

12. DEZ. 2022



Der Generalsekretär a.i.  
Geschäfts-Nr.: 2022-324

A-Post  
AsyLex  
z.Hd. Frau Joëlle Spahni  
Gotthardstrasse 52  
8002 Zürich

St. Gallen, 9. Dezember 2022 / kin

**Ihre Anfrage vom 28. November 2022**

Sehr geehrte Frau Spahni

Betreffend Ihre Anfrage vom 28. November 2022 via unser Kontaktformular übersenden wir in der Beilage die von Ihnen gewünschten Angaben.

Wir hoffen, Ihrem Anliegen mit der vorliegenden Zustellung zu entsprechen.

Freundliche Grüsse

Bernhard Fasel  
Generalsekretär a.i.



Beilagen:

- Aufstellung Asylverfahren

# Auswertung Asylverfahren nach neuem AslyG (zuhanden AsyLex)

(Periode vom 1. Mai 2020 bis 25. November 2022)  
--- Auswertung mit Folgeverfahren ---

## **Inhalt:**

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[Auswertung nach Vertretungsverhältnis](#)

29.11.2022 / bup

## Asylverfahren Hauptübersicht

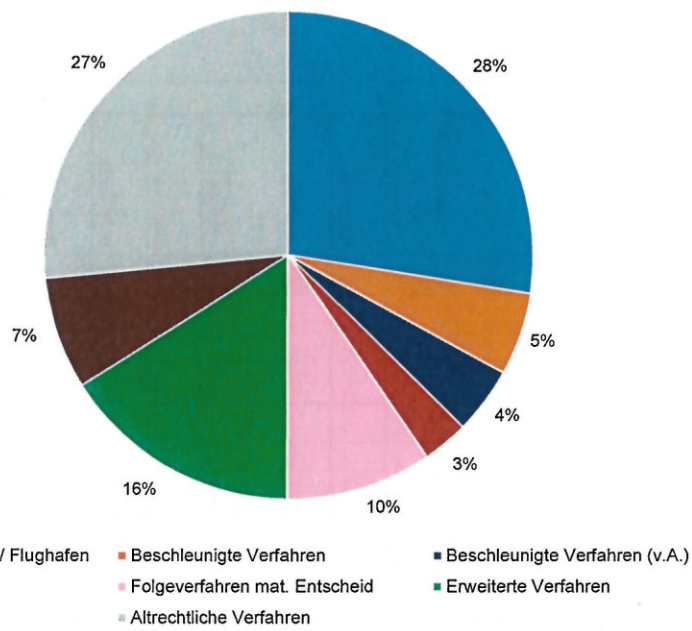
Statistik-Code TA-10\_A\_D

Periode von 01.05.2020  
bis 25.11.2022

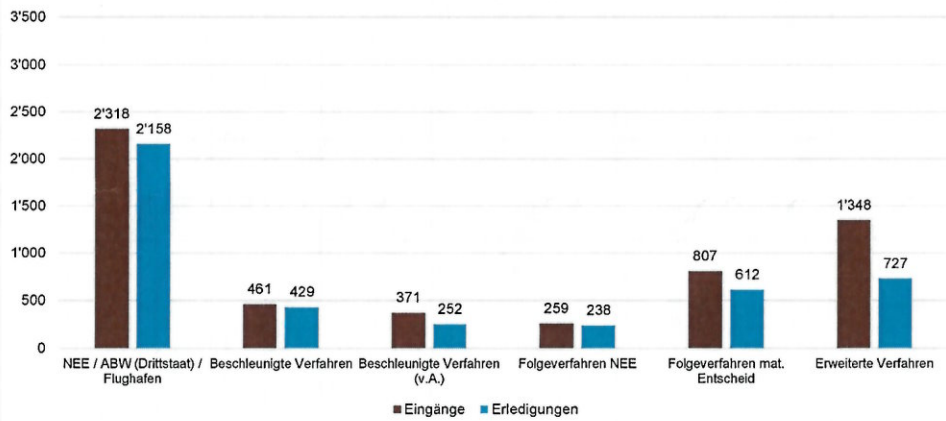
Datum: 29.11.2022  
Zeit: 09:30:00

Unbereinigte Zahlen	Pendenzen vor dem 01.05.2020	Eingänge	Erledigungen	Pendenzen nach dem 25.11.2022
<b>Total Asylverfahren:</b>	2'763	8'423	8'929	2'257
<b>Beschwerden gegen Nichteintretensentscheide SEM und Abweisungsentscheide sicherer Drittstaat SEM</b>	30	2'309	2'149	190
Abteilung IV	11	865	787	89
Abteilung V	7	659	599	67
Abteilung VI	12	785	763	34
<b>Beschwerden im Rahmen Flughafenverfahren SEM</b>	0	9	9	0
Abteilung IV	0	4	4	0
Abteilung V	0	5	5	0
Abteilung VI	0	0	0	0
<b>Beschwerden im Rahmen beschleunigter Verfahren SEM</b>	23	461	429	55
Abteilung IV	11	270	245	36
Abteilung V	12	191	184	19
Abteilung VI	0	0	0	0
<b>Beschwerden im Rahmen beschleunigter Verfahren SEM mit vorläufiger Aufnahme</b>	8	371	252	127
Abteilung IV	4	203	136	71
Abteilung V	4	168	116	56
Abteilung VI	0	0	0	0
<b>Folgeverfahren Nichteintretensentscheide SEM</b>	0	259	238	21
Abteilung IV	0	124	118	6
Abteilung V	0	121	106	15
Abteilung VI	0	14	14	0
<b>Folgeverfahren materieller Entscheid SEM</b>	0	807	612	195
Abteilung IV	0	411	319	92
Abteilung V	0	377	277	100
Abteilung VI	0	19	16	3
<b>Beschwerden im Rahmen erweiterter Verfahren SEM</b>	53	1'348	727	674
Abteilung IV	22	696	398	320
Abteilung V	31	652	329	354
Abteilung VI	0	0	0	0
<b>Spezielle Verfahren</b>	76	626	539	163
Abteilung IV	29	257	218	68
Abteilung V	46	348	299	95
Abteilung VI	1	21	22	0
<b>Altrechtliche Verfahren</b>	2'573	2'233	3'974	832
Abteilung IV	1'163	1'041	1'869	335
Abteilung V	1'401	1'165	2'070	496
Abteilung VI	9	26	35	0

