administrative Court, Decision D-2314/2018, on Congo, para. 5.2.2; E-2497/2016, on Azerbaijan, available at: <https://bit.ly/2Q0UBcW>, para. 5.3.1; D-4923/2009, on Algeria, available at: <https://bit.ly/2TEIS7n>, para. 4.2.3; D-7041/2013, on Morocco, available at: <https://bit.ly/3cJ9E4D>, para. 5.2; E-7217/2014, on Tunisia, para. 5.2.4; D-891/2013 on Iran, available at: <https://bit.ly/3aDnLq>, para. 5.2. and 5.3; E-4373/2013, on Pakistan, available at: <https://bit.ly/2PYaG39>, para. 4.3.3; E-3952/2017, on Afghanistan, available at: <https://bit.ly/2lvGWGq>, para. 3.3. Very recent on the specific situation of bisexual persons in Morocco, D-5585/2017, available at: <https://bit.ly/2VYOAKS>. On the situation in Ethiopia, see: E-2109/2019, 28 August 2020, available at: <https://tinyurl.com/y5bfjl89>. On the one in Syria, see: D-6722/2017, 12 August 2020. On the one in Uganda see: E-4133/2020, 20 November 2020. For a different approach, on Iraq, see D-6539/2018, available at: <https://bit.ly/2Q0NOzN>, para. 7.5.

<sup>344</sup> The CJEU case in point is X, Y and Z v. *Minister voor Immigratie en Asiel* (consid. 70 et 71). The SEM in its Handbook states officially that the discretion requirement is no longer applied in LGBTQI cases, but practice is not always correct. When it comes to the jurisprudence of the Federal Administrative Court, recent examples

The European Court of Human Rights ruled in November 2020 that Switzerland had violated Art. 3 ECHR in the case of a Gambian homosexual person who faced removal to Gambia.<sup>345</sup> The European Judges took specific issue with the fact that the Swiss authorities had simply gone by the assumption that the applicant would have been able to live discretely in case of removal to the country of origin, furthermore benefitting from the improved situation for LGBTI-people since the election of a new, more LGBTI-friendly president in 2016. This had led the Swiss authorities to completely overlook whether the Gambian authorities would be able and willing to protect LGBTIQ\* people against ill treatment by non-State actors. On the contrary, the Court underlined that the applicant's sexual orientation could still be discovered in case of return, and that the Swiss courts had failed to sufficiently assess the availability of State protection against acts of persecution stemming from non-state actors, leading to a violation of Art. 3.

### Victims of gender-based violence

Although SEM specifically recognises in its Handbook that domestic violence, forced marriage and sexual violence are forms of gender-based persecution that may be relevant to an asylum application, there are very few concrete cases where applications based on this type of violence have actually been accepted. The biggest problem is always the credibility of the applicants, but both the SEM and the FAC also have great difficulty in recognising that women victims of these types of violence could also qualify as members of a particular social group<sup>346</sup>. Assessment of the availability of State protection in case of persecution coming from third parties can also be quite problematic.

In recent years, asylum has often been granted to applicants coming from the Middle-East (e.g. Afghanistan, Iraq, Syria) when falling under the listed categories above.<sup>347</sup> Much more controversial is the assessment of claims of 'honour' killings, domestic violence, or forced marriage, lodged by 'western' women, especially the ones coming from the Balkan area and Turkey. In these cases, most of the times, applications are rejected, on the basis of the fact that these States have been designated as 'safe countries of origin' (or, in the case of Turkey, on the basis of settled case-law),<sup>348</sup> and that State authorities would be willing and able to offer adequate protection to women/girls targeted by these types of gender-based persecution<sup>349</sup>

Practice concerning victims of sexual violence was also problematic. Despite noting, in its Handbook, that persecutions inflicted for one of the Convention grounds could take the form of sexual violence, the Administration sometimes failed, in the practice, to properly link this form of mistreatment to the appropriate Convention ground. In such cases, allegations of rape were then dismissed as 'common misadventures' that took place because of the general situation of instability/ war existing in the country of origin, thus neglecting the fact that this very typical form of gender-specific persecution can be used to assess or perpetuate political, racial or religious structures of power.<sup>350</sup> The SEM finally changed its approach, as evidenced by Handbook which now devotes a new paragraph to "Women in Conflict

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are the following: E-1842/2019, available at: <https://bit.ly/2lxSCZC>; E-3952/2017, available at: <https://bit.ly/3cJjU8>; E-1490/2015, available at: <https://bit.ly/2PZAWdk>; D-7342/2017, available at: <https://bit.ly/3cKSBz6>; D-6635/2017, available at: <https://bit.ly/2lx5Q8P>; D-5961/2017, available at: <https://bit.ly/2lz5KO4>; D-6447/2017, available at: <https://bit.ly/2Q0eaCh>. See also, again and unfortunately, E-2109/201 and E-4133/2020, already mentioned in note 282.

<sup>345</sup> ECtHR, *B and C v. Switzerland*, Application nos. 43987/16 and 889/19, 17 November 2020.

<sup>346</sup> Federal Administrative Court, E-2883/2019, 28 June 2019, available at: <https://bit.ly/39F9tW0> and D-3064/2019, 11 July 2019, available at: <https://bit.ly/339uqWL>. See also, more positive, D-3501/2019, 21 August 2019, available at: <https://bit.ly/39G6bCO> and E-2461-2462/2019, 12 November 2019, available at: <https://bit.ly/2xgnuLw>.

<sup>347</sup> Federal Administrative Court, E-4962/2019, 2 December 2019, available at: <https://tinyurl.com/y6lyqgsm>. For Afghanistan, see Federal Administrative Court, D-3501/2019, 21 August 2019 and E-2245/2017, 26 November 2019.

<sup>348</sup> E-1948/2018, 12 June 2018, E-6626/2019, 23.12.2019, E-1175/2020, 16.03.2020, E-5920/2019, 21.11.2019.  
<sup>349</sup> For Albania, see Federal Administrative Court D-1960/2019, 7 May 2019, for Macedonia, see Federal Administrative Court E-2883/2019, 28 June 2019; for Kosovo, see E-4677/2018, 27 May 2020 and E-3437/2020, 13 July 2020.

<sup>350</sup> See for instance: Federal Administrative Court D-2290/2017, 8 February 2019, D-6021/2017, 15. April 2019 and E-2657/2015, 4 April 2017.

Situations".<sup>351</sup> In this new section, the SEM explicitly admits that «it cannot be ignored that women, solely because of their sex, are particularly and specifically affected by sexual violence in the context of conflicts», that «the examination of asylum applications from persons coming from countries facing war or conflict will therefore have to determine whether the person concerned has been personally targeted because of his or her characteristics, including his or her sex». These are certainly positive changes, which incorporate the TAF case law as well as international recommendations on the subject. It will be important to continue to monitor the case law in the coming months to see if it will be effectively implemented in daily practice

The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) entered into force in Switzerland in April 2018. The country reports of its monitoring body, the GREVIO, will certainly shed more light on women's specific conditions in the member states. Yet, it is to be noted that so far reference to such reports is seldom done both by the administration and by the Federal Administrative Court.<sup>352</sup> A group of NGOs, the [Network Istanbul Convention](#), has been created to monitor the implementation of the Convention in the Swiss practice.

According to information provided by the SEM in 2021, gender-based persecution is the topic of one basic training (2 hour) and one specialisation training (3 hours) offered to caseworkers.<sup>353</sup> The content of the training or the number of caseworkers having followed such course are not known.

The SEM does not produce disaggregated statistics on the asylum grounds and therefore also not on gender-specific persecution, which would be necessary to better grasp the problematic and the protection rate for asylum applications based on gender-specific persecution. It is not planned to introduce this kind of statistics according to the SEM.<sup>354</sup>

### **Victims/possible victims of human trafficking**

Contrary to practice in other European countries, the SEM and the Federal Administrative Court deny that victims of trafficking can be considered as 'members of a defined social group'.<sup>355</sup>

While decisions and judgments on the merits are rare, there are more cases concerning victims of trafficking in the Dublin procedure, with, in some cases at least, positive decisions. In one case the Federal Administrative Court considered the case of a Nigerian mother-of-two, PVOT, whom the SEM wanted to transfer to Italy under the Dublin procedure.<sup>356</sup> While denying the existence of structural deficiencies in the Italian reception and accommodation system, the Federal Administrative Court found that, after the entry into force of the Salvini Law (L132/2018), the SEM should conduct additional inquiries on the real possibility for the Italian authorities to take charge of the applicant and her children. Hence, the Court referred the case to the SEM for further instruction.

In another case, concerning France, the Court reminded the administrative authorities that in possible cases of trafficking they need to initiate investigations *ex officio* without the need for the victim to report it.<sup>357</sup> Furthermore, the Court found that the general presumption of safety in human trafficking cases is

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<sup>351</sup> SEM Handbook on asylum and return, available at: <https://bit.ly/2TRQv7Y>, D2, p. 13, para 2.3.6.

<sup>352</sup> On the questionable practice concerning Turkey, for instance, especially in light of the already available GREVIO Report on this country, see Federal Administrative Court, E-1948/2018, 12 June 2018, E-6626/2019, 23 December 2019, E-1175/2020, 16 March 2020; E-5920/2019, 21 November 2019.

<sup>353</sup> Information provided by the SEM, 27 April 2021.

<sup>354</sup> Information provided by the SEM, 27 April 2021.

<sup>355</sup> It is, unfortunately, constant practice. See: Federal Administrative Court, D-2759/2018, 2 July 2018, available at: <https://bit.ly/3cJdf2D>; D-2341/2019, 22 October 2019, available at: <https://bit.ly/2vaYaGi>; D-2759/2018, 2 July 2018, available at: <https://bit.ly/39G6zjW>; E-4273/2018, 4 February 2020, D-1547/2017, 04 December 2019, mostly focuses on the availability of State protection for VOT in Benin, and concludes that the State is willing and able to assist them.

<sup>356</sup> Federal Administrative Court, D-3471/2019, 23 July 2019, available at: <https://bit.ly/2v6NSqx>.

<sup>357</sup> Federal Administrative Court, D-3292/2019, 1 October 2019, available at: <https://bit.ly/2TUFy5w>.

not justified in the case of France, given that there are concrete indications that the vulnerability of potential victims of human trafficking in France cannot always be adequately taken into account”.

## 1.2. Exemption from special procedures

It is possible, on an individual basis, to exempt an applicant from the airport procedure if stay in the transit zone is deemed not appropriate on the basis of medical reports and/or vulnerability. In practice, however, also vulnerable applicants including unaccompanied minors spend the initial phase of the procedure at the airport. In some cases, their entry can be authorised just after the first summary interview.

The number of vulnerable applicants who were authorised to enter Swiss territory in 2020 was 8. However, the data provided by SEM do not make it possible to know after how long they were allowed to enter, so in many cases this only occurs after the interview on the grounds for asylum.<sup>358</sup>

## 3. Use of medical reports

### Indicators: Use of Medical Reports

1. Does the law provide for the possibility of a medical report in support of the applicant’s statements regarding past persecution or serious harm?  Yes  In some cases  No
2. Are medical reports taken into account when assessing the credibility of the applicant’s statements?  Yes  No

Every asylum seeker has to sign an agreement at the beginning of the asylum procedure that gives the SEM the right to have access to his or her medical reports. The asylum seeker is not forced to sign, but if he or she does not, the SEM will claim that the asylum seeker has not complied with the duty to cooperate and therefore loses his or her right to have the proceeding continued.

According to the law, asylum seekers must state any serious health problems of relevance to the asylum and removal procedures of which they were aware when filing the application for asylum.<sup>359</sup> In practice, this is very problematic as traumatised people are often not aware of their trauma, it is symptomatic that a trauma can show up only after some time, which speaks for the credibility of the disease.<sup>360</sup> Medical problems that are claimed at a later stage or established by another medical specialist may be taken into account in the asylum and removal procedures if they are proven. The provision of *prima facie* evidence suffices by way of exception if there are excusable grounds for the delay or proof cannot be provided in the case in question for medical reasons. That should be the case for all psychological diseases which can hardly be proven.

Under the new asylum procedure in force throughout Switzerland since March 2019, medical care and the establishment of medical facts in the examination of asylum applications, appear to be one of the main issues induced by the acceleration of procedures. They crystallize the tension between, on the one hand, the new procedural deadlines provided for in the Asylum Act and the processes put in place in federal structures and, on the other hand, an examination of asylum applications based on adequate medical care enabling the medical professionals to make clear and detailed medical diagnoses.

In this respect, the recent case law of the Federal Administrative Court highlights several shortcomings concerning medical care and measures of instruction taken by the authority of first instance on the medical aspects before issuing a decision on removal or transfer to another Dublin State. The Federal Administrative Court particularly points out to the following points: decisions issued in the absence of a medical diagnosis, the difficulty for asylum-seekers in accessing a doctor, the transfers from one federal

<sup>358</sup> Information provided by the SEM, 19 March 2021.

<sup>359</sup> Article 26-bis AsylA.

<sup>360</sup> On the obligation of the SEM to always assess the applicant’s medical situation when there are concrete signs that he or she may suffer from serious diseases such as PTSD that, even though the applicant does not specifically mention any kind of health issues, see e.g. Federal Administrative Court, Decision D-6057/2017, 15 May 2018, para 5.4.

centre to another during the procedure which result in the interruption of medical follow-up or treatment, the lack of adequate translation during interviews with doctors or medical staff of the centres and finally the difficulty for legal representatives to obtain information or medical reports.<sup>361</sup> In a recent case concerning an Iraqi family with refugee status in Greece, the Federal Administrative Court (FAC) acknowledged that the SEM did not sufficiently investigate the mother's state of health. The claimant had claimed psychological problems at the Dublin hearing and her legal representative had asked the SEM to investigate her state of health. According to the SEM, the doctor operating inside the Federal Center did not consider a referral to a specialist necessary and the appellant did not explain her problems in the infirmary. The FAC notes that this argument does not take into account the fact that this lack was due to the absence of a translation. At the time of the medical examination, there had only been one translation by a member of staff at the centre with limited knowledge of the Kurdish language. The case is now back to SEM for re-assessment of the facts.<sup>362</sup>

The health concept implemented by the SEM in French-speaking Switzerland prohibits direct contacts between legal representation and health professionals, both inside and outside the federal centres. Thus, only email contacts are allowed between the infirmary of the centres and the legal representatives and the latter do not have the possibility to directly contact the health professionals located outside the centres. In one important judgment last year, the Federal Administrative Court stated that the unjustified lack of transmission of medical information represents a violation of the right to a lawful hearing.<sup>363</sup> From the perspective of organisations such as the Swiss Refugee Council, direct and effective communication between medical staff and legal representation is necessary to ensure adequate care and a complete establishment of the relevant facts, especially in the context of an accelerated procedure.

In principle, the asylum seekers do not have to pay for the medical examination. Moreover, medical treatment – if necessary – will be paid by the basic health insurance every asylum seeker is provided with. However, medical examinations for the purpose of a detailed medical report to be used in the asylum procedure are rarely requested by the authorities. In the majority of federal centres the SEM has concluded partnerships with doctors or medical centres to which asylum seekers are redirected in case of need. In the eventuality that an asylum seeker consults a doctor who is not included in the SEM concept, the costs incurred are not covered by the basic health insurance. In light of the current breaches as reflected in the recent FAC's case law as described above, there is in some cases a real difficulty in asserting health problems in time in the first instance procedure.

Another problem is that, in a large number of cases, medical reports are taken into account mainly in order to assess whether the removal order is legal and reasonable, and are not adequately considered for the assessment of the person's credibility.

The medical reports are unfortunately infrequently based on the methodology laid down in the Istanbul Protocol. In the view of NGOs, there is need for improvement in this regard.

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<sup>361</sup> See for instance: OSAR, *L'accélération ne doit pas prêter l'équité et la qualité*, 4 February 2020, available (in French) at: <https://bit.ly/2SJPiAv>; Vivre Ensemble, *Procédures accélérées et accès aux soins. L'équation impossible? | Prise en considération de l'état de santé: des procédures bâclées*, June 2019, available (in French) at: <https://bit.ly/32djGq4>.

<sup>362</sup> Federal Administrative Court, Decision D-2676/2019, 19.08.2020, available at: <https://tinyurl.com/yd6ca357>

<sup>363</sup> For a more detailed description of the medical concept see in particular: Federal Administrative Court, Decision D-1954/2019, 13 May 2019, available at: <https://bit.ly/2wE1vxU>; E-3262/2019, 4 July 2019, available at: <https://bit.ly/2TONtkZ>.

#### 4. Legal representation of unaccompanied children

##### Indicators: Unaccompanied Children

1. Does the law provide for the appointment of a representative to all unaccompanied children?  
 Yes  No

In Switzerland, unaccompanied children are entitled to asylum interviews if they are deemed capable of judgment. The assessment of this capability depends on the maturity and the development of the child in question.<sup>364</sup> Usually, a person is considered as able to make a judgment at the age of 14. The Federal Administrative Court has stressed the importance of the right of the child to properly take part in all the decisions that concern him/her and clarified in a detailed manner how this should be put into practice during the personal interview.<sup>365</sup>

A representative, a so-called person of trust, is immediately to be appointed for each unaccompanied asylum-seeking child. The latter assists the unaccompanied child during the asylum procedure.<sup>366</sup> The Asylum Ordinance 1 specifies that the duty of the representative starts with the first interview.<sup>367</sup> This means that in all the procedures, the representative should be present in the first as well as the second interview. Also, when a hearing takes place because the SEM does not believe that the person is a minor and is about to treat the person as an adult, a representative should be attending because the change of the asserted birth date should be considered as a decisive procedural step.

The child may then be transferred to a Canton, if s/he is moved to the so-called extended procedure and his/her asylum application is accepted or temporary admission granted. In these cases, the legal duties of the person of trust are passed on to other representatives, mostly social workers that operate within the different cantons as well as a legal representative if the asylum procedure is not yet completed. The discrepancies and different quality level of the care and support provided by the different cantonal offices has been highlighted in a report by the Conference of the Cantonal Directors of Social affairs committees.<sup>368</sup> The division of responsibilities between the persons of trust working in the Federal centres and the cantonal representatives is another sensitive issue. It must be added that the person of confidence is foreseen as an interim measure until child protection measures according to the Civil Code (such as appointing a guardian) are implemented. The appointment of a guardian usually occurs after attribution to a Canton.

According to the new Asylum Ordinance 1, the mandate of the trusted persons working inside the Federal centres or at the airports begins after the submission of the asylum application and lasts as long as the unaccompanied stays in said centre or at the airport or until he turns 18. If a Dublin procedure is pending, then the activity of the trusted person lasts until the unaccompanied minor is transferred to the competent Dublin State, or until s/he becomes an adult.<sup>369</sup> Even if the unaccompanied minor renounces of the appointed legal representative, the trusted person remains responsible for defending his or her interests. Neither the authorities nor the unaccompanied minor can waive the appointment of a trusted person.<sup>370</sup> This means that there is no need for the unaccompanied minor to agree with such designation.

In 2020, 535 applications were lodged by unaccompanied children, compared to 441 in 2019 and 401 in 2018.<sup>371</sup> The high majority of unaccompanied children was from Afghanistan (314 out of 535).

<sup>364</sup> Asylum Appeals Commission, Decision EMARK 1996/4, 9 March 1995.

<sup>365</sup> Federal Administrative Court, Decision E-1928/2014, 24 July 2014, available at: <https://bit.ly/3axJq3g/>.

<sup>366</sup> Article 17(3) AsyIA.

<sup>367</sup> Article 7(2-bis) AO1.

<sup>368</sup> Recommandations de la Conférence des directrices et directeurs cantonaux des affaires sociales (CDAS), 20 May 2016, available at: <https://go.aws/39BQxHD>.

<sup>369</sup> The trusted person also represents the child in the procedures referred to in art. 76a and 80a of the Federal Act on Foreign Nationals and Integration.

<sup>370</sup> Federal Administrative Court, D-5672/2014, 6 January 2014.

<sup>371</sup> SEM statistics available at: <https://bit.ly/3c87Js7>.

## Profile and tasks

The duties of the person of trust (who also acts as legal representative in federal asylum centres) are not precisely defined by law and are therefore not always clear in practice.<sup>372</sup> The Asylum Ordinance 1 specifies that the representative must have knowledge of asylum law and the Dublin procedure. He or she accompanies and supports the minor in the asylum or Dublin procedure. The Ordinance lists a few examples of tasks that the representative must fulfil: advice before and during interviews; support in naming and obtaining elements of proof; support especially in the contact with authorities and medical institutions.<sup>373</sup> The idea is that the person of trust should support the asylum seeker in the asylum procedure, as well as in other legal/administrative tasks related to the asylum claim and to the minor's situation in Switzerland (accommodation in the centre, attendance to school, health issues etc). In practice, as long as the minor stays in the federal asylum centre (maximum 140 days), the representative mostly accompanies him/her to the asylum interview or hearing. The child and the representative often only meet shortly before the interview and, in some cases, persons of trust cannot have direct access to the federal reception centres where minors are accommodated. Often the translator of the SEM is asked for help with the explanation of the representative's role. Under these circumstances there is hardly any time to build trust.

## E. Subsequent applications

### Indicators: Subsequent Applications

1. Does the law provide for a specific procedure for subsequent applications?  Yes  No
2. Is a removal order suspended during the examination of a first subsequent application?
  - ❖ At first instance  Yes  No
  - ❖ At the appeal stage  Yes  No
3. Is a removal order suspended during the examination of a second, third, subsequent application?
  - ❖ At first instance  Yes  No
  - ❖ At the appeal stage  Yes  No

The Asylum Act provides a specific procedure for subsequent applications. The procedure is described in Articles 111c AsylA and 111d AsylA (regarding the costs) and in Article 7c AO1 (procedural aspects). Every application submitted within 5 years since the asylum decision or removal order became legally binding is considered subsequent application. As such it must be submitted in writing and include a statement of the grounds.

The responsible authority is the SEM, as in cases of first applications in the regular procedure. The procedure remains the same even with more than one subsequent application during the 5-year period after the asylum decision or removal order has become legally binding, except for unmotivated or repeated subsequent applications with the same motivation, discussed below.

The subsequent application should not be confused with a request for re-examination. An application is to be treated as a subsequent asylum application if there are significant reasons which have an impact considering the examination of refugee status. On the other hand, if the new application is not based on grounds regarding refugee status, but only regarding obstacles to return (for example medical reasons), it is treated as a request for re-examination. The distinction is difficult in practice, even for persons specialised in the field of asylum.

There is no obligation for the SEM to provide a personal interview. Nevertheless, it has the duty to examine all arguments carefully and individually.<sup>374</sup>

<sup>372</sup> Asylum Appeals Commission, Decision EMARK 2006/14 of 16 March 2006.

<sup>373</sup> Article 7(3) AO1.

<sup>374</sup> Martina Caroni et al., *Migrationsrecht*, 3<sup>rd</sup> edition, Berne 2014, 342 et seq.

Unlike in the regular procedure, during the examination time of the application, the asylum seeker is not granted a place to stay in federal asylum centres. Subsequent applicants will be most of the time accommodated in cantonal emergency shelters. The application does also not have suspensive effect, but the SEM would grant this effect if it starts examining the application in detail. In practice, the deportation will be suspended pending the first opinion of the SEM on the subsequent application.

Unmotivated or repeated subsequent applications with the same motivation will be dismissed without a formal decision. The Federal Administrative Court has clarified that, normally, there is no legal remedy to appeal this dismissal decision.<sup>375</sup> However, if the SEM has applied this provision incorrectly, there is the right to an effective remedy for denial of justice.<sup>376</sup>

The legal advisory offices in the cantons can be asked for help in the procedure of a subsequent application. Their legal assistance will depend on their capacities and their estimation of the prospects of success. A list of such offices is available on the Website of the Swiss Refugee Council.<sup>377</sup>

The number of persons lodging subsequent applications in 2020 was as follows:

| Subsequent applicants in Switzerland: 2020 |                      |            |
|--|----------------------|------------|
| Main countries of origin                   | Number of applicants | Accepted   |
| Sri Lanka                                  | 107                  | 6          |
| Iraq                                       | 87                   | 11         |
| Eritrea                                    | 77                   | 9          |
| Georgia                                    | 74                   | 0          |
| Afghanistan                                | 71                   | 7          |
| Syria                                      | 67                   | 5          |
| Turkey                                     | 62                   | 21         |
| Iran                                       | 59                   | 4          |
| Ethiopia                                   | 43                   | 16         |
| <b>Total</b>                               | <b>990</b>           | <b>133</b> |

Source: SEM, Asylum Statistics 2020.

## F. The safe country concepts

### Indicators: Safe Country Concepts

1. Does national legislation allow for the use of “safe country of origin” concept?  Yes  No
  - ❖ Is there a national list of safe countries of origin?  Yes  No
  - ❖ Is the safe country of origin concept used in practice?  Yes  No
2. Does national legislation allow for the use of “safe third country” concept?  Yes  No
  - ❖ Is the safe third country concept used in practice?  Yes  No
3. Does national legislation allow for the use of “first country of asylum” concept?  Yes  No

### 1. Safe country of origin

The Federal Council is responsible for designating states in which, on the basis of its findings, there is protection against persecution, as safe countries of origin.<sup>378</sup> In such a case, SEM usually issues a decision of inadmissibility without further investigations. The time limit for an appeal in these cases is 5

<sup>375</sup> Federal Administrative Court, Decision E-3979/2014, 3 November 2015.

<sup>376</sup> Federal Administrative Court, Decision E-5007/2014, 6 October 2016.

<sup>377</sup> Available at: <https://bit.ly/33cXspz>.

<sup>378</sup> Article 6a(2)(a) AsylA.

working days.<sup>379</sup> The common list of safe countries of origin and safe third countries is published in the Annex 2 of Asylum Ordinance 1 on procedural aspects (AO1),<sup>380</sup> and was last updated in October 2019. It includes:

- EU and EEA Member States;
- Albania;
- Benin;
- Bosnia-Herzegovina;
- Burkina Faso;
- Georgia;
- Ghana;
- India;
- Kosovo;
- Moldova, excluding Transnistria;
- Mongolia;
- Montenegro;
- North Macedonia;
- Senegal; and
- Serbia.

## 2. Safe third country

The Federal Council is also responsible for the designation of states where there is effective protection against *refoulement*,<sup>381</sup> as safe third countries.<sup>382</sup> The Federal Council should periodically review these decisions.<sup>383</sup>

### 2.1 Safety criteria

The following requirements must be met:<sup>384</sup>

- ❖ Ratification of and compliance with the ECHR, the Refugee Convention, the UN Convention against Torture and the UN Covenant on Civil and Political Rights.
- ❖ Political stability which guarantees the compliance with the mentioned legal standards.
- ❖ Compliance with the principle of a state governed by the rule of law.

According to the Asylum Appeals Commission (predecessor of the Federal Administrative Court), what is relevant is the possibility to find actual protection in the third country. This is not the case if there is no access to the asylum procedure or if the third country only applies the Refugee Convention to European refugees.<sup>385</sup> According to the materials of the Federal Council in preparation of the mentioned provision, it is also necessary that the third country accepts the readmission of the person in question.<sup>386</sup>

This list includes so far all EU and EFTA member states.<sup>387</sup>

In a case concerning a Kurdish journalist for whom the SEM had issued an inadmissibility decision and an expulsion order to **Brazil**, the Federal Administrative Court recalled that, unlike third countries designated as safe by the Federal Council, the SEM must, when it comes to a return to another third country, examine in each case whether the latter offers sufficient protection against *refoulement*. In the

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<sup>379</sup> Article 108(3) AsylA.

<sup>380</sup> Annex 2 AO1, available (in French) at: <http://bit.ly/2FMt9sO>.

<sup>381</sup> As defined in Article 5(1) AsylA.

<sup>382</sup> Article 6a(2)(b) AsylA.

<sup>383</sup> Article 6a(3) AsylA.

<sup>384</sup> Federal Council, Bundesblatt (Federal Gazette) 2002, available (in German) at: <http://bit.ly/2j9UF6l>, 6877ff.

<sup>385</sup> Asylum Appeals Commission, Decisions EMARK 2000/10, 2001/14.

<sup>386</sup> Federal Council, Bundesblatt (Federal Gazette) 2002, 6884.

<sup>387</sup> SEM, 'Bezeichnung aller EU- und EFTA-Staaten als sichere Drittstaaten', 14 December 2007, available (in German) at: <http://bit.ly/1NgJbf5>.

present case, the Court considered that the reasoning put forward by the SEM, which concluded that there was effective protection against any *refoulement* in the country of origin, was insufficient.<sup>388</sup>

## 2.2 Connection criteria

According to the law, the SEM shall normally dismiss an application for asylum if the asylum seeker can return to a safe third country as described above in which he or she was previously resident. In practice, these are normally cases in which the asylum seeker already has international protection (or another type of residence permit) in an EU/EFTA-member state. If the person was there as an asylum seeker or had merely passed through, the Dublin Regulation applies, rather than the safe third country rule (all countries on the safe third country list are Dublin member states as well).

## G. Information for asylum seekers and access to NGOs and UNHCR

### 1. Provision of information on the procedure

#### Indicators: Information on the Procedure

1. Is sufficient information provided to asylum seekers on the procedures, their rights and obligations in practice?  Yes  With difficulty  No  
  
❖ Is tailored information provided to unaccompanied children?  Yes  No

In 2019, the SEM published a video on Youtube with some simplified explications regarding the new procedure in several languages.<sup>389</sup> The SEM even has a dedicated YouTube channel where it advertises a variety of videos for asylum seekers. Asylum seekers also receive a leaflet with the most important information regarding the asylum procedure from SEM. A specific leaflet is provided to persons applying for asylum at airports which explains the airport procedure.

Furthermore, as the new system provides free advice and legal representation during the first instance procedure, every asylum seeker assigned to the federal centres, following the lodging of the asylum application, obtains an initial information from the NGO in charge of legal protection in the form of an individual consultation meeting to present the work of the legal protection service, inform about the rights and obligations of the asylum seekers during the procedure and to gather initial information. A leaflet available in the main languages spoken by the applicants is provided by the NGOs and a short film explaining the procedure and questions regarding accommodation, health insurance, allowance and access to the labour market is also broadcasted in the offices of the legal representation. In addition, asylum seekers have the possibility to visit the legal protection offices spontaneously or by appointment during their stay in the federal centre in order to obtain information or submit any evidence. However, access to legal protection offices is highly dependent on the location of federal centres and legal aid offices.

### 2. Access to NGOs and UNHCR

#### Indicators: Access to NGOs and UNHCR

1. Do asylum seekers located at the border have effective access to NGOs and UNHCR if they wish so in practice?  Yes  With difficulty  No
2. Do asylum seekers in detention centres have effective access to NGOs and UNHCR if they wish so in practice?  Yes  With difficulty  No
3. Do asylum seekers accommodated in remote locations on the territory (excluding borders) have effective access to NGOs and UNHCR if they wish so in practice?  Yes  With difficulty  No

<sup>388</sup> Federal Administrative Court, Decision D-635/2018, 8 February 2018.

<sup>389</sup> See the English at: <https://bit.ly/2SS2NxO>.

Asylum seekers at the border (airports) have effective access to the NGOs mandated to provide legal representation at first instance (namely Caritas and RBS Bern, see [Border procedure: Legal assistance](#)). The right of asylum seekers to access to UNHCR is not specifically regulated in Swiss national law. Access to legal assistance can be difficult for persons in detention, as their means to contact and find a legal representative within the short time limits for appeal (especially in case of inadmissibility decisions) are limited. However, with the entry into force of the new asylum procedure, free legal assistance was introduced at first instance to counter the introduction of tight deadlines (see [Regular procedure: Legal assistance](#)).

One serious difficulty in Switzerland is the access to NGOs and legal advice for persons who are located in remote federal accommodation centres. Since the procedure in principle takes place exclusively in the federal asylum centre with processing facilities, the presence of NGOs responsible for ensuring the legal protection of asylum seekers is considerably reduced in remote federal accommodation centres. Concrete opportunities for access to other civil society organisations vary strongly depending on the location of both centres with and without processing facilities.

