OHCHR: Inputs for report on rights of the child and inclusive social protection

Commentary by AsyLex regarding Switzerland

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A. About the commenting organization

AsyLex is an independent, Switzerland-based association providing legal aid to asylum seekers in Switzerland and beyond. Our work is performed primarily by volunteers, who provide legal counseling and representation regarding Swiss asylum law, including immigration detention.

We share the concern about inclusive social protection affecting the respect, protection, and fulfillment of the rights of the child around the world.

Therefore, we are of the view that it is crucial to bring below's issues to the OHCHR's attention, with reference to the rights of migrant children.

B. Responses to OHCHR's questions

1. Social protection systems for children and main gaps and challenges to children's enjoyment of social protection in law, policy, and practice including its impacts on children's rights

1.1 Accommodation, care and representation

During their asylum procedure, Unaccompanied Minor Asylum seekers (hereinafter "**UMA**") have the right to a person of trust *and* a legal representative. In the accelerated procedure, the assigned legal representatives assume the function of a person of trust in addition to their actual role as legal representatives, in accordance with Art. 7(2) of the Asylum Ordinance 1 (hereinafter "**AO1**") and Art.17 Abs. 3 lit a and lit. b of the Asylum Act (hereinafter "**AsylA**"). With the dual role and the resources available for it, the legal representative is often overburdened and the additional safeguards are not effective, since *de facto* no additional person of trust is dedicated to the UMA. Therefore, the protection of UMA is severely affected as government-assigned legal representatives are already overloaded with cases and take on the work of psychologically supporting UMAs without being trained for it specifically. After a UMA has been assigned to the canton, a guardian or guardianship is appointed (Art. 7(2quater) AO1).

UMAs under 12 (sometimes 15, depending on the canton) years of age are usually placed in foster families[1]. UMAs older than 12, however, are accommodated in a federal asylum center ("**FAC**") during the asylum procedure. In theory, they are given rooms separated from the adults and divided according to gender, but children are usually placed in regular asylum shelters, not separated from the adults, for capacity reasons[2]. These children with specific needs would require different accommodation, tailored to

[1] https://www.osar.ch/themes/asile-en-suisse/les-personnes-avec-des-droits-particuliers/les-mineurs-non-accompagnes-dans-la-procedure-dasile?_ga=2.234171358.1324048472.1673521015-809518401.1673521015

[2] https://www.humanrights.ch/fr/pfi/droits-humains/migration-asile/droits-humains-centres-federaux-requrantes-asile

children and their needs, with trained personnel and sufficient integration opportunities which is not the case currently.

In addition, the lack of privacy in FACs is a further issue. Vulnerable people, including families with children, are regularly faced with the police coming into the sleeping rooms at night to deport rejected applicants forcibly. Furthermore, the National Comission on the Prevention of Torture ("**NCPT"**) found that both searches and inspections of personal belongings were almost systematic concerning children[3]. Yet, both should only be operated in case of a concrete suspicion.

1.2 Asylum procedure

According to Art.17(2bis) AsylA, UMAs' asylum procedures should be prioritized. According to 2021's statistics, 15% of all children's asylum claims are by UMAs aged 13-17, and 7% of these are from girls. AsyLex has observed that particularly boys 16-17 have longer procedures that would not demonstrate a priority as stated in the AsylA. It is of concern that delayed decisions on UMAs, specifically decisions issued after reaching majority, facilitate deportations for the authorities.

The Swiss Refugee Council ("**SRC**") and the Children's Rights Committee notably recommend developing a uniform **practice for interviewing UMA under 12 years of age** and setting up appropriate rooms in the FACs that are reserved for interviewing children. Interviewing methods such as video/audio recordings should be used to avoid having to interview a child more than once as well as introducing alternative interviewing methods, such as drawings and role-playing. To AsyLex's knowledge no or only very seldom such alternative interviewing methods are applied. In addition, the State Secretariat for Migration ("**SEM**") staff still lack the necessary training and skills to conduct a child-sensitive hearing. This concerns AsyLex as the SEM is mandated by regulation to have child-sensitive training, and yet, the application of this training is not or very limited observable in practice.

Furthermore, particularly for accompanied minors, the **right to be heard is often violated** as the authorities assume the children have the same interests as their parents or that the proximity to their parents takes precedence over their own individual claim to asylum. Based on national Swiss law, there is no provision granting a child the right to be heard before they reach 14 years of age[4] despite the right to be heard enshrined in Art.12 of the Convention of the Rights of the Child. In this context, AsyLex has knowledge of cases where not even children over the age of 14 were granted the right to be heard during their family's asylum procedure, which is even more concerning given the fact that some children concerned suffered from psychological or medical issues.

