UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Submission by the United Nations High Commissioner for Refugees

For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review:

SWITZERLAND

I. Background and Current Conditions

At the end of 2011, a total of 30,880 refugees and 19,408 persons with a provisional admission ('admission provisoire') lived in Switzerland. The number of asylum-seekers rose considerably during the year, with 19,439 persons lodging initial asylum applications. This represented an increase of 43.7% compared to 2010. The main countries of origin were Eritrea (3,225 persons) and Tunisia (2,324 persons), followed by Serbia (including Kosovo) (1,539 persons), Nigeria (1,302 persons) and Afghanistan (1,006 persons). In 2011, Switzerland recognized 21% of asylum applications (3,711 persons), and 10.7% of applicants received a 'provisional admission' through the asylum procedure (2,082 persons). Applicants receiving 'provisional admission' included refugees 'sur place' and others fleeing conflict and general violence. Of the 19,467 asylum decision that were taken at first instance, 7,099 were inadmissibility decisions based on the Dublin II Regulation, and only 2,279 decisions were rejections on substantial grounds. It should be noted that inadmissibility decisions may be based on material grounds.

Due to Switzerland's federal system, persons in need of international protection often experience different reception and integration conditions, depending on the canton to which they are assigned. While the Federation retains a coordinating role, the cantons vary widely in terms of law and practice.

II. Achievements

UNHCR welcomes the landmark Judgment Related to the Assessment of Internal Protection Alternatives: On 21 December 2011, the Swiss Federal Administrative Court applied a more protection-oriented approach in a decision related to the reasonable test for assessing an internal protection alternative. Previously, asylum-seekers with an internal flight alternative, even if deemed that it would have been unreasonable, would be granted a provisional admission only, based on the unreasonableness of the return, but not asylum. While the impact of the judgment needs to be assessed, it will likely bring Switzerland in line with other States.

III. Challenges and Recommendations

Issue 1: "Provisional Admission"

Under Article 54 of the Asylum Act, refugees 'sur place' only receive "provisional admission as a refugee." They are not entitled to asylum under Swiss law. Persons fleeing conflict and generalized violence also receive a provisional admission. Refugees who receive asylum thus enjoy greater access to rights than refugees 'sur place' and persons fleeing conflict and generalized violence, although the law provides that provisionally admitted refugees should benefit from all of the rights set forth under the 1951 Refugee Convention. "Provisional admission" is granted after an asylum claim is rejected and an expulsion order has been issued. Expulsion is stayed because return would be unlawful, unreasonable or impossible. The status is not linked to a residence permit.

Recommendation:

- To ensure that refugees who receive asylum, refugees 'sur place,' and persons fleeing conflict and generalized violence in principle enjoy the same rights on an equal basis. The needs of persons who have received "provisional admission" on protection grounds are just as compelling as those of recognized refugees granted asylum.

Issue 2: Proposed Amendments to Article 3 of Asylum Act

UNHCR has voiced concerns regarding proposed amendments to Article 3 of the Asylum Act, which states that desertion and draft evasion are not a ground for asylum.[1] The wording of the proposal goes counter to developments at the European and international level.

Recommendation:

- To refrain from amending Article 3 of the Asylum Act in the manner described above.

Issue 3: Freedom of Movement and the Right to a Family Life

Asylum-seekers and persons granted a "provisional admission" are generally not permitted to change the canton to which they are assigned. For refugees with a "provisional admission," a leading judgment of the Federal Administrative Court of 6 February 2012, E-2324/2011, has just recently clarified that the right to free movement provided by Article 26 of the 1951 Convention prohibits these restrictions for refugees (regardless of their residency status). Persons displaced by conflict and generalized violence, however, continue to be largely restricted to their assigned canton. The obligation to reside in a specific canton significantly hampers access to the labour market due to huge variations in opportunity in the 26 cantons.