In cases where mandated legal representation decides not to appeal a negative decision because it would be doomed to fail (so-called “merits-test”), there are very few possibilities to seek assistance from another organisation or private lawyer. First of all, the time limit is very short, especially in the Dublin and accelerated procedure. Secondly, a ticket for transportation to a legal advisory office must be organised and finally, some legal advisory offices are only open one day per week. As a result, persons located in the countryside face clear disadvantages especially regarding the access to legal advice and therefore also access to some information and support.<sup>390</sup>

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<sup>390</sup> For further information on this topic, see Thomas Segessenmann, *Rechtsschutz in den Aussenstellen der Empfangs- und Verfahrenszentren des Bundes*, ASYL 1/15, 14ff.

## H. Differential treatment of specific nationalities in the procedure

### Indicators: Treatment of Specific Nationalities

1. Are applications from specific nationalities considered manifestly well-founded?  Yes  No  
 ❖ If yes, specify which: Syria
2. Are applications from specific nationalities considered manifestly unfounded?<sup>391</sup>  Yes  No  
 ❖ If yes, specify which: Albania, Algeria, Benin, Bosnia-Herzegovina, Burkina Faso, North Macedonia, Gambia, Georgia, Ghana, India, Kosovo, Moldova, Mongolia, Montenegro, Morocco, Nigeria, Senegal, Serbia, EU/EFTA Member States

### 1. Eritrea

In 2020, Eritrea was the top country of origin with 1,917 applications lodged. This is consistent with previous years. However, this is not due to high numbers of new arrivals (primary applications) but rather to so-called “secondary applications”, including births, family reunification and multiple applications. Since April 2020, the SEM provides detailed statistics distinguishing between the different categories of applications:<sup>392</sup>

| Applications lodged by Eritreans : 2019-2020 |                               |                      |                        |        |                      |                       |            |
|--|-------------------------------|----------------------|------------------------|--------|----------------------|-----------------------|------------|
|  | Total new asylum applications | Primary applications | Secondary applications |        |                      |                       | Relocation |
|  |                               |                      | Total                  | Births | Family reunification | Multiple applications |            |
| 2019   | 2,899                         | 297                  | 2,601                  | 1,434  | 1,057                | 110                   | 1          |
| 2020   | 1,917                         | 211                  | 1,706                  | 1,173  | 366                  | 167                   | 0          |

Primary applications refer to applications lodged directly by Eritrean applicants in Switzerland, while secondary applications refer to applications lodged following family reunification procedure, to subsequent applications as well as to children who were born in Switzerland from refugee or asylum seekers’ parents. The above figures demonstrate that the number of new applications lodged by Eritreans is very low, representing 11% of asylum applications in 2019 and 10% in 2020. In 2019, half of the “new asylum applications” registered corresponded to newborn who automatically acquire refugee status because their parents have been recognised as refugees, while more than one third of applications concerned family members arrived for the purpose of family reunification who normally acquire refugee status if they are reunited with a spouse or parent granted international protection, and are included in the temporary admission if their family member is a temporarily admitted person in Switzerland.

The high proportion of such secondary applications clearly increases the protection rate in a way that is misleading. In fact, according to the statistics, the protection rate (asylum status) was 68% and the temporary admission rate was 21% in 2020 (see the statistical table at the beginning of this report), but few people have been granted protection upon a primary application (no detailed data available).

In June 2016, the SEM changed its policy regarding Eritrea. It stated that persons who left Eritrea illegally and had previously never been called to the military service, exempted from military service, or released from military service, would no longer be recognised as refugees. In January 2017, the Federal Administrative Court also changed its practice and ruled that the illegal exit of Eritrea could not anymore, in itself, justify the recognition of refugee status and that additional individual elements were required.<sup>393</sup> Confirming a more restrictive approach regarding Eritrean cases, the Court subsequently found, in August 2017, that the return of Eritrean nationals could not be generally considered unreasonable. Thus, noting that the situation in Eritrea had improved significantly since 2005, the Court estimated that persons whose

<sup>391</sup> Whether under the “safe country of origin” concept or otherwise.

<sup>392</sup> It does so retrospectively for the years 1994-2019. Such statistics are available at: <https://bit.ly/3vHKhcb>. See also more detailed statistics at: <https://bit.ly/395snGy>, Table 7-21. See also asile.ch, “Les bébés de réfugiés gonflent les statistiques des demandes d’asile”, available at: <https://bit.ly/2X9Sp69>.

<sup>393</sup> Federal Administrative Court, Decision D-7898, 30 January 2017.

asylum request was rejected and who have already done their military service as well as those who “settled” their situation with the Eritrean State and benefit from the status of so-called “diaspora member”, were not under the threat of being convicted or recruited to the national service and that there was no obstacle to the execution of removal under national law.<sup>394</sup> In a third leading decision, the Federal Administrative Court stated that there was no interdiction of *refoulement* (due to art. 3 and/or 4 ECHR) nor an obstacle to the execution of removal in national law<sup>395</sup> for persons who have to serve in national service.<sup>396</sup> This practice change has been criticised by the Swiss Refugee Council and others, as it does not seem justified by the current country of origin information (COI) or the difficulty to obtain reliable COI.<sup>397</sup>

Following these recent changes, in spring 2018, the SEM started to re-examine the status of approximately 3,000 Eritreans already granted temporary admission (as foreigners, without refugee status) according to this case law. Between 2018 and 2020, the SEM examined and reviewed the temporary admission of 3,400 Eritrean nationals, concluding that removal was reasonable and revoking the temporary admission status in 83 cases (2.4%). 63 of these decisions have entered into force by December 2020, while six appeals were admitted and the 14 cases are still in appeal procedure.<sup>398</sup> In October 2020, the Federal Administrative Court has clarified that revocation of temporary admission after such review requires an examination of proportionality taking into account the degree of integration of the person concerned.<sup>399</sup>

In December 2018, the UN Committee against Torture ruled that the expulsion of an Eritrean national would constitute a violation of Article 3 of the Convention.<sup>400</sup> Following a negative decision taken by the SEM, the Federal Administrative Court had declared the appeal filed doomed to failure, by a single-judge procedure. It had thus required the payment of an advance fee of 600 CHF despite the claimant’s proven indigence. The Committee considered that the examination carried out under this procedure was anticipated and summary, whereas the complainant’s allegations were plausible, particularly in view of the disastrous human rights situation in Eritrea. It found that the requirement of procedural costs had prevented the applicant from having the possibility to see his appeal examined on the merits by the Federal Administrative Court. It therefore concluded that a removal to Eritrea would constitute a violation of Article 3 and ordered the Swiss authorities to maintain the suspension of the removal to Eritrea and to reassess the claimant’s asylum application.<sup>401</sup>

## 2. Syria

Syrians were the fifth largest group of asylum seekers in Switzerland in 2020, with a total of 904 applications for international protection lodged. The recognition rate at first instance (asylum status) was 39% and the temporary admission rate was 49% in 2020. The higher rate of temporary admission seems to be due to the fact that the SEM finds the applicant to be a victim of generalised conflict and violence rather than a direct target of persecution.

In February 2015, the Federal Administrative Court issued two leading cases regarding Syria. In a first judgment, it stated that considering the current circumstances in Syria, army deserters and conscientious objectors can risk persecution. The Court also denied an internal flight alternative for the applicant (of

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<sup>394</sup> Federal Administrative Court, Decision D-2311/2016, 29 August 2017.

<sup>395</sup> Federal Administrative Court, Decision D-2311/2016, 29 August 2017.

<sup>396</sup> Federal Administrative Court, Decision E-5022/2017, 10 July 2018.

<sup>397</sup> For further information, see Swiss Refugee Council, ‘Décision du Tribunal administratif concernant le renvoi d’une Erythréenne – Le jugement est incompréhensible’, 31 August 2017, available (in French) at: <http://bit.ly/2FKqT5b>; ‘La Confédération mise sur l’intimidation plutôt que sur des solutions’, 3 September 2018, available (in French) at: <https://bit.ly/2TJGCbr>.

<sup>398</sup> Communication of SEM, 18.12.2020, available at: <https://bit.ly/3pxbTxv>. See also the report of the Federal Council responding to the motion nr. 18.3409 by Müller Damian of 29 May 2018, available at: <https://bit.ly/3mWAOZP>.

<sup>399</sup> Judgement of the Federal Administrative Court E-3822/2919 of 28 October 2020.

<sup>400</sup> UN Committee against Torture, CAT/C/65/D/811/2017, 17 December 2018.

<sup>401</sup> See also CSDM, ‘Une décision de renvoi vers l’Érythée prise par les autorités suisses viole la Convention contre la torture’, 19 December 2018, available (in French) at: <https://bit.ly/2SoBFb6>.

Kurdish origin) in the Kurdish-controlled area, due to the instability of the region.<sup>402</sup> In a second judgment, the Court stated that even ordinary participants of demonstrations in Syria against the regime risk persecution if they have been identified by Syrian state security forces.<sup>403</sup> Regarding the forced recruiting of persons by the Kurdish group YPG, the Court stated that this did not amount to a justified fear of persecution.<sup>404</sup> In the case of a woman who joined the Rojava Peshmerga in Northern Iraq, the Federal Administrative Court stated that she should be recognised as refugee as the Rojava are perceived as YPG-critical and therefore she would face problems to re-enter Syria as the partial cooperation between YPG and the Syrian Regime could not be excluded.<sup>405</sup> In 2020, the Court ruled on two cases concerning homosexual applicants whom the SEM had not recognised as refugees, and granted them asylum.<sup>406</sup>

Concerning resettlement, the Federal Council decided to resettle 1,600 particularly vulnerable recognised refugees in Switzerland for the years 2020-2021, mainly victims of the Syrian conflict.<sup>407</sup> In 2020, 512 refugees were resettled to Switzerland (compared to 1,009 in 2019).<sup>408</sup>

### 3. Afghanistan

The second largest group of asylum seekers in 2020 were Afghans, with a total of 1,681 applicants. 19% were granted asylum at first instance, while 76% received temporary admission. Returns to Afghanistan are generally considered unreasonable (which means a temporary admission is granted), with three exceptions: returns to the cities of Kabul, Mazar-i-Sharif and Herat can be considered reasonable if certain conditions are met in the individual case, mainly a family or social network.<sup>409</sup> Although the Federal Administrative Court made a new analysis of the situation concerning Mazar-i-Sharif in 2019, and stated that the situation deteriorated, it still considered the return reasonable under certain conditions in the individual case.<sup>410</sup>

In a principle judgment released on 13 October 2017, the Federal Administrative Court reassessed the security situation in Afghanistan.<sup>411</sup> Firstly, the Court estimated that the general security situation in Afghanistan had deteriorated but remains better in Kabul. Thus, the Court considered the execution of the expulsion to Kabul to be reasonable under careful consideration of circumstances that are favourable in individual cases (sustainable network of relationships, the possibility of securing the minimum existence level, secure living conditions, good health status). Paragraph 7 includes a general analysis of the situation in Afghanistan based on numerous sources, which concludes that the security situation has deteriorated in all regions since 2011.

The situation of Kabul is considered separately under paragraph 8 of the ruling. The Court finds that the security situation in Kabul is extremely precarious,<sup>412</sup> and has clearly deteriorated in comparison with the BVGE 2011/7 judgment. The situation in Kabul is regarded as fundamentally life-threatening and thus unacceptable.<sup>413</sup> However, this rule may be deviated from if there are particularly favourable factors which would prevent the returning person from being placed in a situation which would threaten his or her existence and on the basis of which, in exceptional cases, it can be assumed that the execution is reasonable. In summary, the Court considers an expulsion to Kabul to be reasonable only if the conditions are particularly favourable – in particular single, healthy men with a sustainable network of relationships, an opportunity to secure the minimum subsistence level and a secure housing situation – to be

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<sup>402</sup> Federal Administrative Court, Decision D-5553/2013, 18 February 2015.

<sup>403</sup> Federal Administrative Court, Decision D-5779/2013, 25 February 2015.

<sup>404</sup> Federal Administrative Court, Decision D-5329/2014, 23 June 2016.

<sup>405</sup> Federal Administrative Court, Decision D-5941/2017, 13 March 2019.

<sup>406</sup> Federal Administrative Court, D-6722/2017 of 12.08.2020 and D-1648/2018 of 17.12.2020.

<sup>407</sup> Information on resettlement programs available on the SEM Website, at: <https://bit.ly/3padRU2>.

<sup>408</sup> SEM, Asylum Statistics 2020.

<sup>409</sup> Federal Administrative Court, Decisions D-7950/2009, 30 December 2011 (Mazar-i-Sharif), D-2312/2009, 28 October 2011 (Herat), BVGE 2011/7, 16 June 2011 (Afghanistan in general and Kabul).

<sup>410</sup> Federal Administrative Court, Reference Decision D-4287/2018, 8 February 2019.

<sup>411</sup> Federal Administrative Court, Decision D-5800/2016, 13 October 2017.

<sup>412</sup> *Ibid*, para E.8.2.3.

<sup>413</sup> *Ibid*, para E.8.4.1.

reasonable.<sup>414</sup> Accordingly, the Court put higher demands in place than in the past with regard to the clarification of a sustainable social/family network. The network must be able to guarantee “in particular economic progress and housing”. Even stricter conditions are required if Kabul is considered as an internal flight alternative, for example because the applicant has been living or studying there and has family or social network in Kabul. According to the Court, it may exceptionally be reasonable for young healthy men with a sustainable social network to be deported to Kabul.

The rate of refugee status recognition for Afghans is still low (12%), with many asylum claims being rejected with the argumentation that persecution or tentative for recruitment through the Talibans lacks a relevant motive for asylum. The Court has defined a series of profile risks (persons who have collaborated with international troops, organisations and NGOs and their family members),<sup>415</sup> however the applicants must provide evidence of a concrete risk in their individual case to be granted asylum. Recently the Court has also ruled in a few cases concerning gender specific violence, stating that the state is unwilling to protect women victims of violence and granting them refugee status.<sup>416</sup>

On 5<sup>th</sup> November 2019, the ECHR has ruled in a case concerning an asylum applicant converted to Christianity that Swiss asylum authorities had not sufficiently inquired into how the applicant was practicing his faith and how he could continue doing so in Afghanistan.<sup>417</sup> A few months afterwards, the Federal Administrative Court recognised in a judgement of March 2020 that the need to hide one’s faith in the Afghan context could reach the threshold of an intolerable psychological pressure justifying granting asylum.<sup>418</sup>

#### 4. Sri Lanka

In 2020, 468 asylum applications were lodged by persons from Sri Lanka. The recognition rate at first instance (asylum status) reached 32% of all the decisions rendered on the merits while 12% were given a temporary admission status. In July 2016, the SEM changed its practice regarding Sri Lanka. As it saw certain improvements in the security and human rights situation, asylum applications would be treated more restrictively from that moment.<sup>419</sup> In July 2016, the Federal Administrative Court updated its case law related to Sri Lanka by considering that the enforcement of removal to the northern (apart from the Vanni) and eastern provinces of the country was, in principle and under certain conditions, reasonable.<sup>420</sup> Subsequently, the Court continued restricting its stance through a principle judgement released in October 2017.<sup>421</sup> Thus, the Court argued that, since the end of the conflict in 2009, the security situation has improved significantly in the Vanni region. As a result, it considered that a person with a sustainable network of relationships and the possibility of securing the minimum existence level with time should be able “to resettle there without undue difficulty”.<sup>422</sup> Regarding vulnerable profiles such as single women with or without children, persons with serious health issues or elderly, the Court concluded that the execution of the removal remained unreasonable. In 2019, the practice remained the same despite the change of government. In November 2019, an employee of the Swiss embassy was kidnapped in order to obtain information about a high profile police inspector who had investigated family Rajapaksa and had

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<sup>414</sup> *Ibid*, para E.8.4.2.

<sup>415</sup> See for example Federal Administrative Court, judgements E-2802/2014 of 15.1.2015, c. 5.3.3; D-4286/2016 of 4.06.2018; E-7357/2016 of 24.07.2018.

<sup>416</sup> Federal Administrative Court, judgement D-3501/2019 of 21.08.2019.

<sup>417</sup> A.A. c. Switzerland (Request n° 32218/17).

<sup>418</sup> Federal Administrative Court, judgement E-2956/2018 of 12.03.2020.

<sup>419</sup> SEM, ‘Anpassung der Asyl- und Wegweisungspraxis für Sri Lanka’, 7 July 2016, available (in German) at: <http://bit.ly/2jV4utf>.

<sup>420</sup> Federal Administrative Court, Decision E-1866/2015, 15 July 2016.

<sup>421</sup> Federal Administrative Court, Decision D-2619/2016, 16 October 2017.

<sup>422</sup> The Swiss Refugee Council expressed strong reservations concerning the evaluation made by the Court regarding the security situation in the northern part of Sri Lanka, especially in the Vanni’s region. Indeed, this appreciation is mostly based on a UNHCR’s survey of 113 families who returned voluntarily from India to the northern part of the country. Therefore, it appears that the evaluation made does not rest on a detailed analysis. For further information see: Swiss Refugee Council, ‘Curieux sondages et requérant-e-s d’asile du Sri Lanka’, 14 December 2017, available (in French) at: <http://bit.ly/2AG5w5Z>.

flown to Switzerland after the election of President Gotabaya Rajapaksa, where he had applied for asylum.<sup>423</sup> This incident did not impact the SEM's practice towards Sri Lankan applicants.

## 5. Turkey

In 2020, Turkey was the third largest group of asylum seekers in Switzerland. 1,201 asylum applications were lodged by persons from Turkey. The recognition rate at first instance (asylum status) reached 72% of all the decisions rendered on the merits while 10% were given a temporary admission status.

In a principle judgment regarding exclusion from asylum released on 25 September 2018,<sup>424</sup> the Federal Administrative Court excluded a Kurdish refugee from asylum status for supposed proximity to Komalen Ciwan, an organisation considered as affiliated to PKK. The presumption of proximity to that organisation was considered as sufficient by the Federal Administrative Court to suspect that the applicant endangered Switzerland's internal or external security. The decision raises many questions notably concerning freedom of expression as well the standard of proof and the burden of proof in cases of suspected links to terrorist organisations or violent extremism. It calls into question the notion of refugee protection as such insofar as the latter aims precisely to protect persons persecuted for their political opinion.<sup>425</sup>

In 2019, the Court stated in several judgements that the situation in Turkey deteriorated with regard to the political and human rights situation, especially in the southeast of the country.<sup>426</sup> In a judgement of November 2019, the Court ruled that Turkish authorities can be considered as willing and able to protect victims of gender specific persecution.<sup>427</sup> This case law might change due to the recent withdrawal of Turkey from the Istanbul Convention on preventing and combating violence against women and domestic violence.

## 6. Other nationalities

Regarding **Iraq**, in December 2015 the Federal Administrative Court stated that there is no situation of generalized violence in the northern Kurdish provinces. Therefore, persons can be returned to northern Iraq if they have a sustainable social or family network there.<sup>428</sup> Persons from central and southern Iraq usually receive a form of protection. As of 2020, the practice concerning Kurdish provinces remained the same.

Practice toward **Ethiopian** asylum seekers has become more and more restrictive since the election of President Abiy Ahmed in 2018. Despite several reports of violence and violation of human rights, the Federal Administrative Court considers the situation as having significantly improved and such violations of human rights as "an outgrowth of the democratisation process that has been initiated".<sup>429</sup> In January 2019, Switzerland concluded an agreement with Ethiopia on the repatriation of applicants from Ethiopia who have received a negative asylum decision.<sup>430</sup> The planned agreement between Switzerland and Ethiopia provides close cooperation with the Ethiopian secret services. The latter would be responsible for identifying the asylum seekers concerned. Switzerland has nearly 300 Ethiopian nationals whose asylum applications were rejected and who are awaiting removal.<sup>431</sup> According to SEM's statistics, four

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<sup>423</sup> See the News on the Website of the Swiss Refugee Council, available at: <https://bit.ly/3qb2MTP>.

<sup>424</sup> Federal Administrative Court, Decision E-2412/2014, 25 September 2018.

<sup>425</sup> For further information, see Swiss Refugee Council, 'L'arrêt sur les Kurdes ébranle les fondements du droit d'asile', 5 October 2018, available (in French) at: <https://bit.ly/2y9BULg>.

<sup>426</sup> Example: Federal Administrative Court, Decision E-1625/2017, 24 January 2019.

<sup>427</sup> Federal Administrative Court, judgement E-5920/2019 of 21.11.2019.

<sup>428</sup> Federal Administrative Court, Decision E-3737/2015, 14 December 2015, confirmed in Decision E-86/2017, 7 November 2018.

<sup>429</sup> See for example, Federal Administrative Court, judgements D-1759/2018 of 07.08.2020, c. 5.1 and D-1842/2020 of 21.07.2020, c. 6.1.

<sup>430</sup> SEM, 'La Suisse et l'Éthiopie règlent leur collaboration dans le domaine du retour', 16 January 2019, available (in French) at: <https://bit.ly/2SoLndI>.

<sup>431</sup> For further information see Swiss Refugee Council, 'Éthiopie: est-il vraiment urgent de renvoyer les demandeurs d'asile déboutés?', 5 December 2018, available (in French) at: <https://bit.ly/2QeCHp1>.

removals took place in 2020 (compared to 0 in 2019). On 27 January 2021, the SEM deported three Ethiopian rejected asylum seekers on a special flight to Addis Abeba.<sup>432</sup>

Regarding applicants from **Tibet**, very often the SEM does not believe that they have actually been brought up in Tibet (China) but considers them as having been socialised in exile communities in India or Nepal. Due to alleged failure to comply with the asylum procedure, their claims are rejected without further investigations. To assess their place of socialisation, SEM uses country experts and linguistics analyses (LINGUA-analysis). In 2020, an asylum seeker whose claim to have been socialised in Tibet had been considered not credible following such analysis. However, independent experts argued that the LINGUA-Analysis had not been conducted in a professional way and therefore was not reliable.<sup>433</sup> In 2020, about 300 Tibetans lived in Switzerland without regular status.

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<sup>432</sup> See for example media report by Le Temps, available at: <https://bit.ly/2OjX2cs>.

<sup>433</sup> See for example the News of the Swiss Refugee Council, available at: <https://bit.ly/2Neunol>.

## Reception Conditions

### Short overview of the reception system

The reception system is organised in two phases, the first being under federal and the second under cantonal responsibility. During the first phase – which should not exceed 140 days – asylum applicants are accommodated in federal asylum centres under the responsibility of the State Secretariat for Migration, while upon allocation to a canton, their accommodation is managed at cantonal level.

Asylum applications can be submitted in one of the six federal asylum centres with processing facilities, located in **Zurich**, **Bern**, **Basel**, **Chiasso/Balerna**, **Boudry** and **Altstätten**. Once the application for international protection has been lodged, the applicant can be transferred to one of the other centres within the same category. All applicants (except from those falling under the airport procedure) spend the first weeks after their application and up to 140 days in those centres, where they are accommodated and where the first steps of the procedure are carried out.

If their application is dismissed or rejected, asylum seekers are transferred to a federal asylum centre without processing facilities (so-called “departure centres”), from which their Dublin transfer or removal to their country of origin is organised. In cases where the removal has not taken place within 140 days from the lodging of the asylum application – *inter alia* due to difficulties in organising the travel documents, awaiting of a Court decision or any other reason – the persons will be allocated to a canton.

The second phase of reception is managed at cantonal level. A transfer in cantonal facilities occurs: a) when a person receives a positive decision or a temporary admission within an accelerated procedure; b) when the extended procedure is ordered; c) when a person is accommodated in a federal asylum centre for more than 140 days, even if his or her application has been dismissed or rejected.

Cantons are in charge of their own reception centres. Usually, asylum seekers and beneficiaries of protection will be first accommodated in collective centres, and in a second stage in shared apartments or private apartments in case of larger families. For those rejected asylum seekers who have lost their right to social assistance, the cantons provide for emergency aid shelters (see [Forms and levels of material reception conditions](#)).

Persons who have been recognised as refugees and temporarily admitted persons have the right to social assistance, including accommodation, without time limit.

## A. Access and forms of reception conditions

Both the Confederation and the cantons are responsible for providing material reception conditions to asylum seekers, depending on whether the person is in a federal or a cantonal reception centre. The first phase of the asylum procedure takes place in one of the 6 federal asylum centres with procedural facilities, and can be followed by transfer to a federal asylum centre without procedural facilities.<sup>434</sup> Asylum seekers stay in federal centres for up to 140 days, and are then allocated to a canton (see section on [Freedom of Movement](#)).<sup>435</sup>

### 1. Criteria and restrictions to access reception conditions

#### Indicators: Criteria and Restrictions to Reception Conditions

1. Does the law make available material reception conditions to asylum seekers in the following stages of the asylum procedure?
 

|                           |   |   |  |
|---------------------------|---|---|--|
| ❖ Regular procedure       | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions            | <input type="checkbox"/> No            |
| ❖ Dublin procedure        | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions            | <input type="checkbox"/> No            |
| ❖ Admissibility procedure | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions            | <input type="checkbox"/> No            |
| ❖ Border procedure        | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> Reduced material conditions | <input type="checkbox"/> No            |
| ❖ First appeal            | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions            | <input type="checkbox"/> No            |
| ❖ Onward appeal           | <input type="checkbox"/> Yes            | <input type="checkbox"/> Reduced material conditions            | <input checked="" type="checkbox"/> No |
| ❖ Subsequent application  | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> Reduced material conditions | <input type="checkbox"/> No            |
  
2. Is there a requirement in the law that only asylum seekers who lack resources are entitled to material reception conditions?
 

|                                       |   |  |
|---------------------------------------|---|--|
| ❖ Social assistance and emergency aid | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No            |
| ❖ Accommodation                       | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> No |

Material reception conditions primarily consist of accommodation, food, health care and limited financial allowance according to the specific entitlement to social assistance. Assistance benefits are granted only when a person is unable to maintain him or herself from own resources, and under the condition that no third party is required to support him or her on the basis of a statutory or contractual obligation.<sup>436</sup> For organisational reasons, accommodation in asylum centres is available for all asylum seekers, regardless of their financial resources, and even obligatory in most cases.<sup>437</sup> Social assistance, departure and enforcement costs as well as the costs of the appeal procedure must be reimbursed subsequently if the person has the necessary means at a later point in time.<sup>438</sup>

#### Regular procedure

Asylum seekers in a regular procedure are entitled to full material reception conditions from the lodging of the application until the granting of a legal status or the rejection of their application. Material or financial assistance then continues either under the emergency aid scheme in case the person has to leave the country, or according to the usual legislation on social assistance if the person receives a protection status.

In the federal centres, reception conditions are similar for all asylum seekers regardless of the type of procedure they will go through, with the exception of the daily 3 Swiss francs pocket money, to which persons from EU/EFTA countries or countries exempt from the visa requirement are not entitled.<sup>439</sup> After

<sup>434</sup> The setup of federal reception and processing centres is foreseen by Article 26 AsylA; the Ordinance of the FDJP on the management of federal reception centres in the field of asylum (the Ordinance of the FDJP) provides operating rules for all federal centres; further internal rules are applied in each centre.

<sup>435</sup> Article 24(4) AsylA.

<sup>436</sup> Article 81 AsylA.

<sup>437</sup> Article 28(2) AsylA states that the SEM and the cantonal authorities may allocate asylum seekers to accommodation, and in particular accommodate them as a group. This provision is separate from the ones on social assistance and emergency aid in Article 80 ff AsylA. On the side of financial organisation, accommodation is however counted in within the social assistance budget.

<sup>438</sup> Article 85(1) AsylA.

<sup>439</sup> SEM, *Stratégie de traitement du SEM dans le domaine de l'asile*, available (in French) at: <https://bit.ly/2SFqYjb>. In the decision F-3150/2018 of 20.07.2020, the Federal Administrative Court has

cantonal attribution, reception conditions may change significantly. General legal entitlement to reception conditions is governed by national law and should therefore be similar in all cantons, but the implementation of those national provisions is largely dependent on cantonal regulation and varies in practice.

### **Admissibility procedure (including Dublin)**

According to national law, asylum seekers whose application may be dismissed without proceeding to an in-merit examination are entitled to the same reception conditions as persons in a regular procedure, until formal dismissal of their application.<sup>440</sup>

Swiss legislation is based on the idea that dismissal of an application will occur within the 140 days of the stay in the federal centre.<sup>441</sup> Quickly rejected or dismissed asylum seekers should in principle not be allocated to a canton, unless their appeal has not been decided within a reasonable time or they are prosecuted or convicted of a felony or misdemeanour committed in Switzerland.<sup>442</sup> Persons in the Dublin procedure are not allocated to a canton, unless their removal cannot be completed within 140 days. They are transferred to a federal asylum centre without processing facilities.<sup>443</sup>

Since the entry into force of the new asylum procedure in March 2019, practice in the different asylum regions does not yet seem to be uniform and clearly defined. For example, there have been several cases of persons who had exceeded the maximum legal stay of 140 days in federal centres but were still residing there. During 2020, there was a higher number of cases in which this length of stay went significantly beyond the maximum of 140 days. This was due to the fact that during several months, the attributions to the cantons were significantly restricted because cantonal structures were already at their maximum capacity under the new measures related to COVID-19. The SEM needed to open a few additional facilities to cope with this situation. In some cases, asylum seekers were transferred to other federal centres without their legal representation being informed beforehand. Also, in some cases it has happened that applicants were transferred to centres situated in another asylum region; an exception related to the complications brought by the pandemic.

Asylum seekers are entitled to social benefits until the decision of rejection or dismissal becomes enforceable. This is the case when the deadline for appeal expires without any appeal being made, or at the moment the appeal authority rejects the appeal. The person has to leave the country and the material reception conditions become dramatically reduced as the person is excluded from social assistance and falls into the emergency aid scheme (see section on [Forms and levels of material reception conditions](#)).<sup>444</sup>

### **Airport procedure (border procedure)**

When an asylum seeker applies for asylum at the airport of **Geneva** or **Zurich**, Swiss authorities must decide whether to permit entry into Switzerland within 20 days.<sup>445</sup> If entry into Swiss territory is allowed, the asylum seeker is assigned to a federal centre or a canton and is entitled to regular reception conditions. If entry is refused, the SEM should provide persons with a place of stay and appropriate accommodation until they leave the country.<sup>446</sup> While the asylum seekers are in the airport procedure, they are provided with accommodation in the transit zone (they cannot go out of the airport), food and first necessity goods. The centre in the transit zone of **Geneva** has a capacity of 30 places, in **Zurich** of 60 places. Given the closed nature of these centres, the holding of asylum seekers during the airport procedure is considered as detention within the meaning of this report (see Chapter on Detention starting

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observed that an automatic application of this rule could lead to a violation of the constitutional principle of equality before the law in the case of a person claiming a legitimate need for protection (c. 7.6).

<sup>440</sup> See sections on [Dublin](#) and [Admissibility Procedure](#).

<sup>441</sup> See sections on [Dublin](#) and [Admissibility Procedure](#).

<sup>442</sup> Article 27(4) AsyIA.

<sup>443</sup> Information on this is available at: <https://bit.ly/3abc6Px>.

<sup>444</sup> See section on [Forms and levels of material reception conditions](#).

<sup>445</sup> For details on the airport procedure see section [Border Procedure](#).

<sup>446</sup> Article 22(3) AsyIA.

with [General](#)). Asylum seekers may be held at the airport or exceptionally at another location for a maximum of 60 days. After this period, the SEM allocates the person either to a canton or a Federal asylum centre.<sup>447</sup> Upon issuing a legally binding removal order, asylum seekers may be transferred to an immigration detention facility.<sup>448</sup>

## Appeal procedure

The appeal procedure is part of the overall procedure and does not affect the entitlement to material reception conditions. Restrictions occur at the moment when the decision becomes enforceable, which means either at the moment the appeal authority rejects the appeal, or when the deadline for appeal expires. There should therefore be no change of reception conditions during the appeal procedure, neither regarding accommodation, nor social assistance benefits.