### Aufteilung der Eingänge Asylverfahren (01.05.20 - 25.11.22)



### Verfahren nach neuem AsylG (01.05.20 - 25.11.22)



# Asylverfahren Erledigungen nach Erledigungsart

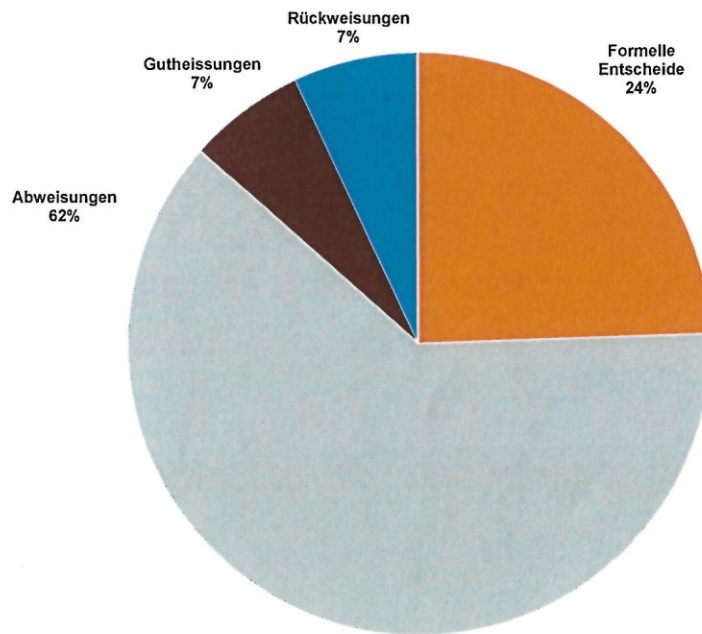
Statistik-Code TA-10\_B\_D

Periode von 01.05.2020  
bis 25.11.2022

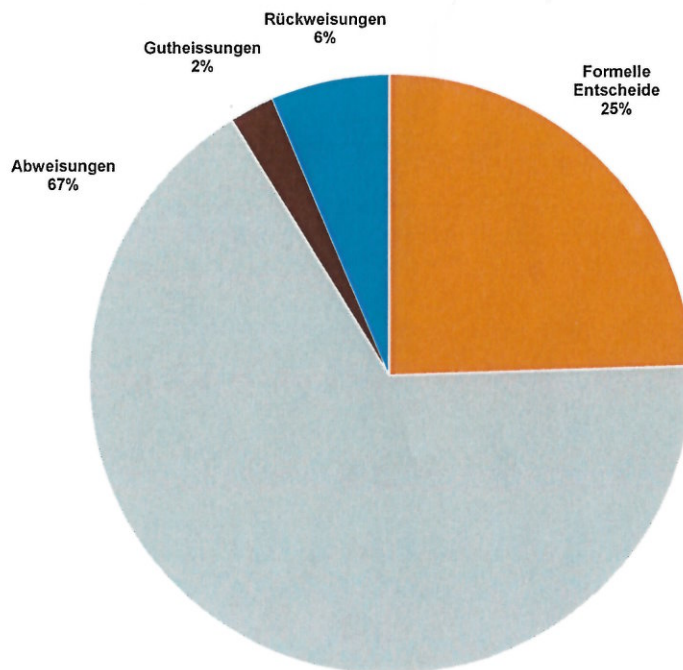
Datum 29.11.2022  
Zeit 09:30:00

Unbereinigte Zahlen	Abschreibung				Nichteintreten	Abweisung			Teilgutheissung	Gutheissung	Rückweisung	Überweisung	weiterer Ausgang	kein Eintrag	Total
	davon:	- Rückzug	- Wiedereintragung SEM	- Gegenstandslosigkeit		davon:	- offensichtlich unbegründet								
<b>Total Asylverfahren</b>	<b>893</b>	<b>233</b>	<b>393</b>	<b>241</b>	<b>1'198</b>	<b>5'538</b>	<b>3'016</b>	<b>177</b>	<b>406</b>	<b>622</b>	<b>60</b>	<b>35</b>	<b>0</b>	<b>8'929</b>	
<b>Beschwerden gegen Nichteintretensentscheide SEM und Abweisungsentscheide sicherer Drittstaat SEM</b>	<b>161</b>	<b>15</b>	<b>92</b>	<b>51</b>	<b>166</b>	<b>1'640</b>	<b>1'291</b>	<b>5</b>	<b>38</b>	<b>137</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>2'149</b>	
<i>Abteilung IV</i>	62	4	24	31	61	592	431	5	7	59	0	1	0	787	
<i>Abteilung V</i>	69	5	53	11	41	447	353	0	6	35	1	0	0	599	
<i>Abteilung VI</i>	30	6	15	9	64	601	507	0	25	43	0	0	0	763	
<b>Beschwerden im Rahmen Flughafenverfahren SEM</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>7</b>	<b>5</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>9</b>	
<i>Abteilung IV</i>	0	0	0	0	0	3	1	0	1	0	0	0	0	4	
<i>Abteilung V</i>	0	0	0	0	0	4	4	0	0	1	0	0	0	5	
<i>Abteilung VI</i>	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
<b>Beschwerden im Rahmen beschleunigter Verfahren SEM</b>	<b>36</b>	<b>4</b>	<b>10</b>	<b>18</b>	<b>43</b>	<b>310</b>	<b>214</b>	<b>2</b>	<b>5</b>	<b>33</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>429</b>	
<i>Abteilung IV</i>	18	1	1	10	29	175	115	0	3	20	0	0	0	245	
<i>Abteilung V</i>	18	3	6	8	14	135	99	2	2	13	0	0	0	184	
<i>Abteilung VI</i>	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
<b>Beschwerden im Rahmen beschleunigter Verfahren SEM mit v.A.</b>	<b>14</b>	<b>6</b>	<b>3</b>	<b>2</b>	<b>25</b>	<b>180</b>	<b>114</b>	<b>2</b>	<b>8</b>	<b>23</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>252</b>	
<i>Abteilung IV</i>	10	7	2	1	19	87	45	2	4	14	0	0	0	136	
<i>Abteilung V</i>	4	1	1	1	6	93	69	0	4	9	0	0	0	116	
<i>Abteilung VI</i>	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
<b>Folgeverfahren Nichteintretensentscheide SEM</b>	<b>11</b>	<b>5</b>	<b>5</b>	<b>1</b>	<b>79</b>	<b>121</b>	<b>106</b>	<b>0</b>	<b>9</b>	<b>17</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>238</b>	
<i>Abteilung IV</i>	5	3	1	1	44	57	49	0	3	9	0	0	0	118	
<i>Abteilung V</i>	6	2	1	0	31	56	49	0	6	7	0	0	0	106	
<i>Abteilung VI</i>	0	0	0	0	4	8	8	0	0	1	1	0	0	14	
<b>Folgeverfahren materieller Entscheid SEM</b>	<b>57</b>	<b>24</b>	<b>18</b>	<b>13</b>	<b>228</b>	<b>289</b>	<b>228</b>	<b>5</b>	<b>8</b>	<b>24</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>612</b>	
<i>Abteilung IV</i>	31	18	3	9	141	128	96	3	2	14	0	0	0	319	
<i>Abteilung V</i>	25	6	15	3	83	153	126	2	5	8	1	0	0	277	
<i>Abteilung VI</i>	1	0	0	1	4	8	6	0	1	2	0	0	0	16	
<b>Beschwerden im Rahmen erweiterter Verfahren SEM</b>	<b>110</b>	<b>27</b>	<b>60</b>	<b>18</b>	<b>149</b>	<b>384</b>	<b>241</b>	<b>7</b>	<b>18</b>	<b>48</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>727</b>	
<i>Abteilung IV</i>	53	18	23	10	101	201	104	5	12	25	0	1	0	398	
<i>Abteilung V</i>	57	9	37	9	48	193	137	2	6	23	0	0	0	329	
<i>Abteilung VI</i>	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
<b>Spezielle Verfahren</b>	<b>66</b>	<b>18</b>	<b>33</b>	<b>17</b>	<b>134</b>	<b>247</b>	<b>139</b>	<b>9</b>	<b>29</b>	<b>28</b>	<b>15</b>	<b>9</b>	<b>0</b>	<b>539</b>	
<i>Abteilung IV</i>	21	8	8	7	74	91	48	4	12	11	4	1	0	218	
<i>Abteilung V</i>	44	11	23	10	57	143	82	5	15	16	11	8	0	299	
<i>Abteilung VI</i>	3	1	2	0	3	13	9	0	2	1	0	0	0	22	
<b>Altrechtliche Verfahren</b>	<b>436</b>	<b>192</b>	<b>172</b>	<b>120</b>	<b>374</b>	<b>2'350</b>	<b>678</b>	<b>147</b>	<b>290</b>	<b>311</b>	<b>42</b>	<b>24</b>	<b>0</b>	<b>3'974</b>	
<i>Abteilung IV</i>	186	58	67	56	218	1'077	285	57	138	161	19	13	0	1'869	
<i>Abteilung V</i>	245	73	104	64	144	1'261	389	90	151	148	21	10	0	2'070	
<i>Abteilung VI</i>	5	3	1	0	12	12	4	0	1	2	2	1	0	35	

