

OHCHR: Call for input by the Special Rapporteur on the independence of judges and lawyers for the upcoming report on legal empowerment

Input by AsyLex regarding Switzerland

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A. About the Commenting Organization

AsyLex is an independent, Swiss-based association providing legal assistance and representation to asylum seekers in Switzerland and beyond. Our work is performed primarily by volunteers, who provide legal counseling and representation in cases involving Swiss asylum procedures and immigration detention.

B. Responses to Special Rapporteur's Questions

1. Shortcomings and Challenges

1.1. Distribution of Asylum Cases at the Federal Administrative Court and Lack of Judicial Independence

In Switzerland, the Federal Administrative Court (“FAC”) is responsible for adjudicating appeals in asylum matters. These judgments are final and cannot be appealed to the Federal Supreme Court. If the case is not eligible to be reviewed by an individual judge, a panel of judges is formed ([Art. 32\(1\), VGR](#)). Each panel consists of three judges, who are determined according to an automatic distribution key ([Art. 31\(3\), VGR](#)) in order to ensure the highest degree of independence.

Despite this legal obligation, AsyLex is highly concerned about alleged manipulations of this distribution key in asylum cases. While in exceptional cases it is possible to replace certain judges with others after the panel has been selected by the distribution key, for example because of the need for specific language skills, it was found that this manual replacement after the automatic selection of the panel was in fact frequent, especially in the asylum divisions. Research shows that judges were manually replaced in 45 out of 100 cases. Moreover, in 40 percent of the manually replaced panels, no reasons were given for replacing the judges.¹ Since judges at the FAC belong to a political party and are elected by parliament according to party strength, such manual manipulation is highly concerning and can lead to negative outcomes in asylum cases. Indeed, an investigation by the Swiss newspaper “Tagesanzeiger” found in 2016 that judges from right-wing parties rejected complaints from asylum seekers up to three times more often than other judges.² This is probably also related to the fact that judges can be pressured by their parties to rule in accordance with their party lines. Some parliamentarians have already threatened not to re-elect

¹ See for instance:

<https://www.tagesanzeiger.ch/richterpfusch-in-st-gallen-nun-droht-revision-in-hundertten-von-faellen-687172416546>

² See for instance:

https://www.swissinfo.ch/ger/politik/problematische-steuer_richter-am-gaengelband-der-parteien/43569468

certain judges following controversial rulings.³ In the interest of judicial independence, it is crucial that the decisions of judges can no longer be used as a reason for not being re-elected and that the strong political ties are removed.

1.2. State-Paid Legal Representation

AsyLex appreciates the general right to legal representation in the Swiss asylum procedure that entered into force in March 2019 as part of the revision of the [Asylum Act](#). However, we are highly concerned about its practical implementation. The remuneration model of the state-appointed legal representation is based on a lump sum payment per represented asylum seeker ([Art. 102k\(2\), AsylA](#)), regardless of the amount of work involved in a specific case and whether the legal representation decides at its own discretion to write an appeal on behalf of the asylum seeker. Thus, uncountable asylum seekers are left without representation in moments when representation is needed the most.

This problem is evident in the statistics: Between 1 May 2020 and 25 November 2022, only 53% of all appeals were filed by the state-paid legal representation. 10% were filed by representatives who took over the mandate after the state-paid legal representation terminated it, and 37% were filed without legal representation. The context of French-speaking Switzerland, where most appeals are filed against inadmissibility decisions or substantively negative decisions, demonstrates that appeals are worthwhile. Out of 412 appeals filed, 277 were dismissed. However, 19 were successful, 51 were remanded to the lower instance court, and 65 were substantively decided. In addition, both appeals filed by the state-paid legal representation and appeals filed after the state-paid legal representation terminated its mandate, have a three percent chance of a positive decision.⁴ This makes the premature termination of mandates by the state-paid legal representation problematic.