## Subsequent applications: application for re-examination, revision or subsequent applications

Swiss law provides for the restriction of reception conditions during the procedure for subsequent applications or applications for revision or re-examination. Therefore, persons in such procedures are excluded from receiving social assistance (as they are subject to a legally binding removal decision for which a departure deadline has been fixed) and receive only emergency aid for the duration of a procedure.<sup>449</sup> This restriction of reception conditions also applies when the removal procedure is suspended by the competent authority. Regarding accommodation, subsequent asylum applicants do not return to a federal centre but stay mostly assigned to the same canton and level of accommodation conditions depends on the cantonal practice.<sup>450</sup> In case five years have passed since the entry into force of the last asylum decision,<sup>451</sup> the application will be considered a new demand and the asylum seeker will normally be accommodated in a federal asylum centre.

## 2. Forms and levels of material reception conditions

### Indicators: Forms and Levels of Material Reception Conditions

1. Amount of the monthly financial allowance/vouchers granted to asylum seekers and temporarily admitted persons on average, as of 31 December 2018 2020 (in original currency and in €):  
CHF 1,119 / 1,041 €

Social assistance for asylum seekers includes basic needs such as food, clothes, transportation and general living costs, in the form of allowance or non-cash benefits, accommodation, health care and other benefits related to specific needs of the person. National law specifically provides for accommodation in a federal or cantonal centre,<sup>452</sup> social benefits in the form of non-cash benefits whenever possible, or vouchers or cash.<sup>453</sup> Limited health insurance also ensures access to medical care according to Article 82a AsylA (see section on [Health Care](#)).

## Accommodation

The provision of accommodation facilities is governed by Article 28 AsylA, according to which the authorities (SEM or the cantonal authorities) may allocate asylum seekers to a place of stay and provide them with accommodation. The Confederation and the cantons each have their own accommodation facilities, which vary (see [Types of Accommodation](#)).

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<sup>447</sup> Article 22(6) AsylA.

<sup>448</sup> Article 22(5) AsylA.

<sup>449</sup> The legal basis for the restriction is Article 82(2) AsylA (in force since 1 February 2014). For the reception conditions under the emergency aid scheme, see [Forms and Levels of Material Reception Conditions](#).

<sup>450</sup> For more information on subsequent applications, see section [Subsequent Applications](#).

<sup>451</sup> Article 111c AsylA.

<sup>452</sup> Article 28 AsylA.

<sup>453</sup> Articles 81 and 82(3) AsylA. National provisions on social assistance and emergency aid for asylum seekers are in Chapter 5 AsylA. The AO2 on Financial Matters provides important precisions on the financing of welfare benefits.

Food and clothing are not specifically mentioned in the law, even though they may be provided in the reception centres. In the federal centres, meals are served 3 times a day, on a regular schedule. Asylum seekers who do not show up at meal time will have to wait for the next service. Cantonal centres have their own systems, depending on the type of accommodation centres and the nature of social benefits (cash or non-cash benefits). The amount of daily financial allowance (including vouchers) varies according to the internal organisation of each centre and to the possibility to receive daily meals in kind. Clothing distribution is also regulated at a local level, in collaboration with NGOs. This support is part of the non-cash benefits of the social assistance.

Asylum seekers are provided with accommodation during the entire procedure. Accommodation is included in the right to social benefits. Asylum seekers do not have a choice regarding the allocated place of stay and will usually be moved from one centre to another during the entire procedure (first after the cantonal allocation, then within the canton according to their individual situation). In most cantons, rejected or dismissed asylum seekers are regrouped in special centres regulated under the emergency aid scheme.

### **Social benefits**

Persons who are staying in Switzerland on the basis of the Asylum Act and who are unable to support themselves with their own resources shall receive social benefits unless third parties are required to support them on the basis of a statutory or contractual obligation, or may request emergency aid.<sup>454</sup> The provision of social benefits is under the responsibility of the Confederation as long as the person is staying in a federal asylum centre. After allocation to a canton, the canton should provide social assistance or emergency aid on the basis of Article 80 AsylA. Fixing of the amount, granting and limiting welfare benefits are regulated by cantonal law when it falls under cantonal responsibility.<sup>455</sup> This results in large differences in treatment among cantons.

Asylum seekers are also entitled to child allowances for children living abroad. These are however withheld during asylum procedures and should be paid only when the asylum seeker is recognised as a refugee or temporarily admitted in accordance with Article 83(3)-(4) FNIA.<sup>456</sup>

### **Emergency aid**

Persons subject to a legally binding removal decision for which a departure deadline has been fixed are excluded from receiving social assistance.<sup>457</sup> In fact, this concerns all persons whose asylum application has been rejected (and the appeals deadline expired) as all negative decisions from the SEM include a departure deadline. This exclusion from social assistance also extends to persons in a subsequent procedure (application for re-examination, revision or subsequent application).<sup>458</sup> These persons receive emergency aid on request in case they find themselves in a situation of distress according to Article 12 of the Federal Constitution. In 2019, 7,090 asylum applicants were benefitting from emergency aid in the whole country (6,784 whose applications had been rejected under the ancient procedure, 306 under the new procedure).<sup>459</sup>

Emergency aid consists of minimal cantonal benefits for persons in need and unable to provide for themselves. The Federal Supreme Court has set some basic guidance regarding what emergency aid must entail in order to respect human dignity.<sup>460</sup> But the concrete fixing and granting of the emergency aid is regulated by cantonal law, which results in large differences in treatment between asylum seekers.

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<sup>454</sup> Article 81 AsylA.

<sup>455</sup> Article 3(2) AO2.

<sup>456</sup> Article 84 AsylA.

<sup>457</sup> Article 82(1) AsylA.

<sup>458</sup> Article 82(2) AsylA.

<sup>459</sup> SEM, Rapport de suivi sur la suppression de l'aide sociale: Rapport annuel 2019 / anciens dossiers, available at: <https://bit.ly/37Bw6fp>; and Rapport annuel 2019 / nouveaux dossiers, available at: <https://bit.ly/2WCd961>.

<sup>460</sup> See Muriel Trummer, Bundesgerichtliche Rechtsprechung zur Auslegung der Nothilfe für abgewiesene Asylsuchende, in: ASYL 4/12, 24ff.

In some cantons this task is delegated to municipalities or relief organisations.<sup>461</sup> The Confederation compensates cantons for the costs of the emergency aid.<sup>462</sup>

Like social benefits, emergency aid is provided in the form of non-cash benefits wherever possible. Persons under emergency aid are housed in specific shelters (often underground bunkers or containers, with access sometimes restricted to night time), where living conditions are reduced to a minimum and are known to be quite rough.<sup>463</sup> Under emergency aid, people may have to live with around 8 CHF (around 7 Euros) a day, which must cover the expenses for food, transportation, household items and any other needs. This amount is extremely low in comparison with the high living costs in Switzerland. Further restriction is that the entire amount is granted in the form of non-cash benefits or vouchers (which can only be used in one particular supermarket chain), as it is encouraged by the national legislation.

This restriction of reception conditions raises serious problems for asylum seekers whose (subsequent) procedure is still running. Long-term stay under emergency aid is known to be disastrous for the integration and health of asylum seekers, despite the chance of being granted a legal status at the end of the procedure.

In 2019, 6% of the persons with a Dublin decision issued under the new reform have benefitted from emergency aid; 20% of asylum seekers with a negative or dismissal decision taken within the accelerated procedure; and 34% of those with a negative or dismissal decision taken within the extended procedure.<sup>464</sup>

### 3. Reduction or withdrawal of reception conditions

#### Indicators: Reduction or Withdrawal of Reception Conditions

1. Does the law provide for the possibility to reduce material reception conditions?  
 Yes  No
2. Does the legislation provide for the possibility to withdraw material reception conditions?  
 Yes  No

National law provides for the possibility to refuse (completely or partially), reduce or withdraw social benefits under explicit and exhaustive conditions. General restriction conditions of social benefits are foreseen in Article 83(1) AsylA, which provides for partial or total withdrawal of material reception conditions where the asylum seeker:

- (a) Has obtained them or attempted to obtain them by providing untrue or incomplete information;
- (b) Refuses to give the competent office information about their financial circumstances, or fails to authorise the office to obtain this information;
- (c) Does not report important changes in his or her circumstances;
- (d) Obviously neglects to improve his or her situation, in particular by refusing to accept reasonable work or accommodation allocated to him or her;
- (e) Without consulting the competent office, terminates an employment contract or lease or is responsible for its termination and thereby exacerbates his or her situation;
- (f) Uses social benefits improperly;
- (g) Fails to comply with the instructions of the competent office despite the threat of the withdrawal of social benefits;
- (h) Endangers public security or order;

<sup>461</sup> Contact details of cantonal coordination offices for asylum issues are available at: <http://bit.ly/1LtvLuH>. See also practice in the Canton of Vaud: *Guide d'assistance 2013 : recueil du Règlement du 3 décembre 2008 sur l'assistance et l'aide d'urgence octroyées en application de la loi sur l'aide aux requérants d'asile et à certaines catégories d'étrangers et des directives du Département de l'intérieur en la matière / EVAM Etablissement vaudois d'accueil aux migrants*, available (in French) at: <http://bit.ly/1eGZqTZ>.

<sup>462</sup> The compensation scheme has changed for the applications filed after the 1st March 2019. For details see the 2019 SEM monitoring report on the suppression of social assistance available at: <https://bit.ly/37B3d3a>.

<sup>463</sup> For more information on this subject, see Christian Bolliger, Marius Féraud, Büro Vatter AG (Politikforschung & -beratung), *La problématique des requérants d'asile déboutés qui perçoivent l'aide d'urgence sur une longue période*, Bern, 26 May 2010, available (in French) at: <http://bit.ly/1N9NXqE>.

<sup>464</sup> SEM, Rapport de suivi sur la suppression de l'aide sociale: Rapport annuel 2019 / nouveaux dossiers, available at: <https://bit.ly/2WCd961>.

- (i) Has been prosecuted or convicted of a crime;
- (j) Seriously and culpably fails to cooperate, in particular by refusing to disclose his or her identity; or
- (k) Fails to comply with the instructions from staff responsible for the proceedings or from the accommodation facilities, thereby endangering order and security.

Restriction patterns are related to the obligation of the asylum seeker to collaborate with the authorities for the establishment of the facts (identity, financial situation, etc.), to reduce the reliance on social benefits by being ready to participate in the economic life, to reduce living expenditures, and to conform with Swiss law generally.

Emergency aid is however an unconditional right for everyone present on Swiss territory and unable to provide for him- or herself. The exclusion from social assistance has no impact on the entitlement to emergency aid. This means that every asylum seeker (even dismissed or rejected) should find an accommodation place during their stay in Switzerland and be able to provide for their own (basic) needs. However, reception conditions are very critical under the emergency aid scheme, with several cantons making use of underground civil protection centres (so-called *bunkers*) that are originally conceived for the protection of civil population in case of armed conflict or other types of emergency but are used as emergency aid shelters in some cantons. The conditions have been particularly problematic during the COVID-19 pandemic.

The Asylum Act also provides for the possibility to exclude persons from a federal asylum centre as a disciplinary sanction, when an asylum applicant has endangered others in that centre, disturb the peace or refuse to obey staff orders. The exclusion can however not exceed 24 hours and is subject to a written decision made by SEM. Other sorts of disciplinary sanctions exist in the federal centres, such as denial of exit permits, elimination of pocket money or a ban on entering specific spaces.<sup>465</sup>

Before any reduction or withdrawal is ordered, an assessment of proportionality is made and the subsistence minimum has to be considered. The basic need is defined as “enforcement legal subsistence minimum” (*betriebsrechtliches Existenzminimum*) and differs in each canton.

### Special centres for uncooperative asylum seekers

The new legislation of March 2019 introduced a legal basis for the creation of special centres for uncooperative asylum seekers. Article 24a AsylA states that asylum seekers who endanger public security and order or who by their behaviour seriously disrupt the normal operation of the federal asylum centres may be accommodated by the SEM in special centres that are set up and run by the SEM or by cantonal authorities. Although applications cannot be lodged in those centres, procedures are carried out according to the same rules than in the usual federal asylum centres. The only centre of this type ever opened is situated in **Les Verrières**, Canton of **Neuchâtel** and has a capacity of 20 places. It opened in December 2018 but was temporarily closed on 1 September 2019 after nine months with on average two inhabitants<sup>466</sup>. During 2020, the centre was not in function, however the SEM has decided to reopen it in February 2021 due to an increase in applicants disturbing the functioning of the centres or endangering its security.<sup>467</sup> It was originally planned to open a second special centre in the German-speaking part of Switzerland, but plans were put on hold because of the low numbers of asylum applications.

According to the law, the decision to send someone to a special centre is made either by federal or cantonal authorities. In its statement, the SEM indicated that only men would be placed in such centres.<sup>468</sup> The decision to place a person in a special centre must respect the principle of proportionality. According to SEM practice, the placement in a special centre is ordered for a period of 14 days and can be prolonged

<sup>465</sup> Article 25(1)(e) Ordinance of the FDJP on the management of federal centres and accommodation at airports.

<sup>466</sup> SEM, Communication of 7.08.2019, available at: <https://bit.ly/2VdzR5b>.

<sup>467</sup> SEM, Communication of 2.02.2021, available at: <https://bit.ly/3rzOwV8>.

<sup>468</sup> SEM, ‘Asile: ouverture du centre spécifique de la Confédération aux Verrières’, 3 December 2018, available (in French) at: <https://bit.ly/2RwVZlr>.

to a maximum of 30 days.<sup>469</sup> Although the law did not foresee a separate remedy against such decision, the Federal Administrative Court has ruled that it must be possible to contest such decision within 30 days.<sup>470</sup> In the same judgement, the Court stated that placement in a special centre constitutes a significant restriction of liberty but not deprivation of liberty.

Grounds for assignment to a special centre are defined in Article 15 AO1. According to this provision, a person can be assigned to a special centre if he or she is in a federal asylum centre and endangers public security and order or who by his or her behaviour seriously disrupts the normal operation of the federal asylum centre. A danger to public security and order is assumed if there are concrete indications that the behaviour of the asylum seeker will with great probability lead to a breach of public security and order.

A serious disruption of the normal operation of the federal asylum centre is assumed in the following two situations:

- First, if the asylum seeker seriously violates the house rules of the centre, especially if they have weapons or drugs, or if they repeatedly disregard a ban to leave the centre.
- Second, if the person defies the instructions for behaviour by the head of the centre or their deputy and by this behaviour namely repeatedly disturbs, threatens or endangers the staff or other asylum seekers.

#### 4. Freedom of movement

##### Indicators: Freedom of Movement

1. Is there a mechanism for the dispersal of applicants across the territory of the country?  
 Yes  No
2. Does the law provide for restrictions on freedom of movement?  Yes  No

##### 4.1. Dispersal across cantons

Asylum seekers who have not received a final decision on their application after 140 days as well as asylum seekers assigned to the extended procedure are allocated to one of the 26 Swiss cantons according to a distribution key. The distribution key is laid down in Article 21(1) AO1 and allocates a certain percentage of asylum seekers to each canton according to its population (for example Zurich: 17.8%, Uri 0.4%).

Article 22 AO1 states that the SEM distributes the asylum seekers as equitably as possible among the cantons, taking into account family members already living in Switzerland, nationalities and cases requiring particular care. In accordance with Article 27(3) AsylA, when allocating an asylum seeker to a canton, the SEM shall take into account the legitimate interests of the cantons and the asylum seekers. However, this provision also states that asylum seekers may only contest the decision on allocation to the Federal Administrative Court if it violates the principle of family unity. In practice, the interests of the asylum seekers are hardly taken into account (except for family unity regarding core family members). This system is problematic, as it fails to seize opportunities that would facilitate integration, such as language or further family ties. For example, the allocation strictly according to the distribution key often leads to French speaking asylum seekers being allocated to a German language canton, which makes integration much more difficult.<sup>471</sup> Applications to change one's canton based on other than (core) family unity grounds are hardly ever successful.

Following the allocation to the canton, cantonal authorities become responsible for the provision of material reception conditions. They provide for accommodation in a cantonal centre as well as for social

<sup>469</sup> SEM, Manuel Asile et Retour, chapter C1; 2.2.2.3; see also PLEX (Plan d'exploitation Hébergement), Annex 2, cited in a judgement of the Federal Administrative Court (F-1389/2019 of 20 April 2020, c. 7.10).

<sup>470</sup> Federal Administrative Court, judgement F-1389/2019 of 20 April 2020.

<sup>471</sup> On this topic see Daniel Auer, Language Roulette? Refugee Placement and its Effect on Labor Market Integration, in a nutshell #4, January 2017, nccr – on the move, available at: <https://bit.ly/34xhjcf>.

or emergency assistance to all persons present on their territory, whether legally or illegally. They may delegate implementation competences to municipalities.

Cantonal reception conditions are regulated by cantonal legislation and differ significantly from one canton to another. Therefore, the allocation to a canton may result in large inequality in terms of material reception conditions. The type of accommodation facilities, as well as the amount of financial allowance, is specific to each canton. Some cantons are known to be restrictive in terms of reception conditions, or even lacking adapted structures for the needs of vulnerable persons.<sup>472</sup>

## 4.2. Restrictions on freedom of movement

### Federal asylum centres

As long as asylum seekers stay in a federal centre,<sup>473</sup> they are subject to the semi-closed regime of all federal asylum centres. Exits are only possible with a written authorisation delivered by the SEM once fingerprints and a photograph of the asylum applicant have been taken.<sup>474</sup> Exit hours are strictly regulated in the ordinance and the general rule allows asylum seekers to go out from 9am to 5pm during the week (from Monday to Friday) and to spend the weekend away, from Friday 9am until Sunday 5pm. SEM may define more extended exit hours in agreement with the commune hosting the federal asylum centre,<sup>475</sup> which is for instance the case in the centres of **Boudry** and **Chevilles** where asylum seekers are allowed to return to the asylum centre until 7pm, in **Chiasso** and **Pasture** until 6pm, and in **Basel** until 8pm.<sup>476</sup>

Asylum seekers are supposed to stay in the centre on days on which they have an appointment regarding their asylum application (with the authorities, the lawyer or the counselling) or regarding their departure. This further applies where they have an appointment with a dentist or doctor, if they are required to participate in maintenance work of the premises, if a transfer to another centre is planned or on the day in which the enforcement of the removal is foreseen.<sup>477</sup>

As a consequence of the COVID-19 pandemic, asylum seekers can be set in quarantine and isolated in single rooms when they are tested positive, have symptoms or have had contacts with infected persons. In a few cases, whole reception centres have been set in quarantine for approximately two weeks without any possibility to exit the centre for the residents (staff being able to enter and exit though). According to information available to the Swiss Refugee Council, this has been the case in **Giffers** and **Flumenthal**. The centre of **Zurich** and the centre for unaccompanied minors in **Basel** were also set in quarantine for some time. Furthermore, it was reported that the possibility to spend the weekend outside has been suspended in several federal asylum centres, asylum applicants being obliged to spend the night in the centre during weekend. The Swiss Refugee Council considers this provision unlawful since it has no legal basis and contradicts the Ordinance of the FDJP on the management of federal reception centres<sup>478</sup>, as well as inadequate to prevent infections.

In case of late arrival or unjustified absence, asylum seekers may be subject to a disciplinary sanction such as being deprived of the possibility to go out on the next day or to access certain areas of the centre. Their pocket money or issuing of public transport tickets can also be cut. Other measures can be the exclusion of the centre for a maximum of 24 hours (during which entry in the centre is not allowed)<sup>479</sup> or placement in a special centre (Les **Verrières**).<sup>480</sup> The disciplinary measures are communicated orally,

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<sup>472</sup> These large differences in treatment occur despite a fixed compensation system from the Confederation to the cantons. For details on the costs sharing system, see AO2.

<sup>473</sup> General rules for the federal centres are set up in the Ordinance of the FDJP on the management of federal reception centres in the field of asylum.

<sup>474</sup> Article 17 (1) Ordinance of the FDJP.

<sup>475</sup> Article 17(5) Ordinance of the FDJP.

<sup>476</sup> House rules of the individual centres, not publicly available.

<sup>477</sup> Article 23 Ordinance of the FDJP.

<sup>478</sup> Article 17(3) Ordinance of the FDJP.

<sup>479</sup> Usually a place to sleep is provided in containers placed outside the centre.

<sup>480</sup> Article 25 Ordinance of the FDJP.

only the exclusion from the centre for more than eight hours as well as the allocation to a special centre need to be notified in writing. If the refusal of exiting the centre is ordered for more than 24 hours or more than once, a written decision (which can be appealed) is required. A separate room should be provided to asylum seekers excluded from the centre for more than eight hours or in cases the centre is closed at the time the measure ends.<sup>481</sup>

Some federal centres have a so called “reflection container” or “reflection room”, installed within the entry area of the centre or within a short distance from it. These spaces are intended for emergencies (pending the arrival of the police) to receive recalcitrant asylum seekers for them to calm down and for protecting them and others from injuries. They are mostly equipped with a surveillance camera. During their visits, the delegations of the National Commission for the Prevention of Torture (NCPT) found that the use and purpose of these containers are not defined in any law or directive. It is thus required that those containers are not used for disciplinary reasons.<sup>482</sup> In its report published in 2021, the NCPT noted that the use of such “reflection rooms” had been regulated in internal documents. In particular, the maximum length was set to two hours and the prohibition to use it for unaccompanied minors was decided. However, regulation on a formal, legal level is still insufficient.<sup>483</sup> According to data provided by SEM to the NCPT, between April 2019 and March 2020, use of this room was registered 39 times in **Kreuzlingen**, 33 times in **Chiasso**, 22 times in **Boudry** and once in **Kappelen**.

### **Restriction vs. deprivation of liberty**

In a 2017 report to the Commission Federal against Racism, Kiener and Medici concluded that the current regulation of exit hours was too far-reaching in terms of personnel and time (social exchange and employment opportunities are severely restricted; even more so due to the remote location of the centres) and was therefore disproportionate.<sup>484</sup> It would on the contrary be possible to use milder means (obligation to notify when leaving and returning or general initial authorisations), in order to monitor the movements of asylum seekers without impinging on their personal freedom. The Federal Supreme Court has not yet commented on the proportionality of these regulations.

The centres are operated by private providers, which means that there are great management differences in practice. The same legal requirements apply, but the operating rules are different. Based on the legal report, the Federal Commission against Racism stated that interventions by the providers are attributable to the State, which is thus responsible for protecting the fundamental rights of asylum seekers.

A report published in August 2017 by the Swiss Center of Expertise in Human Rights (SCHR) deals in detail with the question of when certain restrictions on the freedom of movement of asylum seekers associated with accommodation should be classified as detention.<sup>485</sup> The demarcation between restriction of liberty and deprivation of liberty is gradual and depends on the individual case and various factors. The intensity of the intervention can be regarded as a criterion for differentiation. Like the ECtHR, the Federal Supreme Court relies on a combination of temporal and spatial factors. In addition, qualitative criteria are also decisive.

Such criteria could be the existence of reporting obligations, the extent of supervision and surveillance, the organisation of the disciplinary regime or, in particular, the possibility of maintaining social contacts. The latter includes not only the exit hours, but also visiting hours and other communication options. Visiting hours in the federal asylum centres are daily from 2 pm to 8 pm, but visitors are only allowed to enter the centres if they have a relationship to an asylum seeker and with the approval of the personnel.<sup>486</sup>

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<sup>481</sup> Article 26 Ordinance of the FDJP.

<sup>482</sup> NCPT, Report 2014, 11, para 39, available at: <https://bit.ly/3nGLpsP>; Report 2018, p. 33, para 122, available at: <https://bit.ly/2KPfOa8>.

<sup>483</sup> NCPT, Report on federal asylum centres 2019-2020, January 2021, available at: <https://bit.ly/3jEAb72>, p. 21.

<sup>484</sup> Regina Kiener and Gabriela Medici, ‘Asylsuchende im öffentlichen Raum’, Rechtsgutachten im Auftrag der Eidgenössischen Kommission gegen Rassismus EKR, February 2017.

<sup>485</sup> Swiss Center of Expertise in Human Rights (SCHR), ‘Freiheitsentzug und Freiheitsbeschränkung bei ausländischen Staatsangehörigen - Dargestellt am Beispiel der Unterbringung von Asylsuchenden in der Schweiz’, written by Künzli Jörg/Frei Nula/Krummen David, 21 August 2017.

<sup>486</sup> Article 16 Ordinance of the FDJP.

Despite this rule, in practice most federal asylum centres are not provided with a visitors' room.<sup>487</sup> The cell phone ban in the centres has been lifted since in November 2017.

The study concluded that the accommodation in the reception and processing centres does not reach the intensity level of a deprivation of liberty if the daily possibility to leave the centre is guaranteed and if there are no further restrictions. So although there is no clear definition, we would suggest not to qualify the stay in the ordinary federal asylum centres as *de facto* detention.

In 2020, the Federal Administrative Court has ruled that the placement in a special centre does not constitute deprivation of liberty, despite entailing significant restrictions of personal freedom and freedom of movement.<sup>488</sup>

### Centres in remote locations

The location of some centres is very remote. A good example are the **Boudry** and **Giffers/Chevrilles** federal centres, which are characterised by their isolation. The Boudry centre is located in a complex that includes the asylum processing centre and a psychiatric hospital. It is several kilometres away from the surrounding village and about 15km from the town of Neuchâtel. The waiting and departure centre of Chevrilles is even more isolated. In order to get there by public transport, it is necessary to take a 20-minute bus ride from the city of Fribourg. Once arrived in the village of Chevrilles, it still takes a 20-minute walk to reach the centre. There are two buses per hour driving to both centres, and asylum seekers receive every week a single ticket to go to Neuchâtel or Fribourg and 3 CHF of pocket money per day, with the exception of persons from EU/EFTA countries or countries exempt from the visa requirement who do not receive any pocket money.

It is more difficult to distinguish between deprivation of liberty and restriction of liberty in the case of isolated centres, given the lack of possibilities of social contacts with people outside the centre. The location of the centre is decisive for the question of whether restrictions amount to *de facto* deprivation of liberty. Accommodation on a mountain pass, for example, from where the nearest lively town can only be reached by means of transport that asylum seekers cannot afford, is generally to be considered a deprivation of liberty in accordance with the case-law of the ECtHR.<sup>489</sup> In individual cases, the characteristics of a specific accommodation can lead to difficulties even in the case of less remote centres. Such is the case if, for example, a person's physical condition makes it more difficult to establish social contacts: this could happen to vulnerable persons such as children, the elderly or physically handicapped persons. Not only social contacts, but also access to legal assistance can be rendered difficult by the location of the centre, leading to significant obstacles in terms of access to an effective legal remedy.

The problem arises in particular with the remote locations of some federal asylum centres, which are usually located in former military facilities outside of larger towns and villages (this is the case of Glaubenberg, for example). According to the Coalition of independent lawyers for the right of asylum, such isolation leads to restrictions on freedom of movement and thus the impossibility of a dignified daily life for those seeking asylum, who are practically denied contact with the outside world, leading to social exclusion. This problem is exacerbated by the precarious financial situation of the people concerned.<sup>490</sup>

In conclusion, even though there is no clear definition, for the purpose of this report the accommodation in some centred with remote locations could be qualified as *de facto* detention (see [Detention of Asylum Seekers](#)).

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<sup>487</sup> NCPT, Report on federal asylum centres 2019-2020, p. 37.

<sup>488</sup> Federal Administrative Court, judgement F-1389/2019 of 20 April 2020. See also News of the Swiss Refugee Council, available (in French) at: <https://bit.ly/36bO5bf>.

<sup>489</sup> ECtHR, *Stanev v. Bulgaria*, Application No 36760/06, Judgment of 17 January 2012.

<sup>490</sup> Coalition des juristes indépendant-e-s pour le droit d'asile, *Restructuration du domaine de l'asile: Bilan de la première année de mise en œuvre*. Available in French at: <https://bit.ly/3mJPg7u> and in German at: <https://bit.ly/34vbKCG>. Page 8, ch. 4.1.5.

## Restriction and exclusion orders

In addition to the mentioned restrictions on freedom of movement for asylum seekers in general, Article 74 FNIA allows for restriction or exclusion orders. According to this provision, the competent cantonal authority may require a person not to leave the area he or she was allocated to or not to enter a specific area:

- a. In case of threat to public security and order. This measure is intended to serve in particular to combat illegal drug trafficking;
- b. If he or she has a final negative decision and specific indications lead to the belief that the person concerned will not leave before the departure deadline or has failed to observe the departure deadline. This provision could also apply to asylum seekers in the Dublin procedure, as from a perspective of national law they are dismissed asylum seekers;
- c. If the removal has been postponed due to specific circumstances such as medical reasons. This could also apply to asylum seekers with a Dublin transfer decision.

Restriction orders can have different radius, forbidding to leave the area of a canton, a district/region, or a commune. The measure must be proportional to their aim, especially with regard to the length and rayon (restriction to a commune is usually only admitted for criminal offenders).

This has been practiced in certain cantons such as **Zurich** in the case of rejected asylum seekers under the emergency aid regime.<sup>491</sup> Another example is a case in the canton of **St. Gallen**, where a young male asylum seeker was considered as a threat to public order and security and therefore was issued a restriction order which forbid him to leave the canton. This order was issued without any concrete accusation because Swiss Federal Intelligence Service saw stated a possible risk that the person might be a Kurdish activist.<sup>492</sup>

Since 1 March 2019, a new paragraph (1bis) was inserted to Article 74 FNIA regarding the special centres for uncooperative asylum seekers: The competent cantonal authority shall require a person who is accommodated in a special centre under Article 24a AsylA3 not to leave the area they were allocated to or not to enter a specific area.

Appeals may be lodged with a cantonal judicial authority against the ordering of these measures. The appeal has no suspensive effect.<sup>493</sup>

The SEM was not able to provided statistical data on the number of restriction and exclusion orders issued by cantons in 2020.<sup>494</sup>

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<sup>491</sup> Federal Supreme Court, Decision 2C\_287/2017, 13 November 2017.

<sup>492</sup> Newspaper Article of 6 June 2019, available (in German) at: <https://bit.ly/2PiqIV0>.

<sup>493</sup> Article 74(3) FNIA.

<sup>494</sup> According to information provided by the SEM on 27 April 2021, no such data is available.

## B. Housing

### 1. Types of accommodation

#### Indicators: Types of Accommodation

- |  |               |
|--|---------------|
| 1. Number of federal reception centres:  | 21            |
| 2. Total number of places in the federal reception centres: <sup>495</sup>   | 4,794         |
| 3. Total number of places in private accommodation:  | Not available |
| 4. Type of accommodation most frequently used in a regular procedure:  |               |
| <input checked="" type="checkbox"/> Reception centre <input type="checkbox"/> Hotel or hostel <input type="checkbox"/> Emergency shelter <input type="checkbox"/> Private housing <input type="checkbox"/> Other |               |
| 5. Type of accommodation most frequently used in an accelerated procedure:   |               |
| <input checked="" type="checkbox"/> Reception centre <input type="checkbox"/> Hotel or hostel <input type="checkbox"/> Emergency shelter <input type="checkbox"/> Private housing <input type="checkbox"/> Other |               |

The reception system is organised in two phases: during the first phase – which should not exceed 140 days – asylum applicants are accommodated in federal asylum centres; while upon allocation to a canton, their accommodation is managed at the cantonal level.

Federal asylum centres are of two sorts: each one of the six asylum regions has one centre with processing facilities where the first stages of the procedure are carried out, and one or more centres without processing facilities (so-called “departure centres”) that are mainly used for those persons whose application has been dismissed or rejected and for whom the authorities are organizing a Dublin transfer or removal.

A transfer to cantonal facilities occurs: a) when a person gets a positive decision or a temporary admission within an accelerated procedure; b) when the extended procedure is ordered; c) when a person is accommodated in a federal asylum centre for more than 140 days, even if his or her application has been dismissed or rejected.