**Erledigungsarten alle Asylverfahren  
(Entscheide vom 01.05.20 - 25.11.22)**



**Erledigungsarten neue Asylverfahren  
(Entscheide vom 01.05.20 - 25.11.22)**



## Neues Asylverfahren

### Hauptübersicht nach Vertretungsverhältnis

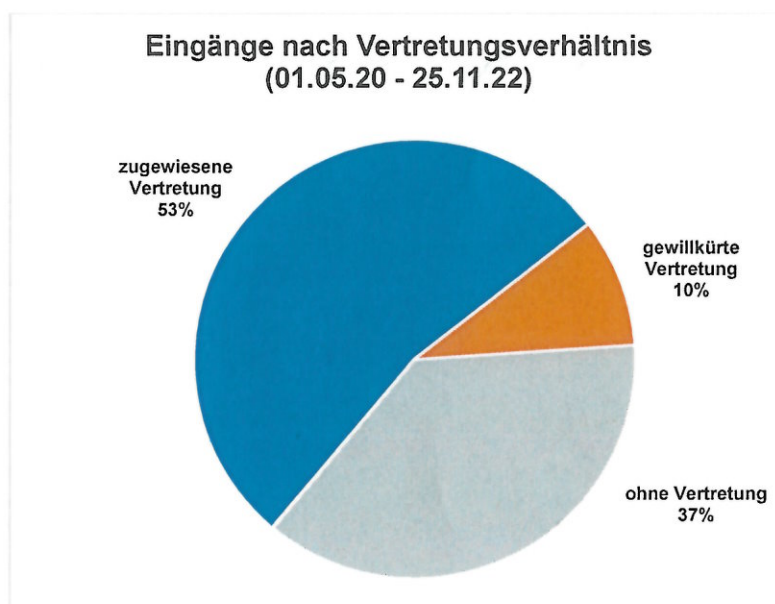


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Unbereinigte Zahlen	Pendenzen vor dem 01.05.2020	Eingänge	Erledigungen	Pendenzen nach dem 25.11.2022
<b>Total Asylverfahren</b>	2'763	8'423	8'929	2'257
<b>Total nach neuem Asylrecht 2019</b>	190	6'190	4'955	1'425
<b>Total mit Verfahren in BAZ</b>	61	3'150	2'839	372
zugewiesene Vertretung	46	1'680	1'438	288
Bern	3	140	117	26
Zürich	6	195	172	29
Ostschweiz	5	197	173	29
Westschweiz	21	464	412	73
Tessin/Zentralschweiz	4	380	300	84
Nordwestschweiz	7	304	264	47
gewillkürte Vertretung	10	300	266	44
ohne Vertretung	5	1'170	1'135	40