The above restrictions may also implicate the right to family life, because family members are sometimes assigned to different cantons, especially when they arrive separately. Switzerland was found to be in breach of the right to family life in July 2010 by the European Court of Human Rights[2] with respect to two married couples (rejected asylum-seekers), where the spouses had remained separated from each other, as they had been assigned to different cantons.

[1] UNHCR, Prise de position du HCR sur le message concernant la modification de la loi sur l'asile, Octobre 2010. Other issues raised relate *inter alia* to procedural concerns.

[2] ECtHR, Agraw v. Switzerland, Application No: 3295/06 and ECtHR, Mengesha Kimfe v. Switzerland, Application No: 24404/05.

Although revisions to the Aliens Act, which entered into force on 1 January 2008, brought some improvements, including a conditional right to family reunification and unconditional access to the labour market for persons with a "provisional admission", the conditions for family reunification stipulate, *inter alia*, a three-year waiting period, an adequate level of income and a suitable place of accommodation. Only members of the nuclear family may benefit from family reunification. This is a considerable hardship for persons who cannot be expected to reunite with their family elsewhere. At present, this hardship is mitigated to some extent by the possibility under Swiss law to ask for protection at a Swiss Embassy abroad (the so-called "embassy procedure"), which has in practice served in many cases as an alternate route to family reunification. The abolition of the "embassy procedure" is, however, proposed as part of the current asylum law revisions. This would be a major setback for the right to family unity for persons in need of international protection.

Refugees enjoy a right to family reunification with respect to nuclear family members, inasmuch as the family existed prior to the flight (Article 51 of the Asylum Law). Where this is not the case, the same conditions apply as for persons with a 'provisional admission.'

Recommendations:

- To remove restrictions on movement for all persons of concern to UNHCR, including persons displaced by conflict and generalized violence. These persons should not be restricted to residence or employment in one canton.
- To refrain from abolishing the "embassy procedure," as it would be a major setback for the right to family unity for persons in need of international protection.

Issue 4: Reception Conditions

Due to a serious lack in reception capacity, Switzerland regularly relies on nuclear bunkers built for the emergency protection of the general population. These bunkers are situated underground and do not permit any daylight. They do not present appropriate conditions in particular for vulnerable persons who may be traumatized.

Recommendations:

- To avoid the usage of nuclear bunkers as reception facilities.
- To ensure that there are sufficient reception facilities, and that conditions are appropriate also for extended stays, including *inter alia* for vulnerable persons.

Issue 5: Access to the Labour Market and Problems with the Tax Regime

Persons of concern are generally reported to face challenges in accessing the labour market. Thus, for example, employers may hesitate to employ persons with a "provisional admission" due to the perceived uncertainty of their legal status. While it is possible in principle for asylum-seekers to access the labour market after a three-month stay in Switzerland, this access is regularly subject to further restrictions. There are also considerable variations in opportunity depending on the Canton. In a recent study, the Organization for Economic Co-operation and Development (OECD) identified this problem[3] and recommended special measures for these groups to facilitate access to the labour market and more incentives for the cantons to provide

[3] Cf. the respective recommendation of the OECD: *"Better inform employers about the labour market access of persons with temporary protection status."* See also below on tax regime.

necessary assistance.[4] The situation in the cantons currently varies considerably. Efforts are underway to ensure a more structured approach.

When asylum-seekers are able to access the labour market, they are subject to additional taxes under Switzerland's taxation regime. According to Article 86 of the Asylum Act, employed asylum-seekers and persons with a provisional admission[5] have to pay a special tax of up to 10% of their salary, in order to reimburse the State for expenditures on their behalf. Given the considerable backlog of asylum applications pending in the asylum procedure, asylum-seekers may be required to pay the above-mentioned special tax for extended periods, although they would be released from this obligation should they be recognized as refugees.[6] The existence of this tax in question appears to conflict with the objective of ensuring the persons' self-sufficiency and decreased dependence on social welfare. The tax regime is also reported to present an additional hurdle for access to the labour market, due to the additional administrative efforts for employers when employing persons with a provisional admission.