Cantons are in charge of their own reception centres. Usually, asylum seekers and beneficiaries of protection will be first accommodated in collective centres, and in a second stage in shared apartments or private apartments for families. The management of reception centres at cantonal level is very often entrusted to NGOs or private companies.<sup>496</sup> For those rejected asylum seekers who have lost their right to social assistance, the cantons provide for emergency aid shelters (see [Forms and levels of material reception conditions](#)).

While the Federal Supreme Court held that reception conditions in a civil protection shelter do not violate the human dignity of persons under emergency aid,<sup>497</sup> the situation in such shelters seems largely unsatisfactory for asylum seekers who are still in a procedure. Single men are mostly affected, although there are sometimes also families who are accommodated in bunkers.

Below is an overview of the different types of centres, principally at the federal level, as cantons all have their own specificities.

<sup>495</sup> This figure includes the places in the following types of accommodation: the six federal asylum centres, the so-called remote locations centres and the two international airports: Information provided by the SEM, 12 February 2020.

<sup>496</sup> See Camilla Alberti, “Privatisation: Les enjeux autour de la délégation de l’asile. Qui profite de qui?”, *Vivre Ensembl* nr. 167, available at: <https://bit.ly/2LEMjs8>.

<sup>497</sup> Federal Supreme Court, Decision 8C\_912/2012, 22 November 2013. For a comment on that decision, see Swiss Centre of Expertise in Human Rights, ‘Héberger un requérant d’asile débouté dans des abris de protection civile est conforme au droit’, 12 March 2014, available (in French) at: <http://bit.ly/1CsdPrX>.

## 1.1. Federal asylum centres<sup>498</sup>

Federal asylum centres are divided into two categories: those with processing facilities and those without. Each of the six asylum regions has one federal centre with processing facilities and at least one without. Persons in need of protection should lodge their asylum application in one of the 6 federal centres with processing facilities. Following the application, the SEM can decide to allocate them to one of the other five centres. In principle, asylum seekers remain in these centres during a few weeks or months, until they are either assigned to a canton or transferred to a federal asylum centre without processing facilities (also called “departure centres”).<sup>499</sup> The maximum length of stay in federal asylum centres – be it with or without processing facilities – is 140 days, whereby this length can be exceeded by a few days. In 2020, the average length of stay in federal asylum centres was 71 days.<sup>500</sup>

In order to be able to respect the measures related to COVID-19, the SEM has reduced the capacity of the federal asylum centres to 60% of the beds they dispose of in 2020. Thus, the capacity of all federal asylum centres by the end of 2020 was 4,794 places. If considering the total number of beds in the centres, the average occupancy rate was 41%.<sup>501</sup>

The running of the centres and security matters are entrusted to private companies.<sup>502</sup> The federal asylum centres can be described as semi-closed, as the hours when asylum seekers may leave and return are limited. For more information, see section on [Freedom of Movement](#).

### Federal asylum centres with processing facilities

The centres with processing facilities are the following, one for each of six asylum regions:

- ❖ **Altstätten** (Canton of St. Gallen, Region Eastern Switzerland);
- ❖ **Basel** (Canton of Basel, Region North-Western Switzerland);
- ❖ **Boudry** (Canton of Neuchâtel, French-speaking Region);
- ❖ **Zurich** (Canton of Zurich, Zurich Region);
- ❖ **Chiasso/Balerna-Novazzano**<sup>503</sup> (Canton of Ticino, Region Ticino & Central Switzerland); and
- ❖ **Berne** (Canton of Berne, Bern Region).

### Federal asylum centres without processing facilities (“departure centres”)

In addition to the federal asylum centres with processing facilities, where the asylum procedures are conducted, there are other federal asylum centres without processing facilities, also called “departures centres”, where asylum applicants are usually transferred when they are subject to a Dublin or a negative decision. This can occur either before the final decision (when the main investigative measures requiring the presence of the applicant have been conducted), or after the expiry of the time limit to appeal. These centres mainly house people who have to leave Switzerland within a short period of time and therefore

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<sup>498</sup> Legal provisions related to the management of the federal asylum centres are in the Asylum Act, the Ordinance of the FDJP on the management of federal reception centres in the field of asylum and internal house rules of the registration centres. Further information is available on the website of the SEM, at: <http://bit.ly/1dfDc9V>.

<sup>499</sup> Article 24 (4) AsylA.

<sup>500</sup> Data provided by the SEM, 19 March 2021.

<sup>501</sup> Information provided by the SEM, 27 April 2021.

<sup>502</sup> The SEM delegates the task of managing the operation of reception and processing centres to third parties under Article 24b (1) AsylA. Thus, the ORS Service AG (asylum regions Western Switzerland, French speaking Switzerland and Berne) and AOZ Asyl Organisation Zürich (asylum regions Eastern Switzerland, Ticino and Central Switzerland, Zurich) are responsible for running the centres. Security services at the lodges are provided by the companies Securitas AG (asylum regions French speaking Switzerland, Eastern Switzerland, Zurich, Ticino and Central Switzerland) and Protectas SA (asylum regions Western Switzerland and Zurich). Finally, the mandates of patrols operating in the vicinity of the centres have been awarded to three companies: Securitas AG (asylum regions French speaking Switzerland, Zurich) Protectas SA (asylum regions Western Switzerland and Berne) and Verkehrsüberwachung Schweiz (asylum regions Eastern Switzerland and Ticino and Central Switzerland).

<sup>503</sup> Those are actually two centres, both temporary, and located separately from the SEM and legal protection offices.

are not transferred to the cantonal asylum centres, unless they cannot be removed from Switzerland within the set period of 140 days.

Each asylum region has at least one departure centre. Currently the centres without processing facilities operating are located in **Kreuzlingen, Sulgen, Embrach, Glaubenberg, Giffers, Vallorbe, Kappelen, Boltigen, Flumenthal, Allschwil, Reinach** and **Brugg**.<sup>504</sup> Some of those – and a few more – have been temporarily opened in order to cope with the pandemic, since the capacity of the centres must be reduced to respect the distancing rule.

Most of these centres are situated in remote and isolated locations, which is highly problematic both because those residing there are practically denied contact with the outside world, leading to social exclusion, and because they are prevented from finding a legal representative to appeal a negative decision.<sup>505</sup> The restriction of movement due to isolation is further exacerbated by the precarious financial situation of most asylum seekers who cannot afford public transportation.

Furthermore, part of these centres are located in former military shelters. This is the case of the centre of **Glaubenberg**, for example. Federal military buildings and installations may be used without cantonal or communal authorisation to accommodate asylum seekers for a maximum of three years provided the change in use does not require substantial structural measures and there is no significant change in the occupancy of the installation or building.<sup>506</sup> The National Commission for the Prevention of Torture (NCPT) considers that these military installations are only suitable for short stays of up to three weeks.<sup>507</sup> Like in the federal asylum centres with processing facilities, the regime is semi-closed.

### Special centres for uncooperative asylum seekers

Special centres for uncooperative asylum seekers are foreseen by the Asylum Act under Article 24a and Article 15 OA1. The first special centre opened its doors in December 2018 in Les Verrières, Canton of **Neuchâtel** but was temporarily closed on 1 September 2019 after nine months with in average two inhabitants.<sup>508</sup> During 2020, the centre was not in function, however the SEM has decided to reopen it in February 2021 due to the presence of applicants allegedly disturbing the functioning of the centres or endangering their security.<sup>509</sup> It was originally planned to open a second special centre in the German-speaking part of Switzerland, but plans were put on hold because of the low numbers of asylum applications (for more information and a definition of special centres, see section on [Reduction or Withdrawal of Reception Conditions](#)).

## 1.2. Reception centres at the cantonal level

After the maximum of 140 days spent in federal asylum centres, asylum applicants and beneficiaries of protection are allocated to a canton and transferred to a cantonal reception facility. Each canton has its own reception system that usually includes several types of housing (collective centre, family apartment, home for unaccompanied children, etc.). Generally, asylum seekers will be placed in accommodation facilities according to the stage of their procedure (i.e. the supposed length of their stay in Switzerland) and on their personal situation (family, unaccompanied children, vulnerable persons, single men, etc.).

Many cantons organise the accommodation structure in 2 phases: the first one in collective shelters, the second in private accommodation. The moment asylum seekers are transferred in individual accommodation depends on the canton of allocation and its accommodation capacity.

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<sup>504</sup> SEM Webpage, <https://bit.ly/37GdsTJ>, updated on 28 April 2021.

<sup>505</sup> Coalition des juristes indépendant-e-s pour le droit d'asile, *ibid.*, p. 11, ch. 4.2.5.

<sup>506</sup> Article 24c AsyIA.

<sup>507</sup> NCPT, *Report 2014*, 8, para 26.

<sup>508</sup> Conseil Federal, Asile: Fermeture temporaire du centre spécifique de la Confédération des Verrières, available (in French) at: <https://bit.ly/2uu87OK>. According to the NCPT report on federal asylum centres published on January 2021, between April and September 2019, only ten asylum applicants have been assigned to this centre, p. 19.

<sup>509</sup> SEM, Communication of 2.02.2021, available at: <https://bit.ly/3rzOwV8>.

As a general comment on the reception issue, it should be noted that cantonal reception structures were reorganised in 2007, after the FDJP decided to reduce financial allocation to the cantons, based on a temporarily lower number of asylum seekers. Rising numbers of arriving asylum seekers in the following years, and within short periods of time in 2014 and 2015, have presented a challenge to the cantons, some of which started to use underground bunkers for accommodating asylum seekers. The numbers have decreased again in the following years, so that the reception capacity was not an issue anymore. During 2020, however, it has represented a major challenge for the cantons as well as for federal authorities in charge of federal asylum centres due to the COVID-19 pandemic, since the capacity had to be significantly reduced in order to allow for the respect of the social distancing to prevent infections.

## 2. Conditions in reception facilities

### Indicators: Conditions in Reception Facilities

1. Are there instances of asylum seekers not having access to reception accommodation because of a shortage of places?  Yes  No
2. What is the average length of stay of asylum seekers in the reception centres?<sup>510</sup>  
71 days in the federal centres
3. Are unaccompanied children ever accommodated with adults in practice?  Yes  No

### 2.1. Conditions in federal reception centres

In the federal asylum centres, asylum seekers are usually housed in single-sex dorms, while families are accommodated together. Places to rest or get isolated are mostly inexistent. Rooms contain at a minimum two or three beds (usually reserved for couples and families) and up to several dozens of beds each, equipped with bunk beds. Asylum seekers are responsible for cleaning their rooms. In its report published in 2021, the NCPT considered the level of cleaning satisfactory. Asylum seekers share common showers and toilet facilities, which are poorly equipped in terms of privacy.<sup>511</sup> In some cases, men and women share the same showers that they access during different times. The same happens with male and female unaccompanied minors, for whom the NCPT recommends providing specific time slots for the use of showers.

The law stipulates that the special needs of children, families and other vulnerable persons are taken into account as far as possible in the allocation of beds,<sup>512</sup> but this provision is very general. In 2020, the schooling has been organized in all federal asylum centres, while few leisure activities exist for children, especially under and above school age. The general tension that exists within the centres, due to the high psychological pressure asylum seekers are living under, the coexistence of persons with very different backgrounds, or even alcohol or drug issues that may occur in the centres, can make the situation very difficult for children, single women or other vulnerable persons.<sup>513</sup>

Asylum seekers are subject to body-search by security personnel every time they come back after going out of the centres. This has concerned even children until 2019, however since 2020 children are body-searched only upon suspicion. According to the National Commission for the Prevention of Torture (NCPT), also adults should be body-searched only in case of suspicion.<sup>514</sup> Security personnel is also authorised to seize goods when asylum seekers enter or go out of the centre.<sup>515</sup>

<sup>510</sup> Information provided by the SEM, 21 March 2021.

<sup>511</sup> NCPT, Report on federal asylum centres 2019-2020, p. 27.

<sup>512</sup> Article 4(1) Ordinance of the FDJP on the management of federal reception centres in the field of asylum.

<sup>513</sup> Alcohol and drugs are strictly prohibited within the centres under Article 4(2) Ordinance of the FDJP on the management of federal reception centres in the field of asylum. However, this does not prevent some breaches of the regulation from happening in practice.

<sup>514</sup> NCPT, Report on federal asylum centres 2019-2020, available (in German) at: <https://bit.ly/3cQJj7k>, p. 20.

<sup>515</sup> According to Article 4 of the Ordinance of the FDJP, security personal is allowed to seize travel and identity documents, dangerous objects, assets, electronic devices that may disturb the peace, alcohol, drugs and food. Prohibited weapons and drugs are given to the police immediately.

In its latest report published in January 2021,<sup>516</sup> the NCPT draws its conclusions on the visits carried out between 2019 and 2020 in 8 federal asylum centres.<sup>517</sup> On a positive note, it highlights the introduction of schooling for children in the centres. The Commission observed shortcomings in several areas. The identification of vulnerable persons (victims of trafficking, victims of torture, etc.) is still insufficient and so is the level of care offered to them. There is a need to reinforce the first medical consultations and to provide a psychological assessment upon arrival at the federal asylum centre. According to the Commission, there is also potential for improvement in the area of conflict management and the prevention of violence. The NCPT recommends improving the training of security personnel and providing for the establishment of a complaint management system. It also recommends avoiding systematic searches of asylum seekers at the entrance of the centres, clarifying the use of the "reflection room" and formalising the decisions on disciplinary sanctions, which should always take place in writing.

Asylum seekers are required to participate in domestic work on request of the staff. Household tasks are shared between all asylum seekers according to a work breakdown schedule. The permission to leave the centre is denied until the given tasks have been accomplished. Generally, maintenance is provided by third parties, namely for cleaning tasks (especially for toilets and showers) and the cooking as well as security tasks.<sup>518</sup> Asylum seekers may voluntarily help to serve meals or help in the kitchen. They are not allowed to cook their own food in the federal centres (with a few exceptions regarding centres without processing facilities), but specific diets are mostly respected.

There is a chaplaincy service in every federal centre. Protestant and catholic chaplains spiritually accompany asylum seekers. They often play an important social role, as they provide an open ear to asylum seekers' worries, and they sometimes call attention to problems in the centres. Between July 2016 and December 2018, a pilot project with Muslim chaplains was set up in the test centre in **Zurich**.<sup>519</sup> Despite a very positive evaluation of the project,<sup>520</sup> which highlighted the relevance of offering spiritual support to asylum seekers of Muslim faith, the project ended in Zurich and was not extended to other centres of the Confederation.

Occupational programmes are proposed to asylum seekers from 16 years of age on, in order to give a structure to the day and thus facilitate cohabitation.<sup>521</sup> The occupational programmes must respond to a local or regional general interest of the town or municipality. They must not compete with the private sector. They include work in protection of nature and the environment or for social and charitable institutions. Examples are cutting trees or hedges, fixing rural pathways, cleaning public spaces. There is no right to participate in occupational programmes. In case of shortage of places in the occupational programmes, places are distributed according to the principle of rotation of the participants. An incentive allowance may be paid to the asylum seeker. This amount is very low and can therefore not be compared to a salary for a regular job. Thus, remuneration is limited to CHF 5 per hour, a maximum of CHF 30 per working day and a maximum of CHF 400 per month. Persons staying in a special centre for uncooperative asylum seekers receive the incentive allowance in the form of non-cash benefits. It was reported that in

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<sup>516</sup> NCPT, Report on federal asylum centres 2019-2020.

<sup>517</sup> The centres visited were Boudry, Kappelen, Kreuzlingen, Balerna, Chiasso, Chiasso Via Motta, Geneva airport, Halle 9 in Oerlikon.

<sup>518</sup> The SEM delegates the task of managing the operation of reception and processing centres to third parties under Article 24b (1) AsyIA.. Thus, the ORS Service AG (asylum regions Western Switzerland, French speaking Switzerland and Berne) and AOZ Asyl Organisation Zürich (asylum regions Eastern Switzerland, Ticino and Central Switzerland, Zurich) are responsible for running the centres. Security services at the lodges are provided by the companies Securitas AG (asylum regions French speaking Switzerland, Eastern Switzerland, Zurich, Ticino and Central Switzerland) and Protectas SA (asylum regions Western Switzerland and Zurich). Finally, the mandates of patrols operating in the vicinity of the centres have been awarded to three companies: Securitas AG (asylum regions French speaking Switzerland, Zurich) Protectas SA (asylum regions Western Switzerland and Berne) and Verkehrsüberwachung Schweiz (asylum regions Eastern Switzerland and Ticino and Central Switzerland).

<sup>519</sup> SEM, 'Pilotprojekt für muslimische Seelsorge in Bundesasylzentren gestartet', 4 July 2016, available (in German) at: <http://bit.ly/2j0EUDT>.

<sup>520</sup> SEM, 'Aumônerie musulmane au centre pilote de Zurich: le projet pilote donne de bons résultats', 16 February 2018, available (in French) at: <https://bit.ly/2GkVwSm>.

<sup>521</sup> Article 6a Ordinance of the FDJP.

some centres, remuneration is provided only at the time of transfer to another centre, meaning that asylum seekers cannot access the money earned in practice.

### **Use of physical force and violence episodes in the federal asylum centres**

During 2020, there was a number of cases in which violence escalated in the federal asylum centres. The media reported about excessive use of physical force by security personnel.<sup>522</sup> According to the information received by the NCPT, the security personnel intervened several times with physical coercion (fixation on the ground), pepper gel and the use of the "reflection room" (see above). Repeatedly, bruises and hematomas resulted from the interventions. Several criminal proceedings were initiated against security staff, with allegations of disproportionate or arbitrary violence and abuse of authority.<sup>523</sup> As noted above, the security staff is contracted from private companies.

On 5 May 2021, the SEM announced that it had mandated a former federal judge with an independent investigation on such episodes of violence.<sup>524</sup> Parallel to this, the SEM has suspended 14 security agents working in the federal asylum centres according to the media.<sup>525</sup>

In all federal asylum centres visited by the NCPT the security staff carried pepper spray. According to data available to the Commission, between April 2019 and March 2020 it was used 17 times in **Boudry**, 6 times in **Kreuzlingen**, 5 times in **Chiasso** and one in **Kappelen**. The NCPT also reported the worrying use of a dog in the outside zone of the centre of **Balerna**.

In the Commission's assessment, there is considerable potential for improvement in the handling of conflicts, in the prevention of violence and in allegations of violence, namely through the introduction of a low-threshold and systematic complaint management system. The NCPT has also recommended that security companies recruit experienced and competent personnel and improve their training, reinforce the role of assistance staff and introduce consultation hours for persons with addictions (on the basis of a best practice tested in Kreuzlingen).

The SEM is currently finalising a violence prevention concept to be applied to all federal asylum centres. One positive measure that was already taken is that security agents wear an identification number on their uniform.<sup>526</sup> A complaint management system is also foreseen, but the SEM was initially planning to directly manage such complaint system. Several NGOs such as the Swiss Refugee Council and Amnesty International claimed the need to establish an independent complaint and monitoring system or an ombudsman's office. As of May 2021, there was still no follow-up on this..

### **Conditions under the COVID-19 pandemic**

In order to prevent COVID-19 infections and respect the hygiene and distancing rules issued by the Federal Office of Public Health, at the beginning of the pandemic the SEM has decided to lower the maximum capacity of the federal asylum centres to 50%. This was possible given the low numbers of new applications and the opening of six new centres operating as federal asylum centres.

Masks were not immediately at disposal but were accessible to asylum seekers within a few weeks since the beginning of the pandemic. An obligation to wear them was also introduced in the federal centres, outside the dormitories. Information videos and posters were put at disposal of the asylum seekers and the temperature was measured after every exit from the centre.<sup>527</sup> However, the distancing rule can hardly

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<sup>522</sup> See the Communication of the Swiss Refugee Council on this matter, available at: <https://bit.ly/2Z0xsvl>.

<sup>523</sup> NCPT, Report on federal asylum centres 2019-2020, p. 22-24. See also newspaper article "Violence à Chevilles", Le Courrier, 18.06.2020, available at: <https://bit.ly/3pbGQXm>.

<sup>524</sup> SEM, Media release, available at: <https://bit.ly/3tBUm92>.

<sup>525</sup> Swissinfo, "Switzerland launches probe into suspected asylum centre violence", 5 May 2021, available at: <https://bit.ly/3xWpjbz>.

<sup>526</sup> NCPT, Report on federal asylum centres 2019-2020, ch. 61 (page 17).

<sup>527</sup> NCPT, Report on federal asylum centres 2019-2020, p. 31.

be observed in collective centres.<sup>528</sup> Due to the difficulties in enforcing the measures, staff members have been especially burdened and overloaded. Persons belonging to particularly high-risk groups have been accommodated in separate areas or centres. Infected persons were placed in isolation and in a few cases, entire centres have been quarantined (see section on [Freedom of movement](#)). As of January 2021, 230 asylum seekers tested positive to COVID-19 have been registered; none of them has died.

## 2.2. Conditions in cantonal-level facilities

As explained under the section on [Types of Accommodation](#), reception conditions differ largely from one canton to another. Individual housing provides comfortable housing conditions, while most asylum seekers stay in collective centres, at least at first arrival in the canton. Cantonal authorities strive to house families in individual accommodations, even though this is not always possible. Generally speaking, asylum seekers benefit from less restrictive measures in the cantonal centres compared to the federal centres, as they mostly can go out at their convenience, or cook for themselves for instance.

Asylum seekers are however frequently confronted with the remoteness of reception centres, which impedes them to meet with family members, acquaintances or even consult a legal representative if they do not have financial resources.

## C. Employment and education

### 1. Access to the labour market

#### Indicators: Access to the Labour Market

- |  |   |
|--|---|
| 1. Does the law allow for access to the labour market for asylum seekers?<br>❖ If yes, when do asylum seekers have access the labour market? | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| 2. Does the law allow access to employment only following a labour market test?  | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |
| 3. Does the law only allow asylum seekers to work in specific sectors?<br>❖ If yes, specify which sectors:                                   | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |
| 4. Does the law limit asylum seekers' employment to a maximum working time?<br>❖ If yes, specify the number of days per year                 | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| 5. Are there restrictions to accessing employment in practice?   | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |

Since 1 March 2019, asylum seekers staying in a federal asylum centre are no longer allowed to engage in a gainful employment.<sup>529</sup> Asylum seekers who are entitled to pursue gainful employment in accordance with the immigration provisions (who are mainly persons already living in Switzerland with a residence permit and who submit a subsequent asylum application) or who participate in charitable occupational programmes, however, are not subject to the ban on employment.<sup>530</sup> After allocation to a canton, asylum applicants can request permission to work but they are subject to the precedence of domestic employees as regulated by the FNIA.<sup>531</sup> According to statistics published by the SEM, 9% of asylum seekers between 18 and 65 years old are active on the labour market.

<sup>528</sup> See for example SRF Rundschau, 1.04.2020, "Virus im Heim: Corona-Kampf im Asylwesen", available at: <https://bit.ly/2JSf2c5>; Le Courrier, 10.06.2020, "Des requérant-e-s en 'quarantaine'", available at: <https://bit.ly/35k7lmH>.

<sup>529</sup> Article 43(1) AsyIA, as amended on 25 September 2018, BBI 2015 7181 and AS 2018 2855.

<sup>530</sup> Article 43(4) AsyIA, as amended on 25 September 2018, BBI 2015 7181 and AS 2018 2855.

<sup>531</sup> At Article 21(1), providing that foreign nationals may be permitted to work only if it is proven that no suitable domestic employees or citizens of states with which an agreement on the free movement of workers has been concluded can be found for the job.

## 2. Access to education

### Indicators: Access to Education

1. Does the law provide for access to education for asylum-seeking children?  Yes  No
2. Are children able to access education in practice?<sup>532</sup>  Yes  No

### 2.1. Compulsory education

All children under 16 must attend school according to the Federal Constitution. For the first stage of reception, schooling is provided within the federal asylum centres as provided by Article 80(4) AsylA. As education is a matter of cantonal competence, the federal asylum centres in each region should determine with the competent cantonal authority the modalities for schooling. Thus, there are significant differences in the location, maximum age of admission, number of hours of classes per week and their content between the different centres. Schooling mostly takes place inside the federal centres in school rooms provided by the Confederation. In the centres visited by the NCPT in 2019 and 2020, classes were taking place at least three days and up to five days per week and were provided by teachers by training. In a few centres, there was ambiguity regarding whether children between 15 and 16 could attend classes and the lack of occupation programs for this age was reported.<sup>533</sup>

In 2020, Save the Children has developed recreational material for children residing in federal or cantonal asylum centres with different kinds of activities and tasks that can easily be done also during quarantine or restricted possibilities for social contact.<sup>534</sup>

After allocation to a canton, the organization of schooling varies from one canton to another, as the school systems can differ in significant ways between cantons. In fact, the schooling of children is under cantonal authorities. In some cantons, children attend special classes for asylum seekers at their arrival (for example **Solothurn**), while others directly join the usual education system, mostly without knowing the language well (**Basel-City**). Some cantons organise special language classes for newly arrived asylum seekers (French, German or Italian according to the canton), until the children are able to join public school (**Berne, Zug**). In the canton of **Grisons** (GR), temporarily admitted children are – due to the alleged provisional nature of this status – educated in special classes together with asylum seekers.

The schooling of young asylum seekers may raise some difficulties for local schools and teachers, since some of the children stay for a short and undefined period of time. Educational background and language knowledge may also be very variable from one child to another. Such issues are usually sorted out at the municipal level and may therefore be influenced by political or even personal sensitivities on the general issue of migration. Specific problems may also arise for children whose parents' asylum application has been rejected or dismissed but who refuse to leave the country. Children have the right to continue to attend class as long as they are present in Switzerland. However, in some cantons children in emergency assistance only have the right to a special class with other children in emergency assistance. Other cantons leave the children in emergency assistance and their families in the regular structures, so that no change of school is necessary and the best interests of the child can be taken into account.

Furthermore, access to primary education can be hindered by the issue of age determination. Children who are considered to be over 16 have in principle no access to compulsory education.

### 2.2. Apprenticeship and studies

Lack of access to further education, in the form of an apprenticeship or studies, is an important problem in the integration process of asylum applicants over 16. Although the legislation allows asylum seekers to

<sup>532</sup> Access is very limited in the federal reception and processing centres.

<sup>533</sup> NCPT, Report on federal asylum centres 2019-2020, p. 36.

<sup>534</sup> Available to download at: <https://bit.ly/3vIGj2V>. Save the Children has also created a Webpage for asylum seeking parents with much useful information and material, available at: <https://bit.ly/3xOx0F>.

enter education programmes, many practical and administrative impediments deter potential employers to hire asylum seekers whose procedure has not been concluded yet. As asylum procedures may last for years (although the average length has significantly decreased with the asylum reform), it may happen that young girls and boys stay excluded from the higher education system during one of the most important periods of their life. In addition to the great difficulties that young asylum seekers face in finding an apprenticeship or to be accepted in a higher school,<sup>535</sup> they can also be confronted with the problem of financing their studies as they are excluded from the public scholarship programmes. Financing of post-compulsory education for asylum seekers is therefore highly dependent on the goodwill of cantonal and municipal authorities.

Some cantons adopted specific measures to bridge the educational gap that asylum seekers between 16 and 18 face. Such non-compulsory measures are highly dependent on the communal and cantonal authorities, as well as from NGOs like Caritas, which has set up some specialised programmes for young migrants in some cantons.

Pursuing of apprenticeships for rejected asylum seekers is currently problematic, since young asylum seekers are often obliged to interrupt their training after a negative decision. In December 2020, the National Council has accepted a political motion to solve this problem and allow these people to finish their apprenticeship before the removal decision being enforced.<sup>536</sup> However in future there will no longer be many of such situations given the acceleration of the asylum procedures since 1 March 2019.

#### D. Health care

| Indicators: Health Care   |   |   |                             |
|---|---|---|-----------------------------|
| 1. Is access to emergency healthcare for asylum seekers guaranteed in national legislation?               | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No                 |                             |
| 2. Do asylum seekers have adequate access to health care in practice?                                     | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> Limited | <input type="checkbox"/> No |
| 3. Is specialised treatment for victims of torture or traumatised asylum seekers available in practice?   | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> Limited | <input type="checkbox"/> No |
| 4. If material conditions are reduced or withdrawn, are asylum seekers still given access to health care? | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Limited            | <input type="checkbox"/> No |

According to national law, access to health care must be guaranteed for asylum seekers during the entire procedure and even longer, after dismissal or rejection of the application under the regime of emergency aid. Like most public allowances, health care falls within federal competence during the period spent in the reception and processing centre, while it becomes a cantonal one after the cantonal assignment. During the stay in a federal centre, asylum seekers should have access to all necessary medical basic care and dental emergency care.<sup>537</sup> Medical care within federal centres is delegated to the company or organisation in charge of general logistics and management of the centres (see section on [Types of Accommodation](#)).

The national law provides for a generalised affiliation of all asylum seekers to a health insurance, according to the Federal Act of 18 March 1994 on Health Insurance.<sup>538</sup> This means that every asylum seeker has health insurance. The Asylum Act provides specific dispositions that allow cantons to limit the choice of insurers and service providers for asylum seekers. Psychological or psychiatric treatment is covered by health insurance. Health care costs are included in the social assistance and are therefore under cantonal competence from the moment of the assignment to the canton. Since 1 August 2011,

<sup>535</sup> The apprenticeship is the most common form of post-compulsory education in Switzerland. The apprentice learns a profession over 3 to 4 years within a company, while attending theoretical classes 2 days a week. First condition to access the apprenticeship is to get an apprenticeship contract with a company, which proves to be a difficult task even for young Swiss nationals.

<sup>536</sup> On this topic, see the News on the Refugee Council Website: <https://bit.ly/36ZQ2YC>.

<sup>537</sup> Article 8 Ordinance of the FDJP on the management of federal reception centres in the field of asylum.

<sup>538</sup> Federal Act on Health Insurance, Loi fédérale du 18 mars 1994 sur l'assurance-maladie (LAMal), RS 832.10.

rejected and dismissed asylum seekers who have a right to emergency aid are also affiliated to a health insurance.<sup>539</sup>

According to the health concept implemented by SEM,<sup>540</sup> all federal asylum centres benefit from a health personnel service, composed mainly of nurses and administrative staff, which is run by private management companies mandated by the Confederation. The medical service is the first point of contact for asylum-seekers regarding the various health problems they may encounter. Upon arrival in the centre, asylum seekers must submit to a compulsory medical briefing within 3 days of arrival at the centre. Carried out by means of a computer programme available in the main languages spoken by asylum seekers,<sup>541</sup> the main objective of this information session is the detection, prevention and treatment of transmissible and infectious diseases. The health concept in federal structures focuses mainly on acute and urgent health problems. At the request of an asylum seeker or if the medical staff deems it necessary, an initial medical consultation within the centre may be scheduled in order to determine whether the asylum seeker should be redirected to a doctor or a specialist but also to make an initial assessment of his or her state of health. This "triage" or gatekeeping process is carried out not only for this first optional consultation but also during the entire stay of the asylum seekers in the federal structures.

Under the new asylum procedure in force throughout Switzerland since March 2019, medical care and the establishment of medical facts in the examination of asylum applications appear to be one of the main issues induced by the acceleration of procedures (see:

**Use of medical reports).** The identification of vulnerabilities, including psychological problems and psychiatric diseases, remains a significant challenge. A psychological screening at arrival in the centre could be a useful measure and also a tool to prevent suicides. According to the NCPT, within the accelerated procedure, access to psychiatric care is limited to the most acute situations, however an early identification of psychiatric and trauma-related problems and orientation towards the competent services already during the stay in federal asylum centres is recommended.<sup>542</sup> The NCPT also reports that a translation service per phone is available to the medical staff, who however make too little use of it.<sup>543</sup>

The organisation of health support in the cantonal reception centres is under cantonal competence. Similar obstacles as in the federal centres may occur regarding the triage by the staff of the centre, even though some cantons do provide for medical staff within the reception centres.