# Neues Asylverfahren

## Erledigungen nach Vertretungsverhältnis

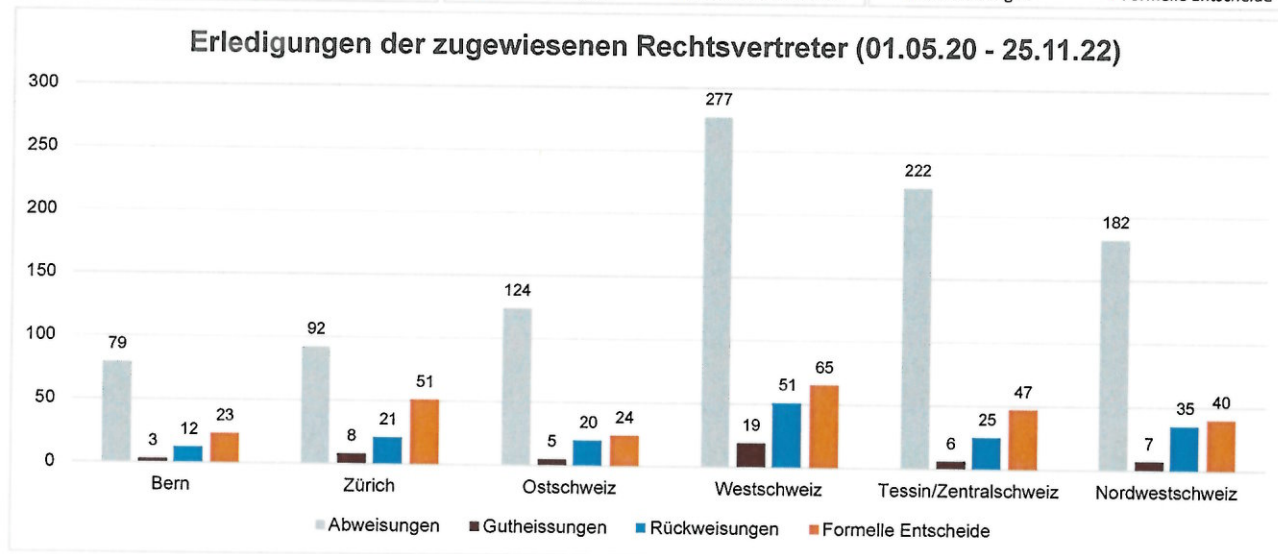
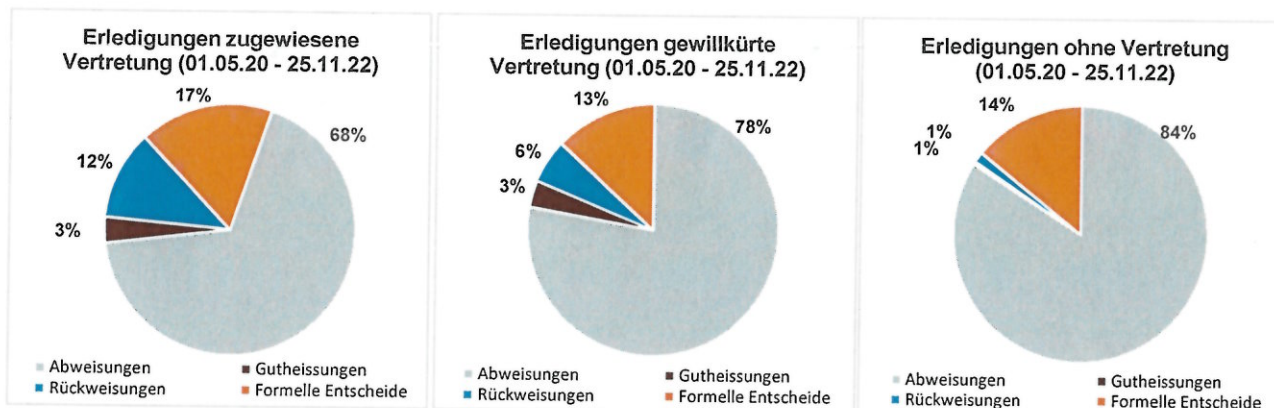


Statistik-Code TA-10\_F\_D

Periode von 01.05.2020  
bis 25.11.2022

Datum 29.11.2022  
Zeit 09:30:00

Unbereinigte Zahlen	Abweisungen	Gutheissungen	Rückweisungen	Formelle Entscheide	Total
<b>Total Asylverfahren</b>	5'538	583	622	2'186	<b>8'929</b>
<b>Total nach neuem Asylrecht 2019</b>	3'188	146	311	1'310	<b>4'955</b>
<b>Total mit Verfahren in BAZ</b>	2'137	61	194	447	<b>2'839</b>
zugewiesene Vertretung	976	48	164	250	<b>1'438</b>
Bern	79	3	12	23	<b>117</b>
Zürich	92	8	21	51	<b>172</b>
Ostschweiz	124	5	20	24	<b>173</b>
Westschweiz	277	19	51	65	<b>412</b>
Tessin/Zentralschweiz	222	6	25	47	<b>300</b>
Nordwestschweiz	182	7	35	40	<b>264</b>
gewillkürte Vertretung	207	9	15	35	<b>266</b>
ohne Vertretung	954	4	15	162	<b>1'135</b>







## **OHCHR: Draft General comment No. 5 (2020) on migrants' rights to liberty and freedom from arbitrary detention**

### **Commentary by AsyLex – the online legal aid on Swiss asylum law (Switzerland)**

Orianna Haldimann MLaw student, Nicole Ahoya MLaw, Caroline Reichelt MLaw, Natalina Haller B.Soc.Sc.

Date: 2020/10/30

Contact: [detention@asylex.ch](mailto:detention@asylex.ch)

## **1. About the commenting organization**

AsyLex is an independent, Switzerland-based association providing legal assistance and representation to people affected by immigration detention in the Zurich region and beyond. Our work is performed primarily by volunteers, who provide legal counseling and court representation in cases involving Swiss asylum procedure and deprivations of the liberty of asylum seekers. We mostly advise people over the phone and online; however, we usually also visit our clients in detention.

During the Covid-19 pandemic, we focused on challenging the legality of detention, as border closures rendered deportations impossible and therefore rendered the legal basis for the detention orders invalid. From March until July 2020 (and ongoing), we managed to release over 30 of our clients from detention. On the basis of art. 78 para. 6 lit. a, art. 80 para. 6 lit. a and art. 80a para. 7 of the Swiss Federal Act on Foreign Nationals and Integration (hereinafter FNIA)<sup>1</sup> as well as art. 5 of the European Convention on Human Rights (hereinafter ECHR), we argued that the detention lacked legal foundation and that the conditions of incarceration during the pandemic were very poor.<sup>2</sup> In several cases, we were able to win precedent cases before the Swiss Federal Court, acknowledging the failure of regional authorities to handle the situation appropriately.<sup>3</sup>

We share the observation of the Committee that migration policies are worryingly restrictive and easily manipulated. The deprivation of liberty has become a standard procedure after someone's asylum request has been denied. In the case of Switzerland, one major concern is that this development is extremely poorly researched and documented. The most relevant numbers on immigration imprisonment are from the time period 2011-2014. After the implementation of the Dublin-III regulations as well as the humanitarian crisis following the summer of 2015, no further data on the national level has been collected.<sup>4</sup> In a recently published article, AsyLex criticized this serious gap in the monitoring of the administrative detention of foreigners and proposed alternatives to the common practice.<sup>5</sup>

## **2. Decriminalization and destigmatization**

We share the Committee's concern over the increasing criminalization of migration, and we welcome the Committee's approach to addressing the arbitrariness of immigration detention associated with increasing securitization and criminalization of border crossings and restrictive migration policies.

