

**OHCHR: Questionnaire of the report of the Special Rapporteur on how to expand and diversify regularization mechanisms and programs to enhance the protection of the human rights of migrants**

**Commentary by AsyLex regarding Switzerland**

**Authors: Hannah Ammann, Joëlle Spahni**

**Date: 15 February 2023   
  
Word Count: 1990** (*excluding “A. About the commenting organization” and the indicated questions)*

**Contact: international@asylex.ch   
  
A. About the commenting organization**

AsyLex is an independent, Switzerland-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 court representation in cases involving Swiss asylum procedure and immigration detention.

**B. Responses to Special Rapporteur’s questions**

**1. How regularization processes facilitate the enjoyment of human rights by migrants**

To illustrate how regularization would facilitate the enjoyment of human rights by rejected asylum seekers, in the following the issues faced by rejected asylum seekers in Switzerland will first be explained.

***Rejected Asylum Seekers***

Persons who neither receive asylum in Switzerland nor temporary admission but cannot be deported, stay in Switzerland without a regularized permit. These rejected asylum seekers are **prohibited from working** (Art. [43 Asylum Act](https://www.fedlex.admin.ch/eli/cc/1999/358/fr#art_43) (AsylA) **and excluded from obtaining social aid** (Art. [82 para. 1 AsylA](https://www.fedlex.admin.ch/eli/cc/1999/358/fr#art_82)**).** Nevertheless, many rejected asylum seekers take on illegal work to earn a living, where they face harsh working conditions and low wages.

According to [Art. 12 of the Swiss Federal Constitution](https://www.fedlex.admin.ch/eli/cc/1999/404/en#art_12), “*Persons in need and unable to provide for themselves* ***have the right to assistance and care****, and to the* ***financial means required for a decent standard of living*”**. This **emergency-aid,** frequently solely consisting of material provision instead of money, is, however, **insufficient.** A shelter, designed for **short-term stay,** is also provided ([Swiss Refugee Council, 2023](https://www.fluechtlingshilfe.ch/themen/asyl-in-der-schweiz/nothilfe)), yet, the **living conditions in these shelters are worrying**, especially for families and children ([WOZ, 2022](https://www.woz.ch/2211/leben-in-der-nothilfe/mit-unerbittlicher-haerte)).

Moreover, **access to health care is very difficult for rejected asylum seekers.** They only receive medical care in emergencies ([SODK, 2023](https://www.sodk.ch/fr/themen/migration/aide-sociale-et-aide-durgence-dans-le-domaine-de-lasile/)) and **access to psychological care is almost impossible** for them.

Furthermore, rejected asylum seekers who stay in Switzerland may be **subject to punishment** under  [Art. 115 para. 1 of the Foreign Nationals and Integration Act (FNIA):](https://www.fedlex.admin.ch/eli/cc/2007/758/en#art_115) “*A custodial sentence not exceeding one year or a monetary penalty shall be imposed on anyone who stays in Switzerland unlawfully”*. In a ruling of 2008 ([Decision 6B\_114/2008](https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F04-11-2008-6B_114-2008&lang=fr&type=show_document&zoom=YES&)), the Federal Supreme Court established the legal construction of a **permanent offense for illegal stay** in Switzerland, thus, undermining the legal principle of *double jeopardy* in Switzerland ([Ruckstuhl et al., 2022](https://solinetz-zh.ch/wp-content/uploads/Bericht_Nothilfesystem_Print_ganz_weiss_einzelseiten2.pdf)). Therefore, **rejected asylum seekers can be prosecuted *repeatedly* for illegal stay**, for a maximum of 1 year of detention.   
Additionally there is **administrative detention which** secures the removal of a foreign person without a valid residence permit ([CNPT, 2020](https://www.nkvf.admin.ch/nkvf/fr/home/thematische-schwerpunkte/verwaltungsrechtliche-freiheitsentzuege-im-migrationsbereich/auslaenderrechtliche-administrativhaft.html)). **Administrative detention can last up to 18 months, thus, even longer than criminal detention, and may be imposed before or after the maximum of 12 months under criminal law.**

Milder measures, provided for under [Art. 74 FNIA](https://www.fedlex.admin.ch/eli/cc/2007/758/en#art_74), include ***restriction and exclusion orders***, preventing rejected asylum seekers from leaving or entering a designated area. These restrictions can be very problematic especially if rejected asylum seekers have **family in another canton and are consequently no longer allowed to visit them**.