## E. Special reception needs of vulnerable groups

### Indicators: Special Reception Needs

1. Is there an assessment of special reception needs of vulnerable persons in practice?  
 Yes  No

#### 1. Reception in federal asylum centres

As discussed in the chapter on **Guarantees for vulnerable groups**, national law does not define the categories of persons who are considered vulnerable. Even though some provisions are in place to support some categories of asylum seekers (victims of gender-based violence and unaccompanied minors) during the asylum interview, the practice related to the conduct of the interview and the credibility assessment is not always consistent. Furthermore, decision making of the SEM and jurisprudence concerning vulnerable groups do not always live up to the standards set by international guidelines and case law.

<sup>539</sup> Article 92d Ordinance on Health Insurance of 28 June 1995, RS 832.102, in connection with Article 82a AsylA and Article 105a Federal Act on Health Insurance.

<sup>540</sup> OFSP/SEM, Soins médicaux pour les requérants d'asile dans les centres de la Confédération et les centres d'hébergements collectifs cantonaux, 30 October 2017, available (in French) at: <https://bit.ly/2HBGqX4>.

<sup>541</sup> Accessible at: <https://bit.ly/3xOyxqc>.

<sup>542</sup> NCPT, Report on federal asylum centres 2019-2020, p. 32.

<sup>543</sup> NCPT, Report on federal asylum centres 2019-2020, ch. 139.

As already mentioned, all but very complex asylum cases will be assessed and decided (including the appeal) within 140 days in the so-called accelerated procedure. During this time, all asylum seekers (including vulnerable ones) are accommodated in a federal asylum centre with processing facilities or sometimes (mainly if the case is assessed under the Dublin Regulation) in a federal asylum centre without processing facilities.<sup>544</sup> Separate housing facilities exclusively reserved for vulnerable asylum seekers are not provided in the accelerated procedure. However, separate buildings, wings, floors or rooms for families, women, minors or other vulnerable persons do exist – albeit to different extents - within the federal asylum centres. Special solutions (usually foster care) are found for unaccompanied minors under the age of 12.

In some special cases, the SEM can allow asylum seekers to join their family members in a private accommodation. No statistics are available on the number of requests for private accommodation that asylum seekers made. As of December 2020, 118 asylum seekers were in private accommodation.<sup>545</sup>

The Ordinance of the FDJP on the on the management of federal reception centres in the field of asylum and accommodation at airports provides that asylum seekers are to be accommodated in single-sex dormitories, and that families are accommodated in the same dormitory. Furthermore, families should also be accommodated in premises “which allow a common life and which take into account, as much as possible, the need to have a private sphere”. As far as vulnerable groups are concerned, the Ordinance contents itself to state that the specific needs of vulnerable persons, including unaccompanied minors, will be taken into account during their accommodation and supervision, and that unaccompanied minors will be accommodated away from adults.

Two years after the entry into force of the new procedure, there seems to be wide margins for improvement. For instance, no special accommodation is granted to highly traumatised people, and their access to healthcare and health assistance is limited in practice through different factors (see the chapter on [Guarantees for vulnerable groups](#)). When it comes to LGBTQI\* and female asylum seekers, the solutions envisaged do not always fully account for the great importance of ensuring protected spaces (not only dormitories), separate from male applicants. This specific situation of women and girls was addressed in a political intervention at the Swiss Parliament, further to which a broad investigation was launched to verify whether the accommodation conditions for women inside the federal centres were compliant with the international standards, and especially with the Istanbul Convention. In October 2019 the Government published a report,<sup>546</sup> according to which there is scope for improvement in different areas, such as training and awareness raising for staff, information and support for asylum seekers and the identification of victims of sexual violence. Guidelines should be issued in early 2021 detailing how the administration intends to implement the results of these reports, but, at the time of publication of this report, such guidelines had not been made available.

As far as the reception and accommodation of unaccompanied children is concerned, in January 2019, a report was published on the situation in the two test centres of **Basel** and **Zurich**, with multiple recommendations for improvement addressed to the SEM.<sup>547</sup> According to the information provided by SEM officials, some of these recommendations (for instance, the need of having social workers present inside the centres to accompany minors in their day-to-day tasks and challenges, the need to ensure separate rooms for the minors to play or to rest etc) started to be implemented from 2020. According to the latest report of the National Commission for the prevention of torture, the reception and accommodation of unaccompanied children has improved. The commission visited some of the federal reception centres between 2019 and 2020 and found for instance that all centres guarantee children access to basic education. Some concerns remain, though, for older children (15 and above) because, once compulsory schooling ends, there are no occupational programs in place. In a previous report, dating

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<sup>544</sup> See the SEM webpage for further details, available at: <https://bit.ly/2VXusQ4>

<sup>545</sup> Information provided by the SEM, 27 April 2021.

<sup>546</sup> Swiss Confederation, *Rapport sur la situation des femmes et des filles relevant du domaine de l'asile*, October 2019, available (in French) at: <https://bit.ly/2w01y6Z>.

<sup>547</sup> Zurcher Hochschule fur angewandte Wissenschaften, *Evaluation des UMA-Pilotprojektes*, Januar 2019, available (in German) at: <http://bit.ly/37QD3WV>.

back to 2019, the NCPT found that in some cases unaccompanied minors were still accommodated with adults.<sup>548</sup> These observations related to federal asylum centres in use *before* the new Asylum Act entered into force. According to caseworkers now working in the federal centres this can still happen, though, especially because of the difficulties in assessing the asylum seekers' age. In any event, not all centres accommodate unaccompanied minors in separate buildings and therefore in some cases unaccompanied minors are just on a separate floor, which cannot always ensure separation between them and the adults.

## 2. Reception in cantonal centres

Asylum seekers, including vulnerable ones and unaccompanied minors, are transferred to a canton if their asylum application has been granted, if they have been given a temporary permit or if their asylum procedure is still pending, but the case is complex and needs more time (extended procedure). Minors below 12 are also assigned to cantonal accommodations. In all these cases, asylum seekers are thus assigned to reception facilities, for whose maintenance and regulation the assigned canton will be responsible.

While the SEM used to assign unaccompanied children to cantons in which specific structures were set up, it now includes all cantons in the reception of unaccompanied minors.<sup>549</sup> Due to the increase in the number of unaccompanied minors 2014 and 2015, several cantons increased their reception capacities:<sup>550</sup> for example the canton of **Argovia** opened a specialised centre for unaccompanied minors (who had previously been accommodated together with adults) in spring 2015,<sup>551</sup> the canton of **Berne** opened additional specialised reception centres for unaccompanied minors in autumn 2014,<sup>552</sup> January 2016,<sup>553</sup> and autumn 2016,<sup>554</sup> as **Schwyz** did so in August 2016.<sup>555</sup> **Lucerne** ruled an emergency centre between 2015 and 2017,<sup>556</sup> which was subsequently replaced by a specific centre that opened its doors in November 2017 in **Kriens**. In May 2016, the Conference of the Cantonal Social Directors published recommendations on unaccompanied minor asylum seekers in order to work towards a certain uniformity. The canton of **Geneva** was foreseeing establishment of a new specific centre in 2019,<sup>557</sup> however as of February 2021, the project is still in discussion.

Several organisations provide assistance to traumatised asylum seekers. The Outpatient Clinic for victims of torture and war (*Service ambulatoire pour victimes de la torture et de la guerre*) in **Bern** offers a wide range of therapies that combine social work and different treatments for persons traumatised by extreme violence.<sup>558</sup> Similar services are available in **Geneva**, **Zurich**, **St. Gallen** and the Canton of **Vaud**.<sup>559</sup> However, the capacities of these institutions are insufficient compared to the needs. According to national

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<sup>548</sup> Report regarding federal centres for asylum, 2017-2018, §84

<sup>549</sup> Konferenz der kantonalen Sozialdirektorinnen und Sozialdirektoren (SODK), Empfehlungen der SODK zu unbegleiteten minderjährigen Kindern und Jugendlichen aus dem Asylbereich, 20 May 2016, available at: <http://bit.ly/2jmq4JE>.

<sup>550</sup> For a global and regularly updated view of the reception facilities for unaccompanied children in the cantons, see: Alliance for the Rights of Migrant Children, *Cartographie cantonale des structures de prise en charge pour MNA*, available at: <http://bit.ly/2Fh73hA>.

<sup>551</sup> Canton of Argovia, 'Unterkunft für unbegleitete minderjährige Asylsuchende in Aarau', 29 April 2015, available (in German) at: <http://bit.ly/1FQ5k1f>.

<sup>552</sup> Canton of Berne, 'Zusätzliche Unterkunftsplätze für unbegleitete minderjährige Asylsuchende in Belp', 23 October 2014, available (in German) at: <http://bit.ly/1j9xief>.

<sup>553</sup> Canton of Berne, 'Eröffnung eines Ankunftsentrums in Huttwil', 15 December 2015, available (in German) at: <http://bit.ly/2jt3kSJ>.

<sup>554</sup> Canton of Berne, 'Zusätzliche Unterbringungsplätze in Beatenberg', 11 July 2016, available (in German) at: <http://bit.ly/2j0EEF9>.

<sup>555</sup> Canton of Schwyz, 'Kanton führt temporäre Wohngruppe für unbegleitete minderjährige Asylsuchende', 30 June 2016, available (in German) at: <http://bit.ly/2jt4PjL>.

<sup>556</sup> Canton of Lucerne, 'Neues Zentrum für unbegleitete minderjährige Asylsuchende in Kriens', 28 October 2015, available (in German) at: <http://bit.ly/2jmlVCy>.

<sup>557</sup> Le Courrier, 'Nouveau foyer pour MNA à Genève: L'encadrement proposé ne convainc pas encore', 8 June 2017, available in French at: <http://bit.ly/2ETX1Sq>.

<sup>558</sup> Swiss Red Cross, *Service ambulatoire pour victimes de la torture et de la guerre*, available (in French) at: <http://bit.ly/1KcqxTR>.

<sup>559</sup> For contacts and more information, see the website Support for Torture Victims, available at: <http://bit.ly/1ldLMmq>.

law,<sup>560</sup> the SEM may financially support the setup of facilities for the treatment of traumatised asylum seekers, in particular the teaching and research in the field of specialised supervision of those asylum seekers.

In a report published in 2016 and subsequently updated in 2018 by Asile LGBT Genève, it was highlighted that the reception and accommodation conditions were particularly worrisome for LGBTI asylum seekers.<sup>561</sup>

Shelters offering special protection to victims of trafficking as well as victims of domestic violence are missing in most areas or there are significant obstacles for asylum seekers in accessing, partly due to financing issues between federal and cantonal authorities.

## F. Information for asylum seekers and access to reception centres

### 1. Provision of information on reception

With the entry into force of the new legislation in March 2019, all asylum seekers are provided with information on the asylum procedure but also on reception, accommodation, health insurance, allowances etc. They also watch a short film that presents the main steps of the procedure and the intervening actors. As they also have the opportunity to address questions to the counselling persons, it can be stated that they are better informed and have a better understanding of the asylum process than under the old procedure.

The asylum procedure, as well as the rights and obligations of foreigners according to their status is outlined on the Swiss Refugee Council website, in German and in French, partially also in English.<sup>562</sup> The procedure is also explained in the website of the SEM, with videos.<sup>563</sup>

### 2. Access to reception centres by third parties

#### Indicators: Access to Reception Centres

1. Do family members, legal advisers, UNHCR and/or NGOs have access to reception centres?  
 Yes       With limitations       No

Reception centres are only accessible for asylum seekers. They are in principle not open to the public.<sup>564</sup> In 2020, access to reception centres was further restricted in the context of COVID-19.

#### Family members and other visitors

In the federal centres, asylum seekers may receive visitors with the agreement of the staff, as long as the visitor can prove the existence of links with the asylum applicant. Visits are allowed every day from 2:00pm to 8:00pm, only in rooms provided for this purpose. The SEM can change the visit schedule for organisational reasons. Visitors have to check in with the reception desk on arrival and departure and identify themselves. They are subjected to the same security rules as asylum seekers. The staff in charge of security is therefore empowered to search them and seize dangerous objects and alcoholic beverages for the duration of their visit.<sup>565</sup> According to the most recent report of the NCPT, not all federal asylum centres have actually arranged a visitors' room.<sup>566</sup>

<sup>560</sup> Article 44 AO2.

<sup>561</sup> Asile LGBT Genève, *Recherche-action sur l'accueil des réfugié.e.s LGBTI à Genève*, January 2019, available (in French) at: <https://bit.ly/32g6ArR>.

<sup>562</sup> Swiss Refugee Council, available (in English) at: <https://bit.ly/34KEc3t>.

<sup>563</sup> SEM, available (in English) at: <https://bit.ly/2L3Skhe>.

<sup>564</sup> Article 3 Ordinance of the FDJP.

<sup>565</sup> Article 16 Ordinance of the FDJP.

<sup>566</sup> NCPT, Report on federal asylum centres 2019-2020, January 2021, available at: <https://bit.ly/3jEAb72>, p. 37, ch. 161.

Federal reception centres are equipped with public telephones, as well as internet.<sup>567</sup> Telephone cards must be bought by asylum seekers from their own limited budget. It should also be noted that there are usually very few public telephones available for about 300 asylum seekers, which makes access sometimes difficult, while also the noise levels can make a proper conversation very difficult. Swiss legislation does not allow asylum seekers to sign a cell phone contract in their own name, unless they have a residence permit in Switzerland.

### Legal representation

In theory, legal representatives could enter the federal asylum centre during visiting hours. This access is granted as the legal representation is foreseen by the law. However, in practice, applicants get appointments at the offices of the legal representation, which implies that access to legal representation varies depending on the geographical location of the infrastructure and transport modalities. To the best of our knowledge and with some exceptions (e.g. the federal centre in Zurich), the legal protection has no direct access to the accommodation buildings (see chapter on [Regular procedure](#)).

### NGOs and civil society organisations

Church representatives can access the federal asylum centres during the opening hours on presentation of accreditation. The national law does not make any specific reference to the access of NGOs. If necessary, it should be possible to arrange a visit with the SEM upon prior request.

The Ordinance of the FDJP states that the SEM must take organisational measures to encourage exchanges between asylum seekers and civil society actors.<sup>568</sup> The platform ZiAB provides support to groups of volunteers intervening and proposing activities in or near federal asylum centres.<sup>569</sup>

## G. Differential treatment of specific nationalities in reception

There is no difference in treatment in reception based on nationality. The reception standards are the same as for asylum seekers of other nationalities with the notable exception of the distribution of pocket money. Thus, nationals of **countries exempt from the visa requirement** do not receive the 3 CHF granted by the SEM as pocket money to asylum seekers housed in the federal centres.<sup>570</sup> In 2020, the Federal Administrative Court has observed that an automatic application of this rule could lead to a violation of the constitutional principle of equality before the law in the case of a person claiming a legitimate need for protection.<sup>571</sup>

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<sup>567</sup> Article 13 Ordinance of the FDJP.

<sup>568</sup> Article 7 Ordinance of the FDJP.

<sup>569</sup> Plattform "Zivilgesellschaft in Asyl-Bundeszentren", <https://bit.ly/33m7uEs>. List of volunteering groups available at <https://bit.ly/37Ri8WY>.

<sup>570</sup> SEM, *Stratégie de traitement du SEM dans le domaine de l'asile*, March 2019, available (in French) at: <https://bit.ly/37NwrlJ>.

<sup>571</sup> Decision F-3150/2018 of 20.07.2020, c. 7.6. In this case, the Court has ruled that the difference of treatment was justified.

## Detention of Asylum Seekers

### A. General

#### Indicators: General Information on Detention

|  |               |
|--|---------------|
| 1. Total number of asylum seekers detained in 2020:          | 1,309         |
| 2. Number of asylum seekers in detention at the end of 2020: | 207           |
| 3. Number of detention centres:                              | At least 22   |
| 4. Total capacity of detention centres:                      | 352 (in 2018) |

Immigration detention in Switzerland is applied for the purpose of removal, as no general detention of asylum seekers is foreseen. The administrative detention of asylum seekers *during* the asylum procedure is rarely practiced (this is only possible in the form of Detention in preparation for departure and Temporary detention in some exceptional cases), while the other detention types are possible only *after* a removal decision has been issued. Therefore, most asylum seekers are detained after their procedure has ended with a decision of removal or transfer according to the Dublin III Regulation.

In Switzerland, the cantons are competent to enforce removals as well as to use coercive measures aiming at facilitating such enforcement. This means that cantonal authorities are responsible for ordering detention, which leads to a significant diversity of detention practices across the country.<sup>572</sup> Against a cantonal detention order, an appeal can be filed to the cantonal appeal instances. The Federal Supreme Court is responsible for examining appeals against decisions issued by the highest cantonal appeal instance.

The cantons are also in charge of the organisation of detention in terms of capacity and conditions, which results in a high number of facilities used for the purpose of administrative detention and a certain diversity of detention conditions. There are at least 22 detention facilities across Switzerland including separate sections within prisons, with a total capacity of 352 places (in 2018).<sup>573</sup> Many of the cantons are actually using normal prisons or other penal detention facilities for the detention of asylum seekers (see section on [Detention conditions](#)).

### 1. Statistics on detention

According to data provided by SEM in March 2021, detention was ordered against asylum seekers in 1,309 cases in 2020 (out of a total of 2,370 immigration detention orders including non-asylum seekers). The SEM differentiates between temporary detention under Art. 73 (which cannot exceed 3 days) that concerned 230 detention orders regarding asylum seekers (120 of whom were Dublin cases) and other forms of pre-removal detention that concerned 1,079 orders regarding asylum seekers (653 of which were under the Dublin procedure).<sup>574</sup> The data should be read with caution for the following three reasons:

- ❖ Immigration detention in Switzerland is applied for the purpose of removal. As a consequence, the available data on pre-removal detention often concerns both asylum seekers and irregular migrants having not applied for asylum. For this report, it has been possible to obtain data on asylum seekers specifically. When the available data concerns immigration detention in general, this will be specified.
- ❖ Since the entry into force of the new asylum procedure on 1 March 2019, the SEM cannot order detention anymore, so now only the cantons are competent for ordering detention.<sup>575</sup>

<sup>572</sup> This has been highlighted by the Parliamentary Control of Administration in the cited report. See also Achermann et al, "Administrative Detention of Foreign Nationals in Figures," in a nutshell #12, January 2019, <http://bit.ly/2wDdHik>.

<sup>573</sup> Swiss Competence Centre for the Execution of Criminal Penalties, *Monitorage des capacités de privation de liberté 2018*, February 2019, 27-34.

<sup>574</sup> Information provided by the SEM, 12 February 2020.

<sup>575</sup> Article 80(1) and 80 (1bis) Foreign Nationals and Integration Act (FNIA).

Although the cantons have a legal obligation to report all cases of administrative detention to the SEM since 2008,<sup>576</sup> the registration of the relevant information and quality of registered information present several deficiencies as reported by a study commissioned by the Parliamentary Control of the Administration.<sup>577</sup>

- ❖ The definition of detention of asylum seekers in Swiss law is not totally clear. For instance, temporary detention (up to three days) is not always considered detention. However, it is considered a form of detention of asylum seekers for the scope of this report.

The Global Detention Project classifies accommodation in the transit zones of **Geneva** and **Zurich** airports as well as the federal asylum centres as detention facilities.<sup>578</sup> If these facilities were to be classified as detention, the number of detained asylum seekers would be far higher than the official numbers. There are good legal reasons for classifying the holding of asylum seekers prevented from entry into Swiss territory in airport transit zones as detention, given that asylum seekers are locked in and their contacts to the outside world are significantly limited, and so this choice was made for the present report.<sup>579</sup>

Regarding the federal asylum centres, the assessment depends on the concrete situation. Some commentators qualify accommodation in centres that are isolated and very far from the closest municipality as deprivation of freedom, because even if asylum seekers are allowed to leave the centre during certain hours, they do not have any real possibility of social contact, as the centres are so remote and the asylum seekers do not have the means for public transportation.<sup>580</sup> With the introduction of the new asylum procedure, the maximum duration of stay in Federal Asylum Centres has increased to 140 days. Moreover, some of the federal asylum centres without processing facilities (also called “departure centres”) such as **Glaubenberg**, **Giffers/Chevilles**<sup>581</sup> or **Flumenthal** are located in particularly isolated areas.

For the purpose of this report it was decided not to classify the stay of asylum seekers in federal centres – neither with nor without processing facilities – as detention, as it would not present the situation in Switzerland accurately, although the situation in the centres can be qualified as being close to a deprivation of liberty, as said above, especially concerning centres located in isolated areas.

It is also not clear whether persons in a Dublin procedure, after the order of the transfer to another Member State, are to be counted as asylum seekers according to the *Cimade and GISTI* ruling of the CJEU.<sup>582</sup> Following the CJEU’s conclusion, for the purpose of this report these persons are considered asylum seekers. Therefore, this chapter includes detention of persons with a Dublin decision.

## 2. The question of *de facto* detention in Switzerland

The European Court of Human Rights (ECtHR) set out the relevant key criteria for the assessment of *de facto* detention, these being namely the possibility of movement and the degree of social contact. In *Khlaifia and Others v. Italy*, the ECtHR stated that applicants had been *de facto* deprived of their liberty in the CSPA of Lampedusa and in the ships where they were held involuntarily. The restrictions imposed on the applicants violated Article 5(1) ECHR as detention took place without any formal decision. Articles

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<sup>576</sup> Article 15a Decree on execution of removals and expulsion of foreigners, RS 142.281.

<sup>577</sup> Guggisberg, Jürg, Aurélien Abrassart and Severin Bischof. Administrativhaft im Asylbereich: Mandat «Quantitative Datenanalysen». Final report for the attention of the Parliamentary Control of the Administration, 16 October 2017.

<sup>578</sup> Global Detention Project, Switzerland immigration detention profile, last update 2011, available at: <https://bit.ly/3bocydt>.

<sup>579</sup> Prof. Dr. Stefan Trechsel, ‘Die Unterbringung von Asylsuchenden zwischen Freiheitsbeschränkung und Freiheitsentzug’, ASYL 3/14, 3ff. Reference is made to ECtHR, *Amuur v France*, Application No 19776/92, Judgment of 25 June 1996.

<sup>580</sup> *Ibid.*

<sup>581</sup> A visit report by an independent observer can be found at: <http://bit.ly/38VCg8A>.

<sup>582</sup> CJEU, Case C-179/11 *Cimade and GISTI v Ministre de l’Intérieur*, Judgment of 27 September 2012.

5(2) and 5(4) ECHR were also violated as the applicants were not provided with the necessary information on the legal bases nor with an effective right to challenge their detention.<sup>583</sup>

In Switzerland, there are ongoing discussions on the distinction between deprivation and restriction of liberty. The term *de facto detention* has not yet been used in case law. As said before, there are good legal reasons for considering the accommodation in the transit zone during the airport procedure *de facto* detention (see section on [Border procedure \(border and transit zones\)](#)). Indeed, legally speaking, this form of accommodation can be qualified as deprivation of liberty.<sup>584</sup> The same could be said for asylum centres in isolated or remote locations, which provide for limited possibilities of access and movement outside the centres. In the past, several authors dealt with the different restrictions imposed on the asylum seekers' freedom of movement and, in particular, with the framing of their accommodation from a legal perspective. This definition effort is particularly relevant following the entry into force of the new legal provisions on 1 March 2019, which entail new forms of accommodation (see section on [Types of accommodation](#)). As asylum seekers now stay in federal centres for longer periods, the maximum length being fixed at 140 days (Article 24(4) of the Asylum Act), the conditions of their stay and particularly the restrictions on their freedom of movement become all the more relevant for the debate about *de facto* detention (see section on [Freedom of movement](#)).

The enforcement of the new asylum procedure has led to the creation of new types of federal asylum centres next to the six centres where the asylum applications can be submitted. In particular, federal asylum centres without processing facilities (also called "departure centres") are used for the accommodation of asylum seekers whose applications result in or are highly likely to result in a Dublin decision, as well as for those receiving a negative decision within the accelerated procedure. Those centres are often located in particularly isolated areas, as in the case of Glaubenberg, Giffers/Chevilles or Flumenthal. Those areas are poorly served by public transportation, which makes it difficult to receive visitors or leave the area of the centre. The other new type of asylum centres are the "special centres" for "asylum seekers who pose a significant danger to public safety and order or who significantly disrupt the operation and security of federal centres" (Article 24a Asylum Act). A first such centre opened in December 2018 in Les Verrières, Canton of **Neuchâtel**. However, the Federal Council decided to temporarily close it on 1 September 2019, because it had been largely under-occupied.<sup>585</sup> The centre has opened again in February 2021.<sup>586</sup> In April 2020, the Federal Administrative Court pronounced itself on the question whether accommodation in a special centre would represent deprivation of liberty and concluded that it did not. However, it clarified that the decision to assign a person to such centre must be subject to possible contestation within 30 days, despite the law did not foresee a separate remedy against such decision.<sup>587</sup>

In a legal opinion addressed to the attention of the Federal Commission against Racism, Kiener and Medici had stated that a restrictive exit regime and the remote location of centres are particularly sensitive.<sup>588</sup> The possibilities of moving from one place to another, establishing social contacts and shaping everyday life are very limited. The Federal Supreme Court points out that reduced exit possibilities represent a significant encroachment on personal freedom, especially if the restrictions last longer than a few days.<sup>589</sup> This also applies to indirect interventions such as a time consuming and thus deterrent control procedures at the exit.

In addition, accommodation in a federal asylum centre can involve deprivation of liberty in the form of sanctions. According to Article 25 of the Decree on the operation of federal centres and accommodation

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<sup>583</sup> ECtHR, *Khlaifia and others v. Italy*, Application No 16483/12, Judgment of the Grand Chamber of 15 December 2016.

<sup>584</sup> Spescha et al. 2019: Kommentar Migrationsrecht, page 676, citing BGE 123 II 193, c. 3c; BGE 134 I 140, c. 3.2 and decision of the ECHR *Amuur vs. France*, Nr. 1977/92.

<sup>585</sup> Announcement of SEM on 7 August 2019, available (in French) at: <https://bit.ly/2T4h3mc>

<sup>586</sup> SEM, Communication of 2.02.2021, available at: <https://bit.ly/3rzOwV8>.

<sup>587</sup> Federal Administrative Court, judgement F-1389/2019 of 20 April 2020.

<sup>588</sup> Kiener Regina und Medici Gabriela, 'Asylsuchende im öffentlichen Raum', Rechtsgutachten im Auftrag der Eidgenössischen Kommission gegen Rassismus EKR, February 2017.

<sup>589</sup> Federal Supreme Court, Decision BGE 128 II 156, 9 April 2002, para 2c.

at airports, disciplinary measures include the prohibition of exit the centre for one or several days. This topic is further discussed in section on [Freedom of movement](#)).

## A. Legal framework of detention

### 1. Grounds for detention

#### Indicators: Grounds for Detention

1. In practice, are most asylum seekers detained
  - ❖ on the territory:  Yes  No
  - ❖ at the border:  Yes  No
2. Are asylum seekers detained in practice during the Dublin procedure?
  - Frequently  Rarely  Never
3. Are asylum seekers detained during a regular procedure in practice?
  - Frequently  Rarely  Never

A general remark about the competence for ordering detention orders is necessary before outlining the different types of administrative detention existing under Swiss law. Since the entry into force of the new asylum procedure on 1 March 2019, only the cantons are competent to order detention, except from the detention of asylum seekers in airport transit zones.<sup>590</sup> Previously, the SEM could order detention in case the removal decision was issued in a federal reception centre (only in case of Dublin decision and/or if the enforcement of removal was imminent). The new legal provisions in force since March 2019 foresee that, in case of persons staying in federal asylum centres (Article 76(1)(b)(5) FNIA), the canton where the centre is located is responsible for ordering detention. If in accordance with Article 46(1<sup>bis</sup>) of the Asylum Act a canton other than the canton where the centre is located is responsible for executing removal, that canton is also responsible for ordering detention.<sup>591</sup>

The detention of persons at the airport is an exception, since the SEM continues to be the authority in charge of deciding whether or not to allow asylum seekers entry into Swiss territory.

#### 1.1. Detention at the airport

When an asylum seeker applies for asylum at the airport of **Geneva** or **Zurich**, the Swiss authorities must decide whether to allow his/her entry into Switzerland within 20 days.<sup>592</sup> If entry into Swiss territory is allowed, the asylum seeker is assigned to a canton and is entitled to regular reception conditions. If entry is refused, the SEM should provide persons with a place of stay and appropriate accommodation until they leave the country.<sup>593</sup> While the airport procedure is ongoing, asylum seekers are confined in the transit zone. Asylum seekers may be held at the airport or exceptionally at another location for a maximum of 60 days in total,<sup>594</sup> if entry cannot be granted immediately.

The aim of detention at the arrival is to prevent unauthorised entry. According to the Federal Supreme Court and to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), it is an uncontested deprivation of liberty, in line with the *Amuur v. France* ruling of the ECtHR.<sup>595</sup> This type of confinement is based on the assumption that the persons have not yet entered Switzerland.<sup>596</sup> From the moment in which entry into the country has been established, holding in transit

<sup>590</sup> Article 80(1) and 80 (1bis) Foreign Nationals and Integration Act (FNIA).

<sup>591</sup> Article 80(1), 80(1bis) and 80a(1), in combination with Article 46(1bis) of the Asylum Act.

<sup>592</sup> For details on the airport procedure, see section [Border Procedure](#).

<sup>593</sup> Article 22(3) AsylA.

<sup>594</sup> Article 22(5) AsylA. Other locations are not used in practice.

<sup>595</sup> Federal Supreme Court, Decision BGE 129 I 139, 27 May 1997, para. 4.4; CPT, Rapport au conseil fédéral suisse relative à la visite effectuée en Suisse par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants du 24 septembre au 5 octobre 2007, para 93.

<sup>596</sup> Federal Council, Message concernant la modification de la loi sur l'asile, de la loi fédérale sur l'assurance-maladie et de la loi fédérale sur l'assurance-vieillesse et survivants du 4 septembre 2002.

zones is no longer permitted under this legal title.<sup>597</sup> The Federal Administrative Court, however, goes further and considers it possible to carry out an arrest to prevent illegal entry even within a certain time and space *after* the border has effectively been crossed.<sup>598</sup> Yet this brings with it a new difficult question of demarcation.

In 2020, 66 asylum applications were lodged at the airport. None of these cases concerned unaccompanied children according to the SEM. Of these 66 asylum seekers, 27 were registered as part of a family unity. In 2020, 8 people were refused entry in Switzerland, 3 of which were part of a family.<sup>599</sup> (see also [Border procedure \(border and transit zones\)](#)).

## 1.2. Temporary detention

So-called “temporary detention” for identification purposes (as far as the person’s personal cooperation is required) or for the purpose of issuing a decision in connection with his or her residence status may be ordered according to Article 73 FNIA for a maximum of 3 days. In 2020, 420 persons were temporarily detained under Article 73 FNIA (compared to 399 in 2019). Out of this total number of persons, 230 were asylum seekers, of which 120 were Dublin cases. Temporary detention ended with deportation in 9% of cases.<sup>600</sup>

## 1.3. Detention in preparation for departure

Detention in preparation for departure may be ordered during the asylum procedure according to Article 75 FNIA to facilitate the conduct of removal proceedings or criminal proceedings. It can be ordered on the following grounds, where persons:<sup>601</sup>

- (a) refuse to disclose their identity, submit several applications for asylum using various identities or repeatedly fail to comply with a summons without sufficient reason or ignore other instructions issued by the authorities in the asylum procedure;
- (b) leave an area allocated to them in accordance with a restriction order or enter an area they are prohibited from entering;<sup>602</sup>
- (c) enter Swiss territory despite a ban on entry and cannot be immediately removed;
- (d) were removed and submitted an application for asylum following a legally binding revocation of their residence or permanent residence permit or a non-renewal of the permit due to violation of or representing a threat to the public security and order or due to representing a threat to internal or external security;
- (e) submit an application for asylum after an expulsion ordered by the Federal Office for Police to protect internal or external national security;
- (f) stay unlawfully in Switzerland and submit an application for asylum with the obvious intention of avoiding the imminent enforcement of a removal or expulsion order. Such an intention shall be suspected if it were possible and reasonable to file the asylum application earlier and if the application is submitted in close chronological relation to detention, criminal proceedings, the implementation of a penalty or the issue of a removal order;
- (g) seriously threaten other persons or considerably endanger the life and limb of other persons and are therefore being prosecuted or have been convicted; or
- (h) have been convicted of a felony.