We understand that the Committee combines all disciplinary measures which are based on an individual's residence status as "immigration detention". We welcome this inclusive and broad view,

<sup>1</sup> FNIA available online <https://www.admin.ch/opc/en/classified-compilation/20020232/index.html>.

<sup>2</sup> NGO boxt über 30 Ausschaffungshäftlinge frei in 20 Minuten, 30 July 2020, [https://www.20min.ch/story/ngo-boxt-ueber-30-ausschaffungshaeftlinge-frei-514049037218?fbclid=IwR3SU5Dn8ghH0mCRK1FWPmgg\\_RfIkyWHjEmIF-kWs-Zy-5QB6KTV8xNt7Ug](https://www.20min.ch/story/ngo-boxt-ueber-30-ausschaffungshaeftlinge-frei-514049037218?fbclid=IwR3SU5Dn8ghH0mCRK1FWPmgg_RfIkyWHjEmIF-kWs-Zy-5QB6KTV8xNt7Ug).

<sup>3</sup> Bundesgericht rügt Zürcher Migrationsamt in Zueriost.ch, 16 June 2020, <https://zueriost.ch/news/2020-06-16/bundesgericht-ruegt-zuercher-migrationsamt>.

<sup>4</sup> Bericht der Geschäftsprüfungskommission des Nationalrats, 26 June 2018, <https://www.admin.ch/opc/de/federal-gazette/2018/7511.pdf>.

<sup>5</sup> Die ausländerrechtliche Administrativhaft – Kritik und Alternativen in Humanrights.ch, AsyLex Gastbeitrag, 7 October 2020, <https://www.humanrights.ch/de/ipf/menschenrechte/migration-asyl/administrativhaft-kritik-alternativen>.

as it is fundamental to understanding the restrictions which the affected people are subjected to, *e.g.* concerning geographical exclusion and limitations and criminal detention. However, as our organization is primarily active in administrative detention cases, we focus our comment on this form of detention.

The legal basis for administrative detention (detention prior to deportation) is not criminal but administrative law. However, it still deprives the affected people of their freedom in a prison setting. Oftentimes, the affected people face even more arbitrariness and disproportionality than people detained under criminal law, *e.g.* concerning legal representation and accommodation, as explained in this commentary. Technically, administratively detained foreigners in Switzerland are not supposed to be accommodated in facilities that also host criminal offenders; however exceptions are permitted. Sadly, in most of the cases this is rather the rule than the exception, which takes the criminalization of migrants to the extreme.<sup>6</sup>

This criminalization originates in the illegalization of border crossings and the ensuing stigmatization of the affected people. This leads to disproportionate detention. In Switzerland, for example, this means that thousands of migrants can spend up to 18 months in detention. The situation is therefore extremely concerning. Because of Swiss federalism, the regional authorities are responsible for the application of the principle of proportionality. This results in significant differences in its application and treatment of the affected people. Moreover, standardized monitoring is largely lacking, and the issue is significantly under-researched. This issue will be addressed again in detail in the next chapter (3. Legal Inconsistencies).

AsyLex strongly condemns the detention of foreigners prior to deportation in general. Criminalizing people on the ground of their residency status and incarcerating them in prison facilities not only presents an extreme invasion of personal freedom, but also increases stigmatization throughout society, creating a very weak foundation for the affected people to receive necessary social and livelihood support and health care. How fundamentally problematic this stigmatization is becomes especially visible in times of crisis, such as during the Covid-19 pandemic.<sup>7</sup> In Switzerland, denied asylum seekers are forced to quarantine in underground bunkers, deprived of appropriate attention to health and social issues by psychosocial and healthcare professionals. Such maltreatment results in deep trauma, frustration and desperation, and may possibly lead to self-harm and aggression towards others.<sup>8</sup>

## 2.1. Measures to counter stigmatization

Stigmatization leads to existential threats and extreme distress for the affected people. It contributes to a perception that they are not worthy of dignified care and support, which in turn creates significant obstacles to their ability to meet their basic needs.

The Committee mentions the exacerbation of the stigmatization of migrants in cases where alternatives to detention are applied. We share this concern, especially regarding measures that will still apply some sort of custody, such as electronic ankle monitors. Such measures reproduce the issue of connecting residency status actively with a need to deprive the affected people of their freedom, and interfere with their personal freedoms severely.

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<sup>6</sup> Flughafenefängnis Zürich-Kloten,  
<https://www.zh.ch/de/direktion-der-justiz-und-des-innern/justizvollzug-wiedereingliederung/vollzugseinrichtungen-zuerich/h/flughafengefaengnis.html>; Justizvollzugsanstalt  
<https://www.suedostschweiz.ch/ereignisse/2018-06-06/ausschaffungshaft-in-realta-in-der-kritik>. Realta,

<sup>7</sup> Wir klagen an, [www.wir-klagen-an.ch](http://www.wir-klagen-an.ch).

<sup>8</sup> Die mit dem Coronavirus infizierten abgewiesenen Asylsuchenden sind genesen und wieder im Rückkehrzentrum Urdorf untergebracht *in* Neue Zürcher Zeitung, 12 October 2020, <https://www.nzz.ch/zuerich/zuerich-abgewiesene-asylbewerber-von-covid-infektion-genesen-ld.1580451?reduced=true>.

We therefore advocate for a sensitized application of alternatives and we represent the view that the only sustainable and destigmatizing option is to follow a path of psychosocial and livelihood support as well as legal counselling in a safe environment which definitively does not involve incarceration. We support the Committee’s recommendation to focus on community-based non-custodial forms of accommodation and support. In our experience, the affected people are often accommodated in facilities far away from any geographical contact to society. We heavily condemn this segregation. Even though the affected people will not be physically deprived of their freedom, the inability to participate in social gatherings, language classes, etc. poses a grave intrusion to personal freedom. Additionally to physical proximity to society, the following is needed to counter stigmatization: access to education, dignified housing and health care, and the protection of the unit of the family. Separating families, as Swiss authorities often do when detaining a parent, is an absolute “no-go” and is under no circumstance acceptable.

In conclusion, we advocate not only for an amendment to the law and strict compliance with existing (international) frameworks, but also for the sensitization of the public, for example, through media coverage, awareness raising campaigns and parliamentarian networking.