Another problem is the lack of legal representation at the so-called "Dublin hearings". As Switzerland is part of the Schengen / Dublin system, the Dublin-III-Regulation applies ([Art. 26b AsylA](#)). The Dublin-III-Regulation defines which European country is responsible for the assessment of an asylum claim, based on a complex allocation scheme that mostly refers to the first country of arrival. The Dublin Member States are generally considered by Switzerland as safe third countries - be it when the applicant is still in the asylum procedure in such a Dublin Member State or (on the basis of separate readmission agreements) when the person has already been granted protection status in such a country ([Art. 6a para. 2 lit. b AsylA](#)). Because of Switzerland's geographical location, most asylum seekers are subject to the Dublin procedure and eventually subject to return to the respective Dublin state.⁵

Yet, based on our practical experience, we are highly concerned about the application of the safe third country concept by the State Secretariat for Migration ("SEM") and the FAC. They merely rely on the formal ratification of different human rights treaties and legal standards by the third country and fail to thoroughly examine the actual human rights practice in the country concerned. They conclude from this formal examination that the applicant's return is lawful, regardless of their physical or mental health, and family situation. In our opinion, the SEM and the FAC do not sufficiently take into account the individual situation of the person concerned in these constellations.

This makes it all the more important for a legal representative to be present at the Dublin interview to ensure that the person concerned is able to raise any important issues that may militate against

³ See for instance:

<https://www.tagesanzeiger.ch/richterpfusch-in-st-gallen-nun-droht-revision-in-hunderten-von-faellen-687172416>
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⁴ Appendix 1, Federal Administrative Court ("FAC") Statistics, 2022

⁵ State Secretariat for Migration ("SEM") Foreign Population and Asylum Statistics 2021, pp. 75, 92,

<https://www.sem.admin.ch/dam/sem/en/data/publiservice/statistik/bestellung/auslaender-asylstatistik-2021.pdf.download.pdf/auslaender-asylstatistik-2021-e.pdf>

return to the Dublin Member State. However, AsyLex has learned that the state-paid legal representation does not always accompany the asylum seeker to their Dublin hearing, which is highly concerning.

A further issue in this context is that if the state-paid legal representation terminates their mandate after a negative decision by the SEM, it is almost impossible for the persons concerned to find new legal representation within the very short appeal deadlines of 5 or 7 ([Art. 108, AsylA](#)) working days. This is aggravated by the fact that many asylum seekers are in remote asylum centers and therefore cannot easily access other legal representation.

Finally, access to free legal representation is not only a challenge for people trying to appeal a negative or an inadmissibility decision, but also for people in administrative detention. In Switzerland, the decision to grant legal assistance to a detainee is a regional responsibility. The differences between the regions are enormous. As a result, very few persons in administrative detention have access to free legal representation, which is highly problematic.⁶ AsyLex is concerned about this lack of access to legal aid, especially free legal aid.

2. Varieties of Legal Empowerment Approaches and Examples of Legal Empowerment Modalities and Innovations

2.1. AsyLex's Online Legal Advisory

Due to the above-mentioned challenges, legal empowerment is essential. It requires the existence of independent and free legal advisories, such as AsyLex. To lower the threshold for asylum seekers to access legal representation when the state-paid legal representation terminates its mandate, AsyLex operates exclusively online and is available around the clock, via email and various social media as well as through different chatbots. This enables us to take on cases immediately and to meet the extremely short appeal deadlines. In addition, asylum seekers who live in very remote asylum centers or who have been victims of domestic violence, and thus may not have the opportunity to receive in-person counseling, can contact us without having to travel.

2.2. Volunteering

AsyLex also promotes legal empowerment through the use of volunteers. With only a small office staff, the majority of AsyLex members are volunteers, totaling over 150 people. Many volunteers are former clients who decided to join AsyLex and dedicate their free time to helping other asylum seekers by sharing their language expertise within our translation team. Yet, the majority of our volunteers are law students. In order to ensure their training and to keep them up to date with the latest developments in asylum law, AsyLex organizes quarterly training sessions - the so-called AsyLex Academies - which are mandatory for all volunteers. This, together with the knowledge they gain from working with AsyLex, not only benefits them personally as law students or refugees, but it is also know-how that is transferred to their environment and daily work, thereby increasing awareness and enhancing knowledge of the asylum context and law in other fields as well.