In practice, only persons lodging an asylum application in prison or detention facilities or prior to entering Switzerland at **Geneva** or **Zurich** airports are likely to be detained during the whole procedure (yet in the latter case under another legal provision, see above). Asylum seekers are rarely detained during the asylum procedure, which mostly occurs in cases where they have committed criminal offences. According

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<sup>597</sup> SKMR, S. 21.

<sup>598</sup> Federal Administrative Court, Decision D-6502/2010, 16 September 2010.

<sup>599</sup> Information provided by the SEM, 12 February 2020.

<sup>600</sup> Information provided by the SEM, 12 February 2020.

<sup>601</sup> Article 75(1) FNIA.

<sup>602</sup> Article 74 FNIA.

to the SEM, in 2020, there were 41 persons in detention in preparation for departure (compared to 85 in 2019), including asylum seekers (24) and foreign nationals outside the asylum sector (17). Detention in preparation for departure ended with a deportation in 39% of cases.<sup>603</sup>

#### 1.4. Detention pending deportation

Detention pending deportation according to Article 76 FNIA is applicable to persons who have received a negative decision as well as a dismissal without entering in the substance of the case (NEM/NEE), for example in case removal to a [Safe third country](#) has been ordered. Until 2015 there was also a specific provision for persons who had received a Dublin transfer decision, but this is not the case anymore since a new article addressing detention under the Dublin procedure has entered in force on 1 July 2015.

Once the SEM has issued a decision (expulsion or removal order), cantonal authorities can order a so-called detention pending deportation ("*Ausschaffungshaft*") to ensure the enforcement of the decision. This can occur also before the entry into force of the decision.<sup>604</sup> A person can also be kept in detention if he or she is already in detention in preparation for departure according to Article 75 FNIA.<sup>605</sup> In addition, according to Article 76 FNIA, detention pending deportation can be ordered if persons:

- i. refuse to disclose their identity, submit several applications for asylum using various identities or repeatedly fail to comply with a summons without sufficient reason or ignore other instructions issued by the authorities in the asylum procedure;
- ii. leave an area allocated to them in accordance with a restriction order or enter an area they are prohibited from entering;<sup>606</sup>
- iii. enter Swiss territory despite a ban on entry and cannot be immediately removed;
- iv. stay unlawfully in Switzerland and submit an application for asylum with the obvious intention of avoiding the imminent enforcement of a removal or expulsion order. Such an intention shall be suspected if it were possible and reasonable to file the asylum application earlier and if the application is submitted in close chronological relation to detention, criminal proceedings, the implementation of a penalty or the issue of a removal order;
- v. seriously threaten other persons or considerably endanger the life and limb of other persons and are therefore being prosecuted or have been convicted;
- vi. have been convicted of a felony;
- vii. are suspected of seeking to evade deportation, according to serious indications, in particular because they fail to comply with the obligation to cooperate with the authorities;
- viii. based on their previous conduct, it can be concluded that they will refuse to comply with official instructions;
- ix. are issued with a removal decision in a federal centre and enforcement of the removal is imminent.

According to case law of the Federal Supreme Court, a risk of absconding can be found to exist where the person has already disappeared once, he/she attempts to hinder the enforcement of removal by giving manifestly inaccurate or contradictory information, or if he/she makes it clear, by his/her statements or behaviour, that he/she is unwilling to return to his country of origin.<sup>607</sup> As expressly provided for in Art. 76(1)(b)(3) FNIA, there must be concrete elements to this effect. The mere fact of not leaving the country within the time limit set for this purpose is not sufficient, taken individually, to admit a ground for detention.<sup>608</sup>

In practice, the assessment of the risk of absconding leaves cantonal authorities a large discretion to order this type of detention. Case law has assessed a risk of absconding in cases where a foreign national has already disappeared, hampers the removal proceedings by providing false or contradictory

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<sup>603</sup> Information provided by the SEM, 19 March 2021. The removal rate is difficult to read, since this type of deportation is only applicable to persons who still do not have a removal decision and must be changed into detention pending deportation once there is an enforceable decision.

<sup>604</sup> Federal Supreme Court, Decision BGE 140 II 409, c. 2.3.4; 121 II 59, c. 2a, 122 II 148, c. 1.

<sup>605</sup> Article 76(1)(a) FNIA.

<sup>606</sup> Article 74 FNIA.

<sup>607</sup> Federal Supreme Court, Decisions 2C\_256/2013, c. 4.2; ATF 130 II 56 c. 3.1; 2C\_1139/2012, c. 3.2.

<sup>608</sup> Federal Supreme Court, Decision 2C\_142/2013, c. 4.2.

information, or even if he or she states unwillingness to return.<sup>609</sup> Like for all the other types of detention, detention must be proportional and deportation must be foreseeable in order to be lawful.<sup>610</sup>

According to SEM, in 2020, there were 1,163 persons detained pending deportation (compared to 1,648 in 2019), of which 430 were asylum seekers. Detention pending deportation ended with deportation in 78% of cases.<sup>611</sup>

A special provision concerning detention pending deportation exists in the FNIA for cases in which the enforcement delay is due to lack of cooperation in obtaining travel documents.<sup>612</sup> This specific type of detention, regulated under Art. 77 FNIA, can be used both with regard to asylum seekers and other foreigners, after the deadline for leaving has expired, and cannot exceed 60 days. It is hardly ever used: 16 cases have been reported in 2020, of which 11 concerning asylum seekers. This type of detention has resulted in deportation in 61% of cases.<sup>613</sup>

## 1.5. Detention in the Dublin procedure

According to Article 76a FNIA, a person in the Dublin procedure can be detained if:<sup>614</sup>

- (a) There are specific indications that the person intends to evade removal;
- (b) Detention is proportional; and
- (c) Less coercive alternative measures cannot be applied effectively.<sup>615</sup>

Article 76a FNIA provides a list of the specific indications that can lead to the assumption that the person intends to evade removal. These are the following:

- (a) The person concerned disregards official orders in the asylum or removal proceedings, in particular by refusing to disclose their identity, thus failing to comply with his or her duty to cooperate or by repeatedly failing to comply with a summons without sufficient excuse.
- (b) His or her conduct in Switzerland or abroad leads to the conclusion that he or she wishes to defy official orders.
- (c) He or she submits two or more asylum applications under different identities.
- (d) He or she leaves the area that he or she is allocated to or enter an area from which he or she is excluded.
- (e) He or she enters Swiss territory despite a ban on entry and cannot be removed immediately.
- (f) He or she stays unlawfully in Switzerland and submits an application for asylum with the obvious intention of avoiding the imminent enforcement of removal.
- (g) He or she seriously threatens other persons or considerably endangers the life and limb of other persons and is therefore being prosecuted or have been convicted.
- (h) He or she has been convicted of a felony.
- (i) He or she denies to the competent authority that he or she holds or has held a residence document and/or a visa in a Dublin State or has submitted an asylum application there.
- (j) If the person resists boarding a means of transport for the conduct of a Dublin transfer, or prevents the transfer in another way by his or her personal conduct.

Different aspects of these provisions are problematic, especially the manner in which the risk of absconding is defined, as well as the maximum duration of detention (see section on [Duration of detention](#)), which are not in line with Article 28 of the Dublin III Regulation. As a non-EU member state, Switzerland has no possibility to access the CJEU to clarify these issues. This is problematic especially from the perspective of the individual asylum seeker, as there is no effective remedy to contest the violation of EU law by Swiss law.

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<sup>609</sup> Federal Supreme Court, Decision 140 II 1, 9 December 2013, c. 5.3).

<sup>610</sup> Article 96 FNIA, Article 15(1) of the Return Directive.

<sup>611</sup> Information provided by the SEM, 19 March 2021.

<sup>612</sup> Article 77 FNIA.

<sup>613</sup> Information provided by the SEM, 19 March 2021.

<sup>614</sup> Article 76a FNIA.

<sup>615</sup> The principles of necessity (absence of a less coercive measure) and proportionality are valid for the other types of detention as well, although they are clearly stated only for detention under the Dublin procedure.

The Federal Supreme Court set down important principles in a leading case decision of May 2016:<sup>616</sup>

- A person may not be detained for the sole reason that he or she previously applied for asylum in another Dublin State. There must be an individual examination of specific indications for a high risk of absconding;
- If requested, the legality of the Dublin detention must in principle be reviewed by a judge within 96 hours from the moment of the written request of the detainee; and
- There must not be high formal requirements for the request to have the legality of the detention reviewed.

The Federal Administrative Court has also lifted detention decisions made by the SEM in Dublin cases on numerous occasions. It stated that the SEM had violated the person's right to be heard by not examining in an individual manner whether there was a high risk of absconding.<sup>617</sup> It also stated that when examining proportionality, a restriction order on the territory of the reception centre could be an alternative to detention.<sup>618</sup> Appeals to the Federal Administrative Court are not possible anymore since federal authorities (SEM) are not competent anymore in the ordering of detention after 1 March 2019. Appeals must be done at the cantonal level first, and only then to the Federal Supreme Court.

According to SEM, in 2020, there were 700 detention orders concerning detention under the Dublin procedure (compared to 1,123 in 2019). Detention under the Dublin procedure has ended with the enforcement of transfer in 61% of cases.<sup>619</sup>

## 1.6. Coercive detention

Coercive detention under Article 78 FNIA can be ordered when a legally enforceable removal or expulsion order cannot be enforced due to the personal conduct of the foreigner. It is aimed to persuade the person to change his or her behaviour in cases where the enforcement of removal is impossible without his or her cooperation.<sup>620</sup> This is highly problematic when considering Article 15(4) of the Return Directive, stating that when a reasonable prospect of removal no longer exists, detention ceases to be justified and the person concerned shall be released immediately. In a recent case in relation with the COVID-19 pandemic, the Federal Supreme Court has clarified that coercive detention is only lawful when removal is objectively possible in foreseeable future, the level of cooperation of the foreigner being irrelevant in this evaluation.<sup>621</sup>

In 2020, there were 30 cases coercive detention (compared to 37 in 2019), of which 28 were rejected asylum seekers. Only in 4% of cases, coercive detention has ended with deportation.<sup>622</sup>

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<sup>616</sup> Federal Supreme Court, Decision 2C\_207/2016, 2 May 2016.

<sup>617</sup> Federal Administrative Court, Decision D-2925/2016, 17 May 2016, E-2850/2016, 13 May 2016, D-2484/2016, 27 April 2016.

<sup>618</sup> Federal Administrative Court, Decision D-2484/2016, 27 April 2016; D-1626/2016, 22 March 2016.

<sup>619</sup> Information provided by the SEM, 19 March 2021.

<sup>620</sup> Decision of the Federal Supreme Court 133 II 97 of 2 April 2007, c. 2.2.

<sup>621</sup> Judgement of the Federal Supreme Court C\_408/2020 of 21.07.2020.

<sup>622</sup> Information provided by the SEM, 19 March 2021. According to this data, of the 5 persons in coercive detention at the end of 2020, one was from Afghanistan, one from Iran, one from Morocco, one from Tunisia and in one case the nationality was unknown.

## 2. Alternatives to detention

### Indicators: Alternatives to Detention

1. Which alternatives to detention have been laid down in the law?  
 Reporting duties  
 Surrendering documents  
 Financial guarantee  
 Residence restrictions  
 Other
2. Are alternatives to detention used in practice?  
 Yes  No

Except from Dublin-related detention, Swiss legislation does not explicitly establish that detention can be ordered only when less coercive measures are not sufficient. However, the examination of alternatives to detention is implied by the principle of proportionality.<sup>623</sup> The FNIA provides for some measures that can be used as alternatives to detention. In particular, Article 64e provides that cantonal authorities can require the foreign national: (a) to report to an authority regularly; (b) to provide appropriate financial security; (c) to hand in travel documents. Those measures can be used with the aim of ensuring the enforcement of removal orders and can function as alternatives to detention. Furthermore, the restriction and exclusion orders (Article 74 FNIA), prohibiting respectively to leave an allocated area or to enter a specific area, were explicitly introduced in the law as alternatives to detention.<sup>624</sup> The implementation of alternatives to detention is not registered as such and there are no statistics available on their use. According to the SEM, there are also no statistics concerning the number of restriction and exclusion orders issued by the cantons.<sup>625</sup>

In 2015, the UN Committee against Torture stated in its recommendations that Switzerland must apply alternative measures to detention.<sup>626</sup> Although some alternative measures exist, they are still too rarely implemented in practice. There are also wide divergences between the practices of different cantons. The National Council Control Committee has stated in a 2018 report that the significant differences among cantons in the rate of detention orders signify that the cantons apply differently the principle of proportionality, raising fundamental questions of equality of treatment.<sup>627</sup>

Regarding Dublin detention cases, the Federal Administrative Court has stated that a restriction order on the territory of the reception centre could be an alternative to detention, subject to an individual examination.<sup>628</sup> The Federal Supreme Court has also highlighted that detention is only admissible as an *ultima ratio* measure and after a thorough examination of other less coercive measures.<sup>629</sup>

## 3. Detention of vulnerable applicants

### Indicators: Detention of Vulnerable Applicants

1. Are unaccompanied asylum-seeking children detained in practice?  
 Frequently  Rarely  Never  
  
❖ If frequently or rarely, are they only detained in border/transit zones?  Yes  No
2. Are asylum seeking children in families detained in practice?  
 Frequently  Rarely  Never

<sup>623</sup> See for example decisions of the Federal Supreme Court 2C\_1063/2019 of 17.01.2020, c. 5.3.

<sup>624</sup> Businger, Martin (2015). *Ausländerrechtliche Haft: Die Haft nach Art. 75 ff. AuG*. Zürich: Schulthess Verlag. On the topic of alternatives to detention, see also "Die ausländerrechtliche Administrativhaft – Kritik und Alternativen", from *Asylex* on humanrights.ch; available at: <https://bit.ly/3d1c80K>.

<sup>625</sup> Information provided by the SEM, 27 April 2021.

<sup>626</sup> UN Committee Against Torture, *Observations finales concernant le septième rapport périodique de la Suisse*, Advanced unedited version, 13 August 2015, available at: <http://bit.ly/1LuTgEQ>, no. 17.

<sup>627</sup> *Détention administrative de requérants d'asile : Rapport de la Commission de gestion du Conseil national du 26 juin 2018*. Page 7502. See also Achermann et al, "Administrative Detention of Foreign Nationals in Figures". in a nutshell #12, January 2019, available at: <https://bit.ly/2UcAKKI>.

<sup>628</sup> Federal Administrative Court, decision D-2484/2016 of 27 April 2016, D-1626/2016 of 22 March 2016.

<sup>629</sup> Federal Supreme Court, Decision 2C\_1052/2016, 2C\_1053/2016, 26 April 2017.

The law prohibits the detention of children under 15. Detention for minors between 15 and 18 is currently possible and can last a maximum of 12 months (whereas detention of adults can last up to 18 months). The Parliament has to decide on an initiative that asks to forbid detention of minors altogether.<sup>630</sup>

The following numbers of children's detentions were provided by SEM from 2017 to 2020:

| Detention of children: 2017-2020             |      |      |      |         |
|--|------|------|------|---------|
|  | 2017 | 2018 | 2019 | 2020    |
| Children subject to administrative detention | 21   | 8    | 7    | Unknown |
| Of which, unaccompanied children             | 4    | 2    | 2    | 11      |
| Children subject to temporary detention      | 10   | 11   | 19   | Unknown |
| Of which, unaccompanied children             | 3    | 6    | 9    | 25      |

Source: SEM, 19 March 2021.

According to a report of the National Commission for the Prevention of Torture (NCPT), two cantons (**Geneva** and **Neuchâtel**) formally prohibit the detention of minors (including those of 15 and above) in their cantonal law, while five (Basel-Land, Jura, Obwald, Nidwald, Vaud) do not order administrative detention as a matter of principle. In several other cantons, no detention of minors has been registered in 2017 and 2018. On the other side, ten cantons have communicated having placed minors in administrative detention (**Aargau, Basel-Stadt, Bern, Glarus, St-Gallen, Solothurn, Uri, Valais, Zug, Zurich**). The length of detention was particularly long in **Bern, Valais, Zug** and **Zurich**. The NCPT also highlights that most minors are detained in prisons for the execution of penalties or remand prisons, which are inadequate.<sup>631</sup>

Terre des Hommes reported in 2018 that most cantons avoid detaining whole families, however in case of non-collaboration, some cantons detain the father, while the mother and children stay in the reception centre.<sup>632</sup> In some (rare) cases it can also happen that a single parent or both parents are detained, while the children are placed in foster care or a home. If a mother of a baby is detained, it occurs that the baby is placed in detention with her. Since the child is not formally detained in those cases, there are no data on this measure.<sup>633</sup> This occurred especially in the cantons of Bern and Zurich, but Zurich has communicated that it ended this practice on 1 July 2018.<sup>634</sup> This practice is unlawful since the FNIA prohibits the detention of children under the age of 15. Furthermore, it is very problematic from the point of view of the right to family life and the best interests of the child. The Swiss Refugee Council's view is that children and families should never be detained. The position of the Federal Council goes in the same direction.<sup>635</sup> On 28 September 2018, the Federal Council has responded to recommendation Nr. 4 of the Parliamentary Control of Administration stating that SEM will ask the cantons to avoid detention of children below 15 and study alternatives for the enforcement of families' removals.<sup>636</sup> However this cannot be guaranteed since detention is in the competence of cantonal authorities.

The Federal Supreme Court ruled in favour of an Afghan family in a judgment from April 2017 regarding the detention of the parents of four children and the separation of the family. The authorities simulated a transport of a five-person family from the asylum centre to an apartment, but instead they brought the family with packed suitcases to the airport in order to return them to Norway where they had been issued

<sup>630</sup> The National Council has approved the initiative, which still has to be voted by the Council of States, see Website of the Swiss Parliament, at the following link: <https://bit.ly/38GRsax>.

<sup>631</sup> NCPT, *Rapport au DFJP et à la CCDJP relatif au contrôle des renvois en application du droit des étrangers, d'avril 2018 à mars 2019*, 24 May 2019, 16-18.

<sup>632</sup> Terre des Hommes, *État des lieux sur la détention administrative des mineur.e.s migrant.e.s en Suisse*, November 2018, 77.

<sup>633</sup> NCPT, *Rapport au DFJP et à la CCDJP relatif au contrôle des renvois en application du droit des étrangers, d'avril 2018 à mars 2019*, 24 May 2019, 19.

<sup>634</sup> Ibid.

<sup>635</sup> Federal Council, *Détention administrative de requérants d'asile*, 26 June 2018, available (in French) at: <https://bit.ly/2MV0IkZ>.

<sup>636</sup> Available at: <http://bit.ly/2wAQPQu>.

a negative asylum decision. The family refused to board the plane because they feared to be deported from Norway to Afghanistan. After they refused to enter the plane, the family was separated. The authorities of the Canton of Zug arrested the parents for three weeks and placed the children somewhere else in order to force them to leave the country. The Court recognised the human misery in which the complainants found themselves, in particular due to the lack of the possibility of making contact with each other and with their children during their detention and stated that the experienced treatment almost reached a threshold of Article 3 ECHR. Furthermore, the Court considered the detention of the complainant with her four-month-old baby in the Zurich airport prison, separated from her three other, older children, was not an ultima ratio and was thus disproportionate. Therefore, the Court found a violation of Article 8 ECHR.<sup>637</sup> This is not an isolated case. In many cases, detention and the ordering of coercive measures are disproportionate, yet the lack of access to legal representation prevents many asylum seekers from appealing against it.

As regards the conditions of detention, Article 81(3) FNIA contains special rules, which require taking into account the specific needs of vulnerable persons, unaccompanied children and families in the detention arrangements. However, it is not clear how exactly this provision is translated into practice, particularly since ordinary prisons are often used for carrying out immigration detention despite this being forbidden by law (with exceptions). In particular, minors are not always separated from adults in practice, which led the National Council Control Committee to recommend the creation of places of detention that would be conform to the Convention on the Rights of the Child and to avoid any confinement in other facilities.<sup>638</sup> Terre des Hommes reports that the conditions in which the detention of minors occurs are unacceptable and put them at risk of abuse, particularly if the separation from adults is not respected.<sup>639</sup>

There are few facilities with places reserved for the administrative detention of women. Since the facilities only house a small number of women and the places are often empty, women can find themselves in a condition of loneliness and de facto isolation.<sup>640</sup> As of 31 December 2020, 7 women were detained (out of a total of 160 persons), of which 3 were asylum seekers.<sup>641</sup>

Regarding the detention of asylum seekers in airport transit zones during the airport procedure, also vulnerable applicants – including unaccompanied minors – can be held at the airport. This occurs usually during the first days after their application. When the vulnerability is manifest, for example in cases of unaccompanied minors or pregnant women, entry into the territory is usually allowed faster, for example after the summary interview.

#### 4. Duration of detention

##### Indicators: Duration of Detention

- |  |           |
|--|-----------|
| 1. What is the maximum detention period set in the law (incl. extensions): | 18 months |
| 2. In practice, how long in average are asylum seekers detained?           | 31 days   |

##### 4.1. Maximum duration set by law

Altogether, detention can be ordered for a maximum of 6 months and it can be extended for a further period of up to 12 months where the person does not cooperate with the authorities.<sup>642</sup> Therefore the maximum period for detention under Articles 75, 76 and 78 FNIA is 18 months as foreseen in the Return Directive. When a person is released and detained again the duration is summed up, unless he or she has left the national territory.

<sup>637</sup> Federal Supreme Court, Decision 2C\_1052/2016, 2C\_1053/2016, 26 April 2017.

<sup>638</sup> Recommendation Nr. 5. Détention administrative de requérants d'asile : Rapport de la Commission de gestion du Conseil national du 26 juin 2018.

<sup>639</sup> Terre des Hommes, État des lieux sur la détention administrative des mineur.e.s migrant.e.s en Suisse, November 2018, 81.

<sup>640</sup> Karin Meier, Eine Stimme für Menschen in Ausschaffungshaft, Reformiert, 4 March 2019, available (in German) at: <https://bit.ly/39TzUXs>.

<sup>641</sup> Information provided by the SEM, 19 March 2021.

<sup>642</sup> Article 79 FNIA.

For children between 15 and 18, the maximum period of detention is 6 months and may be extended by up to 6 months, thereby totalling 12 months.<sup>643</sup>

Detention under Article 76(1)(b)(5) can last a maximum of 30 days,<sup>644</sup> while detention under Article 77 cannot exceed 60 days.<sup>645</sup>

For detention in the Dublin procedure, there are specific rules regarding duration.<sup>646</sup> The person concerned may remain or be placed in detention from the date of the detention order for a maximum duration of:

- (a) Seven weeks while preparing the decision on responsibility for the asylum application; this includes submitting the request to take charge to the other Dublin State, waiting for the response or tacit acceptance, and drafting and giving notice of the decision;
- (b) Five weeks during a remonstrance procedure;
- (c) Six weeks to ensure enforcement from notice being given of the removal or expulsion decision or the date on which the suspensive effect of any appeal against a first instance decision on removal or expulsion ceases to apply and the transfer of the person concerned to the competent Dublin State.

In addition, the law foresees the possibility to detain the person if he or she refuses to board the means of transport being used to effect the transfer to the competent Dublin State, or if he or she prevents the transfer in any other way through his or her personal conduct. In that case, he or she can be detained for another 6 weeks. The period of detention may be extended with the consent of a judicial authority if the person concerned remains unprepared to modify their conduct. The maximum duration of this period of detention is three months.

Some of these provisions actually violate the Dublin III Regulation. Indeed, the maximum duration of detention under the Dublin procedure exceeds that foreseen in Article 28 of the Dublin III Regulation. The detention served under the Dublin regime will be deduced from the total maximum detention period of 18 months.

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<sup>643</sup> *Ibid.*

<sup>644</sup> Article 76(2) FNIA.

<sup>645</sup> Article 77(2) FNIA.

<sup>646</sup> Article 76a(3)-(5) FNIA.

## 4.2. Duration of detention in practice

In practice, the average duration varies according to the type of detention:

| Average duration of detention (days) per type of detention:<br>2020        | Overall                    | Only asylum cases          |
|--|----------------------------|----------------------------|
| Temporary detention (art. 73 FNIA)   | 1                          | 1                          |
| Preparatory detention (art. 75)  | 18                         | 17                         |
| Detention pending deportation (art. 76)                                    | 27                         | 53                         |
| Detention in the Dublin procedure (art. 76a)                               | 22                         | 25 <sup>647</sup>          |
| Detention pending deportation in order to organise travel papers (art. 77) | 34                         | 37                         |
| Coercive detention (art. 78)   | 74                         | 76                         |
| Detention at the airport transit zone                                      | 55 in Zurich, 18 in Geneva | 55 in Zurich, 18 in Geneva |

Source: SEM, 19 March 2021.

In addition, the use and duration of detention varies considerably among the cantons.

In 2015, the UN Committee against Torture stated in its recommendations that Switzerland must apply detention only as a measure of last resort, especially regarding unaccompanied children, and for a period as short as possible.<sup>648</sup> The report of the Parliamentary Control of Administration refers to significant differences in the ways cantonal authorities interpret the principles of celerity and proportionality.<sup>649</sup>

## B. Detention conditions

### 1. Place of detention

#### Indicators: Place of Detention

- Does the law allow for asylum seekers to be detained in prisons for the purpose of the asylum procedure (i.e. not as a result of criminal charges)?  Yes  No
- If so, are asylum seekers ever detained in practice in prisons for the purpose of the asylum procedure?  Yes  No

According to Article 81(2) FNIA, “detention shall take place in detention facilities intended for the enforcement of preparatory detention, detention pending deportation and coercive detention. If this not possible in exceptional cases, in particular because of insufficient capacity, detained foreign nationals must be accommodated separately from persons in pre-trial detention or who are serving a sentence”. This formulation was introduced on 1 June 2019 in order to align the provision with Article 16(1) of the Return Directive and interpretation of the CJEU and sets a clearer framework for immigration detention, which requires specialised facilities. In a judgement issued in March 2020, the Federal Supreme Court analysed this new legal provision and stated that detention for immigration related purposes must take place in facilities especially dedicated and conceived for this scope and that detention in a non-specialised

<sup>647</sup> The difference between the overall length and the length for asylum seekers is unclear. It is possible that some Dublin transfers, when they occur for the second or third time, are registered as FNIA and not asylum cases.

<sup>648</sup> UN Committee Against Torture, *Observations finales concernant le septième rapport périodique de la Suisse*, 13 August 2015, available at: <http://bit.ly/1LuTgEQ>, para 17.

<sup>649</sup> Parliamentary Control of Administration. Page 7547-7549.

facility – even in a separated section – is only admissible for short time, in exceptional and well-founded cases.<sup>650</sup>

However, the administrative detention of asylum seekers and other foreigners in prisons that are also holding prisoners under the penal code – usually in separated areas – is still a very frequent solution adopted by cantons. Following this judgement, this practice should be considered unlawful.

### 1.1. Specialised facilities, prisons and pre-trial facilities

In practice, asylum seekers are regularly detained in prisons or pre-trial detention facilities as there are very few detention centres used exclusively for immigration detention. To this latter category currently **belong** only four facilities: **Frambois** (20 places) and **Favra** (20 places) in the canton of Geneva, **Bazenheid** (12 places) and **Widnau** (8 places) in the canton of St. Gallen. Altogether, they provide only 60 places out of a total 352 (17%). While the detention centre of Frambois, which resulted from an inter-cantonal cooperation (“*Concordat*”) of three cantons (Geneva, Vaud and Neuchâtel)<sup>651</sup>, has largely the most liberal detention conditions in Switzerland, Bazenheid and Widnau have been strongly criticised in the past.<sup>652</sup> Since the detention of asylum seekers in Switzerland takes the form of pre-removal detention, there is no specialised facility for asylum seekers only, but asylum seekers are detained together with irregular migrants and foreign nationals without or having lost their residence permit.

All other facilities confine both immigration detainees and convicted or remand prisoners. Most facilities dispose of a separated section or even a separate building for the holding of persons detained under immigration law. It happens however in some facilities that such sections are used for other forms of detention or that administrative detention is executed in cells that are not specifically foreseen for this form of detention.<sup>653</sup>

Given the decentralised nature of immigration detention in Switzerland, it is difficult to provide for a list of the facilities used for this purpose. According to a 2018 report of monitoring in the area of liberty deprivation, there are 22 facilities carrying out immigration detention, including separate sections within prisons, totalling a capacity of 352 places.<sup>654</sup> Based on that report, the facilities dedicating an area or some cells specifically to immigration detention are the following:

- Crêtelongue, centre LMC Granges (Canton Valais): 18 places (men)
- Prison de Delémont (Canton Jura): 2 places (men)
- Etablissement concordataire de Favra (Canton Geneva): 20 places (men)
- Etablissement concordataire de Frambois (Canton Geneva): 26 places, and 20 according to other sources (men)
- Prison centrale de Fribourg (Canton Fribourg): 4 places (men)
- JVA Wauwilermoos (Canton Lucerne): 15 places (men)
- Strafanstalt Zug (Canton Zug): 12 places (men)
- Gefängnis Bässlergut (Canton Basel-Stadt): 30 places (men)
- Untersuchungsgefängnis Basel-Stadt (Waaghof, Canton Basel-Stadt): 3 places (women)
- Gefängnis Stans (Canton Nidwalden): 4 places (men)

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<sup>650</sup> Decision of the Federal Supreme Court 2C\_447/2019 of 21st March 2020. In the case under exam, the Court ruled that art. 81(2) FNIA had not been violated because detention was short (4 days) and motivated (facilitating transportation to the airport).

<sup>651</sup> See the website on the inter-cantonal cooperation of the Heads of the police and justice Departments of the “Latin cantons” that also contains a description of the detention centre: La Conférence latine des Chefs des Départements de justice et police (CLDJP), available at: <https://bit.ly/2JbO8YG>. The legal basis for the detention centre and a description of the centre may be available at: <https://bit.ly/2QzOSLt>.

<sup>652</sup> NCPT, “Bericht an den Regierungsrat des Kantons St.Gallen betreffend den Besuch der Nationalen Kommission zur Verhütung von Folter in den Gefängnissen der Kantonspolizei St.Gallen vom 5. und 6. Oktober 2015”, 17th March 2016, page 9.

<sup>653</sup> Parliamentary Control of Administration, page 7552.

<sup>654</sup> Swiss Competence Centre for the Execution of Criminal Penalties, *Monitoring des capacités de privation de liberté*, February 2019.