### **3. Legal inconsistencies**

#### **3.1. Non-arbitrariness: Necessity and proportionality**

We welcome the determination of the Committee reminding states that administrative detention is an exceptional measure of last resort which must be examined on a case by case basis to determine whether it is based on a legitimate State objective, is necessary and proportional. This obliges states to examine whether there are less coercive or restrictive measures which would be effective in the specific case.

We notice in our work that alternatives to detention are often not taken into sufficient consideration and therefore would like to highlight this issue. In Switzerland, for example, even though alternative measures to detention are provided by the law,<sup>9</sup> in practice, rejected asylum seekers are often detained without any real consideration of less restrictive measures. We therefore welcome the fact that the Committee stresses the importance of providing alternative measures. At the same time, the Committee rightfully points out that most of the alternative measures provided by states today are still too restrictive and can lead to stigmatization of the affected people or unnecessarily restrict their personal freedom. This is why it is important to remind states that also the application of alternative measures must be carefully examined in each individual case and that the principle of necessity and proportionality must always be respected.

As detention is the last resort and must respect the principle of exceptionality, the Committee states that it should only be applied if “all the less harmful alternatives are analyze and ruled out”.<sup>10</sup> In view of the problematic issue that states like Switzerland often do not sufficiently consider alternative measures, we would welcome it if the Committee also provided examples of good practices regarding alternative measures to detention or if it referred to good practices in other reports.<sup>11</sup>

We also need to address the fact that in Switzerland detention practices vary considerably even between the different regions. This leads to the conclusion that the application and interpretation of the principle of necessity and proportionality in particular seems to differ between the different regional

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<sup>9</sup> Art. 64e and 74 FNIA.

<sup>10</sup> General Comment No. 5 (2020), ch. 45.

<sup>11</sup> For example: UNHCR, Detention guidelines, 2012, <https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

authorities.<sup>12</sup> It is inherent in the principle of necessity and proportionality that it leaves a margin of appreciation for the authorities. However, we fear that, in general, this legal principle is often not respected strictly and consistently. This increases the risk of arbitrary decisions. The Committee should therefore not only remind states that the principle of necessity and proportionality must always be considered, but also call upon states to monitor whether all their competent authorities apply these legal principles strictly, consistently and thoroughly in every individual case.

In order to ensure accountability and transparency regarding the strict application of those legal principles, it is important to monitor detention practices. A possible means would be to collect and process the data regarding detention and to make it accessible to the public. As mentioned before, in Switzerland, for example, since 2014 no such data has been collected. There is thus an urgent need for action. We find that the importance of data collection as a means to monitor the application of legal principles should be stressed. The other pendant to this extent is to keep track on how each case sees the proportionality's principle applied. It requires the authorities to document the case law. This case law should be also published, so that all capital principles (equality before the law, non-discrimination, interdiction of arbitrary decision) can be effectively guaranteed.

In the context of necessity and proportionality, it is also important to address the issue of the duration of detention. We welcome therefore the respective consideration from the Committee. In our view, it should be mentioned in addition, that the longer the detention lasts, the less probable an actual return to the home country becomes, which the data of the Swiss migration authority (hereinafter SEM) demonstrated.<sup>13</sup> The question of whether the measure is still proportionate will therefore become more pressing with time. In Switzerland, for example, we could also observe that administrative detention is often ordered for a longer period than actually necessary. This enables the authorities to avoid the need to regularly file a new request for an extension of detention. We agree therefore that detention should always only be ordered for the shortest possible period and must be reviewed periodically.

### **3.2. Access to justice (articles 16, 17, and 18 of the Convention)**

All States parties to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families have an obligation not to criminalize migration. As already seen before, putting migrants into detention on the basis of criminal and administrative law is a criminalization. Restricting someone's right to freedom has to be used with extreme parsimony, as an exceptional measure of last resort.

AsyLex salutes the denunciation that immigration detention is slowly but surely becoming a mechanism for mass arbitrary imprisonment for migrants and their families. Such arbitrary decisions occur in Switzerland, too, leading to migrants staying behind bars for eighteen months without any chances of being deported. Now, what has to be done to avoid such decisions?

Procedural safeguards should be systematically applied, and among them, the automatic review by a court is of paramount importance. As repeatedly reported by the Committee, the right to liberty applies to all forms of detention and must be guaranteed to all persons without discrimination, regardless of their immigration status. The Committee rightfully underlines that a deprivation of liberty occurs in all forms of detention, regardless of the name or reason given for carrying out the deprivation of liberty and shall not be arbitrary, particularly if such detention is being ordered on the basis of a failure of compliance of administrative norms.

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<sup>12</sup> Administrativhaft im Asylbereich, Bericht der Geschäftsprüfungskommission des Nationalrates vom 26. Juni 2018, p. 7522, <https://www.parlament.ch/centers/documents/de/bericht-gpk-n-admin-haft-asylbereich-2018-06-26-d.pdf>

<sup>13</sup> ACHERMANN Christin/BERTRAND Anne-Laure/MAIAZ Jonathan/REZZONICO Laura, Die ausländerrechtliche Administrativhaft in Zahlen, 2019, p. 2, [https://nccr-onthemove.ch/wp\\_live14/wp-content/uploads/2019/01/Policy-Brief-nccr-on-the-move-12-Achermann-DE-Web.pdf](https://nccr-onthemove.ch/wp_live14/wp-content/uploads/2019/01/Policy-Brief-nccr-on-the-move-12-Achermann-DE-Web.pdf).

It is deeply regrettable that the Committee does only consider that only migrant workers and members of their families must be promptly brought before a court if they are incarcerated under criminal law. In effect, the scope of the right to liberty and security of migrant workers and members of their families does not cease at administrative proceedings, in particular at custodial measures in the context of migration. In Switzerland, there exist types of immigration detention which do not systematically end up in a judge's hands. This type of detention – also called “detention under Dublin procedure”<sup>14</sup> – is highly problematic, because, as underlined by the Committee, many migrants face numerous barriers into accessing adequate safeguards. Many detainees are not even aware of their right to being brought in front of a court, or are just too afraid to ask the authorities, with whom they do not share the language.