Consequently, the **emergency-aid regime is designed to make rejected asylum seekers leave Switzerland**. Yet certain nationalities, such as Eritreans, experience particularly harsh asylum screening practices, with their asylum claims often rejected even though they cannot return to their home country due to imminent violations of *non-refoulement*. However, this is often disregarded by Switzerland. Therefore, these persons live long-term in the emergency-aid regime which is, however, solely **designed for short-term stay**. **Hence, all above described restrictions constrain rejected asylum seekers from enjoying basic human rights.** Regularizing their stay would, thus, help them considerably to enjoy these rights.

***Temporarily Admitted People***

[Art. 83 FNIA](https://www.fedlex.admin.ch/eli/cc/2007/758/en#art_83)  provides for the **temporary admission of asylum seekers.** According to [Art. 83 para. 1 FNIA](https://www.fedlex.admin.ch/eli/cc/2007/758/en#art_83) the State Secretariat for Migration (SEM) shall order temporary admission if the person does not meet the refugee status, however, “*the enforcement of removal is not possible, not permitted or not reasonable*”. Persons who are admitted temporarily receive a “*F status*”. The temporary admission is issued for 12 months and can be extended for further 12 months at a time ([SEM, 2022](https://www.sem.admin.ch/sem/en/home/themen/aufenthalt/nicht_eu_efta/ausweis_f__vorlaeufig.html)). Yet, **the *temporary* nature of this admission status is misleading** because the authorities often repeatedly renew the temporary admission as the enforcement of removal is still not possible. **More than half of all temporarily admitted persons are staying in Switzerland for seven or more years** ([SEM, 2022](https://www.sem.admin.ch/dam/sem/de/data/publiservice/statistik/asylstatistik/2022/11/6-22-Effectif-AP-activ-f-2022-11.xlsx.download.xlsx/6-22-Effectif-AP-activ-f-2022-11.xlsx)). This is particularly concerning, since, in comparison to a refugee status, a so-called *B permit*, **the F status comes with numerous disadvantages:**

Temporarily admitted persons receive **less social aid** ([Art. 86 para. 1 FNIA](https://www.fedlex.admin.ch/eli/cc/2007/758/en#art_86), [Swiss Refugee Council, 2023)](https://www.fluechtlingshilfe.ch/themen/asyl-in-der-schweiz/aufenthaltsstatus/die-vorlaeufige-aufnahme);it is **more difficult** for them **to find work,** because employers are deterred by the temporary nature of the permit; there are **travel restrictions**, whereby only in exceptional circumstances travel may be permitted ([SEM, 2019](https://www.sem.admin.ch/dam/sem/en/data/publiservice/publikationen/info-flue-va/info-flue-va-en.pdf)), significantly restricting their right to freedom of movement; and temporarily admitted persons can apply for family reunification **the earliest 3 years after the temporary admission was granted (**[Art. 85 para. 7 FNIA](https://www.fedlex.admin.ch/eli/cc/2007/758/en#art_85)), severely restricting the right to family life.

To conclude, a **regularization of persons with F status would be essential to ensure their basic and fundamental human rights** such as the **right to free movement and family life.**

**2. Examples of national and regional solutions to legalize the stay for migrants in irregular situations**   
  
***Hardship request***

***General information and legal basis***

An example of a national solution to legalize the stay for migrants in irregular situations is the **hardship request** provided for under[Art. 14 para. 2 AsylA](https://www.fedlex.admin.ch/eli/cc/1999/358/fr#art_14) read in conjunction with [Art. 31 OASA](https://www.fedlex.admin.ch/eli/cc/2007/759/fr#art_31). This is particularly interesting for rejected asylum seekers or temporarily admitted persons (with an F-Status) who can directly apply for a B (foreigner not refugee) permit through a hardship request.