- Prisons of the Canton Bern: 25 places according to this source, but significantly higher according to the Website of the Cantonal Security Department:
  - Regionalgefängnis Bern: 27 places (22 men, 5 women)
  - Regionalgefängnis Moutier: 28 places (24 men, 4 women)
  - Regionalgefängnis Thun: 12 places (not defined)
- Gefängnisse Biberbrugg (Canton Schwyz): 8 places (men)
- Untersuchungsgefängnisse Solothurn and Olten (2 facilities, Canton Solothurn): 19 places (men)
- Zentral- und Bezirksgefängnisse Aargau (Canton Argau): 14 places (not specified)
- JVA Realta (Canton Graubünden): 16 places (men)
- JVA Sennhof (Canton Graubünden): 20 places (men)
- Flughafengefängnis Zürich (Canton Zurich): 106 places (86: men; 20: women)
- Ausschaffungsgefängnis Bazenheid (Canton St. Gallen): 12 places (men)
- Gefängnis Widnau (Canton St. Gallen): 8 places (men)

The number of 22 facilities is probably an underestimation since it only includes facilities that permanently reserve some places for immigration detention, but it can also happen that other facilities hold immigration detainees for a few days. Indeed, in the 2019 Catalogue of penitentiary establishments published by the Federal Statistical Office, 13 additional facilities are said to be used for the execution of detention under the FNIA:<sup>655</sup>

- Gefängnis Appenzell (AI)
- Kantonales Gefängnis Appenzell Ausserrhoden (AR)
- Prison de Champ-Dollon (only under articles 73 and 75) (GE)
- Kantonales Gefängnis Glarus (GL)
- Prison de Porrentruy (JU)
- JVA Grosshof (LU)
- Regionalgefängnis Altstätten (SG)
- Kantonale Strafanstalt Saxerriet (SG)
- Gefängnis St. Gallen (SG)
- Kantonsgefängnis SSB Schwyz (SZ)
- Carcere Giudiziario “Farera” (TI)
- Prison de la Tuilière (VD)
- Polizeigefängnis Zürich (ZH)

In 2018, the cantons estimated a further need of approximately 150 places,<sup>656</sup> which indicates that they are not planning to reduce the number of detentions. In Geneva, it is planned to close down Frambois and Favra and reassign the prison La Brenaz (168 places) to immigration detention by 2023. In Basel, the prison of Bässlergut, which was planned as an immigration detention centre but confined sentenced prisoners as well since 2011, has enhanced its capacity for immigration detention since the expansion of a prison building for the execution of penal sanctions in 2020. Other plans for the creation of new places of administrative detention have been decided in Valais (20 places in Sion) and St. Gallen (52 places in Altstätten), where some smaller detention facilities or sections will be closed down in future.<sup>657</sup>

## 1.2. Airport transit zones

The SEM should provide persons who lodged an asylum application at the airport with a “place of stay and appropriate accommodation” in case entry is temporarily denied.<sup>658</sup> Maximum stay in the transit zone is 60 days in total.<sup>659</sup> The centre situated in the transit zone of Geneva airport has a capacity of 30 places,

<sup>655</sup> Federal Office of Statistics, “Catalogue des établissements pénitentiaires”. Last update on January 2020. <https://bit.ly/3tmayLA>.

<sup>656</sup> Swiss Competence Centre for the Execution of Criminal Penalties, *Monitorage des capacités de privation de liberté*, February 2019, page 25.

<sup>657</sup> Ibid.

<sup>658</sup> Article 22(3) AsyIA. See [Border Procedure](#).

<sup>659</sup> Article 22(5) AsyIA.

in Zurich of 60 places.<sup>660</sup> For the purpose of this report, we qualify these as detention centres, although people are not formally detained and they can leave the centre and remain in the airport transit zone in principle.

### 1.3. Reception centres in isolated areas

As detailed in [Freedom of Movement](#) and [The question of \*de facto\* detention in Switzerland](#) accommodation in federal asylum centres that are located in isolated areas may be considered as constituting *de facto* detention in some cases. See also [Types of Accommodation](#).

## 2. Conditions in detention facilities

### Indicators: Conditions in Detention Facilities

- |   |   |  |
|---|---|--|
| 1. Do detainees have access to health care in practice? | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No            |
| ❖ If yes, is it limited to emergency health care?       | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> No |

Article 81(3) FNIA states that detention conditions must take into account the needs of vulnerable persons, unaccompanied children and families with children, and that detention conditions must be in line with Articles 16(3) and 17 of the Return Directive and with Article 37 of the Convention on the Rights of the Child. Federal law does not provide any more detailed preconditions for detention conditions, as detention is ordered at the cantonal level and lies within the competence of the respective cantons. However the Federal Supreme Court has laid down some requirements for pre-removal detention: contacts with outside as well as with other detainees must be allowed; detainees should have right to unlimited visits without surveillance; detainees' rights and liberties can be restricted only to ensure the aim of detention and the proper functioning of the facility; and the detention regime must be freer than the regimes in penal forms of incarceration.<sup>661</sup>

### 2.1. Conditions in specialised facilities, prisons and pre-trial facilities

Detained asylum seekers have access to health care in practice. As asylum seekers are usually detained in detention centres for pre-trial detention and/or criminal detention, the health care provided is generally at an acceptable level although it is limited to primary health care.<sup>662</sup> In some facilities there is medical personnel present, for example in the prison **Bässlergut** in Basel. In a recent report on the provision of medical care in custodial institutions (not focused on immigration detention), the NCPT has highlighted important language barriers, which are often overcome with the help of other detainees or detention staff. This is highly problematic, and the NCPT recommends the resort to interpreters.<sup>663</sup>

Differences between the cantons and between facilities are huge with regard to the conditions of detention, the type of facilities used, as well as the legal bases and practices of ordering and reviewing detention. Unfortunately, it is not possible to provide an overview of the practice in the cantons here.

The National Commission for the Prevention of Torture (NCPT) regularly visits carceral facilities used for purposes of criminal justice and/or immigration detention. Its reports are the main source of information on those confinement spaces. The NCPT also makes recommendations to the cantonal authorities and follow-up visits to check if those have been followed, however there is no legal obligation for the Cantons to implement those.

The NCPT affirms that in general, the conditions are too restrictive and resemble too much to those of penal incarceration. Foreigners in administrative detention do not benefit from enough freedom of

<sup>660</sup> SEM, Manuel Asile et Retour, chapter C2, page 4.

<sup>661</sup> ATF 122 II 49 of 2 May 1996, c. 5; 122 I 222 of 12.07.1996, c. 2; 122 II 299 of 16 August 1996.

<sup>662</sup> See the reports issued by the Swiss national CAT Committee, the National Commission for the Prevention of Torture (NCPT), issued during the visits to several detention centres since 2010. The reports always also contain a section on access to health care, and are available at: <http://bit.ly/1RplLjn>.

<sup>663</sup> NCPT/NKVF, "Gesamtbericht über die schweizweite Überprüfung der Gesundheitsversorgung im Freiheitsentzug durch die Nationale Kommission zur Verhütung von Folter (2018 – 2019)", 28.

movement within the facilities.<sup>664</sup> In its various reports, the NCPT recommends the Cantons to provide for more freedom of movement, which should be granted as a matter of principle in all detention facilities; detention cells should be open without time limitation and stay closed only during the night. With this respect, the out-of-cell time differs greatly from one facility to another. As a way of example, detainees in Frambois can freely move within the whole facility (including a fenced courtyard) from 8am to 9pm, while in Granges, they spend 19 to 20 hours in their cell. The NCPT also often recommended to study the possibility of free internet access and/or of using mobile phones.

According to NCPT, occupational programmes should be offered to the detainees, while this possibility is only provided in some of the facilities, for example in Frambois, Bässlergut, and the Zurich airport prison. In Bässlergut, detained persons can work in a workshop for 2,5 hours daily, and are paid 6 sfr per day. Many other facilities do not provide for occupational programs.

Concerning the detention facilities of Frambois, Favra and Realta, NCPT suggests disciplinary measures should be better regulated and controlled. Concerning Favra and Realta, information about rights and obligations should be more accessible for the detainees through flyers in the most used languages. Here are summarised some of the findings of NCPT in the last years:

**Frambois and Favra:** NCPT has found that the regime in these facilities has not the same character of criminal detention, but recommends that the concerned persons have access to a medical screening in the first 24 hours. In Favra, which will be closed in the medium term due to its old structure, the need to grant an access to the exterior facilities and to work on a suicide prevention concept exists.

**Bässlergut:** During a follow-up visit in 2017, the NCPT has seen improvements, but still suggests to take measures in order to protect the health of the detainees, e.g. protection against passive smoke or prevention of suicidal risk through psychiatric care and accommodation in adequate facilities. Although some improvement could be noted, the facility has still a strong criminal detention facility character.

**Realta:** NCPT has expressed in 2017 its concerns in relation to the cell opening hours (approx. 7 hours), the shortage of natural light in the cells, the inadequacy of the courtyard for long stays in the facility, the impossibility to have visits during weekend, the impossibility to keep one's own personal clothes and substitution with prison clothes, the shortage of occupation, the absence of a systematic medical screening upon admission.

**Granges:** In 2018 the NCPT has expressed severe concerns because the national and international standards of detention conditions are not met in this facility. Accommodation of women, especially pregnant women, is not acceptable as there is no department for women and most of the guards are men. In a follow-up visit, the NCPT has noted that despite women and minors had not been detained in the previous months, most of the recommendations had not been followed and strongly criticized the material conditions and the detention regime, recommending to provide for more freedom of movement within the facility.<sup>665</sup>

**Regionalgefängnis Bern:** In 2019, NCPT has visited the prison and recommended to stop the administrative detention of migrants in that prison, since the material conditions do not allow to provide for a less restrictive detention regime. In its response, authorities of Canton Bern stated that since 2018, a new separated sector in the Regional Prison of Moutier had been arranged for the administrative detention of foreigners, allowing for more freedom of movement (from 9am to 6pm with the exception of the lunchtime; access to the courtyard during 3 hours in the afternoon). It also stated that since September 2019, the Regional Prison of Bern would only be used as entry and transit facility, where stays would be limited to a maximum of four days.<sup>666</sup>

<sup>664</sup> NCPT, "Rapport d'activités 2017", 6.

<sup>665</sup> Report available at: <http://bit.ly/3c4fPQw>.

<sup>666</sup> Report available at: <http://bit.ly/2STqNAD>.

**Regionalgefängnis Moutier:** NCPT has visited the facility in June 2019. In administrative detention, the cells are open from 12 to 18 and the courtyard and common spaces are accessible from 14 to 17. Some work occupations are available but these are not sufficient for all people detained. The NCPT judged this regime as too restrictive and recommended limiting the locking of cells to the night time and studying the possibility to allow the use of Internet and mobile phones. It also recommended to ensure access to psychiatric care, develop a concept to deal with suicide attempts, resort to professional interpreters during medical visits and improve detainees' access to information and house rules.<sup>667</sup>

**Prison of Sarnen (OW):** The prison is sometimes used for administrative detention, but there is no separation from (only different cells) nor different detention conditions than other detention regimes. After its 2019 visit, the NCPT has recommended not to use this prison for immigration-related administrative detention.

**Prison of Aarau:** The infrastructure is too similar to that of criminal detention and the NCPT has recommended to lift the obligation to wear prison uniforms.

The NCPT has also highlighted that the conditions of detention of minors in general are not adequate as most of them are detained in penitentiaries or remand prisons, which do not guarantee the minimum standards with regard to children's rights. Even in facilities specific to immigration detention, the character is too carceral and the regime too strict.<sup>668</sup>

In the framework of the evaluation of the Schengen acquis' application by Switzerland with respect to the return policy, the Council of the European Union has visited a few detention facilities and published the following recommendations:<sup>669</sup>

**Zurich airport prison:** Members of a family should not be systematically separated, and families without children should be accommodated separately and in conditions guaranteeing an adequate intimacy (art. 17(2) of the Return Directive); there should be more indoor living space at the disposal of detainees, who should be locked for the shortest appropriate period of time during the day.

**Regional Prison of Thun:** The detention regime should allow detainees to spend more time outside their cells; there should be sufficient daylight in cells; an adequate outdoor area should be available; less intrusive methods than strip search should be used during the intake procedures; there should be sufficient and well-trained staff equipped to cater for the needs of illegally staying third-country nationals, including families, women and minors, to guarantee both the security of the premises and daily assistance to detainees.

In 2015, the UN Committee against Torture stated in its recommendations that Switzerland should establish and apply alternatives to detention and use detention only as a last resort and for the shortest time possible. The State should pursue its efforts to provide for specialised structures for administrative detention in all cantons, with a regime that is adapted to its purpose.<sup>670</sup>

During 2020 and due to the COVID-19 pandemic, there were significant restrictions on freedoms and rights of detained persons in the different detention facilities. In the **Zurich** airport prison, for example, visitors were not allowed during several months, occupation programs were significantly reduced, the fitness room was closed and newly detained people had to spend the first 10 days of their detention in quarantine, which is equivalent to solitary confinement.<sup>671</sup>

<sup>667</sup> Report available at: <https://bit.ly/2RacOoT>.

<sup>668</sup> NCPT, "Rapport au DFJP et à la CCDJP relatif au contrôle des renvois en application du droit des étrangers, d'avril 2018 à mars 2019", 24 May 2019, page 18.

<sup>669</sup> Council of the European Union, "Council Implementing Decision setting out a Recommendation on addressing the deficiencies identified in the 2018 evaluation of Switzerland on the application of the Schengen acquis in the field of return", 14 May 2019, available at: <http://bit.ly/37YiNTb>, paragraphs 16 to 19.

<sup>670</sup> Committee Against Torture, *Observations finales concernant le septième rapport périodique de la Suisse*, 13 August 2015, available at: <http://bit.ly/1LuTgEQ>, no. 17.

<sup>671</sup> Information provided by Asylex (program Detention), e-mail of 25.01.2021.

## 2.2. Conditions in airport transit zones

When asylum applicants are assigned a place of stay in the transit zone, this means that they are placed in a detention centre during the airport procedure. Conditions in such centres are known to be minimal. Asylum seekers may move freely within the centre and they can access an area with bars and restaurants within the transit zone, at least in principle. They are entitled to a daily walk outdoors on a terrace (in **Zurich**) or a courtyard (in **Geneva**), both without a green area. For this reason, accommodation at the airport is considered de facto detention for the scope of this report.

The detention centre in the transit zone of **Geneva** has a capacity of 30 places and is located rather far from the terminals. It is accessible with a shuttle bus only and is composed of a men's and a women's dormitories, a communal and a play room, and an outside walking yard with a fence.<sup>672</sup> There are also a praying room and a cafeteria. In principle, asylum seekers have access to the non-Schengen transit zone at the airport, with shops, restaurants and bars, but they need to take a shuttle bus to reach it, which means that in practice, they stay in the facility.<sup>673</sup> The centre is managed by the private company ORS, while security is ensured by airport staff. The SEM, IOM and the legal representation offered by Caritas have their own offices in the facility as well. There is no school for children, nor any occupation program available for asylum seekers.<sup>674</sup> Health staff is not permanently present. A doctor systematically conducts a first short medical screening within a few days from the arrival and can make further visits in case of necessity.

The detention centre in the transit zone of **Zurich** airport has a capacity of 60 places<sup>675</sup> and is composed of three dormitories: for men, women and a families.<sup>676</sup> Asylum seekers have access to a terrace, a praying room, and an area with shops and restaurants.<sup>677</sup> The terrace is the only place where they can breathe fresh air and is located far from the centre; it is used by airport and air companies' personnel. The centre is not appropriate for families with children since there is no school, but families are also held there. Furthermore, no occupation programs are offered. A nurse is regularly there and people in airport procedures have access to a doctor in the airport as well.

## 3. Access to detention facilities

### Indicators: Access to Detention Facilities

#### 1. Is access to detention centres allowed to

|                   |   |   |                             |
|-------------------|---|---|-----------------------------|
| ❖ Lawyers:        | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Limited            | <input type="checkbox"/> No |
| ❖ NGOs:           | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> Limited | <input type="checkbox"/> No |
| ❖ UNHCR:          | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Limited            | <input type="checkbox"/> No |
| ❖ Family members: | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> Limited | <input type="checkbox"/> No |

Lawyers and UNHCR have access to detention centres. Family members have access during visiting hours. Access is dependent on the rules that apply in the detention centre ("*Hausordnung*") and may vary significantly.<sup>678</sup> Regarding the access of NGOs, according to the experience of Amnesty International, a personal authorisation must be obtained in advance in order to visit the facilities. Usually visitors from NGOs need to know and communicate the name of the person they want to visit.

The visiting hours represent a hurdle for the effective access of family members to detention centres. Many detention facilities allow visits on weekdays only. This is for example the case in the Regional Prison

<sup>672</sup> Terre des Hommes, État des lieux sur la détention administrative des mineur.e.s migrant.e.s en Suisse, November 2018, p. 56

<sup>673</sup> NCPT, Report on federal asylum centres 2019-2020, p. 17.

<sup>674</sup> NCPT, Report on federal asylum centres 2019-2020, p. 35.

<sup>675</sup> AOZ, Asylunterkunft Transitzone Zürich-Flughafen, available (in German) at: <http://bit.ly/38Q3IEF>.

<sup>676</sup> Le Temps, Des requérants d'asile bloqués, à Zurich, en zone de transit, available (in French) at: <http://bit.ly/2vVS1h7>.

<sup>677</sup> Ibid.

<sup>678</sup> The visiting rights and the concrete *modus* is also taken up by the NCPT in its reports.

of Bern and the Regional Prison of Moutier according to their Websites.<sup>679</sup> This was also reported by NCPT for the **Zurich Airport prison**, with the recommendation to cantonal authorities to examine the possibility of visiting hours also on weekends.<sup>680</sup> The Zurich cantonal government has responded in a public statement that this was impossible due to limited resources. The NCPT has also made the same remark and recommendation to the Canton Graubünden regarding Realta in 2017, but it is not clear whether the visiting hours have changed since. During 2020, the possibility to receive visits was significantly reduced as a consequence of measures taken to prevent COVID-19 infections, violating the rights of detainees.<sup>681</sup>

As regards airport **transit zones**, third parties are usually not allowed to visit. Church representatives can access the centre on presentation of their accreditation as long as they announce their arrival and departure with the staff running the holding centre in the transit zone. IOM has access to the detention centres.

Since the introduction of the new asylum procedure on 1 March 2019, persons who apply for asylum at the airport and are confined in the transit area systematically get free legal representation like all other asylum seekers (see also Section on [Border procedure \(border and transit zones\)](#)). The organisations mandated for the region Zurich (RBS Bern) and West Switzerland (Caritas Suisse) have access to the transit zones and have a regular presence there for the relevant steps of the procedure.

## C. Procedural safeguards

### 1. Judicial review of the detention order

#### Indicators: Judicial Review of Detention

- |   |   |  |
|---|---|--|
| 1. Is there an automatic review of the lawfulness of detention? | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No            |
| ❖ Dublin detention  | <input type="checkbox"/> Yes            | <input checked="" type="checkbox"/> No |
| 2. If yes, at what interval is the detention order reviewed?    | 96 hours                                |  |

Review of administrative detention (except Dublin detention, as seen below) is regulated under Article 80 FNIA. In fact, Article 80(2) FNIA provides that the legality and appropriateness of detention must be reviewed at the latest within 96 hours by a judicial authority on the basis of an oral hearing. The same occurs with decisions to extend the detention order.

According to Article 80(3) FNIA, the judicial authority may dispense with an oral hearing if deportation is anticipated within 8 days of the detention order and the person concerned has expressed his or her consent in writing. If deportation cannot be carried out by this deadline, an oral hearing must be scheduled at the latest 12 days after the detention order.

According to Article 80(4) FNIA, when reviewing the decision to issue, extend or revoke a detention order, the judicial authority shall also take account of the detainee's family circumstances and the conditions under which detention is enforced. In no event may a detention order in preparation for departure or detention pending deportation be issued in respect of children or young people who have not yet attained the age of 15. The Court also needs to examine if detention is proportional and if removal could not be achieved through other means.<sup>682</sup>

The detainee may submit a request for release from detention one month after the detention review. The

<sup>679</sup> Sicherheitsdirektion, Besucherinformationen, available (in German) at: <https://bit.ly/2T1ORjP>; Direction de la sécurité, Informations aux visiteurs, available (in French) at: <https://bit.ly/39Pqqgj>.

<sup>680</sup> NCPT, Report to the Government of the Canton of Zurich regarding a follow-up visit of 14 April 2016 to the administrative detention section of the airport prison Zurich, 8 November 2016, no 25.

<sup>681</sup> This was the case during several months in the Zurich airport prison, for example. Information provided by Asylex (program Detention), e-mail of 25.01.2021.

<sup>682</sup> See decisions of the Federal Supreme Court 2C\_1063/2019 of 17.01.2020, c. 5.3, with references to 2C\_263/2019 of 27.06.2019, c. 4.3.2 and 2C\_466/2018 of 21.06.2018, c. 5.2.

judicial authority must issue a decision on the basis of an oral hearing within 8 working days. A further request for release in the case of detention in preparation for departure (Art. 75 FNIA) may be submitted after one month or in the case of detention pending deportation (Art. 76 FNIA) after 2 months.<sup>683</sup>

The detention order shall be revoked if: the reason for detention ceases to apply or the removal or expulsion order proves to be unenforceable for legal or practical reasons; a request for release from detention is granted; or the detainee becomes subject to a custodial sentence or measure.<sup>684</sup>

Review of Dublin detention is regulated by Article 80a FNIA. It represents an exception since no automatic review is foreseen. In case of detention under a Dublin procedure, the legality and the appropriateness of detention shall be revised by a judicial authority only at the request of the detainee and in a written procedure (both the request and the exam are done in writing). This review may be requested at any time. According to a ruling of the Federal Supreme Court of 2 May 2016, the review should in principle be conducted within 96 hours after the request.<sup>685</sup>

Detention under the Dublin procedure can no longer be ordered by SEM, which means that all review procedures are now carried out at the cantonal level (before 1 March 2019, the Federal Administrative Court was competent for the judicial review of Dublin detention when ordered by SEM). Again, cantonal practice is very diverse with regard to judicial review. National legislation provides for important safeguards, but compliance with these safeguards is not guaranteed in all cantons. Each canton organises its system of judicial review, and the practice of cantonal Courts is very diverse. It is not possible to provide an overview of all cantonal practices here.

The Swiss Refugee Council has observed that in cases of Dublin detention, the requirements by Swiss law as well as Article 28 of the Dublin III Regulation have not always been met, at least until the Federal Supreme Court and Federal Administrative Courts set down some ground rules (see [Grounds for Detention: Dublin Procedure](#)). The Swiss Refugee Council also suspects that detainees in the Dublin procedure are insufficiently informed that they must themselves ask in written form for a review of the detention. To help remedy this, the NGO has drafted a basic form in four languages with which to ask for a review of the Dublin detention order.<sup>686</sup> Another challenge, however, remains the distribution of this leaflet to the relevant persons.

During 2020, a year characterised by COVID-19, several detained persons have been released following a decision of cantonal administrative authorities, a judicial review procedure or a request for release. The ground for release was that enforcement of removal was not foreseeable due to the pandemic and related travel limitations. In some cantons, all detained persons were released at the beginning of the **pandemic**. This was the case in **Basel-Stadt** and in the French-speaking cantons of **Geneva, Vaud** and **Neuchâtel**. Some cantons released Dublin detainees only, while some other released detainees without criminal records but maintained in detention those with criminal records, a questionable practice since administrative detention is not related to criminal prosecution.

Following the first months of the pandemic, most cantons have started to detain people again in view of removal. The question of foreseeability of removal remains crucial since the enforcement of removals encounters many obstacles due to the pandemic and related travel restrictions. The way of examining the question of foreseeability of removal varies consistently between cantons. Following appeals introduced against cantonal courts, the Federal Supreme Court has corrected the cantonal evaluation in several individual cases, stating that detention pending deportation was unlawful since removal was not enforceable in foreseeable future.<sup>687</sup> The Court has also clarified that coercive detention is only lawful when removal is objectively possible in foreseeable future, the level of cooperation of the foreigner being irrelevant in this evaluation.<sup>688</sup>

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<sup>683</sup> Article 80(5) FNIA.

<sup>684</sup> Article 80(6) FNIA.

<sup>685</sup> Federal Supreme Court, Decision 2C\_207/2016, 2 May 2016.

<sup>686</sup> The form can be found in English, French and German, available at: <http://bit.ly/2T9jhke>.

<sup>687</sup> For example in judgements 2C\_386/2020 of 9.06.2020 and 2C\_414/2020 of 12.06.2020.

<sup>688</sup> Judgement of the Federal Supreme Court C\_408/2020 of 21.07.2020.

The SEM does not dispose of statistics on the number of release requests filed or the number of judicial reviews required by asylum seekers in detention under the Dublin procedure.<sup>689</sup>

## 2. Legal assistance for review of detention

### Indicators: Legal Assistance for Review of Detention

1. Does the law provide for access to free legal assistance for the review of detention?  
 Yes  No
2. Do asylum seekers have effective access to free legal assistance in practice?  
 Yes  No

Detained persons have the right to communicate with their legal representative (Article 81(1) FNIA). With the new asylum procedure in force since March 2019, asylum seekers are systematically assigned a legal representative. However, in cases where the legal representative has resigned the mandate of representation – which occurs when he/she does not make appeal against the Dublin or the asylum decision – he/she would consequently not be formally informed if one of his/her former clients has been detained. It would be up to the detained person to contact him/her, but no representation is ensured given that the mandate has been resigned and detention falls outside the mandate of the appointed legal representation.

Judicial review of detention takes place automatically except for detention under the Dublin procedure. Usually detainees are not legally represented during this procedure, but this depends on the cantonal legal bases and practice. Indeed, the right to free legal assistance is regulated by cantonal procedural law. As a minimal constitutional guarantee, the Swiss Federal Supreme Court has ruled that free legal representation must be granted upon request in the procedure of prolonging detention after 3 months.<sup>690</sup> Regarding the first review by a judge, free legal representation must only be granted if it is deemed necessary because the case presents particular legal or factual difficulties.<sup>691</sup> The SEM does not dispose of statistics on the number of detained asylum seekers having a legal representation.<sup>692</sup>

Some detention facilities provide access to legal support services. For example, in the prison of **Bässlergut** a legal advisor from the NGO HEKS/EPER is present every week and accessible for detainees who request a meeting.<sup>693</sup> However in many other detention facilities access to legal support is very difficult, and the local NGOs providing legal support in asylum cases often do not have the resources to provide free legal assistance to detained persons. Since 2020, Asylex provides legal support and representation for persons detained at **Zurich** airport prison and in some cases also to people detained elsewhere.<sup>694</sup>

Access to legal advice and representation for persons who apply for asylum at the airport and are consequently confined in the transit zone is guaranteed by Article 22(3bis) of the Asylum Act.

On the other hand, access to legal advice and representation for those persons applying for asylum in detention facilities (be they detained under immigration or criminal law) is not explicitly mentioned in the law, which has led to several cases where such legal representation for the asylum procedure had not been provided. In November 2019, the Federal Administrative Court clarified that the fact that the person concerned had lodged her asylum application while in detention does not dispense the competent authority of its duty to duly investigate the application in accordance with the law in force, in particular to

<sup>689</sup> Information provided by the SEM, 27 April 2021.

<sup>690</sup> Federal Supreme Court, Decision BGE 122 I 49, 27 February 1996, para 2c/cc; Decision 134 I 92, 21 January 2008, para 3.2.3.

<sup>691</sup> Federal Supreme Court, Decision BGE 122 I 275, 13 November 1996, para. 3.b. Free legal representation was granted in Decision 2C\_906/2008, 28 April 2009.

<sup>692</sup> Information provided by the SEM, 27 April 2021.

<sup>693</sup> The “Kontaktstelle für Zwangsmassnahmenbetroffene” is active since 2008. More information is available at: <https://bit.ly/2Va0CY7>.

<sup>694</sup> The NGO can be contacted through the address [detention@asylex.ch](mailto:detention@asylex.ch).

ensure the right to free legal advice and representation.<sup>695</sup> During 2020, the SEM has not provided access to legal assistance and representation to people applying for asylum while in prison or detention, although there have been several judgements ruling that such access must be guaranteed<sup>696</sup> (see also section on [Legal assistance in the Regular Procedure](#)).

#### D. Differential treatment of specific nationalities in detention

There is no information on specific nationalities being more susceptible to detention or systematically detained, or otherwise treated differently than others. Analyses carried out on data from 2011 to 2017 show that the nationalities most represented among asylum seekers detained were Nigeria, Tunisia, Algeria, Morocco, Gambia, and Eritrea.<sup>697</sup> The detention of Algerian and Eritrean nationals with the purpose of removal to their country of origin – many are actually detained in view of a transfer to a Dublin State – deserves a comment. In both cases, removal is technically possible only with the consent and compliance of the person involved, in the form of ‘voluntary return’ or autonomous return (without police escort). The Swiss Refugee Council is aware of the practice in some cantons of detaining persons of these nationalities in the attempt to force them to collaborate with their own deportation. Although coercive detention (Article 78 FNIA) allows detaining people when deportation cannot be enforced due to their own behaviour, this practice is very problematic since administrative detention can be proportional and lawful only when the removal is possible and foreseeable.

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<sup>695</sup> Federal Administrative Court, Decision D-5705/2019, 25 November 2019.

<sup>696</sup> Federal Administrative Court, Decisions D-5705/2019 of 25.11.2019, E-1401/2020 of 1.04.2020, D-5480/2020 of 19.11.2020.

<sup>697</sup> Achermann et al, “Administrative Detention of Foreign Nationals in Figures”. in a nutshell #12, January 2019, <https://bit.ly/39YFBUB>.

**General remark:** The status of subsidiary protection does not exist in Switzerland as the Qualification Directive is not applicable. Regarding the application of Article 9 of the Dublin III Regulation, the term “international protection” includes the temporary admission status in cases in which the status is granted on the ground that the removal is either contrary to international law or not reasonable because of a situation of war or generalised violence (but not a temporary admission based on medical grounds).<sup>698</sup>

### A. Status and residence

A table summarising the rights regarding family reunification, travelling, change of residence, work etc. for each legal status is available on the Website of the Swiss Refugee Council.<sup>699</sup>

#### 1. Residence permit

##### Indicators: Residence Permit

- |  |        |
|--|--------|
| 1. What is the duration of residence permits granted to beneficiaries of protection? |        |
| ❖ Refugee status   | 1 year |
| ❖ Temporary admission  | 1 year |

#### Refugees with asylum

Recognised refugees with asylum receive a residence permit called B-permit.<sup>700</sup> This permit is issued for a year and then prolonged by the responsible canton. Recognised refugees with asylum have a right to have this permit issued and prolonged. If there are reasons to withdraw the refugee status, the right to have the permit issued and prolonged is withdrawn. In 2020, asylum status and B-permits were granted to 5,409 persons, including family asylum.<sup>701</sup> On 31 December 2020, there were a total of 48,435 recognised refugees with a B-permit and 18,740 with a C-permit in Switzerland.<sup>702</sup>

#### Temporary admission

Persons granted temporary admission receive an F-permit.<sup>703</sup> Technically this is not considered a real permit of stay, but rather the confirmation that a deportation order cannot be carried out and that the person is allowed to stay in Switzerland as long as this is the case. The concept of temporary admission is legally designed as a replacement measure for a deportation order that cannot be carried out because of international law obligations, humanitarian reasons or practical obstacles. This means that there is a negative decision, but the execution of this decision is stayed for the duration of the legal or humanitarian obstacles. Consequently, the F-permit has a number of relevant limitations: for example, persons with an F-permit are only allowed to travel outside Switzerland in exceptional cases, under restrictive and limited circumstances. Also, family reunification is only possible after a waiting period of 3 years, and under the condition that the person is financially independent and has a large enough apartment. The F-permit is issued for one year and then prolonged by the responsible canton, unless there are reasons to end the temporary admission.

<sup>698</sup> Federal Administrative Court, Decision BVGE 2015/18.

<sup>699</sup> Available in French here: <https://bit.ly/37X8wdt> and in German here: <https://bit.ly/3pxqyJ3>.

<sup>700</sup> Article 60(1) AsyIA.

<sup>701</sup> This refers to persons who have been granted asylum on a derivative ground, particularly members of the nuclear family who are not entitled to their own grounds for asylum.

<sup>702</sup> SEM, Asylum Statistics 2019.

<sup>703</sup> Article 41(2) and Article 85(1) FNIA.

In 2020, 4,309 persons were granted a temporary admission as a foreigner. On 31 December 2020, there were a total of 48,644 persons with a temporary admission as a foreigner living in Switzerland. Out of these, 11,195 persons have had this status for more than seven years.<sup>704</sup>

There are also persons who have a refugee status but receive only temporary admission instead of asylum (in case of exclusion grounds from asylum, as Switzerland makes the distinction between refugee status and asylum). They receive the same F-permit as other foreigners with temporary admission (with the mention “refugee”), but in addition they have the right to a refugee travel document, and all the other rights granted by the Refugee Convention. In 2020, 785 persons were granted a temporary admission as a refugee. On 31 December 2020, there were a total of 10,080 persons with a temporary admission as a refugee living in Switzerland. Out of these, 3,636 persons have had this status for more than seven years.<sup>705</sup>

The Swiss Refugee Council is not aware of systematic difficulties in the issuance or renewal of those residence permits with the exception of the situation of Eritrean nationals (see [Differential Treatment of Specific Nationalities in the Procedure](#)).