Therefore, we urge that any detention, including the ones based on administrative law, shall be systematically reviewed by a court. The migration authorities shall not be empowered to imprison migrant workers and their families – thus, infringe their right to liberty – without a judicial control. To this extent, AsyLex values the mentioned conditions by the Committee as insufficient. Systematic judicial reviews in each and every detention are a necessary, but non exclusive, step towards the end of arbitrary decisions for migrant workers and their families. The contrary does not offer a sufficient guarantee for all rights in the Convention, and particularly for art. 16 para. 3 of the Convention. The risk that arbitrary decisions will continue to be issued will always be present if not constantly being reviewed by a judge.

Thus, access to justice shall imply an automatic judicial review of every single detention decision.

### **3.3. Judicial guarantees – free legal assistance**

The Committee defines the General Comment as a guidance to States on how to implement the Convention. In the context of legal assistance, the Convention only mentions a right to make arrangements with a legal representation. It is regrettable that the Committee does not define further under which conditions those arrangements shall be made – including detention based on administrative law.

AsyLex is deeply concerned that it also solely focuses on the needs of having a legal representation when migrants are being put into detention due to criminal law. What about migrants put into detention on the basis of administrative law? As stated by the Committee,<sup>15</sup> the right to legal advice and representation is a condition to making the rights to due process and access to justice truly operational. Those rights also exist in the context of administrative detention; otherwise, the risk that arbitrary decisions are issued is certain, therefore rendering inevitable violations of the right to freedom.

As an example, upon the COVID-19 crisis, it was clear that all migrants detained into Swiss administrative detention centers had to be released. In effect, the FNIA states clearly that if “the removal or expulsion order proves to be unenforceable for legal or practical reasons;”<sup>16</sup> one has to be released. Nevertheless, it hasn't been done in many cases. Whereas a few politicians in Switzerland acknowledged there were no means to enforce removal or expulsion order, thus opened certain detention centers,<sup>17</sup> the administration in charge of other centers did not follow the same path. Therefore, detained stayed for months during the first times of the COVID crisis into administrative detention. If no legal representation organization had brought numerous cases before the Swiss

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<sup>14</sup> Art. 76a FNIA.

<sup>15</sup> General Comment No. 5 (2020), ch. 79.

<sup>16</sup> Art. 80 para. 6 lit. a FNIA.

<sup>17</sup> Des détenus libérés de détention administrative *in* La Tribune de Genève, 18 April 2020, <https://www.tdg.ch/suisse/detenus-liberes-detention-administrative/story/13892640>

Supreme Court – as AsyLex did<sup>18</sup> - those migrants would have stayed longer behind the bars with not a single chance of being deported.

This underscores the importance of legal representation of each and every case. As rightfully emphasized, NGOs work does not relieve States from their responsibility to provide migrants with free legal assistance and representation.<sup>19</sup> In Switzerland, it is of regional competence to decide whether a legal assistance shall be accorded to a detainee. Enormous disparities occur in the different regions.<sup>20</sup> It is the responsibility of the international community to urge the provision of legal assistance and representation for each person who faces detention, including detention based on administrative law. This legal assistance shall be enshrined in the States' domestic law, including the component that it shall be free of charge for persons who cannot afford it – which is almost always the case. The actual practice, which is the opposite, makes the access to justice extremely illusory in certain regions. Private initiatives do not replace the States' responsibilities.

Thus, legal assistance and representation, which has to be free of charge if the migrants cannot afford it, shall be guaranteed, including in situations where the detention order is issued on the basis of administrative law.

## 4. Prison Conditions

### 4.1. Infrastructure of detention facilities

#### a. Specialized detention facilities for administrative detention

We share the Committee's concern of an increasing association in the public opinion of migrants with criminals. We argue that the infrastructure and locality of administrative detention centers critically adds to this perception. In Switzerland, administrative detention is often carried out in the same facilities for *criminal* detention or in prison-like facilities (e.g. only different prison wings for administrative detention in a prison for both criminal and administrative detention).<sup>21</sup> Since 1 June 2019, there is a separation rule in force that reads that detainees in administrative and criminal detention must be placed in different facilities.<sup>22</sup> Furthermore, a recent decision by the Swiss Supreme Court ruled that administrative detention must be carried out in specially designed facilities for administrative detention.<sup>23</sup> Only in cases of a shortage of capacity, persons in administrative detention can be detained in prisons but *always* in separate sections of the prison. According to the Supreme Court, administrative detention facilities must avoid the facility's prison-like character *by design*.<sup>24</sup> Therefore, we argue, it is not sufficient to convert and modify former prisons into administrative detention facilities. Instead, the character of prisons must be avoided at all. We strongly support that these requirements for design and locality of administrative detention facilities must be realized in all States.

Furthermore, in our work as legal advisors, we observe that almost all persons spend the first hours or days after arrest in police custody centers with a highly criminalizing tendency for detained persons. In

<sup>18</sup> Le TF critique la détention en vue du renvoi in La Tribune de Genève, 15 June 2020, <https://www.tdg.ch/le-tf-critique-la-detention-en-vue-du-renvoi-352216366834> ; Asile: pas de détention si le renvoi est empêché par le coronavirus in 24 heures, 8 October 2020, <https://www.24heures.ch/asile-pas-de-detention-si-le-renvoi-est-empeche-par-le-coronavirus-783597632491>.

<sup>19</sup> General Comment No. 5 (2020), ch. 80.

<sup>20</sup> Comparison for instance between art. 12 para. 2 of the Applicational Act of the Federal Act on Foreign Nationals (F 2 10) in the Canton of Geneva and art. 6 para. 1 Act of the Enforcement of Coercive Measures in the Law on Foreign Nationals (211.56) in the Canton of Zürich.

<sup>21</sup> KÜNZLI Jörg/BISHOP Kelly, *Ausländerrechtliche Administrativhaft in der Schweiz*, 2020, pp. 21f., [https://www.skmr.ch/cms/upload/pdf/2020/200819\\_Administrativhaft.pdf](https://www.skmr.ch/cms/upload/pdf/2020/200819_Administrativhaft.pdf); Die ausländerrechtliche Administrativhaft – Kritik und Alternativen in Humanrights.ch, AsyLex Gastbeitrag, 7 October 2020, <https://www.humanrights.ch/de/ipf/menschenrechte/migration-asylex/administrativhaft-kritik-alternativen>.

<sup>22</sup> Art. 81 para. 2 FNIA.

<sup>23</sup> Swiss Federal Court Decision 146 II 201.