Recommendations:

- To ensure that specific needs of persons in need of international protection are always fully assessed and taken into account.[7]
- To ensure more equal access to the labour market also for asylum-seekers and persons with provisional admission and to lift the additional taxation.

Issue 6: Access to Education

Asylum-seekers and persons with a "provisional admission" often have difficulty accessing tertiary school education and apprenticeships. At times, difficulties in accessing basic education have also been reported. This is often the result of the perceived insecurity of the status of the persons concerned. The process of seeking asylum, for example, can at times last years. This problem was highlighted in the OECD report cited above under Issue 5. Among other things, the OECD recommended "(…).investigat[ing] the reasons for the apparently low completion rates of apprenticeship by children of immigrants and tak[ing] remedial action."[8]

Recommendation:

- In line with OECD recommendations, to investigate reasons for the apparent low completion rates of apprenticeship by children of immigrants, as well as limited access to tertiary education, and to take necessary remedial action.

Issue 7: Public Campaigns

A number of controversial public campaigns and general public discourse have the potential to negatively affect the integration of persons in need of international protection and hamper their enjoyment of economic, social and cultural rights. Some campaigns have been linked to popular initiatives and referenda, both of which are a regular and important aspect of democracy in Switzerland. These include the

[4] Cf. Thomas Liebig et. al., The labour market integration of immigrants and their children in Switzerland, OECD Social, Employment and Migration Working Papers, N° 128, February 2012, p. 6 and p. 40pp.

[5] Article 86 refers to *"Les requérants et les personnes à protéger qui ne sont pas titulaires d'une autorisation de séjour."*

[6] The special tax is subject to time limits according to Article 10 (2) Asylum Ordinance 2."

[7] Cf. UNHCR, Note on the Integration of Refugees in the European Union, May 2007.

[6] OECD study, p. 7.

campaign on automatic expulsion of foreign criminals, the campaign to ban further construction of minarets, and a more recent campaign to "stop mass immigration."

Freedom of speech is interpreted broadly and valued very highly. Unless the initiatives violate *jus cogens* – as determined by the Federal Council and Parliament, such initiatives are permissible; thus, while revisions of the criteria have been proposed, clear contradictions with the Constitution or international law may not prevent approval of the initiatives.

Recommendation:

- To monitor public campaigns to ensure that they do not negatively affect the integration of persons in need of international protection or their enjoyment of economic, social and cultural rights.

Issue 8: Discrimination

Switzerland does not have any comprehensive federal anti-discrimination legislation, nor does it have relevant provisions in the different substantive laws, although some provisions exist in national law (like constitutional, penal, civil and public law) that provide a basis to challenge discriminatory practices.

If the discriminatory practices can be attributed to the State, there are certain safeguards in the legal system, although these are weak. This does not fully apply to the civil law sector, as discrimination is not prohibited in this area. A violation of rights through discriminatory practices in this area may therefore only be argued indirectly, as it has to be based on general human rights protection. Switzerland has not signed the 12th Additional Protocol of the ECHR and maintains a reservation to Article 26 of the ICCPR, limiting its applicability as an independently actionable right in such a way, that this anti-discrimination provision may only be invoked in connection with other rights guaranteed by Article 26 of the ICCPR. The Swiss authorities also consider that the rights guaranteed by ICESCR are not self-executing. The transposition of the ICESCR provisions into national legislation has only been partial, so that some rights enshrined in the treaty cannot be directly invoked in Switzerland.