### Temporary protection

Swiss asylum law provides the possibility to grant temporary protection (“*protection provisoire*”, “S permit”) to persons in need of protection during a period of serious general danger, in particular during a war or civil war as well as in situations of general violence (Articles 66-79a AsylA). This instrument – introduced in the aftermath of the conflicts in the former Yugoslavia – should enable the Swiss authorities to react in an appropriate, quick and pragmatic manner to situations of mass exodus. Until now, this instrument has never been used by the Swiss authorities.

## 2. Civil registration

Every birth in Switzerland must be recorded as soon as possible by the civil register office at the place of birth. Parents must present the required identity documents. If the procurement of documents is impossible or unreasonable and the personal data are not disputed, a substitute declaration (*Ersatzerklärung*) can be made. Residence in Switzerland is not required for the registration of births or paternity recognition, and is therefore also possible for persons without a residence permit. In practice, registration due to missing documents is sometimes problematic, depending on the readiness of the relevant authorities to allow for a substitute declaration.

In principle, persons seeking asylum or rejected asylum seekers may also marry in Switzerland. Nevertheless, lawful residence in Switzerland is necessary. Persons who do not have a residence permit can apply for a short stay permit for the purpose of marriage. In addition to proof of legal residence, identity documents must also be submitted. This may pose a problem for asylum seekers as they endanger their asylum procedures if they contact their home country during the procedure. Furthermore, it is often not possible to obtain documents due to the situation in the home country. In such cases, a replacement declaration can also be requested. In practice, problems with marriage due to missing documents have been reported, depending on the readiness of the relevant authorities to allow for a substitute declaration. Differences exist in practice between cantons.

## 3. Long-term residence

The Long-Term Residence Directive is not applicable in Switzerland.

A recognised **refugee with asylum** status receives a residence permit (B permit). After 10 years, or if he or she is especially well integrated, after 5 years, the canton can issue a permanent residence permit (C

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<sup>704</sup> SEM, Asylum Statistics 2020.

<sup>705</sup> SEM, Asylum Statistics 2020 (table 7-40).

permit).<sup>706</sup> However, there is no absolute right to receive this permit; it is at the discretion of the canton. These are the same rules that also apply for other foreigners.

A **temporarily admitted** person receives an F permit. After 5 years, the person can apply to the canton for a residence permit (B permit), if he or she is well integrated.<sup>707</sup> However, the practice among the cantons varies and is in general strict. In 2020, 2'835 persons obtained a B permit in this way.<sup>708</sup> Once the person has a B permit, he or she can again apply for a permanent residence permit (C permit) after 5-10 years similar to the process described above.

Under the revised naturalisation law, which entered into force on 1 January 2018, it is now necessary to have a C permit in order to apply for naturalisation. This is very difficult for protection beneficiaries, especially temporarily admitted persons, as they will first have to go through all the different steps of permits, which takes a very long time. This is also the case for those born in Switzerland.

#### 4. Naturalisation

##### Indicators: Naturalisation

|  |          |
|--|----------|
| 1. What is the waiting period for obtaining citizenship?                 | 10 years |
| 2. Number of citizenship grants to beneficiaries in 2020: <sup>709</sup> | 702      |

Until the end of 2017, the criteria for naturalisation were the same for persons with refugee status and for persons with temporary admission status. In January 2018, the amended Federal Act on Swiss Citizenship<sup>710</sup> entered into force. Since then, it is necessary to have a permanent residence permit and reside in Switzerland for 10 years in order to be able to apply for citizenship, whereby the years as asylum seekers do not count.<sup>711</sup> This means that **temporarily admitted** persons must wait at least 5 years more than **refugee status** holders (see [Long-Term Residence](#)).

Years spent in Switzerland between the ages of 8 and 18 count as double.

The initial application is examined by the SEM, but both the canton and commune of residence have their own requirements. The SEM examines whether applicants are integrated in the Swiss way of life, are familiar with Swiss customs and traditions, comply with the Swiss rule of law, and do not endanger Switzerland's internal or external security. In particular, this examination is based on cantonal and communal reports. If the requirements provided by federal law are satisfied, applicants are entitled to obtain a federal naturalisation permit from the SEM. Naturalisation proceeds in three stages. The cantons and communities have their own, additional residence requirements which applicants have to satisfy. Swiss citizenship is only acquired by those applicants who, after obtaining the federal naturalisation permit, have also been naturalised by their municipalities (in some places this decision is taken by a panel, in others by a popular vote of all citizens of the commune) and cantons. There is no legally protected right to being naturalised by a municipality and a canton. The fee payable also varies according to the place of residence.<sup>712</sup>

In 2020, 698 recognised refugees and 4 temporarily admitted persons were granted citizenship.<sup>713</sup>

<sup>706</sup> Article 34 FNIA.

<sup>707</sup> Article 84(5) FNIA. The specific criteria are listed at Article 31 OASA.

<sup>708</sup> SEM, Asylum statistics 2020 (table 7-60).

<sup>709</sup> Information provided by the SEM, 12 February 2020.

<sup>710</sup> The Act is available at: <https://bit.ly/2PcBpZi>.

<sup>711</sup> Article 33 of the Nationality Act.

<sup>712</sup> Overview on the fees for regular naturalisation is available at: <https://bit.ly/2J13AH2>.

<sup>713</sup> Information provided by the SEM, 19 March 2021.

## 5. Cessation and review of protection status

### Indicators: Cessation

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the cessation procedure?  Yes  No
2. Does the law provide for an appeal against the first instance decision in the cessation procedure?  Yes  No
3. Do beneficiaries have access to free legal assistance at first instance in practice?  Yes  With difficulty  No

### Refugees with asylum<sup>714</sup>

The automatic cessation of the asylum status is possible if a person has lived abroad for more than one year. If a person is granted asylum in another country or he or she renounces his or her refugee status, the protection status ceases as well. The renouncement leads to the immediate cessation of the status. Refugee status and asylum expire as well if the foreign national acquires Swiss nationality. Finally, asylum expires if an expulsion order under criminal law has become legally enforceable.

In 2020, asylum expired in 1,773 cases resulting in cessation of the status for one of the reasons mentioned above.<sup>715</sup>

### Temporary admission<sup>716</sup>

According to the law, the SEM should periodically examine whether the requirements for temporary admission are still met. In practice this does not happen in every case due to practical and capacity reasons. The SEM should revoke temporary admission and order the enforcement of removal or expulsion if the requirements are no longer met. It also expires in the event of definitive departure, an unauthorised stay abroad of more than two months, or on the granting of a residence permit.

The review is based on an individual assessment. When a conflict ends, it is possible that a possible revocation is examined for all members of the group who were specifically concerned by this conflict. This happened, for example, at the end of the conflicts in ex-Yugoslavia in the 1990s. Recently this has hardly ever been the case, however, as most of the relevant conflicts are long-standing (Somalia, Afghanistan, Iraq, Syria). Even if cessation is considered for a group of persons, it is examined in each case individually.

In 2018, the Swiss Parliament has tasked the SEM with the review of the temporary admission of 3,400 Eritrean nationals. This project was set in a context of significant hardening of the practice of both the SEM and the Federal Administrative Court (FAC) with regard to asylum applications submitted by Eritreans. In fact, since a leading decision issued by the FAC in 2017, the enforcement of removal is not anymore considered generally unreasonable (see [Eritrea](#)). This approach has been criticised by NGOs,<sup>717</sup> including the Swiss Refugee Council.<sup>718</sup> Between 2018 and 2020, the SEM examined and reviewed the temporary admission of 3,400 Eritrean nationals, concluding that removal was reasonable and revoking the temporary admission status in 83 cases (2.4%). 63 of these decisions have entered into

<sup>714</sup> Article 64 AsyIA.

<sup>715</sup> Information provided by the SEM, 19 March 2021.

<sup>716</sup> Article 84 FNIA.

<sup>717</sup> See in particular ODAE, *Rapport thématique – Durcissements à l'encontre des Érythréen·ne·s : une communauté sous pression*, 29 November 2018, available (in French) at: <https://bit.ly/2SCdBAW>.

<sup>718</sup> Swiss Refugee Council, 'La Confédération mise sur l'intimidation plutôt que sur des solutions', 3 September 2018, available (in French) at: <https://bit.ly/2TJGCbr>.

force by December 2020, while six appeals were admitted and the 14 cases are still in appeal procedure.<sup>719</sup>

In October 2020, the Federal Administrative Court has clarified a question that had remained unsettled, namely that the revocation of temporary admission due to the consideration that the obstacles to the enforcement of removal no longer exist always requires an examination of proportionality taking into account the degree of integration of the person concerned.<sup>720</sup>

Apart from the review of the necessity of protection due to the situation in the country or the situation of the person, temporary admission ceases automatically if a person leaves Switzerland permanently, if he or she is abroad for more than two months without a permission to travel, or if he or she receives a residence permit.<sup>721</sup> A person's departure from Switzerland is already considered permanent if the person asks for asylum in another country.<sup>722</sup> This can lead to unclear situations if persons are transferred back to Switzerland from other European states, and then find that their temporary admission has ceased in the meantime.

As in general any ruling can be subject to an appeal,<sup>723</sup> the cessation of the protection status can also be appealed. The appeal must be filed within 30 days of notification of the ruling.<sup>724</sup> No legal assistance is foreseen in the law for this specific case but the general legal aid scheme is applicable: If it is necessary for safeguarding the right of the person concerned, the court can appoint a lawyer to represent the applicant.<sup>725</sup>

In 2020, 4,338 temporary admissions were ceased, meaning for example that the person has obtained another residence status, has left Switzerland.<sup>726</sup>

## 6. Withdrawal of protection status

### Indicators: Withdrawal

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the withdrawal procedure?  Yes  No
2. Does the law provide for an appeal against the withdrawal decision?  Yes  No
3. Do beneficiaries have access to free legal assistance at first instance in practice?  
 Yes  With difficulty  No

The SEM shall revoke asylum or deprive a person of **refugee status** if the foreign national concerned has fraudulently obtained asylum or refugee status by providing false information or by concealing essential facts. Furthermore, the SEM shall deprive a person of refugee status if he/she travels to his/her country of origin. The asylum will also be withdrawn if a refugee has violated or represents a threat to Switzerland's internal or external security, or has committed a particularly serious criminal offence.<sup>727</sup> The revocation of asylum or the deprivation of refugee status applies in relation to all federal and cantonal authorities. As a consequence of the withdrawal of asylum and refugee status, the residence permit will also be withdrawn as the purpose for the permit has ceased.

<sup>719</sup> Communication of SEM, 18.12.2020, available at: <https://bit.ly/3pxbTxv>. See also the report of the Federal Council responding to the motion nr. 18.3409 by Müller Damian of 29 May 2018, available at: <https://bit.ly/3mWAOZP>.

<sup>720</sup> Judgement of the Federal Administrative Court E-3822/2019 of 28 October 2020.

<sup>721</sup> Article 84(4) FNIA.

<sup>722</sup> Article 26a(a) Ordinance on the Enforcement of the Refusal of Admission to and Deportation of Foreign Nationals (OERE).

<sup>723</sup> Article 44 Federal Act on Administrative Procedure.

<sup>724</sup> Article 50 Federal Act on Administrative Procedure.

<sup>725</sup> Article 65(2) Federal Act on Administrative Procedure.

<sup>726</sup> Information provided by the SEM, 19 March 2021.

<sup>727</sup> Article 63 AsyIA.

If only the asylum was withdrawn and not the refugee status, the person concerned could be entitled to a temporary admission as a refugee (see the distinction in [Residence Permit](#)).

The grounds for a withdrawal are always examined individually. The revocation of asylum or the deprivation of refugee status does not extend to the spouse or the children of the person concerned. Before the asylum or temporary admission status is withdrawn, the SEM grants the right to be heard in written form but no individual interview is usually conducted.<sup>728</sup>

As in general any ruling can be subject to an appeal,<sup>729</sup> the withdrawal of the protection status can also be appealed. The appeal must be filed within 30 days of notification of the ruling.<sup>730</sup> No legal assistance is foreseen in the law for this specific case, but the general rule regarding legal aid is applicable: If it is necessary in order to safeguard the right of the person concerned, the court can appoint a lawyer to represent the applicant.<sup>731</sup>

In 2020, asylum was withdrawn in 126 cases: in all but 13 cases, the people concerned were also deprived of their refugee status (in those 13 cases, the persons must have received a temporary admission). In 85 additional cases, the refugee status was withdrawn to temporarily admitted persons who already did not benefit from asylum (F refugees).<sup>732</sup>

As seen in the chapter on [Cessation](#), temporary admission can be withdrawn under Article 84(2) FNIA after review of the conditions that led the authorities to consider the removal as not enforceable and unreasonable. Such review procedure should be conducted for all members of the group concerned by the change of circumstances in the country of origin and is very rarely initiated. Between 2018 and 2020, however, the temporary admission of 3,400 Eritreans has been reviewed, leading to withdrawals in 83 cases.

Withdrawal of **temporary admission** can also be ordered under Article 84(3) FNIA if someone has been sentenced to a long-term custodial sentence in Switzerland or abroad; has seriously or repeatedly violated or represented a threat to public security and order in Switzerland or abroad or represented a threat to internal or the external security; or has made their removal or expulsion impossible due to their own conduct. Those are also grounds for excluding applicants from the temporary admission status in the first place. However, such exclusion or revocation is only possible when temporary admission was granted because enforcement of removal was considered unreasonable or impossible, but not if it was considered inadmissible (because it would violate international law).<sup>733</sup> The revocation of temporary admission requires a detailed examination of the principle of proportionality, where the public interest to remove the applicant and his/her private interest of pursuing their life in Switzerland (integration, family ties, etc.) must be carefully balanced.

In 2020, 39 temporary admissions were withdrawn on such legal basis.<sup>734</sup>

On 1 October 2016, changes to the Federal Act on Foreign Nationals and the Criminal Code came into force. Foreigners who commit criminal acts (not only severe criminal acts but also for example social welfare fraud) can more easily be expelled under the new rules.<sup>735</sup> In case of an expulsion order, which is pronounced under criminal law, the asylum status will be withdrawn. Temporary admission shall not be granted or shall expire if an order for expulsion from Switzerland becomes legally enforceable.<sup>736</sup> There is not sufficient information on how this is applied so far.

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<sup>728</sup> Information provided by the SEM, 18 January 2017.

<sup>729</sup> Article 44 Federal Act on Administrative Procedure.

<sup>730</sup> Article 50 Federal Act on Administrative Procedure.

<sup>731</sup> Article 65(2) Federal Act on Administrative Procedure.

<sup>732</sup> Information provided by the SEM, 19 March 2021.

<sup>733</sup> Article 83(7) FNIA.

<sup>734</sup> Information provided by the SEM, 19 March 2021.

<sup>735</sup> Federal Council, Referendum on Asylum Act of 5 June 2016.

<sup>736</sup> Article 83(9) FNIA.

## B. Family reunification

### 1. Criteria and conditions

| Indicators: Family Reunification  |   |
|---|---|
| 1. Is there a waiting period before a beneficiary can apply for family reunification?       |   |
| ❖ Recognised refugees   | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| ❖ Temporarily admitted persons  | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |
| Waiting period for temporarily admitted persons   | 3 years   |
| 2. Does the law set a maximum time limit for submitting a family reunification application? | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |
| ❖ If yes, what is the time limit?   | 5 years<br>1 year for children over 12                              |
| 3. Does the law set a minimum income requirement?   |   |
| ❖ Recognised refugees   | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| ❖ Temporarily admitted persons  | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |

The differences between the statuses are relevant regarding the question of family reunification. The Swiss Refugee Council provides a table summarising the relevant rules and legal bases according to the status on its Website.<sup>737</sup>

#### Refugees with asylum

Spouses or registered partners of refugees and their minor children are entitled to family reunification. They will also be recognised as refugees and granted asylum provided there are no special circumstances that preclude this (for example if the family member has a nationality allowing for the family to reside in another country or has been granted refugee status in a safe third country<sup>738</sup>).

If one of those persons is still abroad, their entry must be authorised on request, if the person in Switzerland and the person abroad were separated during the flight.<sup>739</sup> If the family had not been separated during the flight, for example because the family / marriage did not exist at that time, they are not entitled to family reunification under the Asylum Act and can only request family reunification under Article 44 FNIA, with more restrictive conditions and no *right* to it. However, if the spouse and children are already in Switzerland, this rule does not apply and they can be included in the asylum of the family member.<sup>740</sup>

In case of family asylum, there are no requirements regarding income or health insurance.

Practical problems frequently arise in case of lack of necessary documentation. Also, in some cases the SEM required the conduct of DNA-tests to prove parenthood. The high costs of such tests as well as the travel costs can be covered by SEM on demand, which however has discretion in the decision whether or not to approve such demand. The refusal can be appealed.<sup>741</sup> This represents a clear obstacle to family reunification. IOM can provide logistical support for the organisation of the flight.<sup>742</sup>

In 2020, 1,511 recognised refugees applied for family reunification for family members residing abroad (compared to 1,643 in 2019). During the same year, the SEM authorised entry as a consequence of refugee family reunification cases for 1,414 persons (compared to 1,463 in 2019).<sup>743</sup> However, due to the

<sup>737</sup> Available in French here: <https://bit.ly/37X8wdt> and in German here: <https://bit.ly/3pxqyJ3>.

<sup>738</sup> BVGE 2019 VI/3 c. 5.5–5.7. The same is not true for subsidiary protection, cf. judgement D-2976/2018 of 31.01.2020, c. 5.3.2.

<sup>739</sup> Article 51 AsylA.

<sup>740</sup> BVGE 2017 VI/4, c. 4.2–4.4, especially 4.4.1.

<sup>741</sup> The Human Rights Law Clinic of the University of Bern provides a template for appealing those decisions, available at: <https://bit.ly/2KNqu9t>.

<sup>742</sup> See Website: <https://bit.ly/2MhFsF7>.

<sup>743</sup> Information provided by the SEM, 19 March 2021.

pandemic, many of those concerned were not able to travel or had to wait a significant amount of time before being able to reach Switzerland. Due to travel restrictions, persons who had received their entry authorisation from SEM could not reach Switzerland in absence of direct flights. In addition to the cases mentioned, family asylum was granted in 675 cases concerning family members already in Switzerland.

At the beginning of the COVID-19 pandemic in spring 2020, family reunifications were suspended. In addition, many embassies around the world closed their counters and prevented family members to pursue their family reunification procedures.

### Temporary admission

Three years after having received temporary admission, the person can apply to be reunited with their spouse and unmarried children under the age of 18. The requirements are that they all live in the same household, the family has suitable housing (a big enough apartment, already at the time of the application), and the family does not depend on social assistance (income requirement).<sup>744</sup> The application must be filed with the competent cantonal migration authority, which passes it on to the SEM. Certain deadlines apply to the application.<sup>745</sup> After the three-year waiting period is over, the application for family reunification must be submitted within five years, in case of children over 12 years the time limit is twelve months (in case of important family-related reasons, especially the best interest of the child, a later family reunification is possible). If the family / marriage was established after the waiting period of three years, the time limits start at the time the family / marriage was founded.

In 2020, 304 temporarily admitted persons applied for family reunification (compared to 401 in 2019). The approved cases during the same year by the SEM concerned 108 persons (compared to 120 in 2019).<sup>746</sup>

Regarding practical obstacles related and not related to the COVID-19 pandemic, the same observations can be made as for recognised refugees (see above).

## 2. Status and rights of family members

In the case of family **asylum**, the beneficiaries themselves are granted the same rights as the sponsor. However, as the refugee status originated in the grounds of the sponsor, the refugee status is of a derivative character, therefore it is not possible for persons with this kind of status to be the sponsor of further family members. The same applies to cases of temporary admission status as a refugee.

However, before the family members are included in the sponsor's status, the SEM usually examines whether they fulfil the refugee definition on their own and can therefore be granted their own original refugee status. During the procedure, or at least at the beginning, they are accommodated in a federal asylum centre and not together with the spouse, which leads some persons to renounce to the examination of their own asylum grounds. This can be problematic in case of separation since the status of the reunited spouse will be dependent on the refugee who has applied for family reunification.

In case there are asylum exclusion grounds<sup>747</sup> relating to the family member, this person will only be granted a temporary admission as refugee even though the sponsor was granted asylum.<sup>748</sup>

Family members of a person who has been granted a **temporary admission status** will receive the same status, if the application for family reunification is granted. If the family members arrive independently of the sponsor, they have to make their own asylum application and will receive temporary admission if those conditions are met.

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<sup>744</sup> Article 85(7) FNIA.

<sup>745</sup> Article 74(2)-(3) Ordinance on Admission, Stay and Gainful Employment.

<sup>746</sup> Information provided by the SEM, 19 March 2021.

<sup>747</sup> Articles 53 and 54 AsyLA.

<sup>748</sup> Federal Administrative Court, Decision BVGE 2015/40.

## C. Movement and mobility

### 1. Freedom of movement

In general, after some time (maximum 140 days) in a federal asylum centre, the SEM allocates the applicants / beneficiaries to a canton according to a distribution key. This allocation can only be contested if it violates the principle of family unity.<sup>749</sup>

After a status has been granted, **recognised refugees** have the right to choose their place of living within the canton. Additionally, they have the right to change the canton, if they are not dependent on social assistance and there are no grounds for revocation of a residence permit.<sup>750</sup>

Persons with a **temporary admission as foreigners** also have a right to choose their place to live within the allocated canton, unless they depend on social assistance. In this case, the canton can determine a residence or accommodation. In order to change cantons, an application must be filed at the SEM, which will decide after a consultation of the two cantons concerned. A negative decision can only be challenged if it violates the principle of family unity. The allocation to a canton does not limit the freedom of movement within Switzerland.

Since the cantons are responsible for granting social assistance, the concrete arrangements depend on the canton. If a person depends on social assistance, it is possible that the canton provides for a room in a certain accommodation and therefore 'determines' the place of residence for the person concerned.

Normally, beneficiaries have to move from the first reception centre to the cantonal collective centre and as a next step within the canton to a private accommodation. We are not aware of problems of beneficiaries related to being obliged to change their accommodation too often.

We are also not aware of any specific residence for beneficiaries for reasons of public interest or public order.

No legal assistance is foreseen in the law for these specific cases, but the general rule regarding legal aid is applicable: If it is necessary in order to safeguard the right of the person concerned, the court can appoint a lawyer to represent the applicant.<sup>751</sup>

### 2. Travel documents

**Recognised refugees** have a right to receive a travel document in accordance with the Refugee Convention. The travel document for recognised refugees is valid for five years.<sup>752</sup>

Recognised refugees cannot travel to their home country or they might lose their refugee status. Since 1 April 2020, the Foreign Nationals and Integration Act (FNIA) also includes a provision prohibiting them to travel to neighbouring countries of their country of origin, when there is a justified suspicion that the ban on travel to the home country will be disregarded.<sup>753</sup> This provision has entered in force but was still not implemented in January 2021. It allows the SEM to pronounce collective travel bans to certain neighbouring countries for all refugees coming from one specific country.

For **persons with temporary admission** there are important practical obstacles in obtaining travel documents and re-entry permits. They do not have an automatic right to a travel document, and their

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<sup>749</sup> Article 27(3) AsylA.

<sup>750</sup> Article 63 FNIA.

<sup>751</sup> Article 65(2) Federal Act on Administrative Procedure.

<sup>752</sup> Article 13(1)(a) Ordinance on the Issuance of Travel Documents for Foreign Persons of 14 November 2012, SR 143.5 (Verordnung über die Ausstellung von Reisedokumenten für ausländische Personen vom 14. November 2012, RDV, SR 143.5).

<sup>753</sup> Article 59c FNIA. Further information is available (in French) at: <https://bit.ly/2VaWTcX>.

travel rights are very limited. If they want to travel outside Switzerland, they must first apply to the SEM (via the cantonal authority) for a return visa (permission to re-enter Switzerland). A return visa is only granted in specific circumstances (severe illness or death of family members and close relatives; to deal with important and urgent personal affairs; for cross-border school trips; to participate in sports or cultural events abroad; or for humanitarian reasons). A return visa can be issued for other reasons if the person has already been temporarily admitted for three years.<sup>754</sup>

In addition to the return visa, the person needs a valid travel document. Persons with temporary admission can apply to the SEM (via the cantonal authority) for a travel document if they can show that it is impossible for them to obtain travel documents from their home country, or that it cannot be expected of them to apply for travel documents from the authorities of their home country.<sup>755</sup> The practice regarding this is very strict, it is only seldom recognised that the person cannot obtain travel documents from their home country. They must document very clearly what they have done to obtain travel documents (visits to the embassy etc.). In many cases, the persons do not succeed in proving their lack of documents, as the embassies of their home countries are reluctant to confirm in writing that they will not issue a travel document. This means persons with temporary admission are often unable to travel – for lack of documents, but mainly due to the strict regulation regarding return visas, see above.

If a person with temporary admission is issued a travel document by the SEM, this is called a “passport for a foreign person”.<sup>756</sup> It is valid for 10 months and loses its validity at the end of the conducted journey; the document is only issued for one specific journey.<sup>757</sup>

There are important practical obstacles in obtaining travel documents and re-entry permits for foreigners with temporary admission.

## Procedure

The application for a travel document must be made in person at the cantonal migration office.<sup>758</sup> This office will register the application and forward it to the SEM. The SEM issues the travel document. Applications for a re-entry visa must also be made to the cantonal migration authority, and will be forwarded to the SEM for decision.<sup>759</sup>

Both recognised refugees and beneficiaries of temporary admission are not allowed to travel to their home country, otherwise they risk losing their protection status.

In 2020, the SEM issued 13,251 travel documents for recognised refugees; 992 “foreign passports” for persons granted temporary admission and who do not have a passport; and 326 return visas (of which 3 were valid for repeated entries) for foreigners granted temporary admission.<sup>760</sup>

## D. Housing

### Indicators: Housing

- |   |               |
|---|---------------|
| 1. For how long are beneficiaries entitled to stay in reception centres?        | No limitation |
| 2. Number of beneficiaries staying in reception centres as of 31 December 2020: | Not available |

<sup>754</sup> Article 9 RDV.

<sup>755</sup> Articles 4(4) and 10 RDV.

<sup>756</sup> Article 4(4) RDV.

<sup>757</sup> Article 13(1)(c) RDV.

<sup>758</sup> Article 14 RDV.

<sup>759</sup> Article 15 RDV.

<sup>760</sup> Information provided by the SEM, 19 March 2021.

There is no maximum time limit to accommodation connected with the status. As long as a person depends on social assistance, housing will be provided by the canton. It is possible that this means a collective centre or a specific allocated housing, but there is no temporal limitation on it. The concrete arrangements depend on the canton.

## E. Employment and education

### 1. Access to the labour market

Foreign nationals, refugees and stateless persons who have been temporarily admitted to Switzerland, refugees who have been granted asylum in Switzerland and stateless persons who are recognised in Switzerland may take up gainful employment as soon as they received such status.

**Recognised refugees** (with asylum or with a temporary admission status) are entitled to engage in gainful employment and to change jobs or professions without any restrictions.<sup>761</sup> The requirements are that the employer must report the start and end of employment and comply with the usual local wage and working conditions for the given profession and industry.<sup>762</sup> On 31 December 2020, 37.8% of refugees with asylum who were able to work were employed (compared to 36.3% in 2019).<sup>763</sup>

Since January 2019, **temporarily admitted persons** may work anywhere in Switzerland if the salary and employment conditions customary for the location, profession and sector are satisfied. The employer must report the start or end of employment to the cantonal authority responsible for the place of work in advance. The report must include a declaration, stating that the employer is aware of the salary and employment conditions customary for the location, profession and sector, and that he is committed to observing them.<sup>764</sup> However, due to the temporary nature and especially the name of this status, temporarily admitted persons still encounter significant hurdles to employment. On 31 December 2020, 46% of temporarily admitted persons able to work were employed (compared to 44.3% in 2019).<sup>765</sup>

Personal qualifications like diplomas from other countries are not recognised for the most part, which is a big problem in respect of access to the labour market.

### 2. Access to education

Basic education is mandatory until the age of 16 and has to be available to all children in Switzerland. The cantons are responsible for the system of school education and state schools are free of charge.<sup>766</sup> As long as the children are accommodated in a federal reception centre (first phase of the procedure), schooling is mainly organised within the centres. To meet the requirements of the Convention of the Rights of the Child, particularly as regards access to education until the age of 18, law and practice would need to be adjusted. In particular, for teenagers who arrive just at or above the age of 16 years, it can be difficult to find a place of education. No major obstacles are known to us regarding the access to education until the age of 16.

**Recognised refugees** have the same rights concerning access to education as Swiss nationals, including special education for people with disabilities. According to the Federal Constitution, cantons shall ensure that adequate special needs education is provided to all children and young people with disabilities up to the age of 20. As the system of school education depends on the canton, the implementation differs.

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<sup>761</sup> Article 61 AsylA.

<sup>762</sup> Article 65 Ordinance on Admission, Stay and Gainful Employment (OASGE).

<sup>763</sup> SEM, Asylum Statistics 2020 (table 6-23).

<sup>764</sup> Article 85a FNIA.

<sup>765</sup> SEM, Asylum Statistics 2020 (table 6-22).

<sup>766</sup> Article 62 Federal Constitution.

## F. Social welfare

**Refugees** with asylum and temporarily admitted refugees who are unable to maintain themselves from their own resources are entitled to social benefits. They must be granted the same benefits as local recipients of social assistance.<sup>767</sup> The guidelines of the Swiss Conference for Social Assistance (SCSA) apply.<sup>768</sup>

For their part, **temporarily admitted** foreigners should receive the necessary social benefits unless third parties are required to support them.<sup>769</sup> The social benefits should be rendered in kind as non-cash benefits if possible. The benefits are lower than the social benefits given to the local population.<sup>770</sup> They can be as much as 40% below the guidelines of the SCSA. On national average, beneficiaries subjected to asylum law (asylum seekers and temporarily admitted persons) received a monthly average of 1,119 CHF of net income to cover their needs as of June 2015. The amount, however, strongly varies from one canton to another and is supposed to cover basic social assistance, accommodation, health care costs as well as specific needs when necessary.

The provision of social benefits is under the responsibility of the Confederation as long as the person is staying in a federal asylum centre. After allocation to a canton, the canton should provide social assistance or emergency aid on the basis of Article 80a AsylA. Cantonal laws fix the amount and grounds for granting and limiting welfare benefits. This results in large differences of treatment among cantons.

Temporarily admitted foreigners are usually free to choose their place of residence within the canton unless they receive social assistance benefits. The cantonal authorities assign a place of residence and accommodation to temporarily admitted persons dependent on social assistance.<sup>771</sup>

## G. Health care

Every person living in Switzerland, including rejected asylum seekers, must be insured against illness,<sup>772</sup> and therefore has access to the basic health system.

Cantons may limit the choice of insurers and of physicians and hospitals for asylum seekers and **temporarily admitted persons**.

Apart from this restriction, the basic insurance and the covered treatments do not depend on the status but on the needs. Mental health problems are also covered if a psychiatrist (not psychologist) is involved; however, there are limited capacities for adequate treatment in some fields.

Specialised treatment for victims of torture or traumatised beneficiaries or people with mental health problems is available, but the capacity is way too small. There is not only a lack of specialised psychiatrists but the number of interpreters and funding for interpretation for this purpose are insufficient. Especially intercultural interpretation would be needed for specialised treatment of mental health problems.

Language barriers are relevant for any kind of health care, including problems to fill out the paperwork.

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<sup>767</sup> Article 3(1) AO2.

<sup>768</sup> SCSA, *Les normes CSIAS*, available (in French) at: <https://bit.ly/39GyAr6>.

<sup>769</sup> Article 81 AsylA.

<sup>770</sup> Article 82(3) AsylA.

<sup>771</sup> Article 85(5) FNIA.

<sup>772</sup> Article 3 Health Insurance Act (HIA).