***Conditions and Requirements***

To obtain a hardship permit the applicant must have resided in Switzerland for at least five years; their place of residence must have always been known to the authorities; they must prove a serious personal hardship due to advanced integration (including proof of relevant language skills) according to [Art. 58a para. 1 FNIA](https://www.fedlex.admin.ch/eli/cc/2007/758/en#art_58_a); and there must be no grounds for revocation under [Art. 62 para. 1 FNIA](https://www.fedlex.admin.ch/eli/cc/2007/758/en#art_62). Also, the family, financial and health situation as well as the possibilities for reintegration in the country of origin must further be considered.

Yet, regarding these requirements, significant cantonal differences to obtain a hardship permit are observable: Whereas in the Canton of Zurich a German level of [A2 is required](https://www.zh.ch/content/dam/zhweb/bilder-dokumente/organisation/sicherheitsdirektion/migrationsamt/informationsbrosch%C3%BCre-sans-papiers/SansPapiers%20Englisch.pdf) in the Canton of Bern they require solely [a level A1](https://www.asyl.sites.be.ch/fr/start/asylverfahren/haertefallgesuch.html)

***Procedure***

The hardship request must be submitted to the cantonal migration authority. The cantonal authority examines the hardship request and forwards it to the SEM if accepted. The SEM must then also approve the request ([UNIA, 2023](https://www.unia.swiss/working-in-switzerland/sans-papiers-1)). If the cantonal authority rejects the hardship request there is no possibility to appeal (see [Art. 14 para. 4 AsylA](https://www.fedlex.admin.ch/eli/cc/1999/358/fr#art_14)). This is very problematic and **not in accordance with the rule of law.** However, if the SEM rejects the hardship request, there is a possibility to appeal.

***Problematic Issues***

To submit a hardship request, **identity documents** must be provided to the authorities. This can become problematic for the applicants, since they **can also be used to enforce deportation.** Therefore, there is always a risk for rejected asylum seekers to be deported, when identity documents are provided for the hardship request.

Moreover, in order to organize identity documents, the **domestic authorities must be contacted.** Since these people had fled their country in the first place, **this can be problematic**. Also, in certain countries, **the organization of such identity documents is connected to numerous bureaucratic hurdles or is even completely impossible.** While this issue is notorious, Swiss authorities usually insist on the provision of these identity documents nonetheless.

***Further regularization possibilities   
Reconsideration request***

A further regularization possibility is the reconsideration request provided for under [Art. 111b AsylA](https://www.fedlex.admin.ch/eli/cc/1999/358/fr#art_111_b). If there is new proof or the situation has substantially changed since the asylum request, a reconsideration request can be submitted no later than 30 days after the discovery of a reason for reconsideration.

***International complaint***

Another regularisation possibility is the submission of an international complaint in cases of severe human rights violations, which were not sufficiently assessed by the Swiss authorities before an international court, such as the European Court for Human Rights or an UN Human Rights Committee (Committee against Torture, Committee on Enforced Disappearances, Committee on the Elimination of Discrimination against Women, Committee on the Elimination of Racial Discrimination, Committee on the Rights of the Child).

***Marriage and reversed family reunification under*** [***Art. 8 ECHR***](https://www.fedlex.admin.ch/eli/cc/1974/2151_2151_2151/fr#art_8)

Rejected asylum seekers who are in a relationship with a Swiss citizen or a person with a residence permit in Switzerland may regularize their status through marriage. This is provided for under [Art. 44 FNIA](https://www.fedlex.admin.ch/eli/cc/2007/758/en#art_44). Similarly can parents of minor children with a residence status in Switzerland apply for reversed family reunification under Art. [8 ECHR](https://www.fedlex.admin.ch/eli/cc/1974/2151_2151_2151/fr#art_8) in order to regularize their status.   
  