2.3. Project Examples

2.3.1. Access to Justice at the International Level

As explained above, the Swiss authorities often fail to adequately assess the individual situation of asylum seekers, especially when the country in question is considered a "safe third country". This is

⁶ Appendix 2, AsyLex's submission on migrants' rights to liberty and freedom from arbitrary detention from 20 October 2020

regularly the case when the asylum seekers were subjected to serious human rights violations in the Dublin Member State or in their home country. Our legal volunteers are often confronted with cases of clients who would face a real risk of serious human rights violations upon return. In these cases, the SEM and the FAC simply refer to the international obligations by which the respective state is bound, without providing an individualized assessment of the risk to the applicant. In addition, the very short deadlines in the Dublin procedure often do not allow for an adequate examination of the facts of the case, including the medical situation of the person concerned, leading to unjustified inadmissibility decisions.

It is precisely because of this context that AsyLex has begun to bring these cases to the international level and to provide (rejected) asylum seekers with access to justice before the UN human rights treaty bodies or the European Court of Human Rights. As a result, the UN human rights treaty bodies have repeatedly ordered interim measures to prevent the return of these people to their respective Dublin or home countries, thus protecting them from further human rights violations. In this way, AsyLex empowers people who suffered serious human rights violations that have not been adequately assessed by the Swiss authorities by ensuring that their right to access to justice is fulfilled at the international level.

2.3.2. Access to Justice through Chatbots

To promote legal empowerment and access to justice for asylum seekers, AsyLex also initiated numerous emergency response projects, by creating legal chatbots.

Emergency Support Afghanistan: Within hours of the fall of Kabul, AsyLex created a [chatbot](#) in Farsi and English that guided thousands of people, and hundreds of individual questions were answered by the AsyLex emergency team. In addition, by setting up another [chatbot](#), which automatically generated humanitarian visa applications, AsyLex helped hundreds of persons draft such applications directly from Afghanistan or the neighboring countries.

Emergency Support Ukraine: Just a few hours after the outbreak of the war in Ukraine, AsyLex launched a [chatbot](#) in English and Ukrainian to provide Ukrainian refugees with the latest legal information on the possibilities of leaving the country and the legal situation in various European countries. Since then, the chatbot has been used more than 20,000 times.

Both projects provide access to justice in emergency situations for people who do not have the financial means, the time, or the ability to travel to service providers, in order to receive legal assistance. Answers to specific questions can immediately be found online, with the option to request individual advice at the click of a mouse.

2.3.3. Building a Network of Like-Minded Organizations Across the Globe

In order to make legal empowerment available to as many people as possible, AsyLex has initiated the AsyLex Global Project. As part of this project, AsyLex connects with like-minded organizations around the world to share knowledge and collaborate on cross-border cases. This helps to tackle common problems together. We also aim to raise awareness of the potential of using international human rights mechanisms to protect asylum seekers and refugees from human rights violations. In this context, we are currently in the process of creating an interactive global map showing all available human rights mechanisms for every country in the world. As this map will be made publicly available, human rights lawyers and defenders or like-minded organizations will be able to immediately obtain the necessary information on the applicable human rights mechanisms in their country, thus facilitating assistance to asylum seekers and refugees and increasing access to justice at the international level.

By supporting organizations abroad and sharing knowledge and experience, AsyLex aims to contribute to the legal empowerment of refugees and asylum seekers in other countries as well. The exchange of ideas and know-how is extremely valuable for all parties involved.

3. Conclusion and Learnings

There are several shortcomings and challenges in the Swiss asylum system that require urgent attention. AsyLex has demonstrated that a legal empowerment approach can be highly valuable in addressing these shortcomings and challenges. AsyLex's work in including former clients as volunteers in the translator teams, training legal volunteers and providing online legal advice has been effective in empowering refugees, promoting their rights and enabling access to justice. Our efforts to bring cases to the international level have resulted in positive outcomes for those at risk of serious human rights violations. In addition, our legal chatbots have been invaluable in providing emergency legal assistance to those who need it most. Finally, through our AsyLex Global Project, we hope to make legal empowerment and access to justice on the international level available around the world by increasing collaboration with like-minded organizations.

We strongly recommend that the Special Rapporteur encourage the use of legal empowerment approaches, such as those implemented by AsyLex, as a means of promoting and protecting the rights of refugees and asylum seekers worldwide. In particular, we would like to highlight the usefulness of technological tools in providing access to justice and the importance of global cooperation in sharing innovations in legal empowerment.