<sup>24</sup> Swiss Federal Court Decision 146 II 201, para. 6.2.2.

these centers there is no differentiation between detainees for criminal respectively administrative detention. In the same vein, we were confronted with alarming tendencies – particularly during the ongoing Corona pandemic – that detainees without any criminal records or violent behavior are restrained with hand- and foot cuffs during court hearings. This further exacerbates the highly questionable criminalization of migrants and is unacceptable. We argue that these developments must be observed carefully (e.g. by independent reporting offices) and data on these developments must be made publicly available.

#### **b. Movement *within* detention facilities**

We support the Committee’s determination that the deprivation of liberty is highly burdensome and restrictive of the human rights of individuals. In this regard, we criticize the fact that the movement of detainees is generally excessively restricted even within administrative detention facilities. It is highly concerning that the cell confinement periods of persons in administrative detention are, in many cases, just as restrictive as those of persons in criminal custody or in custody pending trial. Except for the daily one-hour walk and any employment opportunities, persons detained in administrative detention spend most of the day in their cells. That is unacceptable. The outdoor courtyard should be accessible all the time during the day to guarantee the widest possible freedom of movement and to avoid the criminalization of detainees. Furthermore, detainees should be allowed to move around freely within the facility (e.g., free access to group facilities).

Furthermore, we observed that the movement within detention facilities was further limited on the grounds of Corona containment. Mechanisms should be put in place to foresee pandemics scenarios and how the free movement within detention facilities can be upheld in the best possible manner even during pandemics.

#### **c. Access to activities and education (incl. religious activities)**

In the same vein, in order to avoid restrictions of human rights of detained individuals, access to activities and education should be guaranteed. We observed that access varies significantly between different detention facilities in Switzerland. In general, employment and leisure activities are not sufficient. The longer the period of imprisonment, the more varied the offers should be. We also argue that if activities within the facility are not possible, alternative activities must be provided outside the detention facility. To allow the freedom of religion, rooms for prayers or religious ceremonies should be available and accessible all the time. We would welcome guidelines for all states on the activities’ extent and scope. We would also suggest it should be possible to claim access to these activities (based on a statutory entitlement).<sup>25</sup>

## **4.2. Medical care**

The Committee states that, both in law and in practice, detainees should have access to emergency medical care and basic health services under the same conditions as nationals of the State party. We strongly share the Committee’s call on states. Based on our observations, we are highly concerned about the lack of medical care, particularly the insufficient access to psychological care, in Switzerland. It is alarming that some regional laws explicitly foresee a reduction of the required standard for administrative detention. This leads to the unacceptable situation that psychological care for persons in administrative detention is often less accessible than for persons in criminal detention. Against the background that persons in administrative detention often have a long record of post-traumatic stress disorder, sufficient and quality psychological care is even more pressing. Furthermore, we see a lack of continuity of the treatment when persons are detained.

We also agree with the Committee that vulnerable persons should not be detained. Furthermore, we also agree to the Committee’s call that due diligence measures should be put in place to identify vulnerable persons. In our work we have been confronted with a lack of a clear procedure for identifying vulnerable persons in Switzerland. In our work as legal advisors, we are still confronted

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<sup>25</sup> ZÜND Andreas, Art. 81 FNIA in SPESCHA Marc/ZÜND Andreas/BOLZLI Peter/HRUSCHKA Constantin/DE WECK Fanny (eds.), *Migrationsrecht, Kommentar*, 2019, N 3.

with very vulnerable persons (e.g., victims of human trafficking or persons with several suicidal attempts due to a severe depression or post-traumatic stress disorder) who are in detention. The Committee stressed several times that these persons must not be deprived of their liberty under any circumstances. Despite the unlawfulness of the detention of these persons, we were further confronted with inadequate psychological care for these detainees leading to further exacerbation of their psychological condition. We would therefore fully support improved due diligence measures by all states to avoid detention of vulnerable persons.

### **4.3. (Digital) Communication infrastructure (i.e. for access to judicial remedies)**

The Committee has touched upon the importance of access to knowledge and communication. In our work, we have seen various problematic restrictions worsening access to knowledge and communication. In Switzerland, cell phones of detained persons are confiscated immediately on arrest. In many detention facilities, access to telecommunication and Internet services is highly restricted or not available at all. We criticize the minimal access to communication infrastructure for detainees in administrative detention. We see no grounds to limit forms of digital communication as it is currently done in a very restrictive way.<sup>26</sup> The sudden cut-off of their networks of family and friends can further aggravate the traumatizing effects of administrative detention. We argue that detainees should have free access to the Internet and other forms of telecommunication since the limitation of access is a severe restriction and a violation of personal liberty.

Furthermore, as legal advisors, we see the urgent need to improve (digital) communication infrastructure in the light of access to judicial remedies. We agree with the Committee that recalls that migrants face multiple obstacles accessing justice, such as language barriers, lack of knowledge about applicable laws and lack of support networks. We argue that the Internet and other means of communication become increasingly important for granting access to justice. Digital access cannot only ease language problems, but also grant access knowledge and support networks. It is essential that detainees have better access to digital communication technologies, which is consistent with the requirement that detention should always be the last resort and must be as proportionate as possible.

We argue that only in the case of a severe violation of safety measures through the use of communication technologies, may their use be restricted, and even so, such restrictions must be reasonable and proportionate. If access to communication technologies is limited, we would urge the creation of a procedural mechanism by which this decision could be challenged and subjected to judicial review.

## **5. Conclusion**

Deprivation of liberty is the strongest state intervention in fundamental rights of migrants. It should always only be applied ultima ratio/as last resort.

As legal advisors we observe arbitrary detention practices largely ignoring the principle of proportionality under the rule of law - even though among those affected are often particularly vulnerable, mentally ill and traumatized persons. Therefore, we advocate for a systematic application of alternatives to administrative detention. We see urgent need for a consequent decriminalization and destigmatization of migration in general, particularly in regard to denied asylum seekers. Detention and alternatives to detention must in all circumstances contain safe accommodation, access to healthcare services, work and education. Moreover, anyone who is subjected to custodial detention must always be granted access to justice and legal assistance.

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<sup>26</sup> See also CPT, Bericht Tschechische Republik 2014, CPT/Inf(2015) 18, para. 42; CPT, Bericht Griechenland 2018, CPT/Inf (2019) 4, para. 134; see also ECHR, Kalda v. Estland, 17429/10 (2016), para. 53 f.; Janovskis v. Republik Litauen, 21575/08 (2017), para. 61 und 64.





We welcome the Committee's effort to conceptualize measures and principles against arbitrary immigration detention and we expect all ratifying Member States to implement those implications and adapt their immigration detention practices accordingly on a national level.