**3. Promising practices**

***Temporary humanitarian admission for people fleeing the war in the Ukraine***

On 11 March 2022 **protection status S** (“S permit”), temporary humanitarian admission, was introduced for people who fled to Switzerland from the war in the **Ukraine**. The advantage is that the **asylum reasons do not have to be examined, which leads to a more efficient procedure**. Additionally, once a person applies for an S permit, they are **covered by health insurance** and can **choose to live in an asylum center, privately or with a family.** Asylum seekers from other countries, however, must live in asylum centers. Once the S permit is granted, people are assigned to a canton where they **receive social assistance**. Furthermore, although the S permit grants only temporary protection, individuals with S permit can be **immediately reunited with their nuclear family members and are free to travel without restrictions**, which stands in stark contrast to individuals with F status, as seen above. Finally, people with an S permit have **immediate access to the Swiss labor market** and can even register for **self-employment (**[SEM, 2022](https://www.sem.admin.ch/dam/sem/fr/data/asyl/faktenblatt-schutzstatus-s.pdf.download.pdf/faktenblatt-schutzstatus-s-f.pdf)**).**

AsyLex welcomes the rights granted with the S permit and the speedy procedures associated, yet the obvious differences between the rights granted to asylum seekers from Ukraine and those from other countries, including between S and F status holders, are striking. Therefore, AsyLex recommends that **every asylum seeker be granted the same rights as those applying for S permit**. Likewise, it would be welcomed if **people with an F status were granted the same rights as people with an S permit.**

*Otherwise, to our knowledge, no other specific regularization initiatives exist.*

**4. Concrete initiatives by civil society organizations to the regularization of migrants in an irregular situation**

***The Afghanistan context***

After the Taliban takeover in Afghanistan the SEMinformed that **rejected asylum seekers from Afghanistan could file a reconsideration request** ([SEM on Afghanistan, 2022](https://www.sem.admin.ch/sem/en/home/asyl/afghanistan.html#accordion_6359255831675251855384)), through which they would be granted temporary admission. However, this was neither done *ex officio,* norpart of the mandate of the state-paid legal representation. Rather, Afghans are dependent on other legal representatives and organizations to inform them of this possibility and to file the reconsideration request on their behalf.

***Civil society’s engagement in drafting hardship requests***

Many civil society organizations play an important role in providing recommendations for hardship requests from asylum seekers or draft them directly, as this does not require a lawyer.

However, assisting in the integration of rejected asylum seekers is a double-edged sword, as any assistance can be prosecuted, as per [Art. 116 para. 1](https://www.fedlex.admin.ch/eli/cc/2007/758/en#art_116) FNIA*.*

***Further regularization initiatives of civil society***

***Operation Papyrus in the canton of Geneva***

In Geneva, Operation Papyrus was officially launched in 2017 to regulate the stay of well-integrated undocumented workers, while addressing the problems of those sectors of the economy most affected by undeclared work and the resulting low-wage competition. Operation Papyrus is the result of a long struggle by civil society organizations advocating for the rights of undocumented workers. Although the project received attention beyond the canton of Geneva, it has not been implemented elsewhere to date ([Swissinfo, 2018](https://www.swissinfo.ch/eng/society/operation-papyrus_a-new-life-for-1-000-illegal-immigrants-in-geneva/43922736)). AsyLex would welcome the introduction of this Operation Papyrus on a national level.

***City Card in the canton of Zurich***

In scope of the city of Zurich popular vote on May 15, 2022, the electorate voted in favor of a "*Züri City Card*". This city card is an official identity card for the city of Zurich, which is issued to all citizens of the city, regardless of their origin or residence status. Thus, *Sans-Papiers* can also use it to identify themselves, exercise their rights and participate in public life. Yet, the *Züri City Card* is not a formal legalization of the stay of irregular migrants. ([ZueriCityCard, 2023](https://www.zuericitycard.ch/zuericitycard)).