Concerning the **determination of age**, the burden of proof of being a minor in fact lies with the applicant from the beginning of the asylum procedure and the applicant has to bear the consequences of the lack of evidence. With regard to the required degree of proof, the Federal Administrative Court (the "**Court"**) requires that the applicant at least makes their claimed minor age credible within the meaning of Art. 7 AsylA. If there are indications that an asylum seeker who claims to be a minor has already reached the age of 18, the SEM can arrange for an age assessment (art. 17(ebis) AsylA). Such assessments are scientifically as well as ethically controversial. In a decision by the Court (E-1443/2017 from 3 May 2017), the so-called "three-pillar model", which provides for a radiological (bone age), dental (tooth age) and physiognomic (physique and sexual maturity) examination, was recognized as a "strong indication to

[3] *ibid.*
[4] https://asile.ch/2014/09/24/droit-des-refugies-et-les-enfants-dans-tout-ca/#:~:text=Quant%20au%20droit%20d'%C3%AAtre,o%C3%B9%20l'audition%20est%20planifi%C3%A9e

the age determination". The Swiss Pediatric Society is very critical towards this method, namely due to its margin of error[5]. In this context, it should be emphasized that the Committee on the Rights of the Child generally recommends to refrain from medical age assessments as they might be inaccurate and susceptible to errors, as well as traumatizing for children (CMW/C/GC/4-CRC/C/GC/23)[6]. Finally, it is highly concerning that cases have come to light in which children were not properly informed about the tests and were, therefore, subjected to forced examinations without understanding their purpose.

In addition, AsyLex has observed that, in general, the **vulnerability of children is not sufficiently addressed in the Swiss asylum system**. Particularly for accompanied children the dangers specific to the deportation of children are not sufficiently addressed during their asylum procedure. As a result, their asylum applications were rejected even though they had suffered serious human rights violations or had already integrated in Switzerland, which would have resulted in the children being uprooted from their familiar environment. In various cases led by AsyLex, neither the SEM nor the Court took the affected children's best interest properly into account; quite frequently, the children involved were not even heard. Deportations of families with rejected asylum applications are ordered (e.g. to Sri Lanka), even though the children were born and raised in Switzerland. Moreover, the SEM and the Court regularly consider asylum applications as inadmissible where applicants were registered in another European country already (namely based on the Dublin III Regulation). In such inadmissibility decisions, the specific risks for the children involved are generally not considered and it is simply referred to the theoretical legal obligations the country of return has. Such inadmissibility decisions are even taken in situations where the children are severely traumatized and urgently need mental health support, where the child or the family suffered severe human rights violations in the country of return before and also if there is a high risk of further human rights violations upon return. In various situations like these, AsyLex brought the case to the attention of the Committee on the Rights of the Child, and for all such communications, interim measures were granted (No. 126/2020, No. 174/2022, No. 200/2022, No. 155/2021, No. 191/2022, No. 163/2021, No. 181/2022). In some cases, the Swiss authorities subsequently reconsidered their decision and refrained from deportation. These constellations reveal that the Swiss authorities and courts do (or at least did initially, before the Committee intervened) not properly consider relevant rights of the child.

1.3 Deportation and administrative detention of children

Art. 79 FNIA allows for administrative detention of up to 12 months for minors aged between 15 and 18. However, the NCPT has found that "closed facilities that are mainly used for pre-trial detention and/or enforcement of sentences are unsuitable to accommodate minors as they cannot guarantee minimum standards of children's rights" and that "the closed facilities used specifically for administrative detention, in which minors have been placed, do not offer better conditions of detention for minors because of the markedly custodial nature of the facilities and the particularly strict regime prevailing there"[7]. NCPT has also criticized the detention of all minors in institutions for the deprivation of liberty and asked authorities to resort to other execution measures that take into account family integrity and the best interests of the children concerned. Finally, minors under the age of 15 cannot be detained (Art. 80(4) FNIA).

[5] https://www.paediatrieschweiz.ch/fr/news/recommandations-concernant-lestimation-de-lage-des-jeunes-migrants/
[6] https://www.refworld.org/docid/5a12942a2b.html
[7] https://www.nkvf.admin.ch/dam/nkvf/de/data/Berichte/2019/vollzugsmonitoring/rapport.pdf.download.pdf/rapport.pdf

In the case of a negative asylum decision, **UMAs may be expelled** if it is ensured that they can be taken in by their family or an institution and the authorities may use coercive measures for this purpose. If this is not the case, they must be temporarily admitted.