According to the Swiss legal system, some intrusions of personal rights are considered to be justified by outweighing private interests. In addition, international treaties are not binding for private persons. As a result, in some cases, the principle of freedom of contract has been valued higher than general human rights protection, and what could be seen as discriminatory practice has been considered lawful in Switzerland by the courts: The Swiss Federal Commission Against Racism has found that discriminatory practice is prevalent in the labour market (including in job advertisements and interviews), in access to private housing (including renting flats and houses) as well as widely diverging cantonal and municipal practices regarding naturalization. [9] National citizenship can be obtained only if municipal and cantonal citizenship is granted. The OECD and the European Commission against Racism and Intolerance have also noted that numerous studies would seem to confirm the above-mentioned instances of

[9] Commission fédérale contre le racisme, *Le droit contre la discrimination raciale, Analyse et recommandations*, Décembre 2009

discrimination.[10] The above presents challenges for foreigners in Switzerland generally. Persons under the Mandate of UNHCR are, however, particularly vulnerable inasmuch as they are more likely to be of different origins and have a more insecure status in Switzerland, making them less likely to avail themselves of possible remedies which exist.

Recommendations:

- To investigate the impact of current legislation on persons in need of international protection amongst others,
- To ensure access for victims of racist and discriminatory acts to effective legal remedies under national and cantonal legislation.

Issue 9: Reservations to the Convention on the Rights of the Child

Upon ratification of the Convention on the Rights of the Child, Switzerland made seven reservations concerning five articles. Of these, the reservations concerning Article 10 (1), which ensures family reunification; Article 37 (c), which ensures that children in detention are being kept separate from adults; and Article 40, concerning criminal procedures relating to young offenders; are still valid today.[11]

Recommendation:

- To withdraw reservations to the Convention on the Rights of the Child.

Issue 10: Detention and Penalization of Illegal Entry

Immigration detention has been the subject of a critical report by the Global Detention Project in October 2011.[12] UNHCR has voiced concerns with respect to the detention of persons that are to be transferred under the Dublin II Regulation, as these persons might not have had a material examination of their claim and could thus be persons in need of international protection.[13] There are also provisions for restrictions in freedom of movement, which may be quite extensive. Any violation of the restrictions could result in detention of asylum-seekers perceived as "trouble makers" without a procedure under criminal law.

Recommendation:

- To ensure that, in line with international standards, the detention of asylum-seekers and refugees is used as a last resort, where necessary, for as short a period as possible and judicial safeguards are in place to prevent arbitrary and/or indefinite detention. Alternatives to detention should be sought and given preference, in particular for certain categories of vulnerable persons. If detained, asylum-seekers should be entitled to minimum procedural guarantees, including the possibility to contact and be contacted by the local

[10] OECD study (footnote 6) as well as Council of Europe: European Commission Against Racism and Intolerance (ECRI), ECRI Report on Switzerland (Fourth Monitoring Cycle), Adopted on 2 April 2009, 15 September 2009, CRI(2009)32, p. 20, 22, 25.

[11] See: www.humanrights.ch.

[12] Cf. Michael Flynn/Cecilia Cannon, Immigration Detention in Switzerland. A Global Detention Project Special Report, October 2011.

[13] UNHCR, Prise de position du HCR sur l'arrêté fédéral portant approbation et mise en œuvre de l'échange de notes entre la Suisse et la Communauté européenne concernant la reprise de la directive Communauté européenne sur le retour (développement de l'acquis de Schengen).

UNHCR Office. Detention should in no way constitute an obstacle to the ability of asylum-seekers to pursue their application.[14]

Issue 11: Statelessness

Switzerland is a State party to the 1954 Convention on the Status of Stateless Persons, but it has not yet acceded to the 1961 Convention on the Reduction of Statelessness.

The 1961 Convention establishes an international framework to ensure the right of every person to a nationality by establishing safeguards to prevent statelessness at birth. Stateless persons are often discriminated against in their enjoyment of fundamental rights. An increase in the number of States Parties to these conventions is essential to strengthening international efforts to prevent and reduce statelessness.

Recommendation:

- To accede to the 1961 Convention on the Reduction of Statelessness.

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[14] UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, available at: http://www.unhcr.org/refworld/docid/3c2bf844.html.