Concerning families with children, **forced deportations take place.** This occurs when the family concerned, who has received a deportation order, does not leave the country voluntarily within a predefined time frame. Depending on how willing the family concerned is to cooperate with a forced deportation, the deportation is carried out according to different levels, level 4 being the most restrictive one. Level 4 deportations are applied if the persons are considered so recalcitrant that they are unable to travel on an ordinary scheduled flight, even if handcuffed. In this case, a special flight with increased restraint is carried out. It should be noted that the authorities define the term "recalcitrant" very broadly: Anyone who has refused to take a flight once can be considered recalcitrant. In the case of level 4 deportations, the persons concerned are tied to a wheelchair with up to eight cable ties, where a helmet is put on their heads[8]. AsyLex has knowledge about families, where the parents were treated in the above explained manner, while the children were separated from them and handed over to the police during the flight. Thereby, the usually already highly traumatized children become re-traumatized and the dignity and personal integrity of the parents concerned is systematically violated. Finally, even in cases of level 2 or 3 flights coercive measures are applied, including against vulnerable people, namely families with children. Such returns often occur in the context of returns under the Dublin III regulation, the provisions of which Switzerland implemented through the Agreement between the Swiss Confederation and the European Community Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or in Switzerland, where another State is responsible for the asylum application; in the context of so-called "safe third countries"[9]; or in the context of removal to home countries.

1.4 Inadequate access to education and integration opportunities

All children of school age must have access to free basic education, according to Arts. 19 and 62 of the Swiss Federal Constitution (hereinafter "**FC**"). Art. 11 FC also states that children and adolescents are entitled to special protection of their integrity and to promotion of their development. Therefore, asylum seeking children attend primary schools regardless of their residence status. Compulsory schooling lasts until the child reaches the age of 16, with entitlement to complete the level attended. Access to education for UMAs from the age of 16 is not systematically guaranteed, especially during their stay in FACs.

After entering Switzerland, the SEM assigns asylum seeking children and their families to a FAC where they live for a maximum of 140 days. Children of all school levels attend an asylum reception class in which the children receive initial instruction in a national language as a second language and lessons in

[8] In 2011, a film of a reconstruction of a shackling and forced level 4 deportation from Switzerland was published. The film is based on statements of victims and the training documents of the police. Anyone who is living in Switzerland without valid residence papers and does not leave voluntarily can become a victim of such treatment. The persons concerned need not have been criminals or violent.: https://www.youtube.com/watch?v=IlDAyZuvPuM (visited on November 25, 2022),

[9] For the definition as a safe third country, the Swiss authorities have to consider the political stability, compliance with human rights, the assessment of other EU/EFTA member states and UNHCR as well as other country specific criteria (Article 2 para. 1 Asylum Ordinance 1 [AsylO 1(Appendix 6)]). Based on a bi-annual assessment, the list of safe third countries is defined and amended in the ASylO 1, Annex 2 (available here: https://www.fedlex.admin.ch/eli/cc/1999/359/de#annex_2/lvl_d4e130, as well as in Appendix 7). This list currently contains about 45 countries, namely the member states of EU/EFTA as well as further countries such as Albania, North Macedonia, Bosnia and Herzegovina, Senegal, Georgia, Ghana, India, Kosovo, Moldova, Mongolia or Montenegro.

other subjects. Yet, **numerous reports and witness statements criticize both the quality and the quantity of education in the FAC**[10].

Furthermore, due to the **isolated housing and schooling** both in federal and cantonal asylum centers, children are affected by **inadequate access to education and integration opportunities** as well as virtually denied contact with the outside world mainly due to the physical distance of most FAC to the closest city or even village, leading to social exclusion.

Finally, while all asylum seeking children are also allowed to start an apprenticeship, even though they are in an open asylum procedure, **the chance that they will get an apprenticeship is small**, not only due to the language barrier but also because of the uncertainty regarding their status and stay in Switzerland[11].

2. Recommendations

Because of the above explained context, Switzerland is encouraged to:

2.1. Accommodation, care and representation

- Effectively implement access to a legal representative *and* a person of trust.
- Ensure child-adapted accommodations.

2.2. Asylum procedure

- Develop child-appropriate ways of upholding the children's right to be heard.
- Refrain from conducting medical age determination on children.
- Adopt measures to tailor the asylum procedure to the particular needs of children.
- Ensure appropriate training of asylum staff who work with children .
- Ensure a proper and individualized assessment of the potential risk of human rights violations rejected asylum seeker children may face.

2.3. Deportation and administrative detention of children

- Refrain from imposing administrative detention on children.
- Refrain from forcibly deporting families with children and completely cease level 4 deporations.

2.4. Inadequate access to education and integration opportunities

- Improve integration of young people after 16 and 18 years old so they do not reach adulthood without the tools and support system necessary to thrive in their adult lives.
- Ensure training for all federal and cantonal asylum-related personnel that takes into account the best interests of children during all steps of the procedure.

[10] https://www.letemps.ch/suisse/une-petition-demande-un-meilleur-acces-formation-travail-exiles, ,https://www.tagblatt.ch/ostschweiz/stgallen-gossau-rorschach/unterricht-in-asylzentren-gutachten-zeigt-maengel-auf-ld.734839

[11] https://beobachtungsstelle.ch/fileadmin/Publikationen/2021/Zugang_zu_Bildung_F.pdf